STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PLUMBERS AND PIPEFITTERS LOCAL 557, Complainant, vs. JEROME FILBRANDT PLUMBING AND HEATING, INC., Respondent.	Case 2 No. 46219 Ce-2121 Decision No. 27045-B

Appearances:

Ms. Marianne Goldstein Robbins, with Ms. Renata Krawczyk on the brief, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin 53212, appearing on behalf of Plumbers & Pipefitters Local 557.

Mr. Ronald J. Rutlin, with Mr. Jeffrey T. Jones on the brief, Ruder, Ware & Michler, S.C., Attorneys at Law, 500 Third Street, Wausau, Wisconsin 54402-8050, appearing on behalf of Jerome Filbrandt Plumbing & Heating, Inc.

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Plumbers and Pipefitters Local 557 filed a complaint with the Wisconsin Employment Relations Commission on September 6, 1991, alleging that Jerome Filbrandt Plumbing and Heating, Inc., had committed unfair labor practices within the meaning of Secs. 111.06(1)(a) and (d), Stats. On October 9, 1991, the Commission appointed Richard B. McLaughlin, a member of its staff, to act as an Examiner to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07, Stats. Hearing on the matter was conducted in Wausau, Wisconsin, on November 6, 1991. A transcript of that hearing was provided to the Commission on November 27, 1991. The parties filed briefs and reply briefs by February 5, 1992. On February 14, 1992, the Commission issued an Amended Order Appointing Examiner to reflect that Examiner McLaughlin would issue Proposed Findings of Fact, Conclusions of Law and Order as provided by Sec. 227.46(2), Stats.

PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1. Plumbers and Pipefitters Local 557, referred to below as the Union, is a labor organization which maintains its offices at 318 South Third Avenue, Wausau, Wisconsin 54401.

2. Jerome Filbrandt Plumbing and Heating Inc., referred to below as the Company, is an employer which maintains its offices at 908 Edison Street, P.O. Box 31, Antigo, Wisconsin 54409.

3. On April 16, 1990, the Union filed a Petition with the National Labor Relations Board, referred to below as the NLRB, seeking to be certified as the exclusive collective bargaining representative for certain employes of the Company.

4. Dennis Guenther, the Union's Business Manager, issued a letter to Jerome Filbrandt, dated May 9, 1990, which states:

> On May 7, 1990, the membership of Local 557 accepted the applications for membership of your plumbing employees Jonathan Wald and Daniel Kessler.
>
> As your company has refused to acknowledge Local 557 as the bargaining representative for these employees, we will be striking your company for recognition on May 14, 1990. Please be informed that the two employees named above will not appear for work on May 14, 1990.

5. On June 18, 1990, the NLRB issued a "CERTIFICATION OF REPRESENTATIVE" which stated that after a NLRB conducted election "a majority of the valid ballots have been cast for UNITED ASSOCIATION OF PLUMBERS & PIPEFITTERS LOCAL 557", and which certified the Union as the bargaining representative for employes in the following unit:

> All full-time and regular part-time plumbers employed at the Employer's Antigo, Wisconsin facility; but excluding office and store personnel, helpers, sheet metal workers, guards and supervisors as defined in the Act, and all other employees.

6. In a letter to Jerome Filbrandt dated June 20, 1990, Guenther stated:

> Today we received notice from the National Labor Relations Board that we are the exclusive collective bargaining agent for all full and

> part-time plumbers employed at your Antigo facility. As agent we are requesting to start negotiations at your shop on July 11, 1990 at 7:00 P.M. I will present a proposal to you at that time.
>
> The two members who have worked for you in the past will remain on strike until an agreement has been reached.
>
> If the time or place is not suitable to you, please contact our office to arrange a new time or location.

Joseph A. Filbrandt responded in a letter to Guenther which states:

> In an effort to expedite negotiations and in lieu of the meeting on 7-11-90, we request that you please send a copy of your proposal for our review.

Guenther received that letter on July 6, 1990, and responded in a letter dated July 9, 1990, attached to which was a proposal for a three year collective bargaining agreement. In the cover letter, Guenther noted that "the meeting set for July 11th will be cancelled" and that "we will discuss the proposal on July 31, 1990 at 7:30 p.m. in your office." The Union's proposal contained the following provisions:

> It is mutually understood that the public can best be served and progress maintained and furthered in the Plumbing Industry only if there is a sound, reasonable and harmonious working arrangement between the Employer and Employee. This agreement is, therefore, made and entered into by and between Jerome Filbrandt Plumbing & Heating Company and PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 557 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (hereinafter referred to as "Union").
>
> ARTICLE I
>
> GEOGRAPHICAL JURISDICTION
>
> Section 1.1 The jurisdictional area covered by this Agreement are the Counties of Marathon-Langlade-Lincoln-Oneida-Vilas-Forest and Florence.
>
> . . .

ARTICLE III

Section 3.1 The Employers agree that all new Plumbing employees shall within thirty (30) calendar days after the date of employment become members of the Union and shall maintain their membership in good standing as condition of continued employment. All persons now employed by the Employers shall within thirty (30) calendar days after the effective date of this Agreement become members of the Union and shall maintain their membership in the Union in good standing as a condition of continued employment.

Section 3.3 New Plumbing employees shall be subject to a trial period of thirty (30) calendar days. Such new employees shall be on trial subject to the sole judgement of the Employers. These employees are classified as temporary employees during the trial period.

. . .

Section 3.5 Authorized representatives of the Union shall have access to jobs where employees covered by this Agreement are employed, provided they do not unnecessarily interfere with the employees or cause them to neglect their work; and, further, provided such Union representative complies with customer rules.

(a.) There shall be a steward on each job who shall be appointed by the Business Representative, or elected by the men on the job. The Employer shall approve the appointment. The steward shall keep a record of workers laid-off or discharged and take up all grievances on the job and try to have some adjusted, and in the event he cannot adjust them, he must promptly report that fact to the Business Representative, who in turn, shall report same to the proper officers of the Union so that efforts can be made to adjust any matter without a stoppage of work. He shall see that the provisions of these working rules be complied with and report to the Union the true conditions and facts. The steward shall promptly take care of any injured workers and accompany them to their homes, or to a Hospital as the case may require, without loss of time, and report the injury to the proper officers of the Union. A steward failing to fulfill his duties shall be subject to such other disciplinary measures as may be provided in the International Constitution.

(b.) The steward shall be on the job at all times when any men are working and shall be notified of any men coming or going off the job. There shall be no non-working steward. A steward shall be permitted to perform his duties during working hours if same cannot be performed at any other time. At no time shall a steward be discriminated against for the faithful performance of his duties. He shall remain on the job until its completion unless removed by the Business Representative for cause.

(c.) The duly appointed or elected steward shall be the last off, on any job, or project, except the foreman, provided he has the ability to, and does efficiently perform the work available to him.

(d.) No steward shall be laid-off, or discharged until after proper notification has been given to the Business Representative of the Union.

Section 3.6 An Employer shall have the right to discharge any Employee for due cause, after the Employee has been duly warned, once for this faults. No warning is required in cases of drunkenness or dishonesty.

ARTICLE IV

MANAGEMENT RIGHTS

Section 4.1 It is the intent of all parties to this Agreement that the employee will furnish a full day's work for a day's pay.

Section 4.2 Management shall be the sole determiner of the size and composition of the work force. Management shall have the sole perogative of controlling its operations, introducing new or improved methods or facilities and changing existing methods or facilities.

Section 4.3 Management is responsible for safety rule making and shall be able to make and enforce any reasonable rule or regulation. In the event there has been assessed against any Employer any penalty in connection with a violation of a safety rule or regulation, then such Employer may petition the Joint Grievance Committee to have such penalty assessed against the offending

employees as liquidated damages.

Section 4.4

(a) It is agreed by all parties to this contract that all personnel referred by the Union will be qualified for the work they were requested for and hired to perform.

(b) Welders will do all required testing, to obtain certification. The Employer will pay for the cost of the test, actual testing time, at straight time wage, and mileage, as per contract.

. . .

ARTICLE IX

WAGES

Section 9.1 The Industrial and Manufacturing straight-time wage rate of pay per hour under this Agreement commencing June 1, 1990 and continuing until May 31, 1991, shall be as follows:

Wage rate of	$ 17.55
Vacation pay of	1.00
Union assessment	.50
TAXABLE HOURLY WAGE RATE	$ 19.05
Pension Contribution of	1.05
Welfare Contribution of	1.95
Industry Fund Contribution	.05
Training Fund Contribution	.10
TOTAL HOURLY COMPENSATION	$ 22.20

Commencing June 1, 1991 thru May 31, 1992.
$1.00 per hour increase with distribution by Local 557.

Commencing June 1, 1992 thru May 31, 1993.
$1.00 per hour increase with distribution by Local 557.

Section 9.2 The Residential and Light Commercial straight-time hourly wage rate of pay per hour under this Agreement commencing June 1, 1990 and continuing until May 1, 1991, shall be as follows:

Wage rate of	$ 13.10
Vacation pay of	1.00
Union assessment	.50
TAXABLE HOURLY WAGE RATE	$ 14.60
Pension Contribution of	1.05
Welfare Contribution of	1.95
Industry Fund Contribution	.05
Training Fund Contribution	.10
TOTAL HOURLY COMPENSATION	$ 17.40

Commencing June 1, 1991 thru May 31, 1992.
$1.00 per hour increase with distribution by Local 557.

Commencing June 1, 1992 thru May 31, 1993.
$1.00 per hour increase with distribution by Local 557.

7. The Union and the Company met at the Company's Antigo office on July 31, 1990, at 7:30 p.m. Guenther represented the Union, and the Company was represented by Joseph Filbrandt and his wife, Mary Jo. Joseph Filbrandt, referred to below as Filbrandt, is an employe of the Company. Mary Jo Filbrandt is employed as the Business Manager of the Antigo School District, and is not an employe of the Company. The Company presented the Union with its proposal for a three year collective bargaining agreement. The Employer's initial proposal identified the Union as United Association of Plumbers & Pipefitters, Local 557, and contained the following provisions:

MANAGEMENT RIGHTS

1. It is agreed that the management of the Employer and its business and the direction of its working force is vested exclusively

in the Employer, and that this includes, but is not limited to the following: to direct and supervise the work of its employees; to hire, promote, transfer, recall or layoff employees or to demote, suspend, classify, discipline or discharge employees; to plan, direct and control operations and production schedules; control raw materials, semi-manufactured and finished parts which may be incorporated in the products manufactured, supplied or installed; to determine the amount and quality of the work needed, by whom it shall be performed and the location where such work shall be performed; to determine to what extent any process, service or activity of any nature whatsoever shall be added, modified, eliminated or obtained by contract with any other person or employer; to partially or completely terminate operations; to introduce different methods, tools, equipment or facilities, or to change existing service practices, methods, tools, equipment and facilities; to schedule the hours of work and to determine the assignment and allocation of duties; to select and to determine the number and types of employees required; to assign work to such employees in accordance with the requirements determined by the Employer and to make, modify and enforce reasonable rules and regulations.

2. The Employer shall have the right to employ temporary or casual help. Such temporary or casual help shall not be covered by the terms of this Agreement.

3. The Employer's exercise of the foregoing functions shall be limited only by the express provisions of this contract and the Employer has all the rights which it had at common law except those expressly bargained away in this Agreement. This Article shall be liberally construed.

4. The exercise by the Employer of any of the foregoing functions shall not be reviewable by arbitration except in case such function is so exercised as to violate an express provision of this contract.

. . .

DISCIPLINE AND DISCHARGE

The Company shall have the sole right to discipline and discharge employees; however, such discipline or discharge may not

be wholly without reason. The burden of proof shall be on the Union to show by wholly clear and convincing evidence the discharge was without reason.

. . .

NONDISCRIMINATION

1. Neither the Employer nor the Union will discriminate against any employee because of the employee's membership or nonmembership in the Union.

GENERAL PROVISIONS

1. The Union's business representative may enter the working areas of the Employer's premises during working hours upon first obtaining written consent from the Employer. Such visits shall be confined to the investigation of written grievances or collection of dues necessitating the visit. No investigation will be made into any matter during working hours which can be handled by interviewing employees or entering working areas after working hours. Collection of dues shall only be conducted during nonworking time. The Union agrees that no employee or Union representative will solicit for Union membership or carry on other Union activities in working areas during work periods or in any manner so as to interfere with the efficient operation of the Employer.

That proposal contained a provision governing "WAGES" which provided for a "minimum rate" which could be supplemented by "merit increases . . . based on merit alone and the determination of merit . . . shall be solely in the discretion of the Employer." The proposal did not specify the minimum rate. Guenther reviewed the Company's proposal, and noted that the Introduction did not state the Union's full name. He noted to the Company representatives that he thought the contract should contain the Union's complete name, and the Company responded that it did not do work in Canada. Guenther informed the Company representatives that the use of the Union's full name had nothing to do with the definition of the bargaining unit. The Company representatives did not, however, agree to the use of the Union's full name. The Company also objected to the inclusion in the agreement of the first sentence of the introductory paragraph of the Union's proposal. The Union's position on Article 3 was discussed, and the Company voiced its objection to any union security provision. The meeting lasted roughly two and one-half hours. Before the close of the meeting, the parties set August 30, 1990, as their next bargaining session.

8. Guenther supplied the Company with a revised proposal in a letter dated August 17, 1990. That proposal did not revise the provisions set forth above in any substantial way. Guenther phoned the Company prior to August 30, 1990, and advised the Company he would be unable to meet that date because of his family's vacation plans. The parties agreed to meet on September 13, 1990. The parties again met at roughly 7:30 p.m. at the Company's Antigo shop. The parties again discussed the introductory paragraph of the Union's proposal, and the Company continued to object to any reference to "Canada" in the Union's name. The parties discussed Section 3.5 of the Union's proposal, with the Company taking the position that a Company as small as theirs did not require a steward, or a steward on every job. Filbrandt tried to focus the discussion on the Company's proposal, with Guenther taking the position that the Company's positions could be incorporated in the provisions of the Union's proposal. The parties again discussed the union security provisions of the Union's proposal. The Company indicated no flexibility on the point. The parties also discussed a drug and alcohol testing and discipline procedure. The parties reached no firm understanding on when they would next meet.

9. In a letter to Filbrandt dated October 29, 1990, Guenther stated:

> Please find enclosed a copy of the federal mandate on drug testing for the gas pipeline industry. You will note that it is very complete in detail.
>
> If it is your wish to negotiate a drug testing program we can, but it is my belief that we would be better off by leaving it out.
>
> I would like to negotiate again in November. Is the night of November 8th around 7:00 P.M. ok? If not, please call our office to change the date.

At some point, Filbrandt called Guenther and advised him that it would not be possible to meet on November 8, 1990. The parties ultimately agreed to meet on December 6, 1990.

10. The parties met on December 6, 1990. Filbrandt and his wife again represented the Company, with Guenther representing the Union. The Union supplied the Company with a proposal which deleted the first sentence of the introductory paragraph of the Union's original proposal. That proposal also amended Section 3.5(a) of the Union's original proposal to read thus:

> There shall be a steward on each job who shall be appointed by the Business Representative, or elected by the men on the job. The Employer shall approve the appointment. The steward shall keep a record of workers laid-off or discharged and take up all grievances on the job and try to have some adjusted, and in the event he cannot adjust them, he must promptly report that fact to the Business

> Representative, who in turn, shall report same to the proper officers of the Union so that efforts can be made to adjust any matter without a stoppage of work. He shall see that the provisions of these working rules be complied with and report to the Union the true conditions and facts. The steward shall promptly take care of any injured workers and accompany them to their homes, or to a Hospital as the case may require, without loss of time, and report the injury to the proper officers of the Union. A steward failing to fulfill his duties shall be subject to such other disciplinary measures as may be provided in the International Constitution.

The Company supplied the Union with a one page, handwritten proposal which included the following proposal on what appeared in the Union's original proposal as Section 3.5:

> The union's business representative may enter the working areas of the Employer's premises only at a time mutually agreed upon by the employer and the union rep. Such union representative shall comply with customer rules. Such visits shall be confined to the investigation of written grievances.

The Company's proposal referred to the Union as "Plumbers & Pipefitters Local Union No. 557 of the Unified Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry". The parties again discussed union security and their conflicting proposals on what appeared as Section 3.5 of the Union's proposed agreement. The parties discussed the presence of helpers on the job site. Guenther took the position that helpers were excluded from the unit, and need not be discussed. Filbrandt took the position that helpers were vital to the Company's performance of work. Filbrandt took Guenther's position to be that any helpers on a job site could perform fewer functions than the Company had historically assigned them. The parties also discussed drug testing and dues deduction, which were both Company proposals. At some point during this meeting, Guenther asked Filbrandt about the scope of his authority to negotiate for the Company. The meeting lasted roughly two hours. While the parties discussed another meeting date, Guenther advised the Company that he would be available to meet more often, including during the holiday season. He also advised the Company he was concerned with the amount of time passing between meetings. The earliest mutually agreeable date the parties could reach was January 10, 1991.

11. The parties met on January 10, 1991, at the Company's Antigo shop. Filbrandt and his wife represented the Company, and Guenther represented the Union. Filbrandt gave the Union a letter signed by Jerome Filbrandt, dated January 10, 1991, which stated:

> With this letter, I hereby authorize Joe and Mary Jo Filbrandt to negotiate with Local 557 as representatives of Jerome Filbrandt Plumbing and Heating, Inc.

The parties again discussed union security and each party's proposal on management rights. Guenther thought an agreement in concept had been reached on Sections 4.1 and 4.2 of the Union's proposed agreement, and that Company representatives would rewrite Sections 4.3 and 4.4 to reflect what the Company could agree to. The Company objected to the reference in Section 4.3 of the Union's proposed agreement to the "Joint Grievance Committee", and to the requirement in Section 4.4 that the Company pay for welders' tests. Filbrandt and his wife understood that an agreement in principle had been reached on the two sections, and that they were to attempt to reduce that principle into writing. The parties also discussed the Union's pension proposal and the Company asked the Union to supply them with a copy of the pension plan. At the end of the meeting, the parties discussed when they would next meet. The parties agreed upon February 28, 1991. Filbrandt understood that Guenther generally wanted more frequent meetings, but did not understand Guenther to specifically object to the February 28, 1991, meeting date. Guenther accepted the February 28, 1991, date as being the earliest date available to both Filbrandt and his wife, but noted his displeasure with the amount of time between meetings.

12. The parties met on February 28, 1991, at roughly 7:00 p.m.. Filbrandt and his wife represented the Company, and Guenther and Errol Schmelling, the Union's Business Agent/Organizer, represented the Union. The Union supplied the Company with a proposal which accepted the Company's position on the introductory paragraph to the agreement. The Union's proposal did, however, refer to the Company as a "(contractor)", and did not use "Inc." in the Company's name. The Filbrandts objected to each point. The Union agreed to change the reference to "(employer)", and to

incorporate "Inc." in the Company name. The Union's proposal revised Section 3.5(a) to read thus:

> At the Unions discretion there maybe a Union Steward designated, this designatee shall be approved by the employer. This Steward shall be an employee of the employer and a member of the United Association of Plumbers & Pipefitters.

The parties also agreed to a provision governing "Geographical Jurisdiction" of the agreement, and a provision governing "Recognition". The parties discussed the issues of union security and management rights. Filbrandt asked the Union about the status of the two employes who had gone on strike, since he had received correspondence from the Division of Unemployment Compensation regarding them. Filbrandt asked the Union why they should negotiate if there were no current Company employes who could be negotiated for. Guenther stated that the Union would be available to meet whenever the Company could. Guenther did not object to the failure of the Company to supply the Union with the language of Sections 4.1, 4.2, 4.3 and 4.4. The Company did not object to the failure of the Union to supply it with a copy of the pension plan. The parties eventually set April 4, 1991, for their next meeting.

13. In a letter to the Company dated March 18, 1991, Schmelling stated:

> Enclosed you will find a copy of our purposed contract. I have incorporated changes from our last meeting and parts of your purposed contract on management rights.
>
> It is our hope, to come to agreement on this portion of the contract at our April 4th meeting because we need to move along if we are ever to complete a contract.
>
> Please call me if you have any questions in advance of our meeting.

The attached proposal changed the reference from "(contractor)" to "(Employer)" in the introductory paragraph, and stated the parties' understanding regarding "GEOGRAPHICAL JURISDICTION" and "RECOGNITION". The proposal did not include "Inc." in the Company name, but did modify the 30 calendar day time limits of the Union's original proposal on Sections 3.1 and 3.3 to 45 calendar days. Article IV of the proposal did incorporate some of the language contained in the Company's original proposal, but retained the Joint Grievance Committee at Section 4.3, and retained the requirement in Section 4.4 that the Company pay for welders' tests.

14. In a letter to Guenther dated April 1, 1991, Ronald J. Rutlin stated:

> This will confirm our telephone conversation on Wednesday, March

> 27, at which time I informed you that we have been retained by Filbrandt Plumbing & Heating to advise them regarding their negotiations with Local 557. I also informed you that there appeared to be some confusion regarding the current status of two former employees of Filbrandt Plumbing & Heating, Inc., . . . You informed me that these two employees were on strike until the date of the election. Since then, they have voluntarily terminated their employment with Filbrandt and have accepted employment elsewhere. Thank you for clarifying this issue.

15. The parties met on April 4, 1991. Filbrandt and his wife represented the Company, Guenther and Schmelling represented the Union. The parties discussed management rights, helpers, and union security. Filbrandt asked Guenther if the Union's proposed contract was applicable to an employer as small as the Company.

16. After the April 4, 1991, meeting, Guenther called the Federal Mediation and Conciliation Service, and asked that they provide a mediator to assist with the negotiations. A meeting date was arranged through the mediator for May 15, 1991. That meeting was cancelled by the mediator, and rescheduled for June 4, 1991. The parties met on June 4, 1991, with the FMCS assigned mediator. Filbrandt and his wife represented the Company, Guenther and Schmelling represented the Union. At that meeting, the Company provided the Union with a written proposal. That proposal did not incorporate any language from the Union's proposal on management rights. The proposal continued to base wages on a minimum rate supplemented by merit increases. The Company did, however, specify, for the first time the minimum rate. That rate was $12.00 per hour. At the time the Company made this proposal, a journeyman plumber employed at the Company earned in excess of $14 per hour. The parties discussed the management rights provision in some detail, but reached few substantive agreements. Guenther noted that either he or Schmelling could represent the Union and that any future meeting could be set with either one of them. The FMCS mediator attempted to set another meeting date prior to his taking vacation, but was unable to secure such a date from the Company. The parties agreed to meet again on July 2, 1991.

17. The parties met on July 2, 1991, with the FMCS mediator. Filbrandt and his wife represented the Company, Guenther and Schmelling represented the Union. The meeting was set to start at 7:00 p.m., at the Company's Antigo shop. The meeting started at 7:30 p.m., because Guenther and Schmelling did not arrive until then. They had forgotten the meeting had been set for 7:00 p.m. The parties discussed union security briefly, and discussed helpers at length. Both the Company and the Union submitted a proposal. The Union's proposal did not substantially modify Article III of its prior proposal. The proposal also contained the following:

ARTICLE IV
MANAGEMENT RIGHTS

Section 4.1 It is the intent of all parties to this Agreement that the employee will furnish a full day's work for a day's pay.

Section 4.2(a) Management shall be the sole determiner of the size and composition of the work force. Management shall have the sole perogative of controlling its operations, and that this includes but is not limited to the following; to direct and supervise the work of its employees to hire, promote, layoff or discharge employees.

(b) Management shall direct and control operations and production schedules, determine the amount and quality of the work needed. Assign and direct employees at what locations such work shall be performed.

(c) Management will determine to what extent any process, service or activity of any nature whatsoever shall be added, modified or eliminated and to partially or completely terminate operations. Also to introduce different methods, tools, equipment or facilities, or to change existing service practices, methods, tools, tools, equipment and facilities.

(d) Management shall schedule the hours of work, within the terms of Article X, and determine the asignment and allocation of duties; to determine the number and type of employees required and the assignment of work to such employees, in accordence with their trade jurisdiction, and to make, modify and enforce reasonable rules and regulations.

Section 4.3 Management is responsible for the making of safety rules, and shall be able to make and enforce any reasonable rule or regulation. In the event there has been assessed against any Employer any penalty in connection with a violation of a safety rule or regulation, then such Employer may petition through the Grievance procedure to have such penalty assessed against the offending employees as liquidated damages.

Section 4.4(a) It is agreed by all parties to this contract that all personnel referred by the Union will be qualified for the work they were requested for and hired to perform.

(b) Welders will do all required testing, to obtain certification. The Employer will pay for the cost of the test, actual testing time, at straight time wage, and mileage, as per contract.

Under Section 9.1 of the Union's proposal, the "TOTAL HOURLY COMPENSATION" was $23.15. Under Section 9.2 of that proposal the "TOTAL HOURLY COMPENSATION" was $18.70. The increase for 1992-1993 in each section was "$1.00 per hour . . . with distribution by Local 557". The proposal submitted by the Company included the following provisions:

ARTICLE III UNION MEMBERSHIP

3.1 The Employer and the Union agree to not discriminate against employees because of their membership or nonmembership in the Union. Membership is at the discretion of the employee.

3.2 New employees will be initially reviewed by the Employer within ninety (90) calender days of their employment by the employer.

3.3 The Union's business representative may enter the working area of the Employer's premises during working hours upon first obtaining written consent from the Employer. Such visits shall be confined to the investigation of written grievances or collection of dues necessitating the visit. No investigation will be made into any matter during working hours which can be handled by interviewing employees or entering working areas after working hours. Collection of dues shall only be conducted during nonworking time. The Union agrees that no employee or Union representative will solicit for Union membership or carry on other Union activities in working areas during work periods or in any manner so as to interfere with the efficient operation of the Employer.

ARTICLE IV MANAGEMENT RIGHTS

4.1 It is agreed that the management of the Employer and its business and the direction of its working force is vested exclusively in the Employer, and that this includes, but is not limited to the following:

A. Direct and supervise the work of its employees.
B. Hire, promote, suspend, discipine or discharge employees.
C. Plan, direct and control operations and production schedules.

D. Control raw materials, semi-manufactured and finished parts which may be incorporated in the products manufactured, supplied or installed if code approved.
E. Determine the amount and quality of work needed, by whom it shall be performed and the location where such work shall be performed.
F. Determine to what extent any process, service or activity of any nature whatsoever shall be added, modified, eliminated or obtained by contract with any other person or Employer.
G. Partially or completely terminate operations.
H. Introduce different methods, tools, equipment or facilities, or to change existing service practices, methods, tools, equipment and facilities.
I. Schedule the hours of work and to determine the assignment and allocation of duties.
J. Select and to determine the number and types of employees required.
K. Assign work to such employees in accordance with the requirements determined by the Employer and to make, modify and enforce reasonable rules and regulations.

4.2 The Employer shall have the right to employ temporary or casual help. Such temporary or casual help shall not be covered by the terms of this Agreement unless hired from the union hiring hall.

4.3 The Employer's exercise of the foregoing functions shall be limited only by the express provisions of this contract and the Employer has all the rights which it had at common law except those expressly bargained away in this Agreement. This Article shall be liberally construed.

4.4 The exercise by the Employer of any of the foregoing functions shall not be reviewable by arbitration except in case such function is so exercised as to violate an express provision of this contract.

4.5 It is agreed by all parties to this contract that all personnel referred by the Union will be qualified for the work they were requested for and hired to perform.

4.6 The Union shall not sanction the taking of subcontracts by any of its members or to allow members to work for members making such subcontracts. No union member shall do any plumbing, heating

> or pipe work for other than his Employer after working hours unless on his own premises.

The Company's proposal continued to base wages on a $12.00 per hour minimum rate which could be supplemented by merit increases determined "solely in the discretion of the Employer." The parties agreed to meet again on July 18, 1991.

18. Filbrandt and his wife decided to have Rutlin participate at the July 18, 1991, meeting. Rutlin had a prior engagement on that date, and, as a result, the July 18, 1991, session was cancelled. On July 29, 1991, the Company filed a petition for election with the Wisconsin Employment Relations Commission.

19. The Company has employed two different law firms from the time it learned of the Union's wish to be recognized as the representative of Company employes to the time of hearing in this matter. From Filbrandt's first contacts with the first law firm employed by the Company, he was aware that an election petition could be filed after one year of bargaining with the Union.

20. The parties did not establish any ground rules for negotiations. Neither party requested that items tentatively agreed to, be reduced to a jointly agreed upon, signed writing.

21. The delays between negotiations meetings were due primarily to the unavailability of Company negotiators.

PROPOSED CONCLUSIONS OF LAW

1. The Company is an "employer" within the meaning of Sec. 111.02(7), Stats.

2. The plumber employed by the Company and covered by the unit description noted in Finding of Fact 5 above is an "employe" within the meaning of Sec. 111.02(6), Stats. The Union is the "representative", within the meaning of Sec. 111.02(11), Stats., of that employe.

3. The Company, by refusing to meet at regular intervals with the Union, in a mutually genuine effort to reach an agreement, has failed to bargain in good faith with the Union in violation of Secs. 111.06(1)(a) and (d), Stats.

PROPOSED ORDER 1/

1. To remedy its violation of Secs. 111.06(1)(a) and (d), Stats., the Company shall immediately:

a. Cease and desist from:

(1). Refusing to bargain in good faith with the Union as the representative of the bargaining unit set forth in Finding of Fact 5 above.

b. Take the following affirmative action which the Wisconsin Employment Relations Commission finds will effectuate the purposes and policies of the Wisconsin Employment Peace Act.

(1). Bargain in good faith with the Union as the representative of the bargaining unit set forth in Finding of Fact 5 above.

1/ Any objections to the Examiner's proposed decision must be received by the Commission within 20 days of the date the Examiner's decision is issued and mailed to the parties. Any objection must be accompanied by any written argument a party wishes to make to the Commission. An opportunity to respond to any objection filed will be provided by the Commission.

(2). Notify the Wisconsin Employment Relations Commission within twenty days of the date of this Order as to what steps the Company has taken to comply with the Order.

2. To further remedy the Company's violation of Secs. 111.06(1)(a) and (d), Stats., the Wisconsin Employment Relations Commission has, by separate Order, dismissed the election petition which was filed by the Company on July 29, 1991, and which has been captioned by the Commission as Case 1, No. 46039, E-3072. The Commission will not process another petition filed by the Company for a period of not less than six months from the date of this Order.

Dated at Madison, Wisconsin, this 20th day of March, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Richard B. McLaughlin, Examiner

MEMORANDUM ACCOMPANYING
PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The complaint alleges Company violations of Secs. 111.06(1)(a) and (d), Stats. It seeks the dismissal of an election petition submitted by the Company and an order compelling the Company to bargain in good faith with the Union.

THE PARTIES' POSITIONS

The Union's Initial Brief

After an extensive review of the record, the Union contends that the Company's refusal to schedule more frequent bargaining sessions demonstrates its bad faith. Wisconsin and federal law establish, the Union argues, that the duty to bargain collectively "encompasses the affirmative duty to make expeditious and prompt arrangements for meeting and conferring" and requires an employer "to attend to his bargaining obligation with the same degree of diligence as he would to any other important business matter." The Union asserts that the record demonstrates that the Company refused to meet promptly, or at regular intervals. The Union concludes, after a review of the evidence, that "every personal or recreational activity (of Company negotiators) came before bargaining, in direct contradiction to the statutory duty to bargain in good faith." The Company's cancellation of several meetings without a valid excuse only underscores this point, according to the Union.

The Union's next major line of argument is premised on its assertion that "an employer cannot insist on a recognition clause which fails to correctly identify the certified representative". From this it follows, according to the Union, that the Company's "refusal to agree to the inclusion of the proper name in the labor agreement by itself constitutes an unfair labor practice."

The Union then contends that the Company entered into negotiations with a closed mind, thus engaging in bad faith bargaining. More specifically, the Union contends that the Company held an inflexible position on Union security, and used its intransigence on that point "to block opportunities for negotiation on other issues.

Beyond this, the Union argues that the Company engaged in a pattern of surface bargaining. More specifically, the Union contends that the following conduct establishes the pattern: the Company's refusal to permit the Union to use its official name, in spite of the Union's willingness to afford that courtesy to the Company; the Company's refusal to permit the first sentence of the introductory paragraph proposed by the Union into the contract; the Company's inordinate concern over helpers who were not part of the bargaining unit; the Company's excessive concern over

typographical errors; and the Company's use of its position on Union security to thwart discussion of other proposals.

The Union then asserts that the Company's proposals were regressive in nature, thus evidencing bad faith. More specifically, the Union asserts that the parties had reached a tentative understanding on Sections 4.1 and 4.2 of the proposed agreement, and had determined that the Company should draft a version of Sections 4.3 and 4.4 which it could live with. The Union contends the Company failed both to make any proposal on the latter two sections and to honor the agreement on the former two sections. Beyond this, the Union asserts that the Company made a regressive wage proposal and benefit proposal, further evidencing its unwillingness to engage in meaningful bargaining.

That Company representatives interpreted the bargaining atmosphere as cordial is irrelevant, according to the Union. The Union counters that this characterization is inaccurate, but is in any event irrelevant, since it is not necessary to demonstrate that the Company actively disliked the Union.

The Union then contends that the "essence of bad faith in bargaining is the intent to avoid agreement", and that in this case "the entirety of the Employer's conduct indicates an intention to avoid reaching agreement". Beyond this, the Union argues that even "in the absence of direct evidence as to intent, the conduct of the Employer is enough to establish bad faith." More specifically, the Union asserts that the Company early in the negotiations determined it could seek to decertify the Union after one year, and then acted on this intent prior to the end of that year, by making the last bargaining session no more than a formality. The Union concludes that "by any standard, (it) did not have a year to reach agreement . . . as required under the Wisconsin Peace Act and the parallel federal statute."

The Union concludes by asserting that a certification must be honored by an employer for a reasonable period, typically one year. In this case, the Union contends that it has been denied that one year period of time due to the Company's bad faith, thus requiring that "the certification year be extended and that the Company be ordered to bargain in good faith."

The Company's Initial Brief

After an extensive review of the record, the Company asserts that a review of the record in light of relevant case law establishes that it neither bargained in bad faith, nor engaged in surface bargaining. The Company asserts that the totality of its bargaining conduct must be assessed to determine the merit of the Union's allegations. Neither Wisconsin nor federal law requires a finding of bad faith bargaining, according to the Company, where there has been isolated instances of misconduct; where no final agreement has been reached; where an employer has refused to move an a given proposal or has not made any counter proposal; where give-backs have been demanded; where "both parties have been equally dilatory"; or where no progress has been made in

negotiations. Rather, according to the Company, such factors must be assessed as a whole, to determine if the Company did not intend to reach any agreement. In this case, the Company asserts that the "evidence . . . leads to one inescapable conclusion -- the Employer did not engage in surface or bad faith bargaining".

More specifically, the Company asserts that there is no evidence to rebut the Company's stated intention to reach an agreement through bargaining. Beyond this, the Company asserts that the Company did not consider the decertification petition until after its employe approached Company representatives to express "his satisfaction with his present working conditions." The Company contends that the bargaining sessions were set in the absence of prior agreement on the frequency of meetings, with the consent of the Union, and against the background of the crowded calendars of each negotiator. The record actually demonstrates, the Company contends, that "the Union not the Employer, cancelled the vast majority of previously scheduled meetings."

The Company then asserts that it did not insist on unduly lengthy discussions on inconsequential points. Regarding the discussion of helpers, the Company contends "this issue was of vital importance to the Employer." Beyond this the Company asserts that there is no evidence the Company refused to discuss other issues until Union security was resolved, and that the "documentary evidence demonstrates that the Employer provided a number of proposals and counterproposals." That the Company provided the Union the negotiations authorization it requested while the Union failed to supply the Company the pension plan the Company requested establishes, the Company concludes, that the Union has no basis to claim it was dealt with in bad faith. Beyond this, the Company challenges the assertion that it did not honor a prior agreement. The Company notes that the parties did not sign off any agreements; that the parties lacked experience in negotiating a new labor agreement; and that there is a dispute on what, if anything, was agreed to. It follows from this, the Company concludes, that the parties' misunderstanding on the status of proposals cannot be held against the Company.

Viewing the record as a whole, the Company contends that the "Union has failed to establish by a clear and satisfactory preponderance of the evidence that the Employer has engaged in surface or bad faith bargaining." It necessarily follows, the Company contends, that the complaint must be dismissed.

The Union's Reply Brief

The Union asserts that contrary to the Company's protestations, it made itself available to bargain "a maximum of one time per month." This is, according to the Union, "by itself . . . evidence of bad faith bargaining." Beyond this, the Union argues that the Company cannot use the crowded calendars of its negotiators as a defense, and that the Union "consistently objected to the delay between meetings commencing on December 6, 1990."

The Union then specifically challenges the assertion that the Union itself cancelled a

number of negotiation sessions. Acknowledging that Guenther did cancel the August 30, 1990, meeting, the Union asserts that a detailed review of the record will establish that "testimony and documentary evidence on the subject . . . does more to call Joseph Filbrandt's credibility into question" than to support a contention that Guenther cancelled the November 29, 1990, session. The Union contends that Filbrandt's lack of credibility on this point calls into question the credibility of his claim that Guenther "called to cancel a purported negotiating date of March 26, 1991".

The Union argues that the record demonstrates a pattern by which the Company would make itself available to bargain no more than "once every month or six weeks". Beyond this, the Union contends that the Company's cancellation of meetings forced a "two month hiatus" between certain bargaining sessions. The Union also specifically rejects any assertion any legal advice afforded the Company can operate as a defense to its pattern of bad faith bargaining.

That the Company determined to file a decertification petition before the certification year had run establishes, the Union contends, that "(t)here was no intent to reach agreement." It follows, according to the Union, that the Company should be ordered to bargain in good faith, and that "the certification petition now on file be dismissed."

The Company's Reply Brief

The Company contends that the Union's brief "misstated and mischaracterized the evidence in this dispute". More specifically, the Company contends that a review of Filbrandt's testimony "establishes quite clearly that (his) goal in negotiations was to reach an agreement with the Union." Beyond this, the Company contends that Filbrandt did not seek any specific advice on decertification until the two employes who had voted for representation had resigned, and the employe hired after their resignations voluntarily informed the Company he did not wish to be represented.

The Company then contends that the Union's brief characterized the evidence in a misleading fashion. More specifically, the Company argues that the July 11, 1990, session was scheduled through mutual agreement; that the Union never requested a copy of the Company's proposal prior to the first meeting; that the Company's insistence on having the Union's name accurately set forth in the contract was proper; that the delays between meetings are attributable to the Union's conduct and to the difficulty of coordinating different work calendars; that the Employer's wage proposal was not regressive; and that the Company's consultation with another attorney in April of 1991 shows its continuing willingness to conduct serious negotiations. The Company concludes that a "fair review of the evidence establishes, without doubt, that the Employer did not delay or stall the negotiations, or otherwise engage in bad faith or surface bargaining with the Union."

The Company concludes that the Union has failed to meet its burden of proof, and that the complaint must be dismissed.

DISCUSSION

The complaint alleges the Company has failed to discharge its duty to bargain in good faith with the Union, as required by Sec. 111.06(1)(d), Stats. Any violation of Sec. 111.06(1)(a), Stats., is derivative in nature.

The Union's claim is within the Commission's jurisdiction because the NLRB will not assert its jurisdiction over what is now a one-person unit. At the time of the NLRB's certification of the Union, the unit consisted of two employes.

Although the Wisconsin Employment Peace Act thus becomes the law governing this complaint, 2/ standards established as federal law must be applied to the merits of this dispute due to the unique circumstances posed. It is undisputed that the NLRB, which originally took jurisdiction of this matter, will no longer do so. It is apparent that the substantive law governing 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).

parties' conduct, and presumably the law the parties conformed their behavior to, is federal. Against this background, an application of the Commission's case law developed under the WEPA would not necessarily mirror the law the parties initially acted under.

This is a significant consideration in this case because the Commission's substantive case law may conflict with federal law on the points posed here. This poses the risk that conduct undertaken in conformance with federal law might be improper under Wisconsin law. For example, after being notified that its employes had become members of the Union, the Company denied the Union recognition, and the Union filed a petition for election with the NLRB. It is at least arguable that Commission case law would have imposed a duty on the Company to bargain with the Union prior to the certification of the election results. 3/ In addition, the Commission's case law may or may not conflict with the NLRB's regarding the period of time which must elapse after a certification has been issued before another election petition covering the same unit can be processed. The Commission has variously stated its law on this point, referring in some cases to a "reasonable period of time" 4/ and in other cases to a one year rule 5/. The Commission's one year rule, to the extent it has one, has not been applied as rigorously as the NLRB's. 6/ In assessing any conflict between Commission and NLRB law, the fact that the NLRB's case law is more readily available to the public than is the Commission's must be considered. In sum, federal law standards should be considered the substantive law governing the complaint. An application of the Commission's substantive law risks applying a standard unknown to the parties at any point relevant to this matter.

Since principles of substantive federal law govern this matter, the Union was entitled, under the NLRB's certification, to "a conclusive presumption of majority status for one year following the certification". 7/ The parties do not dispute this point. Rather, the dispute here turns on whether the Company engaged in bad faith or surface bargaining during that one year period, thus defeating any claim on its part that the certification year has run.

3/ See, Pleasant Valley Co-operative Creamery, Eleva, Wisconsin, Dec. No. 6304 (WERC, 4/63).

4/ Lindey Cleaners & Dyers, Dec. No. 2711 (Slavney, 2/51), aff'd, Dec. No. 2711-B (WERC, 3/51).

5/ See, for example, Columbia Hospital, Dec. No. 5399 (WERC, 12/59), citing Lindey Cleaners, footnote 4/ above.

6/ Cf. Lakeside Industries, Dec. No. 4610 (WERC, 9/57), and H.C. Prange Co., Dec. No. 4823 (WERC, 7/58) to Children's Habilitation Centers, 289 NLRB No. 109, 129 LRRM 1084 (1988).

7/ Fall River Dyeing & Finishing v. NLRB, 482 US 27, 37; 125 LRRM 2441, 2445 (1987).

The Company accurately notes that the NLRB uses a "totality of conduct" standard to assess whether an employer has discharged its duty to bargain. 8/ The Union's complaint focuses on a series of actions which it contends manifest bad faith bargaining by the Company: a pattern of refusing to meet at intervals of less than one month; the cancellation of previously set negotiations meetings; a pattern of surface bargaining manifested by extended discussions on helpers and other non-substantive issues; a refusal to discuss matters beyond union security; a failure to provide a promised counterproposal; and the rescission of earlier agreements. Certain other areas of conduct were brought up at hearing, including a Union contention that the Company advanced a series of proposals it knew the Union could not accept, including a regressive wage proposal.

With one exception, the Company has persuasively argued that the indicia of bad faith cited above remain unproven. The Company's cancellation of the July 11, 1990, and November 8, 1990, bargaining sessions is, standing alone, unremarkable. Beyond this, it must be noted that the Union cancelled at least one negotiating session (August 30, 1990) and was late for one other. The bad faith of one negotiating party must be tested by the good faith conduct of the other. 9/

While the Union has persuasively argued that there is little evidence to indicate the Company genuinely wanted to mutually seek common ground with the Union, the record will not support its allegations of surface bargaining. The difficulty with the Union's case on this point is that, with one exception, it is difficult to find solid evidence of surface bargaining given the Union's unwillingness to move toward any of the Company's positions. That the Company wished to discuss helpers is not evidence of surface bargaining. While helpers are not in the unit, the accuracy of Filbrandt's perception that Guenther wished to limit the Company's established pattern of extensively using such employes stands unrebutted. That the Company would be concerned on the impact of the agreement on the use of helpers is understandable. Beyond this, the record will not support the Union's assertion that the Company obstructed the negotiations by dwelling on typographic errors and other non-substantive points. Schmelling specifically noted that the parties did not dwell on the typographic errors of the proposal he submitted. It can, however, be noted that the parties dealt at length discussing the Union's correct name. The Company's assertion that this was substantive assumes that the Company sought to have the contract parallel the Certification. This ignores that the Company's December 6, 1991, proposal does not parallel the Certification.

8/ Commission and NLRB law is consistent on this point, see Frank Carmichael, d/b/a Old Market Square Theatre, Dec. No. 22243-C, 22244-C (WERC, 12/86); Schwab Foods dba Mooresville IGA Foodliner, 858 F2d 1285; 129 LRRM 2601 (CA 7, 1988).

9/ See, for example, Dunn Packing Co., 143 NLRB 1149, 53 LRRM 1471 (1963). NLRB and Commission case law is consistent on this point. See Misericordia Hospital, Dec. No. 6931 (WERC, 11/64).

Thus, this point does underscore the Union's assertion that the Company was seeking to bog negotiations down on an inconsequential point.

The Union's assertion that the Company insisted on discussing points on which it is apparent agreement would be difficult, if not impossible, is more persuasive. Here too, however, the record demonstrates the Union did not, by its conduct, seriously test the point. That union security would be a troublesome issue is not, in itself, surprising. The record offers some indication that the Company insisted on bogging negotiations down to this point. The record also, however, indicates that the Union's flexibility on the point was limited. The Union did offer to move the period in which new employes would be required to become members from 30 to 45 calendar days. It is not, however, apparent that the Union had any flexibility beyond this point. More significantly, it is not apparent what, if any, action Guenther took to move negotiations to the remaining issues, other than generally stating the discussions on union security were taking too long.

The Union accurately notes that the Company failed to provide it with a counter proposal on Sections 4.3 and 4.4, and a statement of the "agreement" reached on Sections 4.1 and 4.2. The record does not, however, establish that anything other than a vague general agreement had been reached. More significantly, Guenther did not specifically demand that the proposal be provided. That the parties had no ground rules and did not sign off any tentative agreements makes the misunderstanding on this point unremarkable. Beyond this, the Union itself never provided the Company a copy of the pension plan the Company requested. It is not apparent why the Company's neglect should be considered bad faith, while the Union's should not. In addition, it can be noted that the Union was aware of the Company's opposition to its position on Section 4.3 and 4.4. Rather than insist on the counter proposal cited as evidence of bad faith here, the Union simply resubmitted the proposals on Sections 4.3 and 4.4 which the Company had already rejected, and said nothing of substance regarding the counter proposal.

The Union's citation of regressive Company proposals affords some indication of bad faith, but that indication is again weakened by the Union's own conduct. What, if any, action Guenther took to move negotiations to wages other than a general statement that wages should be discussed is not apparent. More specifically, the Company's "regressive" proposal was never seriously tested. The Union showed no movement toward the Company on wages from its first proposal to its last: The Section 9.1 total hourly rate went up $0.95, while the Section 9.2 total hourly rate went up $1.30.

It is doubtful whether any of the above cited factors warrant a finding that the Company engaged in anything other than hard bargaining. On balance, the record does indicate some reason to believe the Company had no willingness to agree with the Union on any point of substance. This point has not, however, been seriously tested by the Union, for the record indicates the Union took the position that the Company should take the Union's proposed agreement on an all or nothing basis. The duty to bargain does not require the making of a specific concession. It is apparent the

Union itself chose a hard bargaining stance, with unit members striking to advance their demands. In the absence of evidence beyond that cited above, it would be difficult to characterize the Company's actions as anything other than its own hard bargaining stance.

There is, however, evidence beyond that cited above. The evidence which supports the bad faith bargaining allegation in this case turns on the Company's unwillingness to meet at reasonable intervals. The Company's request to postpone the initial bargaining session is, standing alone, unremarkable. It did, however, serve to cut roughly one month from the certification year. More significantly, that postponement does not stand alone but prefaces an extended period during which the Company negotiators were unable to meet at anything approaching regular intervals. By the time of the anniversary of the Union's certification, the parties had met six times. While the Company accurately notes that the Union acquiesced in the setting of the meeting dates, the point remains that the Company never made itself available at less than four to six week intervals. Guenther was less than emphatic in seeking more regular meetings, and did not seek to challenge the frequency of the meetings until the December 6, 1990, meeting. The point remains, however, that there can be no collective bargaining without mutual meetings. To overlook the Company's limited availability to meet in this case in effect turns the certification year into certification months.

It can be noted that the Company is a small employer, and the unit is also small. This point does not, however, impact on the statutory duty to bargain. As the United States Supreme Court noted in Brooks v. NLRB, 348 US 96, 35 LRRM 2158 (1954):

> (I)t is not within the power of this Court to require the Board . . . to relieve a small employer, like the one involved in this case, of the duty that may be exacted from an enterprise with many employees. 10/

The Court, in Brooks and in Fall River, specifically discussed the policies supporting the presumption which is applied to the Union's majority status during the year following certification. To ignore the Company's demonstrated unavailability for bargaining in this case would effectively gut that presumption.

The remedy set forth in the ORDER proposed above does not require extensive discussion. The election petition would be dismissed. No refiling would be permitted for six months. 11/ This six month period is to remedy the delays attributable to the Company discussed above. A longer extension is not appropriate on this record. As noted above, in the absence of the Company's pattern of unavailability, it would be difficult to characterize the parties' bargaining as anything beyond hard bargaining. The ORDER also requires the Company to bargain in good faith during this period. To discharge that duty, Company representatives must make themselves available at reasonable intervals to negotiate.

Dated at Madison, Wisconsin, this 20th day of March, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

10/ 348 US at 104, 35 LRRM at 2161.

11/ See Colfor Inc. v. NLRB, 838 F2d 164; 127 LRRM 2447 (CA 6, 1988).

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