STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TILE, MARBLE, TERRAZZO FINISHERS AND SHOP WORKERS LOCAL NO. 47-T, affiliated with the MILWAUKEE AND SOUTHEAST WISCONSIN DISTRICT COUNCIL OF CARPENTERS, Complainant, vs. NEALON MASONRY, Respondent, LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL NO. 113, Intervenor.	Case 1 No. 47148 Ce-2124 Decision No. 27248-A

Appearances:
Mr. James P. Judziewicz, and Mr. Ronald Lemon, Business Representatives, Tile,
Mr. Timothy Nealon, President, Nealon Masonry, 17840 West Wisconsin Avenue, Brookfield, Wisconsin 53005, on behalf of the Respondent.
Mr. William E. Johnson, Business Manager, Laborers International Union of North America, Local No. 113, 6310 West Appleton Avenue, Milwaukee, Wisconsin 53210, on behalf of the Intervenor.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On March 6, 1992 the Tile, Marble, Terrazzo Finishers and Shop Workers Local 47-T filed a complaint with the Wisconsin Employment Relations Commission wherein it alleged that Nealon Masonry had committed unfair labor practices in violation of Secs. 111.06(1)(a) and (d) of the Wisconsin Employment Peace Act. The Commission appointed a member of its staff, David E. Shaw, as Examiner in the matter. A hearing was held before the Examiner on May 27, 1992 in Brookfield, Wisconsin. At the hearing Laborers International Union of North America, Local No. 113 moved to intervene in this matter and the motion was granted. A stenographic transcript was made of the hearing and post-hearing argument was received by July 20, 1992. The Examiner, having considered the evidence and arguments of the parties, now makes and issues the following

FINDINGS OF FACT

1. Tile, Marble, Terrazzo Finishers and Shop Workers Local No. 47-T, hereinafter the Complainant, is a labor organization having its offices located at 3020 West Vliet Street, Milwaukee, Wisconsin 53208. Complainant is affiliated with the Milwaukee and Southeast District Council of the United Brotherhood of Carpenters. James Judziewicz is employed as a business representative with the Carpenters and primarily covers the tile, marble and terrazzo industry. Judziewicz is also the Financial Secretary/Treasurer of the Complainant. At all times material herein, Judziewicz has represented the Complainant in its dealings with Nealon Masonry.

2. Nealon Masonry, hereinafter the Respondent, is an employer with its offices located at 17840 West Wisconsin Avenue, Brookfield, Wisconsin 53005. At all times material herein, Timothy Nealon has been the President of Respondent and its principal representative in its dealing with the Complainant. Respondent is a mason contractor with Nealon doing masonry work in brick, block, stone, granite and marble. In addition to Nealon, Respondent at times employs another person as a mason tender or helper on a project. At no time has Respondent had more than one employe in addition to Nealon. Approximately in June or July of 1988, Respondent, through its representative, Timothy Nealon, became signatory to the 1987-1990 Marble Setter Helpers' labor agreement between the Marble Dealers of Milwaukee, Wisconsin, Allied Construction Employers Association, Inc., and the Complainant. Said agreement contained the wages, hours and working conditions for Marble Setter Helpers and, in part, contained the following provisions:

1987-1990 MARBLE SETTER HELPERS' LABOR AGREEMENT

> THIS AGREEMENT made and entered into this 1st day of June, 1987, by and between the MARBLE DEALERS OF MILWAUKEE, Wisconsin, the ALLIED CONSTRUCTION EMPLOYERS ASSOCIATION, INC., and the TILE, MARBLE, TERRAZZO FINISHERS AND SHOPWORKERS, LOCAL NO. 47, all of the Counties of Milwaukee, Ozaukee, Washington and Waukesha, State of Wisconsin.
>
> WITNESSETH
>
> That the parties hereto, for and in consideration of the mutual promises and obligations hereinafter imposed, and mutual benefits derived, agree to and with each other as follows:
>
> ARTICLE I
>
> DEFINITIONS
>
> Section 1.1. The Allied Construction Employers Association, Inc. will be referred to in this Agreement as the "Association." The Marble Dealers of Milwaukee will be referred to in this Agreement as the "Marble Dealers." Whenever the term "Employer" is used in this Agreement, it is intended to mean and shall refer to an individual Employer or Contractor represented in collective bargaining by either or both the "Association" or the "Marble Dealers" just referred to or one otherwise becoming a party to this Agreement.
>
> Section 1.2. The Tile, Marble, Terrazzo Finishers and Shopworkers, Local No. 47 will be referred to in this Agreement as the "Union." The Tile, Marble, Terrazzo Finishers and Shopworkers International Union will be referred to in this Agreement as the "International Union."
>
> Section 1.3. The Employer hereby recognizes the Union as the exclusive collective bargaining agent for the Employees who perform the work stipulated in Article II, Sections 2.1 and 2.2.
>
> ARTICLE II

APPLICABILITY OF AGREEMENT

Section 2.1. This Agreement shall apply and pertain only to marble setter helpers (including helper trainees) as are represented by the Union and as are engaged in exterior and interior marble, slate and granite masonry.

Section 2.2. Work on composition marble shall be governed by all conditions of this Agreement.

Section 2.3. Marble Employers from outside of the Helpers No. 47 geographical jurisdiction must hire one Helper from Local No. 47 as the job steward. Such Employer shall be allowed to bring in one key man; the balance of the Helpers, if needed, will come from Local No. 47.

Section 2.4. This Agreement shall cover the geographical areas of Milwaukee, Waukesha, Washington and Ozaukee Counties in the State of Wisconsin.

. . .

ARTICLE XVI

DURATION OF AGREEMENT

Section 16.1. This Agreement shall be binding upon the parties, their successors and assigns, and shall continue in full force and effect until May 31, 1990, and from year to year thereafter, unless terminated by written notice given by either party to the other not less than ninety (90) days prior to the expiration date (May 31, 1990), or any anniversary thereof. Since it is the intention of the parties to settle and determine, for the term of this Agreement, all matters constituting the proper subjects of collective bargaining between them, it is expressly agreed that there shall be no reopening of this Agreement for any matter pertaining to rates of pay, wages, hours of work, or other terms and conditions of employment, or otherwise, during the term of this Agreement.

Dated this July 1 day of _____, 1987.

Neither Respondent nor Complainant gave the other party notice of termination of the Agreement pursuant to Section 16.1. Respondent is not a member of the employer group that negotiated the 1987-1990 Agreement with Complainant and has not delegated bargaining authority to that group.

3. Laborers International Union of North America, Local No. 113, hereinafter the Intervenor, is a labor organization having its offices located at 6310 West Appleton Avenue, Milwaukee, Wisconsin 53210. William Johnson is the Business Manager for the Intervenor.

4. Respondent was signatory to a 1987-1990 Agreement with the Intervenor and on December 6, 1990, also became signatory to the 1990-1993

labor Agreement with the Intervenor. Said 1990-1993 Agreement, in part, contained the following provisions:

1990-1993
BUILDING LABORERS' AGREEMENT

THIS AGREEMENT made and entered into this 1st day of June, 1990, by and between the ALLIED CONSTRUCTION EMPLOYERS ASSOCIATION, INC. of Waukesha County, THE ASSOCIATED GENERAL CONTRACTORS OF GREATER MILWAUKEE, INC. of Milwaukee County, hereinafter referred to as the "Associations", and the WISCONSIN LABORERS' DISTRICT COUNCIL and its affiliated Local Unions 113 and 392 of the LABORERS' INTERNATIONAL UNION OF NORTH AMERICA of the Counties of Milwaukee, Waukesha, Washington and Ozaukee, State of Wisconsin, hereinafter referred to as the "Union."

WITNESSETH

That the parties hereto, for and in consideration of the mutual promises and obligations hereinafter imposed, and mutual benefits derived, agree to and with each other as follows:

ARTICLE I
Geographical Jurisdiction &
Definition of General Laborer

Section 1.1. This contract shall cover all general labor working on construction projects in Milwaukee, Waukesha, Washington and Ozaukee Counties. It shall cover all laborers working on the job site or in a contractor's yard when such yard work involves only supplies and materials which are to be incorporated directly into a construction project.

Section 1.2 Laborers Jurisdictional Work. The following work jurisdiction is claimed by the "Union."

Tenders. Tending masons, plasterers, carpenters and other building and construction crafts.

Tending shall consist of preparation of materials and the handling and conveying of materials to be used by mechanics of other crafts, whether such preparation is by hand or any other process. After the materials has been prepared, tending shall include the supplying and conveying of said material and other materials to such mechanic, whether by bucket, hod, wheelbarrow, buggy, trucks, skid loaders or other motorized units used for such purpose including fork lifts.

Unloading, handling and distributing of all materials, fixtures, furnishings and appliances from point of delivery to stockpiles and from stockpiles to approximate point of installation.

Drying of plaster, concrete, mortar or other

aggregate, when done by salamander heat or any other drying process.

Cleaning and clearing of debris, including wire brushing of windows, scraping of floors, removal of surplus materials from all fixtures within confines of structure and cleaning of all debris in building construction area. The general cleanup, including sweeping, cleaning, washdown and wiping of construction facility, equipment and furnishings and removal and loading or burning of all debris including crates, boxes, packaging waste material. Washing or cleaning of walls, partitions, ceilings, windows, bathrooms, kitchens, laboratory, and all fixtures and facilities therein. Clean-up, mopping, washing, waxing and polishing or dusting of all floors or areas.

The aging and curing of concrete, mortar and other materials applied to walls, floors, ceilings and foundations of buildings and structures, highways, airports, overpasses and underpasses, tunnels, bridges, approaches, viaducts, ramps or other similar surfaces by any mode or method.

. . .

ARTICLE XXIV
Duration of Agreement

Section 24.1. This Agreement shall be binding upon the parties, their successors and assigns, and shall continue in full force and effect until May 31, 1993, and from year to year thereafter, unless terminated by written notice given by either party to the other not less than ninety (90) days prior to the expiration date (May 31, 1993), or any anniversary thereof. Since it is the intention of the parties to settle and determine, for the terms of this Agreement, all matters constituting the proper subjects of collective bargaining between them, it is expressly agreed that there shall be no reopening of this Agreement for any matter pertaining to rates of pay, wages, hours of work, or other terms and conditions of employment, or otherwise, during the term of this Agreement.

Section 24.2 Effective as of June 1, 1990, this Agreement supersedes and replaces the 1987-1990 Agreement heretofore entered into on June 1, 1987.

Dated this _____ day of _____, 1990.

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA

WISCONSIN LABORERS' DISTRICT COUNCIL AND ITS AFFILIATED LOCAL UNIONS No. 113 and 392.

By _____
Raymond B. Ervin, Business Manager

Delano Blunt, President

Aaron Couillard, Business Manager

Terry Miller, Business Agent

5. For some period of time Respondent was working outside of Wisconsin and then returned to the state in May of 1991. Sometime in June of 1991, Nealon and one employe helper began working on a job at Mount Olivet Cemetery working on granite crypt fronts. Judziewicz and another individual noticed the work while driving by the cemetery and drove in to investigate. Judziewicz found Nealon and his employe, Ronell Burnside, working on the granite fronts of the crypts. At that time Judziewicz asked Nealon if Burnside was a member of Local 47-T. Nealon advised Judziewicz that Burnside was a member of Laborers Local 113 and Judziewicz told Nealon and Burnside that Burnside would have to be a member of Local 47-T in order to work on that job pursuant to the Agreement with the Complainant. Judziewicz also told Nealon that he was still signatory to the Agreement with Complainant and also asked him to sign the new 1990-93 Agreement. Nealon said he would sign the new agreement as he wanted to pay Burnside the proper wages and benefits. Burnside subsequently signed an authorization card for the deduction of the working assessment and payment to Complainant backdated to May 1, 1991 and became a member of Local 47-T. On June 20, Judziewicz sent the following letter to Nealon enclosing two copies of the 1990-1993 Agreement as well as a Voluntary Recognition Agreement for Nealon to sign:

June 20, 1991

Nealon Masonry
17840 W. Wisconsin Avenue
Brookfield, Wisconsin 53005

Attention: Mr. Timothy Nealon

Dear Sir:

Enclosed, for your signature, are two copies of our 1990-1993 Area 2 Marble/Granite Helpers' Working Agreement.

We would also like you to execute the Voluntary Recognition Agreement which is the page directly behind the signature page.

Please return one signed copy of this Agreement to our office, and retain the other copy for your files.

Sincerely yours,

By letter of July 2, 1991, Judziewicz sent Nealon a copy of Burnside's "Union Checkoff Authorization Card" authorizing the deduction of the working assessment. Subsequently, Judziewicz sent Nealon the following letter of

July 11, 1991 with the referenced enclosures:

July 11, 1991

Nealon Masonry
17840 W. Wisconsin Avenue
Brookfield, Wisconsin 53005

Attention: Mr. Timothy Nealon

Dear Sir:

Enclosed please find the following:

1) A wage and benefit rate chart covering our current agreement.

2) An instruction sheet for remitting the various Benefit Fund and Dues Assessment payments.

3) A copy of a completed remittance report to assist you in filling out the report.

4) Remittance forms for remitting the Benefit Fund and Dues Assessment payments.

5) The Union Checkoff Authorization Card from Ronell J. Burnside. Please keep this card on file at all times.

If you have any questions regarding the enclosed material, please call me at either (414) 342-6301 or at the number shown above in the letterhead.

Sincerely yours,

TILE, MARBLE, TERRAZZO FINISHERS AND SHOPWORKERS LOCAL NO. 47-T

James P. Judziewicz
Business Representative

Nealon paid into Complainant's benefit funds for Burnside for the months of June, July and August, 1991, but paid him the contractual rate in the agreement with Laborers Local 113 (a higher rate). Subsequent to August, 1991, Nealon did not pay into Complainant's benefit funds and did not pay Burnside the wage rate in Complainant's Agreement. At no time material herein did Nealon sign the 1990-1993 Agreement with Complainant. Sometime in early November of 1991, Judziewicz had a conversation with Nealon wherein he again asked him to sign the 1990-1993 Agreement with the Complainant and Nealon refused. In that conversation Judziewicz told Nealon that he could end up spending a lot of money in attorneys' fees and he would be sorry for refusing to sign the Agreement. Subsequently, Judziewicz filed a complaint with the National Labor Relations Board alleging that the Respondent had failed and refused to execute a collective bargaining agreement to which it had previously agreed. On December 27, 1991 the National Labor Relations Board, Region 30, sent Judziewicz the following letter notifying him that it was refusing to issue a complaint in the matter:

December 27, 1991

James P.Judziewicz
Tile Marble Terrazzo Finishers
and Shopworkers Local No. 47 T
3020 W Vliet St
Milwaukee, WI 53208

Re: Nealon Masonry
Case 30-CA-11616

Dear Mr. Judziewicz:

The above-captioned case, charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it appears that further proceedings on the charge are not warranted inasmuch as the evidence does not establish that the Employer has unlawfully failed and refused to execute a collective-bargaining agreement to which it has previously agreed. The evidence shows that the Employer has only one employee as defined in the National Labor Relations Act.

Separate and apart from considerations of the Employer's duty to bargain in light of the parties' historic Section 8(f) relationship, from early on, the Board has held that it will not hold an election or certify a one-person unit. Luckenbach Steamship Company, Inc., 2 NLRB 192 (1936). Because the principle of collective bargaining presupposes that there is more than one eligible person who desires to bargain, the Board is precluded from directing an employer to bargain with respect to such a unit. Foreign Car Center, Inc., 129 NLRB 319 (1960). Accordingly, the Employer's refusal to execute an asserted agreed-upon collective-bargaining agreement or a voluntary recognition agreement does not violate Section 8(a)(5) of the Act, as alleged. I am, therefore, refusing to issue a complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, Series 8, as amended, you may obtain a review of this action by filing an appeal with the General Counsel addressed to the Office of Appeals, National Labor Relations Board, Washington, D.C. 20570, and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D.C., by the close of business on January 10, 1992. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. Any request for extension of time must be submitted to the Office of Appeals in Washington, and a copy of any such request should be submitted to me.

If you file an appeal, please complete the Form NLRB-4767, Notice of Appeal, I have enclosed with this letter and send one copy of the form to each of the other parties whose names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with the Regional Director within the time stated above.

Very truly yours,

Joseph A. Szabo /s/
Joseph A. Szabo
Regional Director

On March 6, 1992, Complainant filed the instant complaint in this matter alleging that Respondent had violated the Wisconsin Employment Peace Act.

6. Neither Respondent nor Complainant notified the other in writing of their intent to terminate the 1987-1990 Agreement. Respondent, by its President, Tim Nealon, agreed orally in June in his conversation with Judziewicz to sign the successor agreement with the Complainant for 1991-1993. At all times material herein thereafter Nealon has refused to sign said successor agreement with Complainant. Subsequent to August of 1991 Respondent has failed to pay the wages and benefits provided under said agreement and failed to pay into Complainant's pension health and welfare and vacation trust funds on behalf of Burnside or any subsequent employe hired subsequent to August, 1991.

7. Intervenor also claims the work performed by Burnside at the Mount Olivet project. Both the Intervenor Local 113 and Complainant stipulated at the hearing that there is no work jurisdiction dispute board currently functioning where those parties could resolve their dispute in that regard.

8. That at no time has Complainant petitioned the National Labor Relations Board or the Commission for an election in the collective bargaining unit consisting of Respondent's employe - nor has it been certified or voluntarily recognized as the exclusive bargaining representative of a majority of the employes in that bargaining unit.

Based on the foregoing Findings of Fact the Examiner makes the following

CONCLUSIONS OF LAW

1. That the 1987-1990 Agreement between Complainant and Respondent constituted a pre-hire agreement and was therefore violative of the Wisconsin Employment Peace Act.

2. That the 1990-1993 Agreement which Complainant seeks to enforce would constitute a pre-hire agreement, and therefore would be violative of the Wisconsin Employment Peace Act.

3. That Respondent, Nealon Masonry, is not covered by the federal Labor Management Relations Act.

4. That by refusing to abide by the terms and conditions of the 1987-1990 Agreement with Complainant and refusing to sign the 1990-1993 Agreement

with Complainant, the Respondent did not commit an unfair labor practice in violation of Secs. 111.06(1)(a) and (d), of the Wisconsin Employment Peace Act.

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

ORDER 1/

The instant complaint is hereby dismissed in its entirety.

Dated at Madison, Wisconsin this 15th day of October, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By David E. Shaw /s/
David E. Shaw, Examiner

(Footnote 1/ appears on the next page.)

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.

NEALON MASONRY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

In its complaint in this case, the Complainant alleges that the

Respondent has had at all times material no more than one employe working for it at any one time and that the Commission therefore has jurisdiction over the matter, the National Labor Relations Board (NLRB) having dismissed a similar prior complaint on the basis that it does not have jurisdiction over a one-employe bargaining unit. The complaint also alleges that Respondent initially agreed to sign and comply with the terms of a successor labor agreement with Complainant, and then subsequently refused to do so, thereby violating Section 111.06(1)(a) and (d), Stats. At the hearing in this matter, Laborers' International Union, Local Union No. 113, hereinafter the Intervenor, moved to intervene in this case and said motion was granted. Intervenor moved at the hearing to dismiss the complaint on the basis that the Commission has no jurisdiction over the dispute, the dispute being over work jurisdiction. Ruling on the motion was withheld pending decision in this matter.

In its answer, Respondent alleged that it currently is employing a member of Intervenor Laborers' Local Union No. 113 and that that employe wishes to remain a member of that union. Respondent further alleges that Complainants' representative has advised him that the employe must be a member of Complainant, while representatives of the Intervenor have advised him that the employe is properly placed in that union. Therefore, there is a jurisdictional dispute between the two unions. Respondent further asserts that in June of 1991 it agreed to pay the benefits for employe Burnside to the Complainant because of threats made to Nealon by Complainant's representative. Having been scared into believing that is where its employe belonged, Respondent made payment to Complainant for three months. Respondent was subsequently advised by the Intervenor that it did not need to continue to make payments to Complainant and that it should be making payments to Local 113 for said benefits. It is on that basis that Respondent has refused to sign the agreement with Complainant. Respondent concludes that it would like the Commission to resolve the matter so that it can comply with the unions' guidelines.

Complainant asserts that at the very least the Respondent is bound by the 1987-1990 agreement with Complainant due to the existence of a "rollover" provision in the agreement. It being undisputed that neither Respondent nor Complainant terminated the agreement per Article XVI, Section 16.1, that therefore by its terms the agreement remained in full force and effect. Complainant asserts, however, that Respondent verbally agreed to sign a successor 1990-1993 agreement with Complainant, and that by its actions in employing a member of Complainant and paying the wages and benefits required by the successor agreement, Respondent evidenced the willingness to comply and be bound by said agreement. Complainant disputes the Intervenor's position that the matter ought to be dismissed for lack of jurisdiction by the Commission. This matter deals with contract enforcement and bad faith on the behalf of Respondent in agreeing to assign a successor agreement and comply with its terms and then ultimately refusing to do so. It asserts that is not a work jurisdiction dispute. However, even if it were a jurisdictional dispute, both the Intervenor and the Respondent had the opportunity to seek relief in a timely manner in the proper forum and they both "sat on their rights", thereby forfeiting any possible claim in that regard. As a remedy, Complainant requests that Respondent be ordered to sign the successor agreement and to provide the Complainant with the necessary information to assure contract compliance on behalf of any affected employes on the Complainant's referral list who were denied referrals by virtue of the Respondent's failure to abide by the provisions of the agreement and to make said employes whole for any lost wages and benefits.

DISCUSSION

Taking Intervenor's jurisdictional argument first, it is well established

that the Commission is preempted from exercising its jurisdiction under WEPA where the conduct complained of arguably falls within the scope of the Labor Management Relations Act (LMRA) administered by the National Labor Relations Board (NLRB). 2/ Hence, the Commission has consistently concluded that it has no jurisdiction over unfair labor practice complaints involving conduct and parties over which the NLRB will exercise its jurisdiction. 3/ In this case, the NLRB has concluded that it does not have jurisdiction since it involves a one-man bargaining unit and refused to issue a complaint. (Complainant Exhibit No. 6) Thus, the Commission is not pre-empted by federal law from asserting jurisdiction over the instant complaint. The Examiner is unable to find any statement of law that would preclude the Commission from asserting its jurisdiction in this case based on the fact that this case might indirectly involve the existence of a work jurisdiction dispute as a defense to refusing to sign a new agreement with one of the disputing unions.

Having found that the Commission has jurisdiction, it is necessary to review the specific alleged violations of WEPA. In its complaint, Complainant alleges that Respondent violated Secs. 111.06(1)(a) and (d) of the Wisconsin Employment Peace Act 4/ by refusing to abide by the terms of the 1987-90 Agreement and by refusing to sign the 1990-93 Agreement after having agreed to do so in June of 1991. Complainant characterizes the 1987-90 Agreement as a "pre-hire agreement." (Tr. 47) This means that when Respondent hired someone to perform work covered by the agreement, that person would have to be a member

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2/ Local 248 v. WERB, 11 Wis.2d 277 (1960), cert. denied 365 U.S. 878 (1961); Markham v. American Motors Corp., 22 Wis.2d 680 (1964); Arena v. Lincoln Lutheran of Racine, 149 Wis.2d. 35 (1989).

3/ Local 244, Bakery Workers', Dec. No. 5743 (WERC, 5/61); Nopak, Inc., Dec. No. 5708-B (WERC, 7/61); Local 200, Teamsters, Dec. No. 6375 (WERC, 6/63); Local 444, Meat Cutters, Dec. No. 6791 (WERC, 7/64); Portage Stop N. Shop, Inc., Dec. No. 7037 (WERC, 2/65); Napiwocki Construction, Inc., Dec. No. 11941-B (WERC, 3/76); Trucker's and Traveler's Restaurant, Dec. No. 20882-C (WERC, 10/84); and Pember Excavating, Inc., Dec. No. 26672-A (WERC, 2/91).

4/ Those provisions of WEPA provide as follows:

> 111.06 What are unfair labor practices. (1) It shall be an unfair labor practice for an employer individually or in concert with others:
> (a) To interfere with, restrain or coerce his employes in the exercise of the rights guaranteed in s. 111.04.
>
> . . .
>
> (d) To refuse to bargain collectively with the representative of a majority of his employes in any collective bargaining unit; provided, however, that where an employer files with the commission a petition requesting a determination as to majority representation, he shall not be deemed to have refused to bargain until an election has been held and the result thereof has been certified to him by the commission.

of Complainant and would be paid, etc., in accord with the terms in the agreement.

In its decision in John H. Gassman, Dec. No. 24893-C (WERC, 7/88), the Commission stated the following as to the lawfulness and enforceability of a pre-hire agreement under WEPA:

> A pre-hire agreement is distinctive in that it is agreed to by an employer and a union before the workers to be covered by it have been hired. Iron Workers Local 3, supra, citing, Roberts' Dictionary of Industrial Relations, 3 ed. 562 (1986). On its face, WEPA would appear to outlaw such agreements. For, WEPA Secs. 111.02(2) and 111.06(4)(d), (sic) 5/ respectively, define collective bargaining in terms of a negotiation between an employer and a representative of a majority of the employes in a collective bargaining unit and prohibit an employer from bargaining with the representatives of less than a majority of his employees in collective bargaining unit. However, the Commission has held that construction and building industry pre-hire agreements are enforceable in proceedings initiated under Sec. 111.06(1)(f), Stats., where the relationship is in interstate commerce so as to be subject to the National Labor Relations Act. Don Cvetan Plumbing, supra. Also see, Overhead Door Co., 9055-B (WERC, 9/70) (dicta). As its basis for doing so, the Commission has relied on and applied Sec. 8(f) of the NLRA, 29 U.S.C. 158(f), which provides, as follows:
>
> > It shall not be an unfair labor practice . . . for an employer engaged primarily in building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction industry employees are members . . . because (1) the majority status of such labor organizations has not been established under the provisions of Section 9 of the Act prior to the making of such agreement . . . Provided . . . that any (such) agreement shall not be a bar to a petition (for a representation election) filed pursuant to Section 9(c) . . . .
>
> Other subsections of Sec. 8(f) allow construction industry pre-hire agreements to contain union security clauses, exclusive hiring hall provisions and job referral requirements.
>
> By comparison, WEPA contains no such provisions except for Sec. 111.06(2) which provides as follows:
>
> > It is not a violation of this subchapter for an employer engaged primarily in the building and

5/ Should be Sec. 111.06(1)(d), Stats.

> construction industry where the employes of such employer in a collective bargaining unit usually perform their duties on building and construction sites, to negotiate, execute and enforce an all-union agreement with a labor organization which has not been subjected to a referendum vote as provided in this subchapter.
>
> Thus, it is only by an application of NLRA Sec. 8(f) that the instant agreement could be enforceable herein. The Commission's jurisdiction to apply federal law to disputes and relationships in interstate commerce derives from the fact that Sec. 111.06(1)(f), Stats., proceedings before the Commission have been held to be competent state tribunal proceedings for the adjudication of violation of collective bargaining agreement disputes arising under Sec. 301 of the Labor Management Relations Act. Indeed, in such cases, the Commission is required to apply the federal Sec. 301 case law as it has been developed by the federal courts.
>
> Accordingly, the potential lawfulness and enforceability of the pre-hire agreement entered into herein turns initially on whether the parties' relationship was one in commerce within the meaning of LMRA Sec. 301 and hence within the meaning of the National Labor Relations Act generally. . . .
>
> At 8-9.

The Examiner reads the Commission's decision in Gassman as holding that a prehire agreement is illegal under WEPA and is only enforceable before the Commission where the employer involved is covered by the LMRA, which authorizes such agreements in the construction industry, and the charge filed is a Sec. 111.06(1)(f), Stats., violation of a collective bargaining agreement, in which case the Commission must apply the federal law.

In this case the alleged protected activity, i.e., to engage in "collective bargaining" is not covered or protected by the federal law (LMRA) as Respondent has never had more than one employe. 6/ Further, the charge in this case is an alleged refusal to bargain in violation of Secs. 111.06(1)(a) and (d), Stats., in which case it is WEPA, and not federal law, that must be applied.

Given the foregoing, it is concluded that the Complainant cannot enforce the 1987-90 Agreement, as a prehire agreement, under WEPA. For the same reasons Complainant is precluded from enforcing Respondent's agreement to enter

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6/ The NLRB has long held that it does not have jurisdiction to certify one-man bargaining units. Luckenbach Steamship Co., Inc., 2 NLRB 181, 193 (1936). See also, NLRB v. WGOK, Inc., 384 F. 2d 500, 503 (5th Cir., 1967). The Wisconsin Supreme Court has concluded that the bargaining or the signing of a bargaining agreement for a one-man unit is not "protected, prohibited or contrary to the legislative purposes of the federal labor act", and therefore, the federal act does not pre-empt states from regulating such activity. WERC v. Atlantic Richfield Co., 52 Wis. 2d 126, 132-137. There was no evidence presented as to whether Respondent would otherwise meet the commerce standards of the LMRA.

into the 1990-1993 Agreement, as that likewise would have constituted a prehire agreement in violation of WEPA. Thus, the Examiner has dismissed the complaint in its entirety.

Dated at Madison, Wisconsin this 15th day of October, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By David E. Shaw /s/
David E. Shaw, Examiner