STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

IBEW LOCAL UNION NO. 577, Complainant, vs. FRANK KUEHL d/b/a KUEHL ELECTRIC, Respondent.	Case 1 No. 49740 Ce-2145 Decision No. 27854-A

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law
No. 577.
Di Renzo & Bomier, Attorneys at Law, by Mr. Howard T. Healy and Mr. R. Valjon

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On September 2, 1993, International Brotherhood of Electrical Workers Local Union No. 577 filed a complaint of unfair labor practice with the Wisconsin Employment Relations Commission wherein it alleged that Frank Kuehl, d/b/a Kuehl Electric, committed an unfair labor practice within the meaning of Sec. 111.06(1)f, of the Wisconsin Employment Peace Act by refusing to comply with a final and binding arbitration award. On September 20, 1993 the Respondent filed a motion to dismiss and answer in the matter. The Commission appointed a member of its staff, David E. Shaw, to be the Examiner in the matter. A hearing was held before the Examiner on March 22, 1994, in Neenah, Wisconsin. A stenographic transcript was made of the hearing and the submission of post-hearing briefs was completed by August 10, 1994. Having considered the evidence and the arguments of the parties, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. International Brotherhood of Electrical Workers Local Union No. 577 hereinafter the Complainant, is a labor organization having its offices located at 2828 North Ballard Road, Suite 201, Appleton, Wisconsin 54915. Since July of 1990, Daniel Klatt has been Complainant's Business Manager. At all times material herein prior to July of 1990, Complainant's Business Manager was Ron Hansen. Until September of 1993, Roger Perkins was the Complainant's Assistant Business Manager.

2. Frank Kuehl, hereinafter the Respondent, is an individual residing at 724 Congress Street, Neenah, Wisconsin. Prior to July 31, 1992, Respondent was an electrical contractor doing business as Kuehl Electric, a sole proprietorship in Neenah, Wisconsin, and employed his son, Steven Kuehl, his

daughter-in-law, Holly Kuehl, Randy Kuehl and Doug Stumpf.

3. In August of 1989, Respondent signed a "Letter of Assent - A" authorizing the Fox Valley Division, Wisconsin Chapter, National Electrical Contractors Association, Inc., hereinafter "N.E.C.A.", to act as the collective bargaining representative for Kuehl Electric. Said "Letter of Assent" reads, in relevant part, as follows:

LETTER OF ASSENT - A

> In signing this letter of assent, the undersigned firm does hereby authorize Fox Valley Division, Wisconsin Chapter, N.E.C.A., Inc. as its collective bargaining representative for all matters contained in or pertaining to the current and any subsequent approved Inside Construction labor agreement between the Fox Valley Division, Wisconsin Chapter, N.E.C.A., Inc. and Local Union 577, IBEW. The Employer agrees that if a majority of its employees authorizes the Local Union to represent them in collective bargaining, the Employer will recognize the Local Union as the exclusive collective bargaining agent for all employees performing electrical construction work within the jurisdiction of the Local Union on all present and future jobsites. This authorization, in compliance with the current approved labor agreement, shall become effective on the 4 day of Aug. 1989. It shall remain in effect until terminated by the undersigned employer giving written notice to the Fox Valley Division, Wisconsin Chapter, N.E.C.A., Inc. and to the Local Union at least one hundred fifty (150) days prior to the then current anniversary date of the applicable approved labor agreement.
>
> In accordance with Orders issued by the United States District Court for the District of Maryland on October 10, 1980, in Civil Action HM-77-B302, if the undersigned employer is not a member of the National Electrical Contractors Association, this letter of assent shall not bind the parties to any provision in the above-mentioned agreement requiring payment into the National Electrical Industry Fund, unless the above Orders of Court shall be stayed, reversed on appeal, or otherwise nullified.
>
> SUBJECT TO THE APPROVAL OF THE INTERNATIONAL PRESIDENT, IBEW
>
> NAME OF FIRM

Kuehl Electric

SIGNED FOR THE EMPLOYER	SIGNED FOR THE UNION 577, IBEW
BY Frank Kuehl /s/	BY Ronald Hansen /s/
NAME Frank Kuehl	NAME Ronald Hansen
TITLE OWNER	TITLE Business Manager
DATE 8-4-1989	DATE 8-9-89

4. Pursuant to the Letter of Assent, Respondent was party to a 1990-1992 Agreement with Complainant which expired on May 31, 1992.

5. Sometime in February of 1991, Respondent incorporated a business known as Frank and JoAnn Leasing Incorporated, with Respondent owning all 900 shares in the corporation, and Respondent and his spouse as its officers. The corporation was inactive and did not do any business. Respondent subsequently filed amended articles of incorporation changing the name of the corporation to Kuehl Electric, Inc. (KEI), with Respondent as the sole shareholder and director and he and his spouse as officers effective May 31, 1991. The corporation did not own any assets and conducted no business prior to August 1, 1992.

6. In the first part of June of 1992, the Respondent contacted the National Electrical Benefit Fund to inquire about the withdrawal liability status of the fund to determine whether he would owe the fund any additional monies upon going out of business and also inquired as to his eligibility and amount of benefits for pension and social security he would have coming and to make sure all of the paperwork was complete and correct. By the following letter of July 31, 1992, the Respondent notified the Complainant he was retiring and going out of business as of that date:

> July 31, 1992
>
> ATTN: Dan Klatt
> IBEW Local #577
> 2828 N Ballard Rd STE 201
> Appleton WI 54915
>
> Dear Mr Klatt
>
> This letter is to inform you I am retiring from my business, DBA Kuehl Electric, as of July 31, 1992. As of this date I will no longer be employing any electricians from the IBEW, as I will cease operating the business.
>
> I will be forwarding all benefits due the IBEW/NECA for the month of July. I believe my health and welfare insurance will stay in effect for the months of August and September 1992.

I understand that if I continue to forward my personal health and welfare payments each month, my health insurance will stay in force as long as I maintain my dues payment to the International office.

If I decide to cancel my national dues and health and welfare at any time in the future, I will notify you at such time.

I have enjoyed my years as an electrician and contractor and I should now find more time to do the things that I enjoy.

Sincerely,

Frank Kuehl /s/
Frank Kuehl

7. On or about July 22, 1992, Respondent's son, Steven Kuehl, sent the following letter to the Appleton-Oshkosh Area Joint Apprentices and Training Committee (JATC) regarding the apprenticeship of an individual then employed by Respondent:

July 22, 1992

Appleton-Oshkosh Area JATC
Superior Electric Co
2015 W Spencer Street
Appleton, WI 54914

Attention: Gerald Schultz

My father, Frank, is retiring at the end of this month. Doug Stumpf has indicated that he would like to finish his apprenticeship with my company. Therefore, as president of Kuehl Electric Inc., I am requesting that he be transferred to my shop for completion of his apprenticeship.

I would appreciate it if approval be given before dad retires. I realize the apprenticeship committee does not meet during the summer months, but believe this can be expedited by phone or mail. Thank you.

If there are any questions or concerns, please contact my office.

Respectfully,

Steven W. Kuehl /s/
Steven W. Kuehl, President
Kuehl Electric Inc.
PO Box 606
Neenah, WI 54957-0606

By letter of July 31, 1992, Schultz advised Steven Kuehl that the Appleton-Oshkosh Area JATC acknowledged that the apprenticeship of Stumpf would "remain with your company, Kuehl Electric, Inc., effective immediately."

8. Respondent transferred all of his shares in KEI to his son, Steven Kuehl, for no consideration, effective August 1, 1992. On or about August 3, 1992, Respondent began an electrical design and consulting business, KDC, and entered into the following agreement with KEI effective August 5, 1992:

August 5, 1992

Agreement between KDC and Kuehl Electric, Inc.

Kuehl Electric, Inc., (KEI) has agreed to hire the service's of KDC, Neenah, Wisconsin.

KDC's service's to KEI shall constitute the following: KDC shall supply consulting and design service's for power, lighting, repair, and service type work. Drawings shall be provided as hand drawn, or layout design, as per the customer's needs.

The owner of KDC, as a former Electrical Contractor, shall also provide, upon request, consulating service's in the area of management, finance, programs, and Hazcom programs, and other areas the KEI may request.

KDC shall work directly with accounts of KEI, in all areas as stated above, and shall be authorized to provide pricing directly to KEI, through KEI wholesaler's, if the projects so require.

KDC shall have full use of all of KEI office equipment, (Example: Fax, copier, computor, etc,) for the purpose so intended.

The office secretary shall assist in typing letters, mailing, and support for KDC, as required.

> KDC shall supply there own vehicles, but gas shall be supplied by KEI.
>
> KDC also agree's, to work a minimum of 16 hours, each week, for a minimum of 36 weeks, each year. No time card or records of hours worked, are required, at this time, but may be required in the future.
>
> KDC shall receive a flat rate of $364.50, each month, payable by the 10th of each month. This rate shall remain in effect until June 30, 1993, at which time, this contract will be reviewed, and changed if necessary, between both KDC and KEI.

Steve Kuehl	Frank Kuehl
Steve Kuehl /s/ President, Kuehl Electric, Inc.	Frank Kuehl /s/ KDC

Date 8/5/92

At approximately the same time, Respondent, as F & J Leasing Co., entered into a lease agreement with KEI wherein Respondent agreed to lease "the former equipment, tools, inventory and building of Frank Kuehl (DBA) Kuehl Electric, located at 2215 Harrison St., Neenah, WI 54956." The lease agreement stated the responsibilities of lessee and lessor to the effect that KEI is responsible for the maintenance and upkeep of the building, equipment (including vehicles) and tools and is liable for damage done to same that is not covered by insurance and requires lessee to provide insurance on the vehicles and the tools and other equipment; Respondent is responsible for maintaining the lawn, keeping the parking area in good repair and clear of snow, major repairs to building equipment, maintaining fire insurance on the building. The lease agreement also provided that Respondent retains his office in the building for his use and that he have the use of the shop facilities for repair of his equipment or personal equipment and that Respondent shall lease additional equipment to KEI at the latter's request, if available, and at additional cost. The agreement also provided:

> This lease agreement shall be in force for a time period of one (1) year, but shall be reviewed each six months and adjustments made in language or cost agreement.
>
> Any additional equipment may be leased, at an added cost to this agreement, at any time, at an additional cost to the yearly cost agreement.
>
> The yearly cost of this lease shall be paid to the leasor in monthly payments, no later than the 10th of each month with the first payment due February 10, 1993 and final payment in full by December 15, 1993 for the

> full cost of the yearly agreement.
>
> Failure to make the monthly payments, the leasor retains the right to cancel this agreement after written notice - 48 hours after the 10th of the each month when the monthly payments are due.
>
> At the end of the 11th month of this yearly agreement, a new lease agreement shall be executed and signed by no later than the 10th of the last month of the calendar year (December).
>
> If this agreement is cancelled by either party, either for reasons stated or otherwise, the leasee shall have 48 hours to remove his personal items.
>
> Also, as part of this lease agreement, the leasee shall put into the Associated Bank, of Neenah, WI a $5,000 security deposit in the name of the leasor, F & J Leasing. This shall be held in trust by the Associated Bank and shall be used to cover any expenses to the building or equipment, according to the leasors judgement.

The cost of the initial lease agreement covering 1992 was $36,000, plus the $5,000 security deposit, and the agreement was signed by the Respondent on behalf of F & J Leasing and by Steve Kuehl on behalf of KEI. Said lease agreement constituted an "arm's length" transaction between Respondent and KEI. Respondent continued to keep an office in the building leased to KEI. KEI leased two vans Respondent had as a contractor and a third van, a Toyota van with "Kuehl Electric" printed on its side, the Respondent continued to drive. KEI continued to use the same mailing address and phone number as had Respondent. KEI continued to employ Randy Kuehl and Doug Stumpf as electricians and Holly Kuehl, spouse of Steven Kuehl, as Office Manager. On August 10, 1992, Respondent submitted his "Monthly Payroll Report For Electrical Contractors" to the Wisconsin Electrical Employees Benefit Funds for the month of July, 1992 and marked on that form the appropriate line to indicate it was the "Final report in this Local Union area."

9. Prior to arranging the leasing agreement with KEI, the Respondent contacted a local bank and some of his former customers that he knew leased their property or equipment to find out what they were paying for leasing those items and then discussed with his accountant what would be a fair price for leasing his building and equipment. The Respondent concluded that $3,000.00 per month was a fair price for such an arrangement and offered the arrangement to his son at that price as "take it or leave it".

10. On or about August 7, 1992, Steven Kuehl sent the Complainant the following letter:

IBEW Local #577
2828 N Ballard Rd STE 201
Appleton WI 54915

Dan Klatt

I have recently requested a withdrawal card from the Electrical Workers Union. It appears I am not going to receive it.

Effective 08/01/92 I withdraw my affiliation with IBEW Local #577.

Respectfully,

Steven W. Kuehl

KEI employes Doug Stumpf and Randy Kuehl sent Complainant letters identical to Steven Kuehl's letter and of the same date.

11. Respondent retained ownership of the records of Kuehl Electric and its accounts receivable and did not sell or transfer them to KEI, and Respondent paid any bills that were outstanding at the time he retired. Respondent completed all work of Kuehl Electric prior to July 31, 1992, and no ongoing contracts or work of Kuehl Electric was transferred to, or taken over by, KEI. Since July 31, 1992, Respondent spends approximately ten to twelve hours per week in the office he retains in the building he leases to KEI. Under the consulting agreement with KEI, Respondent has no set hours he must work for KEI. Respondent provides the electrical design work for KEI, except for the design work provided by the engineering departments of paper mills that are customers of KEI. Steven Kuehl does not perform any electrical design work. For the most part, Respondent's consulting clients for the first year were limited to KEI. Respondent receives no fringe benefits from KEI and no other remuneration from KEI beyond that provided through the consulting agreement and the leasing agreement. In 1993, Respondent was in Crandon, Wisconsin, working on his cottage from April through November, and did not perform any work for KEI other than design work for a small project which he sent by fax or mail. Since August of 1992, Respondent has been taking dancing lessons approximately 30 to 40 hours per week, and has built an addition to his home and a barn at his place in Crandon, Wisconsin as areas for dancing.

12. Steven Kuehl had been employed by his father, the Respondent, for twelve years or more and during that time had become a journeyman electrician. During the several years prior to August of 1992, Steven Kuehl worked as a journeyman electrician, did estimating, and was in charge of some of the smaller jobs in the field for Respondent. Respondent did all of the billings to customers himself and made all of the business decisions and personnel decisions during the time he employed his son, Steven Kuehl. Steven Kuehl had no authority to write checks on Respondent's accounts or to withdraw funds from

those accounts. At all times material, since August 1, 1992, Steven Kuehl has been the President and sole shareholder of KEI and the officers and directors of KEI have been Steven Kuehl, his spouse, Holly Kuehl, and his brother, John Kuehl. At all times material since August 1, 1992, Steven Kuehl has made all of the business decisions and financial decisions affecting KEI, and has been solely responsible for the personnel and labor relations decisions for KEI and has been responsible for generally running the business. Although Steven Kuehl has at times asked the Respondent for advice concerning KEI, Steven Kuehl makes the final decisions and Respondent has no authority in that regard. Respondent does not have any authority to write checks on KEI's accounts or to withdraw funds from those accounts. Respondent has no financial arrangement with KEI beyond the consulting agreement and the leasing agreement and has no ownership interest in KEI. At the time of hearing, KEI employed between eight and seventeen employes besides Holly Kuehl, with approximately half of those employes being journeymen electricians.

13. By the end of May, 1992, NECA and the Complainant had reached tentative agreement on a successor Inside Labor Agreement for 1992-1994. Said Agreement was ultimately reduced to writing and signed by NECA on August 20, 1992, and by the Complainant on August 31, 1992. By its terms, said Agreement was given retroactive effect to June 1, 1992. Said Agreement contained, in relevant part, the following provisions:

AGREEMENT

> Agreement by and between the FOX VALLEY DIVISION, Wisconsin Chapter, N.E.C.A., Inc. and LOCAL UNION #577, I.B.E.W.
>
> It shall apply to all firms who sign a letter of assent to be bound by this Agreement.
>
> As used hereinafter in this Agreement, the term "Division" or "Chapter" shall mean the Fox Valley Division, Wisconsin Chapter, N.E.C.A., Inc. and the term "Union" shall mean Local Union #577, I.B.E.W.
>
> The term "Employer" shall mean an individual firm who has been recognized by an assent to this Agreement.

. . .

ARTICLE I

EFFECTIVE DATE - CHANGES - GRIEVANCES - DISPUTES

> SECTION 1.01 - This Agreement shall take effect June 1, 1992 and shall remain in effect through May 31, 1994 unless otherwise specifically provided for herein. It shall continue in effect from year to year thereafter, from June 1 through May 31, of each year, unless changed or terminated in the way later provided herein.

. . .

> SECTION 1.04 - There shall be no stoppage of work either by strike or lockout because of any proposed changes in this Agreement or dispute over matters relating to this Agreement. All such matters must be handled as stated herein.
>
> SECTION 1.05 - There shall be a Labor-Management Committee of three (3) representing the Union and three (3) representing the Employers. It shall meet regularly at such stated times as it may decide. However, it shall also meet within forty-eight (48) hours when notice is given by either party. It shall select its own Chairman and Secretary.
>
> SECTION 1.06 - All grievances or questions in dispute shall be adjusted by the duly authorized representatives of each of the parties to this Agreement. In the event that these two are unable to adjust any matter within forty-eight (48) hours, they shall refer the same to the Labor-Management Committee.
>
> SECTION 1.07 - All matters coming before the Labor-Management Committee shall be decided by a majority vote. Four (4) members of the Committee, two (2) from each of the parties hereto, shall be a quorum for the transaction of business, but each party shall have the right to cast the full vote of its membership and it shall be counted as though all were present and voting.
>
> SECTION 1.08 - Should the Labor-Management Committee fail to agree to adjust any matter, it shall then be referred to the Council on Industrial Relations for the Electrical Contracting Industry for adjudication. The Council's decisions shall be final and binding on both parties hereto.
>
> SECTION 1.09 - When any matter in dispute has been referred to conciliation or arbitration for adjustment, the provisions and conditions prevailing prior to the time such matters arose shall not be changed or abrogated until Agreement has been reached or a ruling as been made.

For the months of June and July of 1992, Respondent paid Randy Kuehl and Doug Stumpf wages and benefits in the amounts provided for under the 1992-1994 Inside Labor Agreement.

14. Between July 31, 1992 and September 24, 1992, Complainant's Business Manager, Klatt, had a number of conversations with Steven Kuehl

regarding signing a Letter of Assent. On some of those occasions, Respondent was present at KEI and on one occasion returned Klatt's call to Steven Kuehl asking if he could help. During his conversations with Klatt, Steven Kuehl indicated that he intended to be a non-union contractor. Klatt sent Steven Kuehl the following letter of September 3, 1992:

> September 3, 1992
>
> Kuehl Electric
> Attention: Steve
>
> Dear Steve:
>
> Enclosed are union copies of current Kuehl Electric Letter's of Assent-A for the Inside and Residential Agreements with Local Union 577. You will note that Frank Kuehl signed for the employer, and as owner. I have also enclosed for your review, sample Letter's of Assent-A, B which are the current forms in use since 1991.
>
> As previously discussed, I am available at your convenience to discuss Letter's of Assent (Contracts) and their slight differences such as, but not limited to, Notice Requirement for Termination and parties involved.
>
> Representing the I.B.E.W., I can express to you, without reservation, the sincere value we place on your past, present, and hopefully, future association with Local Union 577.
>
> I have also enclosed for your review an appropriate section taken from the Wisconsin Electrical Employees Health and Welfare Trust Plan, specifically concerning Randy and Doug's hour bank.
>
> As discussed at our August 6, 1992 meeting in your office, I request to review only your new Incorporation Document, Apprentice Transfer Papers, and Agreement of Sale.
>
> If International representation of the I.B.E.W. is desired for a meeting to address any concerns you have, I would arrange this at a mutually agreed upon date and time. Please respond as to your intent to renew your association with the I.B.E.W. by September 15, 1992.

Sincerely,

I.B.E.W. Local Union No. 577

Don Klatt /s/
Don Klatt
Business Manager

15. Steven Kuehl continued to refuse to sign a letter of assent and Klatt, on October 9, 1992, mailed the following grievance dated September 24, 1992, to NECA:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

Grievance Form and Record of Proceedings

L.U. 577 Co. Kuehl Electric Grievance No.

Date September 24, 1992 Time A.M./P.M.

Name Frank Kuehl, President Employer I.D. No. Dept.
State Grievance: Article I, Section 1.01, 1.02, 1.03, Article II, Section 2.08, 2.08 Article IV, Section 4.10. Article X, Section 10.01. Article XIII, Section 13.02. Article XIV, Section 14.01, 14.02, 14.03, 14.04, 14.05, 14.07
Settlement Requested: Kuehl Electric to fulfill conditions agreed to under Letter of Assent

Signed Aggrieved Employee Signed Daniel Klatt /s/ 10/9/92 Union Representative

By the following letter of October 19, 1992, NECA advised the Respondent of the pending grievance:

Mr. Frank Kuehl
Kuehl Electric
P.O. Box 606
Neenah, WI 54956

Dear Frank:

I am in receipt of a grievance against Kuehl Electric and you, as President, as filed by I.B.E.W. Local Union #577. A copy is attached.

I have discussed this grievance with Dan Klatt,

Business Manager of I.B.E.W. Local Union #577. It appears that the Union's position is that Kuehl Electric and Kuehl Electric, Inc., are one and the same company, or an alter-ego, and therefore are still bound to the Letter of Assent "A" to the labor agreement.

A meeting will be scheduled to hear this grievance. At this meeting you will be given an opportunity to present any written or oral testimony you may wish to present. I will advise you of the time and place of the meeting when it is set.

In the meantime, if I can be of any assistance to you, please do not hesitate to give me a call.

Sincerely,

Ron Steiner /s/
Ron Steiner
Executive Vice President

The Respondent did not respond to Steiner's letter and Steiner sent Respondent the following letter of November 16, 1992, regarding the pending grievance:

Mr. Frank Kuehl
Kuehl Electric
P.O. Box 606
Neenah, WI 54956

Dear Frank:

I wrote to you on October 19, regarding a grievance against Kuehl Electric and you, as President, as filed by I.B.E.W. Local Union #577. A copy is attached.

We have scheduled a Labor/Management meeting to hear the grievance on Tuesday, December 1, at 1:00 p.m. at the Midway Motor Lodge in Appleton. At this meeting you will be given an opportunity to present any written or oral testimony you may wish to present.

I regret we have been unable to resolve this without a meeting.

Please feel free to call me if you have any questions.

Sincerely,

Ron Steiner /s/

Ron Steiner
Executive Vice President

The date of the hearing was subsequently changed to December 2, 1992.

By the following letter of December 1, 1992, Respondent's attorney, Howard Healy, responded to Steiner's letters on behalf of the Respondent:

December 1, 1992

<u>Via Facsimile</u>
Mr. Ronald Steiner
Executive Vice President
NECA
6200 Gisholt Drive
Madison, WI 53713

RE: Kuehl Electric Grievance hearings scheduled 12/2/92, Midway Motor Lodge, Appleton, Wisconsin

Dear Mr. Steiner:

Please be advised that we have been requested by Kuehl Electric to respond to the Notice of Grievance hearing which was mailed to Frank Kuehl October 19, 1992. Please be advised that Mr. Kuehl does not enter an appearance before the arbitration proceeding. Mr. Kuehl objects to the arbitration proceeding on the basis that he is not at the present and was not at the time of the grievance, a signatory to any collective bargaining agreement, or any other agreement with NECA IBEW.

Mr. Kuehl is retired from the electrical contracting business. He previously operated as a sole proprietor under the name of Frank Kuehl, d/b/a Kuehl Electric.

Mr. Kuehl terminated his business effective July 31, 1992. Since that date, Mr. Kuehl has not been actively engaged in the electrical contracting business. Mr. Kuehl employs no employees. He provided the union with notice of the termination of his business.

NECA has no jurisdiction to conduct an arbitration proceeding regarding Frank Kuehl.

Very truly yours,

DI RENZO AND BOMIER

Howard T. Healy /s/
Howard T. Healy

16. On December 2, 1992, the Joint Labor Management Committee, (JLMC), consisting of three members representing employers and three members representing the Complainant, met at the Midway Motor Lodge in Appleton, Wisconsin to consider the grievance filed against the Respondent. Klatt and Steiner were also present at the meeting. No one appeared at the meeting on behalf of the Respondent. At that meeting, Klatt presented verbal testimony regarding his conversations with Steven Kuehl and the Respondent and his account of what had happened in his attempts to have Steven Kuehl sign a letter of assent. Klatt also presented "Letters of Incorporation" obtained from the Secretary of State's office showing Respondent as President, copies of newspaper ads from October 7 and 14, 1992, wherein "Kuehl Electric" was advertising for non-union help. Klatt also testified that he had seen Respondent's Toyota van, with "Kuehl Electric" still painted on it, parked at KEI's shop on numerous occasions and that he had personally observed the Respondent and Steven Kuehl working on a job on November 12, 1992, at Neenah Foundry Plant #3. The JLMC discussed the matter and Healy's letter of December 1st and then approved a motion that Complainant contact its legal counsel to obtain the necessary information regarding the ownership of Kuehl Electric and KEI, with the meeting to reconvene on January 5, 1993.

17. Subsequent to the December 2, 1992 meeting of the JLMC, the Complainant attempted to serve subpoenas duces tecum on the Respondent and Steven Kuehl by registered mail, but were unsuccessful. Complainant's Assistant Business Manager at the time, Roger Perkins, then attempted to personally serve the subpoenas on Respondent and Steven Kuehl at their personal residences at the end of December, 1992. In the case of Respondent, his wife refused to accept the subpoenas and accompanying check, so Perkins placed it in the mailbox while she was watching. Steven Kuehl's wife accepted the subpoena and check from Perkins. The cover letters to the subpoenas read, in relevant part, as follows:

BEFORE THE
LABOR MANAGEMENT COMMITTEE
FOX VALLEY DIVISION, WISCONSIN
CHAPTER NECA AND LOCAL UNION NO. 577, IBEW

- -

IN THE MATTER OF:

THE GRIEVANCE AGAINST FRANK KUEHL d/b/a
KUEHL ELECTRIC AND KUEHL ELECTRIC, INC.

- -

SUBPOENA DUCES TECUM

- -

- - - - - TO: Frank Kuehl

YOU ARE HEREBY REQUIRED to appear before the

> Labor Management Committee Fox Valley Division, Wisconsin Chapter NECA and Local Union No. 577, IBEW to give evidence in the above-referenced proceeding pending before said Committee at 2:00 p.m. on January 5, 1993 at the Midway Motor Lodge - Appleton.
>
> YOU ARE FURTHER REQUIRED to bring with you at the time and place mentioned, the following papers and documents:

. . .

18. By letter of January 5, 1993, Healy returned to Complainant its check to Steven Kuehl for the subpoena fee. By the following fax transmittal of January 4, 1993, Healy advised Steiner and Klatt that Steven Kuehl would not appear at the JLMC's proceeding on January 5th:

> RE: Labor Management Committee
> Fox Valley Division, Wisconsin
> Chapter NECA and Local Union No. 577, IBEW
>
> Grievance Against Frank d/b/a
> Kuehl Electric and Kuehl Electric, Inc.
>
> Gentlemen:
>
> Steven W. Kuehl has requested that I respond to the Subpoena Dueces Tecum which he received at his residence on December 29, 1992. Mr. Kuehl refuses to appear and/or participate in any proceeding before the Labor Management Committee of the Fox Valley Division, Wisconsin, Chapter NECA and Local Union No. 577, IBEW. The proceeding which is scheduled at 2:00 p.m. on January 5, 1993 at the Midway Motor Lodge, Appleton, Wisconsin relates to matters under the current collective bargaining agreement between the Fox Valley Division, Wisconsin, Chapter NECA and Local Union No. 577, IBEW. My client is neither a member of the employer group nor a person who has signed or assented to the terms and conditions of that labor agreement. The Subpoena Duces Tecum has no force or effect. Your organization has no jurisdiction over my client.
>
> Very truly yours,
>
> DI RENZO AND BOMIER
>
> Howard T. Healy /s/
> Howard T. Healy

19. On January 5, 1993, the JLMC reconvened to consider the grievance

against Respondent. Neither the Respondent, nor Steven Kuehl, nor anyone on their behalf, appeared at said meeting. The JLMC unanimously voted to find the Respondent had violated the 1992-1994 Inside Wireman Labor Agreement. Steiner sent the Respondent the following letter of January 22, 1993 informing him of the JLMC's decision:

> Mr. Frank Kuehl
> Kuehl Electric
> P.O. Box 606
> Neenah, WI 54956
>
> Dear Frank:
>
> As Secretary of the Labor Management Committee, as appointed by I.B.E.W. Local Union #577 and the Fox Valley Division, Wisconsin Chapter N.E.C.A., I have been instructed to inform you of the following decision as reached by unanimous vote of the Labor Management Committee on the grievance filed by I.B.E.W. Local Union #577.
>
> The decision reads as follows:
>
> In this instant case, based on the evidence provided, the Labor Management Committee does hereby find Frank Kuehl, Kuehl Electric, guilty of violation of the current Inside Wireman Labor Agreement between I.B.E.W. Local Union #577 and the Fox Valley Division, Wisconsin Chapter N.E.C.A., as charged by I.B.E.W. Local Union #577.
>
> THE REMEDY SHALL BE AS FOLLOWS
>
> Based on the payroll reports as filed for May, June, and July 1992, the reports indicate two (2) employees working an average of 311.83 hours per month, at the total wage/fringe benefit package of twenty-three dollars and twenty-seven cents ($23.27) per hour, or a total due of seven thousand two hundred fifty-six dollars and twenty-eight cents ($7,256.28) per month.
>
> Frank Kuehl, Kuehl Electric, is hereby directed to pay the sum of $7,256.28 per month for each month starting August 1, 1992, until the date of resolution of this amount.
>
> The monies to be paid shall be made payable to IBEW Local Union #577 to be distributed as wages and benefits to the #1 and #2 persons on the out-of-work list.

Your prompt attention to this matter will be appreciated.

Sincerely,

Ron Steiner /s/
Ron Steiner
Executive Vice President

RS/sb

DECISION APPROVED BY LABOR MANAGEMENT COMMITTEE:

Tom Woods /s/	Ron Steiner /s/
Tom Woods	Ron Steiner
Chairman	Secretary

The latter was sent by certified mail. The Respondent refused to claim the letter and it was returned unclaimed. Subsequently, by letter of March 5, 1993, Klatt sent Respondent a copy of the JLMC's decision by regular mail addressed to P.O. Box 606, Harrison Street, Neenah, Wisconsin, which Respondent received.

20. The Respondent ceased doing business as an electrical contractor on July 31, 1992 and has had no financial interest in, or managerial control, over the operation of KEI, no authority with regard to KEI's labor relations and no financial stake or ownership in the operation of KEI. There is no evidence in the record demonstrating union animus on the part of the Respondent, Frank Kuehl.

21. At all times material herein, the Respondent has refused to comply with the award of the Joint Labor Management Committee.

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

CONCLUSIONS OF LAW

1. The issue of whether the Respondent Frank Kuehl, d/b/a Kuehl Electric, was bound by the 1992-1994 Inside Labor Agreement between the Complainant and N.E.C.A. was an issue of arbitrability and was not an issue which the Joint Labor-Management Committee, convened pursuant to the grievance and arbitration provisions of that Agreement, had jurisdiction to decide.

2. The Respondent, Frank Kuehl, did not by his letter of July 31, 1992, to Klatt announcing his retirement effective that date, effectively withdraw NECA's authority to enter into the 1992-1994 Inside Labor Agreement with Complainant on behalf of Respondent.

3. As of July 31, 1992, the Respondent, Frank Kuehl, d/b/a Kuehl

Electric, ceased doing business as an electrical contractor and did not continue in the form of an alter ego, Kuehl Electric, Inc., and, therefore, did not continue to be a party to the 1992-1994 Inside Labor Agreement between the Complainant and N.E.C.A. after that date. Therefore, Respondent was not required to submit a dispute with Complainant regarding the application of that Agreement to a period of time after July 31, 1992 to the Joint Labor-Management Committee.

4. The decision and award of the Joint Labor-Management Committee which the Complainant seeks to enforce against the Respondent, Frank Kuehl d/b/a Kuehl Electric, is not enforceable. Therefore, the Respondent did not commit an unfair labor practice within the meaning of Sec. 111.06(1)(f), Stats., by refusing to comply with said award.

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

ORDER 1/

The complaint filed herein is dismissed in its entirety.

Dated at Madison, Wisconsin this 4th day of November, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

Section 111.07(5), Stats.

> (5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same

(Footnote 1/ continues on the next page.)

(Footnote 1/ continues from previous page.)

> 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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

FRANK KUEHL, d/b/a KUEHL ELECTRIC

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Complainant has alleged that Respondent Frank Kuehl, d/b/a Kuehl Electric, has violated Sec. 111.06(1)(f), Stats., by refusing to comply with the award of the Joint Labor-Management Committee finding that Kuehl Electric, Inc., is Respondent's alter-ego and that, therefore, Respondent violated the 1992-1994 Inside Labor Agreement between Complainant and the National Electrical Contractors (NECA) when Kuehl Electric, Inc. employed non-union electricians and did not comply with the terms and conditions of employment set forth in the 1992-94 Agreement.

The Respondent has in turn, asserted that the Commission does not, and that the JLMC did not, have jurisdiction over him on the basis that as of July 31, 1994, he went out of business and was no longer an "employer", and that, therefore, he was not a party to the 1992-94 Inside Labor Agreement between Complainant and NECA and not bound by that Agreement.

Complainant

The Complainant believes that Kuehl Electric, Inc., or KEI, is a continuation of Frank Kuehl d/b/a Kuehl Electric, and that Respondent is therefore bound by the 1992-1994 Inside Labor Agreement. Based upon that belief, it submitted a grievance in an attempt to resolve the disputed status of KEI. Under the Agreement, disputes as to the agreement are to be resolved by a Joint Labor-Management Committee (JLMC). If the JLMC resolves a dispute, that decision is final and binding on the parties. The Respondent received adequate notice that the grievance was scheduled to be heard by the JLMC in December of 1992 and January of 1993 and in fact the Respondent responded to these notices through correspondence from its attorney. The JLMC met in December of 1992 and January of 1993, considered all of the evidence presented, and based on that evidence found the Respondent guilty of violating the Agreement and directed Respondent to pay $7,256.28 to Complainant per month beginning in August of 1992, until Respondent began effecting the terms of the agreement. The Respondent has at all times since receiving notice of the decision and award failed and refused to comply with the award, in violation of Section 111.06(1)(f), Stats.

Complainant asserts that the Respondent is bound to the 1992-1994 Inside Labor Agreement by virtue of the Letter of Assent, and that therefore it is bound by the decision and award rendered pursuant to that Agreement's grievance and arbitration provisions. Respondent signed the Letter of Assent binding "Kuehl Electric" to the agreements arrived at between NECA and the Complainant and Respondent never sent the required written notice to Complainant or NECA that he was terminating the latter's authorization to enter into collective bargaining agreements with Complainant on his behalf. The Letter of Assent signed by Respondent also binds any alter ego, including KEI, that may be determined to exist by a decision of the JLMC under the broad grievance and arbitration provisions of the agreement. It is irrelevant that the alter ego is not signatory to the Agreement.

The alter ego issue was properly before the JLMC since the Agreement's grievance and arbitration provisions do not specifically exclude it from consideration. The U.S. Supreme Court has held:

> Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must. . .come within the scope of the grievance and arbitration provisions of the collective bargaining agreement. United Steelworkers v. Warrior & Gulf Navigations Company, 363 U.S. 574 (1960).

Wisconsin law is in complete harmony with federal substantive law regarding arbitration of labor disputes as reflected in the "Steelworkers" cases. Citing, District Lodge 48, IAW v. Seaman-Andwall Corp., Dec. No. 5910 (WERC, 1/62). Also, the Seventh Circuit Court of Appeals has enforced a joint arbitration board decision finding alter ego status. Citing, Walter Sheet Metal Corp. v. Sheet Metal Workers Local No. 18, 910 F.2d 1565 (7th Cir. 1990). In that case, the union filed a grievance claiming that Walters had violated the agreement by using an alter ego corporation and the joint arbitration board sustained the grievance and awarded the union damages. Both the district court and the Court of Appeals enforced the joint arbitration board's award. Similarly, in Eischleay Corporation v. International Association of Ironworkers, 944 F.2d 1047 (3rd Cir. 1991), the Court of Appeals found that the alter ego issue was properly before the joint arbitration committee and decided by it, since the relationship between the two corporations was not expressly excluded from arbitration under the agreement's grievance and arbitration procedure.

In this case, Section 1.04 of the Inside Labor Agreement clearly does not exclude consideration of alter ego issues related to the application of the Agreement. Thus, the alter ego issue was arbitrable and properly before the JLMC.

The JLMC's finding of alter ego status must be accorded deference because that issue is fundamental to the merits of the grievance. The Complainant cites state and federal precedent for the principle that both state and federal law presumes the validity of an arbitrator's decision and award, including decisions of joint labor management committees, and that review of the decision and award is limited to the question of whether or not it is based upon a perverse misconstruction of the contract. The standard of review requires deference to the arbitrator's determination on the merits of the grievance. Citing, City of Milwaukee v. Milwaukee Police Association, 97 Wis. 2d 15 (1980); Chicago Cartage Company v. International Brotherhood of Teamsters, 659 F. 2d 825 (7th Cir. 1981). In this case, the JLMC's finding of alter ego status was supported by the evidence provided at the hearings from which the JLMC could find that Respondent and KEI were a single employer and that violation of the agreement by one constituted a violation of the agreement by the other. The JLMC's determination must not be disturbed. Citing, City of Milwaukee, supra; Stoughton Trailers, Inc. v. WERC, et. al., Court of App. IV Decision No. 84-1681 (1985); Walter Sheet Metal Corp. supra; Eischleay Corp. supra, and United Paperworkers International Union v. Misco, Inc., 484 U.S. 29

(1987).

In Kuhlman, Inc. v. Insulators Local 19, Case No. 92-C-121 (E.D. Wis. 1993), the court faced the same issues as in this case. Based upon the broad deference accorded factual findings by an arbitration committee, the court upheld the joint committee's determination that a signatory employer was responsible for the contract violations of a related company. If the award in Kuhlman was properly enforced, a fortiori the award in this case should be enforced. While Respondent cannot relitigate the merits of the grievance on review, the evidence presented in this case supports the JLMC's findings of alter ego status. The evidence shows that when Respondent gave notice of his retirement effective July 31, 1992, he did not physically cease the operation of his business, rather his operation substantially continued as KEI. According to the records of the State of Wisconsin as of September, 1992, Respondent was still the sole shareholder of KEI.

Respondent cannot now defend against enforcement of the arbitration award with new evidence or defenses that it had the opportunity to present before the JLMC. It is well-settled that a party may not raise as defenses to enforcement of an arbitration award issues and information not first presented to the arbitrator. Citing, Chicago Newspaper Guild, supra; National Wrecking Company v. Teamsters Local 731, 990 F.2d 957 (7th Cir. 1990); UFCW Local 100A v. John Hofmeister & Son, Inc., 950 F.2d 1340 (7th Cir. 1991); Mogge v. International Association of Machinists, 454 F.2d 510 (7th Cir. 1971). The JLMC properly found that Respondent was bound by the conduct of KEI. Respondent cannot now present evidence in defense of those findings and enforcement of the award, as that goes to the merits of the grievance. Similarly, Respondent's evidence as to whether he in fact retired and ceased operating his business, also goes to the merits of the grievance and he is precluded from presenting those defenses upon review.

As to the remedy provided by JLMC's award, it was based upon the evidence presented, i.e., the payroll records presented at the arbitration and the wage and fringe benefits provided for under the Agreement. The remedy was rationally based upon the evidence and was within the broad authority of the JLMC to fashion a remedy in light of the violation. Citing, United Paperworkers v. Misco, supra; Miller Brewing Company v. Brewery Workers Local Union No. 9, 739 F.2d 1159 (7th Cir. 1984).

Complainant also contends that it should be awarded reasonable attorney's fees and costs in this enforcement action. Respondent has refused to comply with the decision and award and the arguments it offered to justify its refusal to comply are frivolous. Those arguments were either waived in the first instance or clearly foreclosed by the well-settled deference accorded under the law to the determinations and contract interpretations of an arbitrator. Given this, and the intolerance of the law for calculated disregard of contractual responsibilities under an arbitration agreement, Complainant should be awarded reasonable attorney's fees and costs. Citing, Hill v. Norfolk & Western Railroad Company, 814 F.2d 1192 (7th Cir. 1987).

In its reply brief, Complainant reiterates its argument that where a party fails to raise issues concerning the interpretation of the contract or

procedural questions at the arbitration hearing, such issues are waived. It asserts that the arguments made by Respondent do not concern the authority of the JLMC over him, rather, they go to the interpretation of the provisions of the Agreement, which include alter ego issues. The wording of Section 1.04 of the Agreement includes the issue of alter ego as a matter relating to the application of the Agreement; therefore, the issue was properly before the JLMC. Respondent's failure to present evidence as to his retirement in defense of the alter ego finding forecloses his right to present that evidence here. State and federal case law is incontrovertible on that point. Citing, Walters Sheet Metals Corp., supra; U.S. Steelworkers v. Warrior & Gulf Navigation Co., supra; and Sparta Manufacturing Company, Inc., Dec. No. 20787-A, (McLaughlin, 12/83).

Complainant reasserts that Respondent is bound by the 1992-94 Agreement. The evidence shows that he effected the terms of the new agreement in June and July of 1992, and did not send notice to either Complainant or NECA that he did not wish to be bound by it. He therefore bound any alter egos of Frank Kuehl d/b/a Kuehl Electric and KEI to the Agreement. The evidence also shows that Respondent remained in business after July 31, 1992, regardless of how many hours per week he may have worked after that date, and so is therefore also bound by the Agreement in that manner.

As to Respondent's assertions that he was denied due process with regard to the arbitration hearing, the evidence shows unequivocally that Respondent was provided with reasonable notice of the dispute and the dates of the arbitration hearings on the dispute. Complainant attempted to make personal service on Respondent, but that service was refused and evaded by Respondent. Further, the fact that the Respondent had adequate notice for the arbitration proceedings in the dispute is evidenced by his responses through his attorney to Complainant prior to those hearings taking place. Thus, Respondent's argument that it was denied due process is meritless.

Complainant reasserts that the JLMC had the authority to determine the alter ego issue and that determination was supported by the evidence and should be accorded deference by the Examiner. Respondent is foreclosed from relitigating the issue with evidence at this hearing that it did not present before the JLMC in the arbitration hearing that resolved this issue.

Since Respondent signed the Letter of Assent binding it to the Agreements arrived at between NECA and Complainant, and Respondent and KEI are one and the same employer bound by the Letter of Assent, the collective bargaining agreement of one binds the other, even though the other is not signatory to the agreement. Citing, Watt Electric Company, 273 NLRB 655, 658 (1984). Regardless of the fact that the Agreement was not signed until August of 1992, Respondent and Complainant were bound to the Agreement as of June 1, 1992. The Agreement was retroactive by application of its terms to June 1, 1992, and also as of that date, Respondent implemented the terms of that Agreement, evidencing that he considered himself bound to the Agreement as of June 1, 1992. Although Respondent informed the Complainant he was retiring as of July 31, 1992, he was still bound to the Agreement by virtue of the Letter of Assent and his implementation of the Agreement as of June 1, 1992. Further, he did not in fact go out of business as of July 31, 1992.

Finally, since Respondent failed to present evidence to the JLMC concerning remedy, there is no basis for Respondent's now claiming that the remedy was "punitive". John Hofmeister & Son, Inc., supra. The remedy was rationally based on the evidence presented at the arbitration and not upon speculation as claimed by Respondent. The JLMC had the authority to fashion the remedy it did, and Respondent must bear the cost of its contract violation and injury flowing from the violation. Plumbing, Heating and Piping Employees Council, 39 LA 313 (Ross, 1962).

Respondent

Respondent initially notes that it moved to dismiss the complaint on the basis that the WERC lacks jurisdiction because at the time the arbitration was initiated, he was not a "employer", within the meaning of Sec. 111.02(7), Stats., and that at all times material to the complaint, he was not bound by the labor agreement between NECA and Complainant. In support of those contentions, Respondent first asserts that after July 31, 1992, he was no longer doing business as Kuehl Electric and therefore is not bound by the 1992-1994 Inside Labor Agreement. Although Complainant asserted that the Letter of Assent required a 150 day withdrawal notice, it conceded that if Respondent was no longer in the electrical contracting business after July 31, 1992, and in fact retired, he was not bound by the Agreement. Complainant failed to demonstrate at hearing that Respondent was involved in the electrical contracting business after July 31, 1992. In fact, there is no evidence in the record that after that date, Respondent was involved in any aspect of the electrical contracting business, except as a design consultant. Complainant provided no credible evidence that Respondent continued in business as Kuehl Electric after July 31, 1992, and presented no evidence to rebut the testimony of Respondent in that regard. Further, it declined the offer of a second day of hearing to put in evidence concerning that issue.

Complainant has the burden of proving that after July 31, 1992, Respondent continued to do business as Kuehl Electric. That is an issue of fact. The grievance was filed on October 9, 1992, against Kuehl Electric and named Frank Kuehl, Respondent, as President. On that date, Frank Kuehl was not President of Kuehl Electric or of any other company. He credibly testified that he spends more than half of what had been his prior workweek on his hobby of ballroom and country and western dancing. Since July 31, 1992, Respondent has been primarily involved in dancing and private pursuits, rather than the electrical contracting business. Other than the money received for the consulting arrangement and the leasing of his assets to KEI, he has no financial or operational interest in that business, and no involvement in, or control over, its labor relations.

With regard to the claim that Respondent continues to be bound by the Agreement, Respondent asserts that the Complainant's conduct from July 31, 1992 until August 9, 1992, needs to be reviewed. Complainant was immediately aware in the first part of August of 1992 that Steven Kuehl had hired employes who previously worked for his father. Complainant tried, but did not succeed in securing a signed Letter of Assent from Steven Kuehl as President of KEI. However, Complainant never requested bargaining of KEI, or attempted to assert

that KEI was a successor of Respondent. Complainant asserted no claim against KEI, rather, it took the position that Respondent was still in business and still doing business as KEI. If Respondent is not doing business as KEI, then contractual obligations cannot be imposed upon him, nor can an arbitration award be enforced against him individually. Citing, Milwaukee Typographical Union No. 23 v. Madison Newspapers, Inc., 444 F. Supp. 1223 (1978). Therefore, Respondent is not bound by the award and was not required to participate in the arbitration proceeding since he did not continue after July 31, 1992 to do business as KEI.

Respondent also asserts that the complaint must be dismissed on the basis that the Complainant failed to prove there was a collective bargaining agreement in effect on the date Respondent retired, i.e., July 31, 1992. The prior agreement expired on May 31, 1992 and there is no evidence that the contract was extended after that date. Negotiations on a successor continued after June 1, 1992, and the new agreement was not signed until August 20, 1992 by NECA and August 31, 1992 by Complainant. While the terms of that Agreement provided that it would be retroactive to June 1, 1992, it was not effective until it was signed. Prior to the effective date of the retroactivity provision, Respondent retired from the electrical contracting business, terminating his employes and ceasing doing business. Hence, when the Agreement was signed and made retroactive in August of 1992, it had no binding effect on Respondent.

Respondent next contends that he was denied due process in the arbitration proceeding. Complainant admitted that it did not give personal notice of the arbitration to Respondent, rather the grievance and notice of hearing were left at his residence. Complainant did not offer any proof that either the subpoenas or the meeting notices were personally served on either Frank or Steven Kuehl and provided no explanation at hearing as to why that could not have been done. Since it is the Complainant that is attempting to enforce the provisions of a contract, it has the burden of proving that it complied with basic due process in this case, including the reasonable requirement of personal service.

With regard to the issue of whether or not KEI is the alter ego of Respondent, Respondent cites ILA Local 1242, 310 NLRB 1 (1993), wherein the National Labor Relations Board (NLRB) considered the issues of "single employer" or "alter ego". The NLRB stated:

> In determining the single employer issue, the Board looks at four principal factors:
>
> 1) Management
>
> 2) Centralized control of labor relations
>
> 3) Interrelation of operations
>
> 4) Common ownership or common financial control
>
> In cases where a close familial relationship

> exists between the owners of two companies, the Board focuses on whether the owners of one company retain financial control over the operations of the other.
>
> Single employer status depends on all the surrounding circumstances and has been characterized as an absence of an arm's length relationship among integrated companies.

To determine whether an alter ego relationship exists, the NLRB considers the above single-employer factors, as well as the additional factors of similar business, sharing of equipment, customers and supervision in the presence or absence of an unlawful motivation. ILA Local 1242, supra.

Here, Respondent managed Kuehl Electric and Steven Kuehl manages KEI, and neither had a substantial management role in the other's business. Respondent has no control over labor relations in KEI, there is no interrelationship of operations, no common ownership, and no common control of financial affairs. Respondent has no financial stake in the business success of KEI. The lease payments paid to Respondent by KEI are not related to the profits, business volume, prior business, or any aspect of Respondent's prior contracting business. Rather, the lease arrangement is an arm's length transaction and is the same business relationship that would exist if assets were leased to a stranger. While both Respondent and KEI were involved in the electrical contracting business, and KEI leases equipment that Respondent formerly used, there was no transfer of customers and no common supervision of employes. In Gartner Harf Company, 308 NLRB 77 (1992), the NLRB found that an alter ego was not created where the employer's president acquired an ownership interest in another company where the firms did not have centralized control over labor relations and the business relationship was at "arm's length".

While the NLRB may find alter ego status if the purpose of creating a new company is to evade a backpay order or a bargaining obligation, there is no claim here that the Respondent is anti-union. Complainant admitted that Respondent was not anti-union, and there is no claim that he engaged in unfair labor practices or was attempting to evade his union contract. Further, there was no co-mingling of funds between Respondent and KEI or any other type of scheme to get rid of the union. Respondent distinguishes this case from Marbro Company, 310 NLRB 195, where the NLRB found that a corporation formed by the unionized employer's president, his two sons and his son-in-law was the alter ego of the employer, based on the fact that the one president and his son-in-law possessed significant control over both firms, and the president became a major investor in the corporation and acted as its principal loan guarantor and was instrumental in transferring business to it. Here, Steven Kuehl possessed no significant control over his father's business, and Respondent possesses no control whatsoever over his son's business. Neither is an investor in the business operated by the other, and neither has acted as a principal loan guarantor, nor has had any involvement in the other's banking operations. Respondent took no action to transfer business to KEI or to have KEI complete any work Respondent had been performing.

Regarding the JLMC's award of monetary damages to Complainant, Respondent

asserts that it is a punitive remedy based upon speculation. The remedy assumes that since there were two employes working for Respondent prior to August 1, 1992, two employes on Complainant's out-of-work list were denied work, and that the employes would continue to work an average of 311 hours per month. There is no evidence to suggest Respondent, who was working 10 to 12 hours a week after he retired, and working virtually no hours in the months of April through November of 1993, would have continued to employ any employes in his business. Complainant's claim is really against KEI. If it had been able to establish that KEI was a successor, it could have compelled it to bargain, and if it had reached agreement, it could have imposed the terms of that agreement on KEI. There is no evidence that two additional journeymen from the out-of-work list would have been hired by Respondent; rather, the testimony showed that two employes who had worked for Respondent continued working for KEI. The assumption that is the basis for the remedy awarded is not supported by the evidence. Thus, the award is punitive and unreasonable.

If Complainant believes that KEI violated the Agreement, it should have taken action against KEI and not against Respondent, personally. At hearing, Complainant asserted that Respondent could not raise defenses going to the merits of the issue that was arbitrated, as he was obligated to raise those issues at the arbitration. Complainant was made aware, prior to the arbitration, that Respondent objected to the arbitration on the basis that he was not signatory to any agreement, and that he had terminated his business effective July 31, 1992 and therefore Complainant had no jurisdiction to proceed against him personally. The same defenses raised in the answer to the instant complaint. If Complainant believed that Respondent had an obligation to arbitrate, it should have commenced a proceeding to compel arbitration. Instead, it chose to proceed in an ex parte manner, and the default award issued by the JLMC should be given no force or effect.

In its reply brief, Respondent reasserts that it is not bound to the 1992-1994 Agreement, is not obligated to arbitrate any dispute related to that Agreement, and the JLMC had no jurisdiction over him. The ultimate issue is whether Respondent was obligated to submit to arbitration with Complainant. The question of whether an entity is contractually bound to submit to arbitration is an issue to be decided by the courts, rather than the arbitrator. Laborers' International Union of North America v. HSA Contractors, Inc., 728 F.Supp. 519 (E.D. Wis., 1989). The principles governing the arbitrability of disputes under collective bargaining agreements are well-established by the Supreme Court cases known as the "Steelworkers' Trilogy". 2/

Those principles were reaffirmed in A T & T Technologies, Inc. v. Communication Workers, 475 U.S. 643 (1986). In that case, the Supreme Court held that

> The duty to submit a dispute to arbitration is

2/ United Steelworkers v. American Manufacturing Company, 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Company, 363 U.S. 574 (1960); and United Steelworkers v. Enterprise Wheel & Car Corporation, 363 U.S. 593 (1960).

> contractual and therefore a party cannot be compelled to arbitrate a dispute when he has not agreed to do so. 475 U.S. at 648.

Without such an agreement, the arbitrator has no jurisdiction over the person sought to be charged. HSA Contractors, Inc., 728 F.Supp. at 523. Therefore, the threshold issue in this case is whether a contractual obligation for Respondent to arbitrate the grievance existed. There was no contractual obligation to arbitrate under the 1992-1994 Agreement, since that Agreement came into existence after Complainant had been notified that Respondent was ceasing operation of his business. The claim that the Letter of Assent Respondent signed still binds him to the 1992-1994 Agreement, ignores the holding in William Chalson & Company v. Amalgamated Jewelry, Diamond & Watchcase Workers Union Local No. 1, 478 F. Supp. 1103 (1979); and IBEW Local 532 v. Brink Construction Company, 825 F. 2d 207 (9th Cir. 1987). In Chalson, the Court held that regardless of whether it was proper or not, the employer had in fact withdrawn from the multi-employer association before a successor agreement had been agreed to, and the association had neither actual, nor apparent, authority under general principles of agency law or the NLRA to bind the employer. Under contract law, an agent whose authority had been terminated cannot thereafter bind the principal to an agreement to arbitrate or any other contract. Thus, the Court found that the employer was not bound by the new agreement obtained after its withdrawal and that therefore the employer was not required to arbitrate any issue under the new agreement. Similarly, in this case, Respondent was represented by NECA, and through that agent, was a participant in a multi-employer collective bargaining agreement. That Agreement expired on May 31, 1992, and prior to its effective renewal in August of 1992, Respondent provided the Complainant with written notice of his cessation of business. Ceasing business caused Respondent to no longer be a firm or employer, and after July 31, 1992, NECA no longer had actual nor apparent authority to bind Respondent because NECA's agency had been terminated. Complainant had received actual notice of NECA's inability to bind Respondent to the new Agreement before it was signed in August of 1992. Hence, the execution of the new Agreement by NECA and Complainant did not bind Respondents to the arbitration or other provisions of the new Agreement. To hold otherwise, would result in Respondent being required to arbitrate the issue of whether he is bound by the 1992-1994 Agreement, under that same Agreement, i.e., an illogical result.

Complainant also ignores the holding in Brink Construction Company, supra, wherein the Ninth Circuit Court of Appeals concluded that an employer that had terminated its membership in NECA prior to agreement being reached on a new agreement was not obligated to arbitrate any dispute under the new agreement. The Court also found that there was no evidence that the employer had complied with the new agreement or intended to be bound by that agreement. Rather, the evidence showed that there were subsequent negotiations between the employer and the union with respect to having the employer sign a new letter of assent, making it apparent that neither party believed the agreement was in effect between them. Similarly, here, the Respondent notified Complainant of its cessation of business which terminated his status as an employer and his status as a participant in NECA. Thus, NECA no longer had authority to negotiate on Respondent's behalf since he was no longer an

"employer" as that term is defined in Article II, Section 2.09 of the Agreement. 3/ Further, Complainant's allegation that Respondent "adopted" the 1992-94 Agreement must fail since at the time Respondent remitted its payments to Complainant for June and July of 1992, there was no 1992-1994 Agreement to adopt. That Agreement did not come into existence until the parties signed it, the last of which was on August 31, 1992. Therefore, there was no agreement in effect between Respondent and Complainant at the time the grievance was filed. The duty to arbitrate is contractual, and a party cannot be compelled to arbitrate a dispute when he has not agreed to do so. Absent such an agreement giving rise to the duty to arbitrate, the JLMC had no jurisdiction over Respondent when it proceeded to arbitrate the dispute.

Respondent has objected to the jurisdiction of the JLMC from the outset and has informed Complainant of his position. Where either the union or the employer refuses to arbitrate, it has been held that an arbitrator cannot function and that any award issued in such a circumstance would be void and unenforceable. The remedy in such a situation for the party not in default is a suit to enforce arbitration, not a suit to enforce a unilateral award. Citing Fuller v. Pepsi-Cola Bottling Company, 406 S.W.2d 416 (Ct. App. Ky., 1966).

Respondent also asserts that the JLMC's award is the result of a mistake of law, and should not be enforced. Complainant contends that the JLMC found KEI to be the "alter ego" of Respondent, and subsequently contended that KEI and Respondent were a "single employer". With respect to either theory, it is clear that the JLMC failed to apply and consider the applicable law with respect to making either determination. While trial courts give arbitrators' decisions considerable deference, if the decision fails to "draw its essence from the collective bargaining agreement", courts will refuse to enforce that decision. The NLRB and the courts have established specific factors that must be proved in order to hold that two business entities are either a single employer or have an alter ego relationship. To establish that two business entities are in reality a single employer, four factors must be shown to exist: interrelated operations, common management, centralized control of labor relations and common ownership. Local 1988 v. Pate Stevedore Co., 145 LRRM 2275. In this case there was no substantial evidence of interrelated operations between KEI and Respondent or of common management. Respondent was the sole proprietor of Kuehl Electric, and his son, Steven Kuehl, is the President and manager of KEI. There was no evidence presented to the JLMC that Respondent was in fact still President of KEI as of July 31, 1992, and the minutes of the arbitration hearing state that the committee was informed that Steven Kuehl was in fact, President of that corporation. There was no indication that any evidence was produced to demonstrate centralized control of labor relations of KEI and Respondent, and there was also no evidence presented to the JLMC to establish or infer that Respondent retained financial control

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3/ "An employer, as recognized by this agreement, who contracts for electrical work, shall mean a person, firm or corporation whose principal business is electrical contracting. The Employer shall maintain a place of business and a suitable financial status to meet payroll requirements. . ."

over the operations of KEI. Thus, the JLMC failed to consider and find that the four principal factors required to establish that KEI and Respondent were a "single employer" were proved. Therefore, it is clear the JLMC made its award based on some unknown, unstated criteria rather than the necessary legal requirements required by the NLRB and the courts to find "single employer" status.

With regard to the JLMC's finding of alter ego status, that doctrine applies when the employer creates a sham new business to continue operating the old unionized business and therefore evade the contract with the union. The NLRB utilizes a seven-prong test to determine whether a new business is a disguised continuance of the old business, and two entities will not be held to be an alter ego unless they have "substantially identical" ownership, business purpose, management, supervision, customers, operation and equipment. The fact that there are many similarities between a new business and the old business is insufficient to satisfy that seven-prong test. Pate Stevedore Company, supra, at 2278. In most alter ego cases, the same individual or corporation owns both entities. There was no evidence introduced that established the ownership interest of Respondent in KEI, or that he received any financial benefit from KEI or that he exercised integral control over that corporation. As to identical business purpose, Respondent was an electrical contractor and KEI is engaged in the same business, however, that factor can be expected in almost every alter ego case. There was no evidence presented to the JLMC of commonality of management between KEI and Respondent or that the supervision of the labor forces of the two entities was substantially identical, or that the customer base of KEI was substantially identical to that of Respondent. Although KEI commenced operations from the same facility previously utilized by Respondent, at no time did the JLMC have evidence that both of those entities operated simultaneously from that same premises. While there was evidence presented that Respondent's former employes now worked for KEI, there was no evidence to show that those employes of KEI were paid by Respondent. To the contrary, the evidence demonstrates that Respondent ceased payment of payroll to all employes effective July 31, 1992. There was no evidence presented to establish that the two entities utilized substantially identical equipment or share the same equipment, other than the presence of the Toyota van at the KEI shop.

In addition to these seven factors, the courts have also required that there exist an intent to evade the contract with the union. Thus, to determine alter ego status, the JLMC was required to find subjective intent on behalf of Respondent to evade the obligations under the agreement. There was no evidence presented to the JLMC which even remotely established such an intent on behalf of the Respondent and the evidence presented to the JLMC was insufficient for it to have found that KEI was a mere continuance of Respondent's sole proprietorship. Therefore, the JLMC obviously based its findings of alter ego status on some body of law, thought or feeling, that ignores the seven-prong test and intent analysis required by the NLRB and the courts in order to find alter ego status. Thus, the JLMC's finding of alter ego status is the result of a mistake of law, and the resulting award against Respondent should not be enforced.

Finally, with regard to costs and attorney's fees, Complainant has

ignored and failed to bring to this proceedings the holding of the court in Brink Construction Company, supra, in which the same union had conceded the termination of NECA's authority to bind the employer and lost on the issue of whether the employer was contractually obligated to arbitrate any dispute. In light of Respondent's continuous objection to the jurisdiction of the JLMC from the onset, Respondent requests that he be awarded his reasonable attorney's fees and costs.

DISCUSSION

The Complainant in this case is seeking enforcement of an arbitration award in alleging a violation of Sec. 111.06(1)(f), Stats., by the Respondent's refusal to comply with the award. 4/ The Commission has previously explained that in such a case, it is the law that:

> As a competent state tribunal having concurrent jurisdiction with the federal courts to enforce bargaining agreements covering employes in industry affecting commerce, the Commission must apply legal standards which are consistent with federal case law developed in Section 301 actions under the Labor Management Relations Act. Textile Workers Union v. Lehigh Mills, 353 U.S. 448 (1957); Local 174, Teamsters v. Lucas Flout 369 U.S. 95 (1962); Dowd Box v. Courtney 368 U.S. 52 (1962); Tecumseh Products Co. v. WERB 23 Wis. 2d 118 (1963); American Motors Corp. v. WERB 32 Wis. 2d 237 (1966). 5/

The Complainant has argued, both at hearing and in its post-hearing briefs, that the issue of whether the Respondent, Frank Kuehl, continued in business after July 31, 1992 in the form Kuehl Electric, Inc., was properly decided by the JLMC and that, therefore, the Respondent is precluded from attempting to litigate the merits of that decision in this proceeding to enforce the award. Conversely, the Respondent has argued that the JLMC had no jurisdiction to decide the issue since he was no longer in business and was not a party to the 1992-1994 Inside Labor Agreement under which the Complainant filed the grievance against Respondent.

The question raised by Respondent's objections to the JLMC deciding the issues before it, is whether Respondent was contractually obligated to arbitrate any dispute, i.e., is it bound by the 1992-1994 Inside Labor

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4/ Section 111.06(1)(f), Stats., provides that it is an unfair labor practice for an employer:

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

5/ J.I. Case Company and United Auto Workers Local 100, Dec. No. 18324-B (WERC, 9/82).

Agreement between Complainant and NECA. That question is one to be decided by the courts, rather than by an arbitrator. In A T & T Technologies v. Communications Workers, 475 U.S. 643 (1986), the U.S. Supreme Court reiterated its holdings in prior decisions that it is for a court, rather than an arbitrator, to decide whether a party is required to arbitrate:

> The principles necessary to decide this case are not new. They were set out by this Court over 25 years ago in a series of cases known as the Steelworkers Trilogy: Steelworkers v. American Mfg. Co., supra; Steelworkers v. Warrior & Gulf Navigation Co., supra; and Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). These precepts have served the industrial relations community well, and have led to continued reliance on arbitration, rather than strikes or lockouts, as the preferred method of resolving disputes arising during the term of a collective-bargaining agreement. We see no reason either to question their continuing validity, or to eviscerate their meaning by creating an exception to their general applicability.
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> The first principle gleaned from the Trilogy is that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Warrior & Gulf, supra. at 582; American Mfg. Co., supra. at 570-571 (BRENNAN, J., concurring). This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration. Gateway Coal Co. v. Mine Workers, 414 U.S. 368, 374 (1974).
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> The second rule, which follows inexorably from the first, is that the question of arbitrability - whether a collective bargaining agreement creates a duty for the parties to arbitrate the particular grievance - is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator. Warrior & Gulf, supra. at 582-583. See Operating Engineers v. Flair Builders, Inc., 406 U.S. 487, 491 (1972); Atkinson v. Sinclair Refining Co., 370 U.S. 238, 241 (1962), overruled in part on other grounds, Boys Markets, Inc. v. Retail Clerks, 398 U.S. 235 (1970). Accord, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985).
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> The Court expressly reaffirmed this principle in

> John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964). The "threshold question" there was whether the court or arbitrator should decide if arbitration provisions in a collective bargaining contract survived a corporate merger so as to bind the surviving corporation. Id., at 546. The Court answered that there was "no doubt" that this question was for the courts. "Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.'. . .The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty." Id., at 546-547 (citations omitted).
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> 475 U.S. at 648-649

Complainant cites a number of cases in support of its contention that the broad scope of the grievance and arbitration provisions in the Inside Labor Agreement requires a finding that the parties agreed to submit the issue of whether Respondent continued in business in the form of its alter ego, KEI, to arbitration. However, those cases involved the question of whether the parties to an agreement agreed to submit a particular issue to arbitration, not as here, where the question is whether the Respondent is bound by the agreement under which Complainant proceeded to arbitration. The distinction is critical, as in the latter case, it is necessary to look beyond the arbitration clause. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 547 (1964).

Complainant also cites numerous cases to support its contentions that the decision of the JLMC must be given deference and should not be disturbed, and that Respondent is foreclosed from litigating at this point the merits of the issues decided by the JLMC's decision and award. In regard to the assertion that the JLMC's decision must stand, the cases cited by Complainant again involved instances where there was no dispute as to whether the employer against whom the union had filed the grievance was party to the collective bargaining agreement. Again, it was a matter of determining whether the issue decided by the arbitrator was within the scope of the arbitration clause in the parties' agreement. The employers in those cases had appeared and participated in the arbitration, and then moved to vacate the award after they lost. The same is true of those cases cited by Complainant to support its contention that Respondent should not be permitted to now litigate in this proceeding the issue of whether he in fact went out of business or continued in the form of KEI, since he failed to make arguments and submit evidence in that regard before the JLMC. In those cases cited by Complainant, the employers had participated in the arbitration, and subsequently attempted to raise new issues or defenses before the court that they had failed to present to the arbitrator. The courts in those cases appropriately found that the employers, by failing to raise those issues or defenses with the arbitrator, had effectively waived their right to later raise them before the court in a motion to vacate or in defense of a motion to enforce the award.

The Examiner finds the decision of the Court in International Union of Operating Engineers, Local 542 v. Evans Asphalt Co., Inc., 542 F. Supp. 73 (M.D. Pa. 1989); aff'd 891 F.2d 281 (3rd Cir. 1989), more on point. In that case, the business was sold to a new company that kept the name of the old business. The union filed a grievance with the new owner alleging a violation of the collective bargaining agreement between the union and the former owner. The new owner refused to participate in the arbitration on the basis that it was not a party to the collective bargaining agreement and advised the union it would not submit to arbitration and objected to an arbitrator taking jurisdiction of the dispute. The new owner did not attempt to enjoin the arbitration, and refused to appear or be represented at the arbitration or in any way participate. The union arbitrated the dispute ex parte and the arbitrator found that the business was the same company under new ownership, and that the new owner was bound by the collective bargaining agreement and had violated the agreement. The new owner did not move to vacate the award, but raised the defense in a suit to enforce the award that it was not a party to the agreement under which the grievance was arbitrated. The Court held that the failure of the new owner to move to vacate the award did not foreclose it from raising the issue. The question in the first instance is whether the new owner was party to an agreement to arbitrate and that question is one for the courts to decide, not an arbitrator. 542 F.Supp. at 75-76.

The Respondent having raised the issue of arbitrability and made clear his position that he was not bound by the 1992-94 Inside Labor Agreement, that he was no longer in business and that the JLMC had no jurisdiction over him, it was incumbent on the Complainant at that point to seek a judicial or administrative determination in regard to those issues, i.e., an order to compel arbitration, rather than proceed with an ex parte proceeding before the JLMC. 6/ A T & T Technologies, supra, wherein the U.S. Supreme Court reasoned:

> The second rule, which follows inexorably from the first, is that the question of arbitrability - whether a collective bargaining agreement creates a duty for the parties to arbitrate the particular grievance - is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator. Warrior & Gulf, supra. at 582-583. See Operating Engineers v. Flair Builders, Inc., 406 U.S. 487, 491 (1972); Atkinson v. Sinclair Refining Co., 370 U.S. 238, 241 (1962), overruled in part on other grounds, Boys Markets, Inc. v. Retail Clerks, 398 U.S. 235 (1970). Accord, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614,

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6/ This is not to say that the Complainant was trying to "slide one by" the Respondent. The record indicates it made every effort to notify Respondent of the hearing dates and that Respondent, in fact, received notice despite his efforts to ignore the whole matter.

626 (1985).

The Court expressly reaffirmed this principle in John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964). The "threshold question" there was whether the court or arbitrator should decide if arbitration provisions in a collective bargaining contract survived a corporate merger so as to bind the surviving corporation. Id., at 546. The Court answered that there was "no doubt" that this question was for the courts. "Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.'. . .The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty." Id., at 546-547 (citations omitted).

. . .

The willingness of parties to enter into agreements that provide for arbitration of specified disputes would be "drastically reduced," however, if a labor arbitrator had the "power to determine his own jurisdiction. . ." Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1509 (1959). Were this the applicable rule, an arbitrator would not be constrained to resolve only those disputes that the parties have agreed in advance to settle by arbitration, but instead would be empowered "to impose obligations outside the contract limited only by his understanding and conscience." Ibid. This result undercuts the longstanding federal policy of promoting industrial harmony through the use of collective bargaining agreements, and is antithetical to the function of a collective bargaining agreement as setting out the rights and duties of the parties.

[5] With these principles in mind, it is evident that the Seventh Circuit erred in ordering the parties to arbitrate the arbitrability question. It is the Court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances concerning layoffs predicated on a "lack of work" determination by the Company. If the Court determines that the agreement so provides, then it is for the arbitrator to determine the relative merits of the parties' substantive interpretations of the agreement. It was for the court, not the arbitrator, to decide in the first instance whether the dispute was

to be resolved through arbitration.

475 U.S. at 649-651. (Emphasis added).

The Seventh Circuit Court of Appeals reiterated this rule in Sheet Metal Workers Local Union No. 20 v. Baylor Heating & Air Conditioning, Inc., 877 F.2d 547 (7th Cir. 1989):

> Before evaluating the consequence of the interest arbitration clause, we must determine whether this dispute was properly arbitrable and whether the Union should have sought a judicial determination of arbitrability before it unilaterally submitted the dispute for arbitration. As a general rule, the courts, not arbitrators, determine where matters are arbitrable. See A T & T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649 (1986). When "the parties clearly and unmistakably provide otherwise," however, a prior judicial determination is not necessary. Id. see also Toyota v. Automobile Salesmen's Union, Local 1095, 834 F.2d 751, 754 [127 LRRM 2112] (9th Cir. 1987), cert. denied. 108 S.Ct. 2036 [128 LRRM 2568] (1988), modified, 856 F.2d 1572 [129 LRRM 2732] (9th Cir. 1988). 7/

The Court then went on to find that the employer's actions fell within the scope of the broad interest arbitration clause 8/ that "clearly and unmistakably" evidenced their intent to arbitrate, unlike the limiting clauses in A T & T, supra, and John Wiley & Son, supra, that created "sufficient ambiguity" to require prior judicial determinations of arbitrability. The scope of the grievance and arbitration provisions of the 1992-94 Inside Labor Agreement is defined in Sec. 1.04 as a "dispute over matters relating to this Agreement." That is similar in scope to that of the arbitration provision before the Court in A T & T Technologies, supra, "any differences arising with respect to the interpretation of this contract or the performance of any obligations thereunder," which the Court did not find sufficiently broad so as to include the issue of arbitrability. 475 U.S. at 651.

Complainant having failed to first obtain a determination as to whether Respondent was bound by the Agreement under which it was seeking to arbitrate, and instead proceeded with an ex parte arbitration wherein the JLMC decided that issue, as well as the issue of whether KEI is Respondent's alter ego, the decision and award of the JLMC is not enforceable against the Respondent.

7/ See also, IBEW, Local 637 v. Davis H. Elliot Electrical Co., 13 F.3rd 129, 145 LRRM 2082 (4th Cir. 1993).

8/ The parties in that case agreed to arbitrate "any controversy or dispute arising out of the failure of the parties to negotiate a renewal of this Agreement."

It is therefore necessary, at this point, to determine whether the Respondent, Frank Kuehl, was party to and bound by, the 1992-1994 Inside Labor Agreement between Complainant and NECA under which the grievance was filed. Making that determination will require deciding whether the Respondent in fact went out of business as of July 31, 1992, or continued in business in the form of KEI. The same issues decided by the JLMC.

Complainant correctly has pointed out that the policy favoring arbitration of disputes reflected in the U.S. Supreme Court's decision in the "Steelworkers Trilogy" dictates against a court involving itself in the merits of a dispute, as that is the role of the arbitrator, if the dispute is one the parties have agreed to submit to arbitration. However, it is also clear that it is for the courts to determine whether there is an agreement to arbitrate. The U.S. Supreme Court, in its decision in Litton Financial Planning Div. v. NLRB 9/ noted that at times the two roles may come into conflict. The Court held that when that happens, the rule requiring that courts are to decide whether there is an obligation to arbitrate takes precedence. 501 U.S. at 209. The Seventh Circuit Court of Appeals has also noted the tension between the two rules and, citing the U.S. Supreme Court's decision in Litton, concluded that the rule courts must decide the arbitrator's jurisdiction takes precedence over the rule that courts are not to decide the merits of the underlying dispute, and stated, "If the Court must, to decide the arbitrability issue, rule on the merits, so be it." Independent Lift Truck Builders Union v. Hyster Co., 2 F.3rd 233, 236 (7th Cir. 1993).

The dispute in this case boils down to whether the Respondent, Frank Kuehl, is bound by the 1992-1994 Inside Labor Agreement. Several points are clear in the record and not in dispute. Frank Kuehl, d/b/a Kuehl Electric, was signatory to a Letter of Assent - A by which he agreed to authorize the local chapter of NECA as his collective bargaining representative "for all matters contained in or pertaining to the current and any subsequent approved Inside Construction Labor Agreement" between NECA and Complainant. The Letter of Assent also provides that the authorization "shall remain in effect until terminated by the undersigned employer giving written notice to (NECA) and to the Local Union at least one hundred fifty (150) days prior to the then current anniversary date of the applicable approved labor agreement." Frank Kuehl did not send written notice to NECA or Complainant 150 days prior to the anniversary date of the 1990-92 Inside Labor Agreement terminating NECA's authorization.

While it is clear that Respondent notified the Complainant that he was retiring and going out of the electrical contractor business as of July 31, 1992, even if that notice were to be considered tantamount to a notice he was terminating NECA's authorization to bargain on his behalf, it was too late for purposes of withdrawing authorization. Not only was the notice of his retirement not 150 days prior to the anniversary date of the 1990-1992 Agreement, (May 31, 1992) it was after negotiations on the successor agreement, i.e., the 1992-1994 Agreement, had been completed. Klatt's unrebutted testimony was that all issues, local and national, had been resolved prior to

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9/ 501 U.S. 190 (1991); 137 LRRM 2441.

June 1, 1992 and all that remained were the mechanics of putting the new Agreement together and having it signed. (Tr. 41-42). Failure to timely withdraw from the multi-employer group in the manner specified in the parties' agreement (the Letter of Assent) makes such withdrawal ineffective and the employer is bound by the successor agreement reached between the union and the multi-employer association. 10/

Unlike the employer in Brink, supra, cited by Respondent, he failed to timely notify NECA and Complainant of his intent to withdraw authorization from NECA. Therefore, Respondent was bound by the successor 1992-1994 Inside Labor Agreement reached between Complainant and NECA. Contrary to Respondent's assertion that he did not comply with the terms of the new Agreement, Respondent's payroll reports indicate that for the months of June and July 1992 he was paying wages and benefits in the amounts set forth in the new Agreement, which by its terms, was retroactive to June 1, 1992. Thereby demonstrating that he considered himself bound by the new Agreement at the time. That conclusion does not, however, end the inquiry.

Respondent also asserts that as of July 31, 1992, he was not bound by any agreement with Complainant since on that date he was no longer an "employer" or "firm" within the meaning of the Agreement or of the law. The Complainant acknowledges that an employer has a right to go out of business, but contends that Respondent did not, in fact, do so; rather, he continued in business in the form of KEI. Complainant asserts that question was properly decided by the JLMC and the Examiner must defer to its decision. As discussed previously, the JLMC did not have jurisdiction to determine the issue at that point. It having been concluded that Respondent was bound by the 1992-1994 Inside Labor Agreement, the question now becomes whether Respondent continued in business after July 31, 1992 in the form of an alter ego and therefore continued to be bound by the 1992-1994 Agreement after that date. The question of whether the Respondent continued to be bound by an agreement to arbitrate after July 31, 1992, is again jurisdictional in this case and is to be decided by the courts, not an arbitrator. John Wiley & Sons, supra, 55 LRRM at 2771. As noted above, it also cannot be said that the parties "clearly and unmistakably" agreed to submit such an issue to arbitration. Further, the question of whether the new employer, KEI, is an alter ego of Respondent is a question of federal substantive labor law to be decided by the courts. In re Matter of Shippers Interstate Service, Inc., 618 F.2d 9 (7th Cir. 1980).

With regard to determining whether Respondent continued in business after July 31, 1992 in the form of an alter ego, KEI, the Seventh Circuit Court of Appeals set forth the tests for determining "single employer" and "alter ego" status in a recent decision: 11/

> To determine whether two nominally separate business

10/ See Local 104 v. Simpson Sheet Metal, 139 LRRM 2316, (9th Cir. 1992); citing, Bonano Linen Service v. NLRB, 454 U.S. 404 (1982).

11/ Trustees of Pension Funds of Local 701 v. Favia Electrical Co., 995 F.2d. 789 (7th Cir. 1993).

entities are a single employer, one must examine four factors set out by the Supreme Court: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership. South Prairie Constr. Co. v. International Union of Operating Engineers, 425 U.S. 800, 803, 96 S.Ct. 1842, 1843 48 L.Ed. 2d 382 (1976); Radio and Television Broadcast Technicians Local Union v. Broadcast Service of Mobile, Inc., 380 U.S. 255, 256, 85 S.Ct. 876, 877, 13 L.Ed2d 789 (1965). No one of these factors is conclusive; instead, the decisionmaker must weigh the totality of the circumstances. Esmark, Inc. v. N.L.R.B., 887 F.2d 739, 753 (7th Cir. 1989).

. . .

This Circuit discussed the alter ego doctrine in Esmark, Inc. v. N.L.R.B., stating that:

[t]he Board's "alter ego" doctrine is similar [to the single employer doctrine]: generally, one corporation is the alter ego of another where the factors necessary to support a "single employer" finding are met and, in addition, the Board finds that the second corporation is a "disguised continuance" of the employing enterprise, resulting in evasion of the employer's obligations under the labor laws. 887 F.2d 739, 754 (7th Cir. 1989). Meeting all of the elements of the single employer doctrine is not essential to a finding that the alter ego doctrine applies, however. For example, an alter ego relationship has been found to exist "even though no evidence of actual common ownership was present." Central States Pension Fund v. Sloan, 902 F.2d 593, 597 (7th Cir. 1986) (citations and internal quotation marks omitted). Thus, the district court's rejection of the single employer doctrine did not preclude the application of the alter ego doctrine. What is essential for the application of the alter ego doctrine, though, is a finding of "the existence of a disguised continuance of a former business entity or an attempt to avoid the obligations of a collective bargaining agreement, such as through a transfer of assets. In sum, unlawful motive or intent are critical inquiries in an alter ego analysis. International Union of Operating Engineers v. Centor Contractors, 831 F.2d 1309, 1312 (7th Cir. 1987) (citations omitted).

995 F.2d at 788-789.

Single Employer

Looking first at the criteria for determining single employer status.

1) Interrelation of Operations

At first blush, there are a number of striking similarities between Respondent's business, Kuehl Electric and Kuehl Electric, Inc., beyond the names. KEI initially began with the same employes that Respondent had employed except that Steven Kuehl was now also the President of KEI, as opposed to being employed as a journeyman electrician. KEI operated out of the same building and used the same equipment as had Kuehl Electric and kept the same mailing address and phone number as had Kuehl Electric. Certainly there was enough smoke to make the Complainant look for the fire. It would seem likely though, that the same could be true if a business and its assets were sold to a complete stranger - same field of work at same location with the same equipment, and perhaps the same name and employes.

Beyond those similarities, however, there does not appear to be much evidence of interrelated operations. Respondent retained ownership of his accounts and his business records and there was no transfer of work, or the taking of work in progress, from Respondent to KEI. The record indicates Respondent filed his final payroll report for the month of July, 1992, and there is no evidence that he had any role in meeting the payroll of KEI. The Complainant notes that Respondent did not layoff his employes when he allegedly retired. Respondent testified he notified them he was retiring and it appears Steven Kuehl had discussions with the employes prior to July 31st about staying and working for him and on July 22, 1992, he sent a letter to the JATC regarding transferring Stumpf's apprenticeship to KEI. (Finding 7).

It appears that pursuant to the consulting agreement, Respondent did some work for KEI as far as electrical design work, and Klatt testified that he observed Respondent working with Steven Kuehl on a job in November of 1992. However, Respondent testified that he had rented the truck with a bucket and subleased it to KEI to use, and that his son was having trouble with it and called Respondent to come and help him with the truck, since he was the one that had rented it. Respondent went out and started the truck several times that day and stayed with him on one of the jobs so his son could get it done and then left. Klatt also testified he often saw Respondent's Toyota van with "Kuehl Electric" painted on it at the building where KEI is located. However, Respondent retained his old office in the building he leased to KEI for his design work and admitted he would spend 12 hours or so a week there. Contrary to Complainant's claim that Respondent was performing work for KEI for no remuneration, the evidence indicates that Respondent receives $364.50 per month pursuant to the consulting agreement.

2) Common Management

The record indicates that Steven Kuehl's role in Respondent's business, beyond working as a journeyman electrician, was to be in charge in the field on smaller projects and to do some estimating work. Respondent made all of the decisions with regard to the operation of the business, billing customers, personnel decisions and financial decisions. Conversely, Steven Kuehl at times asks his father for advice in those areas, but Respondent has no authority or control over those aspects of the operation of KEI.

3) Centralized Control of Labor Relations

Klatt testified that at times when he called Steven Kuehl, Respondent would answer and that one time Respondent returned Klatt's call to Steven Kuehl and asked if he could help him. There is, however, no evidence that Respondent ever represented himself as speaking on behalf of KEI or his son or that he had the authority to do so. The unrebutted testimony of Respondent and Steven Kuehl is that Respondent has no role in the personnel matters or labor relations aspect of KEI and there is no evidence in the record indicating to the contrary.

4) Common Ownership

The Complainant relies heavily on the fact that when it acquired the incorporation papers of KEI in September of 1992 from the Secretary of State's office the Respondent was listed as the corporation's sole shareholder. However, the paper was dated in 1991, and the corporate record book of KEI, from which the corporation's attorney testified, and which Complainant's attorney was given the opportunity to review in that regard at hearing, indicates that on August 1, 1992, the Respondent surrendered his shares (which was all of the shares in KEI) to KEI and that Steven Kuehl received all of the shares in KEI on that date for no consideration. KEI at that time was an empty corporation with no assets.

Again, the record indicates that Respondent retained no ownership in KEI or control over it as of August 1, 1992. The monies he receives from KEI are limited to the $364.50 per month for his consulting services and the $3,000.00 per month he is paid under the leasing agreement on the building and equipment. He receives no fringe benefits from KEI and has no stake in the business of KEI. The payments he receives under the consulting and lease agreements 12/ are not dependent upon or related to the profits or success of KEI. Respondent has no authority to write checks on KEI's accounts or to withdraw funds from those accounts.

While there is no doubt that the Respondent has done some things for his son that it is unlikely he would have done for a stranger, e.g., deferred the first payment on the lease agreement until February of 1993, that is not sufficient to find that Respondent retained any ownership interest in KEI.

<u>Alter Ego</u>

With regard to determining alter ego status, it is necessary to establish that the new business is merely the disguised continuance of the former business in an attempt to avoid the obligations of a collective bargaining agreement. <u>Favia Electrical</u>, supra.

The Examiner has essentially been unable to find any of the elements necessary for Respondent and KEI to constitute a "single employer" in this

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12/ The protections Respondent wrote into the lease agreement and the monthly fee of $3,000.00 indicates that it was substantially an "arm's length" transaction.

case. Therefore, it would necessarily follow that KEI is not the disguised continuance of Respondent. As noted above, there is no evidence that Respondent has retained any ownership interest in KEI or that he has any interest in the success of the business beyond receiving his monthly payments under the consulting and lease agreements or beyond that of a father wanting to see his son succeed. Further, Respondent's role in performing electrical work for KEI has been limited to doing electrical design and layout work and that has been on a very limited and part-time basis.

There is no evidence in the record that Respondent ever exhibited any animus toward Complainant in the past. To the contrary, Klatt testified that he did not perceive the Respondent to be anti-union. Complainant concedes that Respondent had the right to go out of business and retire, although it contends that he did not. Respondent testified that he retired due to health reasons and in order to devote more time to other interests, especially dancing. The record indicates he spends only a fraction of the time in his electrical consulting business that he spent working in his electrical contracting business and that he devotes a large portion of his time pursuing his interests in dancing.

The Examiner concludes that, while from outward appearances the Complainant had a reason to be suspicious, there is not sufficient evidence from which it can be found that Respondent continued in business after July 31, 1992 in the form of KEI in order to avoid his obligations under the 1992-1994 Inside Labor Agreement. Therefore, Respondent was no longer party to an agreement to arbitrate the grievance that arose in this case after he went out of business. On that basis, and the foregoing, the Examiner has dismissed the complaint.

Respondent has asked that costs and attorney's fees be awarded against Complainant. Given the outward appearances noted above that were certainly sufficient to arouse Complainant's suspicions, and the Respondent's refusal to provide Complainant with the information that would possibly allay those suspicions, the Examiner cannot find the requisite "bad faith" or that Complainant should have known its allegations were groundless. 13/

Dated at Madison, Wisconsin this 4th day of November, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By <u>David E. Shaw /s/</u>
David E. Shaw, Examiner

13/ While the Examiner is restricted to applying the Commission's standards in this regard, the latter is essentially the same as that applied by the federal courts under F.R.C.P. 11. <u>Grunau Co.</u>, Dec. No. 27123-A (Shaw, 5/92).