STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PAINTERS LOCAL 781,		
Complainant,	:	Case 1 No. 49966 Ce-2146
vs.	:	Decision No. 27881-A
UNITED SANDBLASTING & PAINTING, INC.,		
Respondent.		

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 Mr. Larry Lennix, 4671 North 52nd Street, Milwaukee, Wisconsin, President, on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On October 4, 1993, Painters Local 781 filed a complaint of unfair labor practices with the Wisconsin Employment Relations Commission, alleging that United Sandblasting & Painting, Inc., had violated sec. 111.06(1)(f), Stats., by failing to comply with a decision of the parties' Joint Arbitration Committee regarding payments and contributions due under the parties collective bargaining agreement. After efforts at conciliation failed, the Commission, on December 1, 1993, appointed Stuart Levitan, a member of its staff, to serve as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in the matter. Hearing in the matter was held in Milwaukee, Wisconsin, on December 16, 1993, with a stenographic transcript being prepared and made available to the parties by January 10, 1993. The complainant and respondent filed written arguments on February 11, 1994 and May 12, 1994, respectively. The Examiner, now being fully advised in the premises, hereby makes and issues the following

FINDINGS OF FACT

1. Painters Local Union 781, hereafter "the Union," is an employe representative within the meaning of Sec. 111.02(11), Stats., and the representative of certain employes of United Sandblasting & Painting, Inc. The Union maintains its principal offices at 12300 West Center Street, Wauwatosa, Wisconsin.

2. United Sandblasting & Painting, Inc., hereafter "the Employer," is an employer within the meaning of Sec. 111.02(7), Stats., with principal offices at 4671 North 52nd Street, Milwaukee, Wisconsin.

3. At all times material, the Union and employer were parties to a collective bargaining agreement known as the Painters Local 781 Milwaukee Jurisdiction Labor Agreement, which provided for the settlement of disputes as follows:

ARTICLE XVIII

SETTLEMENT OF DISPUTES

Section 1. Joint Committee. The Association and the Union agree to establish a Joint Committee consisting of six members, three of whom shall be chosen by the Association and three to be chosen by the Union, except as otherwise provided for in the Agreement. To this Joint Committee shall be referred all matters of dispute or controversies insofar as such affect this Agreement and to pass upon all matters of mutual interest to both parties concerned. This committee shall meet at 24 hours' notice when called upon by either party to this agreement.

Section 2. Arbitration. In case of a disagreement in any dispute, a seventh member shall be agreed upon by the six members of the joint committee. In the event of their inability to agree upon a seventh member in ten days, the seventh member shall be selected from a panel of arbitrators from the Milwaukee area submitted by the Federal Mediation and Conciliation Service. The majority decision shall be final and binding.

Section 3. Violation of Agreement. Non-compliance with any Section of this Agreement shall be deemed a violation thereof, making this Agreement voidable; and when the Employer violates this Agreement in any particular, this Agreement may be cancelled at once and his name will be stricken from the list of Union painting contractors, after due consideration by the Joint Committee if requested.

4. On February 22, 1993, a Joint Arbitration Committee hearing concerning a wage and benefit claim brought by Michael Harwood against the Employer was held at the Union offices. Present were three representatives of management (members of the Milwaukee Painting, Decorating and Contractors Association) and three representatives of Local 781. The grievant, Harwood, and the Employer's owner/representative, Larry Lennix, provided testimony. The official minutes of the committee hearing state as follows:

Michael Harwood stated that he handed in time cards for work performed the weeks of March 7 and 14, 1992 to his employer; a total of 51 hours for which he has never been paid for. He worked at Jones Island and indicated that the North Utility Pump Station and the engineer should have a record of someone working there.

Larry Lennix stated that Mike wasn't always on the job. Findorf looked for Mike but couldn't always find him. Larry advised that he permitted Mike to work the hours that he wanted. Mr. Lennix did not provide the committee with any evidence that Harwood was not on the job.

COMMITTEE DECISION: The committee felt they needed to review the Engineer's Report from Findorf or the Milwaukee Metropolitan Sewerage District as well as the certified payroll audit report. If the man hour reports substantiate Michael Harwood's claim, the employer shall be obligated to remit the 51 hours wages and benefits.

SUBSEQUENT EVENT: On behalf of the committee, I examined the certified payroll audit report in April which showed no one got paid from United Sandblasting and Painting, Inc. on March 7 or 14, 1992.

Respectfully submitted,

Robert S. Kovacic /s/
Robert S. Kovacic
Committee Secretary

5. On or about April 14, 1993, union business manager/financial secretary Robert S. Kovacic sent to Lennix the following letter:

Dear Sir:

Attached are copies of the Daily Inspection Diary Sheets from the Milwaukee Metropolitan Sewerage District showing that United Painting was on the job at Jones Island on March 2nd, 3rd, 4th, 6th,, 9th and 10th, 1992 which is consistent with Michael Harwood's claim that he is owed 51 hours pay (51 hrs. @ $16.25 = $828.75 gross wages vacation pay)

Based on their investigation and the evidence provided, the Joint Arbitration Committee has determined that your company is liable for the 51 hours wages and benefits.

> The Joint Committee suggests that you issue the payroll check as well as the fringe benefit fund checks for these 51 hours (fringe benefit form is enclosed) and forward these checks to this office by April 29, 1993.
>
> If the payments are not received accordingly, Local Union No. 781 will be forced to terminate your contract for violation of the current agreement as provided under that agreement.
>
> Should you have any questions concerning this matter, do not hesitate to contact the undersigned.
>
> Sincerely,
>
> Robert S. Kovacic /s/
> Robert S. Kovacic
> Business Manager-
> Financial Secretary

6. At all times since April 14, 1993, the Employer has failed and refused to comply with the decision of the Joint Arbitration Committee.

On the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

That, by its refusal to comply with the terms of the Joint Committee decision referred to in Finding of Fact 5, the respondent, United Sandblasting and Painting, Inc., has violated Sec. 111.06(1)(f) and (g), Wis. Stats.

ORDER 1/

That United Sandblasting and Painting, Inc., shall take the following affirmative action which the Examiner finds will effectuate the purposes of the Wisconsin Employment Peace Act:

1. Immediately comply with the terms of the April 14, 1993 letter from Robert S. Kovacic regarding the payment of $828.75 gross wages to Michael Harwood and the value of 51 hours to the fringe benefit fund, said sums to be supplemented by interest at twelve (12) percent for the period April 29, 1993 to the date on which the payment is made.

2. Notify all employes by posting in conspicuous places on the premises, where notices to all employes are usually posted, a copy of the Notice attached hereto and marked "Appendix A." Said Notice shall be signed by an officer of the Employer and shall be posted immediately upon receipt of a copy of this Order, and shall remain posted for sixty (60) days thereafter. The Employer shall take reasonable steps to insure that the notices are not altered, defaced, or covered by other material.

(Footnote 1/ appears on the next page.)

3. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days following the date of this order as to what steps have been taken to comply with this Order.

Dated at Madison, Wisconsin this 3rd day of August, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stuart Levitan /s/
Stuart Levitan, Examiner

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

Section 111.07(5), Stats.

> (5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

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

APPENDIX "A"

NOTICE TO ALL EMPLOYES

United Sandblasting and Painting, Inc. will comply with the decisions of the Joint Committee, as provided for in the Collective Bargaining Agreement with Painters Local No. 781.

Dated this _____ day of _____, 1994.

By _____
UNITED SANDBLASTING AND PAINTING, INC.

THIS NOTICE MUST REMAIN POSTED FOR 60 DAYS FROM THE DATE HEREOF, AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

UNITED SANDBLASTING & PAINTING, INC.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

In support of its complaint, the Union asserts and avers that the Employer's refusal to comply with the joint committee's award constituted a violation of the collective bargaining agreement, which breach itself constituted a violation of applicable state law, specifically Sec. 111.06(1)(f), stats. The Union further states that, due to the Employer's failure to submit an answer to the complaint, the facts in the complaint are deemed admitted to be true pursuant to ERB 2.04, W.A.C.; that the Commission, following judicial and administrative agency precedent, should show great deference to the evidentiary decisions which the joint committee made, and that the appropriate remedy is enforcement of the joint committee's award and interest, plus attorneys' fees and costs. In response to the complaint, the Employer has essentially renewed its challenge to the initial grievance, stating that he never agreed to the illegal practice of banking hours; that the days the grievant claimed to have worked and signed for unemployment benefits were inconsistent; that vehicle logs and time cards show such inconsistencies, and that the grievant was not entitled to the wages as he claimed.

DISCUSSION

Section 111.06(1) Wis. Stats., states that:

> It shall be an unfair labor practice for an employer, individually or in concert with others:
>
> (f) To violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award).
>
> (g) To refuse or fail to recognize or accept as conclusive of any issue in any controversy as to employment relations the final determination (after appeal, if any) of any tribunal having competent jurisdiction of the same or whose jurisdiction the employer accepted.

Venerable Commission precedent indicates how closely (f) and (g) are related. In a case where the collective bargaining agreement provided for arbitration as the step following the failure of the Joint Grievance Committee to reach consensus on a decision resolving a dispute, the Examiner found an employer's refusal to implement the unanimous decision of the Committee to be an unfair labor practice within the meaning of both subsections. 2/ Another examiner found a similar dual-violation in a case involving an arbitration

---

2/ Svendsen Brothers, Inc., Dec. No. 8983-A (Bellman, 10/69).

award clearly identified as such. 3/

While the complainant has plead this case solely in terms of Sec. 111.06(1)(f), I raise the matter of Sec. 111.06(1)(g), because it appears that the underlying action in this case -- the action by the "Joint Arbitration Committee" in February and April, 1993 -- somewhat straddles the line between an arbitration award and something else. Technically, it appears that a close reading of the collective bargaining agreement would indicate that the action was more a "final determination ... of any tribunal having competent jurisdiction" than an arbitration award. That is because the collective bargaining agreement differentiates between two methods for settling disputes, namely the Joint Committee (Section 1) and Arbitration (Section 2). It appears that the six-member Joint Committee is designed to operate, if possible, by consensus; failing consensus, the matter may then be advanced to arbitration, using an outside arbitrator as a seventh member. This reading of the agreement, however, does not fully explain why the minutes of the six-member panel that met in early 1993 refers to the "Joint Arbitration Committee."

Fortunately, as suggested by the Bellman and Fleischli citations above, this may well be a distinction without a difference. Moreover, the Commission has held that, when a respondent has neither asserted nor established any prejudice from the fact that a case was pled and tried under one subsection, rather than another, more correct one, it is "appropriate to proceed to resolve the dispute" under the correct subsection. 4/ Here, the respondent has not raised the issue of whether the more proper citation would have been to subsection (1)(g), and the matter has been fully and fairly litigated.

As to the merits of the matter, the issue is clear-cut. The collective bargaining agreement provides for settlement of disputes through a Joint Committee. That Committee met, heard testimony, reviewed documentary evidence, and made a decision that the Employer owed the grievant and the fringe benefit fund for 51 hours. The Employer has not denied his failure to comply with this decision.

The Employer's position in this complaint proceeding has been that the Committee's decision was flawed, and that the underlying grievance was, contrary to the committee's decision, without merit. In effect, he has sought to re-litigate the matter.

If the Committee's decision were an arbitration award, state and federal case law and statutes establish that I am to regard such an award as presumptively valid, to be disturbed only where its invalidity is demonstrated by clear and convincing evidence. 5/ The evidence which the respondent employer offered at the complaint hearing did not rise to the level of clear and convincing evidence of the invalidity of the Committee's action.

3/ Advance Demolition, Inc., Dec. No. 11950-A (Fleischli, 1/74).

4/ State of Wisconsin, Dec. No. 25281-C (WERC, 8/91)

5/ Milwaukee v. Milwaukee Police Association, 97 Wis. 2d 15, 24 (1980).

Further, this Commission has, "on numerous occasions enforced decisions of joint committees, according them the same finality as those of traditionally 'neutral' arbitrators." Indeed, absent a showing of facts "compelling a contrary result" the determination of such a Committee "must be accorded the identical status as that of an award of an arbitration panel given that it was established pursuant to a collective bargaining agreement providing for its establishment as the proper tribunal to hear and adjust disputes arising thereunder." 6/ The respondent Employer has provided no facts which compel me to reopen issues of credibility and other evidentiary matters already addressed by the Committee.

Having determined that the complaint is meritorious, I now address the issue of remedy. The complainant seeks interest, attorney's fees and costs. The general rule in Wisconsin is that "pre-judgment interest is available as a matter of law on fixed and determinable claims, such as employment related backpay." 7/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the agency, which in this instance as twelve percent annually. 8/

The Commission believes that attorney fees should only be granted in "exceptional cases where an extraordinary remedy is justified," and so has set a test which "is strict," and requires a degree of "aggravated and pervasive misconduct." 9/ The complainant argues that the Employer's refusal to comply with the Joint Committee's decision was a frivolous claim meant to harass the Union and grievant, and was in such bad faith as to warrant attorney fees and costs. I disagree. I believe the Commission's test requires a finding that a respondent knew that a course of conduct was wrong, but continued to engage in egregious behavior deliberately intended to frustrate the goal of labor peace. I do not believe that is what happened here. A legal position or argument which may be frivolous to a veteran labor law practitioner may well seem perfectly plausible to a small contractor appearing on his own behalf; the fact that the respondent was wrong in assuming he could re-litigate the decision of the Joint

---

6/ Giraffe Electric, Inc. Dec. No. 16513-A (Mukamal, 5/79).

7/ West Side Community Center, Dec. No. 19212-B (WERC, 3/84), citing Madison Teachers v. WERC, 115 Wis. 2d 623 (Ct. App. 1983) and Anderson v. LIRC, 111 Wis. 2d 245 (1983). See also, Grunau Company, Inc., Dec. No. 27123-A (Shaw, 5/92), aff'd by operation of law (WERC, 6/92).

8/ Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83).

9/ Wisconsin Dells School District, Dec. No. 25997-C (WERC, 8/90).

Committee does not mean he was displaying "aggravated and pervasive misconduct" in attempting to do so. Accordingly, I have not granted attorney fees and costs.

Dated at Madison, Wisconsin this 3rd day of August, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stuart Levitan /s/
Stuart Levitan, Examiner