STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**LOCAL UNION NO. 494, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS**, Complainant,

vs.

**JAYMES ELECTRIC COMPANY, INC., HIGHLAND ELECTRIC COMPANY, INC. AND JAMES AND JAYNE JASKOLSKI**, Respondents.

Case 1
No. 54715
Ce-2177

## Decision No. 29073-D

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**JAYMES ELECTRIC COMPANY, INC., HIGHLAND ELECTRIC COMPANY, INC. AND JAMES AND JAYNE JASKOLSKI**, Complainants,

vs.

**LOCAL UNION NO. 494, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS**, Respondent.

Case 2
No. 55370
Ce-2182

## Decision No. 29186-E

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Appearances:

Quarles & Brady, by **Attorney Gregg M. Formella**, 411 East Wisconsin Avenue, Milwaukee, WI 53202-4497, appearing on behalf of Jaymes Electric Company, Inc., Highland Electric Company, Inc., and James and Jayne Jaskolski.

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Matthew Robbins**, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, WI 53212, appearing on behalf of Local 494, International Brotherhood of Electrical Workers.

No. 29073-D
No. 29186-E

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS COMPLAINTS**

Daniel J. Nielsen, Examiner: On November 27, 1996, Local 494 of the International Brotherhood of Electrical Workers (hereinafter referred to as Union or Local 494) filed a complaint of unfair labor practices alleging that Jaymes Electric Company, Inc. (hereinafter referred to as Jaymes) had violated Sec. 111.06(1)(a), (f), and (g) of the Wisconsin Employment Peace Act (WEPA) by refusing to comply with the award of a labor-management committee in four grievances. On February 20, 1997, the complaint was amended to add allegations that James and Jayne Jaskolski (hereinafter referred to as the Jaskolskis), the owners of Jaymes, had created a new corporate entity, Highland Electric Company, Inc. (hereinafter referred to as Highland) as a disguised continuation and/or alter ego of Jaymes for the purpose of evading the collective bargaining responsibilities of Jaymes. The amended complaint further alleged that Jaymes and the Jaskolskis had refused to apply the terms and conditions of the collective bargaining agreement to the operations of Highland, and that through these actions Jaymes, the Jaskolskis and Highland had violated Sec. 111. 06(1)(a), (c), (d) and (f), Stats.

On June 11, 1997, the Respondents answered the complaints, denying any violations of Sec. 111, and alleging that the arbitration answers of the local committee were procedurally flawed and unenforceable, denying that Highland was a continuation and/or alter ego established for the purpose of evading the collective bargaining responsibilities of Jaymes, and asserting that the various claims of the Union were preempted by federal law. On that same date, Jaymes filed a complaint against the Union alleging that its hiring hall had sent Jaymes inexperienced and poorly skilled employes, thus damaging the company and violating its implied obligation to act in good faith in the administration of the hiring hall. Highland and the Jaskolskis filed a complaint against the Union alleging that the Union had spread rumors about the viability of the various companies, and had filed the instant complaint as retaliation against Jaymes and the Jaskolskis for operating Highland as a non-Union firm. The Companies' complaints alleged violations of Sec. 111.06(2)(c), (g), and (h), and Sec. 111.06(3), WEPA. On June 25, 1997, the Union advised the Commission that it was not pursuing its claims against the Jaskolskis personally, as they had filed for bankruptcy protection.

The Commission assigned David E. Shaw, an examiner on its staff, to hear the cases. A series of hearing dates were established and were postponed. Each party issued subpoenas and moved to quash the other party's subpoenas. Owing to the subsequent unavailability of Examiner Shaw, the Commission, on November 21, 1997, substituted Daniel Nielsen, an examiner on its staff to serve as examiner. On that same day, the Examiner issued an Order Correcting the Caption in Case #2, an Order Denying Motions to Quash Subpoenas, and a Notice of Rescheduled Hearing, setting these matters for hearing on December 12, 1997. The Examiner subsequently advised the parties that he intended to dispose of the various jurisdictional and preemption arguments before proceeding with a hearing on the merits. The parties agreed that there was no material dispute as to the facts underlying the jurisdictional and preemption claims, and that the companies met the monetary jurisdictional standards of the National Labor Relations Board. Accordingly the December 12th hearing was postponed. Jaymes, Highland and the Jaskolskis submitted a Motion to

Dismiss the Union's complaint. Written arguments were submitted to the Examiner, and the record with respect to the Motion to Dismiss was closed on January 2, 1998.

Now, having considered the evidence, the arguments of the parties, the applicable provisions of the statute, and the record as a whole, the Examiner makes the following

## FINDINGS OF FACT

1. That Local Union No. 494, International Brotherhood of Electrical Workers (hereinafter referred to as the Union or Local 494) is a labor organization maintaining its principal offices at 3303 South 103rd Street, Milwaukee, Wisconsin.

2. That Jaymes Electric Company, Inc. (hereinafter referred to as Jaymes) was, at times pertinent to the complaint, an employer engaged in electrical contracting in the Milwaukee area, with its principal offices currently located at 6232 Washington Circle, Wauwatosa, Wisconsin. James and Jayne Jaskolski are the owners of Jaymes.

3. That Highland Electric Company, Inc. (hereinafter referred to as Highland) is an employer engaged in electrical contracting in the Milwaukee area, with its principal offices currently located at 6232 Washington Circle, Wauwatosa, Wisconsin. Highland was created in December, 1996, by James and Jayne Jaskolski.

4. That the Union, on May 30, 1997, filed a second amended complaint in this matter alleging, inter alia, that the Union and Jaymes were parties to a collective bargaining agreement. The complaint further alleges that the Union filed four grievances against Jaymes in March of 1996, that the grievances were heard by the Local Labor Management Committee provided for in the contract, that the Committee decided in the Union's favor in each case, and that the Company has failed to comply with the arbitration decisions of the Committee. The complaint alleges that this conduct violates Sec. 111.06(1)(a), (f) and (g), Stats.

5. The Union's second amended complaint also alleges that Highland Electric is owned by the owners of Jaymes, has a complete identity of ownership, management, labor relations and business purpose with Jaymes, that Highland was created "for the purpose of evading the collectively bargained obligations of Jaymes Electric, Inc." and that Highland and its owners have refused to apply the terms and conditions of the Milwaukee Inside Wiremen Agreement. The complaint concludes that Highland is a disguised continuation and/or alter ego of Jaymes, and that Jaymes, Highland and the Jaskolskis personally have thereby violated Sec. 111.06(1)(a), (c), (d) and (f), Stats.

6. That Jaymes meets the monetary jurisdictional standards established by the National Labor Relations Board for coverage as an employer under the National Labor Relations Act.

7. That Highland meets the monetary jurisdictional standards established by the National Labor Relations Board for coverage as an employer under the National Labor Relations Act.

8. That the instant complaints are not pending in any fashion before any state or federal court, nor has any action been filed with the National Labor Relations Board over the conduct alleged in the instant complaints.

9. That the National Labor Relations Board has not declined to assert jurisdiction over the aspects of the Union's complaint alleging interference, discrimination and refusal to bargain.

10. That the Union's complaint does not raise any interests deeply rooted in local feeling and responsibility.

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

## CONCLUSIONS OF LAW

1. The Wisconsin Employment Relations Commission has jurisdiction over the allegations that Jaymes and/or Highland have violated "the terms of a collective bargaining agreement (including an agreement to accept an arbitration award)" in violation of Sec. 111.06(1)(f).

2. The Wisconsin Employment Relations Commission has jurisdiction over the allegations that Jaymes has refused or failed "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" in violation of Sec. 111.06(1)(g).

3. The Wisconsin Employment Relations Commission does not currently have jurisdiction over the allegations that Jaymes and/or Highland interfered with, restrained or coerced their employes in the exercise of the rights guaranteed in Sec. 111.04, in violation of Sec. 111.06(1)(a).

4. The Wisconsin Employment Relations Commission does not currently have jurisdiction over the allegations that Jaymes and/or Highland discriminated against employes in regard to hiring, tenure or other terms or conditions of employment in violation of Sec. 111.06(1)(c).

5. The Wisconsin Employment Relations Commission does not currently have jurisdiction over the allegations that Jaymes and/or Highland refused to bargain collectively with the representative of a majority of their employes in any collective bargaining unit, in violation of Sec. 111.06(1)(d).

On the basis of the above and foregoing Conclusions of Law, the Examiner makes and enters the following

## ORDER

1. That the Motion to Dismiss is denied with respect to claimed violations of Sec. 111.06(1)(f) and (g).

2. That the Motion to Dismiss is granted with respect to claimed violations of Sec. 111.06(1)(a), (c) and (d), and those portions of the complaint are hereby dismissed.

Dated at Racine, Wisconsin, this 7th day of April, 1998.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

Daniel Nielsen /s/

Daniel Nielsen, Examiner

JAMES ELECTRIC COMPANY, INC.

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS COMPLAINTS**

The Respondent companies are employers subject to the jurisdiction of the National Labor Relations Board. The issue before the Examiner on the Motion to Dismiss is whether the Commission's jurisdiction to hear the complaints is preempted by federal law.

There are two aspects to the complaint. The first claim is that the Respondent Jaymes Electrical Company, Inc. violated WEPA by refusing to accept the Award of the Joint Labor-Management Committee with respect to four grievances. The second is whether Jaymes and Highland engaged in unfair labor practices by establishing Highland as an alter ego or continuation of Jaymes in order to avoid collective bargaining.

**A. Violation of Contract/Refusal to Accept Decision of the Labor Management Committee - 111.06(1)(f) and (g)**

Section 111.06 makes it an unfair labor practice to refuse to accept an arbitration award or other determination of a competent tribunal:

> (1) It shall be an unfair labor practice for an employer individually or in concert with others:
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> . . .
>
> (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.

It is clear and settled law that the Commission's jurisdiction to hear cases involving claimed violations of Sec. 111.06(f) is not preempted by federal law, notwithstanding the fact that the employer is subject to the jurisdiction of the National Labor Relations Board. In GAYLORD BROADCASTING, DEC. NO. 26231-A (GRATZ, 8/27/90), Examiner Gratz addressed the employer's claim that federal law preempted the Commission in cases alleging violation of a collective

bargaining agreement and/or refusal to accept an award:

> WEPA complaints that an employer in a relationship affecting Interstate Commerce has committed a Sec. 111.06(1)(f), Stats., violation of the terms of a collective bargaining agreement are claims that are justiciable under Sec. 301 of the Labor Management Relations Act by both federal and state tribunals. See, CHARLES DOWD BOX CO. V. COURTNEY, 368 U.S. 502 (1962); and SEAMAN-ANDWALL CORP., DEC. NO. 5910 (WERB, 1/62). The Commission



> has been held to be a competent state tribunal with concurrent jurisdiction with state and federal courts to adjudicate such matters. E.g., TECUMSEH PRODUCTS CO. V. WERB, 23 WIS.2D 118, 126 N.W.2D 520 (1964). However, the Commission and all other state tribunals must apply federal substantive law in resolving such matters. TEAMSTERS LOCAL 174 V. LUCAS FLOUR CO., 369 U.S. 95 (1962); and TECUMSEH PRODUCTS CO. V. WERB, SUPRA. The U.S. Supreme Court has also held that Sec. 301 claims are not subject to pre-emption doctrines reflected in the GARMON, SUPRA line of cases cited by the Employer. VACA V. SIPES, 386 US 171, 184 (1967) ("GARMON and like cases have no application to 301 suits.... [T]he fact that the employer's conduct may be an unfair labor practice does not preclude a suit by the union against the employer to compel arbitration of the employee's grievance...."); see generally, Morris, THE DEVELOPING LABOR LAW (BNA, 1983) AT 1316-17 AND ESP. N.150. The Employer's reliance on OPERATING ENGINEERS LOCAL 926 V. JONES, SUPRA is misplaced since the state tribunal in that case was not hearing a case justiciable under LMRA Sec. 301.
>
> Thus, to the extent that a violation of an agreement to arbitrate grievances arising under a collective bargaining agreement is arguably prohibited by the NLRA, the NLRB's jurisdiction is nonetheless concurrent and not exclusive as compared with the jurisdiction of the various federal and state Sec. 301 forums, the Commission included. The Employer's pre-emption contention is therefore rejected.

Likewise, in UNITED BROTHERHOOD OF CARPENTERS AND JOINERS, DEC. NO. 26527-A (MCLAUGHLIN, 7/11/90), Examiner McLaughlin rejected the employer's claim that federal law would preempt the Commission in cases alleging violation of a collective bargaining agreement:

> Because the Board has not been granted the jurisdiction to enforce collective bargaining agreements, the type of preemption analysis applicable to Sec. 111.06(1)(d), Stats., is not applicable to Sec. 111.06(1)(f), Stats. Even if it is assumed that the asserted duty of the GFRVDC to submit the Rajek termination to arbitration also raises potential unfair labor practices falling within the Board's

jurisdiction, it does not follow that the Commission lacks jurisdiction over the asserted duty to arbitrate. The Sec. 111.06(1)(f), Stats., claim is a Section 301 type action. The Board's unfair labor practice jurisdiction is not exclusive, and does not destroy judicial jurisdiction of suits under Section 301. [See SMITH V. EVENING NEWS ASSOCIATION, 371 U.S. 195, 51 LRRM 2646 (1962)].

Because it has been held that the Commission is "a competent state tribunal having concurrent jurisdiction with the federal courts to enforce bargaining agreements covering employes in industry affecting commerce" [NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, DEC. NO. 22366-B (WERC, 7/86) AT 6, CITING: TEXTILE WORKERS UNION V. LEHIGH MILLS, 353 U.S. 448 (1957); LOCAL 174, TEAMSTERS V. LUCAS FLOUR, 369 U.S. 95 (1962); DOWD BOX V. COURTNEY, 368 U.S. 52 (1962); TECUMSEH PRODUCTS V. WERB, 23 WIS.2D 118 (1963); and AMERICAN MOTORS CORP. V. WERB, 32 WIS.2D 237 (1966). The legal standards applied by the



Commission must be consistent with federal law.], it follows that the Board's unfair labor practice jurisdiction does not preempt the Commission's jurisdiction over the alleged violation of Sec. 111.06(1)(f) Stats.

Here the Union asserts that the refusal to accept the decision of the Local Labor Management Committee violates the collective bargaining agreement and constitutes a refusal to accept either an arbitration award (Sec. 111.06(1)(f)) or the decision of a competent tribunal (Sec. 111.06(1)(g)). The Union further claims that the establishment of Highland as an alter ego violates the contract (Sec. 111.06(1)(f)). The National Labor Relations Board does not have jurisdiction over claims that a contract has been violated. Without commenting on the merits of the Union's claims, on their face they raise issues that are either outside of the scope of the NLRA, or which are subject to the concurrent jurisdiction of the NLRB, the federal courts and the Commission.

The analysis applies with equal force to alleged violation of Sec. 111.06(1)(g), in that the Board does not have jurisdiction over such claims and the Commission, as a competent state tribunal, would hold concurrent jurisdiction with the federal courts to hear the claim, so long as federal law is applied in the Commission's ultimate determination of the case.

To the extent that the Union's case asserts that purely contractual rights have been violated by the actions of Jaymes and/or Highland, the motion to dismiss must be denied.

**B. Alter Ego/Continuation - Section 111.06 (1)(a), (c), (d) and (f)**

In addition to the provisions making it an unfair labor practice to violate a collective

bargaining agreement or refuse to abide by a final determination of a dispute, Sec. 111.06 prohibits, inter alia, interference, discrimination and refusal to bargain. The Union complains that the establishment of Highland Electric Company, Inc. is a subterfuge by Jaymes to avoid collective bargaining and the obligations of the contract. In addition to the Sec. 111.06(1)(f) charge, the complaint alleges violations of sub. (a) (interference), (c) (discrimination), and (d) (refusal to bargain). In PEMBER EXCAVATING, INC. DEC. NO. 26672-A (WERC, 2/13/91), the Commission discussed its role relative to WEPA-based unfair labor practice claims that parallel claims under Sec. 8 of the Labor Management Relations Act:

> In LOCAL 248 V. WERB, 11 WIS.2D 277 (1960), CERT. DENIED 365 U.S. 878 (1961), our Supreme Court held that the Commission is preempted from exercising its jurisdiction under the Wisconsin Employment Peace Act where the conduct at issue arguably falls within the scope of the Labor Management Relations Act administered by the National Labor Relations Board. See also MORELAND CORP. V. RETAIL STORE EMPLOYEES UNION, 16 WIS.2D 499 (1962); MARKHAM V. AMERICAN MOTORS CORP., 22 WIS.2D 680 (1964); HANNA MINING CO. V. DISTRICT 2, ETC., ASSOC., 23 WIS.2D 433 (1964); and KLOTZ V. WATHEN 31 WIS.2D 19 (1966). Given the Court's holding, we have consistently concluded that we have no jurisdiction over unfair labor practice complaints involving conduct and parties as to which the National Labor Relations Board would exercise its jurisdiction. [LOCAL 244, BAKERY WORKERS', DEC. NO. 5743 (WERC, 5/61); NOPAK, INC., DEC. NO. 5708-B (WERC, 7/61); LOCAL 200, TEAMSTERS, DEC. NO. 6375 (WERC, 6/63);

> LOCAL 444, MEAT CUTTERS, DEC. NO. 6791 (WERC, 7/64); PORTAGE STOP_N' SHOP, INC., DEC. NO. 7037 (WERC, 2/65); NAPIWOCKI CONSTRUCTION, INC., DEC. NO. 11941-B (WERC, 3/76); TRUCKER'S AND TRAVELER'S RESTAURANT, DEC. NO. 20882-C (WERC, 10/84).]

Likewise the U.S. Supreme Court, IN SAN DIEGO BUILDING TRADES COUNCIL V. GARMON, 359 U.S. 236 (1959), held that state jurisdiction must give way to the NLRB where the substance of a claim under state law is also the subject of regulation under the NLRA:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by Sec. 7 of the National Labor Relations Act, or constitute an unfair labor practice under Sec. 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.
>
> . . .
>
> When an activity is arguably subject to Sec. 7 or Sec. 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

As noted in Examiner Crowley's decision in ANSUL FIRE PROTECTION, DEC. NO. 26848-A (CROWLEY, 5/91), GARMON admits the possibility of state jurisdiction, where the state claim touches only tangentially upon federal rights, or where the claim implicates a peculiarly important local interest, or if the NLRB declines to assert jurisdiction:

> Thus, the U.S. Supreme Court does not apply the GARMON rule in a literal mechanical fashion, but is flexible and has stated that the critical inquiry is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to or different from that which could have been, but was not, presented to the Labor Board. Where the conduct at issue is arguably within the compass of Sec. 7 or Sec. 8 of the NLRA, the state must defer to the exclusive competence of the NLRB. The Commission has recognized that the pre-emption doctrine set forth in GARMON, SUPRA, is effective to preempt jurisdiction in cases where the NLRB has asserted jurisdiction over matters involving substantially identical allegations. The

Commission has not expressly stated that assertion of jurisdiction by the NLRB is a necessary precondition to preemption, rather the Garmon doctrine precludes the assertion of jurisdiction unless and until the NLRB declines to assert jurisdiction. (Footnotes omitted)

None of the possible exceptions noted in GARMON apply to the sub. (1)(a), (c) or (d) claims presented in this case. Each of these claims is presented under a provision of WEPA which has a parallel provision in the NLRA. The substance of the claims is directly related to the regulation of rights and responsibilities arising from the collective bargaining relationship between the parties, which is itself rooted in the NLRA. The Union's claims are much more than tangentially related to federal rights. There is nothing of compelling and peculiar local importance presented by the claims, and the NLRB has not declined to assert its jurisdiction. Thus the interference, discrimination and refusal to bargain aspects of Local 494's complaint against Jaymes and Highland are clearly preempted as being primarily federal claims, subject to the NLRB's jurisdiction. Accordingly, those elements of the complaints must be dismissed.

Dated at Racine, Wisconsin, this 7th day of April, 1998.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

Daniel Nielsen /s/

Daniel Nielsen, Examiner

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