STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BRICKLAYERS AND ALLIED CRAFTWORKERS OF WISCONSIN, DISTRICT COUNCIL OF WISCONSIN, Complainant,

vs.

FM CERAMICS AND JOSEPH STILSON d/b/a FM CERAMICS, Respondents.

Case 2
No. 59645
Ce-2209

Decision No. 30114-B

BRICKLAYERS AND ALLIED CRAFTWORKERS OF WISCONSIN, DISTRICT COUNCIL OF WISCONSIN, Complainant,

vs.

WFO and JONATHAN BURK d/b/a WFO, Respondents.

Case 2
No. 59644
Ce-2208

Decision No. 30106-C

Dec. No. 30114-B
Dec. No. 30106-C
Dec. No. 30157-A
Dec. No. 30156-A

BRICKLAYERS AND ALLIED CRAFTWORKERS OF WISCONSIN, DISTRICT COUNCIL OF WISCONSIN, Complainant,

vs.

FM CERAMICS AND JOSEPH STILSON d/b/a FM CERAMICS, Respondents.

Case 3
No. 59979
Ce-2213

Decision No. 30157-A

BRICKLAYERS AND ALLIED CRAFTWORKERS OF WISCONSIN, DISTRICT COUNCIL OF WISCONSIN, Complainant,

vs.

WFO and JONATHAN BURK d/b/a WFO, Respondents.

Case 3
No. 59978
Ce-2212

Decision No. 30156-A

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by **Attorney Nathan D. Eisenberg**, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, on behalf of Bricklayers and Allied Craftworkers of Wisconsin, District Council of Wisconsin.

Michael, Best & Friedrich, LLP, Attorneys at Law, by **Attorney Thomas P. Godar,** One South Pinckney Street, P.O. Box 1806, Madison, Wisconsin 53701-1806, on behalf of FM Ceramics and Joseph Stilson, d/b/a FM Ceramics, and WFO and Jonathan Burk d/b/a WFO.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Bricklayers and Allied Craftworkers of Wisconsin, District Council of Wisconsin, filed two complaints of unfair labor practice with the Commission on February 2, 2001. One alleged that FM Ceramics and Joseph Stilson, d/b/a FM Ceramics had violated Sec. 111.06(1)(a) and (f) of the Wisconsin Employment Peace Act (WEPA) by refusing to process a grievance to arbitration. The other alleged that WFO and Jonathan Burk d/b/a WFO had violated Sec. 111.06(1)(a) and (f) of WEPA by refusing to process a grievance to arbitration. After informal attempts to resolve the matters through a Commission conciliator proved unsuccessful in each case, the Commission informally assigned two of its staff members to set hearing on each complaint. On April 4, 2001, the Commission formally appointed Sharon A. Gallagher, to act as Examiner in Case 2, No. 59644, Ce-2208. On April 4, 2001, she set hearing on that matter for May 18, 2001. On April 20, 2001, counsel for the parties in both cases filed a Motion for Consolidation with the Commission. On April 25, 2001, the Commission granted the Motion for consolidation, formally appointed Richard B. McLaughlin, to act as Examiner in Case 2, No. 59645, Ce-2209, and substituted Examiner McLaughlin for Examiner Gallagher in Case 2, No. 59644, Ce-2208. On May 25, 2001, FM Ceramics and Joseph Stilson, d/b/a FM Ceramics and WFO and Jonathan Burk d/b/a WFO filed their answer and a counterclaim against Bricklayers and Allied Craftworkers of Wisconsin, District Council of Wisconsin. The Commission captioned the counterclaims as Case 3, No. 59978, Ce-2212 and Case 3, No. 59979, Ce-2213. On June 11, 2001, Bricklayers and Allied Craftworkers of Wisconsin, District Council of Wisconsin filed an amended complaint and an answer to each counterclaim. On June 19, 2001, the Commission appointed Richard B. McLaughlin as Examiner over each counterclaim. In an Order dated June 19, 2001, I set hearing on the consolidated complaints and counterclaims for July 19, 2001. On July 3, 2001, Bricklayers and Allied Craftworkers of Wisconsin, District Council of Wisconsin filed a motion to dismiss the counterclaims, asserting federal labor law preempted them. On July 11, 2001, FM Ceramics and Joseph Stilson, d/b/a FM Ceramics and WFO and Jonathan Burk d/b/a WFO filed a response to the motion to dismiss. In a letter to the parties dated July 12, 2001, I stated:

. . .

With this letter, I deny the Complainant's motion. The basis for the denial is, to a large degree, procedural and practical. Substantively, I believe the law is unlikely to support preemption of the claims captioned above. "Unlikely" is less than a definitive statement of substance, and not a word I typically employ to deny or to grant a motion.

Practically speaking however, I will be unable to get a formal decision to the two of you by the date of hearing. Beyond this, at least some of the assertions supporting Respondents' view of the law are factual in nature. Even if I were to grant the motion to dismiss, I would permit Respondents to enter the material attached to the response as an offer of proof. I believe the better practice is to take that material and any similar material entered by either one of you as evidence. Denying the motion puts the preemption issue, as a matter of fact, "in play." This is, in my view, the best means of creating a record for hearing and for appellate purposes.

Against this background, my initial view that the law in unlikely to support the motion offers further, if less than definitive, support for denying the motion. In my view, the two of you should feel free to create whatever factual record at hearing you deem necessary to support your position on preemption. I will rule on the matter formally and finally in the Findings of Fact, Conclusions of Law and Order I am obligated to prepare after the hearing. Reserving the final conclusion on preemption until the issuance of that decision will, in my view, not work any prejudice on either of you and will serve to make a better record. My current belief that the law will support that result only underscores the practical benefit of denying the motion.

Hearing on the consolidated complaints and counterclaims was conducted in Madison, Wisconsin on July 19, 2001. Becky J. Gantt of Madison Freelance Reporters filed a transcript of the hearing with the Commission on August 21, 2001. The parties filed briefs and reply briefs by September 24, 2001.

FINDINGS OF FACT

1. Bricklayers and Allied Craftworkers of Wisconsin, District Council of Wisconsin, referred to below as BAC, is a labor organization which has offices located in care

of P.O. Box 510617, New Berlin, Wisconsin 53151-0617. BAC consists of fourteen local unions located throughout Wisconsin. The District Council of BAC is an administrative unit headed by an elected Director and Executive Board. Timothy Ihlenfeld is the Director. BAC employs Field Representatives who report to Ihlenfeld. Michael Bernal and Jeffrey Leckwee serve as Field Representatives. Bernal serves primarily in the Milwaukee area, and Leckwee serves primarily in an area consisting of Dane and four contiguous counties. James Judziewicz served BAC as a Field Representative throughout the period from September of 1999 through April of 2000. Judziewicz served primarily in the Milwaukee area, and has retired from employment with BAC.

2. Joseph Stilson lives at 320 Powers Avenue, Madison, Wisconsin 53714. Stilson has installed and repaired ceramic tile under the business name FM Ceramics (FMC), located at his home address.

3. Jonathan Burk lives at 4304 Shore Acres Road, Monona, Wisconsin 53716, and installs and repairs ceramic tile among other construction work. Burk created the business name WFO.

4. Burk and Stilson have each performed ceramic tile installation for Sergenian's Floor Covering of Madison, Wisconsin. Sergenian's supplies various floor coverings to contractors and individuals. Sergenian's has employed tile layers and has contracted with independent contractors for the installation of tile. In September of 1999, Sergenian's provided tile to a TGI Friday (TGIF) then under construction in Brookfield, Wisconsin. Sergenian's contracted with Stilson, doing business as FMC, to install the tile. At the time Stilson first appeared at that job site, he was not party to a collective bargaining agreement with BAC, and was not an individual member of BAC. The TGIF job required floor and wall tile of perhaps three thousand square feet. Stevens Construction served as general contractor for the TGIF project. Stevens is a union contractor. Judziewicz observed Stilson at the TGIF work site in late September of 1999, and approached him, sometime prior to September 28, 1999, to determine if he had a labor agreement with BAC or was a BAC member. He determined that Stilson, as an individual and as FMC, had no affiliation with BAC.

5. Stilson informed Judziewicz that he was a non-union contractor, who contracted through Sergenian's for the work at the TGIF site. Stilson understood Judziewicz to take the position that a non-union contractor could not work on the TGIF site. Stilson understood Judziewicz to take the position that Stilson should get off the job or join BAC. Stilson believes Judziewicz threatened that if Stilson did not choose either option, Judziewicz would, as Stilson

understood it, "get the money out of me one way or another." Stilson further understood Judziewicz to be willing to accept a cash contribution as a form of payment.

6. Judziewicz organized a picket line at the TGIF work site, manned by at least five BAC Field Representatives, including Bernal. The picket line started on September 28, and continued through September 30, 1999. Some non-BAC represented workers at the TGIF work site declined to cross the picket line. Sometime during this period, Burk came to the TGIF site to assist Stilson. Sometime after September 30, the Stevens employed Superintendent of the TGIF work site directed Stilson and Burk to leave the work site. After perhaps eight days off the site, Stilson returned to complete the tile installation. Stilson, with Burk's assistance, eventually completed the tile installation. Burk assisted Stilson on perhaps six work days.

7. Starting sometime in late September of 1999, Stilson and Burk received phone calls at their homes at late evening and early morning hours. When they would answer the phone, no one would respond. Also during this period, Stilson and neighbors heard squealing car tires and honking car horns at odd times of the evening. Stilson heard someone shout "Scab" from a passing car at some point during this time period. On October 13, 1999, after Stilson had returned to the TGIF work site, someone broke the back window of the car typically driven by Stilson's wife. The damage was inflicted at night, while the car was parked in front of Stilson's home. Nothing was taken from the car. No other cars in the neighborhood received similar damage on that evening. Stilson reported the incident to the Dane County Sheriff's Department, and informed them that he felt Judciewicz was harassing him. The Department has not identified the vandal. On October 28, 1999, the rear window of Burk's van was broken. The vandalism occurred while Burk was working at the TGIF site. He had parked the van just outside of the TGIF building. Nothing was taken from the van.

8. On October 19, 1999, Leckee, Ihlenfeld and Bernal met with Stilson and Burk outside of the TGIF building. They discussed the BAC, and whether or not Burk and Stilson should affiliate with BAC, as contractors or as journeyman members. The discussion, at a minimum, included the BAC representatives detailing the advantages of such affiliation. Stilson and Burk ultimately signed separate forms headed "Application for Journeyman Membership in the International Union of Bricklayers & Allied Craftworkers" and "Independent Contractor – Assumption of Agreeement." Each form listed Union No. 13 as the membership local. The membership application stated $250.00 as the "Local Initiation Fee," and contained the following paragraph:

> **FOR SCHEDULE A LOCALS ONLY** Is this applicant working or would he normally work under your Local's collective bargaining agreement and therefore, be eligible for dues check-off status as well as the reduced dues base rates for Schedule A Locals?

Each form listed a "YES" or "NO" response line following this paragraph. Each form had a handwritten mark by the "YES" entry. Stilson and Burk both signed this form, in cursive. Each informed the BAC representatives that he would not pay the $250, leaving any such payment to Sergenian's. The BAC representatives agreed to this. The assumption of agreement form BAC representatives presented to Stilson and Burk is page 33 of a labor agreement, which is referred to below as the Greater Wisconsin Agreement, and which contains the following paragraph:

> The undersigned hereby agrees to assume and be bound by all the terms and provisions of the Bricklayers & Allied Craftworkers District Council of Wisconsin Locals #1, #3, #6, #7, #9, #11, #13, #19, #21, and #34 – WISCONSIN 1999-2002 Labor Agreement.

Burk signed his name in cursive above the "Signed by" entry of page 33, and stated his "Company Name" as "WFO". Burk has never employed anyone or done any business under the name "WFO." Burk used "WFO" to denote "wide fucking open", to reflect his interest in doing business that required the hire of employees. Stilson printed his name above the "Signed by" line of page 33, and stated his "Company Name" as FM Ceramics. Stilson explained to the BAC representatives that he printed his signature because he would not sign, and did not wish to be bound by it. Leckwee signed page 33 of each form for the BAC. Local 13 is the Madison area local of BAC. BAC Local 74 has an agreement that covers the area including the TGIF worksite. The Associated General Contractors of Wisconsin (AGC) is recognized as the employer in the Greater Wisconsin Area Agreement and Tile Contractors as the employer in the Local 74 agreement. The AGC represents a multi-employer bargaining unit. The Greater Wisconsin Agreement includes the following provisions:

ARTICLE III
UNION RECOGNITION, UNION SECURITY, ACCESS

. . .

Section 3.2 **UNION RECOGNITION** The employer hereby recognizes and acknowledges that the union is the exclusive representative of all its employees in the classifications of work falling within the jurisdiction of the union as defined in this agreement, and in the Constitution Rules of Order and Codes of the International Union of Bricklayers and Allied Craftworkers, for the purpose of collective bargaining as provided for in Section 9(a) of the Labor Management Relations Act of 1947 as amended. Inasmuch as the Union has submitted proof and the Employer is satisfied that the Union represents a majority of its employees in the bargaining unit described herein, the employer recognizes the Union as the exclusive collective bargaining agent for all employees within that bargaining unit, on all present and future job sites within the jurisdiction of the Union. The parties agree that they will honor all of the collective bargaining obligations established hereby for the term of this agreement and will enter into good faith negotiations for a successor contract at the appropriate time.

. . .

ARTICLE VIII
GRIEVANCE PROCEDURE

Section 8.1 A Joint Arbitration Committee shall be established consisting of three (3) Employers and (3) Representatives of the Union for the purpose of deciding disputes, which may arise in connection with the application of this agreement. . . .

Section 8.3 In the event the Joint Arbitration Committee is unable to arrive at a decision by the majority vote, within seven (7) days, then the grievance shall be referred to the Wisconsin Employment Relations Commission, with the request that it immediately appoint an Arbitrator.

. . .

ARTICLE X
TRAVELING CONTRACTOR

Section 10.1 When the employer has work specified in Article II of this Agreement to be performed outside of the area covered by this Agreement and within the State of Wisconsin covered by any agreement with another affiliate of the International Union of Bricklayers and Allied Craftworkers, the Employer agrees to abide by the full terms and conditions fo the Agreement in effect in the job site area. . . .

ARTICLE XIV
GENERAL AND MISCELLANEOUS PROVISIONS

. . .

Section 14.10 CONTRACTOR WORKING WITH TOOLS Not more than one member of a firm shall work with tools, and no contractor, or member of a firm shall be permitted to work with tools on a job unless at least one journeyman is employed. . . .

APPENDIX A

. . .

BRICKLAYERS & ALLIED CRAFTWORKERS
LOCAL #13 – WISCONSIN
(MADISON AREA)

Bricklayer, Pointer Caulker Cleaner
Effective June 7, 1999 through January 2, 2000

Base Rate	Dues Check-Off Local I.U.	Vacation Savings	Local H&W	Local Pension	I.U. Pension	Educ IMI	Fund	CA	Total
$23.03	**(.45)(.31)**	**(.50)**	**3.55**	**2.60**	**1.25**	**.25**	**.20**	**.05**	**$30.93**

. . .

9. Neither Stilson nor Burk paid any dues to BAC, or otherwise contacted BAC between the end of work on the TGIF site and April of 2000. BAC did not seek any payment of any type or communicate with Stilson or Burk in any fashion during this period.

10. In late April of 2000, Leckwee observed Stilson and Burk working on a project involving a Kohls' food store in Madison. Sergenian's supplied tile and workers for the Kohls' site. The project involved roughly 20,000 square feet of tile, demanding several workers. Leckwee observed Stilson on several occasions working with, and in Leckwee's view, supervising the work of other tile layers. Leckwee discussed the issue of dues with Burk and Stilson and Sergenian's responsibility for them. Stilson expected to work through the completion of the tile work at the Kohls' site, but did not. Among other factors, difficulty in coordinating work on the general contractor's end of the project compressed the time available for the tile laying process. At least one union contractor that employed a number of employees completed work Stilson originally anticipated performing.

11. At some time during the work at the Kohls' site, Stilson had a phone conversation with Judziewicz. Stilson perceived Judziewicz to be vulgar and threatening. Stilson quit the ceramic tile laying business sometime after his experience at the Kohls' work site.

12. Through separate letters to the Chairman of the AGC Arbitration Committee dated April 25, 2000, Judziewicz filed a grievance against FMC and WFO. Each letter reads thus:

> The Union maintains that WFO, a signatory contractor has violated the Greater Wisconsin . . . 1999-2001 Labor Agreement for work performed in Wisconsin, specifically:
>
> 1. Article XIV, Section 14.10, Employer Obligations.
>
> The union asks that this grievance be handled per Article VIII, Settlement of Disputes.
>
> We have requested the company to provide us with the following information in order for the union to accurately determine the monetary remedy in this case, as well as being afforded its right and obligation to fulfill its duty of fair representation.

1. Complete payroll records, including tax forms, 941, W-2, W-3 and 1099.
2. Time cards of all employees and classification of each employee.
3. Al contracts the company entered into to perform hard tile, marble and terrazzo.
4. Complete list of jobs (including addresses) done by the company.
5. History of subcontracting of bargaining unit work with another entity or by your company to others.
6. Billing and receipt records for all contracted work.

The time frame for this information request is October 19, 1999 to present. We ask that the requested information be turned over no later than May 10, 2000.

. . .

The AGC attempted to contact Stilson and Burk to investigate the allegations of the grievances. Sometime late in June, 2000, BAC notified Stilson and Burk of a Joint Arbitration Committee meeting on July 10, 2000, at which BAC intended to prove the allegations of its grievances against FMC and WFO. Neither Stilson nor Burk attended the meeting, but the BAC presented its case against them, claiming damages in the amount of $42,682.40. The AGC denied the grievances in a letter dated August 30, 2000. BAC then attempted to invoke grievance arbitration through the Commission. Both Stilson and Burk refused to concur in the request for grievance arbitration.

13. On May 12, 2000, Judziewicz filed a charge against WFO and a charge against FMC with the National Labor Relations Board (NLRB). Each states the "Basis of the Charge" thus:

> Since on or about April 24, 2000, the above-named Employer has failed and refused to furnish information to the Union, as requested by the Union, that is necessary and relevant to the processing of grievances and the administration of the collective-bargaining agreement.

After investigation, the NLRB declined to issue a complaint in either matter. BAC withdrew, with NLRB approval, its charge against WFO, and the NLRB informed BAC by letter that it would not issue a complaint against FMC. The NLRB closed each file by July 28, 2000. BAC did not appeal the NLRB's action in either matter.

14. Neither Stilson nor Burk have, in any capacity, employed employees during any time period relevant to this matter. The NLRB declined to process the charge against FMC and the charge against WFO to complaint because it determined neither WFO nor FMC fell within its jurisdiction. Stilson and Burk have operated as self-employed contractors at all times relevant here. Neither Stilson, Burk, FMC nor WFO is an employer. Stilson and Burk have not, at any time relevant here, performed tile laying work as an employee of an employer. In their performance of tile laying work, Respondents did not operate a business affecting interstate commerce.

14. The evidence does not establish the commission of a crime or misdemeanor by a BAC employee. The evidence does not establish that any BAC employee acted by threats, intimidation, force, coercion or vandalism to prevent Respondents' pursuit of lawful work during the period of time spanning the completion of the TGIF and Kohls' projects.

CONCLUSIONS OF LAW

1. Neither Respondent constitutes an "Employee" within the meaning of Sec. 111.02(6), Stats.

2. Neither Respondent constitutes an "employer" within the meaning of Sec. 111.02(7), Stats.

3. Because neither Respondent is an "employer", neither Respondent could execute a collective bargaining agreement with BAC enforceable under Sec. 111.06(1)(a) and (f), Stats.

4. The provisions of the National Labor Relations Act as amended (NLRA) preempt Commission consideration of Respondents' allegations that BAC committed unfair labor practices within the meaning of Secs. 111.06(2)(a) and (g), Stats.

5. The provisions of the NLRA do not preempt Commission consideration of Respondents' allegations that BAC committed unfair labor practices within the meaning of Secs. 111.06(2)(f) and (j), Stats., through acts of violence and intentional interference with Respondents' performance of lawful work.

6. BAC did not commit unfair labor practices within the meaning of Secs. 111.06(2)(f) and (j), Stats., through acts of violence and intentional interference with Respondents' performance of lawful work.

7. Conclusions of Law 1, 2 and 3 are consistent with federal law, including Sections 2(2), 2(3), and 301(a) of the NLRA.

ORDER

The complaints and the counterclaims captioned above are dismissed.

Dated at Madison, Wisconsin, this 17th day of October, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

**FM CERAMICS AND JOSEPH STILSON d/b/a FM CERAMICS
WFO and JONATHAN BURK d/b/a WFO**

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THE PARTIES' POSITIONS

BAC's Initial Brief

The Complaints

After a review of the evidence, BAC contends that Respondents violated Sec. 111.06(1)(f), Stats., by signing a labor agreement, and then refusing to arbitrate disputes under it. The enforcement of an agreement to arbitrate "may be brought in either state or federal court." When brought to the Commission, such an action "invokes the concurrent jurisdiction of the Commission to hear cases under Sec. 301 of the NLRA." In such cases, the Commission must apply federal law.

Since it is undisputed that Respondents signed assumptions of agreement with BAC, factual issues are posed by Respondents' affirmative defenses. Section 8(f) of the NLRA treats contracts in the construction industry differently than in other industries. The assumption of agreement signed by Respondents establishes BAC as a Section 9(a) representative, under Section 3.1 of the labor agreement. Respondents never challenged BAC's majority status within the governing limitations period of six months, and under federal law no timely challenge can now be brought. It follows that Respondents "in this case seek to do exactly what the Board precedent says they may no do; go back and relitigate their recognition of the Bricklayers in September 1999."

Nor will the evidence establish a repudiation of the labor agreement. Burk's October 21, 1999 letter is, if genuine, ambiguous at best, and "is not a valid repudiation of Burk's obligations." Nor can conduct by Respondents in April of 2000 be considered a repudiation. The repudiation did not follow the labor agreement and is untimely in any event.

Respondents can not persuasively rely on NEALON MASONRY, DEC. NO. 27248-A (SHAW, 10/92), to establish that pre-hire agreements are unenforceable under WEPA. NEALON is distinguishable on its facts and "fails to address the concurrent jurisdiction of the commission to adjudicate claims under sec. 301 of the NLRA." The labor agreement at issue

here "is not a prehire agreement under sec. 8(f)." Beyond this, "Section 301 includes jurisdiction over situations where the Board would not assert jurisdiction."

Respondents' assertions that "they never actually 'signed' the agreements" are "frivolous". Whether viewed as a matter of contract or of labor law, the assumption of agreement is binding. Nor can the assertion that Respondents are not employers be credited. At a minimum, the evidence establishes that they "formed economic relationships with other workers to barter labor." Under Section 2(3) of the NLRA and relevant NLRB case law, this is sufficient to establish an employer/employee relationship. Under the labor agreement signed by Respondents, this "relationship is potentially substantial" since "each caulker or clearner would be paid at the rate of $31.08 per hour." To sanction this arrangement would permit employers "to avoid statutory employment regulations such as worker's compensation and unemployment obligations." Beyond this, Respondents' claims that they are not employers are not credible. Their interest in avoiding contractual and statutory obligations colored their testimony at hearing. That they could manage the TGIF or Kohls' jobs without help is not credible. Burk's tax forms establish, at a minimum, that he paid Stilson as an employee. Beyond this, the acknowledged barter relationship with other contractors undercuts any claim that Respondents can function without employees. Credible testimony rebuts any possible inference that Burk or Stilson did not instruct or supervise other workers on the job sites. In sum, Respondents are "'employers' under the NLRA."

Respondents' assertion that the complaints are defective under ERC 2.01 must be rejected. ERC 2.01 "does not require that the person submitting the claim be the same person that signs the claim." ERC 2.12, in any event, allows a party to appear on their own behalf, or by counsel. To accept the Respondents' assertion would eviscerate this rule, and have no basis in Commission law or practice.

BAC concludes that Respondents violated WEPA, and requests that the Commission "order the Respondents to submit the aforementioned grievances to either a joint arbitration Committee or arbitration by the Wisconsin Employment Relations Commission pursuant to Article VII of the Greater Wisconsin Area Agreement."

The Counterclaims

Because the counterclaims "specifically address conduct under Sec. 8(b) of the NLRA" they are preempted by the NLRA. Commission and NLRB case law affirm this conclusion. Nor can the counterclaims be seen to fall within the "limited exceptions to the preemption rule" articulated in GARMON (cited below). Respondents have not filed charges against BAC

with the NLRB, and each of their allegations under WEPA question conduct falling within the NLRA. Beyond this, jurisdiction over the counterclaims "is not based on Stilson or Burk's status under the NLRA, but on the status of the Bricklayers under Sec. 2(5) of the Act." That the NLRB dismissed claims against Burk and Stilson has no bearing on NLRB jurisdiction over BAC. Nor is there any credible evidence that the counterclaims assert any "state law governing public safety."

For the counterclaims to have merit demands some connection between the alleged coercion of signing the assumption of agreement and the acts of vandalism directed against Respondents. There is no such evidence. Stilson could not identify anyone involved in the "late night calls to his house", "the damage to his car window" or the other alleged acts of vandalism. Stilson's testimony is, in any event, not credible. His assertion that law enforcement officials did not want to listen to him because they were in a union is not credible. The counterclaims rest on speculation, and must be rejected.

Respondents' Initial Brief

The Complaints

After a review of the evidence, Respondents contend that the complaints should be dismissed because BAC failed to submit a complaint signed by a party in interest. Case law defines "party in interest", and ERC 2.01 demands that a party in interest submit a complaint. This rule must be distinguished from Sec. 802.05, Stats., which permits complaints to be filed by attorneys on behalf of a litigant. The absence of this authorization in ERC 2.01 must be given meaning, and governing case law demands that the meaning be jurisdictional. Since BAC's attorney executed the complaint and the amended complaint, it follows that the Commission lacks jurisdiction. Nor can this flaw be considered technical. It is BAC's burden to establish that the flaw is technical, not fundamental. That can not be done.

Even if the Commission has jurisdiction over the complaint, neither Burk nor Stilson are employers under WEPA. The "uncontested evidence demonstrates that neither . . . have (any) person working for them." Burk at one time hired employees in his business, but has not done so since 1999. Burk contracted with Stilson to do flooring work in 2000. Stilson was, however, an independent contractor, not an employee, and did no tile work. Stilson has never hired an employee. Stilson acknowledged that friends have assisted him and that Sergenian's contracted with other contractors for the Kohls' job site. Under no provision of WEPA would these arrangements be considered to establish an employment relationship. Thus, the Commission has no jurisdiction over the complaint and it must be dismissed.

Similar considerations govern any asserted application of federal law. Respondents had no employees and are thus not employers under the NLRA. The NLRB confirmed this in correspondence with BAC. Beyond this, Respondents can not be considered to meet the NLRB's jurisdictional limits, apart from the fact that neither did any business outside of Wisconsin. Thus, "the NLRB cannot assert jurisdiction over the Respondents."

If any type of relationship existed between Respondents and BAC "it was at best a 'prehire agreement.'" NEALON MASONRY involves a similar set of facts, and "found that there was no enforceability of a prehire under the Wisconsin Employment Peace Act." It necessarily follows that the complaints must be dismissed.

Considerations fundamental to the law of contracts preclude accepting BAC's contention that the assumption of agreement established a contractual relationship between BAC and Respondents. Because the agreements resulted from BAC coercion, they are not enforceable. Such coercion is difficult to prove, but unmistakable on the record. The harassment started with Judziewicz' demand that Burk and Stilson join BAC, and ended with the execution of the assumption of agreement. The denial of harassment by BAC witnesses is, at a minimum, an unpersuasive explanation of the "wildly coincidental" connection between the beginning and ending of the harassment and the execution of the assumption of agreement. Respondents put the point thus:

> While Respondents did not engage the services of an actuary, one does not have to go beyond common sense to recognize that if these things happened, the odds of mere coincidence at the same time Messrs. Burk and Stilson were also being picketed and "persuaded" to join a Union or sign on as Union contractors would be virtually impossible.

The absence of testimony from Judziewicz underscores the significance of the point. Since Burk's and Stilson's testimony is credible, it is necessary to conclude that Judziewicz threatened them and delivered on his threat. Under Wisconsin case law, it is appropriate to treat the absence of his testimony as providing a basis for an inference adverse to BAC's case. A review of the circumstances surrounding the execution of the assumption of agreement underscores that BAC deliberately coerced the execution of the document. Because the agreement was not willingly entered into, it cannot be considered enforceable.

Nor will the evidence establish a meeting of the minds regarding the labor agreement. Burk's and Stilson's testimony that the discussion of the agreement was brief is credible. The testimony of BAC witnesses is not. A close examination of the evidence will not support the

assertion that Respondents received any contract governing work in Waukesha. Nor does the testimony of BAC witnesses, standing alone, clearly establish what the BAC provided Respondents. There was no meeting of the minds to enter a labor agreement.

If any agreement was reached, it was "a result of the Union's misrepresentation." Judziewicz wrongfully informed Stilson he could not work at the TGIF work site unless he was a union contractor. Later BAC promises to assist Respondents in finding work or employees proved no more reliable. The arguably most "significant misrepresentation was allowing Burk to sign up as WFO with the understanding that there would be no Union relationship unless WFO was seeking to secure larger jobs and needed more employeees." Stilson and Burk each clarified that they were not willing to establish a relationship with BAC. Significantly, BAC took no steps following the execution of the assumption of agreement to contact either. Binding agreements can not be based on fundamental misrepresentation.

Even it could be concluded that Burk and Stilson assumed the labor agreement, each took timely action to repudiate it.

The Counterclaims

The acts of coercion applied against Respondents were accompanied by legal activity such as picketing. However, the pressure applied included conduct "both legal and illegal, both appropriate and abusive" and was applied "to force or attempt to force Stilson and Burk to enter membership and employer agreements which, under law, they had every right to resist." That conduct violates WEPA, and demands the "awarding of damages and attorney's fees to Stilson and Burk."

Contending that Respondents "set out on the great American dream, forming their own business, being self-employed and independent", Respondents conclude that "this dream . . . has been essentially destroyed by the Union." Stilson has given up laying tile, and has watched his income plummet as a result. His immediate and consequential damages "should be approximately $1,000 a week." Beyond this, Respondents had to incur substantial legal fees to fight BAC, "and if any case cries out for the discretion of the Examiner to provide attorney fees, it is this case."

BAC's Reply Brief

The Complaints

BAC contends that this "is not a difficult case, since the merits are essentially undisputed." Respondents signed the governing labor agreements, and now refuse to arbitrate disputes under them. Respondents complicate the case by failing "to apply the correct body of law and the correct precedent to each claim in this litigation." The complaints state an action under Sec. 301 of the NLRA, and governing precedent is federal. The affirmative defenses question the "breach of a Sec. 9(a) Agreement under the NLRA, and any claims about the validity of such agreements are subject to the NLRB's case law on such defenses." Because Respondents failed to challenge BAC's majority status in a timely fashion, it can not use that as a basis to attack the labor agreement. Beyond this, the complaints pose only contract enforcement issues. The merits of the grievances must be left to an arbitrator, and can play no persuasive role in Respondents' defense to the complaints.

The Counterclaims

These claims are preempted by the NLRA. The NLRB has jurisdiction over BAC, and thus "over claims of unfair labor practices committed by the Union." The sections of WEPA at issue under the counterclaims "have direct and identical provisions under the NLRA." Respondents have failed to submit evidence of facts "which indicate that any of the possible exceptions to preemption are appropriate in this case."

Nor is there credible evidence of harassment, or evidence linking such harassment to BAC. Respondents' characterization of Judciewicz' behavior fails to establish coercion. Rather, "the only thing that Judziewicz is alleged to have done is to aggressively solicit Stilson and Burk to sign a union contract, and, once they signed such contracts, to make them adhere to their obligations." Such conduct "is protected under the NLRA, and is not prohibited by the Act."

Respondents' Reply Brief

The Complaints

The language of ERC 2.01 clearly and unambiguously demands that a party in interest submit a complaint. BAC's assertion that a party in interest can be the party's attorney has no basis in the rule. BAC's citation of ERC 2.12 supports Respondents' view, since it applies to

appearance at a hearing, thus confirming the need for a party in interest to submit the complaint. Nor can citation of Sec. 802.05, Stats., address this. That provision, unlike the Commission's rules, specifically authorizes execution by an attorney. The Commission's complaint form underscores this, and the need for a party in interest to swear to the "truthfulness of the claim and its legal basis." BAC's failure to meet this requirement is not a technical defect, but "a fundamental and jurisdictional requisite."

Neither WEPA nor NLRB precedent can make Burk or Stilson employers under WEPA or the NLRA. The absence of compensation to the friends and associates used by Burk and Stilson defeats BAC's claim. If any help used by Respondents could be considered an employee, they would be "temporary" workers or independent contractors, not statutory employees. The Regional Director's conclusion that Respondents did not employ employees should, in any event, "be given considerable weight and consideration."

BAC mischaracterizes the documents signed by Respondents. They did not execute the documents as a show of assent to the assumption of the labor agreement. Even if they had done so, the labor agreement is unenforceable. Assuming Sec. 301 governs this case, the fact remains that the NLRB declined to assert jurisdiction over Respondents, thus making the determination of "employer" status an issue of state law. In fact, the evidence demonstrates that Respondents signed a prehire agreement, unenforceable under Wisconsin law.

Nor can the precedent cited by BAC overcome this conclusion. If the parties entered into an enforceable agreement, under governing law, "it may be enforced by a state tribunal applying federal standards." Respondents are not, however, subject to federal jurisdiction and a prehire agreement is unenforceable as a matter of Wisconsin law. BAC's precedent wrongfully assumes Respondents can be employers as a matter of federal law. Even if this was not the case, NLRB law establishes that an employer can repudiate a contract midterm if the "purported employer . . . had one or fewer employees."

The evidence establishes that Respondents repudiated any relationship with BAC. Under NLRB precedent, such repudiation is effective midterm in circumstances such as those posed here.

The Counterclaims

Since the NLRB has declined to assert jurisdiction over Respondents as employers, it follows that the Commission may do so. Beyond this, the exceptions to the preemption doctrine articulated in GARMON apply.

BAC arguments can not obscure that Judciewicz threatened Respondents and engineered their removal from the TGIF work site. After this, three other BAC representatives appeared to "sign up" Respondents. Nor can BAC's arguments obscure that harassment and vandalism occurred at times corresponding to BAC's efforts to "sign up" Respondents. This evidence may be circumstantial, but affords a sound basis to conclude BAC violated the law.

The vandalism "was troublesome to Mr. Burk, but devastating to Mr. Stilson." The Commission "must not allow businesses to be driven into the ground by threatening and criminal behavior, even (if) it is within the context of labor relations disputes." It follows that the Commission should find BAC violations of WEPA and assess damages against BAC as well as ordering "the Union to pay reasonable attorney fees to these small business owners."

DISCUSSION

The Complaints

Background

The complaints, as amended, allege violations of Sec. 111.06(1)(a) and (f), Stats. There is no contention that the alleged violation of Sec. 111.06(1)(a), Stats., is anything other than a derivative of the alleged violation of Sec. 111.06(1)(f), Stats. Thus, the issue is whether Respondents can be compelled to arbitrate the April 25, 2000 grievances. Threshold to this issue, however, is whether the complaint and the amended complaint were "submitted by any party in interest" as demanded by ERC 2.01.

ERC 2.01 states:

> A complaint that a person has engaged or is engaging in an unfair labor practice may be submitted by any party in interest. Such complaint shall be in writing upon a form provided by the commission, the original being signed and sworn to before any person authorized to administer oaths or acknowledgments. . . .

ERC 2.12 governs appearance at hearing, and has no direct bearing here, although its specific reference to appearance "at such hearing in person, by counsel or otherwise" supports the inference Respondents seek. ERC 1.01 authorizes the Commission to "waive any requirement of these rules unless a party shows prejudice thereby." Respondents urge, however, that CHAUFFEURS, TEAMSTERS AND HELPERS V. WERC, 51 WIS. 2D 391 (1971) makes the demands of ERC 2.01 jurisdictional in effect.

The Commission, in STATE OF WISCONSIN (UW HOSPITAL AND CLINICS) ET. AL., DEC. NO. 28072-B (WERC, 8/97), AT 19, addressed this point thus:

> The Examiner correctly noted that, unlike the complaint administrative code provisions applicable to the Wisconsin Employment Peace Act (WEPA) and the Municipal Employment Relations Act (MERA), ERC 22.02(1) explicitly states that a "representative" may file a complaint. However, this administrative code provision is not an expansion of the entities with standing to file complaints beyond "parties in interest" but rather an explicit acknowledgement (which we find implicit under the WEPA and MERA code provisions) that law firms, or union business agents, or personnel directors generally "file" complaints. While "representatives" can file complaints, an appropriate "party in interest" must be named as the complainant for the complaint to be a valid one.

This case construed ERC 22.02(1), which governs Subchapter V of Chapter 111, Stats. Thus, the Commission's comments concerning WEPA are dicta. However, the dictum states the Commission's view of Respondents' claim that the pleading defect is fundamental. The complaint and amended complaint state BAC as the party in interest. Under the dictum cited above, the submission of the complaint and amended complaint by BAC's counsel is not a defect under ERC 2.01. This also addresses the impact of CHAUFFEURS, since the Commission's view treats the named party rather than the representative filing the complaint as the party in interest. [**Note:** References below to "Section" refer to the NLRA. References to "Sec." or to "Subsec." are to the WEPA]

Thus, the issue is whether the Commission should compel arbitration of the April 25 grievances under Sec. 111.06(1)(f), Stats. BAC correctly points out that the Commission is an available forum for the enforcement of labor agreements. As such, the Commission functions under Section 301(a), and is obligated to apply federal substantive law, see TECUMSEH PRODUCTS V. WERB, 23 WIS.2D 118 (1963) and TEAMSTERS LOCAL 174 V. LUCAS FLOUR CO., 369 U.S. 95 (1962), 49 LRRM 2717 (1962).

The parties submit a series of well argued points concerning whether a collective bargaining agreement exists or is enforceable. BAC asserts that the agreement is an enforceable Section 9(a) agreement, not a pre-hire agreement. Respondents assert that there is no enforceable agreement or that if it is enforceable, it was repudiated.

Threshold to any of these points is whether either Respondent constitutes an "employer." This point is jurisdictional in effect under Wisconsin or federal law.

Sec. 111.02(2), Stats., defines "Collective bargaining" to demand an "employer". Thus, there can be no collective bargaining agreement without an "employer." Section 301(a) affords no federal departure from this conclusion, for it demands an agreement "between an employer and a labor organization."

Wisconsin law governs the determination of "employer" status if the NLRB declines jurisdiction, see THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS ET. AL., DEC. NO. 26527-B (MCLAUGHLIN, 1/91) AFF'D BY OPERATION OF LAW, DEC. NO. 26527-C (WERC, 2/91) or if the determination is not considered federal substantive law.

This potential distinction is, however, of no effect in this case. Under Wisconsin as well as under federal law, neither Respondent constitutes an "employer." The NLRB has declined to assert jurisdiction over either entity because neither employs any employees. Even if Respondents could be considered employers, there is no persuasive evidence they meet the NLRB's jurisdictional yardsticks.

If Wisconsin law governs the point, the same result must be reached. Sec. 111.02(7), Stats., defines an employer as "a person who engages the services of an employee." Sec. 111.02(6)(a), Stats., mirrors the NLRA by excluding the self-employed and independent contractors from the definition of "employee." There is no persuasive evidence that either Respondent ever employed anyone at any time relevant to this proceeding. Bernal and Leckwee testified that they observed Stilson and Burk directing employees at Kohls' and at TGIF. There is, however, no evidence that any were employees of either Respondent. Neither has filed a W-2 for any person at any time relevant here. That Burk's 2000 tax form indicates he paid Stilson $5,000 for doing flooring work or roughly $500 to others for casual labor fails to establish an employer/employee relationship. There is no evidence to rebut Burk's testimony that in each case, the payment was to an independent contractor. Even if the payments could be considered wages, there is no evidence to establish wages paid for work falling within the agreement the BAC attempts to enforce through the complaint.

That Leckwee and Bernal believed each worksite was sufficiently large to require employees indicates the possibility of an employment relationship between Respondents and Burk and others. However, to become a basis for a finding of fact, that testimony demands further evidence. None exists. If the jobs are large enough to demand employees, those employees should have been identifiable and observable on a regular basis. Documentation of their status should exist. Bernal's and Leckwee's testimony that they observed workers in an area including Burk and Stilson falls short of linking them in an employer/employee relationship. Significantly, there is no evidence to rebut Respondents' testimony that Sergenian's provided independent contractors and its own employees to the Kohls' site.

That Respondents acknowledge exchanging labor with friends and contractors does not establish an employer/employee relationship. There is no demonstrated compensation involved, beyond an after dinner drink or the return of a favor in an undetermined manner at an undefined rate at an indefinite time. Stilson, for example, helped Burk do some landscape work on his home. None of the cases cited by BAC can translate this exchange into a compensation system, barter or otherwise. There is no evidence Stilson or Burk exercised any control over the allegedly hired labor, see AMERICAN FEDERATION OF MUSICIANS, ET. AL., DEC. NO. 8392-A (BELLMAN, 3/70), AFF'D DEC. NO. 8392-D (WERC, 11/70). Beyond this, there is no demonstration of a definable means of compensation for the labor see WBAI PACIFICA FOUNDATION, 328 NLRB NO. 179, 162 LRRM 1070 (1999) and UNITY ALCOHOLISM SERVICES, INC., DEC. NO. 21695 (WERC, 5/84). Some consistent exchange of money or service over time, and some means of valuing the exchange must be established. None is evident here.

LOCAL LODGE NO. 1424 V. NATIONAL LABOR RELATIONS BOARD (BRYAN MFG. CO.), 362 US 411, 45 LRRM 3212 (1960) has no bearing on the determination of employer status. BAC cites this case to establish that Respondents cannot timely challenge BAC's majority status. This ignores that it is Respondents' status as employers that is the essential determination. If neither is an employer, there is no majority status to dispute, for there is no jurisdiction to exercise.

The complaints must, then, be dismissed because the Commission is without authority to enforce Sec. 111.06(1)(f), Stats., against either Respondent as an "employer." Because neither is an employer, there is no agreement to enforce. Ultimately, BAC's attempt to enforce the Greater Wisconsin Agreement obscures the fundamental ambiguity of its action on October 19, 1999. BAC enrolled Stilson and Burk simultaneously as employers and as employees. That a journeyman member can act as an employer can be granted, cf. AMERICAN FEDERATION OF MUSICIANS ET. AL., *supra*. The roles are, however, mutually exclusive at a single point in time, *ibid*. A journeyman member cannot act as an employer unless and until an employee is hired. The Order entered above thus dismisses the complaints.

The Counterclaims

The counterclaims pose a series of troublesome issues of fact and law, turning on Secs. 111.06(2)(a), (f), (g) and (j), Stats.

Threshold among these issues is BAC's assertion that federal law preempts Commission action. BAC's post-hearing preemption argument is stronger than its pre-hearing argument. The pre-hearing argument presumed WFO and FMC were employers under the NLRA. The

NLRB's refusal to assert jurisdiction over them undercut the pre-hearing preemption argument, since the Commission will assert jurisdiction over employers where the NLRB declines to, see Section 14(c). The conclusion that neither WFO nor FMC are employers complicates the preemption analysis. BAC underscores the difficulty by its post-hearing argument that the jurisdictional focus of the counterclaims is not Respondents' employer status, but BAC's status as a labor organization subject to Section 8(b)(4) and (7).

Analysis of this difficulty must start with the precepts of BUILDING TRADES COUNCIL (SAN DIEGO) v. GARMON, 359 U.S. 236, 43 LRRM 2838, 2842 (1959), where the Court stated: "When an activity is arguably subject to Sec. 7 or Sec. 8 of the Act, the States . . . must defer to the exclusive competence of the National Labor Relations Board." The Court's majority made the standard flexible, to accommodate competing state and federal interests:

> State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction. 43 LRRM AT 2843.

The "situations" pointed to by the GARMON court include "conduct marked by violence and imminent threats to the public order" *ibid.*, citing CONSTRUCTION WORKERS v. LABURNUM CORP., 347 US 656, 34 LRRM 2229 (1954) and "the traditional law of torts" 43 LRRM AT 2843. Illustrative of the latter situation is FARMERS v. CARPENTERS, LOCAL 25, 430 US 290, 94 LRRM 2759 (1977), in which the Court found the NLRA did not preempt a state court action for the intentional infliction of emotional distress.

The Commission has incorporated GARMON into its case law, see PEMBER EXCAVATING, INC., DEC. NO. 26672-A (WERC, 2/91), and has addressed the relationship of WEPA to the NLRA to demand that WEPA give way to NLRA provisions "(w)here parallel provisions exist." AQUA-CHEM, INC. DEC. NO. 26102-B (WERC, 11/90) AT 8.

These broad precepts must be applied to the allegations of the counterclaims. Sec. 111.06(2)(a), Stats., is closely parallel to Section (8)(b)(1). The alleged violation of Sec. 111.06(1)(a), Stats., however, suffers from a more fundamental flaw. Sec. 111.06(2)(a), Stats., like Section (8)(b)(1), precludes coercion of an "employee" or "employees." As noted above, Respondents are not "employees" under the Wisconsin or federal act. Thus, the Commission lacks authority to address Respondents' claims under Sec. 111.06(2)(a), Stats., whether viewed as a matter of preemption or as a matter of its jurisdiction to protect the rights of "employees."

Sec. 111.06(2)(g), Stats., regulates secondary boycotts and similar activity. This is parallel to Section (8)(b)(4). The threats and intimidation Respondents assert do not fit well into either provision. In any event, the parallel protections of the acts demand that WEPA give way to the NLRA, and this claim is preempted.

Respondents' claims that can withstand the preemption argument focus on Secs. 111.06(2)(f) and (j), Stats. Subsec. (f) makes it an unfair labor practice for a union to "hinder . . . by . . . force or coercion of any kind the pursuit of any lawful work." Subsec. (j) proscribes the commission of "any crime or misdemeanor" in an employment relations controversy. In each, the proscription is directed to a union as an entity or to individual employees, and neither section is restricted to the protection of an "employee." Subsec. (f) also refers to picketing, which is regulated by the NLRA, but the focus of the counterclaims is not the September, 1999 picketing, but the threats and intimidation BAC representatives allegedly applied to Respondents. The counterclaims focus on violent (the smashing of car windows) and tortious (intentional interference with employment) conduct tied to the federalism exceptions articulated in GARMON.

As applied to the counterclaims, neither Sec 111.06(2)(f) nor (j), Stats., has a clear parallel in the NLRA. Even if such a parallel can be inferred, the counterclaims concern self-employed individuals who do not deal in interstate commerce. Thus, there is no evident federal regulation to counterweigh WEPA's stated interest in the regulation of criminal or quasi-criminal coercion by BAC. Neither the majority nor the concurring opinion in GARMON supports BAC's assertion of preemption, whether BAC's status as a labor organization or Respondents' status as an employer is considered the jurisdictional focus.

In sum, the sole claims made by Respondents that can withstand a preemption analysis involve Secs. 111.06(2)(f) and j, Stats. It thus becomes necessary to consider the merit of the allegations of the counterclaims under these subsections.

The application of Sec. 111.06(2)(j), Stats., does not require extensive discussion. Respondents do not isolate "any crime or misdemeanor" committed by a BAC representative. Presumably, breaking car windows constitutes a crime or misdemeanor. The Commission can independently determine whether conduct subject to criminal sanction also constitutes an unfair labor practice, see LAYTON SCHOOL OF ART & DESIGN V. WERC, 82 WIS.2D 324 (1978). However, it is necessary for a claimant to identify a specific crime or misdemeanor and produce evidence meeting the elements of proof. The assertion of "wildly coincidental" acts of harassment may be sufficient to establish threats, intimidation or coercion, but falls short of identifying or proving a specific crime or misdemeanor. Even if the Commission can

independently posit the crime or misdemeanor involved, (see, e.g. Sec. 134.03, Stats.) it must be proven that BAC representatives committed it. That point is addressed below, and the persuasive force of the counterclaims must turn on Sec. 111.06(2)(f), Stats.

The force of Respondents' arguments on this section, although based on circumstantial evidence, must be acknowledged. The evidence paints a troubling picture, and the allegations cannot be disposed of by a credibility determination. Beavers' testimony corroborates that of Stilson and Burk. This establishes that acts of vandalism coincided with Respondents' difficulties at the TGIF worksite. The Stilsons were clearly and justifiably upset by the incidents. There is no evident basis to dismiss Stilson's testimony that his conversations with Judziewicz involved comments that could be taken as threats. The absence of Judziewicz' testimony hurts BAC's defense. Nor is it easy to treat the October 19, 1999 meeting as an organizational effort to recruit new members or contractors. The absence of any communication from BAC to Stilson or Burk following the session makes it appear as something other than a serious organizational effort. None of the BAC representatives specifically remembered supplying either Burk or Stilson with a Greater Wisconsin or Local 74 agreement. The ambiguity of the meeting also lends credence to Respondents' claims. That Stilson and Burk were enlisted as employees and employers at the same time makes it possible to infer that the effort was directed toward a goal other than recruitment. The inflated damage demands of the grievances asserted by BAC may reflect aggressive advocacy, but may also reflect a continuing attempt to intimidate individual contractors.

Sec. 111.07(3), Stats., however, demands that the inference sought by the counterclaims rest on "a clear and satisfactory preponderance of the evidence." Respondents' arguments do not rest on this solid a foundation. The credibility determination noted above cannot be made by labeling the testimony of BAC representatives not credible. That Bernal and Leckwee could not specifically remember giving Stilson or Burk a labor agreement does nothing to discredit their testimony. It would have been a simple enough misrepresentation for either, particularly if their testimony is to be taken as no more than a series of misrepresentations. Beyond this, Stilson and Burk acknowledged that the October 19, 1999 meeting did involve a substantial sales pitch. That the witnesses differ on the length of the meeting is more reconcilable to a conflict of perception regarding the sales pitch than to a conflict of perception regarding a threat that implied violence. Each BAC witness felt as strongly about the allegations of the counterclaims as did Respondents. Nor is Stilson's testimony beyond question. He testified that the Dane County Sheriffs who investigated his claim showed no interest in his concern with possible BAC involvement because they were members of a union. If this is to be credited, it is difficult to reconcile with Stilson's willingness to let the matter end there. Beyond this, he testified the phone calls and drive-bys

spanned a period from the late September picketing through October 19, 1999. Beavers testified that the traffic noise did not go on terribly long, stopping before he decided to report it to the Sheriff's Department.

The coercion attributable to the October 19, 1999 meeting is, at best, debatable. Burk described his execution of the assumption of agreement as a response to "three huge guys standing around me telling me I couldn't work unless I filled this stuff out" (Transcript at 287). Even assuming the BAC representatives are accurately described as "huge," it is easier to overstate than to understate the force applied. Neither Burk nor Stilson felt sufficiently threatened to acquiesce without objection to the execution of the documents. Both stated that they would leave the payment of dues to Sergenian's, and each openly voiced skepticism regarding the benefits of joining BAC. The meeting took place in the open, in broad public view. Nothing in the context of the meeting described by any of the witnesses details a significant level of coercive conduct.

More significantly, the most troublesome aspects of the evidence of coercion are equivocal. It is not evident what BAC gained by applying the alleged level of intimidation. The smashing of Mrs. Stilson's rear window is argued to be part of a pattern of coercion leading to the execution of the assumption of agreement. The unidentified phone calls are asserted to have ceased with the execution of that document. If the goal of the vandalism was to secure the assumption of agreement, it is impossible to understand why Burk's window was broken on October 28, 1999, well after the execution of the document that prompted the vandalism. There is some testimony that the unidentified phone calls resumed with the difficulties at the Kohls' site. The force of that testimony is muted. Mrs. Stilson was a credible witness, and found it difficult to pinpoint when the calls occurred. Ultimately, she testified that they probably occurred "right around that beginning part of April" (Tr. at 240). While the difficulties at the Kohls' site are difficult to date precisely, they appear to date from late April, most probably April 25. Ambiguity on this point undercuts Respondents' case.

The absence of Judziewicz's testimony hurts BAC's defense, but cannot be made the centerpiece of Respondents' claims. The burden of proof on the counterclaims falls on Respondents, and there is no evidence that Respondents sought to subpoena Judziewicz. Beyond this, the inference sought by Respondents demands something more than the existence of hostility between Judziewicz and the non-union contractors. The counter claims seek to establish considerable damages traceable to a pattern of intimidation and violence by BAC representatives. Even inferring the vandalism was based on hostility toward non-union labor falls short of placing responsibility on BAC. Non-BAC represented employees left the TGIF work site during BAC picketing. That others were aware of the presence of non-union

workers at the site affords an arguable basis for an inference that non-BAC affiliated individuals committed the vandalism. This falls short of resolving the source of the vandalism, but the absence of proof to link the violence to BAC undercuts the counterclaims.

On balance, the evidence of coercion is not sufficiently sound to establish a violation of Sec. 111.06(2)(f), Stats. That the evidence is troubling or that inferences adverse to BAC are possible falls short of establishing a basis to invoke the operation of law to compel the remedies Respondents seek.

The Order entered above dismisses the complaints and the counterclaims. This falls far short of resolving the troublesome undercurrents posed by this litigation. It reflects, however, the ambiguity surrounding the allegations. That ambiguity precludes the invocation of the Commission's coercive authority for the benefit of BAC or the Respondents.

This ambiguity is reflected in the Conclusions of Law stated above. Those conclusions could, but do not, identify Burk and Stilson as independent contractors. Rather, they reflect that neither has been proven to be an "employer" or an "employee." This reflects the ambiguity underlying the evidence, and underscores that neither party has carried the burden of proving their claims.

Dated at Madison, Wisconsin, this 17th day of October, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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