STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, LOCAL 599, Complainant,

vs.

CHARLIE BOWMAN, CT CONSTRUCTION, AND/OR ITS ALTER EGO AND/OR ITS SUCCESSOR TC CONSTRUCTION, Respondent.

Case 1
No. 70914
Ce-2256

Decision No. 33602-A

Appearances:

Charles Bowman, *pro se*, appeared on behalf of the respondent.

Sara J. Geenen, Attorney at Law, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin, appeared on behalf of the Complainant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Operative Plasterers' and Cement Masons' International Association, Local 599. filed a complaint with the Wisconsin Employment Relations Commission, herein "Commission," on September 9, 2011, alleging that Charlie Bowman, CT Construction, and TC Construction, committed unfair practices within the meaning of Sec. 111.06(1)(a), (d), (f) of the Wisconsin Employment Peace Act (herein "WEPA"),[1] by refusing to bargain with complainant and repudiating the parties' collective bargaining agreement, and violating the collective bargaining agreement in effect by not paying its employees the full specified wages and benefits; and the Commission having on December 12, 2011, appointed Stanley H. Michelstetter II, a member of its staff, as Examiner, and the Examiner having held a hearing in Milwaukee, Wisconsin, on

[1] The complaint alleged violations of the corresponding provisions of the Municipal Employment Relations Act, Sec. 111.70, Stats. No "municipal employer" is involved, only a private employer within the meaning of Sec. 111.02, Wis. Stats. I noted in my October 24, 2011, initial letter that I was treating the complaint as one solely under WEPA and the notice of hearing so indicated.

January 23, 2012, and the parties having each filed post-hearing briefs the last of which was filed February 8, 2012. The transcript in the proceedings was first received May 31, 2012. The record was closed as of that date. Having considered the evidence and arguments of the parties, the Examiner hereby makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Operative Plasterers' and Cement Masons' International Association, Local 599, herein "Complainant," is a labor organization with offices at 8701 North Lauer Street, Milwaukee, Wisconsin. At all material times, Randy Hink and Terry Ullsperger (herein "Hink" and "Ullsperger" respectively) were business agents for Complainant.

2. Charlie Bowman (herein individually "Charlie") is a married adult individual who resides at 1409 Little Dam River Road, in Claudville, Virginia, together with his wife Theresa Bowman (herein individually "Theresa"). The two have were married in Virginia. They have co-habited at all relevant times at the foregoing address. Charlie and Theresa own TC Construction, an unincorporated business, and CT Construction, an unincorporated business, each of which has its principle offices in their marital residence. Charlie, CT Construction and TC Construction are herein collectively referred to as "Respondents."[2]

3. Michael Young is Charlie's son.[3] He performed services solely in the role of an employee for CT and TC during the period in dispute.

4. On July 22, 2008, Complainant and Charlie Bowman acting individually and in the name of CT Construction entered into a collective bargaining agreement by which he agreed to be bound by the terms of a comprehensive collective bargaining agreement between the Southeastern Wisconsin Drywall and Plastering Contractors Association and Complainant covering the period June 1, 2008, through May 31, 2012. The assumption agreement specifies that:

> By execution of this Agreement, the Employer authorizes the Southeastern Wisconsin Drywall and Plastering Contractors Association to act as its collective bargaining representative for all matters relating to this Agreement. The parties agree that the Employer will hereafter be part of the multi-employer bargaining unit unless this authorization is withdrawn by written notice to the Southeastern Wisconsin Drywall and Plastering Contractors Association and the Union at least 150 days prior to the expiration of this or any successor Agreement.

[2] Theresa is not named as a respondent in the complaint. For the purposes of factual discussions she is included in the concept of "Respondents;" however, she is not directly included in the concept for the purposes of the order made herein. No decision is made as to the effect of the marital relationship for purposes of enforcing the order made herein.

[3] This finding is made solely for the purposes of this proceeding.

. . .

> The Employer agrees to recognize, and does hereby recognize the Union as the exclusive collective bargaining agent for all employees performing Plasterers work on all present and future sites within the jurisdiction of the Union.

The comprehensive agreement contains the following relevant provisions:

ARTICLE II – RECOGNITION

> Section 1. The Employers bound by this Agreement recognize the Union as the exclusive majority representative of all employees covered by this Agreement in the bargaining unit set forth in this Agreement pursuant to Section 9(a) of the Labor-Management Relations Act. This majority status has been established by the Union's unequivocal demand for recognition as majority representative, the Employer's unequivocal granting recognition of the Union's majority 9(a) status based on the Union having shown or having offered to show an evidentiary basis of the Union's majority support. Section 9(a) status may have also resulted based on a National Labor Relations Board certification that the Union is a majority representative of the bargaining unit covered by this Agreement, doing the following work:
>
> (a) All interior or exterior plastering, cement, stucco, stone, imitation, dryvit, sto, R-Wall, Sure-Wall and all other Outsulation materials, and all similar materials pertaining to the plastering industry or any patent material when cast, the setting of same, fireproofing, and also corner beads when stuck must be done by practical Plasterers of the O.P. & C.M.I.A. This includes the plastering and finishing with hot composition materials in vats, compartments or wherever applied; also the taping and jointing of all joints, nail holes and bruises on wallboard, regardless of the type of materials or tools used, when covered in its entirety; also the setting in place of plasterboards, ground blocks, patent dots, cork plates, Styrofoam, and brownstone, including temporary nailing, cutting and fitting in connection with the sticking of same. All acoustic blocks when stuck with any plastic materials, regardless of thickness, shall be the work of the Plasterer only. Also the sticking, nailing and screwing of all composition caps and ornaments. The preparing, scratching and browning of all ceilings and walls when finished with terrazzo, or tile shall be done by Plasterers of this Association, allowing sufficient thickness the applying of the terrazzo or tile and the application of any plastic material to the same must be done by members of the O.P. & C.M.I.A., who are practical Plasterers.
>
> (b) All Cement Plastering shall be supervised and executed by the Plasterer on walls, over and above the six (6) inch base.

(c) Plasterers claim all waterproofing of work included in their jurisdiction, such as Thoroseal, Ironite, Plaster weld and any similar products, regardless of the tools used, or the method of application, or color of materials used and regardless of the type of base these materials may be applied to.

(d) All moldings run in place and all staff work, the making of templates and horsing of molds in and on buildings must be made and produced by members of the O.P. & C.M.I.A.

(e) Plasterers claim the grouting of hollow metal door frames in stud partitions when grouted with plaster materials.

(f) The Plasterers claim all work listed in the Operative Plasterers' and Cement Masons' International Association constitution.

Section 2. The Union recognizes the Southeastern Wisconsin Drywall and Plastering Contractors Association, as the exclusive bargaining representatives with reference to wages, hours of work and conditions of employment, for all Plastering contractors on all present and future work sites within the geographical area covered by this Agreement.

. . .

ARTICLE VIII – GENERAL PROVISIONS

Section 3. All members of the Unions are at liberty to work for any Employer who is a party to this Agreement. All Employers are at liberty to employ and discharge any employee without discrimination.

. . .

ARTICLE IX – JURISDICTION

The territorial jurisdiction of this contract shall cover the following counties: Milwaukee, Washington, Waukesha, Ozaukee, Waushara, Winnebago, Racine and Kenosha.

ARTICLE X – JURISDICTIONAL DISPUTES

Section 1. It is agreed that this Collective Bargaining Agreement covers all work within the work jurisdiction of the Operative Plasterers' and Cement Masons' International Association as presently set forth in its International Constitution under the sections dealing with Plasterers' and Cement Masons' jurisdiction. The Employer agrees to recognize the jurisdictional claims of the

Union that have been established by agreements of record with other crafts, awards contained in the Green Book, or as a result of decisions by the National Joint Board for Settlement of Jurisdictional Disputes.

Section 2. The Plasterers shall have the jurisdiction over but shall not be limited to the scope of work listed in the Constitution of the Operative Plasterers' and Cement Masons' International Association of America.

ARTICLE XI – ARBITRATION

Section 1. In case of any disagreement over the interpretation, application of (sic) enforcement of specific terms of this Agreement, except jurisdictional disputes, between the Union and an Employer which cannot be settled between such parties, the same shall be submitted in writing within forty-eight (48) hours of the date of the complaint (which in no case shall exceed fourteen (14) days from the date the reason for the grievance occurred) to a Board of Arbitration composed as follows: Three (3) members to be chosen by the Southeastern Wisconsin Drywall and Plastering Contractors Association and three (3) members to be chosen by the Union. In case of disagreement a seventh member shall be chosen by the six (6) members first chosen, within forty-eight (48) hours and in the case the six (6) cannot agree on the seventh member, then the Federal Mediation & Conciliation Service shall be requested to supply a panel of five (5) names, from which each party will alternately strike two (2) names, the remaining name being the seventh member of the Board of Arbitration. A decision of a majority of this Arbitration Board shall be rendered within seven (7) days and shall be binding on both parties. In rendering its decision, the Arbitration Board shall neither add to, detract from nor modify any of the provisions of this Agreement. Either party failing to fulfill their obligations under this clause shall forfeit their contention in the dispute to the other party. It is further agreed that expenses incurred by the Arbitration Board are to be borne equally by both parties, except that neither party shall bear its own costs for witnesses, attorneys and all other out-of-pocket expenses it incurs. Nothing herein shall be construed to obligate either party to arbitrate differences with respect to the terms of a new Agreement when his Agreement has been terminated as herein provided.

Section 2. Each party hereto agrees that there shall be no strikes or lockouts during the life of this Agreement.

. . .

ARTICLE XVI – PAY PROVISIONS

Section 1. The minimum scale of wages for each type of class employee shall be as indicated on Appendix "A" and Appendix "B", attached hereto.

. . .

ARTICLE XVIII – SUBCONTRACTING

The Employer agrees not to subject, assign or transfer any work covered by this Agreement to be performed at the site of a construction project to any person, firm or corporation except where the contractor signifies and agrees in writing to be bound by the full terms of this Agreement and complies with all of the terms and conditions of this Agreement. All charges of violation of this Article shall be considered as a dispute and shall be processed in accordance with the provisions of this Agreement covering the procedures for the handling of disputes and the final and binding arbitration of disputes.

ARTICLE XIX – PENSION FUND

Section 1. The Employer shall pay into the Building Trades United Pension Fund the sum per hour specified in Appendix "A" or Appendix "B", attached hereto for each hour that an employee works, by the fifteenth (15^{th}) day of the following month for each hour that an employee works.

. . .

Section 4. The Association and the Union and all Employers covered by this Agreement, agree to be bound by all of the terms of the Building Trades United Pension Trust Fund Agreement and by all of the actions of the Trustees administering such Pension Fund in accordance with the Trust Agreement. Plans and rules of the Trustees provided that such Trust Agreements, Plans and rules shall not be inconsistent with this Agreement. Each employer covered by this Agreement hereby accepts as Trustees the Trustees appointed under said Trust Agreements by the Association and the Union, respectively, and all such succeeding Trustees as will be appointed in accordance with the Trust Agreements. The Employer hereby ratifies all actions already taken or to be taken by such Trustees consistent with applicable law and within the scope of their authority.

ARTICLE XX – WELFARE FUND

Section 1. The Employer shall pay into the Wisconsin Laborers Health Fund Trust, or the Wisconsin Masons Health Fund Trust, the sum per hour specified in Appendix "A" or Appendix "B", attached hereto for each hour that an employee works, by the fifteenth (15th) day of the following month.

Section 2. Each Employer covered by this Agreement shall contribute to the Wisconsin Laborers Health Fund, or the Wisconsin Masons Benefit Funds, for health and welfare benefits and administrative costs, the sum per hour as specified in Appendix "A" or Appendix "B" effective June 1, 2008 through May 31, 2012 for all hours worked, for all employees covered by this Agreement.

. . .

ARTICLE XXI – APPRENTICESHIP FUND

Section 1. The Employer shall pay into the Wisconsin Operative Plasterers' & Cement Masons' Journeymen & Apprenticeship Training Fund the sum per hour specified in Appendix "A" or Appendix "B", attached hereto for each hour that an employee works, by the fifteenth (15th) day of the following month.

Section 2. Each Employer covered by this Agreement shall contribute to the Wisconsin Operative Plasterers' & Cement Masons' Journeymen & Apprenticeship Training Fund, for Apprenticeship benefits and administrative costs, the sum per hour as specified in Appendix "A" or Appendix "B" effective June 1, 2008 through May 31, 2012 for all hours worked, for all employees covered by this Agreement.

. . .

ARTICLE XXII – ANNUITY PENSION FUND, 401(k) FUND

Section 1. The Employer shall pay into the Union Individual Account Retirement Fund (U.I.A.R.F.) the sum per hour specified in Appendix "B", attached hereto for each hour that an employee works, by the fifteenth (15th) day of the following month.

Section 2. Annuity Pension Fund: It is mutually agreed by the parties to this Agreement, that the Employer shall become a part of the Annuity Pension Fund, established by the Union Individual Account Retirement Fund. The contribution by the Employer shall be set out in the Wage Scale in Appendix "B" for each hour worked per week by the employees.

. . .

ARTICLE XXIII – IAP/CLMC/DEVELOPMENT FUND

Section 1. During the life of this Agreement, each Employer covered by or subject to this Agreement, shall pay to the Industry Advancement Program/Contract Administration (hereinafter referred to as IAP/CA) Fund, for each Employee covered by or subject to this Agreement, the amount nine cents ($0.09) per hour for actual time worked by such Employee.

Section 2. These payments shall be made no later than the fifteenth (15th) day of each month following the month for which payment is to be made. Payments are to be sent with the required remittance report to IAP/CA, P.O. Box 507, Brookfield, WI 53008-0507. Of the nine cents ($0.09) per hour the IAP will remit $0.02 per hour to CLMC as management's contribution to the CLMC including the funding of Big Step. The IAP will also remit $0.02 per hour to CLMC including the funding of Big Step as the Union's funding of those programs. The IAP/CA will remit five cents ($0.05) per hour to the Plasterers Industry Development Fund ("Development Fund").

. . .

ARTICLE XXIV – ENFORCEMENT OF PAYMENTS TO FRINGE BENEFIT FUNDS

Section 1. A "Fringe Benefit Fund", as that term is used in this Article, is any Trust Fund to which the Employer is obligated to make contributions under this Agreement.

Section 2. The Employer's obligation under this Agreement to make payments and contributions to Fringe Benefit Funds for all employees covered by this Agreement applies to all employees regardless of membership or non-membership in the Union and is from the employee's first hour of employment.

Section 3. All payments to the Fringe Benefit Funds for employees covered by this Agreement, and while the same is in effect, are deemed to be paid pursuant to this Agreement.

. . .

ARTICLE XXVII – OTHER CONTRACTS

Section 1. No agreements, alterations, understandings, variations, waivers, or modifications of any of the terms, conditions or covenants contained in this

Agreement shall be made by any Employer or group of Employers with any employees or group of employees, and in no case shall it be binding on the parties hereto.

. . .

ARTICLE XXXII –DURATION

Section 1. This Agreement shall be binding upon the parties, their successors and assigns, and shall continue in full force and effect until May 31, 2012, and from year to year thereafter, unless terminated by written notice given by either party to the other at least sixty (60) but no more than ninety (90) days prior to the expiration date of May 31, 2012, or any anniversary thereof. Since it is the intention of the parties to settle and determine, for the term of this Agreement, all matters constituting the proper subjects of collective bargaining between them, it is expressly agreed that unless otherwise provided in this Agreement that there shall be no re-opening of this Agreement for any matter pertaining to rates of pay, wages, hours of work, or other terms and conditions of employment, or otherwise, during the term of this Agreement.

In the event a new contract has not been agreed to prior to the above termination date, the parties shall work under the terms and conditions of this Agreement until a new Agreement is entered into, provided, however. The Union shall have the right to strike and the Employer shall have the right to lock out at any time after the termination of this contract.

. . .

APPENDIX "A" – AREA 138

MILWAUKEE, OZAUKEE, WASHINGTON, WAUKESHA, WAUSHARA, WINNEBAGO COUNTIES

The minimum scale of wages for each type of employee shall be as follows and shall remain in force and effect, unless changes are made as herein provided for:

EFFECTIVE **June 1, 2008** through **May 31, 2009**

	BASE RATE	*WD	H & W	PENSION	APP. FUND	IAP/CLMC	TOTAL PACKAGE
PLASTERERS	28.41	-1.48	7.30	6.93	.30	.09	43.03
FOREMEN	31.25	-1.48	7.30	6.93	.30	.09	45.87

5. Respondent employed one person at various times when Respondent did work in Wisconsin, Claude M. Smith, Jr. (herein "Smith"). Smith was a member of Complainant and was the sole person in the bargaining unit specified in Finding of Fact 4 above. Respondent employed Smith at various times after July 22, 2008, to perform plastering work in Wisconsin within the jurisdiction of Complainant and paid Smith for his work in accordance with the terms of the collective bargaining agreement specified in Finding of Fact 4, above, until the facts specified below.

6. On September 29, 2010, Respondents sent a letter on CT letterhead to Complainant which was received by Complainant shortly thereafter notifying Complainant in relevant part:

> . . . I no longer wish to be part of Local 599 in the state of Wisconsin. I am withdrawing from the Local 599 as of today.
>
> . . .
>
> Should I travel to Wisconsin in the future to work; it will be for a non-union company and non-union jobs. I've had all I can take.

At all material times thereafter, Respondents refused to honor the terms of the collective bargaining agreement as being binding on them, refused to collectively bargain with Complainant, and refused to honor the grievance process of the collective bargaining agreement.

7. On or before, November 17, 2010, Respondents notified Smith that they refused to employ Smith unless he executed a waiver of his rights under the collective bargaining agreement specified in Finding of Fact 4, above. Respondent prepared the waiver and had Smith fill in his name and sign it. Smith signed it on November 17, 2010. The waiver read in relevant part:

> I, Claude M. Smith [signature], by signing this agreement, do hereby declare that I am working for C-T Construction for the hourly rate of $26.50 per hour on this **non-union** job. I am working on this job with C-T Construction because there are no union jobs available. At no time later will I go to the union seeking benefits as this is a non-union job.

8. Respondents employed Smith from November 17, 2010, to January 29, 2011, on a construction job at 92nd and Howard in Milwaukee, Wisconsin, to perform plastering work within the substantive and territorial jurisdiction of Complainant. Respondents paid him the contractual wage rate of $26.50 per hour, but did not pay him all of the benefits as required by the collective bargaining agreement specified in Finding of Fact 4, above. Charlie and Young also performed plastering work on that job.

9. In January, 2011, Hink came to the 92nd and Howard work site and demanded that Respondents pay Smith the full wages and benefits he was entitled to under the collective bargaining agreement. Charlie stated that the job was a "non-union" job and that he would not do so. He told Hink that he was going to put the company in his wife's name and it would be henceforth known as TC. On January 17, 2011, Ullsperger met with Charlie at the same work site and had a conversation which was substantively the same.

10. On January 18, 2011, Smith withdrew from Complainant in order to retain his job with Respondent.

11. On January 18, 2011, Respondents faxed a letter to Complainant from Respondents' Virginia office stating that CT Construction will close on January 31, 2011.

12. On January 18, 2011, Respondents faxed a copy of the documents specified in Finding of Fact 6 to Complainant from Respondents' Virginia office.

13. Complainant filed a grievance alleging that Respondents violated the collective bargaining agreement by the conduct specified above.

14. On February 1, 2011, Respondents began to operate as TC. Respondents did not accept any further work in the name of TC after February 1, 2011.

15. Shortly after February 1, 2011, Respondents obtained a contract to perform plastering services within the substantive jurisdiction of Complainant at Carroll College in Waukesha, Wisconsin. Respondents operated solely under the name TC with respect to this contract. Respondents employed Smith and others to perform plastering services.

16. Respondents created TC for the purpose of avoiding the terms of the collective bargaining agreement and the collective bargaining relationship with Complainant.

17. Charlie and Theresa jointly manage both CT and TC and no other person or entity has any managerial control over CT and TC. Charlie has ultimate final control over the labor relations of CT and TC. Charlie and Theresa have joint financial control over both TC and CT and no other person or entity has any financial control over CT or TC.

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

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to its concurrent jurisdiction under Sec. 301 of the Labor Management Relations Act and also because the National Labor Relations Board has declined to assert jurisdiction over Respondents.

2. Charlie Bowman, CT Construction and TC Construction are a single employer within the meaning of Sec. 111.02(6) of WEPA.

3. Because Michael Young is the son of Charlie Bowman, Michael Young is not an employee within the meaning of Sec. 111.02(6) of WEPA.

4. Complainant is a "representative" within the meaning of Section 111.02(11) of WEPA.

5. Complainant is the voluntarily recognized collective bargaining representative of various employees of Respondent in a collective bargaining unit within the meaning of Section 111.02(3) and (11) of WEPA.

6. By the actions specified in Findings of Fact 6, 7, 8, and 9 Respondents repudiated and violated the collective bargaining agreement in violation of Section 111.06(1)(f) of WEPA.

7. By the actions specified in Findings of Fact 6, 7, 8, and 9 Respondents failed and refused to collectively bargain with Complainant in violation of Section 111.06(1)(d) and derivatively Section 111.06(1)(a) of WEPA.

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

ORDER

In order to remedy its violation of Sections 111.06(1)(a), (d) and (f), of WEPA, the Respondents shall:

a. Immediately cease and desist from refusing to collectively bargain with the majority representative of its employees as is required by law;

b. Immediately provide an accounting to Complainant of all employees and entities performing work substantively and territorially within the jurisdiction of the collective bargaining agreement;

c. 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 it.

Dated at Madison, Wisconsin, this 29th day of June, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Examiner

TC CONSTRUCTION (Charlie Bowman)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

Complainant

Respondents repudiated the collective bargaining agreement and refused to bargain with Complainant by its September 29, 2011, notice to Complainant. Respondents did work subsequent to that time in the substantive and territorial jurisdiction of Complainant. It employed Smith, but required him to relinquish his rights under the collective bargaining agreement. This circumvented the agreement. CT Construction and TC Construction are a single entity or alter ego for labor relations purposes. TC was created solely to avoid the terms of the labor agreement and the bargaining relationship with Complainant. CT and TC have common management and the same people controlling their labor relations. Respondents should be ordered to cease and desist from refusing to bargain with Complainant and violating the collective bargaining agreement. Respondents should be ordered to make the affected employee and appropriate union funds whole for wages and benefits due under the collective bargaining agreement.

Respondents

CT Construction and TC Construction are two separate businesses. CT is owned by Charlie Bowman and TC is owned by Theresa Bowman. TC Construction was formed in February, 2011, not January 18 as alleged by Complainant. Charlie Bowman did state that he was shutting down CT Construction, but it was a statement made in the heat-of-the-moment. He did not actually do so. The Bowmans need to operate as both a union and non-union operation in order to survive financially. CT Construction and TC Construction do use the same equipment: we cannot afford separate construction equipment. Michael Young is the son of Charlie. He performed work on the Carroll College site; however, he is not an "employee" within the meaning of WEPA. TC Construction did employ Claude Smith on the Carroll College project; however, he had resigned from the Union in January, 2011. Therefore, TC Construction did not employ any union employees on that project. There are separate IRS 941 and IRS 940 tax and checking accounts for the two businesses. Respondents ask that the complaint be dismissed.

DISCUSSION

1. Jurisdiction and Applicable Law

It is undisputed that this matter is before the Commission because the National Labor Relations Board (herein "NLRB") declined to assert its jurisdiction over Respondents. The NLRB declined because the dispute involves a bargaining unit consisting of one person. The NRLB routinely does not assert its jurisdiction over one-person bargaining units. The WERC has a long-standing policy of asserting its jurisdiction over Section 111.06(1)(a), (b) and (d) of the Wisconsin Employment Peace Act (herein "WEPA") when the NLRB has declined to assert its jurisdiction over a one-person bargaining unit. See, for example, Nealon Masonry, WERC Dec. No. 27248-A (Shaw, 10/92); The United Brotherhood of Carpenters and Joiners of America, WERC Dec. No. 26527-B (McLaughlin, 1/91), adopted by operation of law, WERC Dec. No. 26527-C (WERC, 2/91), Oconomowoc Plumbing, Inc. and Oconomowoc Plumbing Systems, Inc., WERC Dec. No. 202124-B (WERC 3/84).

This complaint also includes allegations that the Respondents violated a collective bargaining agreement. The Commission shares concurrent jurisdiction under Section 301 of the LRMRA[4] and has the authority to assert its jurisdiction over the allegations of violation of collective bargaining agreement irrespective of the jurisdiction of the NLRB. See, Fiore Coal & Oil Co., WERC Dec. No. 3234 (WERC, 8/52); Erik's Studio, WERC Dec. No. 11643 (WERC, 3/73); Bay Shipbuilding, WERC Dec. No. 13229-B (Shaw 4/83).

The collective bargaining agreement contains a provision for arbitration of disputes involving the interpretation and application of the agreement. Neither party has requested that the Commission decline to assert its jurisdiction in deference to the arbitration provision. The arbitration provision is waived.

The law governing the creation of business entities is state business and marital property law. The substantive labor relations law which is applicable to this dispute is the federal common law under Sec. 301 and that of the NLRB, both under the Labor Management Relations Act. See Drivers, Warehouse & Dairy Employees Union, Local No. 75 v. WERB, 29 Wis. 2d 272, 276 (1965); cert den. 384 U.S. 906.

Michael Young is Charlie's son. Section 111.02(6)(c) of WEPA excludes a person who works for his parent from the definition of "employee." The WERC does not have jurisdiction over any allegations relating to Michael Young relating to pay and benefits for him while working solely in the role of employee for Respondents. This is the same definition under the Labor Management Relations Act 29 U.S.C.A. § 152

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[4] Tecumseh Products Co. v. WERB, 23 Wis. 2d 118 (1964), WISN Division of Hearst-Argyle Television Stations, Inc., WERC Case No. 31183-A (Gratz, 2005), aff'd WERC Dec. No. 31183-B (7/05).

2. Evidence

Complainant has relied on the statements of Smith in an affidavit taken by the NLRB in its investigation of the complaint in case 3-CA-18891. Mr. Smith is unavailable as a witness. I have accepted that testimony of evidence, but I have limited consideration of this evidence to facts not seriously in dispute. That evidence is sufficient to substantiate the conclusions made herein as to Smith.

3. Effect of alleged "Double Breasted" Structure For Labor Relations Purpose

The situation in dispute is within the class of cases in which an employer with a collective bargaining relationship creates a separate business entity so that it can also operate as both a "union" business and a "non-union" business. This is referred to as "double breasted operation."[5]

The main difficulty with Respondents' position however is its honest, but mistaken, belief that it did create two separate legal entities, TC and CT. In fact, the better view of the evidence is that they are simply separate trade names for what is both in law and in fact a marital partnership under both Virginia and Wisconsin law. Because it is one single entity, it is bound by the collective bargaining agreement in dispute for work within the substantive and territorial jurisdiction of Complainant under the collective bargaining agreement.

There is no dispute in the record about many of the major facts. Respondents created TC in order to become a "double breasted" operation because of the conflict between Charlie and TC on the one hand and Complainant on the other. It also did so to avoid paying what it viewed as onerous benefit costs under the comprehensive collective bargaining agreement when competing for non-union work. There are no written documents establishing the business entities in dispute. Neither entity has any tangible assets although they each have separate bank accounts. Theresa provides the bookkeeping and office support for both entities. She is capable of running a plastering business on her own, but does not do any of the physical work involved. While in theory TC might operate without Charlie's physical plastering labor, it is unlikely that it would. CT cannot operate without Theresa's services. Neither Charlie, nor Theresa is paid wages from either business. Instead, they simply pay whatever family and personal expenses they have from whatever proceeds are available from either business. Were the two not married, the business as a whole would be a classic example of an informal partnership. It is a very good example of a marital partnership. Under Sec. 20-107.3(A) Va. Code, property acquired during a marriage is marital property. A gift between spouses does not create separate property. See, Westbrook v. Westbrook, 5 V. App. 446 (1988). Under Sec. 766.31, Wis. Stats., the "business" entities are simply marital property. Under Sec. 766.51(1)(am), Wis. Stats., Charlie's signature accepting the collective bargaining agreement binds the Respondents to that agreement during its term and with respect to operations within the jurisdiction of Complainant. A similar result also occurs under the apparent authority doctrine of Sec. 111.02(7) of WEPA.[6]

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[5] See, for example, tr. pp. 97-100.

[6] Section 111.07(7) of WEPA includes in the term "employer" "any person acting on behalf of an employer within the scope of his or her authority, express or implied." The provision exists to avoid the "shell game" of

Although it is not necessary to reach the federal law doctrines relating to the effect of attempted double breasted operations, I do so in the interest of judicial economy. The NLRB has addressed those issues by applying its concepts of a "single employer" and "alter ego." These concepts are defined in a relatively close manner. Under its case law, the NLRB is not bound by the forms the Respondents selected for doing business, but primarily evaluates the motive for the change and four basic criteria; management, degree of centralized control of labor relations, interrelation of operations, and common ownership or financial control. See, Radio & Television Broadcast Technicians Local Union v. Broadcast Service of Mobile, Inc., 380 U.S. 255 (1965); Naperville Ready Mix v. NLRB, 242 F.3d 744, 752 (7th Cir, 2001).

The clear and satisfactory preponderance of the evidence is that both TC and CT are the same business, particularly for the operations in dispute in Wisconsin. As noted above, both CT and TC are under common ownership of the marital partnership and jointly managed by both Charlie and Theresa. Neither entity has tangible assets. Both entities are dependent on the use of marital assets and depend heavily on the use of Charlie's vehicle and other property when he is in Wisconsin. It is not believable that TC has ever operated in Wisconsin without Charlie's active management of work at the work sites. There is no dispute that TC was created primarily to avoid what Respondents believed were onerous economic terms of the collective bargaining agreement and a perceived difficult relationship with Complainants' representatives. In this regard, the two businesses are the epitome of the concept of an *alter ego* as used in labor relations.

4. Individual Waiver/Withdrawal

Article XXVII forbids the Employer from entering into any agreement with an individual employee to alter or waive any of the terms of the collective bargaining agreement.[7]

> Section 1. No agreements, alterations, understandings, variations, waivers, or modifications of any of the terms, conditions or covenants contained in this Agreement shall be made by any Employer or group of Employers with any employees or group of employees, and in no case shall it be binding on the parties hereto.

The agreement between Respondents and Smith, dated November 17, 2010, in which he agrees to a wage rate of $26.50 without any of the benefits violates Article XXVII and has no relevant effect. Under Article IX, the agreement applies to any work within the territorial and trade jurisdiction of the Union. The agreement requires the Employer to pay wages and benefits for each employee performing work within the jurisdiction of the agreement. It is undisputed that the Respondents failed to do so. Therefore, Respondents violated the collective bargaining agreement by the foregoing conduct.

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whether or not an agent had actual authority to agree to a collective bargaining agreement. See, Christoffel v. WERB, 243 Wis. 332, 345-6 (1943)

[7] Because the agreement contains an express term prohibiting an employer's efforts to by-pass the union to negotiate with individual employees, it is unnecessary to address whether this conduct also constitutes a violation of Sec. 111.06(1)(d), Stats.

5. Refusal to Bargain

Charlie under CT Construction sent Complainant a letter dated September 29, 2010, in which he stated that he was ". . . withdrawing from the Local 599 as of today." The context of this letter indicated that it was his intent that he would not recognize Complainant as the representative of his employee, not abide by any of the terms of the collective bargaining agreement, and would not bargain with the Complainant in any respect. Charlie and TC Construction performed relevant trade work under the jurisdiction of the Union, but Respondents have not been willing to negotiate with Complainant in any respect with respect to that work. On January 18, 2011, Theresa sent a letter to Complainant stating that CT Construction would close January 31, 2011. Respondents now deny that the letter was intended to misrepresent the fact that Charlie continued to work in the jurisdiction in dispute under one of the rubrics in dispute. Respondents don't dispute that they never made any effort to correct the misimpression the letter tended to create. I conclude that since September 29, 2011, Respondents have refused to recognize and bargain with Complainant with respect to work they were doing in the trade within the jurisdiction in dispute. This violated Sec. 111.06(1)(d) and derivatively violated Sec. 111.06(1)(a), Stats. Additionally, a complete repudiation of a collective bargaining agreement is an anticipatory breach of the agreement in violation of Sec. 111.06(1)(f), Stats.

6. Remedy

The ordinary remedy is a cease and desist order, posting of appropriate notices to workers, and a make whole order. The situation in this case is unusual in a number of respects. First, there is no reason to post a notice because the unit consists of one individual who is unavailable. Second, the cease and desist order is appropriate, but must be qualified. The collective bargaining agreement expired May 31, 2012. The parties agreed at hearing that Respondents might withdraw from the multi-employer consortium and that, if so, Respondents' duty to bargain would end. Because there are facts subsequent to the hearing which might affect the duty to bargain, I have included the word "as required by law" in the cease and desist order with respect to the collective bargaining agreement and the word "unlawfully" in the cease and desist order with respect to the duty to bargain. The evidence establishes that Respondents violated the collective bargaining agreement by failing to pay the full benefits required by the collective bargaining agreement for Claude Smith and to make appropriate payments to the proper funds on his behalf. There is no evidence to establish that Respondents violated the collective bargaining agreement by hiring subcontractors on the Carroll College job in that subcontracting is allowed and there is no evidence that the subcontractor failed to make the payments required by any applicable collective bargaining agreement. It is unclear though whether there were others working at these sites who were not legitimate contractors, but were "employees" of Respondents. Under the circumstances, I have ordered that Respondents fully account for all employees and subcontractors who performed work in the period September 29, 2010, to May 31, 2012 within the substantive jurisdiction of the Union. I note that Respondents

are a small employer with limited financial resources. The Commission reserves the right to consider and set in enforcement proceedings terms which are reasonable and necessary to avoid financial hardship.

Dated at Madison, Wisconsin, this 29th day of June, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stanley H. Michelstetter II /s/
Stanley H. Michelstetter II, Examiner

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