BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

TILE FINISHERS LOCAL NO. 47,
MILWAUKEE & SOUTHERN WISCONSIN
COUNCIL OF CARPENTERS

and

DICK SCHUMACHER TILE COMPANY

Case 4
No. 54360
A-5503

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by Mr. Frederick G. Miner, on behalf of the Union.
Mr. Richard Schumacher, on behalf of the Company.

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "Company", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Appleton, Wisconsin, on November 11, 1996. The hearing was not transcribed and both parties thereafter filed briefs which were received by January 28, 1997. Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUE

Whether the Company violated the manning requirements of the contract and, if so, what is the appropriate remedy?

BACKGROUND

The Company is headed by Dick Schumacher, its owner. At all times material herein, Schumacher has worked on almost all of the Company's construction jobs, during which time he sometimes was accompanied by one or two workers to set and finish tile.

The Company in August, 1989, signed a "Voluntary Recognition Agreement" recognizing the Union as the collective bargaining representative of its employes. The parties ever since then have been involved in various proceedings dealing with the Company's continuing collective bargaining obligations with the Union.

Union Business Representative James P. Judziewicz testified that the Company in about

1989 did not follow the terms of the contract and that it entered into a settlement agreement which called for the Company to pay $5,000 to the Union and to sign a 1989-1991 contract. The Company subsequently complied with the terms of that settlement agreement and on August 7, 1989, signed a 1989-1991 contract, the only contract that the Company has ever signed with the Union. There is no evidence that the Union has ever negotiated with the Company over the terms of any subsequent contracts.

Judziewicz added that the Union in 1994 filed an unfair labor practice complaint with the Wisconsin Employment Relations Commission ("Commission"), against the Company over its refusal to supply the Union with certain requested information relating to the instant grievance. He added that the Commission subsequently ordered the Company to provide such information 1/ and that the Commission's Order was affirmed by a Circuit Court. 2/ Judziewicz also said that the Union in January, 1996, filed another complaint with the Commission over the Company's refusal to arbitrate the instant grievance. That matter was resolved when the Company agreed in May, 1996, to a Settlement Agreement which called for it to proceed with the instant proceeding and to be bound to any Award issued thereunder.

Judziewicz said that Schumacher in the early 1990's told him several times that he was not doing much work. That was why, said Judziewicz, the Union did not try to enforce its contract with the Company over the next several years.

Judziewicz added that someone telephoned him in about December, 1993, and said that the Company was working on a union construction project in Stevens Point, Wisconsin. Judziewicz explained that the Company was required to use a union member for that and any other job because the contractual manning proviso set forth in Article XIII, Section 6, governs if an owner such as Schumacher personally works on any project.

Judziewicz said that the Company's contract with the Union is still in effect because the Company has never served a timely letter terminating it. 3/ He also said that the Company in 1995 worked on a union job in Green Bay, Wisconsin, involving Dietrich Tile. Other than those examples, the Union at the hearing did not have any specific evidence showing what construction

---

1/ See Dick Schumacher Tile Co., Inc., Decision No. 28261-A (Jones, 4/95), affirmed by operation of law, Decision No. 28261-B (6/95).

2/ Wisconsin Employment Relations Commission v. Dick Schumacher Tile Co., Inc., Case No. 96 CV 91 (5/96).

3/ Schumacher's May 30, 1996, letter to Judziewicz (Union Exhibit 6), which sought to terminate the contract was invalid because it was not sent more than 90 days prior to the contract's termination date, as was required in Article XVII. Hence, the contract is still in effect.

jobs the Company has worked on since 1994. 4/ The Union also introduced certain tax data which was supplied by the Company (Joint Exhibits 11-13).

Schumacher, in turn, asserted that he never represented himself as a union contractor for a Frigo cheese project; that he in fact never worked on the Green Bay job referred to by Judziewicz; and that he worked on the Stevens Point job for only a week.

On cross-examination, he said that he had been "all by myself the last two years" and that Randall Baril, his son-in-law, worked for him before then. He also claimed that he does not recall whether he read the 1987-89 contract before he signed it and that he believes that the contract expired some time ago. He also referred to several problems he has had with unqualified workers sent to him by the Union.

In support of the grievance, the Union primarily argues that the Company under Article XIII, Section 6, of the contract, is required to always use at least one Tile Finisher for all its jobs and to follow the member ratio set forth therein; that the Company dating back to at least 1992 has violated Article XIII, Section 6, by not doing so; and that compensatory pay in the amount of $72,190.24 should be awarded.

The Company, in turn, claims that it has not worked on any union jobs throughout this period; that the Union is harassing it, and that no compensatory pay should be awarded.

Article XIII of the contract, entitled "Special Work Rules", provides in Section 6:

> **Section 6.** The Employer agrees that the following ratio will be maintained on a shop-wide annual basis:
>
> | Number of Tile Finishers/Minimum ** | Number of Tile Setters * ** |
> |---|---|
> | 1 | 1 |
> | 1 | 2 |
> | 2 | 3 |
> | 3 | 4 |
> | etc. | etc. |

4/ The Union's post-hearing submission relating to how many hours Schumacher and employes worked also did not identify any union jobs.

* Includes like workmen, apprentices, etc.

** Employer has the latitude to deviate from said ratio by up to a maximum of 500 hours per contract year (June through May).

Here, it is clear that the Company has not followed this ratio over the years. The Union therefore is correct in pointing out that the Company since 1992 has not hired any Tile Finishers to assist the Tile Setters even though Article XIII, Section 6, mandates their hire. Thus, Tile Finishers under a strict interpretation of the contract should have been hired for a total of about 4,336 hours based upon the Company's own records. (That is how the Union computes its $72,190.24 compensatory pay estimate).

The Union thus cites several prior cases where compensatory damages have been awarded when employers have violated such manning provisions. See Helix Electric, 101 LA 649 (Kaufman, 1993); United States Testing Co., AAA No. 72, 30, 000 6 85 (Roberts, 1987); Local 369, Bakery Workers v. Cotton Baking Co., 514 F.2d. 1235 (5th Cir., 1975), cert denied, 423 U.S. 1055 (1976).

However, it is also true that the contract here does not expressly mandate such compensatory damages if Article XIII, Section 6, is violated. Hence, it is a matter of arbitrable discretion as to whether such damages should be paid.

Normally, I would order such a remedy for all of the reasons cited by the Union. Here, though, there are several mitigating factors as to why such a remedy should not be granted.

Thus, the Union seeks back pay for the one-year period before it filed its grievance. Since the Union is responsible for not filing its grievance earlier, it is unfair to burden the Company with a liability before December 21, 1993, the date Judziewicz first contacted the Company about this problem. As a result, the Union should not collect back pay for the approximately 2,000 hours covered in this period.

Secondly, the Company paid its Tile Setters the wages and benefits provided for in their contract. Schumacher testified to that effect and I credit his testimony. Hence, this is not a situation of where the Company has underpaid its employes.

Thirdly, and but for a Stevens Point job, there is no proof that the Company worked on any union jobs after December, 1993. Schumacher testified that he has not worked on any union jobs for the last several years and I credit his testimony. The Company throughout this period therefore has not held itself out to be a union contractor and it has not received any benefits from being a signatory to the contract.

Furthermore, there is no evidence that the Union ever sought to negotiate over the terms of any contracts subsequent to the one signed by Schumacher in 1989. This shows that the parties have not had a viable bargaining relationship since then and that the Union for all practical purposes since then has not represented any employes who have worked for the Company throughout that time.

In addition, Schumacher worked alone for about 1,699 hours from June 1, 1995, to May 31, 1996, hence supporting his claim that he is in ill health and that his business has dropped off significantly.

When all of these factors are combined, I conclude that compensatory pay is inequitable because of the highly unusual facts of this case. Hence, none will be ordered. However, the Company is being put on express notice that it henceforth must follow the contractual manning requirements if it ever again works on any union jobs or if it ever again uses any unionized employes. If it fails to do so, it shall be subject to compensatory damages.

In light of the above, it is my

AWARD

1. That no compensatory damages are warranted to rectify the Company's past failure to adhere to the contractual manning requirements set forth in Article XIII, Section 6, of the contract.

2. That the Company henceforth is required to adhere to those manning requirements if it ever again works on any union jobs or if it holds itself out to be a union contractor. If it fails to do so, it shall be liable for compensatory damages.

Dated at Madison, Wisconsin, this 12th day of February, 1997.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator