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☛ Details: Complaint.

(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

2007-08

(session year)

Joint

(Assembly, Senate or Joint)

Committee for Review of Administrative Rules...

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
(**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
(**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Stefanie Rose (LRB) (August 2012)

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August 13, 2008

Senator Robert Jauch
Representative Daniel LeMathieu
Co-Chairs
Joint Committee for Review of Administrative Rules
Room 118 South
Room 17 North
State Capitol
Madison, WI 537070-7882

Dear Senator Jauch and Representative LeMathieu:

Enclosed is a copy of a Complaint filed with the Circuit Court for Dane County seeking to enjoin the enforcement of certain compulsory process issue by the Department of Workforce Development.

I am of the view that the process is not a "rule" within the meaning of Section 227.01(13). However, in some Wisconsin judicial decisions there is loose talk ("dicta," Lawyers call it) that any application of a statutory norm to a concrete situational dispute creates an obligation, under Section 227.40(5), to invite the Joint Committee into the fray.....

So, the Committee is invited to participate.

Very truly yours,

KRUKOWSKI & COSTELLO, S.C.

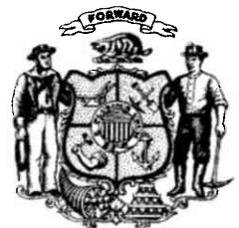

David F. Loeffler
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2008038/0 (126134)



WISCONSIN STATE LEGISLATURE



STATE OF WISCONSIN

CIRCUIT COURT
5TH JUDICIAL DISTRICT

DANE COUNTY

JT ROOFING, INC.,
a Wisconsin corporation
350 Tower Drive
Saukville, WI 53080,

and

GERALD T. THULL
President of JT ROOFING, INC.,
and as an individual
350 Tower Drive
Saukville, WI 53080

Plaintiffs,

v.

WISCONSIN DEPARTMENT OF
WORKFORCE DEVELOPMENT,
an Executive Department of the
State of Wisconsin
201 E. Washington Avenue
Madison, WI 53703

and

ROBERTA GASSMAN,
Secretary of the Wisconsin Department
of Workforce Development
201 E. Washington Avenue
Madison, WI 53703

and

ROBERT (BOB) ANDERSON,
Director of the Labor Standards Bureau,
Wisconsin Department of Workforce
Development
201 E. Washington Avenue
Madison, WI 53703

and

THIS IS AN AUTHENTICATED COPY OF THE
ORIGINAL DOCUMENT FILED WITH THE DANE
COUNTY CLERK OF CIRCUIT COURT.

CARLO ESQUEDA
CLERK OF CIRCUIT COURT

CIRCUIT COURT
08 AUG 13 PM 2:17
DANE COUNTY, WI

08CV3636

The Honorable _____

Case No.:

Classification Code: 30704

**JULIE ECKENWALDER,
Chief of Prevailing Wage Section,
Wisconsin Department of Workforce Development
201 E. Washington Avenue
Madison, WI 53703**

and

**TERRENCE MOE,
Investigator, Prevailing Wage Section,
Wisconsin Department of Workforce Development
201 E. Washington Avenue
Madison, WI 53703**

Defendants

SUMMONS

THE STATE OF WISCONSIN, To each person named above as a Defendant:

You are hereby notified that Plaintiffs named above has filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action. Within forty-five (45) days of receiving this Summons, you must respond with a written answer, as that term is used in chapter 802 of the Wisconsin Statutes, to the Complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The Answer must be sent or delivered to the court, whose address is Dane County Clerk of Circuit Courts, Dane County Courthouse, 215 S. Hamilton Street, Madison, Wisconsin 53703, and to David F. Loeffler, Esq. Plaintiffs' attorney, whose address is Krukowski & Costello, S.C., 7111 W. Edgerton Avenue, Milwaukee, Wisconsin 53220. You may have an attorney help or represent you.

If you do not provide a proper answer within forty-five (45) days, the court may grant judgment against you. Legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law.

Dated at Milwaukee, Wisconsin, this 12th day of August, 2008.

KRUKOWSKI & COSTELLO, S.C.

By: David F. Loeffler

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ATTORNEYS FOR PLAINTIFF
JT ROOFING, INC. AND
GERALD T. THULL

126129/2008038-0

JT ROOFING, INC.,
a Wisconsin corporation
350 Tower Drive
Saukville, WI 53080,

and

GERALD T. THULL
President of JT ROOFING, INC.,
and as an individual
350 Tower Drive
Saukville, WI 53080

Plaintiffs,

v.

**WISCONSIN DEPARTMENT OF
WORKFORCE DEVELOPMENT,**
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201 E. Washington Avenue
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and

ROBERTA GASSMAN,
Secretary of the Wisconsin Department
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201 E. Washington Avenue
Madison, WI 53703

and

ROBERT (BOB) ANDERSON,
Director of the Labor Standards Bureau,
Wisconsin Department of Workforce
Development
201 E. Washington Avenue
Madison, WI 53703

and

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201 E. Washington Avenue
Madison, WI 53703

and

TERRENCE MOE,
Investigator, Prevailing Wage Section,
Wisconsin Department of Workforce Development
201 E. Washington Avenue
Madison, WI 53703

Defendants

**COMPLAINT/INJUNCTION TO ENJOIN ENFORCEMENT OF A
PERSONAL SUBPOENA AND SUBPOENA DUCES TECUM
ISSUED BY THE WISCONSIN DEPARTMENT OF WORKFORCE
DEVELOPMENT AND ORDERS OF THE WISCONSIN DEPARTMENT
OF WORKFORCE DEVELOPMENT TO CONDUCT LOOK-BACK
SELF-AUDITS AND REPORT THE OUTCOME**

NOW COME JT Roofing, inc., a Wisconsin corporation, and Gerald T. Thull, President of JT Roofing, Inc., by their attorney David F. Loeffler, Krukowski & Costello, S.C., and request, pursuant to Sections 801.02(1) & (5), and Sections 813.01 and 813.05 Wis. Stats., an order permanently enjoining all defendants from enforcing a July 16, 2008 personal Subpoena and Subpoena Duces Tecum, and further, and JT Roofing, Inc. further requests an order permanently enjoining them, pursuant to Section 801.02(1) & (5), and Sections 813.01 and 813.05 Wis. Stats. from enforcing orders of April 9, 2008 and May 14, 2008 directing JT Roofing, Inc. to conduct certain look-back self-audits and reporting the results of those audits to the Wisconsin Department of Workforce Development.

SUBJECT MATTER JURISDICTION

1. This Court has subject matter jurisdiction over a claim that enforcement of a Subpoena Duces Tecum, and a personal Subpoena of July 16, 2008, issued by the Wisconsin

Department of Workforce Development (DWD), and enforcement of a DWD Section 109.11(b) look-back self-audit orders are, in the circumstances, “unreasonable” orders within the meaning of Section 103.005(6)(a) and (6)(e) Wis. Stats., and that the prevailing rate provisions relating to mandatory employee benefits are preempted by Section 514 (29 U.S.C. 1144) of the Federal Employee Retirement Income Security Act (ERISA) as amended. Subject matter jurisdiction is conferred by Section 801.02(5) and Section 813.01 when DWD has issued the compulsory process described above, and threatened enforcement prosecution for non-compliance. Paragraph 2 and Exhibit 9 to the Affidavit of Gerald T. Thull attached to this Complaint; paragraph 12 and Exhibits 2 and 3 to the Affidavit of Nikki Jozwowski attached to this Complaint; and paragraph 9 and Exhibit 14 to the Affidavit of David F. Loeffler, as well as the last paragraph on p. 2 and first paragraph on p. 3 of the Loeffler Affidavit. JT Roofing, Inc. and Gerald T. Thull, as President of the Corporation, and as an individual object of the July 16, 2008 Subpoena, ask the Court for an order and final judgment permanently enjoining or prohibiting DWD from enforcing the Subpoena of July 16, 2008, and the orders for look-back “self-audits” of April 9, 2008 and May 14, 2008, all within the meaning of Section 801.02(5) and Section 813.01 Stats.

VENUE

2. Venue in Dane County Circuit Court is appropriate because the compulsory process in dispute was issued from decisions reached at the central offices of DWD located at 201 East Washington Avenue, Madison, Wisconsin 53703-2866. Paragraphs 5, 6 and 9 of the Affidavit of David F. Loeffler, and Exhibits 11, 12 and 14 to that Affidavit; paragraph 12 of the Jozwowski Affidavit and Exhibits 2-3 to that Affidavit; and Exhibit 9 to the Affidavit of Gerald T. Thull.

PARTIES

3. JT Roofing, Inc. (JTR) is a Wisconsin corporation, organized pursuant to Chapter 180 Wisconsin Statutes engaged in the construction business in public product markets in the State of Wisconsin, and in private product markets in Wisconsin, Ohio, Maryland, Pennsylvania, Utah, Missouri, New York, Virginia and Nebraska. Paragraph 1 of Thull Affidavit. Paragraphs 2 and 19 of Jozwowski Affidavit. JT Roofing, Inc., is one of the objects of the Subpoena Duces Tecum of July 16, 2008, Exhibit 9 to the Thull Affidavit, and the object of the Section 109.11(b) look-back self-audit orders of April 9, 2008 and May 14, 2008. Jozwowski Affidavit, paragraph 12 and Exhibits 2 and 3 to that Affidavit. The principal place of business of JTR is 350 Tower Drive, Saukville, WI 53080.

4. Gerald T. Thull is the President, CEO and principal owner of JTR. He is also the personal object of the July 16, 2008 Subpoena. Paragraphs 1 and 2 of the Thull Affidavit and paragraph 9 of that Affidavit. Loeffler Affidavit, paragraph 6 and Exhibit 14 p. 2, DWD letter of July 30, 2008; Loeffler Affidavit, paragraph 9 and Exhibit 12, DWD letter of July 17, 2008.

5. The Wisconsin Department of Workforce Development (DWD) is an Executive Department of the State of Wisconsin created by Section 15.22 Stats. DWD is responsible for enforcement of Section 66.0903 and Section 103.49, statutes requiring the payment of a DWD determined "prevailing wage" on all municipal and public construction projects in Wisconsin. DWD is also responsible for enforcement of an array of statutes creating labor standards on private construction projects in the State of Wisconsin, including minimum wage payments, premium payments for overtime work, prohibition of child labor and maximum hours of consecutive employment. The principal offices of DWD are located at 201 East Washington Avenue, Madison, Wisconsin 53703.

6. Roberta Gassman is the Secretary of DWD and is responsible for all decisions and the execution of all decisions of DWD with respect to the enforcement of the statutes described in paragraph 5 by the terms of Section 15.22 Stats. Her principal business address is 201 East Washington Avenue, Madison, Wisconsin 53703.

7. Robert (Bob) Anderson is the Director of the Labor Standards Bureau of DWD and is responsible for enforcement of the norms of the prevailing wage statutes, Sec. 66.0903, and 103.49, which apply to municipal and state public construction projects and all the private construction project employment norms identified in paragraph 5 of this Complaint. Robert (Bob) Anderson, as an individual, participated and personally approved the DWD decision to reject the settlement agreement of June 24, 2008, proposed by JTR and also unconditionally was of the view that DWD could randomly inspect the payroll records of any Wisconsin employer performing work on any public or private construction project to determine whether the employer had violated Sec. 66.0903 or 109.43 Stats. or any Section 103-106 labor standard imposed on Wisconsin employers or private construction projects. Anderson is also of the view that if any data produced pursuant to the July 16, 2008 or the look-back self-audits ordered by the DWD on April 9, 2008 and May 14, 2008 is wrong, or incorrect, JTR, or the person responsible for production of the data is guilty of a crime. Loeffler Affidavit, paragraph 5. Anderson's principal business address is the Offices of the DWD, 201 East Washington Avenue, Madison, Wisconsin 53703.

8. Julie Eckenwalder is the Chief of the Prevailing Wage Section of DWD, and a participant in the decision to reject the JTR settlement proposal of June 24, 2008, who, in turn, agreed with that decision. Loeffler Affidavit, paragraph 5. Her principal business address is 201 East Washington Avenue, Madison, Wisconsin 53703.

9. Terrance Moe is an Investigator for the Prevailing Wage Section of DWD, who issued the July 16, 2008 personal Subpoena and Subpoena Duces Tecum, and the Section 109.11(b) orders to JTR of April 9, 2008 and May 14, 2008, to conduct self-audits, and report the results of these audits to DWD. Thull Affidavit, Exhibit 9. Jozwowski Affidavit, paragraph 12, Exhibits 2 and 3. Moe also issued the letters of July 17, 2008 and July 30, 2008, on behalf of DWD, rejecting the JTR settlement proposals of June 24, 2008 and July 24, 2008. Loeffler Affidavit, paragraphs 6 and 9, Exhibits 11 and 14 to that Affidavit.

**STANDARD FOR DETERMINING WHETHER THE
DWD ORDERS ARE “REASONABLE” WITHIN THE
MEANING OF SECTION 103.005(6)(A) AND (6)(E) STATS**

10. The Subpoena of July 16, 2008, and the look-back self-audits ordered by DWD on April 9, 2008 and May 14, 2008, should be enforced only if the social cost of enforcement (the aggregation of all costs, direct and indirect, reasonably quantifiable and reasonably non-quantifiable) is less than the social benefit conferred by compelled disclosure – the product of the probability that, absent compulsion, relevant information could not be obtained by alternative non-compulsory, less costly means, and that in the absence of that information, conduct, which potentially imposed a substantial social cost, will be unremedied. This is the calculus for optimal law enforcement. Loeffler Affidavit, Exhibit 15 at p. 4, n.9, pp. 6-9. See also Loeffler Affidavit, Exhibit 10, pp. 1-3.

**IT IS UNREASONABLE WITHIN THE MEANING OF
SECTION 103.005(6)(A) AND (6)(E) TO DEMAND PAYROLL
INFORMATION ON ALL PRIVATE CONSTRUCTION PROJECTS
FROM JULY 1, 2008 TO APRIL 1, 2006, AS A MEANS OF
DETERMINING WHETHER JTR HAS VIOLATED THE PROVISION
OF THE PREVAILING WAGE STANDARDS ON PUBLIC
CONSTRUCTION PROJECTS**

11. The Subpoena of July 16, 2008 demands the production of a large quantity of JTR payroll record information on private construction projects for the period July 1, 2008 to April 1,

2006 because, in the view of the DWD, such information is necessary to determine whether JTR violated the prevailing wage norms of Sections 66.0903 and 103.49 during that period. Thull Affidavit, Exhibit 1, p. 2. Loeffler Affidavit, Exhibit 14, penultimate paragraph p. 2 of the DWD letter of July 30, 2008.

12. During the July 1, 2008 to April 1, 2006 accounting period, JTR understood 2,333 private construction jobs, some outside the State of Wisconsin. Jozwowski Affidavit, paragraph 19.

13. Information on private construction jobs undertaken by JTR during this period is only minimally relevant to the proposition of whether JTR violated the prevailing rate norms of Section 66.093 and 103.49 relating to public project construction projects, and the cost of production and potential inadmissibility exceeds the probative value of the information. JTR has offered to voluntarily produce all requested payroll information on all public jobs performed in Wisconsin during this period (a small ratio of the private jobs and total jobs), as an element in the process of negotiating an overall settlement agreement. Under these circumstances (including the fact that on all private projects during the period, there is evidence of only one inadvertent violation of Wisconsin labor standards on private projects), the demand for payroll information on all private construction projects, July 1, 2008 to April 1, 2006 is “unreasonable” within the meaning of Section 103.005(6)(a) and (6)(e), when the appropriate social cost/social benefit calculus set forth in paragraph 10 of this Complaint is correctly applied. Loeffler Affidavit, paragraphs 10 and 7, and Exhibit 15 at p. 4, fn. 9, 5-6, 8-9. Loeffler letter of August 7, 2008, Exhibit 13, pp. 5-7, 8-9, Loeffler letter of July 24, 2008. Jozwowski Affidavit, paragraphs 18-19 and 21.

**IT IS UNREASONABLE WITHIN THE MEANING OF THE SOCIAL
COST/SOCIAL BENEFIT CALCULUS CODIFIED IN SECTION
(6)(1) AND (6)(E), TO DEMAND PRODUCTION OF ALL JTR PAYROLL
RECORD INFORMATION ON ALL 37 PUBLIC CONSTRUCTION
PROJECTS UNDERTAKEN BY JTR DURING THE PERIOD
JULY 1, 2008 TO DECEMBER 5, 2005**

14. On the admissible evidence, the aggregate social cost of compelled production of all payroll records on 37 public construction jobs over the period July 1, 2008 to December 10, 2005, the accounting period of both the July 16, 2008 Subpoena and the April 9, 2008 and May 14, 2008 look-back self-audits, exceeds the social benefit obtained by forced disclosure, since JTR is willing to voluntarily produce reliable records for this period, as part of a negotiated settlement process, pursuant to Section 109.11(1)(a)(c) and 2(a), and on the admissible evidence available to date, there is only 1 inadvertent violation of Sections 66.0903 and 103.49 involving one employee of an average of 95 employees employed on all JTR construction work during the violation generating a cost to the employee of 1% of the total payroll on those projects, a cost immediately compensated in full with the approval of the DWD. Under these circumstances, the broad, deep and durationally long compelled disclosure, ordered by the July 16, 2008 Subpoena and the look-back self-audits of April 9, 2008 and May 14, 2008, is unreasonable within the meaning of Section 103.005(6)(a) and (6)(e) Stats. Jozwowski Affidavit, paragraphs 1 to 22, and Exhibits 1 through 8(d). Thull Affidavit, paragraphs 3-4, and Exhibit 9. Loeffler Affidavit, paragraphs 2-7, 9-10, and Exhibits 10, 13 and 15 to that Affidavit.

**EXHAUSTION OF ADMINISTRATIVE REMEDIES PURSUANT
TO SECTION 103.005(6)(A)(E)(F) AND (G), AND 227.40(5)**

15. The July 16, 2008 Subpoena and the April 9, 2008 and May 14, 2008 look-back self-audits are not the kinds of orders that must first be challenged through the procedures of Section 103.005(6)(a)(e)(f) and (g). But, assuming they are, JTR has requested a hearing before an Administrative Law Judge employed by the DWD who is outside the chain of command law

enforcement in the DWD. See Exhibit 16 to the Complaint. Should the Court conclude that the Section 103.005(b) procedures must first be exhausted before the Court proceeds, this would be a judgment of primary, not exclusive, jurisdiction, and the Complaint should not be dismissed, but put on hold, pending the outcome within the administrative process.

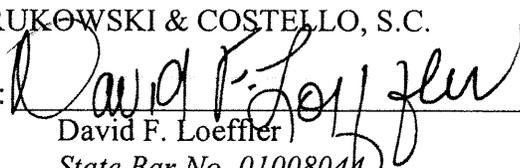
16. The July 16, 2008 Subpoena, and the April 9, 2008 and May 14, 2008 orders to conduct look-back self-audits are not administrative "rules" within the meaning of Section 227.01(13), and thus notice the dispute set forth in this Complaint need not be given to the Legislative Joint Committee on Administrative Rules, pursuant to Section 227.40(5). Nonetheless, JTR has given such notice. Exhibit 17 to this Complaint.

WHEREFORE, JT Roofing, Inc., and Gerald T. Thull request:

1. That the Court enter an order and judgment permanently enjoining the Wisconsin Department of Workforce Development, Roberta Gassman, Robert (Bob) Anderson, Julie Eckenwalder and Terrence Moe from taking any further action to enforce the personal Subpoena and the orders of April 9, 2008 and May 14, 2008 to conduct look-back self-audits of JTR's public project payroll records July 1, 2008 to December 10, 2005, and produce the records of the outcome of those audits to the Department of Workforce Development.

Dated at Milwaukee, Wisconsin, this 12th day of August, 2008.

KRUKOWSKI & COSTELLO, S.C.

By: 

David F. Loeffler

State Bar No. 01008044

7111 W. Edgerton Avenue

Milwaukee, WI 53220

(414) 423-1330

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ATTORNEYS FOR PLAINTIFF
JT ROOFING, INC. AND
GERALD T. THULL