

Wisconsin Chapter NECA
2200 Kilgust Rd.
Madison WI 53713

Chapter Officers:

Governor : Gerald Schulz
Michels Power, Neenah
President: Bernie Cleppe
Roman Electric, Sturtevant
Vice Pres: Mark Hady
Hady Electric, Watertown
Treasurer: Joel Westphal
QWEST Electric, Green Bay
Executive Vice President:
Loyal D. O'Leary

Chapter Board of Directors:

Darrell Braun, Madison
Bernie Cleppe, Racine
Mark Hady, Janesville-Beloit
Arlan Hanson, Indianhead
Greg Dewitz, Kenosha
Tim Padesky, La Crosse
Larry Navarrete, Fox Valley
Bob Van Ert, Wisconsin Valley
Joel Westphal, Northeastern



Inside this issue:

IBEW Code of Excellence	2
Get Your Packer Tickets	2
Attorney Bob Kay's Letter	3
October 2008 Calendar	3
Building Projects on Hold	4
Tom's Code Corner	4
Manpower Statistics	5



October 2008

NECA Convention Offers CEUs

As you know, NECA held its annual convention in Chicago this year, and once again, it was a great convention. The focus of the convention was Green and there were many options to explore solar and photovoltaic installations, as well as other alternative energy technologies. The NECA Show, the nation's largest power distribution, lighting and cabling trade show, featured many new displays including wind power.

The general sessions featured an appearance from the IBEW's Ed Hill. Second City performed skits including custom presentations created just for NECA members, and NBC Sports caster Bob Costas spoke with us on Tuesday in a lively discussion on broadcasting.

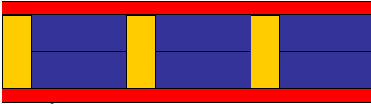
Of course, with any convention, there has to be an element of fun as well, and the convention opening reception was held in grand style on Chicago's renown Navy Pier with Chicago cuisine and fabulous entertainment by the Pink Flamingos. The closing gala was a unique concert with Bruce Hornsby and Ricky Skaggs, held at the Aerie Crown Theater.

All in all, it was a great opportunity for contractors to learn about new technologies, remind themselves of older technologies, network with fellow electrical contractors, and have a little bit of fun as well. Next year the show moves to Seattle and will be held in September. We hope to see you there!

Now That's Good Politics

In case you hadn't heard, this year is a Presidential election year, and that means you have an important decision to make. While the Chapter Staff is not about to start telling you how to vote, we would like to tell you WHERE you can vote. The Culver's restaurant chain has a special election site set up to help you vote your choice for our next *Commander in Treat*. The site, www.votecustard.com has debates, weekly opinion polls, and urges you to vote for either "Reese E. Buttercup" custard or "Heath Toffeebits" custard as our next Commander. Now you can vote online, but for the truly patriotic, cast your ballot by purchasing a custard in the flavor of your candidate. Most of all, it gives you a new way of looking at all the McCain/Obama ads that are constantly airing right now. A hotly contested political race can be delicious!





The Safety and Buildings Division staff are working on developing new administrative code language to regulate the electrical licensing and inspection system requirements of the new legislation.

They have also scheduled a series of public informational meetings to discuss the changes to electrical licensing and inspection. So far they have scheduled the following meetings in rural areas of the state:

December 3, 2008 at
Alliant Energy in Berlin

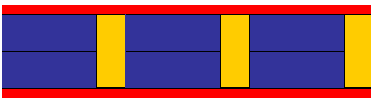
December 4, 2008 at
Richland Coop Center in
Richland Center

December 8, 2008 at City
Council Chamber in
Ashland

December 9, 2008 at City
Council Chamber in
Rhinelander

December 10, 2008 at
City Hall Meeting Room in
Rice Lake

We will keep you posted as more meetings are scheduled in areas near you.



IBEW Code of Excellence Programs

New language in labor agreements this year, the enabling language for the Code of Excellence, requires that the parties agree to and implement a local Code of Excellence program.

The Code of Excellence spells out worksite behaviors that will not be tolerated, including tardiness, absenteeism, failure to follow work rules, and slowdown of work on the job, as well as expectations for contractors, adequate supervision and staffing on projects, timely delivery of supplies and proper tools and planning. The IBEW will train special Excellence Stewards who will work with the employees and management on the job-site to “enforce” the Code of Excellence standards. Employees working on a “Code of Excellence Project” will have to attend a training session and sign off on the program rules before reporting to work. Employees who are not responsive to the Code requirements will face disciplinary actions by the IBEW. The IBEW has a new commitment to enforce the code and thereby create a more productive workforce with a strong emphasis on craftsmanship and professionalism.

The Chapter is beginning meetings in the five areas that have the language so far, and the talks have been very positive to date. It now appears that the IBEW may try to put together a program on a statewide level, which would mean the Code would be essentially the same statewide, and training would be very similar.

Whether your agreement has the language yet or not, this will become a program you will be hearing more about as the training gets underway. The idea is to select certain projects or contractors to start promoting the Code, and once more members are trained, it is anticipated that most contractors will expect all their workers to obey the Code of Excellence on all projects. Madison, IBEW 159, has already selected two upcoming projects that they intend to designate as Code of Excellence jobs.

We’ll keep you informed as this progresses.



Green Bay Packer Tickets Online

The Wisconsin Chapter has two final sets of Green Bay Packer Club Seat tickets available on our online ticket auction. The games are:

Houston Texans—Sunday, December 7 at noon

Detroit Lions—Sunday, December 28 at noon

The minimum bid for the tickets is \$250 per ticket, which is roughly the face value of the tickets. Club Seat amenities include a stadium chair with cup holder, private gate entrance and game day access to the amenities and special concession areas of the Club and Suite levels at Lambeau Field, as well as restroom facilities. The seats themselves are outdoor Club Seats, meaning you get the best of both the Suite level and the great atmosphere of Lambeau Field on game day.



To bid on the tickets, go to the Chapter website www.wisneca.com, click on the link at the bottom of the homepage for “ECPAC Auction” then click on the link for “ECPAC Auction for Packer Tickets”.

From the Desk of Attorney Kay



SUBCONTRACTOR PROTECTION UNDER THE THEFT BY CONTRACTOR STATUTE

In a case decided in June of this year, the Wisconsin Supreme Court held that the theft by contractor statute (§ 779.02(5) Stats.), was intended by the legislature to insure that construction funds are used to pay subcontractors and workers, as well as protecting the owner from having to pay twice. The theft by contractor provision provides that the proceeds from any mortgage on land and all monies paid to any prime contractor or subcontractor constitutes a trust fund in the hands of the prime contractor or subcontractor and goes on to state:

“The use of any such moneys by any prime contractor or subcontractor for any other purpose until all claims, except those which are the subject of a bona fide dispute and then only to the extent of the amount actually in dispute, have been paid in full or proportionally in cases of a deficiency, is theft by the prime contractor or subcontractor of moneys so misappropriated and is punishable under s. 943.20. If the prime contractor or subcontractor is a corporation, limited liability company or other legal entity other than a sole proprietorship, such misappropriation also shall be deemed theft by any officers, directors, members, partners or agents responsible for the misappropriation.”

In State v. Keyes, a general contractor, which the Court concluded was acting as a subcontractor (a premise which is quite obscure from the facts of the case), received construction loan monies, much of which was kept by it, and some of which was paid to subcontractors. The owner ultimately lost trust and terminated the prime contractor, and the State brought a criminal complaint against the prime contractor alleging that the prime contractor had violated § 779.02(5), Stats., by failing to distribute proportionally the construction loan monies to all unpaid subcontractors. It appeared that the construction loan monies were not sufficient to pay all subcontractor claims.

The prime contractor (still insisting it was acting as a subcontractor) filed a motion to dismiss the criminal charge, arguing that it was simply keeping the money for materials purchased and work performed as a subcontractor.

Without examining whether the general contractor was acting as a prime or a sub, the Wisconsin Supreme Court held that keeping monies received as a subcontractor rather than distributing them proportionally to all subcontractors when the construction loan monies were not sufficient constituted a *prima facie* case of theft by contractor. The thrust of the decision was clearly to place upon all prime contractors and subcontractors in Wisconsin the full burden of the theft by contractor statute which includes the obligation of a prime contractor or subcontractor to distribute construction monies proportionally if the amount available is not sufficient to pay all subcontractors. However, the Wisconsin Supreme Court refused to affirm the Wisconsin Court of Appeals' decision insofar as it applied the theft by contractor statute to prohibit prime contractors or

(Continued on page 6)

November 2008

November 5

Madison Membership
Janesville-Beloit Membership

November 10

Kenosha-Racine Membership

November 12

Northeast and Fox Valley
Joint Membership

November 13

Indianhead and La Crosse Joint
Membership

November 20

Wisconsin Valley Membership

Upcoming Meetings

January 23-24, 2009

Winter Meeting
Kalahari Resort, Wisconsin Dells

March 22-25, 2009

Midwest Regional Spring Conf.
Kauai, Hawaii

July 29-August 2, 2009

Summer Meeting
Lake Lawn Resort, Delavan

September 12-15, 2009

NECA Convention
Seattle, WA

Attorney Robert J. Kay can be reached at

Kay & Andersen, S.C.
One Point Place, Suite 201
Madison, Wisconsin 53719

Phone: 608-833-0077

Fax: 608-833-3901

www.kayandandersen.com

U.S. automakers will soon have access to federal low-interest loans to help them modernize or retool their plants to build more energy-efficient vehicles.

The program was approved by Congress as part of a large spending bill, and will make the monies available to automakers at an interest rate of approximately 5 percent.

The auto-makers were directed last year to meet new fuel-efficiency standards of at least 35 miles per gallon by 2020.

It is expected the monies will be used for more gas-electric hybrids, plug-in vehicles and more fuel-efficient gasoline vehicles.

Facilities that are 20 years or older have priority in receiving the funding for modernization and retooling.



Have you got a code question for Tom? Let us know and we'll ask him to answer it in a future newsletter.

Economics for Schools

The troubled economy has hit everyone hard, and it has become apparent that this is not the time to be asking taxpayers for an additional \$67 million to build a new school in Milton. The Milton School District had been planning a referendum in November to propose a new high school project to replace its aging, existing school, which is nearly at capacity as well. The decision to postpone the project indefinitely came amid the news that the GM plant will close in Janesville, the housing market remains sluggish and the district actually had a slight decrease in enrollment numbers this year, the first in several years. After considering their options, the board decided that this was not the time to ask taxpayers for additional monies.

In order to build the project at the projected \$67 million, the project needed to start in the fall of 2009, however, the board recently decided to hold off on major projects until the economy recovers, even though the total cost of the project will likely increase if it is pushed off.

It's a trend that is repeating itself across the country as new expenditures for projects large and small are being postponed or projects cancelled due to concerns on an impending recession.



Tom's Code Corner

Question: We are installing a fire pump at an existing facility that has a standby generator. There are 2 existing transfer switches, one for the emergency egress lighting and one for optional loads. Can we feed the fire pump from the emergency transfer switch?

Answer: No, per NEC 695.3(A), 695.3(B)(1), and 695.10. 695.3 Requires a fire pump to be supplied by a reliable source of power. You have 2 choices, an electrical utility service connection. Or an on-site power production facility which would need to be operating continuously and be the normal supply for site.

The standby generator does not qualify as an on-site production facility so you would be required to install a separate utility service or make a connection ahead of the service disconnecting means. 695.3(A)(1) does not allow this connection to be made in the same cabinet, enclosure, or vertical switchboard section as the service disconnecting means. 695.10 requires the fire pump controller, electric motor, and fire pump power transfer switch to be listed for fire pump service. UL product categories are XNVE Page 287 for transfer switches and QYZS page 219 for controllers and combination controller, transfer switches.

MANPOWER STATISTICS

For the Month of -- August 2008

Local Union #	14	127	158	159	388	430	577	890	TOTAL
	=====	=====	=====	=====	=====	=====	=====	=====	=====
Local Contractors: NECA	8	4	4	17	5	5	2	6	51
Non-NECA	35	9	15	19	11	15	10	16	130
Total Local Contractors:	43	13	19	36	16	20	12	22	181
Traveling Contractors: NECA	11	3	6	0	5	5	6	9	45
Non-NECA	6	11	7	4	2	4	0	3	37
Total Traveling Contractors:	17	14	13	4	7	9	6	12	82
TOTAL # OF CONTRACTORS - LOCAL AND TRAVELERS:	60	27	32	40	23	29	18	34	263
Contractors More Than Two Months Delinquent in N.E.B.F.	1	2	0	1	3	0	0	0	7
Total Number of Contributing Contractors in Area:	61	29	32	41	26	29	18	34	270
Employees: NECA	293	53	143	631	238	52	176	253	1839
Non-NECA	224	74	169	97	51	62	61	77	815
TOTAL EMPLOYED:	517	127	312	728	289	114	237	330	2654

<u>Union #</u>	<u>NECA Division Name</u>
127	Kenosha Division
158	Northeastern Division
159	Madison Division
388	Wisconsin Valley Division
430	Racine Division
577	Fox Valley Division
890	Janesville-Beloit Division
14	Indianhead/La Crosse Divisions

NOTE: These figures only reflect employees of contractors not more than 2 months delinquent in their N.E.B.F. payments.

There is a lot of discussion these days about renewable energy and one of the renewable fuels that is now being considered is one of the oldest of all: wood. Many states are proposing new wood-burning electricity plants as an alternate source once again. Developers say they would not be cutting down trees to power the plants because there is already a surplus of available wood, much of it from lumber operations or paper mills.

These new plants qualify for federal subsidies intended to increase renewable energy usages, and in many cases, they are being sited at or near the lumber and paper facilities thereby reducing the transportation costs involved to haul the wood.

Of course there are environmental concerns as with any new power plants, however the argument that they utilize waste wood products seems to outweigh the other concerns.

From the Desk of Attorney Kay (continued)

(Continued from page 3)

subcontractors receiving construction monies from paying themselves profit before paying their subcontractors.

In a recent article appearing in the *Wisconsin Constructor*, published by the Associated General Contractors of Wisconsin, the lawyer that represented AGC of Wisconsin, AGC of Greater Milwaukee and the ABC of Wisconsin wrote that, “*This decision is welcomed as a positive step toward clarifying rights and responsibilities of all contractors.*”

AGC’s view is questionable. In *State v. Keyes*, the facts involved an owner, who may have been acting as its own general contractor, and a general contractor that claimed it was acting as a subcontractor, which was a relationship not typical in the construction industry, although not unknown either. The thrust of the decision as suggested by the legal counsel for AGC was that profit can be kept by a general contractor for work performed by the general contractor even though the subs are not fully paid. He failed to focus upon language in the decision which states:



“Using the money to pay themselves in full while other subcontractors have not been paid proportionally constitutes using money for a non-statutory purpose. ...

Assuming that Angela had a claim to the payments she received, taking full payment when third-party subcontractors remained unpaid violates the proportionality requirement of the statute.”

The defendant contractor and AGC argued that the proper interpretation of the theft by contractor statute is that it prohibits contractors from diverting money away from a project rather than prohibiting payment for a contract that includes profit within a particular project. The Supreme Court held that:

“Their interpretation, however, ignores the second statutory purpose, securing payments for subcontractors. Allowing a prime contractor acting as a subcontractor to pay itself in full while leaving subcontractors with unpaid claims totaling \$47,000.00 is incompatible with the purpose of ‘securing payments to subcontractors and workers.’”

The Court then said:

“Even if it turns out that the money was profit, that alone is neither here nor there. Rather, the issue is whether payment was proportional as required by § 779.02(5). ...

For several reasons, we decline to follow the court of appeals’ approach here. As noted above, it bases its analysis on a faulty assumption, i.e., that it is undisputed that the Keyes kept the unaccounted for \$36,036.28 as profit.

In addition, it is unclear how to construe ‘profit’. The State does not contend that the Keyes violated the statute for receiving some or all of their contractor fee prior to the end of the project. However, a leading treatise on construction law understands contractor fees to include profit. ... The court of appeals’ view would potentially preclude taking that fee.

Further, the court of appeals’ approach appears to require that any profit be deferred until the end of a project...

...We therefore disagree with the court of appeals that § 779.02(5) prohibits prime contractors acting as subcontractors from receiving profit prior to paying other subcontractors for their labor and materials.”

(Continued on page 7)

From the Desk of Attorney Kay (continued)

The only reasonable conclusion to draw from the Supreme Court's decision is that while a prime contractor may receive profit in the payment of its pay applications, the construction monies must nonetheless be held in trust for the benefit of subcontractors until they are paid in full, or if there is a deficiency, until they have received proportionate payment. An offending prime contractor or subcontractor who does not comply with that statute will have no real defense whether or not profit is included in the construction moneys held in trust.



Electrical contractors should remember that it will be up to the district attorney to determine whether there is a criminal case sufficient to justify prosecution of the prime contractor. In *State v. Keyes*, the State is named because the district attorney of the La Crosse County determined that the facts justified criminal prosecution.

In the next issue I will discuss the civil remedies that an electrical contractor has against a nonpaying prime contractor, which is entirely a separate subject matter from the filing of a complaint with the district attorney with the hope that the district attorney will issue a criminal complaint against the nonpaying prime contractor. Those civil remedies include the right to recover treble damages.

Cassville Power Plant Gets Environmental Support

The proposed coal-fired power plan for Cassville has some unexpected supporters on board. A coalition of union, farm and environmental groups has all now voiced their support for the \$1.3 billion dollar project in southwestern Wisconsin. A few of the environmental groups supporting the project are Wisconsin Wildlife Federation and Better Environmental Solutions.

The unions are on board because the project will provide hundreds of construction jobs and up to 40 full-time positions once the project is complete. The village of Cassville is desperately hoping the PSC approves the project, saying their future depends on these new jobs. The farm groups welcome the use of switchgrass and corn as alternative energy sources as the area has a strong agricultural base, and these projects would be produced locally, a boost for area farmers.

The project in Cassville, located along the Mississippi River, would involve clean up of the existing 50-year old plant and expansion of the facility from 200 to 500 megawatts. The site's emissions of sulfur dioxide would be reduced by 90%, nitrogen oxides would be reduced by 55% and mercury would be reduced by 75%, helping Wisconsin to attain current and upcoming Environmental Protection Agency Clean Air standards.

The plan includes use of 20% biomass product, likely to be switchgrass, wood waste and corn stover, which would reduce carbon dioxide emissions by more than 500,000 tons per year. The location of the facility on the Mississippi River would also mean it could utilize wind energy from Iowa, which has more wind resources and is cheaper than Wisconsin.

This could be the largest flex-fuel hybrid plant in the nation, and could become a model for other utilities and other nations to follow as they increase their uses of biomass either with or without coal. The environmental groups feel it is a good start and a chance to prove that alternative energies can be a viable alternative to fossil fuels.



It's that time of year again, the leaves are changing days are growing shorter, and on November 2, daylight saving time will officially end for the year.

So don't forget to turn your clocks back, or be prepared to arrive early!