

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING :
ENGINEERS LOCAL UNION NO. 139, :
AFL-CIO, :

Complainant, :

vs. :

MIDWESTERN PACIFIC CORP., :

Respondent. :

Case I
No. 15255 Ce-1391
Decision No. 10746-A

Appearances:

Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Gerry M. Miller, appearing for the Complainant.

Mr. Gwyn Johnson, President, appearing for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

International Union of Operating Engineers Local Union No. 139, AFL-CIO, having filed a complaint with the Wisconsin Employment Relations Commission alleging that Midwestern Pacific Corp., has committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act; and the Commission having appointed Herman Torosian, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and hearing on said complaint having been held at Appleton, Wisconsin, on August 22, 1972, before the Examiner; and the Examiner having considered the stipulation entered into by the parties and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That International Union of Operating Engineers Local Union No. 139, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization having its principal office at 7283 West Appleton Avenue, Milwaukee, Wisconsin, and a district office at 2233 Birch Street, Eau Claire, Wisconsin.

2. That Midwestern Pacific Corp., hereinafter referred to as the Respondent, is a general contractor in the building and construction industry and maintains its principal office at Box 866, Appleton, Wisconsin.

3. That Complainant and Respondent have been parties to a collective bargaining agreement effective from September 7, 1971, through May 31, 1973, covering the wages, hours and working conditions of certain of Respondent's employees; that said agreement, in Article IX, provides for final and binding resolution of grievances arising between the Complainant and Respondent by arbitration; that Article XI specifies classification and wage rates for its employees and that Article XVIII and Article XIX provide the following for pension and health and welfare contributions:

"ARTICLE XVIII

PENSIONS

Section 18.1 Contributions: Effective April 1, 1970, the Contractor shall contribute monthly to the Central Pension Fund of the International Union of Operating Engineers and Participating Employers, \$0.25 per hour for all hours worked or paid for within the geographical coverage of this agreement for each workman employed by the Contractor in the job classifications listed in Article XI of this agreement.

Section 18.2 Effective Date: Effective April 1, 1970, the Employer agrees to be bound by the Agreement and Declaration of Trust entered into as of September 7, 1960, establishing the Central Pension Fund of the International Union of Operating Engineers and Participating Employers and by any amendments to said Trust Agreement.

Section 18.3 Employer Trustees: Employer irrevocably designates as his representative among the trustees of said fund such trustees as are named in said Agreement and Declaration of Trust as employer trustees, together with their successors selected in the manner provided in said Agreement and Declaration of Trust as that document may be amended from time to time.

Section 18.4 Enforcement: If the employees are removed from the job by the Union to enforce payments or liquidated damages assessments, the employees shall be paid by the delinquent Employer for all time lost at the straight-time hourly rate. Thirty (30) days prior to the exercise of this section the Employer shall be notified in writing of the delinquency.

The trustees of the Pension Fund (to which fund payments were required to be made by Employers under this Agreement) may for the purpose of collecting any payments required to be made to such funds, including damages and costs, and for the purpose of enforcing rules of the trustees covering the inspection and audit of payroll records, seek any appropriate legal, equitable and administrative relief and they shall not be required to invoke or resort to the grievance or arbitration procedure otherwise provided for in this Agreement.

Section 18.5 Time of Payments and Liquidated Damages: Payments to the Fund are to be made at the end of each month, but not later than the 15th day of the following month, after which the payments will be considered delinquent. In the event an employer becomes delinquent in his payments to the Fund, he shall be assessed as liquidated damages \$2.00 per man for each thirty (30) day period or fraction thereof that he is delinquent."

"ARTICLE XIX

HEALTH AND WELFARE

Section 19.1 Contributions and Effective Date: Effective April 1, 1970, the Contractor shall contribute monthly to the Construction Welfare Fund of Milwaukee the additional sum of \$0.25 per hour made on the basis of all hours worked or paid for within the geographical coverage of this agreement for each workman employed by the Contractor in the job classifications listed in Article XI of this agreement.

Section 19.2 Representation: The Allied Construction Employers Association, Inc. of Milwaukee shall be the exclusive representative of the employers and shall have equal representation (50%) with the participating unions in the establishment and administration of said Construction Industry Welfare Fund and the Program established in connection therewith. Such Program shall also be open to all Employees represented by the Union who are employees of employers not represented by the Allied Construction Employers Association, Inc. on the same basis as it is available to employees of employers represented by said Association, provided their employers make the required contributions to said Program and Fund which the Union agrees shall be required of all employers.

Section 19.3 Agreement With Terms and Conditions: The Employers covered by this Agreement agree to abide by the terms and conditions of the Trust Agreement governing the said Construction Industry Welfare Fund, and the rules and regulations heretofore and hereafter adopted by the trustees pursuant to such Trust Agreement. The Employers covered by this Agreement hereby ratify all actions taken or to be taken by the trustees of such Fund within the scope of their authority.

Section 19.4 Enforcement: If the employees are removed from the job by the Union to enforce such delinquent payments including liquidated damages, the employees shall be paid by the delinquent Employer for all lost time at the straight-time hourly rate. Thirty days prior to exercise of this section the employer shall be notified in writing of the delinquency.

The trustees of the Health and Welfare Fund (to which fund payments were required to be made by Employers under this Agreement) may for the purpose of collecting any payments required to be made to such fund, including damages and costs, and for the purpose of enforcing rules of the trustees covering the inspection and audit of payroll records, seek any appropriate legal, equitable and administrative relief and they shall not be required to invoke or resort to the grievance or arbitration procedure otherwise provided for in this Agreement.

Section 19.5 Time of Payments and Liquidated Damages: Payments to the Fund are to be made at the end of each month, but not later than the 15th day of the following month, after which the payments will be considered to be delinquent. In the event an employer becomes delinquent in his payments to the Fund, he shall be assessed as liquidated damages \$2.00 per man for each thirty (30) day period or fraction thereof that he is delinquent.

Section 19.6 Health and Welfare Fund Reopener: It is mutually agreed that this Agreement may be reopened on or after January 1, 1971, to establish a Health and Welfare Fund, jointly trustee, acceptable to both the Union and the Employer. Upon the establishment of an acceptable fund contributions to the Construction Industry Health and Welfare Fund shall be terminated."

4. That Complainant in its complaint filed on January 20, 1972, alleged that Respondent had committed certain unfair labor practices within the meaning of Section 111.06(1)(a) and (f) of the Wisconsin Statutes; that at the first hearing held in the instant matter on May 11, 1972, the parties agreed to proceed to arbitration over the merits of the issues in dispute and have the instant complaint postponed

indefinitely pending notification by the Complainant that said matter had been submitted to an arbitrator as agreed; that pursuant to said agreement the instant matter was postponed indefinitely and an arbitrator was appointed by the Wisconsin Employment Relations Commission to hear said dispute; that said arbitration was set for hearing by the arbitrator on July 13, 1972; that Respondent did not appear at said hearing; and, that thereafter, upon the request of Complainant, hearing on the instant complaint was rescheduled for August 22, 1972.

5. That at the time of the hearing held on August 22, 1972, Respondent was no longer in operation and Respondent's payroll records were in the possession of the Internal Revenue Service at its Green Bay, Wisconsin, office.

6. That at said hearing Complainant, by its Financial Secretary, presented Respondent with the following letter:

"Dear Sir:

We have completed the computation of the wage deficiencies asserted by the Operating Engineers employed by Midwestern Pacific Corporation between 7 September 1971 and 9 February 1972. The union is prepared to provide personnel time records to substantiate its assertion that Midwestern owes the following individuals the amounts indicated:

Hy Farning	\$ 138.33
H. Mlezvia	329.30
R. A. Wiederhoeft	184.96
Von Hunter	220.35
Richard Schnieder	168.98
Ed Guthman	459.12
W. J. Warner	697.07

These claims therefore total \$2,198.11.

We therefore understand that you will submit this claim to the appropriate bonding firm for payment."

7. That Respondent stipulated to the above letter, but because Respondent was not in possession of its payroll records, and would not for approximately two weeks, the parties further stipulated that Respondent would have 30 days to submit to the Examiner, in writing, any dispute it may have with the above figures claimed by Complainant; and that in the absence of any such submission by the Respondent, the parties further agreed to have the Examiner issue a decision based on the amounts claimed by the Complainant in the above mentioned letter.

8. That Respondent at no time filed with the Examiner any dispute to the amount claimed by the Complainant as outlined above.

9. Complainant and Respondent further stipulated that on Monday, July 17, 1972, after more than 30 days written notice for payment of pension and health and welfare deficiencies, the Union removed operating engineers employed by Respondent from its various job sites to compel the Employer to pay the delinquent sums owing; and that said employees were removed from the jobs for eight hours on Monday, July 17, and eight hours on Tuesday, July 18, and until noon on Wednesday, July 19, at which time they returned to work.

On the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That the Respondent, by not properly compensating employees Hy Farning, H. Mlezvia, R. A. Wiederhoeft, Von Hunter, Richard Schnieder, Ed Guthman and W. J. Warner, violated the collective bargaining agreement existing between it and the Complainant, and therefore, in that regard, Respondent committed and is committing an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

2. That the Respondent, by not paying its employees who were removed from jobs by the Union to enforce delinquent payments to the pension and health and welfare funds, at the straight time hourly rate for all lost time, violated Article XVIII, Section 18.1 and 18.4 and Article XIX, Section 19.1 and 19.4 of the existing collective bargaining agreement between it and the Complainant, and therefore, in that regard, Respondent committed and is committing an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

IT IS ORDERED that Midwestern Pacific Corp., its officers and agents, shall immediately:

1. Take the following affirmative action which the Examiner finds will effectuate the policies of the Wisconsin Employment Peace Act:

(a) Immediately make whole the following employees in the following amounts as stipulated by the parties:

Hy Farning	\$ 138.33
H. Mlezvia	329.30
R. A. Wiederhoeft	184.96
Von Hunter	220.35
Richard Schnieder	168.98
Ed Guthman	459.12
W. J. Warner	697.07

(b) Make whole all employees who were removed from jobs by the Union to enforce delinquent payments to the pension and health and welfare funds for all lost time at the straight hourly rate.

2. Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from the receipt of a copy of this Order as to what action it has taken to comply herewith.

Dated at Madison, Wisconsin, this 10th day of October, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Herman Torosian, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

During the course of the hearing Respondent stipulated money was due and owing to employees Hy Farning, Ed Guthman, Von Hunter, H. Mlezvia, Richard Schnieder, W. J. Warner and R. A. Wiederhoeft. However, inasmuch as Respondent's records were in the possession of the Internal Revenue Service, Respondent did not stipulate to the amounts claimed by the Complainant as being accurate. Said records were to be returned within approximately two weeks of the hearing held on August 22, 1972, and for said reason the parties stipulated to a thirty-day period during which time Respondent could dispute Complainant's monetary claim and file same with the Examiner. The thirty-day period expired September 22, 1972, with no notice of dispute filed by Respondent. Therefore, the Examiner has today ordered the Respondent to pay the above mentioned employees the amount of money claimed due and owing by Complainant in its August 22 letter to Respondent.

The parties further stipulated that after 30 days written notice for payment of deficient pension and health and welfare contributions, the Union removed Respondent's operating engineers on July 17, 18 and until noon on July 19, 1972, to compel Respondent to pay the delinquent amount owing. The Examiner has issued an Order based on said stipulation.

Dated at Madison, Wisconsin, this 10th day of October, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Examiner