

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

EUGENE KELM, CHAIRMAN OF THE BOARD OF
TRUSTEES OF THE WISCONSIN BRICKLAYERS
WELFARE FUND ON BEHALF OF THE BOARD OF
TRUSTEES OF THE WISCONSIN BRICKLAYERS
WELFARE FUND AND ON BEHALF OF THE
WISCONSIN BRICKLAYERS WELFARE FUND,

Complainant,

Case I
No. 15393 Ce-1404
Decision No. 10831-A

vs.

LAKE CITY TILE CO., by and through
TED MCCARTHY, Individually and
as its President, 1/

Respondent.

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow,
appearing on behalf of the Complainant.
Mr. Ted McCarthy, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS

Complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter, and the Commission having appointed Howard S. Bellman, a member of the Commission's staff to make and issue Findings of Fact, Conclusions of Law and Orders in the matter, as provided in Section 111.07(5), Wisconsin Statutes, and the hearing on such complaint having been held at Madison, Wisconsin, on April 11, 1972, before the Examiner, and the Examiner having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Orders.

FINDINGS OF FACT

1. That Eugene Kelm, referred to herein as the Complainant, is an individual residing at 409 Concord Avenue, Watertown, Wisconsin; that the Complainant is the Chairman of the Board of Trustees of the Wisconsin Bricklayers Welfare Fund, hereinafter referred to as the Fund; and in such capacity has authority to act on behalf of the Board of Trustees of said Fund and on behalf of said Fund.
2. That Bricklayers, Masons and Plasterers International Union, Local 13, hereinafter referred to as the Union, is a labor organization having offices at Madison, Wisconsin.
3. That Lake City Tile Company, referred to herein as the Respondent, was, at all times material herein a partnership engaged in tile contracting, and an employer having offices at Madison, Wisconsin; and that Ted McCarthy, an individual residing at 622 Division Street, Madison, Wisconsin, was a partner in said partnership, which was dissolved on approximately December 1, 1971.

- 1/ Caption amended per unopposed post-hearing motion by Complainant received on November 21, 1972.

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4. That at all times material herein, the Union and the Respondent have been parties to a collective bargaining agreement which contains among its provisions the following that are material herein:

"ARTICLE II"

For the period April 1, 1970 to April 1, 1971, the Employer agrees to pay \$6.00 per hour for tile-setters, with 15¢ going toward the union welfare plan if in effect.

For the period April 1, 1971 to March 31, 1972, the Employer agrees to pay \$6.95 per hour for tile-setters.

For the period April 1, 1972 to March 31, 1973, terrazzo workers will be paid 25¢ over the tilesetters scale.

These minimum rates of pay shall apply five days a week, Monday through Friday. The working hours are to be between 8:00 A.M. and 5:00 P.M. of any working day. Noon hours may be curtailed on the job but are not to be less than thirty minutes.

5. That during the period of March, April, May, and June, 1971, the Respondent failed to make contributions to the Fund required by the above-quoted Article II, in the amount of \$59.85.

6. That on approximately October 4, 1971 and November 9, 1971, the Fund notified the Respondent in writing of its failure to make said payments.

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

CONCLUSIONS OF LAW

1. That the Respondent, by violating the collective bargaining agreement existing between it and the Union, by failing to make payments required by said agreement to the Fund for March, April, May, and June, 1971, has 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 failing to make said required payments to the Fund within six weeks after such payments became due and payable and after receiving notice in writing of its failure to do so, violated Section 103.86 of the Wisconsin Statutes; and that by so violating said Statutes, the Respondent committed a misdemeanor in connection with a controversy as to employment relations thereby committing an unfair labor practice within the meaning of Section 111.06(1)(l) of the Wisconsin Employment Peace Act.

3. That any conduct of Respondent regarding payments to the Fund which conduct occurred prior to March 1, 1971, and therefore more than one year preceding the filing of the instant complaint of unfair labor practices, cannot constitute any unfair labor practice within the meaning 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

That Lake City Tile Company and Ted McCarthy shall immediately:

1. Cease and desist from violating Article II of the aforesaid collective bargaining agreement with Bricklayers, Masons and Plasterers International Union, Local 13, by failing, neglecting, and refusing to make payments to the Wisconsin Bricklayers Welfare Fund.

2. Cease and desist from violating Section 103.86 of the Wisconsin Statutes by failing to make payments to the Wisconsin Bricklayers Welfare Fund after timely notice in writing of failure to do so.

3. Take the following affirmative action which the Examiner finds will effectuate the policies of the Act:

(a) Immediately pay to the Wisconsin Bricklayers Welfare Fund the sum of \$59.85 for the months of March, April, May, and June, 1971.

(b) Notify the Wisconsin Employment Relations Commission in writing within 20 days from the date of this Order as to what steps the Respondent has taken to comply herewith.

Dated at Madison, Wisconsin, this 15th day of January, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Howard S. Bellman

Howard S. Bellman, Examiner

LAKE CITY TILE CO., by and through TED MCCARTHY, Individually
and as its President, Case I Decision No. 10831-A

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS

The complaint in this matter was filed on March 1, 1972. 2/ It asserts that the Respondent violated collective bargaining agreements with the Union and, thereby, Section 111.06(1)(f) of the Wisconsin Employment Peace Act, by failing to make certain payments to the Fund from January, 1969 through June, 1971; and, by implication, that said conduct was also a violation of Section 103.86, Wisconsin Statutes 3/ and, thereby, an unfair labor practice within the meaning of Section 111.06(1)(1) of the Act.

At the hearing, Mr. McCarthy, who represented the Respondent, a partnership, in which he was a partner and which was apparently dissolved on approximately December 1, 1971, stated that he did not make the payments in question to the Fund on the basis of an agreement with the employees to pay to them directly, rather than to the Fund, the 15¢ per hour referred to in Section II of said contract, quoted in the Findings of Fact attached.

The Fund first recognized the Respondent's delinquency during September, 1971 when an auditor for the Fund making a routine check uncovered the situation. On October 4, 1971 the auditor wrote to the Respondent notifying him of the delinquencies and requesting that sufficient remittance or "suitable arrangement for payment" be made within ten days, or the Fund would take "legal action to enforce collection". This was the first advice to the Respondent that his direct payment practice was considered improper. This was followed by a November 9, 1971 letter from the Fund's attorney which made similar assertions and advised the Respondent of Section 103.86(1), Wisconsin Statutes.

2/ The instant complaint was filed simultaneously with others which were substantially identical to it. One of these was dismissed on the basis of settlement and the other (Cotzian Ceramic Tile Co., Decision No. 10832-A) is the subject of a decision also issued on this date by the Examiner. It has been understood from the outset that these cases would be processed together. Final arguments including a motion were received from the Complainant on November 21, 1972.

3/ "103.86 Employee welfare funds: default in payments
(1) Any employer who promises in writing to make payments to an employee welfare fund; either by contract with an individual employee, by a collective bargaining agreement or by agreement with such employee welfare fund, and who fails to make such payments within 6 weeks after they become due and payable, and after having been notified in writing of his failure to make the required payments, shall be fined not more than \$200.

(2) This section shall not apply where the failure to make payments is prevented by act of God, proceedings in bankruptcy, orders or process of any court of competent jurisdiction, or circumstances over which the employer has no control."

On November 19, 1971 McCarthy visited the auditor's office, heard the auditor's explanation of the Fund's position, and stated that he had paid the amounts in question to the employees and believed he should not pay such amounts again, to the Fund. The Examiner has concluded, however, that such payments to individual employees clearly fail to fulfill the labor agreement's requirements.

Likewise, these delinquencies constitute violations of Section 103.86, Wisconsin Statutes, misdemeanors, and violations of Section 111.06(1)(1) of the Act.

The one year statute of limitations provided in Section 111.07 (14) of the Act would apparently exclude from the Commission's jurisdiction any delinquencies prior to March 1, 1971. In this regard the Complainant argues that Lorentzen Tile Company (Decision No. 9630, 5/70) pertains. In that case a similar delinquency pattern occurred and the Commission allowed the Complaint to reach back more than one year. However, certain facts present in that matter, and not herein, were relied upon. Thus, in Lorentzen, the Respondent "on several occasions within the one year period preceding the filing of the complaint acknowledged that he owed the money and stated that he intended to pay it." (quite contrary to the Respondent's attitude in the instant case), and "in fact, he attempted to make full payment within the one year period but failed to do so." The Commission did not conclude in Lorentzen that such delinquencies constitute continuing violations which remain actionable, despite their inception beyond the one-year period. Likewise, the Examiner rejects that theory herein.

The Examiner also rejects the Complainant's contention that the remedy should reflect the money not paid to the Fund prior to the one year period even if substantive violations cannot be found to have occurred at such times. Remedies should reflect culpability. The Examiner believes the Respondent's conduct reflected a decision to attract and maintain certain employees by paying the 15¢ per hour to them directly, rather than a decision to avoid the payments altogether.

The Union, in the Examiner's opinion, has been at least equally blameworthy. By failing to police compliance with that Article, the Union allowed for the situation at hand. Therefore, no extraordinary remedy against the Respondent is warranted. This does not mean that the Complainant must, as its brief suggests, institute delinquency actions every month, but that it may not let such delinquencies occur without appropriate action under the Act for more than one year.

It appears that beginning in April, 1971, the Respondent commenced to, at least partially, contribute to the Fund at the 15¢ per hour rate. This practice indicates a mutual understanding not clearly required by Article II of continuing such contributions beyond April, 1971. It is inferred that such practice is contractually required however, and therefore it is found as alleged that the Respondent improperly failed to make the required contributions for the four months - March, April, May, and June, 1971 - that fell within the one year period prior to the filing of the complaint. These delinquencies are of \$28.95, \$26.10, \$3.60, and \$1.20, respectively, and total \$59.85.

The record indicates that around the time of the apparent dissolution of the partnership which was the employer herein, partner McCarthy purchased some equipment from the partnership with the intent

of conducting a similar business. However, he apparently became ill at about the same time and did not commence such subsequent operation to any extent until shortly before the instant hearing. This operation as sole proprietorship includes hiring different employes, purchasing some different equipment, the use of a different warehouse, and the use of a different name, i.e. LCT.

The Complainant urges that this new business, as well as McCarthy, as an individual, should be held liable for the aforesaid debt of the partnership. In that regard it cites the provisions of Chapter 178, Wisconsin Statutes. The Examiner has concluded that McCarthy is liable to the extent that he was a partner in a partnership, now dissolved, which incurred a debt prior to dissolution. The record is held to be insufficient to prove that the sole proprietorship is a successor to the partnership, and as such also liable for such debt. However.

Dated at Madison, Wisconsin, this 15th day of January, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Howard S. Bellman

Howard S. Bellman, Examiner