

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING :
ENGINEERS LOCAL UNION NO. 139, :
Complainant, : Case IV
vs. : No. 16415 Ce-1463
P & J CONTRACTING COMPANY, INC., : Decision No. 11536-A
Respondent. :

Appearances:

Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Thomas P. Krukowski, appearing on behalf of Complainant.
Respondent did not appear in person or otherwise.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Complaint of unfair labor practice having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter, and the Commission having appointed Marshall L. Gratz, a member of its staff, to act as an examiner and to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Sec. 111.07(5) of the Wisconsin Employment Peace Act, and a hearing on said Complaint having been held at Milwaukee, Wisconsin on February 5, 1973 before the Examiner, and the Examiner having considered the evidence and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That International Union of Operating Engineers Local Union No. 139, hereinafter referred to as the Complainant, is a labor organization having offices at 7283 West Appleton Avenue, Milwaukee, Wisconsin.

2. That P & J Contracting Company, Inc., hereinafter referred to as the Respondent, has offices at 12550 West Knoll Road, Elm Grove

3. That at all times material herein, Respondent has recognized the Complainant as the exclusive bargaining representative of certain of its employes; that in said relationship, the Respondent and the Complainant have been, at all times material hereto, parties to a collective bargaining agreement covering the wages, hours and working conditions of such employes, which agreement was negotiated on behalf of the Respondent and other employers by the Wisconsin Excavators and Graders Association; and that said agreement, in Art. VIII, provides for final and binding resolution of grievances arising between the Complainant and Respondent by arbitration.

4. That on December 13, 1972, a grievance arose involving an unnamed employe (who would have been the first qualified operator on the out-of-work book) who was in the collective bargaining unit represented by the Complainant and covered by the aforementioned collective bargaining agreement, in which grievance it was alleged that the Respondent assigned bargaining unit work to a nonbargaining unit individual in violation of Art. VI, Sec. 6.1 ([Work] Jurisdiction) and Art. XI, Sec. 11.6 (Supervisory Replacement of an Operator) of the aforesaid collective bargaining agreement; and that the aforesaid grievance constitutes a claim which, on its face, is governed by the terms of said collective bargaining agreement.

5. That on or about December 14, 1972, Complainant, by its Business Representative, Richard Sette, sent by certified mail to the Respondent the aforesaid grievance in written form; that Complainant in a cover letter accompanying said grievance also stated to the Respondent "[p]ursuant to your current labor agreement, your firm has seven (7) days in which to answer this grievance either in writing, stipulating your willingness to arbitrate, or to contact this office to schedule an appointment for a meeting to settle the matter"; and that Respondent has neither replied in any way to said grievance nor has it filed an Answer to the instant Complaint nor appeared at the hearing in the instant proceeding.

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

CONCLUSION OF LAW

That the Respondent, by failing to reply to the grievance in this matter, and by failing to participate in any manner in the instant

proceeding, has refused to proceed to arbitration with respect to the aforesaid grievance, thus violating the arbitration provisions of the aforesaid 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 Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act.

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

ORDER

IT IS ORDERED that P & J Contracting Company, Inc., its officers and agents shall immediately:

- 1) Cease and desist from refusing to submit the aforesaid grievance filed by Richard Sette, and the issues concerning same, to arbitration.
- 2) Take the following affirmative actions which the Examiner finds will effectuate the policies of the Wisconsin Employment Peace Act:
 - a) Comply with the arbitration provisions of the collective bargaining agreement existing between it and the Complainant with respect to the aforesaid grievance submitted by Richard Sette, and all issues concerning same.
 - b) Notify the Complainant that it will proceed to arbitration on said grievance, and all issues concerning same.
 - c) Participate in the arbitration proceeding before the Arbitrator selected pursuant to the provisions of the aforesaid collective bargaining agreement with respect to the aforesaid grievance and all issues concerning same.
 - d) 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 Milwaukee, Wisconsin, this 22d day of February, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The instant Complaint was filed on January 11, 1973. Essentially it alleges that Respondent violated its collective bargaining agreement with Complainant, and therefore violated Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act, by refusing to proceed to the arbitration of a certain grievance.

A Notice of Hearing was issued by the Examiner on January 19, 1973 specifying a date for hearing and that an Answer to said Complaint "may" be filed on or before January 29, 1973. The hearing was subsequently postponed to February 5, 1973. The initial Notice of Hearing, the Notice of Postponement and an Amended Notice of Postponement were all transmitted to the Respondent by certified mail. The Respondent filed no Answer nor did it appear in person or otherwise at the hearing. In fact, the Examiner has been provided with no response by the Respondent to the Complaint herein although it is clear from mail receipts that the Complaint and the transcript of the Official Record of the hearing were received by the Respondent. ^{1/}

At the hearing, it was established that Richard Sette, Business Representative of Complainant, filed a grievance on behalf of an unnamed employe (who would have been the first qualified operator on the out-of-work book on December 13, 1972) and who was a member of the bargaining unit represented by the Complainant, alleging that nonbargaining unit personnel performed bargaining unit work in violation of certain provisions of the parties' collective bargaining agreement. On December 14, 1972, said grievance was mailed to the Respondent by the Complainant and a United States Post Office return receipt indicates that it was received. With said grievance a letter of transmittal was also mailed; said letter read in pertinent part as follows:

"Please be advised that the International Union of Operating Engineers Local No. 139 is filing a formal grievance against your firm relative to non-bargaining unit personnel operating equipment.

^{1/} At the close of the hearing, the Examiner provided a one-week period subsequent to the date of transmittal of the transcript to afford the Respondent another opportunity to state its position. This opportunity was expressed both in the transcript and in a cover letter from the Examiner to the Respondent accompanying same, which letter was dated and mailed on February 12, 1973.

Pursuant to your current labor agreement, your firm has seven (7) days in which to answer this grievance either in writing, stipulating your willingness to arbitrate, or to contact this office to schedule an appointment for a meeting to settle the matter."

It was also established that the Complainant, subsequent to its December 14, 1972 letter, made several unsuccessful attempts to contact Respondent's President, Patrick J. Murphy, Jr., by telephone concerning the instant grievance.

It is the conclusion of the Examiner that the Respondent has exhibited an attitude in this matter which would make it patently over-technical to require the Union to have made a formal request that the parties submit the aforesaid grievance to arbitration. ^{2/} It seems apparent that such a request would have met with simple silence, as did the grievance and the Complaint herein. It is the Examiner's decision that the entirety of Respondent's conduct with regard to the instant grievance, including its conduct in this proceeding, is sufficient basis for an inference that Respondent recognized Complainant's desire to go to arbitration and refused to comply therewith.

Dated at Milwaukee, Wisconsin, this 22d day of February, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner

^{2/} This conclusion is further supported by official notice, herein taken by the Examiner, of a recent case involving an identical fact situation and the same parties as are present in the instant proceeding, to wit: P & J Contracting Co., Inc., Dec. No. 10876-A (6/72).