

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF BRIDGE
STRUCTURAL AND ORNAMENTAL IRON
WORKERS LOCAL UNION NO. 383,

Complainant,

vs.

PINKERTON ERECTION,

Respondent.

Case I
No. 16671 Ce-1482
Decision No. 11759-A

Appearances:

Mr. Robert C. Kelly, Attorney at Law, for Complainant.
Mr. Jess Pinkerton, Proprietor, for Respondent Employer.

FINDINGS OF FACT, CONCLUSION OF LAW
AND ORDERS

The above entitled matter having come on for hearing before the Wisconsin Employment Relations Commission on May 1, 1973 at Wausau, Wisconsin before an Examiner, Robert M. McCormick, who had been appointed by the Commission pursuant to Section 111.07(5) of the Wisconsin Employment Peace Act to make and issue Findings of Fact, Conclusions of Law and Order in the matter, and the Examiner having considered the evidence and arguments of Counsel, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Orders.

FINDINGS OF FACT

1. That International Association of Bridge, Structural and Ornamental Iron Workers Local Union No. 383, hereinafter referred to as the Complainant, is a labor organization having its offices at 1602 South Park Street, Madison, Wisconsin.

2. That Pinkerton Erection, hereinafter referred to as Respondent, is a sole proprietorship and employer of iron workers engaged in the building and construction business with offices at 5612 Richflex Street, Schofield, Wisconsin.

3. That for all times material herein, the Complainant and Respondent are parties to a collective bargaining agreement effective April 1, 1970 and to remain in effect at least through March 31, 1973, covering the wages, hours and working conditions of certain employees employed by Respondent.

4. That said collective bargaining agreement, in pertinent part, contains the following provisions:

No. 11759-A

"HEALTH AND WELFARE PLAN

Section 7. Effective April 1, 1970 each Employer shall pay into the Welfare Fund by the 10th day of the succeeding month on all employees covered by this Agreement to the Iron Workers Tri-State Welfare Fund, 173 West Madison Street, Chicago, Illinois, the sum of 25¢ per hour.

. . .

PENSION PLAN

Section 8.

. . .

Effective October 1, 1971, each Employer shall pay into the Pension Plan by the 10th day of the succeeding month on all employees covered by this Agreement to the Iron Workers Mid-America Pension Plan, 173 West Madison Street, Chicago, Illinois, the sum of 25¢ per hour.

. . .

VACATION PLAN

Section 9. Effective October 1, 1970 the Employer agrees to withhold from the wages of the employee after all legal deductions, such as Social Security tax, etc., have been made and to pay to the Iron Workers Local 383 Vacation Fund, 1602 South Park Street, Madison, Wisconsin 53715, by the 10th of the succeeding month, the amount of 25¢ per man, per hour worked, calculated to the nearest hour worked for each employee covered by this Agreement, leaving the amount deposited in the Fund the exact amount which will be returned upon request by the member, according to the rules adopted by the Trustees of said Fund.

. . .

APPRENTICE and RETRAINING FUND

Section 10. Effective April 1, 1971, in addition to the per hour wage rates, the Employer shall contribute two and one-half cents (2 1/2¢) per hour for each actual hour worked by each employee covered by this Agreement to the Apprentice & Journeyman Retraining Fund of Iron Workers Local 383, of Madison, Wisconsin. The primary purposes of the Fund shall include apprenticeship training, advanced craft training, advanced training and retraining and education of journeymen, safety education, first aid education, public relationships and market development and other educational and informational betterment of such employees and the common good of the Construction Industry.

Effective October 1, 1971, the Employer shall contribute an additional one-half cent (1/2¢) to the above fund, making a total contribution of three (3) cents per hour for each actual hour worked.

. . .

SETTLEMENT OF DISPUTES

Section 41. Any dispute as to the proper interpretation of this Agreement shall be handled in the first instance by a representative of the Union and the Employer, and if they fail to reach a settlement within five (5) days it shall be referred to a Board of Arbitration composed of one (1) person appointed by each party, the two (2) so appointed to select a third member. In the event that the two (2) so-appointed arbitrators are unable within two (2) days to agree upon the third arbitrator, they shall jointly request the Federal Mediation and Conciliation Services to furnish a panel of five (5) names from which the third member shall be selected. The decision of the Board of Arbitration shall be handed down within two (2) days after the selection of the third member and the decision of the Board of Arbitration shall be final and binding upon both parties.

The Board of Arbitration shall have jurisdiction over all questions involving the interpretation and application of any section of this Agreement. It shall not, however, be empowered to handle negotiations for a new Agreement, changes in the wage scale, or jurisdictional disputes.

Each party shall individually pay the expenses of the arbitrator it appoints and the two parties shall jointly share the expense of the third arbitrator."

5. That during the period commencing on or about November 1, 1972 to April 26, 1973, the Respondent did employ iron workers represented by the Complainant and during such period the Respondent failed and constructively refused to make certain contributions on behalf of such employees, who worked in said period, a total of 6,627 hours to:

- (a) The Iron Workers Tri-State Welfare Fund covering the period from November 1, 1972 to April 26, 1973, the gross total of such defaulted payments amounting to \$1,656.75, less \$354.57 credit based upon Respondent's partial payment from monies otherwise owed to him from Wergin Company, Inc., which latter amount represents a portion of the \$1,106.25 paid by Respondent on April 18, 1973 to the Robert C. Kelly Trust Account.
- (b) The Iron Workers Mid-America Pension Plan covering the period November 1, 1972 to April 26, 1973 in the gross total amount of \$1,656.75, less \$354.57 credit based upon an identical portion of monies paid from the aforementioned Wergin check to the Robert C. Kelly Trust Account on April 18, 1973.
- (c) The Iron Workers, Local 383 Vacation Fund covering the period November 1, 1972 to April 26, 1973 in the gross total amount of \$1,656.75, less \$354.57 credit based upon an identical portion of monies paid from said Wergin check to the Robert C. Kelly Trust Account on April 18, 1973.
- (d) The Apprentice and Journeymen Retraining Fund of Iron Workers Local 383 of Madison, Wisconsin covering the period November 1, 1972 to April 26, 1973, in the gross total amount of \$198.81, less \$42.54 credit based upon such portion of monies paid from the Wergin check to the Robert C. Kelly Trust Account on April 18, 1973.

6. That the collective bargaining agreement contains Section 41 "Settlement of Disputes", which sets forth a procedure for proceeding to final and binding arbitration of unresolved disputes.

7. That at outset of hearing on May 1, 1973, Jess Pinkerton acknowledged that the Complainant made previous efforts to utilize said grievance procedure and that Pinkerton further stipulated on the record that Respondent would accept the jurisdiction of the Wisconsin Employment Relations Commission in the instant unfair labor practice proceeding to decide the merits of the controversy set forth in the complaint; that the Respondent further stipulated that Pinkerton Erection had failed to make contributions to the four (4) aforementioned contractual funds on behalf of the employees covered by the submission of payroll records, in course of hearing, for the total hours worked by said employees between November 1, 1972 and April 26, 1973, as reflected by said records, except for the monies allocated to each fund from the Wergin check in the amount of \$1,106.25 that Pinkerton had endorsed and paid to the Robert C. Kelly Trust Account on April 18, 1973.

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

CONCLUSION OF LAW

That Pinkerton Erection, in violating the collective bargaining agreement existing between it and International Association of Bridge Structural and Ornamental Iron Workers Local Union No. 383, by failing to make the required contributions to the Iron Workers Tri-State Welfare Fund, the Iron Workers Mid-America Pension Plan, the Iron Workers Local 383 Vacation Fund and the Apprentice and Journeyman Retraining Fund of Iron Workers Local 383 of Madison, Wisconsin, has 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 Conclusion of Law, it is

ORDERED

That Pinkerton Erection, and its sole proprietor Jess Pinkerton, shall immediately:

1. Cease and desist from violating Sections 7, 8, 9 and 10 of the collective bargaining agreement in existence between Pinkerton Erection and International Association of Bridge, Structural and Ornamental Iron Workers Local Union No. 383, by failing to make payment to the Iron Workers Tri-State Welfare Fund, the Iron Workers Mid-America Pension Plan, the Iron Workers Local 383 Vacation Fund, and the Apprentice & Journeyman Retraining Fund of Iron Workers Local 383 of Madison, Wisconsin.

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

- (a) Immediately pay to the Iron Workers Tri-State Welfare Fund the sum of \$1,302.18, in the form of a certified check made payable to the order of joint payees, Robert C. Kelly Trust Account and the Iron Workers Tri-State Welfare Fund, and mail same to Robert C. Kelly, Attorney at Law, 114 East Mifflin Street, Madison, Wisconsin, 53703, as remitting agent.

- (b) Immediately pay to the Iron Workers Mid-America Pension Plan the sum of \$1,302.18, in the form of a certified check made payable to the order of joint payees, Robert C. Kelly Trust Account and the Iron Workers Mid-America Pension Plan, and mail same to Robert C. Kelly, Attorney at Law, 114 East Mifflin Street, Madison, Wisconsin, 53703, as remitting agent.
- (c) Immediately pay to Iron Workers Local 383 Vacation Fund the sum of \$1,302.18, in the form of a certified check made payable to the order of joint payees, Robert C. Kelly Trust Account and the Iron Workers Local 383 Vacation Fund, and mail same to Robert C. Kelly, Attorney at Law, 114 East Mifflin Street, Madison, Wisconsin, 53703, as remitting agent.
- (d) Immediately pay to the Apprentice & Journeyman Retraining Fund of Iron Workers Local 383 of Madison, Wisconsin, the sum of \$156.27, in the form of a certified check made payable to the order of joint payees, Robert C. Kelly Trust Account and the Apprentice & Journeyman Retraining Fund of Iron Workers Local 383 of Madison, Wisconsin and mail same to Robert C. Kelly, Attorney at Law, 114 East Mifflin Street, Madison, Wisconsin, 53703, as remitting agent.
- (e) 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 31st day of July, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Robert M. McCormick
Robert M. McCormick, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDERS

Complainant filed a complaint of unfair labor practices on April 3, 1973, alleging therein that the Respondent had violated certain terms of an existing collective bargaining agreement, covering employees in the bargaining unit, by failing and refusing to make monthly contributions required by Section 7, Health and Welfare Plan; Section 8, Pension Plan; Section 9, Vacation Fund; and Section 10, Apprentice and Journeyman Retraining Fund, thereby committing a violation of Section 111.06(1)(f) of the Wisconsin Employment Peace Act. Complainant also contends that it, by its Business Representative, Homer Ingram, processed a grievance concerning said delinquencies and requested the Respondent to submit same to arbitration pursuant to Section 41 of the collective bargaining agreement, but that Respondent at no time responded to said request. The Respondent filed no Answer.

Hearing in the matter was conducted on May 1, 1972, at the outset of which Respondent agreed to accept the jurisdiction of the Commission to decide the dispute on the merits, and a record was developed largely on Respondent's payroll submission and the testimony of owner, Jess Pinkerton. The record discloses a total-hours worked by iron workers employed by Respondent between November 1, 1972 and April 26, 1973 of 6,627 hours. The total obligation of Respondent for the period in question because of his failure to make the contractual payments to the four funds amounted to \$5,169.06.

After filing of complaint and shortly prior to hearing, Respondent made arrangements to sign over a check from Wergin Company, a general contractor, to the Robert C. Kelly Trust Account as a partial payment apportioned to the respective four funds.

The Respondent owner admitted delinquencies in the contractual payments required to be made to the four funds covering employees named in written submissions, the accuracy of which was not questioned by Complainant. The Respondent further stipulated at hearing that the Examiner be permitted to receive a post-hearing exhibit to be submitted by Counsel for the Complainant, which essentially would calculate the total sum of money remaining delinquent to each of the four funds, based upon the journal entries of hours worked submitted by Respondent covering the several iron workers employed since November 1, 1972. Said post-hearing exhibit was received by the Examiner, who thereupon advised Respondent in writing on June 20, 1973, that said journal-summary (Exhibit 3 AA) would be made a part of the record, with opportunity for Respondent to make written amendments or to make other submissions with respect to the calculation of the total delinquent payments. No such other materials or objections were received from Respondent.

Under the circumstances of the instant case where the Respondent accepted the jurisdiction of the Commission to determine the controversy on the merits, and where Jess Pinkerton, the owner, acknowledged Complainant's efforts to exhaust the grievance procedure, it would be futile to order the parties to arbitration. Therefore, the Examiner has asserted the jurisdiction of the Commission, and has ordered Respondent to pay what he obviously owes rather than requiring the Complainant to perform a useless and futile act by proceeding to arbitration. 1/

1/ Madison Commercial & Industrial Corp., (WERC #11462-B, 4/73;
Wonderland Foods, Inc. (WERC #10256-A, 6/71).

The Examiner has therefore concluded that Respondent's conduct described in the attached Findings of Fact, constitutes an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act, and has ordered Respondent to cease and desist from engaging in such violative conduct and directed an appropriate remedy. Payments have been ordered to be made to the joint payees, a Trust Account of Counsel for Complainant and to each of the four respective Funds described in the collective bargaining agreement, since that procedure would appear to be consistent with the dispatch of the partial payment previously made by Respondent out of the Wergin Company proceeds.

Dated at Madison, Wisconsin, this 31st day of July, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Robert M. McCormick
Robert M. McCormick, Examiner