

STATE OF WISCONSIN.

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FRANCIS S. SEVERSON,

Complainant,

vs.

HARRY VINER, INC.,

Respondent.

Case I

No. 19374 Ce-1616

Decision No. 13828-E

ORDER MODIFYING EXAMINER'S FINDINGS OF FACT,
AND AFFIRMING EXAMINER'S CONCLUSIONS OF LAW AND ORDER

Examiner Peter G. Davis, having, on April 1, 1976, issued his Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled matter, wherein he found that the above-named Respondent had not committed any unfair labor practices within the meaning of Section 111.06 of the Wisconsin Employment Peace Act (WEPA) by failing to pay the contractually agreed-to wage rates to the Complainant, and by the layoff of the Complainant; and the Commission having, on April 21, 1976, issued timely notice of its intent to review the Examiner's Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum; and thereafter the Respondent having filed a brief in the matter wherein it argued that the Examiner's decision should be affirmed; and the Commission, having reviewed the entire record and the Respondent's brief in support of the Examiner's decision; and being fully advised in the premises, and being satisfied that the Examiner's Findings of Fact be amended and that the Examiner's Conclusions of Law and Order be affirmed;

NOW, THEREFORE pursuant to Section 111.07 of the Wisconsin Statutes, the Wisconsin Employment Relations Commission makes and issues the following

ORDER

1. That the Examiner's Findings of Fact be modified by adding Finding of Fact No. 11 which shall read as follows:

11. That the Respondent's decision to lay off the Complainant was motivated by legitimate, economic considerations and was not motivated by a desire to discourage or retaliate against the Complainant for contacting his Union or otherwise exercising his rights under Section 111.04 of the Wisconsin Employment Peace Act.

2. That the Examiner's Conclusions of Law and Order be and the same hereby are affirmed.

Given under our hands and seal at the
City of Madison, Wisconsin this 10th
day of June, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Thomas Slavney
Thomas Slavney, Chairman

German Torosian
German Torosian, Commissioner

No. 13828-E

MEMORANDUM ACCOMPANYING ORDER MODIFYING EXAMINER'S FINDINGS
OF FACT, AND AFFIRMING EXAMINER'S CONCLUSIONS OF LAW AND ORDER

This case is before the Commission for review on its own motion because of the Commission's concern, upon reading the Examiner's Memorandum, that the Examiner's conclusion that the layoff was not the result of discriminatory motivation appeared to be based on an erroneous application of the law to the facts presented. Upon review of the entire record the Commission is satisfied that the Examiner's Findings of Fact, and Conclusions of Law are fully supported by the record. In addition, the Commission is satisfied that the evidence establishes that the layoff of the Complainant was motivated by legitimate economic considerations and was not motivated by a desire to discourage or retaliate against the Complainant for contacting his Union or otherwise exercising his rights under Section 111.04 of the WEPA, and we have added a specific Finding of Fact to that effect.

There is no showing of anti-union animus in the record. The Respondent has approximately seven collective bargaining agreements with the various unions. There is no evidence of hostility toward unions in general or the Complainant's union in particular.

It appears from our reading of the record that the Respondent was "carrying" the Complainant on his payroll because there was insufficient work within the jurisdiction of the Complainant's Union which he was capable of performing (i.e., operation of the crane) to justify his full-time employment. In order to keep Complainant employed full-time the Respondent assigned him to work within the jurisdiction of the Laborer's Union, which in the opinion of Harry Viner, the Complainant performed unsatisfactorily.

The motive for reducing the Complainant's rate from \$8.29 per hour to \$6.70 per hour was clearly economic. At that time, there was little or no work for the crane and Harry Viner reduced the Complainant's rate for that reason alone. Harry Viner was in the hospital with a heart attack when the Complainant went to the Union and the agreement was reached with Viner's son to raise the Complainant's rate to \$8.77 per hour, which was the appropriate rate for a crane operator at the time.

The Complainant was performing laborer's work on the West Salem job when Harry Viner learned that the Complainant's rate had been raised. By Viner's own admission, he "went up in the air" and eventually visited the job site and laid off the Complainant. According to the Complainant, Harry Viner told him that he was laid off because Viner couldn't afford him.

This is not a case where an employee was laid off because he refused to perform bargaining unit work for less than the contractually agreed rate. Here the Complainant was doing laborer's work and insisting on a crane operator's pay.

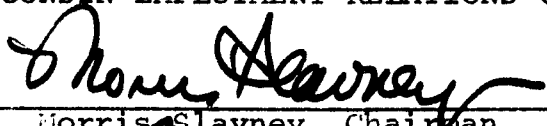
Based on the evidence, we conclude that the layoff was economically motivated. Harry Viner concluded that, when faced with a choice between paying the Complainant the agreed to rate for a crane operator, (even though he was doing laborer's work) and laying him off, it was appropriate to follow the latter course of action. There is no showing of "hostility" in the record. While Harry Viner admits that he was "up in the air" when he discovered that the Complainant was earning a crane operator's wages for doing laborer's work, such an attitude is understandable,

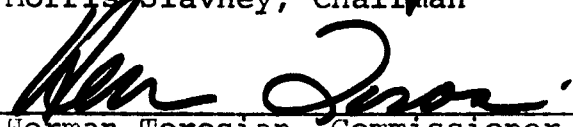
particularly in view of Harry Viner's opinion that the Complainant was not capable of doing such work in an acceptable manner. The contract clearly allows the Employer to lay off a crane operator when there is no crane operator work available, and the Complainant's insistence that Viner pay him the crane operator rate made that result inevitable.

Dated at Madison, Wisconsin this 10th day of June, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Slavney, Chairman


Herman Torosian, Commissioner