STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

| | |
|---|---|
| LOCAL NO. 167 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA,<br><br>Complainant,<br><br>vs.<br><br>BILL SEATON d/b/a GRAND THEATRE,<br><br>Respondent. | Case II<br>No. 19403 Ce-1618<br>Decision No. 13847-B |

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, AMENDING CONCLUSIONS OF LAW, REVERSING ORDER OF DISMISSAL AND GRANTING RELIEF

Examiner Byron Yaffe on May 17, 1976, having issued Findings of Fact, Conclusions of Law and Order dismissing the complaint, and a Memorandum accompanying same in the above-entitled matter; and the complainant on May 27, 1976, having timely filed a petition for review of the same pursuant to sec. 111.07(5), Stats.; and the Commission, having reviewed the said Findings of Fact, Conclusions of Law, Order and Memorandum and having reviewed the entire record and being fully advised in the premises;

NOW, THEREFORE, it is

ORDERED

A. That the examiner's Findings of Fact be, and the same hereby are, affirmed.

B. That the examiner's Conclusions of Law at paragraph 3 thereof be, and the same hereby are amended to provide as follows:

> 3. That the respondent, by failing to pay the terminated projectionists vacation pay pursuant to the parties' collective bargaining agreement, has committed an unfair labor practice within the meaning of sec. 111.06(1)(f), Stats.,

and, as so amended, that the examiner's Conclusions of Law be, and hereby are, affirmed.

C. That the examiner's Order be, and the same hereby is, reversed.

IT IS FURTHER ORDERED:

1. That the respondent shall pay to its terminated projectionists their pro-rata vacation pay which had accrued as of the date of their respective terminations;

2. That the complaint in all other respects be, and the same hereby is, dismissed.

3. That the Commission shall retain jurisdiction to resolve any disputes concerning the amount of vacation pay owing under this Order; and

4. That this Order is final in all other respects.

Given under our hands and seal at the City of Madison, Wisconsin this 29th day of October, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Herman Torosian, Commissioner

_____
Charles D. Hoornstra, Commissioner

BILL SEATON d/b/a GRAND THEATRE, II, Decision No. 13847-B

MEMORANDUM ACCOMPANYING
ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT,
AMENDING CONCLUSIONS OF LAW,
REVERSING ORDER OF DISMISSAL AND GRANTING RELIEF

The Examiner's Decision

The examiner concluded that the respondent, by converting to a 16 millimeter projector operation from a 35 millimeter operation, and by terminating the projectionists in his employ, as a result of such changeover, after having offered to negotiate the impact of such change in operations, (1) did not interfere with, restrain or coerce said employes in their right to engage in concerted activity; (2) did not discriminate against said employes because of their concerted activity; and (3) did not violate the collective bargaining agreement existing between the complainant and the respondent.

The examiner also concluded that the respondent did not violate the collective bargaining agreement by failing to pay any vacation pay to the terminated projectionists, and, therefore, the examiner issued an Order dismissing the complaint.

The Petition for Review

In the petition for review, filed pursuant to Section 111.07(5), Wisconsin Statutes, the complainant set forth no specific exceptions to the examiner's decision. Said statutory provision permits a party in interest to file such a petition when it "is dissatisfied with the finding or order of an examiner." Therefore, we assume that the complainant is dissatisfied with the examiner's Conclusions of Law. The respondent made no response to the petition for review.

Discussion

The Commission has affirmed the examiner's conclusion that the respondent did not violate the collective bargaining agreement by terminating his projectionists as a result of automating his equipment and assigning the few remaining tasks concerning the equipment to management personnel. We also adopt his rationale in that respect, except that we wish to be clear that we are not deciding whether there was such a change in the basic operation as to excuse the employer from its duty to bargain in respect thereto. 1/

We also note that the examiner proceeded as though the collective bargaining agreement contained the customary recognition clause. It did not. Rather, it provided only that the agreement applied to and covered moving picture machine operators in the respondent's employ. That provision does not contain a work security requirement and the examiner's reasoning from the recognition clause cases further demonstrates that the respondent's change in operations and terminations were not in violation of the collective bargaining agreement.

---

1/ This case does not present the question involving the duty to bargain inasmuch as breach of that duty was not alleged, the union declined to accept the employer's invitation to negotiate about the decision to make the change in operation, and the respondent's attorney expressly stated at the hearing that the issue in the case essentially involved a question of breach of contract.

We do, however, disagree with the examiner's conclusion that the failure to pay vacation pay did not violate the agreement. Accordingly, we have amended his contrary Conclusion of Law and reversed his Order of dismissal.

The general rule in Wisconsin is that vacation rights are a form of additional compensation and are thought of as "accruing or vesting in employees as they perform services." 2/ Since entitlement to vacation is a matter of contract, however, 3/ the accrual and vesting are subject to any conditions established by the contract. 4/

The collective bargaining agreement provides:

> "Employees covered by this contract shall receive two weeks salary, (vacation pay) in addition to their regular salary, at their request, during each year of this contract."

The examiner concluded the contract was not violated by the employer's failure to grant vacation pay because, except in one case, no request therefor was made and because an employe is entitled to the vacation pay only at the end of the contractual year.

We disagree that an employe is entitled to vacation pay under this clause only at the end of the contractual year. Such a construction ignores the word "during". The examiner noted this problem, but felt that an unwieldy situation would result if the benefit were due and owing on an as-earned basis. 5/ This reasoning, however, confuses the problem of pro-rata entitlement to vacation pay with the date it becomes payable. Thus, even if it were payable only at the end of the contract year, nothing in the clause contracts out of the general rule in Wisconsin that the compensation accrues and vests as the work is performed. In any event, we do not construe the clause to require payment only at the end of the contractual year. Rather, we construe the phrases "two weeks" and "each year" to establish the method for computing the rate at which vacation pay accrues and vests.

We also disagree with the examiner's conclusion that "at their request" requires a demand for payment. It is not realistic to suppose the parties intended to work a forfeiture of the right to additional compensation absent a request or demand. They did not so provide in respect to wages, and vacation pay is merely a form of additional compensation. Had they intended to work such a forfeiture, at the very least we would expect the parties to have provided for a time certain in which the request or demand must be made. In any event, even were such a demand necessary, the instant complaint is such.

---

2/ Briggs v. Electric Auto-Lite Co., (1967), 37 Wis. 2d 275, 279, 155 N.W. 2d 32.

3/ Id., at 278; Valeo v. J. I. Case Co., (1963), 18 Wis. 2d 578, 582, 119 N.W. 2d 384.

4/ Briggs, at 279.

5/ The examiner's concern about an unwieldy situation makes two presuppositions we do not share: (1) that employes would demand pro-rata payment frequently; and (2) that the employer would have no right to limit the frequency of the requests. In fact, paragraph (7) of the contract says the employer can make reasonable rules for the management of his business.

Accordingly, we have ordered the employer to pay the employes their pro-rata vacation pay. Although this decision and Order are final in all other respects, the Commission has retained jurisdiction to resolve any problems in computing the amounts owing. See sec. 111.07(4), Stats.

Dated at Madison, Wisconsin this 29th day of October, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Herman Torosian
Herman Torosian, Commissioner

Charles D. Hoornstra
Charles D. Hoornstra, Commissioner