

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA, AFL-CIO
LOCAL UNION NO. 836,

Complainant,

vs.

M-K HARTMANN SONS, INC.

Respondent.

Case II
No. 19524 Ce-1627
Decision No. 13934-E

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

Examiner Stanley H. Michelstetter II, having on May 2, 1977, issued Findings of Fact, Conclusions of Law and Order, with accompanying Memorandum, and on May 11, 1977, said Examiner having also issued an Order Amending a Finding of Fact, in the above-entitled matter, wherein he concluded that the above-named Respondent had committed unfair labor practices within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act by violating certain provisions of a collective bargaining agreement existing between said Complainant and said Respondent; and wherein he also concluded that the above-named Respondent had not violated other provisions of the collective bargaining agreement, and therefore that the Respondent, in said regard, had not committed any violation of the Wisconsin Employment Peace Act; and that, with respect to the unfair labor practices found to have been committed, the Examiner having issued an Order to remedy such violation; and the above-named Respondent having timely filed a petition for review of the Examiner's decision, pursuant to Section 111.07(5) of the Wisconsin Employment Peace Act, and a brief in support thereof; and the Commission, having reviewed the Examiner's decision, the entire record, the petition for review, and the brief in support thereof, being satisfied that the Examiner's Findings of Fact should be amended in part, but that his Conclusions of Law, as well as his Order, should be affirmed in all respects;

NOW, THEREFORE, it is

ORDERED

1. That the Examiner's Findings of Fact be affirmed in all respects except as follows:

a. Paragraph 5 of the Examiner's Findings of Fact is amended to read as follows:

5. That on June 25th, Keith, Jack, James, Mark, Forrest, Falkman, and Stadler met at 11:30 a.m. at the Glen Nelson Restaurant, Lake Geneva, Wisconsin, during which meeting Respondent by its agent James acting within the scope of his apparent authority executed a bonding agreement and a letter of assent, the latter of which provides in relevant part:

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". . . The undersigned firm hereby agrees to comply with all the terms and conditions of employment contained in the aforementioned agreement (area agreement) and all approved amendments and addenda thereto. It is further agreed that the signing of this Letter of Assent shall be as binding on the undersigned firm as though it had signed the above referred to agreement, addenda and any approved amendments thereto."

that during the course of the meeting the parties entered into several contemporaneous oral agreements by which: (1) they renewed the June 23rd agreement with respect to "fringe benefits", (2) they agreed Respondent need not use a member of Complainant as the first employe on any of its projects, but that on all of its projects in Complainant's jurisdiction other than the Glen Nelson Project the second and fifty percent of all succeeding employes actively employed at each project would be members of Complainant, (3) they agreed one of Respondent's employes in Complainant's jurisdiction could be its foreman; that during the course of said meeting Complainant informed Respondent it would not require work permits from Respondent's employes while working at the Nelson project; and that Respondent never expressly or impliedly conditioned the existence of the agreement on Complainant's issuance of work permits to any of its employes or any other matter.

2. That the Conclusions of Law be affirmed in all respects; and
3. That the Examiner's Order be affirmed in all respects.

Given under our hands and seal at the
City of Madison, Wisconsin this *12th*
day of May, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By *Morris Slavney*
Morris Slavney, Chairman

Herman Torosian
Herman Torosian, Commissioner

Marshall L. Gratz
Marshall L. Gratz, Commissioner

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

The Examiner's Findings of Fact may be summarized as follows:

In June of 1975, the parties met twice for the purpose of collective bargaining. As a result of those meetings Respondent's agent, James Hartmann, signed a letter of assent, agreeing to comply with the terms of the standard collective bargaining agreement executed by the contractors in the Complainant's jurisdiction. In addition to the written agreement the parties made a number of oral agreements. Pursuant to said written and oral agreements Respondent was required to fill at least 50% of its employment needs on each job in Complainant's jurisdiction with members of Complainant. Complainant orally agreed that such manning requirement would not take effect unless Respondent employed more than one person on a particular job, that all contractual fringe benefits, except contributions to the Apprenticeship & Training Fund, for Respondent's employees who were non-members of Complainant could be paid to the funds connected with the employees' home locals, and that Respondent's work in progress on one nearly completed project would not be subject to the agreement. Subsequently Complainant learned that James Hartmann, who had signed the documents on behalf of Respondent, might not have had actual authority to do so and, thereupon the Complainant attempted to persuade Respondent to re-execute the written agreement with the proper signatures. Complainant utilized various forms of economic pressure, including, but not limited to, restrictive administration of its permit issuance procedures to non-members. After Complainant mailed Respondent two letters alleging violations of the agreement, Respondent repudiated the agreement.

Respondent did not make contributions to the Apprenticeship and Training Funds, and refused to allow an audit of its payroll records, as required in the written agreement.

Respondent also failed to comply with the 50% manning agreement by employing two or more non-members on various jobs at various times in Complainant's jurisdiction. Membership in Complainant does not depend on length of service with Respondent, in the industry, or in any particular geographical area, nor does it constitute a training or experience qualification for employment.

Examiner's Conclusions of Law

The Examiner concluded that the Respondent had violated the agreement by its failure to make payments into the agreed upon Apprenticeship and Training Fund, and by refusing to allow an audit of its payroll records, thereby committing unfair labor practices.

The Examiner also concluded that the 50% manning agreement was unlawful as a violation of Sections 8(a)(3) and 8(b)(2) of the National Labor Relations Act and that therefore Respondent's failure to comply with that portion of the agreement, both written and oral, was not an unfair labor practice.

The Examiner also concluded that the Complainant's assertion of other violations of the agreement were not supported by a clear and satisfactory preponderance of the evidence.

Respondent's Petition for Review

With the exception of objections over a few minor details, all of Respondent's objections to the Examiner's findings and

conclusions are based on the premise that no valid agreement existed between the parties, because Complainant failed to issue work permits to Respondent's employees who were not members of Complainant. Such failure, asserts Respondent, amounts either to non-performance of a condition precedent, or to a repudiation of the agreement by Complainant.

Respondent's objections to the omissions in the Findings of Fact also imply, although they do not directly state, that the Complainant's conduct with regard to the administration of the work permit procedures amounted to a breach of its agreement which should excuse non-compliance by Respondent. 1/

Discussion

Two of Respondent's objections to the Examiner's findings of fact are well taken. The record establishes that James Hartmann, not Jack Hartmann, was the person who signed the documents on June 25. The Commission notes that the Examiner, in fact, found such to be the case. The inadvertent substitution of the name "Jack" in the Finding was merely an oversight.

The record also shows that the discussion on issuance of the permits for the on-going Nelson job occurred prior to, rather than after, the signing of the agreement and Complainant's witness testified, both on direct and cross examination, that such discussion occurred prior to the signing of the documents. 2/ However, the Commission finds that these minor detail corrections do not affect the Examiner's other findings or conclusions in any way.

Condition Precedent

Respondent's claim that the issuance of work permits by Complainant was a "condition precedent" to the continued existence of the agreement is not supported by the record. The record shows, including the testimony of Respondent's own witnesses, that Respondent unilaterally attempted to create a condition precedent. Mistakenly concluding that it would not be bound by an agreement signed by a person without formal corporate authorization, Respondent attempted to create an agreement which it could cancel with impunity should Complainant fail to perform its oral agreements. The record also shows that Respondent was aware of its inability to insist on an express condition precedent, and its attempt to execute an unenforceable agreement evidences a desire to create such a condition without the assent of Complainant.

A "condition precedent," according to traditional contract principles, is a fact or event, the existence or occurrence of which creates a legal relationship. Corbin on Contracts, Secs. 628, 739.

In the instant case, the legal relationship between the parties was created upon the signing of the letter of assent by a person with apparent authority and with the acquiescence of those who did have such authority. Lyons v. Menominee Enterprises, Inc., 67 Wis. 2d 504.

1/ Complainant has not objected to any of the findings or conclusions of the Examiner, nor has Complainant responded in any way to Respondent's objections.

2/ Transcript pages 36 and 38.

In a collective bargaining context, a party to an agreement may not escape his obligations thereunder by asserting a "clean hands" defense. This Commission has consistently refused to accept such a defense with respect to unfair labor practices. Milwaukee Cheese Co., (5792) 8/61.

Repudiation

Alternatively, Respondent objects to the Examiner's failure to find that Complainant was the first to repudiate the agreement. Such a finding would be contrary to the evidence of record. Complainant's attempts to force a re-execution of the agreement do not amount to a "repudiation". On the contrary, such attempts demonstrate a clear affirmance of the existing agreement. At most, such efforts indicate a concern that the agreement might not be enforceable due to formal technicalities.

Omitted Findings

Respondent's objections to assert omissions in the Examiner's findings are all without merit. A finding that Complainant breached its part of the agreement first, even if completely accurate, would be irrelevant. As noted previously, even the presence of such a finding could not excuse Respondent's breach.

The other asserted omissions are based on Respondent's unavailing attempt to characterize Complainant's actions as a failure of a "condition precedent."

Conclusion

Therefore, the Commission accepts the Examiner's findings and conclusions in all respects, with the exceptions as to detail previously noted.

Dated at Madison, Wisconsin this 12th day of May, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Morris Slavney
Morris Slavney, Chairman

Herman Torosian
Herman Torosian, Commissioner

Marshall L. Gratz
Marshall L. Gratz, Commissioner