STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS, CHAUFFEURS & HELPERS LOCAL NO. 43, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, Complainant, vs. EMCEE TRUCKING LTD., Respondent.	Case I No. 19754 Ce-1644 Decision No. 14094-A

Appearances:
Goldberg, Previant & Uelmen, S.C., Attorneys at Law, by Mr. Alan M. Levy, for the Complainant.
Zafis, Rummel and Caldwell, Attorneys at Law, by Mr. James J. Caldwell, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND INTERIM ORDER

Teamsters, Chauffeurs & Helpers Local No. 43, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein referred to as Complainant, having on October 31, 1975 filed a complaint with the Wisconsin Employment Relations Commission wherein it alleges that Emcee Trucking Ltd., herein referred to as Respondent has committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act; and the Commission having appointed Stanley H. Michelstetter II, a member of its staff to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and pursuant to notice, hearing on said complaint having been held at Milwaukee, Wisconsin on December 17, 1975 before the Examiner; and the Examiner having considered the evidence and the arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Interim Orders.

FINDINGS OF FACT

1. That Complainant is a labor organization with offices at 1624 Yout Street, Racine, Wisconsin.

2. That Respondent is an employer within the meaning of the Wisconsin Employment Peace Act and the Labor Management Relations Act, as amended, engaged in the trucking industry with offices at W289 N260

Sylvan Trail, Waukesha, Wisconsin, who meets the jurisdictional standards of the National Labor Relations Board and that in that regard Respondent employs only truck drivers and no employes with other duties; that Michael T. Sholtis and his wife, Carol, are agents of the Respondent.

3. That at all relevant times Respondent recognized Complainant as the exclusive collective bargaining representative of certain of its employes, including Robert Thelen, and that in that regard they have been party to a collective bargaining agreement, in effect at all relevant times, which states in relevant part:

"W I T N E S S E T H :

That the parties hereto, for and in consideration of the mutual promises and obligations hereinafter imposed and mutual benefits derived, agree to and with each other as follows:

ARTICLE 1.

Intent and Purpose

In order to prevent strikes and lockouts and to insure a peaceful adjustment and settlement of any and all grievances, disputes and differences which may arise between any of the parties to this Agreement without stoppage of work, and to bring about, as near as is possible, uniform conditions that will tend to stabilize and encourage the trucking industry, both parties have entered into this Agreement.

ARTICLE 3.
Recognition and Union Security

. . .

Section 1 (c) When the Employer needs additional men he shall give the Union equal opportunity with all other sources to provide suitable applicants, but the Employer shall not be required to hire those referred by the Union.

Section 2. Probationary Employees. A new employee shall work under the provisions of this Agreement but shall be employed only on a thirty (30) calendar day trial basis, during which period he may be discharged without further recourse, provided, however, that the Employer may not discharge or discipline for the purpose of evading this Agreement or discriminating against Union members. After thirty (30) calendar days the employee shall be placed on the regular seniority list. In case of discipline within the thirty (30) calendar day period, the Employer shall notify the Local Union in writing. Casual employees shall not come under this provision. Casual employees shall be those who work less than three (3) days in any week and without any degree of regularity.

. . .

ARTICLE 4.

Seniority

Section 1. Seniority, with ability and qualifications, shall govern in advancement to higher rated jobs.

Section 2. The term "master seniority" means length of service

with the Employer while the employee is performing the work in the collective bargaining unit covered by this Agreement. The term "yard" (which shall mean yard, plant or terminal) seniority means length of service with the Employer while the employee is performing work in the collective bargaining unit covered by this Agreement at the particular yard.

Section 3. Where the Employer operates one yard only, the master seniority list shall be posted and maintained in a conspicuous place at the yard. When such Employer is required to reduce his working force because of diminished business and layoffs are necessary, employees with the least seniority shall be laid off first, in order, and re-hired in reverse order.

Section 4. Where the Employer operates two (2) or more yards, the Employer shall maintain and post in a conspicuous place in each yard a master seniority list and also a separate seniority list for such yard.

Available senior employees shall be given available work in that yard according to the yard seniority list. In the event of a seasonal or permanent shutdown of any yard, the employees so affected may exercise their master seniority at the remaining yards. Any employee whose seniority rights are adversely affected as the result of other employees exercising master seniority, may exercise his master seniority and bump junior employees at any remaining yards. When a yard is reopened after a seasonal shutdown, all employes shall return to their original yards and resume their positions on the yard seniority lists at every yard. This applies to yards that have been moved to new locations.

Section 5. A copy of each seniority list shall be forwarded to the Union.

Section 6. The right to work overtime, the right to work on premium pay jobs, and on Saturdays, Sundays and holidays shall be in accordance with the yard seniority of employees.

Section 7. The senior man in each yard shall be put to work first each working day. Loads to be hauled at the end of each working day shall be taken by the senior driver in the yard, at his option, at the time the load is to be put in the truck. The employee has the seniority not the equipment.

Section 8. When an Employer opens a new yard (without closing an existing yard) he shall post a notice to that effect at all existing yards fifteen (15) days prior to such opening and drivers may exercise master seniority, within the driver's classification, subject to ability and qualifications to transfer into that yard.

Section 9. When additional or a new type of equipment is placed into operation or a vacancy occurs on present equipment, the Employer shall post a notice to that effect for three (3) work days, and drivers may exercise yard seniority, subject to ability and qualifications, to transfer to that equipment. Any such driver shall be offered a one-day trial period to demonstrate his ability and qualifications.

Section 10. (a) Seniority shall be lost for the following reasons:

1. Discharge.
2. Voluntary quit.

3. No work or layoff for more than two (2) years.
4. Failure to respond to notice of recall as set forth in Section 11 of this Article.
5. Failure to report for work without authorization for three (3) consecutive days.

(b) Any employee who is absent because of proven illness or injury shall maintain his seniority, provided, however, that he must report his availability for work within three (3) days after termination of such proven illness or injury.

Section 11. If an employee fails to return to work after being recalled, he shall be given ten (10) days' notice of recall, mailed to his last known address. The employee must respond to such notice within three (3) days after receipt of notice and actually reports to work in seven (7) days after receipt of such notice unless otherwise mutually agreed to. During the period between the mailing of such notice and the time when the recalled employee actually reports for work within such (10) days, the Employer shall have the right to use another employee with less seniority without penalty.

Section 12. It is understood that this Article is subject to a memorandum of understanding attached hereto and made a part hereof.

ARTICLE 6.

Change in Operations

Before an Employer introduces major changes in operations which might result in loss of employment for regular, full-time employees, the Employer shall meet and review such change with the Union in an effort to minimize the possible economic hardship involved for all parties.

ARTICLE 13.

Discharge or Suspension

The Employer shall not discharge or suspend any employee without just cause, but in respect to discharge or suspension shall give at least two (2) warning notices of the complaint against such employee to the employee, in writing, and a copy of the same to the Union and job steward affected provided,however, that if the Employer considers the conduct of the employee to be so serious that repetition of it should lead to discharge, he may state on the warning notice that it constitutes a first final notice, subjecting the employee to discharge or suspension upon its repetition, provided, further, however, that if the Union disagrees that such misconduct warrants a first final notice, it may take the matter up under the grievance procedure. The disposition of each first final warning notice, whether it results from the failure of the Union to grieve, agreement of the parties, decision of the Joint Grievance Committee, or an award of the impartial arbitrator, shall constitute neither a precedent nor evidence in any other dispute relating to the issuance of a first final notice. Neither party shall submit such disposition of such a dispute to, nor testify concerning it before, the impartial arbitrator in an arbitration involving the issuance of another first final notice. The Union shall also have the right to

take up the issuance of any written notice under the grievance procedure.

Notwithstanding any other provision of this Article 13 to the contrary, no warning notice need be given to an employee before he is discharged if the cause of such discharge is dishonesty, drunkenness or recklessness resulting in serious accident while on duty or the carrying of unauthorized passengers while on the job. The first warning notice in the case of tardiness shall be only for chronic tardiness and after the Union, the affected employee, the steward and the Employer meet to review the need for the warning notice. If the Employer and the Union do not agree, the warning notice may be issued by the Employer subject to the provisions of this Article 13 and Article 31. In the event the Union does not meet with the Employer within the first work day following the date of notification to the Union by the Employer for such meeting, the Employer may issue such warning notice.

The warning notice as herein provided shall not remain in effect for a period of more than nine (9) months from the date of the warning notice. Discharge must be by proper written notice to the employee, steward and the Union. The employee may request an investigation as to his discharge or suspension. Should such investigation prove than an injustice has been done an employee, he shall be reinstated. The Joint Grievance Committee and the arbitrator shall have the power to reinstate the employee without or with partial or full back pay. Appeal from discharge or suspension must be taken within seven (7) work days from the date of discharge or suspension. If no decision has been rendered within seven (7) work days, the case shall then be taken up under the grievance procedure.

In the event an Employer intends to discharge an employee, he shall notify the Union office, the steward and the employee affected. Discharge shall not take effect for a 24-hour period following notice to the Union office, during which time the employee shall be suspended.

ARTICLE 25.

Union Cooperation

The Union, as well as the members thereof, agree at all times as fully as it may be within their power, to further the interests of the trucking industry and of the Employer.

ARTICLE 31.

Grievance Procedure

Section 1. The Union and the Employer agree that there shall be no strike, lockout or tie-up. Grievances shall be taken up between the Employer involved and the Union in accordance with the following procedure. A grievance is defined as any controversy between the Employer or Association and the Union concerning compliance with any of the provisions of this Agreement.

Section 2. All grievances, unless otherwise provided for in the Agreement, must be made known in writing to the other party within seven (7) days after the reason for such grievance has occurred or after the first date upon which the grievant

should have become aware of the existence of such grievance, whichever is later. Provided, however, that such time limitations shall not apply in those instances in which the Employer and an employee who have agreed to a condition of employment contrary to this Agreement. The aggrieved employee or employees' shop steward or another authorized representative of the Union shall first submit a written grievance to the Employer's duly authorized representative dated the day of submission. The Employer's duly authorized representative must make a written disposition of the matter within five (5) work days (excluding the day of submission of the grievance and Saturdays, Sundays and holidays) after the submission of such written grievance thereto, by registered mail to the Union office postmarked within said five-day period.

Section 3. If the written disposition of the matter by the Employer's duly authorized representative is unsatisfactory, either party within five (5) days must notify in writing the Employer and the Association or the Union, as the case may be, of its intention to submit the dispute to a permanent Joint Grievance Committee consisting of representatives appointed by, and responsible to, the Union. The Joint Grievance Committee shall convene on the _____ or during the _____ week of every month in which there are pending one or more grievances which either party has submitted in writing as heretofore provided for subject to rules of procedure adopted by the Joint Grievance Committee. In the event that the Association's representatives and the Union's representatives are unable to reach a decision resolving the dispute, either party may, within five (5) days, inform the Co-Chairmen of the Joint Grievance Committee in writing requesting arbitration in accordance with this Article.

Section 4. The parties agree to appoint _____, _____ and _____ as impartial arbitrators and to utilize these impartial arbitrators on a rotating basis. If, however, the arbitrator whose turn on rotation is not available to hear the dispute during the month following the meeting in which the matter was not resolved satisfactorily, either party may select the next arbitrator in rotation who is able to hear the dispute during that month. Unless the parties otherwise agree, there shall be only one impartial arbitrator for each arbitration.

Section 5. The impartial arbitrator shall have the sole and exclusive power and jurisdiction to determine whether a particular grievance, dispute or complaint is arbitrable under the terms of the Agreement. The decision of the impartial arbitrator on any matter submitted to it shall be final and binding on all parties. The impartial arbitrator shall issue his decision no later than thirty (30) days after the case has been submitted to him.

Section 6. The time limits set forth in this Article (except for the time in which an arbitrator must render his award) shall be strictly enforced and failure of either party to comply with these time limits shall constitute a default and resolve the particular grievance, dispute or complaint in favor of the other party.

Section 7. In the event the matter goes to arbitration, the losing party shall bear the full cost of the arbitrator, but not including the wages lost by witnesses. In the event the

parties, and the Joint Grievance Committee, if necessary, are unable to determine which party lost the arbitration, the arbitrator shall have authority to make such determination, including any proration, which he may decide.

Section 8. In the event the Employer or the Union does not comply with the award of the arbitrator, the other party shall have the right to use all legal and economic recourse to enforce compliance with the award.

Section 9. Notwithstanding anything herein contained, it is agreed that in the event it is proven that any Employer is delinquent in the payment of his contribution to the Health and Welfare and Pension Fund created under this Agreement, in accordance with the Rules and Regulations of the Trustees of such Funds after proper official of the Local Union has given a seventy-two (72) hour notice to the Employer of such delinquency in Health and Welfare and Pension Payments, the Local Union shall have the right to take such action as their [sic] deem necessary until such delinquent payments are met. It is further agreed that in event such action is taken, the Employer shall be responsible to the employees for losses resulting therefrom."

4. That at all relevant times 90% of Respondent's work has been performed for Payne & Dolan of Wisconsin, herein P & D, pursuant to a contract requiring Respondent to maintain motor vehicle insurance coverage in the amounts of $250,000, $500,000 and $100,000 ACV for all vehicles operated by Respondent.

5. That at all relevant times prior to August 11, 1975 [1/] Respondent employed Robert Thelen, an unmarried male under twenty-three years of age, as a truck driver; that during the three years preceeding August, Thelen accumulated four speed related traffic violation convictions the last of which occurred June 20, all of which were recorded in the records of the State of Wisconsin, Department of Transportation at appropriate times and were known to Respondent, Robert E. Demers and the Continental Insurance Company, herein Continental, at appropriate times.

6. That in March, (the) Continental (Insurance Company) renewed Respondent's motor vehicle insurance policy in the amounts specified in Finding of Fact 4 above for the period April 1, 1975 to April 1, 1976; that at all relevant times Robert E. Demers was Respondent's motor vehicle insurance consultant; that on or about April 1, Continental supplied its agent Robert E. Demers with a copy of Thelen's motor vehicle record with three violations recorded as of that date; that Demers understood the foregoing to be Continental's warning to Respondent

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[1/] All dates shown herein are in 1975 unless otherwise noted.

through him of its possible intent to cancel Respondent's motor vehicle insurance if Thelen had further traffic violations; that thereafter on several occasions Demers so informed Respondent; that after June 20, but prior to August 9, Demers notified Respondent that Continental intended to cancel its motor vehicle insurance because of Thelen's traffic record; that it is a practice of Continental and other motor vehicle insurers to cancel motor vehicle insurance policies during their term if the insured's employes fail to maintain driving records deemed adequate by the underwriting standards in effect or adopted during the policy term; that on August 9, and at all times thereafter until September 16, Respondent believed Continental would no longer insure Thelen as Respondent's employe.

7. That on August 9, Respondent suspended Thelen for allegedly having recklessly operated its truck; that on August 11, Respondent converted said suspension to a discharge.

8. That Thelen filed a grievance with respect to said discharge which was processed in accordance with the grievance procedure to its third step; that, pursuant to notice to both Complainant and Respondent, the Racine, Kenosha & Walworth County Building Materials, Readi-Mix and Construction Grievance Panel conducted the third step hearing on September 15, during which Respondent's agent Michael Sholtis presented arguments with respect to Thelen's alleged reckless operation of Respondent's truck, but made no argument as to any difficulty of obtaining motor vehicle liability insurance coverage for Thelen; that, thereafter, but still on September 15, said committee rendered the following decision:

> "Robert Thelen is to be put back to work with full seniority on Tuesday, September 16, 1975 with full seniority and no pay for loss of time. Company is to pay Health & Welfare and Pension payments for this period. The discharge letter will be a first and final warning letter and will stand for nine months."

9. That, thereafter, but still on September 15, Respondent contacted Demers and informed him of the aforementioned decision; that thereafter, but still on September 15, Demers contacted Continental who told him that they would not provide motor vehicle insurance coverage for Thelen; that Demers contacted another commercial motor vehicle insurer National Indemnity Insurance Company, herein National, which had a policy of providing motor vehicle insurance for higher risk drivers, and inquired if it would provide the required motor vehicle insurance coverage for Thelen alone; that National offered to do so for an annual premium of $2,000.00; that Demers reported the offer to Respondent on September 15, during which conversation Respondent

declined to purchase said insurance and did not ask Demers to seek such coverage elsewhere.

10. That on October 31, Complainant filed the instant complaint; that Respondent received notice of hearing in the instant matter on November 21; that Respondent filed its answer on December 2.

11. That had Thelen been actively employed by Respondent he would have been laid off prior to December 16 for the season; that on December 16, Demers, at Respondent's direction, contacted National and an insurance broker to obtain motor vehicle insurance for Thelen while operating Respondent's trucks; that National declined to do so at any price because Respondent was under the age of twenty-three; that the insurance broker stated it was unable to find such insurance; that the decreased availability of motor vehicle insurance coverage in the amount required by Respondent occurred in the period since September 15, as a result of a change in insurance industry underwriting policies which routinely vary with economic conditions; that at all relevant times Respondent has refused, and continues to refuse to comply with the award mentioned in Finding of Fact 8, above, in all respects.

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

CONCLUSIONS OF LAW

1. That Respondent Emcee Trucking Ltd. is an employer within the meaning of the Wisconsin Employment Peace Act and the Labor Management Relations Act, as amended, who meets the jurisdictional standards of the National Labor Relations Board.

2. That since Respondent meets the jurisdictional standards of the National Labor Relations Board acting under the Labor Management Relations Act, as amended, the Examiner declines to assert the jurisdiction of the Wisconsin Employment Relations Commission over allegations of violations of Section 111.06(1)(c) and (d) made by Complainant, Teamsters, Chauffeurs and Helpers Union, Local No. 43, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

3. That awards rendered by the Racine, Kenosha & Walworth County Building Materials, Readi-Mix & Construction Grievance Panel which are binding upon Respondent and Complainant pursuant to Article 31 of the parties' collective bargaining agreement, are enforceable by the Wisconsin Employment Relations Commission pursuant to Section 111.06 (1)(f), 111.06(1)(g) and 111.06(2)(c) of the Wisconsin Employment

Peace Act.

4. That the instant award rendered on September 15 by the Kenosha, Racine & Walworth County Building Materials, Readi-Mix & Construction Grievance Panel does not conflict with the policy of Wis. Rev. Stat. (1973) Sec. 194.41 or Ch. 619.

5. That since further evidence is required to fully determine issues involving the interpretation and application of the parties' collective bargaining agreement which have arisen after the issuance of the instant award, it is premature for the Wisconsin Employment Relations Commission to determine whether Respondent has violated the terms of a collective bargaining agreement, including an agreement to accept as binding enforceable arbitration awards.

6. That since under its business circumstances it is impossible for Respondent to employ Robert Thelen under the terms of the parties' collective bargaining agreement if and only if motor vehicle liability insurance required by its service contract is not available or the premium cost would render further operation of its entire business untenable, Respondent is relieved of its obligation thereunder to employ Robert Thelen if and only if motor vehicle liability required by its service contract is not available or the premium cost would render further operation of its entire business untenable.

Upon the basis of the above and foregoing Findings of Fact, and Conclusions of Law, the Examiner makes and files the following

INTERIM ORDER

1. That Respondent Emcee Trucking, Ltd. offer Robert Thelen immediate and full reinstatement to his former position or a substantially equivalent position without prejudice to his seniority or other rights and privileges previously enjoyed by him, provided, however, that Respondent may require as a condition to such reinstatement that Robert Thelen furnish a written offer to provide motor vehicle insurance coverage for him in the amounts required for Respondent's business at a cost not likely to render continued operation of Respondent's entire business untenable.

2. That the instant proceeding be, and the same hereby is, held in abeyance until either party requests the Examiner to conduct further hearing to determine the issues remaining in dispute.

Dated at Milwaukee, Wisconsin, this 24th day of August, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II
Stanley H. Michelstetter II
Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND INTERIM ORDER

The parties stipulated to the elements of the alleged refusal to abide by a final and binding award of a tribunal of competent jurisdiction. On August 11 Respondent converted Thelen's suspension to a discharge for alleged abuse of equipment. Pursuant to Article 31, Section 3, the Racine, Kenosha & Walworth County Building Materials, Readi-Mix & Construction Grievance Panel heard the parties' arguments and issued the following award with respect to Thelen's grievance on September 15:

> "Robert Thelen is to be put back to work with full seniority on Tuesday, September 16, 1976 with full seniority and no pay for loss of time. Company is to pay Health & Welfare and Pension payments for this period. The discharge letter will be a first and final warning letter and will stand for nine months."

Respondent has not complied with said award [2/] in any respect.

POSITIONS OF THE PARTIES

Complainant alleges the foregoing acts constitute unfair labor practices within the meaning of Wis. Rev. Stat. (1973) [3/] Section 111.06(1)(c), (d) and (f) [4/]. Respondent countered with affirmative defenses of inability to obtain, or excessive cost of, motor vehicle insurance for Thelen required by Section 194.41. It asserts that it should be relieved of its obligation to employ Thelen because insurance is expensive and/or totally unavailable.

Complainant has replied that Respondent has waived its affirmative defense by failure to raise it in the underlying grievance committee proceeding. It alternatively contends that Respondent never made a bona fide search for insurance coverage at reasonable cost, and that the cost of insurance, as a cost of compliance is not grounds for denial of enforcement of underlying award.

[2/] No challenge is raised as to the propriety of that proceeding or the award rendered. The parties have assumed, and the Examiner finds, that the instant award is final and binding by operation of Article 31, Sections 1, 3 & 7.

[3/] All statutory citations are to Wis. Rev. Stat. (1973) unless otherwise noted.

[4/] Since Respondent is an employer over which the National Labor Relations Board would exercise jurisdiction under the Labor-Management Relations Act, as amended, the Examiner has declined to assert the jurisdiction of the Commission over the alleged violations of Section 111.06(1)(a) and (d).

DISCUSSION [5/]

Conflict with Public Policy as Expressed by a Specific Statute

This Commission will not enforce an award which contravenes a specific statutory policy. [6/] Section 194.41 requires Respondent to maintain minimum liability insurance coverage for every vehicle it operates on a public highway or comply with alternatives. If it is extremely expensive or actually impossible for Respondent to obtain the required insurance it no doubt would effectively be forced out of business until it could comply. The purpose of Section 194.41 is to protect the public from operators who cannot provide the minimum coverage or the alternatives. Since nothing therein protects the interests of owners who cannot comply, the Examiner finds no conflict with the policy of Section 194.41. [7/]

Chapter 619 provides for the creation of high-risk insurance plans. Its purpose is to ameliorate the impact of statutes like Section 194.41 by making insurance available in high risk situations although at a higher cost than low-risk insurance. No statutory policy is directed to assisting those unable to pay the cost of high-risk insurance.

Demers never made any effort to obtain the minimum coverage required by statute: he only attempted to obtain the substantially higher coverage required by Respondent's service contract. Thus, although Demers was aware of the Wisconsin High Risk Plan, he made no effort to obtain insurance therefrom, if any was available. Further, Thelen in fact obtained his personal liability insurance for a pick-up

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5/ Circumstances concerning the cost and availability of motor vehicle insurance coverage for Thelen changed materially September 15, after the underlying hearing, again December 16, and are likely to continue to change. Although the contract issues discussed infra were not presented to the underlying tribunal, the Examiner finds Respondent is not precluded under the doctrine of res judicata from raising issues requiring resolution thereof in this proceeding.

6/ Standard Kollsman Industries, Inc. at p. 12 (7035) 2/65. See, William O'Donnell, Inc. (6567) 12/63, aff'd William O'Donnell, Inc. vs. W.E.R.B. 26 Wis. 2d. 1, 131 N.W. 2d 352 (1964).

7/ See International Auto & Sales, Inc. v. General Truck Drivers 311 F. Supp. 313, 73 L.R.R.M. 2829, at pp. 2830-1 (E.D. La., 1970); cf. I.B.E.W., Local 494 v. Artkraft, Inc. 375 F. Supp. 129, 86 L.R.R.M. 3111, at pp. 3113-4 (E.D. Wi, 1974), National Maritime Union v. Commerce Tankers Corp. 325 F. Supp. 360, 76 L.R.R.M. 2692, at pp. 2694-6 (S.D. N.Y., 1971), Oil, Chemical & Atomic Workers, Local 7-210 v. Union Tank Car Co., 475 F. 2d. 194 , 82 L.R.R.M. 2823, 2825-2827 (C.A. 7, 1973) cert. den. 84 L.R.R.M. 8422.

truck in the amount required by Section 344.15(1) without deductible, [which is slightly less than that required by Section 194.41] for the period including December, 1975 at an annual premium rate of $500.00. Under the foregoing circumstances the Examiner finds Respondent has failed to establish by a clear and satisfactory preponderance of the evidence that the award conflicts with a specific statutory policy.

Conflict with Public Policy -
Impossibility of Compliance

Determination of Respondent's only remaining affirmative defense essentially requires resolution of the following policy issues under the terms of the parties' collective bargaining agreement:

1. Whether under the facts existing at relevant times or likely to occur concerning the cost or availability of motor vehicle coverage for Thelen's operation of Respondent' trucks and its business circumstances Respondent should be relieved of its obligation to employ Thelen for any period since September 15 or prospectively.

2. If so, what is the appropriate remedy?

In this case, there is no separate issue of public policy. 8/

Impossibility of Performing
Collective Bargaining Agreement Obligations

The Commission applies by analogy the contract doctrine of impossibility of performance (frustration of purpose) to collective bargaining agreements by allocating "unforeseen" risks as parties similarly situated would have done under the precise fact situation. 9/ After Respondent employed the young, unmarried Thelen, he received three speed-related traffic convictions. After Continental notified Respondent of the foregoing, implying possible insurance cancellation, Thelen committed another speed-related violation on June 20. Continental then declined to insure him because of his age, marital status and aggravated traffic record. On September 15, after the underlying hear-

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8/ The parties waived a remand to the grievance procedure if necessary and agreed to the resolution of contractual issues by the Examiner under Section 111.06(1)(f). Effective award enforcement principles may still require a remedy in addition to that afforded for a violation of the agreement itself, if any.

9/ Ladish Co. (13226-A) 11/75 at p. 11, (13226-B) 5/76 at p. 3. Estate of Zellmer v. Shorlein 1 Wis. 2 d. 46, at p. 47 (will provision), 82 N.W. 2d. 891 (1957); DeSombre v. Bickel 18 Wis. 2d. 390, at p. 396, 118 N.W. 2d. 868 (1963) entreprenurial risk, Earl Millikin, Inc. v. Allen 21 Wis. 2d. 497, 124 N.W. 2d. 651 (1963), Clune v. School District 166 Wis. 452, 166 N.W. 11 (1918).

ing, National offered to insure him individually for an annual premium of $2,000 in addition to Respondent's other insurance premium. However, on December 16, because of a change in underwriting standards, no insurer was willing to provide insurance coverage for Thelen required by Respondent's service contract at any price.

Under the collective bargaining agreement Respondent agrees to provide available work to unit employes, who in turn rely thereon for their income. If Respondent cannot profitably undertake delivery work or if none is available, it can avoid wage expense by laying off unit employes. [10/] If Respondent could not obtain the required coverage for Thelen, while actively employed, or the premium cost would render continued operation of its entire business untenable, its unusual business circumstances would force it to at least suspend business rather than endure the loss. Under the agreement, it would be permitted to lay off all unit employes, including Thelen.

Under the above circumstances the risk of not obtaining, or impractical cost of required insurance is properly allocated to Complainant (Thelen): the allocation has no impact on Thelen's economic position, avoids frustration of employe and employer economic motives alike, and does not frustrate Complainant's job security or other industry-wide collective bargaining goals. On the other hand, allocation of the risk of high cost of contractually required insurance is properly allocated to Respondent: it is similar to other cost-type entrepreneurial risks borne by Respondent [11/], except for those underwriting factors affected by employe conduct [12/]; and the allocation preserves Complainant's job security bargaining purpose.

REMEDY

The record has been sufficient to determine the primary underlying contract issue. Since Thelen would have been laid off for the winter prior to December 16, the Examiner would have to extrapolate from the December 16 events to determine the appropriate remedy. However,

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10/ Article 4.

11/ Orlando Transit Co. 60 LA 460, at p. 463-4 (J. Vadakin, 1973), V.J. Tito Jr., Inc. 48 LA 188, at p. 190 (Conn. Bd., 1961).

12/ International Auto & Sales, Inc. v. General Truck Drivers 311 F. Supp. 313, 73 L.R.R.M. 2829, 2830-1 (E.D.La., 1970), cf. I.B.E.W., Local 494 v. Artkraft, Inc. 375 F. Supp. 129, 86 L.R.R.M. 3111, 3113-4 (E.D. Wi., 1974), National Maritime Union v. Commerce Tankers Corp. 325 F. Supp. 360, 76 L.R.R.M. 2692, 2694-6 (S.D.N.Y., 1971), Oil, Chemical & Automic Workers, Local 7-210 v. Union Tank Car Co. 475 F. 2d. 194, 82 L.R.R.M. 2823, 2825-2827 (C.A.7, 1973), cert. den. 84 L.R.R.M. 2422.

insurance underwriting standards changed drastically in the September 15 to December 16 period, and relevant factors are necessarily different in later periods. Therefore, the instant record is insufficient to determine inter alia the appropriate remedy. At the request of either party further hearing will be conducted, if a stipulation is not achieved.

In order to expedite Thelen's reinstatement, if appropriate at this time, the Examiner has ordered Respondent to reinstate him subject to Respondent's right to condition reinstatement on Thelen's providing a written offer to insure him in the amounts required for Respondent's business at a rate not likely to cause Respondent to abandon its entire business. On the basis of Sholtis' admission that he could pay an annual premium rate of $2,000, the Examiner finds, without limitation thereto, such to not be a rate likely to cause Respondent to abandon its entire business.

Dated at Milwaukee, Wisconsin, this 24th day of August, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II
Stanley H. Michelstetter II
Examiner