

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-C

Appearances:

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

AMENDED AND SUPPLEMENTED FINDINGS OF FACT, AMENDED
AND SUPPLEMENTED CONCLUSIONS OF LAW AND ORDER

The examiner having heretofore and on August 24, 1976, entered Findings of Fact, Conclusions of Law and Interim Order, Decision No. 14094-A; and pursuant thereto Complainant having requested, and the examiner having ordered, further hearing in the instant matter; and said hearing having been held at Milwaukee, Wisconsin, October 20, 1976, before the examiner; and the examiner having considered the additional evidence and arguments and being fully advised in the premises, and the examiner being satisfied that said findings of fact and conclusions of law should be amended and supplemented and being satisfied a final order should be entered; the examiner makes and files the following Amended and Supplemented Findings of Fact, Amended and Supplemented Conclusions of Law and Order.

AMENDED AND SUPPLEMENTED FINDINGS OF FACT

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

^{1/} Mr. Uelmen appeared at the October 20, 1976, hearing in place of Mr. Levy.

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 formerly 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 employees with other duties; that Michael T. Sholtis and his wife, Carol, are agents of the Respondent; that between December 17, 1975^{2/} and October 20, 1976 Respondent moved the location of its offices to 29029 West Summit Avenue, Waukesha, Wisconsin.

3. That at all relevant times Respondent recognized Complainant as the exclusive collective bargaining representative of certain of its employees, 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.

^{2/} All dates shown herein are in 1975 unless otherwise noted.

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 employees 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 5.

Transfer of Company Title or Interest

Section 1. This Agreement shall be binding upon the parties hereto, their successors, administrators, executors and assigns. In the event an entire operation or any part thereof is sold, leased, transferred or taken away by sale, transfer, lease, assignment, receivership or bankruptcy proceeding, such operation shall continue to be subject to the terms and conditions of this Agreement for the life thereof. The Employer shall give notice of the existence of this Agreement to any purchaser, transferee, leasee, assignee, etc., of the operation covered by the Agreement or any part thereof. Such notice shall be in writing with a copy to the Union not later than the effective date of the sale.

Nothing in this Agreement shall be construed to prevent an Employer from terminating all or part of his business, following prior notice to the Union.

Section 2. Acquisition, Purchase or Merger. When two or more companies merge their operations then the employees of the respective companies shall all be placed on one seniority roster in the order of the earliest date of hire of each of the employees with their respective Employer.

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 that 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 bodily injury for each person, \$500,000 bodily injury for each accident, \$100,000 property damages,

\$15,000 uninsured motorist each person, \$30,000 uninsured motorist each accident, actual cash value comprehensive deductible, \$500 collision deductible.

5. That commencing in July, 1973 until August 11, Respondent (including its predecessor in interest) employed Robert Thelen, an unmarried male born July 7, 1933, as a truck driver; that Thelen committed four speed related traffic violations, one each on; September 1, 1973, November 7, 1973, August or September, 1974 and 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 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 September 15, 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 employees 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 employee.

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, Read-Mix & 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 (sic) 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 in the third week of November for the season and first been recalled in June, 1976; that on December 16, Demers, at Respondent's direction, contacted National and an insurance broker to obtain its required motor vehicle insurance coverage for Thelen; that neither would provide Respondent's required motor vehicle insurance coverage for Thelen; that prior to November Respondent owned five commercial trucks and purchased two more thereafter, but prior to June, 1976 with borrowed money which Respondent is required to repay (principle and interest) in monthly payments of \$1,000.00 for one truck and \$1,100.00 for the other truck; that Respondent's annual premium rate for its required motor vehicle insurance coverage for April 1 to April 1, 1976 was approximately \$600.00 per truck; that pursuant to its practice of

doing so, Respondent canceled operation related coverage for the above layoff period and received a total premium rebate therefor of \$500.00; that on or about April 1, 1976, Respondent sought price bids for its required insurance coverage without attempting to include Thelen as an eligible driver thereunder and accepted the lowest bid therefor of \$650.00 per truck annual premium by Continental for the period May 1, 1976 to May 1, 1977; that at no time in the period December 16 to August 24, 1976 did Respondent attempt to determine if its required motor vehicle insurance coverage was available for Thelen; that after its receipt of the examiner's decision dated August 24, 1976 Respondent asked Demers if Continental would then insure Thelen; that Demers replied Continental would not; that thereafter until October 20, 1976, Respondent made no effort to obtain its required motor vehicle insurance for Thelen or to confirm insurance information discussed below obtained by Thelen.

12. That pursuant to the interim order entered August 24, 1976, Respondent sent Thelen a letter received on or about August 31, 1976, the body of which provides:

"Pursuant to the interim order of the examiner for the Wisconsin Employment Relations Commission dated August 24, 1976, Emcee Trucking Ltd. hereby offers you immediate and full reinstatement to your former position as truckdriver, without prejudice to your seniority or other rights and privileges previously held by you.

As a condition of this reinstatement, you are required to furnish a written offer from an insurance company to provide motor vehicle insurance coverage for yourself in the amount of \$250,000.00, \$500,000.00, and \$100,000.00, ACV, at a cost in accordance with the ruling of the Wisconsin Employment Relations Commission examiner, plus, a letter from the Dodge County, Wisconsin, District Attorney stating the disposition of your alleged involvement in a certain Dodge County CB Radio theft ring.

You are hereby given six (6) days from date of receipt of this letter to have the above mentioned items in our office."

13. That on September 3, 1976, Thelen met with Michael and Carol Sholtis during which conversation Michael Sholtis spoke in a loud voice, and in substance indicated if Respondent reinstated him, it would harass him and, but for Carol's presence, Michael would have hit Thelen.

14. That Respondent mailed Thelen, but he never received, a letter dated September 11, 1976, the body of which states:

"In our previous letter received and signed for by you at the Neosho, WI (sic) Post Office on August 31, 1976, you were given notice of recall pursuant to our order from the Wisconsin Employment Relations Commission.

That letter gave you six (6) days to reply with a certificate of insurance (vehicle) and a letter from the Dodge County District Attorney. However, on September 3, 1976, it was mutually agreed that the six day period be extended to ten (10) days, ending at midnite (sic); September 10, 1976, using Article 4, Section 11 of the current Teamster's Contract as a guideline.

That time has passed with no further word from you, a certificate of insurance, or the letter from the Dodge County District Attorney.

Emcee Trucking Ltd. hereby considers this matter closed, with the recall notice being terminated and your seniority relinquished with the Company."

15. That pursuant to the letter cited in finding of fact 12, above, Thelen attempted to obtain the necessary insurance coverage from various sources; that prior to September 14, 1976, Thelen contacted Robert Semler, a motor vehicle insurance salesperson; that in the course of the conversation with Semler, Thelen informed him of his age, driving record, the truck he had last driven for Respondent, its purpose and radius of operation; that on September 14 Thelen received a letter from Semler of the same date the body of which states:

"The following is the information which you requested of your driver who has made an inquiry in regard to purchasing insurance on a 1974 GMC 95 Series Dump Truck, gross weight 61,900 lbs. and cost approximately \$30,000. This truck is to be used to haul black top, sand and gravel. The truck will be garaged in the town of Delafield and will be used mostly in a 50 mile radius.

The coverage that Robert Thelen has applied for is the following:

Bodily Injury	----\$250,000 each person
	500,000 each accident
Property Damage	-- 100,000
Uninsured Motor	-- 15,000 each person
	30,000 each accident
Comprehensive	---- 100 Deductible Comp.
Collision	----- 500 Deductible

The cost on the above on an annual basis would be \$2,241.00.

If the above becomes a reality, this coverage will be written through American Interstate Insurance Corporation of Wisconsin.

I hope that the above is sufficient information and if for any reason you have any further questions, please feel free to contact the writer at any time."

That in a later conversation, Semler told Thelen the insurance was available for six months at half the premium rate; that the premium might be less for other of Respondent's trucks and that the insurance would have been available at any time if "the conditions had been the same."

16. That on the evening of September 20, 1976, Thelen presented the letter contained in finding of fact 15 above to Michael Sholtis and that Sholtis told him that Respondent would not reinstate him because he had failed to present the statement in the time specified therefor as extended, he had failed to obtain the letter from the Dodge County District Attorney, and the cost of insurance was too high; that Respondent has refused, and continues to refuse, to comply with the award mentioned in finding of fact 8, above, in all respects; that at all times Thelen would have been actively employed motor vehicle insurance coverage in the amount stated in finding of fact 4 above was and will continue to be available at a cost not likely to render further operation of Respondent's business untenable.

Upon the basis of the above and foregoing Amended and Supplemented Findings of Fact, the examiner makes and files the following

AMENDED AND SUPPLEMENTED 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 jurisdiction 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) (a) 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 since awards rendered by the Racine, Kenosha & Walworth County Building Materials, Read-Mix & Construction Grievance Panel 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, Read-Mix & Construction Grievance Panel does not conflict with the policy of Wis. Rev. Stat. (1973) Sec. 194.41 or Ch. 619.

5. 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 thereof 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 insurance required by its service contract is not available or the premium cost would render further operation of its entire business untenable.

6. That since Respondent has failed to establish by a clear and satisfactory preponderance of the evidence that motor vehicle liability insurance required by its service contract was not available or only available at a premium cost likely to render further operation of its entire business untenable when Robert Thelen would have been actively employed, it is not impossible for Respondent to comply with the terms of the award rendered September 15 by the Kenosha, Racine & Walworth County Building Materials, Read-Mix & Construction Grievance Panel.

7. That Respondent Emcee Trucking Ltd. by having refused, and by continuing to refuse, to comply in any respect with the terms of the award rendered September 15 by the Kenosha, Racine & Walworth County Building Materials, Read-Mix & Construction Grievance Panel, 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 Amended and Supplemented Findings of Fact and Amended and Supplemented Conclusions of Law, the examiner makes and files the following

ORDER

IT IS ORDERED that Respondent Emcee Trucking Ltd., its officers and agents, shall immediately

1. Cease and desist from failing and refusing to recognize and accept as conclusive the award issued September 15 by the Kenosha, Racine & Walworth County Building Materials, Read-Mix & Construction Grievance Panel with respect to reinstating Robert Thelen with full seniority and no pay for time lost from the date of discharge to September 16, 1975, and paying Health & Welfare and Pension payments for said period.

2. Take the following affirmative action which the examiner has determined will effectuate the policies of the Wisconsin Employment Peace Act.

- a. Immediately, reinstate Robert Thelen to the position formerly held by him without loss in seniority.
- b. Make those contributions to the applicable health and welfare and pension funds which would have been made had Robert Thelen not been discharged.
- c. Make Robert Thelen whole for all other wages and benefits he would have received had he been reinstated September 16, 1975, less any amounts he received in unemployment compensation not repaid and less any amounts which he otherwise earned in the period September 16, 1975 to the date of his reinstatement.
- d. Notify the Wisconsin Employment Relations Commission within twenty (20) days of the date hereof as to the steps it has taken to comply herewith.

Dated at Milwaukee, Wisconsin, this 19th day of November, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley W. Michelstetter II
Stanley W. Michelstetter II
Examiner

MEMORANDUM ACCOMPANYING
AMENDED AND SUPPLEMENTED FINDINGS OF FACT AND
AMENDED AND SUPPLEMENTED CONCLUSIONS OF LAW AND ORDER

On August 24, 1976, the examiner rendered Decision No. 14094-A in the instant matter. Matters discussed in the memorandum accompanying that decision are incorporated by reference without further discussion herein.

The findings of fact accompanying that decision are replaced with the instant Amended and Supplemented Findings of Fact which support both determinations. In addition to the correction of clerical errors and new information first heard in the October 20, 1976 hearing, the examiner made the below-listed changes for the reasons listed opposite the specified change:

fact number	change	reason
3.	Add Article 5	Relevant to enforcement
4.	Insurance requirement	State with meaningful particularity for comparison purposes
6.	Period prior to September 15 hearing when Respondent learned Continental would no longer insure Thelen	While the record establishes Respondent learned that Continental would no longer insure Thelen prior to September 15, it is not necessary to either result to determine precisely when.

Except for original Conclusion of Law 5, not necessary to the instant order, the examiner has replaced the previous Conclusions of Law with the instant Amended and Supplemented Conclusions of Law. The latter support the instant order and, taken with the original Conclusion of Law 5, support the Interim Order of August 24, 1976.

Remaining Affirmative Defense-Impossibility of Performance

Respondent bears the responsibility of establishing its affirmative defense of impossibility of performance (frustration of purpose) by a clear and satisfactory preponderance of the evidence.^{3/} On

^{3/} Section 111.07 (3), Wisconsin Employment Peace Act. Under the instant agreement Respondent must establish the circumstances of impossibility are such as to warrant more than a temporary release from its obligations under the award and agreement. See, Ladish Co., Tri-Clover Division (13143-A) 10/75 p. 17, aff'd. (13143-B) 12/75.

September 15, after having contacted only Continental and National, Demers told Respondent that its required motor vehicle insurance coverage could be obtained from National at the annual premium of \$2,000.00. Respondent made no attempt to secure said insurance or find other insurance at a lower cost. Had Respondent actually wanted to secure coverage, it might have suggested placing coverage of its entire fleet with another carrier to induce it to provide coverage for Thelen and it might have inquired as to the amount of rebate it would have gotten for its customary cancellation of use-related coverage for the off-season from National.

From September 15 to the day before the December 17 hearing Respondent made no effort to obtain the required coverage. In its preparation for hearing, December 16, Respondent again contacted National and an insurance broker. At this time underwriting standards had changed so drastically that apparently no insurer was willing to insure Thelen individually. However, Thelen would have been on layoff for the season at that time.

After December 16, but prior to August 24, 1976, Respondent made no effort to secure coverage for Thelen even though it renewed its entire fleet coverage on or about April 1, 1976 by taking the lowest bid on coverage for its entire fleet without including Thelen as an eligible driver. After it received the August 24, 1976, decision it merely asked Demers if Continental would not insure Thelen. When Thelen presented the Semler letter, Respondent made no attempt to determine if it could obtain the coverage specified therein at the specified price. Further, had it inquired of Thelen, it would have learned that it might have been able to purchase said coverage on a six month basis for approximately half the annual premium rate. Again it made no effort to bid coverage of its entire fleet or seek a reassignment of Thelen to a truck which carried a lower inherent value. As of the October 20, 1976 hearing the Respondent has not made any further effort to obtain the required insurance coverage for Thelen.

On the basis of the foregoing, and the record as a whole, Respondent has not established by a clear and satisfactory preponderance of the evidence that the required insurance coverage was not available or available only at a cost likely to cause it to abandon its entire business at any time Thelen would have been actively employed.

REMEDY

On the basis of the record as a whole, the examiner has determined the remedy entered today is appropriate to effect the policies of the Wisconsin Employment Peace Act. The examiner has not continued the provision of the Interim Order permitting Respondent to condition reinstatement on Thelen's providing a written offer for the required insurance at a cost not likely to render continued operation of Respondent's entire business untenable. The foregoing was entered as an exercise of the examiner's discretion with respect to remedy under the facts then known to facilitate a resolution of this matter without further hearing.

Nonetheless, further hearing was conducted at which Respondent did not deny the existence of the offer to insure, but alleged the cost thereof was so expensive that it should be considered relieved of further obligation to reinstate Thelen. Other evidence at that hearing established Respondent planned to end active operation for the season at or about this time. Under the circumstances, insurance cost is not likely to be a factor for this season.

Thelen has taken affirmative action to reduce the number of "points" against his traffic record. Further it appears likely that the effects on motor vehicle insurance premium of his heretofore committed violations and his age will be reduced by the passage of time. Thus, it is unlikely the annual premium for required coverage for Thelen at the beginning of the next season would be as high as that specified in the Semler letter. In any case, Michael Sholtis' testimony at the December 17, 1975 hearing indicates that Respondent could have paid \$2,000.00 in premium from the profit of two trucks in the season ending November, 1975.^{3/} While Respondent's economic situation is worsening as a result of other factors, Respondent has not established by a clear and satisfactory preponderance of the evidence that such an annual premium (less rebate) would be even a primary factor in its economic woes.^{4/}

^{3/} Transcript pages 49-50.

^{4/} Transcript of October 20, 1976, proceedings, page 12.

Dated at Milwaukee, Wisconsin, this 19th day of November, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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