

EMCEE TRUCKING LTD.,

Petitioner,

vs.

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Respondent.

Case No. 37975

FILED IN CIRCUIT COURT
Oct 20 1977WAUKESHA COUNTY, WIS.
Harry Miller, Clerk

Decision No. 14094-D

DECISION

The above-entitled matter having been presented to the court on a petition for review of an order of the Wisconsin Employment relations Commission dated December 17, 1976. The petitioner appearing by the law firm of Michael, Best & Friedrich; the respondent appearing by the Attorney General's Office by Assistant Attorney General David C. Rice. The matter having been presented to the court upon written argument, copies of which have been received from each of the parties. Now, therefore, the court finds and determines as follows:

This is a proceeding commenced December 20, 1976, under Section 111.07 (8) and Chapter 227, of the Wisconsin Statutes to review an order of the Wisconsin Employment Relations Commission dated December 17, 1976. The Commission ordered the petitioner, Emcee Trucking, Ltd., to accept and comply with an arbitration award which had required the reinstatement of employee Robert Thelen on September 16, 1975. The Commission further ordered that Emcee make Thelen whole for all wages and other benefits he would have received had he been reinstated on September 16, 1975, pursuant to the arbitration award.

On January 10, 1977, the Commission counter-petitioned pursuant to Section 111.07 (7) of the Statutes for a judgment confirming and enforcing its order. Thereafter, on April 18, 1977, Emcee filed a written motion requesting leave to present additional evidence.

The essential facts are as follows: Robert Thelen, presently twenty-three years old, was employed by Emcee as a truck driver from July, 1973, until his suspension on August 9, 1975, and subsequent discharge on August 11, 1975. Thelen filed a grievance regarding the discharge pursuant to the collective bargaining agreement then in effect between Emcee and Teamsters Local No. 43. The agreement provided for final and binding arbitration of employee grievances.

On September 15th a grievance panel convened to arbitrate Thelen's grievance, and on the same day issued the following award:

"Robert Thelen is to be put back to work with full seniority on Tuesday, September 15, 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."

Also on September 15, 1975, Emcee's president, Michael Sholtis, contacted Emcee's insurance agent, Robert Demers, concerning Thelen's reinstatement. Demers advised Sholtis that Emcee's insurer, Continental Insurance Company, would not insure Thelen because of his driving record, but that National Indemnity would insure Thelen at a cost of \$2,000 per year. Sholtis felt \$2,000 was "too much" and consequently he did not instruct Demers to arrange for the insurance. Instead, on September 17, 1975, Sholtis wrote to Local 43, stating that Thelen would be reinstated pursuant to the arbitration award only if Thelen would procure the necessary insurance and pay the estimated \$2,000 annual cost himself.

Thereafter, on October 31, 1975, Local 43 filed a complaint with the Commission, alleging that Emcee had committed and was committing an unfair labor practice within the meaning of the Wisconsin Employment Peace Act, chapter 111, subchapter I, of the Statutes, by failing and refusing to reinstate Thelen in accordance with the arbitration award. In its answer to the complaint, Emcee admitted its failure to comply with the arbitration award, but alleged as an affirmative defense that no insurance company was willing to insure Thelen, and that such unavailability of insurance made it impossible to comply with the award.

Hearing on the complaint was held before Examiner Michelstetter on December 17, 1975. Sholtis admitted on the record that it would not be impossible to locate insurance for Thelen and that it would be possible to remain in business if Emcee had to pay the insurance premium for Thelen, but Sholtis asserted that the profit from two trucks could be required to pay the additional insurance coverage.

After an unexpected delay in obtaining the transcript from a private reporting service and after the submission of briefs, ending on May 14, 1976, Examiner Michelstetter issued his findings and interim order on August 24, 1976. The Examiner's interim order required Emcee to reinstate Thelen immediately, provided that Emcee could condition reinstatement on Thelen's furnishing of a "written offer to provide motor vehicle insurance coverage for him in the amounts required for (Emcee's) business at a cost not likely to render continued operation of (Emcee's) entire business untenable."

On August 28, 1976, Emcee offered by letter to reinstate Thelen, if, within six days after receipt of the letter Thelen furnished a written offer from an insurance company, pursuant to and at a cost in accordance with the examiner's order, and further a letter from Dodge County district attorney stating the disposition of Thelen's alleged involvement in a certain CB radio theft ring.

Thelen met with Sholtis on September 3, 1976, and requested an extension of time. Sholtis agreed to a four day extension through September 10, 1976, but when Thelen failed to comply by that date, Sholtis wrote to him on the next day and stated that he considered the matter closed.

On September 20, 1976, Thelen presented Sholtis with a written offer to insure himself, available through an insurance agent named Robert Semler at an annual cost of \$2,241. Sholtis told Thelen that despite such offer of insurance, Emcee would not reinstate him because the amount quoted was in excess of the Examiner's decision, because he did not have a note from the Dodge County district attorney, and because he had exceeded the time given him to return the offer.

On September 28, 1976, at the request of Local 43, Examiner Michelstetter ordered a further hearing to determine whether Thelen should be reinstated immediately on the basis of the Semler offer of insurance coverage, and whether Thelen should be made whole for any losses. The hearing was held on October 20, 1976, and thereafter, on November 19, 1976, the Examiner issued amended and supplemented findings and order.

The Examiner found that insurance coverage for Thelen in the required amounts was and would continue to be available "at a cost not likely to render further operation of (Emcee's) business untenable." He ordered that Thelen be reinstated immediately and that he be made whole for all wages and other benefits he would have received but for Emcee's failure to reinstate him on September 16, 1975, in accordance with the arbitration award.

Emcee filed no petition to review the Examiner's findings and order and therefore, pursuant to Section 111.07 (5) of the Statutes, such findings and order became the final findings and order of the Commission. A formal order of the Commission adopting the Examiner's findings and order was issued on December 17, 1976.

Thelen was returned to work in late October or early November of 1976. On this review Emcee primarily challenges that portion of the Commission's order which requires that Thelen be paid back pay for the period commencing September 16, 1975, and ending when Thelen was reinstated. It also has moved this court for leave to present additional evidence before the Commission in the event that the court does not set aside the back pay portion of the Commission's order.

A review of the entire record and the two decisions issued by the Examiner Michelstetter reveals that in the initial decision by the Examiner and the original arbitration order no reference was made to payment of back pay to the driver, Thelen. The final order of the Examiner, dated November 19, 1976, for the first time required that the petitioner, Emcee Trucking, Ltd., 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 and less any amounts which he otherwise earned in the period from September 16, 1975, to the date of his reinstatement.

At no time during either of the two evidentiary hearings did the petitioner have an opportunity to, nor did it, present evidence regarding the economic impact of such an order for back pay.

After the respondent, WERC counter-petitioned for a judgment confirming and enforcing its order on January 10, 1977, the petitioner filed a written motion requesting leave to present additional evidence relative to the economic impact of the provisions for back pay contained in the final order.

Our Supreme Court has held:

"The ruining of business enterprises and the confiscation of their plants is not the policy of the Wisconsin Labor Relations Act." Folding Furniture Works vs. Wisconsin Labor Relations Board 232 Wis 170

In view of the record in this case it is the opinion of the court that in the interest of justice the petitioner, Emcee Trucking Ltd., should be granted an opportunity to present evidence at an appropriate hearing regarding the economic impact of the final Commission order providing for back pay for all wages to Robert Thelen with an opportunity for Mr. Thelen to present evidence to the hearing Examiner regarding unemployment and other income which would be offset against back wages.

IT IS ORDERED that the Commission's findings and the order pursuant to said findings be in all respects confirmed with the exception that the provision for back pay to be made to Robert Thelen by the petitioner be reviewed, giving the petitioner an opportunity to present evidence regarding economic impact of that provision of the order, and with a further provision that Robert Thelen present evidence on his income during the period that would mitigate the payment of back wages by the petitioner.

IT IS FURTHER ORDERED that the above-entitled matter be remanded to the Wisconsin Employment Relations Commission for further proceedings in accordance with this order.

Dated at Waukesha, Wisconsin, this 19th day of October, 1977.

BY THE COURT:

Clair Voss /s/

Circuit Judge