

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Respondents .

No. 14097-C

"new hearing" in the above-entitled matter on the basis that he was "unable to attend the first meeting and I have [sic] information that could be helpful in the defense of Milwaukee Truck Center."; and Complainant's counsel having by letter received April 2, 1976, objected to any reopening of the hearing in this matter; and the Examiner having by order dated April 1, 1976, mailed to Respondents' last known address an order to show cause with respect thereto; and hearing having been held at the scheduled time and place at which Respondents failed to appear or otherwise contact the Examiner; and the Examiner having denied said motion; and the Examiner having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Teamsters General Local Union No. 200 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is a labor organization with offices at 6200 West Bluemound Road, Milwaukee, Wisconsin.

2. That Respondent Nu-Way is an employer engaged in the sales of automotive parts with offices at 1401 South Sixth Street, Milwaukee, Wisconsin; that since at least September 11, 1975 Ralph Ullenberg has been, and is, its agent.

3. That Respondent Milwaukee Truck is an employer which was actively engaged in the automotive sales and service business with offices at 10521 West Layton Avenue, Greenfield, Wisconsin until it suspended all active business operations on or about June 4, 1975; that at all relevant times Ralph Ullenberg has been, and is, its principal representative.

4. That Respondent Milwaukee Truck recognizes Complainant as the representative of certain of its employees including Carl Six, and in that regard Complainant and Respondent Milwaukee Truck are party to a collective bargaining agreement in effect April 1, 1974 to March 31, 1977 which provides in relevant part:

"ARTICLE VI. HOURS OF WORK & OVERTIME

Section 1. Hours of Work. Five (5) consecutive days, Monday through Friday, shall constitute a week's work and eight (8) consecutive hours, with one-half (1/2) hour for lunch, shall constitute a day's work.

Any changes in the established shift hours or lunch periods shall be first discussed with the union steward as far in advance as possible of any such changes.

As regards mechanics, the first shift shall begin at 7:00 A.M., the second shift shall begin at 3:20 P.M., and the third shift, if any,

shall begin at 11:30 P.M. Parts men and other employees shall have shift starting times determined by the Employer consistent with his business requirements.

Section 2. Overtime. Time and one-half (1 1/2) shall be paid for hours worked in excess of eight (8) in any one day or in excess of forty (40) in any one week or for hours worked on Saturday, except for third shift employees required to complete their Friday schedule. All hours worked on Sunday or on any of the holidays designated in Article VII shall be paid for at the rate of double (2) time.

Section 3. Shift Premium.

A premium of twenty cents (20¢) per hour shall be paid to second shift employees and a premium of twenty-five cents (25¢) per hour shall be paid to third shift employees.

Section 4. Call in Pay. Any employee called to work or permitted to come to work without having been properly notified that there will be no work, shall receive a minimum of four hours pay at their regular hourly rate.

Section 5. Pay Day Procedure. First and second shift employees shall receive their pay checks on the job on Fridays. Third shift employees if any shall receive their pay checks on Friday morning at the end of their previous shift.

Section 6. Lay off and Discharge Procedure. Due to temporary reduction in work, the work week may be reduced before any employees are laid off.

Layoff will be made when the employment requirements are less than an average of twenty-four (24) working hours per week for a period of more than two (2) consecutive weeks or less than an average of thirty-two (32) hours per week for a period of more than four (4) consecutive weeks.

Management will whenever possible give at least twenty-four (24) hours notice prior to layoff to the employees affected.

Any employee who has been disciplined by a suspension layoff or discharge may request the presence of the Union Steward to discuss the case before he is required to leave the premises. Whether presence is requested or not the Union Steward will be advised within one working day of 24 hours of the fact of suspension, lay-off or discharge. After a suspension has been converted to a lay-off or discharge the Union Steward will be notified of the fact of layoff or discharge.

The employee will be given a copy of any warning reprimand, suspension or disciplinary layoff within three working days of the action taken. If a grievance is filed it must be done within three working days of the layoff or discharge. Management will review and render a decision within five working days of its receipt. If the Management decision is not appealed by the Union within five working days this matter will be considered closed.

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ARTICLE VIII. VACATIONS

Section 1. Employees shall be given one (1) week of vacation with pay after one (1) year of service, two (2) weeks of vacation with pay after two (2) years of service, and three (3) weeks of vacation after ten (10) years of service.

Section 2. Selection of Vacation Period. Insofar as practicable, an employee shall be permitted to choose his vacation period, provided,

that in case of conflict between employees in choice of vacation period, the employee having the greater seniority shall prevail.

Section 3. Mandatory Vacation. Employees must take a vacation unless an employee is permitted, for a good and sufficient reason and upon mutual agreement between the Union and the Employer, to work during all or a part of his vacation.

Section 4. Vacation Allowances. Vacations are determined on anniversary date of hiring for the following twelve (12) month period. However, vacations may be allowed with pay in advance based upon a vacation schedule to be completed by February 28th of each year. If employee leaves before anniversary date, his vacation pay will be pro-rated based on lapsed time between anniversary date and termination date.

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ARTICLE XII. PENSION

The Employer shall contribute to the CE[n]tral [sic] States, Southeast and Southwest Area Pension Fund effective April 1, 1974, for each full time employee covered by this Agreement who has been on the payroll thirty (30) days or more.

Contributions will be made in accordance with the following schedules:

\$3.00 per week for first 9 months. Payments to commence April 1, 1974

\$4.00 per week for second 9 months.

\$5.00 per week for third 9 months.

\$6.00 per week for fourth 9 months.

If an employee is absent because of illness or off-the-job injury and notifies the Employer of such absence, The [sic] Employer shall continue to make the required contributions, for a period of four (4) weeks. If an employee is injured on the job, the Employer shall continue to pay the required contributions until such employee returns to work; however, such contributions shall not be paid for a period of more than six (6) months. If an employee is granted a leave of absence, the Employer shall collect from said employee, prior to the leave of absence being effective, sufficient monies to pay the required contributions into the Pension Fund during the period of absence.

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ARTICLE XIV. GRIEVANCES

Section 1. The parties shall make an earnest effort to resolve any differences or disputes arising under the provisions of this Agreement. Grievances shall be submitted promptly and shall be handled expeditiously.

Any employee having a grievance should first take the grievance up with the Department Manager who will attempt to adjust it. An employee may request the presence of the Union Steward. If the grievance is not adjusted at this level it shall be reduced to writing on a grievance form and signed by the employee or employees involved and one copy shall be given to the Department Manager. The Union Steward may then take the grievance up with higher management. Written answers will be given by management to all written grievances presented by the Union Steward.

Section 2. In the event the parties are unable to resolve a grievance, either party, by written notice to the other, may submit the grievance to arbitration for decision by an impartial arbitrator. The parties shall first try to agree on the impartial

arbitrator. If they do not reach agreement within ten (10) days after notice of arbitration is given, a panel of arbitrators shall be obtained from the Federal Mediation and Conciliation Service and the parties shall select the arbitrator by alternately striking names on such panel. Expenses of arbitration shall be shared equally. The impartial arbitrator's award shall be final and binding upon both parties.

The impartial arbitrator shall have no power to add to or subtract from or modify any of the terms of this agreement or any agreements, made supplementary hereto; nor to establish or change any wage. The arbitrator shall have no power to rule on any issue or dispute arising under the Pension Plan or Insurance Program. Any case appealed to the arbitrator on which he has no power to rule shall be referred back to the parties without decision.

Section 3. No Strike - No Lockout. There shall be no strikes, slowdowns, sitdowns, or any other interference with production by the Union or any of the employees during the term of this Agreement provided that the Union shall not be responsible if it has made all reasonable and good faith efforts to terminate any such strike, sitdown or slowdown. Any employee violating this provision shall be subject to discipline including discharge. The Employer shall not lock out employees during the term of this Agreement. It shall not be a violation of this Agreement for an employee to refuse to cross a picket line sanctioned [sic] by the Union.

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ARTICLE XVI. SUCCESSORS AND ASSIGNS

This Agreement shall be binding upon the parties hereto and their succe- [sic] and assigns.

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EXHIBIT 'B'
MINIMUM WAGE SCALE

4/1/75
MECHANIC . . . \$7.16 . . .
. . ."

5. That Respondent Milwaukee Truck actively employed Carl Six as a mechanic until on or about June 4, 1975; that prior to June 4, 1975 Six had been continuously actively employed by Respondent Milwaukee Truck for at least ten years; that prior to June 4, 1975, but after Six had been actively employed for said ten years, Six requested that Respondent Milwaukee Truck pay him three weeks' vacation pay; that thereafter, but prior to June 4, 1975, Respondent Milwaukee Truck refused said request; that by correspondence dated June 4, 1975, Complainant sent by certified mail, to Respondent Milwaukee Truck's last known address, a grievance requesting said vacation pay, the body of which correspondence stated:

"Enclosed please find a copy of Carl Six's grievance. Please advise disposition of this grievance, in writing, within three (3) days, or we will be forced to take this matter to arbitration, as per the terms of the contract."

That said correspondence was forwarded to Respondent Nu-Way and accepted by its agents.

6. That on or about December 6, 1975, Complainant submitted the aforementioned dispute to the Wisconsin Joint Area Grievance Committee mailing a copy of the submission to Respondent Milwaukee Truck; that pursuant to notice by certified mail to Respondent Milwaukee Truck, the Wisconsin Joint Area Grievance Committee held hearing on August 6, 1975 at which time it rendered the following decision:

"DECISION: Claim of the union upheld.

"75-8-41

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|--------------------|----------------------------------|
| Employer: | Milwaukee Truck Center, Inc. |
| Employee: | Carl Six |
| Alleged Violation: | Article VIII - Vacations, Page 4 |
| Local Union: | 200 |

Mr. Clarence Johannes represented the union and stated that the company refuses to pay 3 weeks' vacation after 10 years of service. The union requests that the company pay Carl Six in full for all vacations, to-wit [sic]: 3 weeks.

No one appeared for the company.

A motion was made, seconded and carried to award the claim to the union by default."

At no time did Respondents consent to the jurisdiction of said committee or participate in the aforementioned proceedings.

7. That by separate letters dated September 3 and September 11, 1975, mailed to Respondents' agent Ullenberg at Respondent Nu-Way's address and received there by him, Complainant requested that Respondents pay Six the disputed vacation pay; that by letter dated September 11, 1975, addressed to and received by Complainant, Ullenberg stated in relevant part:

"Milwaukee Truck Center is no longer in business. There are no funds available. When Carl Six left we sent him a week's pay which he returned. That is the amount we figured he had coming.

The Internal Revenue has a claim against the company for back payroll taxes and Social Security taxes.

Very truly yours,

Nu-Way Auto Electric Co.,; [sic]Inc.

Ralph Ullenberg /s/

Ralph H. Ullenberg"

That Respondents at all relevant times have failed and refused to pay Six three weeks' vacation pay.

CONCLUSIONS OF LAW

1. That since Respondent Nu-Way Electric Co., Inc. has not entered

into a collective bargaining agreement with Complainant and since Respondent Nu-Way did not agree to be bound by the decision of the Wisconsin Joint Area Grievance Committee rendered concerning the vacation pay of Carl Six, that Respondent Nu-Way has not committed, and is not committing, any unfair labor practice within the meaning of the Wisconsin Employment Peace Act.

2. That since Respondent Milwaukee Truck Center, Inc. did not agree to be bound by the decision of the Wisconsin Joint Area Grievance Committee concerning the vacation pay of Carl Six, that Respondent Milwaukee Truck has not committed, and is not committing, an unfair labor practice within the meaning of the Wisconsin Employment Peace Act by refusing to accept said decision.

3. That since Respondent Milwaukee Truck refuses to pay Grievant Carl Six three weeks' vacation pay after Six's attainment of his anniversary date of hire in the year 1975 in violation of Article VIII of a collective bargaining agreement then in effect between it and Complainant, that Respondent Milwaukee Truck has committed, and is committing an unfair labor practice within the meaning of Section 111.06 (1)(f) of the Wisconsin Employment Peace Act.

ORDER

IT IS ORDERED that Respondent Milwaukee Truck Center, Inc. take the following affirmative action which the Examiner has determined will effectuate the policies of the Wisconsin Employment Peace Act:

1. Pay Carl Six the sum of Eight Hundred Fifty Nine Dollars and Twenty Cents (\$859.20) as vacation pay due him on reaching his anniversary date of hire in the year 1975.
2. Pay the Central States, Southeast and Southwest Area Pension fund the sum of Twelve Dollars and No Cents (\$12.00) pension contribution for the three week period of vacation due Carl Six.
3. Notify the Wisconsin Employment Relations Commission in writing, within ten (10) days following the date of this Order, as to what steps it has taken to comply herewith.

Dated at Milwaukee, Wisconsin, this 4th day of May, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

MEMORANDUM ACCOMPANYING FINDING OF FACT,
CONCLUSIONS OF LAW AND ORDER

On October 31, 1975, Complainant filed the instant complaint alleging, inter alia, that Respondents operate as a single employer for labor relations purposes; that Ralph Ullenberg owned both and was their principal agent; that Respondents jointly employed Carl Six who had attained ten years seniority at the relevant times; that Respondents were bound by a collective bargaining agreement with Complainant which required that employees with ten years of service be paid three weeks vacation and that grievances be submitted to a grievance committee; that Respondents refuse to pay Grievant more than one week's vacation pay; that Complainant submitted a grievance concerning same to the grievance committee and that Respondents refuse to abide by an award of said committee in Complainant's favor.

Pursuant to notice, hearing was held in this matter on December 29, 1975. When the Examiner concluded that Respondents were not going to appear he held an ex-parte hearing during which Complainant was required to establish the elements of the alleged violations by a clear and satisfactory preponderance of the evidence. ^{1/} After the presentation of its evidence Complainant sought to have Ralph Ullenberg made a party to the proceeding, ^{2/} and specified that it wished an order for Respondents to pay \$859.20 to Grievant Six for his three weeks' vacation pay, \$12.00 pension contribution for the three week period, interest on said amounts, \$.10 costs for filing the action and reasonable attorney fees.

DISCUSSION

Grievance Award

The Commission will refuse to enforce an award by a tribunal where the evidence fails to establish that the responding party ever agreed to be bound thereby. ^{3/} Respondent Milwaukee Truck and Complainant's

^{1/} United Contractors (12053-A) @ p. 6, 12/73, (12053-B) 1/74 enforced.
Wisconsin Employment Relations Commission v. United Contractors
Waukesha Cir. Ct. #32368, 8/74. Burden of proof Wis. Rev. Stat. (1973)
Sec. 111.07(3). All statute citations herein are to Wis. Rev. Stat. (1973).

^{2/} That request was later withdrawn.

^{3/} Modern Plumbing, Heating and Supply Company (10171-A,B) 8/71, 9/71.

agreement in no way specifies the Wisconsin Joint Area Grievance Committee in the grievance procedure, but instead provides for arbitration by a single neutral arbitrator selected in a specified manner. Complainant's Business Representative, its sole witness herein, testified that he first became involved in this case and with Respondent Milwaukee Truck after Charles Scott, the previous Business Representative, retired. He testified that he knew from Complainant's records that Respondent Milwaukee Truck and Complainant had entered into an agreement to submit all grievances to the Wisconsin Joint Area Grievance Committee. Complainant produced no written memorandum from its files to show either a written agreement to that effect or a memorandum that a written or oral agreement to that effect had been entered into. There is no evidence that Enea had actual knowledge of such an agreement at any time. Thus, Enea must have drawn a conclusion from the actions noted in those files.

That legal conclusion is clearly contradicted by the evidence submitted. Scott's June 4, 1975 letter threatened "...or we will be forced to take this matter to arbitration, as per the terms of the contract." There is no evidence that there was any communication between Complainant and Respondent Milwaukee Truck in the interim between Scott's threat to use the arbitration provision of the overall collective bargaining agreement and his submission to the Wisconsin Joint Area Grievance Committee. The Examiner is not satisfied on this record that Respondents ever agreed to be bound by the determination of the Committee.

Contract Violation

Since neither party has requested deferral to arbitration, the Examiner determines the merits of the alleged contract violation. Six had ten years of seniority as of the time he made his request for three weeks' vacation. That request was made before the June 4, 1975 grievance and the testimony suggests that Six was employed beyond his ten year seniority date. It appears that Respondent Milwaukee Truck abandoned active business operations and apparently laid Grievant Six off sometime thereafter. Under Article VIII, Section 1, Grievant is entitled to three weeks' pay at his Mechanic's rate of \$7.16 per hour (Appendix B) for forty hours per week (Article VI, Section 1). There is no evidence that Respondents are entitled to any setoff specified in Article VIII, Section 4 and Complainant does not seek any additional pro-rata vacation. Since Respondent Milwaukee Truck refuses to pay the full vacation pay Six is entitled to, it has violated the collective bargaining agreement in effect between it and Complainant in violation of Section 111.06(1)(f).

Respondent Nu-Way's Liability

Respondent Nu-Way is not actually a party to the instant agreement. Complainant's evidence of receipt of mail, employment of the same agent, (possibly at successive times), and the agent's actions do not, under these circumstances, establish any relevant nexus of relationship of the two Respondents. Respondent Nu-Way cannot therefore be held responsible for Respondent Milwaukee Truck's actions in this matter.

Remedy

Pursuant to Section 111.07(4), the Examiner finds that it will effectuate the policies of the Wisconsin Employment Peace Act to order Respondent Milwaukee Truck to pay Grievant Carl Six three weeks' vacation pay which the Examiner determines to be the sum of \$859.20, and to pay the pension fund specified in the parties' agreement the sum of \$12.00 for that period. It is not the Commission's policy to award attorneys' fees unless the parties have otherwise agreed.^{4/} Since Complainant has failed to present a verified receipt of its expenditure of \$.10 for costs incurred in filing this complaint, the Examiner deems it unnecessary to review Commission policy on that subject. The Examiner is satisfied that the inclusion of the payment of interest will not materially serve the purposes of the Act under these specific circumstances.

Dated at Milwaukee, Wisconsin, this 4th day of May, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Stanley H. Michelstetter II
Stanley H. Michelstetter II
Examiner

4/

United Contractors, supra.