

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Case XII
No. 28340 Ce-1666
Decision No. 14513-A

Goldberg, Previant and Uelmen, Attorneys at Law, by Mr. Howard Janco,
appearing on behalf of the Respondent Union.

A complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter, and the Commission having appointed Sherwood Malamud, a member of the Commission's staff to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and hearing on said complaint having been held at Racine, Wisconsin on May 5, 1976 and the transcript of same having been completed on July 22, 1976; the parties having presented oral argument at the hearing; and the Examiner having considered the entire record in this matter and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

4. That at all times material hereto the Employer and Local 43 have been parties to the National Master Freight Agreement and a rider thereto which contains the following provisions material hereto:

National Master Freight Agreement

"ARTICLE 3.

. . .

Section 2.

A new employee shall work under the provisions of this Agreement but shall be employed only on a thirty-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 days the employee shall be placed on the regular seniority list.

In case of discipline within the thirty-day period, the Employer shall notify the Local Union in writing.

. . .

ARTICLE 8.

All grievances or questions of interpretations arising under this Master Agreement or Supplemental Agreements thereto shall be processed as set forth below. If such Supplemental Agreements provide for arbitration of discharges, such procedure shall be continued.

- (a) All factual grievances or questions of interpretation arising under the provisions of the Supplemental Agreement, (or factual grievances arising under the National Master Agreement) shall be processed in accordance with the grievance procedure of the applicable Supplemental Agreement.

. . .

- (b) Any matter which has been referred pursuant to Section 1(a) above, or any question concerning the interpretation of the provisions contained in the Master Agreement, shall be submitted to a permanent National Grievance Committee which shall be composed of an equal number of Employer and Union representatives."

"R I D E R

. . .

- 7. PROBATIONARY PERIOD. A new employee shall work under the provisions of this Agreement but shall be employed on a sixty (60) day trial basis, during which period he may be discharged without further recourse."

that said Rider does not contain a supplementary grievance procedure.

5. That on October 7, 1975, the Employer hired Complainant as a temporary employee to drive its trucks and haul equipment; that at the time of hire, the Employer informed Complainant that he was hired on a temporary basis.

6. That on Thursday, October 30, 1975, Complainant's immediate supervisor, Casey Adamowicz, told Complainant to "turn in his things"; that on Friday, October 31, 1975, Complainant was asked to take a run from Racine to Chicago, which he did; that after completing this run,

Complainant's employment with the Employer was terminated; that the Employer terminated Complainant's employment because "things were slow" and the Employer did not voice any complaint to Complainant about the quality of his work at that time; that no notice of Complainant's termination was delivered to Local 43 by the Employer.

7. That sometime between November 1975 and the date of hearing, the Employer hired new employees to haul equipment on its trucks; that during this period Complainant confronted his immediate supervisor Adamowicz and asked why Complainant had not been called back; to-wit Adamowicz responded that Complainant was a troublemaker.

8. That Complainant did not file a grievance concerning his termination with Respondent Union, nor did Complainant request Respondent Union to intercede with the Employer on his behalf; and that there is no evidence that Local 43 acted arbitrarily, capriciously or in bad faith towards Complainant in his dispute with the Employer.

9. That the grievance procedure excerpted above was intended by the parties to be the exclusive means for enforcing the provisions of the National Master Freight Agreement and the Rider thereto.

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

CONCLUSIONS OF LAW

1. That Respondent Union did not violate its duty to fairly represent Complainant, Paul Gelmi, relative to Respondent Employer's termination of his employment and thereby the Union did not violate Section 111.06(2)(a) or any other provision of the Wisconsin Employment Peace Act (WEPA).

2. That the Commission will not exercise its jurisdiction to review the merits of the dispute concerning the Employer's termination of Complainant's employment and whether said action breached the collective bargaining agreement and thereby violated Section 111.06(1)(f) of WEPA.

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

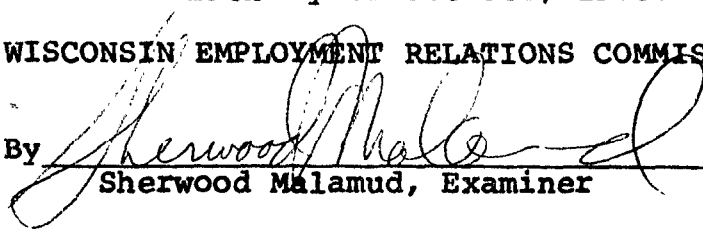
ORDER

IT IS ORDERED that the complaint in the instant matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 19th day of October, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Sherwood Malamud, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Complainant alleges that the Employer violated his contractual rights when it terminated his employment. At the hearing, Complainant appeared as a witness, and testified about the Employer's refusal to rehire him. The rehire issue was not raised in the pleadings, but it too related to the Employer's alleged violation of the Complainant's contractual rights. Complainant further alleges that Local 43 failed to secure those contractual rights for him.

The Employer entered a general denial to the complaint in a written answer submitted just prior to the commencement of the hearing. The Employer did not allege that Complainant failed to exhaust the grievance procedure.

Local 43 orally answered the complaint at the commencement of the hearing on May 5, 1976. It denied Complainant's allegations and asserted as an affirmative defense that Complainant never notified it of his termination nor requested Local 43 to intervene on his behalf.

Complainant seeks to have the Commission exercise its jurisdiction under Section 111.06(1)(f) of the Wisconsin Employment Peace Act and determine the merits of the dispute over his termination. 1/ Under Section 301 of the Labor Management Relations Act, as amended, both federal courts and state tribunals have concurrent jurisdiction to enforce the terms of collective bargaining agreements. 2/ The Commission is an appropriate state tribunal empowered under the Wisconsin Employment Peace Act to determine contractual disputes involving "commerce" employers, and the Commission is empowered by WEPA to enforce said agreements where a violation is found. 3/ However, in those instances, when the Commission asserts its jurisdiction over commerce employers, it must apply federal substantive law. 4/

In Vaca v. Sipes (1967), 386 U.S. 171, the U.S. Supreme Court established the circumstances under which an employee may use alternative proceedings to the contractually established grievance procedure to vindicate his rights. The Court stated at pages 184-185:

" . . . if the wrongfully discharged employee himself resorts to the courts before the grievance procedures have been fully exhausted, the employer may well defend on the ground that the exclusive remedies provided by such a contract have not been exhausted. Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced. For this reason, it is settled that the employee

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- 1/ Since Complainant charges the Employer with violating the collective bargaining agreement, the Examiner concludes that Complainant is alleging a violation of 111.06(1)(f) of WEPA.
 - 2/ Textile Workers Union vs. Lincoln Mills, 353 U.S. 448, 40 LRRM 2113 (1957); Charles Doud Box Co. vs. Courtney; 368 U.S. 502, 49 LRRM 2619 (1962).
 - 3/ Seamen-Andrews Corp. (5510) 1/62; Tecumseh Products Co. (5963) 4/62 aff'd sub nom Tecumseh Products Co. vs. WERB 23 Wis. 2d 118 (1964); American Motors Corp. vs. WERB 32 Wis. 2d 237 (1966).
 - 4/ Local 164, Teamsters vs. Lucas Flour, 369 U.S. 95, 49 LRRM 2917 (1962).

must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement. Republic Steel Corp. v. Maddox, 379 U.S. 650. However, because these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant. The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures."

As Complainant stated at the hearing, "I figured I didn't have to call the Union . . . I figured I did not have my 30 days in." 5/ Complainant did not file a grievance or ask Local 43 to intercede on his behalf. Therefore, the Examiner concluded that Local 43 did not fail to fairly represent him. Absent such finding, the Commission cannot assert its jurisdiction to determine the merits of Complainant's claim that his termination was not justified. Accordingly, the Examiner dismissed the complaint.

Dated at Madison, Wisconsin this 19th day of October, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Sherwood Malamud, Examiner