

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MYRTLE L. GRIFFIN AND CHARLES  
WOODWARD,

Complainants,

vs.

RED CAB COMPANY AND DONALD EITHUN,

Respondents.

Case I  
No. 21522 Ce-1727  
Decision No. 15410-7

Appearances:

Ms. Sheilah O. Jakobson, Attorney at Law, on behalf of  
Complainants.

Mr. Donald Eithun, on behalf of Respondents.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Amedeo Greco, Hearing Examiner: This case was initiated by a complaint filed by Myrtle L. Griffin and Charles Woodward which alleged that Red Cab Company and Donald Eithun had committed an unfair labor practice by terminating them in violation of Section 111.06(1)(a) of the Wisconsin Employment Peace Act, herein WEPBA. <sup>1/</sup> Respondents, in turn, denied that they unlawfully terminated Griffin and Woodward. Hearing was held on May 6, 1977, at Madison, Wisconsin. Following the conclusion of the hearing, Complainants filed a brief.

Upon the entire record in this case and after consideration of the brief, the Examiner makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. At all times material herein, Myrtle Griffin and Charles Woodward were primarily employed as taxi cab drivers and they occasionally served as radio dispatchers for Respondents. Griffin and Woodward began working for Respondents in 1973 and 1976 respectively and, as noted below, both were terminated on or about February 1, or February 2, 1977.

2. Respondents operate and maintain a taxi cab company in Madison, Wisconsin. Donald Eithun is the sole owner of said company and at all times material hereto has served as the agent of said company. Respondent cab company is engaged in intrastate commerce, as it fails to meet the jurisdictional standards established by the National Labor Relations Board.

<sup>1/</sup> Complainants' complaint was amended at the hearing.

3. As noted above, Griffin and Woodward primarily served as taxi cab drivers. At the time of their terminations, 2/ each paid Eithun about eighteen (18) dollars to use the cab for each shift that they used the cab. Each shift lasted from either 4:00 a.m. to 4:00 p.m. or from 4:00 p.m. to 4:00 a.m. In exchange, the drivers paid for their own gasoline and retained all passenger fares. At the end of the shifts, the drivers were expected to return the cabs to the company premises. The drivers had no financial investment in the cabs. At the same time, Respondents carried insurance on the cabs, paid for and authorized their maintenance and repair, and generally directed the drivers where to pick up fares. Respondents also have the power to terminate drivers at will, and they carry city permits for the cabs. Moreover, the cab drivers all bear Red Cab markings and all good will arising from operation of the cabs inures to Respondents' benefit. Additionally, the work performed by the drivers is an essential part of Respondents' operations.

4. Griffin and Woodward both experienced mechanical and safety defects in their respective cabs such as faulty brakes, gas fumes, acceleration and linkage problems and related those defects to Eithun. While Eithun was able to repair some of the defects, other defects remained unrepaired. As a result, complainants, who discussed the safety issues among themselves and other drivers, filed complaints regarding the condition of their cabs with the City of Madison's Department of Transportation, which regulates the taxi cab industry in Madison. The latest complaint was filed in January, 1977. Because of these and other complaints, the Department of Transportation by letter dated February 1, 1977, advised Eithun that:

"Dear Mr. Eithun:

We have received citizen complaints concerning the safety condition of some of your taxi cabs as follows:

- 1) Taxi with permit #52 - 1969 Ford, Serial #9C51B226022. High beam of headlights was not working. Windshield wipers were not working properly.
- 2) Taxi with permit #53 - 1969 Ford, Serial #9C51B226021: Has hole in floorboard. Wheel wells are rusted out.
- 3) Taxi with permit #61 - 1970 Plymouth, Serial #RL41GOA185222: Gas fumes were noticed inside of vehicle. Transmission not functioning properly.

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2/ For sometime before their discharges, Griffin and Woodward had "singled shifted" their cabs. Under that arrangement, the drivers kept the cabs for as long as they wanted and kept the cabs with them at night. The drivers would split their fares with Respondents on a fifty-fifty basis. Part of the money paid to Respondents covered insurance and maintenance. Under this arrangement, the drivers paid for their own gas. The record is unclear as to when Griffin and Woodward changed over from the "single shift" arrangement to the one they had at the time of their terminations.

- 4) Taxi with permit #63 - 1970 Plymouth, Serial #2L4160A233367  
Excessive exhaust fumes were noticed inside of vehicle.

Since these defective conditions affect the safe operation of the vehicles, please inform me by February 9 what action you have taken.

Yours very truly,

James J. McLary  
Transit Coordinator

By \_\_\_\_\_  
G. G. Ranum

5. Eithun visited the Department of Transportation on about February 1, or February 2, 1977, and there learned that Griffin and Woodward had filed safety complaints against him. Additionally, Eithun that day picked up the February 1, 1977 letter noted above. Later that day, Eithun called Woodward and Griffin into his office and there discharged them, 3/ giving as one of the reasons for their discharge the fact that they had hurt his feelings by complaining about the company to the Department of Transportation. Although Eithun claimed at the hearing that he fired Griffin and Woodward for using bad language and speeding respectively, the record shows that Eithun had never reprimanded either employe previously for engaging in such conduct.

Based upon the foregoing Findings of Fact, the Examiner makes and renders the following

#### CONCLUSION OF LAW

Respondents have violated Section 111.06(1)(a) of WEDA by discharging Myrtle Griffin and Charles Woodward in part because they had complained about the safety of their equipment.

Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

#### ORDER

It is ordered that Respondents, their officers and agents, shall immediately

- (1) Cease and desist from terminating Myrtle Griffin or Charles Woodward, or any other employes, in part because they have complained over the safety of their equipment.
- (2) Take the following affirmative action which the Examiner finds will effectuate the policies of the Wisconsin Employment Peace Act.
  - (a) Offer to reinstate Myrtle Griffin and Charles Woodward to their former or substantially similar positions without prejudice to their seniority or other rights or privileges, and make them whole for any loss of pay they may have suffered by reason of Respondents' unfair labor practice, by payment to each of them a sum of money, including all benefits, which they would have received from the time of their termination to the date of an unconditional offer of

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3/ It is somewhat unclear as to whether Eithun terminated Woodward and Griffin on February 1 or February 2, 1977.

reinstatements, less any amount of money that they earned or received (including unemployment compensation) that they otherwise would not have earned. Any offset for unemployment compensation received should be remitted to the Unemployment Compensation Division of the Department of Industry, Labor and Human Relations of the State of Wisconsin.

- (b) Notify all employes by posting in conspicuous places in its offices where employes are employed, copies of the notice attached hereto and marked Appendix "A". That notice shall be signed by the Respondents and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Respondents to ensure that said notices are not altered, defaced or covered by other material.
- (c) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from the date of this Order as to what steps it has taken to comply herewith.

Dated at Madison, Wisconsin, this *12th* day of December, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

*Amedeo Greco*  
Amedeo Greco, Examiner

APPENDIX A

Notice to All Employees

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Wisconsin Employment Peace Act, we hereby notify our employees that:

1. WE WILL immediately offer to reinstate employees Myrtle Griffin and Charles Woodward to their former or substantially equivalent positions and we will make them whole for any loss of pay they suffered as a result of their terminations.
2. WE WILL NOT terminate or otherwise discipline employees in part because they have complained about the safety of their equipment.

RED CAB COMPANY

By \_\_\_\_\_

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 1977.

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSION OF LAW AND ORDER

The complaint herein centers on whether Respondents unlawfully terminated Griffin and Woodward in violation of Section 111.06(1)(a) of WEPA, with Complainants contending, and Respondents denying, that such was the case.

The resolution of this issue primarily turns on whether Griffin and Woodward were employes who engaged in concerted protected activity, whether Respondents knew of such activity and resented it, and whether Respondents in part terminated Griffin and Woodward because of such activities.

As to their employe status, Respondents contend that Griffin and Woodward are independent contractors at the time of their termination and that, therefore, they are not employes under WEPA. 4/ The facts, however, do not bear out this condition. Thus, as noted above, Respondents carry insurance on the cabs, they authorize and pay for the maintenance and repair of the cabs, they generally direct the drivers where to pick up fares, they have the power to terminate the drivers at will, and they carry city permits for the cabs. Additionally, the cabs all bear Red Cab markings and all good will arising from operation of the cabs inures to Respondents' benefit. Furthermore, the drivers have no financial investment in the cabs and the drivers generally retain the cabs for certain prescribed shifts after which time they return the cabs. Moreover, the work performed by the drivers is an essential part of Respondents' operators. In light of these factors, 5/ it must be concluded that the drivers are not independent contractors and that, instead, they are employes under Section 111.02(3) of WEPA. 6/

That being so, the next question is whether under Section 111.04 of WEPA Griffin and Woodward were engaged in "concerted activities for the purpose of collective bargaining or other mutual aid and protection." Here, it is undisputed that Griffin and Woodward discussed the safety of their equipment with each other and other employes, that they then brought such matters to Eithun's attention, and that both thereafter reported alleged safety defects to the Madison Department of Transportation. In these circumstances, it is clear that Griffin and Woodward had banded together in order to correct the alleged unsafe equipment which they were driving. As it is well recognized that protests over safety matters constitute concerted

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- 4/ Respondents stipulated at the hearing that they are engaged in intrastate commerce and that they are not subject to the jurisdiction of the National Labor Relations Act, as amended.
- 5/ Although the drivers operated under somewhat different conditions when they "single shifted", such minor differences are insufficient to offset the other factors herein which establish that Griffin and Woodward were employes at the time of their terminations.
- 6/ See Yellow Cab Company and Checker Taxi Co., Inc., 229 NLRB No. 190, wherein the National Labor Relations Board found that similarly situated taxi drivers were employes and not independent contractors.

protected activity, 7/ it follows that Griffin and Woodward could not be fired for exercising their statutory rights to engage in such activity. 8/

Turning to the question of whether Eithun knew of such activity, Eithun conceded at the hearing that he learned on or about February 1, 1977, before they were fired, that Griffin and Woodward had filed formal complaints against him with the Madison Department of Transportation.

As to the question of whether Eithun resented such complaints, there is also no question but that he did. Thus, Griffin and Woodward both credibly testified that during their exit interviews Eithun told both of them that they were being fired because they had hurt his feelings by complaining to the Department of Transportation. Although Eithun denied making this specific statement, his denial is discredited. This finding is in part based on the respective demeanors of the witnesses. Additionally, Eithun himself acknowledged that their complaints to the City had "hurt me". 9/ Since this latter statement is exactly what Griffin and Woodward testified that Eithun told them in their exit interview, their testimony is credited.

Furthermore, it is also clear that Eithun's decision to discharge Griffin and Woodward was based at least in part on the fact that they had complained about the safety of their equipment. Thus, Eithun testified that he discharged them on the very day that he learned they had complained about the equipment. This timing certainly indicates that the discharge decision was related to the fact they had filed complaints. Moreover, even though Eithun asserted that he fired Griffin and Woodward for bad language and speeding respectively, it appears that neither was ever warned about such conduct previously. Furthermore, Griffin and Woodward both credibly testified that Eithun told them that they were being fired because they had hurt his feelings by complaining to the Department of Transportation. Additionally, the record shows that Eithun admittedly felt hurt by such complaints and that, in his words, "all the stuff of the City added to it", 10/, i.e. his decision to terminate them. Moreover, Eithun conceded that such complaints to the City "would add another straw to it", i.e., his discharge decision. 11/ Accordingly, even assuming arguendo that Eithun may have had otherwise valid grounds to discharge Griffin and Woodward, Eithun violated Section 111.06(1)(a) when he decided

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7/ United Parcel Service 228 NLRB No. 136 and Du-Tri Displays, Inc., 231 NLRB No. 128.

8/ This is so because Section 111.06(1)(a) of WEPA makes it an unfair labor practice "to interfere with, restrain or coerce his employees in the exercise of the rights guaranteed in Section 111.04." As Section 111.04 provides that employees have the statutory right to complain over safety matters, Section 111.06(1)(a) thereby prohibits employees from interfering with the exercise of that right.

9/ Transcript P. 62.

10/ Transcript P. 60.

11/ Transcript P. 62.

to fire them at least in part 12/ because they were engaged in concerted protected activity when they filed their safety complaints. 13/

To rectify that unlawful conduct, Respondents shall take the remedial action noted above.

Dated at Madison, Wisconsin this 12th day of December, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco  
Amedeo Greco, Examiner

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12/ Since there is no evidence that Eithun bore similar such animus against another driver who filed a complaint against him, it is immaterial that Eithun did not discharge that driver, as the facts herein clearly show that Eithun's decision to terminate Woodward and Griffin was based on unlawful considerations.

13/ See, for example, Muskego-Norway Consolidated Schools v. Wisconsin Employment Relations Board, 35 Wis. 2d 541967, wherein the Court held:

"An employee may not be fired when one of the motivating factors is his union activities no matter how many other valid reasons exist for firing him."