

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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|                                  |   |                      |
|----------------------------------|---|----------------------|
| INTERNATIONAL UNION OF OPERATING | : |                      |
| ENGINEERS LOCAL NO. 139,         | : |                      |
|                                  | : |                      |
| Complainant,                     | : | Case I               |
|                                  | : | No. 25329 Ce-1840    |
|                                  | : | Decision No. 17474-B |
| vs.                              | : |                      |
|                                  | : |                      |
| LARSON LANDSCAPE SERVICE, IN.,   | : |                      |
|                                  | : |                      |
| Respondent.                      | : |                      |

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|----------------------------------|---|----------------------|
| INTERNATIONAL UNION OF OPERATING | : |                      |
| ENGINEERS LOCAL NO. 139,         | : |                      |
|                                  | : |                      |
| Complainant,                     | : | Case II              |
|                                  | : | No. 25330 Ce-1841    |
|                                  | : | Decision No. 17475-B |
| vs.                              | : |                      |
|                                  | : |                      |
| LARSON LANDSCAPE SERVICE, INC.,  | : |                      |
|                                  | : |                      |
| Respondent.                      | : |                      |

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Appearances:  
 Goldberg, Previant, Uelmen, Gratz, Miller, Levy and Brueggeman;  
 788 North Jefferson Street; P. O. Box 92099; Milwaukee,  
 Wisconsin 53202; by Mr. David Leo Uelmen, appearing on  
 behalf of the Complainant.  
 No appearance on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

JAMES D. LYNCH, Hearing Examiner: International Union of Operating Engineers Local No. 139, hereinafter the Union, filed the instant complaints on November 16, 1979, with the Wisconsin Employment Relations Commission, hereinafter the Commission, wherein it alleged that the Larson Landscape Service, Inc., hereinafter the Employer, had committed certain unfair labor practices under the Wisconsin Employment Peace Act, hereinafter WEPA. The Commission, on December 5, 1979, appointed the undersigned to make and issue Findings of Fact, Conclusions of Law and Order as provided for in Section 111.07(5) of the Wisconsin Statutes. The matters were consolidated for hearing and the matter was scheduled to be heard on January 3, 1980. On January 3, 1980, Larson appeared personally and was represented by Attorney Joseph Kuemmel. The Union appeared by Mr. Richard E. Mahal. During the course of pre-hearing discussions, the parties entered into a settlement agreement. The agreement required the Employer to make payment to David Hoffman and various Operating Engineer benefit funds in certain specified amounts. The agreement further required the Employer to submit any dispute regarding the Tim Goeden grievance to final and binding arbitration. The proceeding was then held in abeyance pending notice by the parties as to compliance with the terms of the settlement agreement. On March 17, 1980, the

Union filed amended complaints alleging that the Employer had failed to comply with the terms of the settlement agreement and requesting the Commission to exercise its jurisdiction to enforce the settlement agreement and to determine whether the Employer had violated the collective bargaining agreement by its treatment of Tim Goeden. Notice of hearing, and the amended complaints and subsequent postponement having been personally served upon Douglas Larson, the matter was heard on April 1, 1980. The Union appeared by Attorney David Leo Uelmen. The Employer did not appear.

Having considered the evidence and arguments submitted at hearing by the Complainant and being fully advised in the premises as the proceeding would permit, the matter having been duly noticed for hearing with opportunity afforded to Respondent to present evidence and make argument, the Examiner makes and files the following Findings of Fact, Conclusions of Law and Order.

#### FINDINGS OF FACT

1. The Union is a labor organization which represents a bargaining unit of certain classifications of employes in the employ of the Employer Larson Landscape, Inc. Tim Goeden and David Hoffman were members of the bargaining unit represented by the Union. Richard Mahal is the business representative of the Union.

2. The Employer operates a landscape service company. Its principal office is located at 7532 Old Sauk Road, Route 7, Verona, Wisconsin. Douglas Larson is the president of the Company.

3. That at all times material hereto, the Union and the Employer have been parties to a collective bargaining agreement which provided for, inter alia, wage payments, payments to health and welfare funds and final and binding arbitration of unresolved grievances.

4. The Union filed grievances on Goeden's and Hoffman's behalf regarding improper wage and benefit payments made by the Employer.

5. The Employer refused to process these grievances to arbitration as required by the collective bargaining agreement.

6. On November 16, 1979, the Union filed two complaints with the Commission alleging that the Employer was committing unfair labor practices by its refusal to proceed to arbitration with the Goeden and Hoffman grievances. The matters were consolidated for purposes of hearing and a hearing was scheduled for January 3, 1980, in Verona, Wisconsin.

7. On January 3, 1980, prior to convening the hearing, a pre-hearing conference was held before the Examiner. Present were Richard E. Mahal, business representative of the Union, Mr. Douglas Larson and Attorney Joseph Kuemmel who filed an appearance on Larson's behalf. During the course of the conference the Employer agreed to make payment in the following sums in settlement of the Hoffman grievance:

|          |   |   |
|----------|---|---|
| \$157.08 | - | Donald Hoffman  |
| 18.00    | - | Central Pension Fund  |
| 21.00    | - | Operating Engineers Local 139 Health Benefit Fund                       |
| 1.00     | - | Operating Engineers Local 139 Skill Improvement and Apprenticeship Fund |

The Employer further agreed to submit the Goeden grievance to final and binding arbitration in accordance with the terms of the collective bargaining agreement. In view of this agreement, the Examiner notified the parties by letter on January 5, 1980, that he would hold the complaints in abeyance pending compliance with the terms of the agreement.

8. Attorney Kuemmel memorialized these agreements in two letters to Mr. Mahal dated January 7, 1980, the texts of which follow hereafter in their entirety:

IN RE: Larson Landscape Service, Inc./  
David Hoffman

Dear Mr. Mahal:

I have written my client asking him to send you a check to you [sic] for the amount set forth in your January 4, 1980, letter to us. On this issue, it should be resolved as soon as you receive our check.

IN RE: Larson Landscape Service, Inc./  
Tim Goeden

Dear Mr. Mahal:

Based on our understanding of the circumstances surrounding Mr. Goeden's employment for Larson Landscape Service we believe that your claim is not a proper one and have advised our client to contest this matter. We would be more than happy to submit to arbitration.

9. On March 17, 1980, the Union filed amended complaints in this matter alleging that the Employer had refused to make payments according to the settlement agreement and, further, had failed to appear at an arbitration hearing concerning the Goeden grievance. The complaint requested that the Commission enforce the settlement agreement and that the Commission exercise its jurisdiction to determine the merits of the contractual dispute involving Hoffman.

10. These matters were set for hearing on April 1, 1980. The Examiner caused to be sent to the Employer by certified mail on March 18, 1980, copies of the notice of hearing and amended complaints filed herein. These notices were returned to the Examiner by the U.S. Postal Service with a notice stating that they were unclaimed on April 3, 1980.

11. On March 19, 1980, the Union caused to be personally served upon Douglas Larson by the Sheriff of Dane County copies of the notice of hearing set for 10:00 a.m., April 1, 1980. A copy of the return showing service is a part of the file herein.

12. On March 31, 1980, the Examiner issued a letter to both parties causing the hearing which was scheduled for 10:00 a.m. on April 1, 1980, to be rescheduled for 1:00 p.m. on that same date.

13. On March 31, 1980, the Examiner caused copies of the letter postponing the hearing to be personally served upon Mahal and Larson. The letter was served personally upon Larson by a member of the Sheriff's Department of Dane County at the Huber Center, 425 East Gilman Street, Madison, Wisconsin.

14. The Examiner hereby takes administrative notice of entries pertinent to this matter contained in the logbook of the Dane County Huber Center made in the ordinary course of business. A photostatic copy of certain entries contained in the logbook for March 31, 1980, is a part of the record herein.

15. The pertinent logbook entry of the Dane County Huber Center for March 31, 1980, showing receipt by Larson of the letter, is hereafter reproduced in its entirety:

"3/31/80 Larson, Doug - received envelope dropped off to him  
5:36 PM and stated his attorney had handled it & through  
threw the letter away. TCD James Lynch"

16. On April 1, 1980, at 1:00 p.m., these matters came to be heard before the Examiner. The Union appeared by Attorney David Leo Uelmen and Mr. Richard E. Mahal. The Employer did not appear. The hearing was held, testimony was adduced and exhibits were introduced relative to the complained of matters.

17. The Employer has failed and refused to make wage payments as required by the terms of the collective bargaining agreement to Mr. David Hoffman in the amount of \$157.08.

18. The Employer has failed and refused to make benefit payments as required by the terms of the collective bargaining agreement to the following funds on David Hoffman's behalf in the following amounts:

|         |   |  |
|---------|---|--|
| \$18.00 | - | Central Pension Fund   |
| 21.00   | - | Operating Engineers Local 139, Health<br>Benefit Fund                      |
| 1.00    | - | Operating Engineers Local 139 Skill<br>Improvement and Apprenticeship Fund |

19. The Employer has failed and refused to make wage payments as required by the terms of the collective bargaining agreement to Mr. Tim Goeden in the amount of \$1,664.52.

20. The Employer has failed and refused to make benefit payments as required by the terms of the collective bargaining agreement to the following funds on Tim Goeden's behalf in the following amounts:

|          |   |  |
|----------|---|--|
| \$325.80 | - | Central Pension Fund   |
| 380.10   | - | Operating Engineers Local 139 Health<br>Benefit Fund                       |
| 18.10    | - | Operating Engineers Local 139 Skill<br>Improvement and Apprenticeship Fund |

Upon the basis of the above and foregoing, the Examiner makes and issues the following

### CONCLUSIONS OF LAW

1. The settlement agreement entered into by and between the Union and the Employer on January 3, 1980, at Verona, Wisconsin, is a binding agreement between the Union and the Employer affecting wages, hours and conditions of employment.

2. The Employer, by its failure to comply with the terms of the agreement entered into on January 3, 1980, has violated Section 111.06 (1) (f) of the Wisconsin Employment Peace Act by violating the terms of the agreement. 1/

3. The Employer, by its refusal to proceed to arbitration and by its failure and refusal to make wage and benefit payments to Tim Goeden in accordance with the terms of the collective bargaining agreement, has violated Section 111.06(1) (f) of the Wisconsin Employment Peace Act.

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 Larson Landscape Service, Inc., its successors and assigns, shall immediately:

1. Cease and desist from violating the provisions of the collective bargaining agreement in effect between it and the International Union of Operating Engineers Local Union No. 139 relating to wage and benefits payments and submission of unresolved grievances to final and binding arbitration.
2. Take the following affirmative action which the Commission finds will effectuate the policies of the Act:
  - a) Immediately make payment by certified check to the order of David Hoffman in the amount of \$157.08 and mail same to International Union of Operating Engineers Local Union No. 139, at 420 South Park Street, Madison, Wisconsin, 53715, as the remitting agent for improper wage payments due and owing as a result of Hoffman's employment by Larson Landscape, Inc.
  - b) Immediately make payment by separate certified checks to the order of: (1) the International Union of Operating Engineers Central Pension Fund in the amount of \$18.00; (2) Operating Engineers Local 139 Health Benefit Fund in the amount of \$21.00; and (3) Operating

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1/ Section 111.06(1) (f) provides:

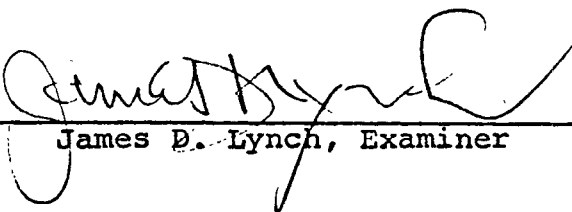
"It shall be an unfair labor practice for an Employer individually or in concert with others . . . (f) to violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award)."

Engineers Local 139 Skill Improvement and Apprenticeship Fund in the amount of \$1.00, and mail same to International Union of Operating Engineers Local Union No. 139 at 420 South Park Street, Madison, Wisconsin, 53715, as the remitting agent for delinquent benefit payments due and owing as a result of Hoffman's employment by Larson Landscape, Inc.

- c) Immediately make payment by certified check to the order of Tim Goeden in the amount of \$1,664.52 and mail same to International Union of Operating Engineers Local Union No. 139 at 420 South Park Street, Madison, Wisconsin, 53715, as the remitting agent for improper wage payments due and owing as a result of Goeden's employment by Larson Landscape, Inc.
- d) Immediately make payment by separate certified checks to the order of: (1) International Union of Operating Engineers Central Pension Fund in the amount of \$325.80; (2) Operating Engineers Local 139 Health Benefit Fund in the amount of \$380.10; and (3) Operating Engineers Local 139 Skill Improvement and Apprenticeship Fund in the amount of \$18.10, and mail same to International Union of Operating Engineers Local Union No. 139 at 420 South Park Street, Madison, Wisconsin, 53715, as the remitting agent for delinquent benefit payments due and owing as a result of Goeden's employment by Larson Landscape, Inc.
- e) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 3rd day of July, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By   
James D. Lynch, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

The original complaints filed herein charged that the Employer violated the collective bargaining agreement existing between it and the Union by refusing to submit to arbitration two grievances which the Union filed on behalf of David Hoffman and Tim Goeden. These matters were set for hearing on January 3, 1980, at Verona, Wisconsin.

The record establishes that during the course of a pre-hearing conference held before this Examiner on January 3, 1980, the Employer entered into a settlement agreement with the Union which provided that the Employer would make certain payments arising from the David Hoffman grievance and would submit disputes regarding the Tim Goeden grievance to arbitration.

The Employer failed to honor this agreement and the Union filed its amended complaints herein seeking enforcement of the settlement agreement as to Hoffman and an Order from the Commission as to the merits of the Goeden contract violation claim in view of the Employer's continued refusal to proceed to arbitration.

The record establishes that the amended complaints were filed with the Commission on March 17, 1980, and that a notice of hearing and amended complaints were sent by certified mail to Larson on March 18, 1980. The letter was returned to the Examiner on April 3, 1980 noting that its contents were unclaimed.

On March 19, 1980, the Union caused the notice of hearing and amended complaints to be personally served upon Douglas Larson by the Sheriff of Dane County. A copy of the affidavit of service showing that personal service was made upon Larson is contained as part of the record herein as Exhibit #11.

On March 31, 1980, the Examiner issued a letter to Mahal and Larson which, by its terms, caused the hearing which was scheduled for 10:00 a.m. on April 1, 1980, to be rescheduled for 1:00 p.m. on that same date. On March 31, 1980, the Examiner caused copies of the letter postponing hearing to be personally served upon Mahal and Larson. The letter was served personally upon Larson by a member of the Sheriff's Department of Dane County at the Huber Center, 425 East Gilman Street, Madison, Wisconsin.

The Examiner hereby takes administrative notice of entries pertinent to this matter contained in the logbook of the Dane County Huber Center. A photostatic copy of certain entries contained in this logbook for March 31, 1980, is a part of the record herein.

The pertinent logbook entry of the Dane County Huber Center for March 31, 1980, showing receipt by Larson of the letter is hereafter reproduced in its entirety:

"3/31/80 Larson, Doug - received envelope dropped off to him  
5:36 PM and stated his attorney had handled it & through  
threw the letter away. TCD James Lynch"

As noted in the Findings of Fact, Larson did not appear at the hearing.

Turning then to the merits of this matter, the Examiner concludes that the settlement agreement is a valid collective bargaining agreement, which the Employer, by its failure to comply therewith, has breached. The Examiner hereby orders the Employer to make payment to Hoffman and the various benefit plans in accordance with its terms as specified in Finding of Fact 14.

However, in view of the Employer's continued refusal to proceed to arbitration on the Goeden grievance, the Examiner finds that the Employer has repudiated the grievance procedure and will thereby exercise the Commission's jurisdiction to determine the merits of Goeden's contract violation claim. 2/

Turning to the merits of that claim, the record establishes that Larson paid Goeden an hourly wage of \$6.50 instead of the contractually required \$10.96 hourly wage. As a result thereof, Goeden suffered a total wage loss in the amount of \$1,664.52. Additionally, during the period of Goeden's employment Larson never tendered any payment to the various benefit funds as contractually required thereby resulting in delinquencies in the following stated amounts: \$325.80 - Operating Engineers Central Pension Fund; \$300.00 - Operating Engineers Local 139 Health Benefit Fund; and \$18.10 - Operating Engineers Local 139 Skill Improvement and Apprenticeship Fund.

On the basis of the above the Examiner finds that the Employer violated the collective bargaining agreement. As a remedy therefor Larson Landscape Service, Inc., its successors and assigns must comply with the terms specified in the foregoing Order.

Dated at Madison, Wisconsin this 3rd day of July, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By   
James D. Lynch, Examiner

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2/ D. L. Bradley Co., Inc., No. 9526-A, B (9/70); Bob Harrison  
Trucking Co., No. 9051-A, B (4/70).