

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CARPENTERS DISTRICT COUNCIL OF MILWAUKEE COUNTY & VICINITY,	:	
	:	Case I
	:	No. 27563 Ce-1905
Complainant,	:	Decision No. 18498-A
	:	
vs.	:	
	:	
TOMPA WOODWORK, INC.,	:	
	:	
Respondent.	:	
	:	

Appearances:

Goldberg, Previant, Uelmen, Gratz, Miller, Levy & Brueggeman, S.C., by Mr. Timothy G. Costello, 788 North Jefferson Street, Milwaukee, Wisconsin appearing on behalf of Complainant.

Mr. Russ R. Mueller, Attorney at Law, 759 North Milwaukee Street, Milwaukee, Wisconsin, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Carpenters District Council of Milwaukee County and Vicinity having on February 26, 1981 filed a complaint with the Wisconsin Employment Relations Commission alleging that Tompa Woodworking, Inc. had committed certain unfair labor practices within the meaning of the Wisconsin Employment Peace Act, (WEPA); and the Commission having appointed Peter G. Davis, a member of its staff, as Examiner in said matter; and hearing having been held in Milwaukee, Wisconsin on April 16, 1981; and the parties having filed post hearing briefs by June 12, 1981; the Examiner having considered the evidence and argument, makes and issues the following

FINDINGS OF FACT

1. Carpenters District Council of Milwaukee County and Vicinity, herein Complainant, is a labor organization.

2. Tompa Woodworking Inc., herein Respondent, is a Wisconsin corporation which opened a millwork business on July 1, 1980 with Joseph Tompa as its president.

3. In mid-April, 1980, Joseph Tompa was laid off from his employment at Prem Woodwork, a millwork company whose employes were represented by Complainant. In June 1980, Tompa learned that Martin Prem, owner of Prem Woodwork, had decided to close down his business. Tompa then arranged to form a corporation and open his own millwork business on Prem's old premises.

4. In mid to late June 1980, apparently desirous of maintaining the welfare, vacation and pension benefits he had received as a union employe at Prem Woodwork, Joseph Tompa approached Complainant about signing a collective bargaining agreement. Complainant informed Tompa that he had to have at least one employe before he would be eligible to sign a contract. Shortly thereafter Tompa made arrangements to have Martin Prem work for him. However, due to his wife's illness, Prem ultimately decided not to work and thus never actually performed any services for Tompa as an employe. The record does not establish that Respondent has ever had an employe.

5. On or about July 10, 1980 Tompa signed a copy of the 1978-1980 contract between Complainant and various millwork employers. In August and September 1980, Tompa made the welfare, vacation and pension payments required by said contract for the months of July and August 1980 for both himself and Martin Prem. In October 1980, after receiving a form letter from Complainant indicating that contributions levels had been revised upward pursuant to the terms of the 1980-1982 millwork industry contract negotiated by Complainant, Tompa made the appropriate welfare, vacation, and pension payments for both himself and Martin Prem for the month of September and for the retroactively covered months of July and August, all at the newly negotiated higher rates. In September 1980 Prem retired. The October payment was the last made by Tompa.

6. Tompa subsequently refused to sign the 1980-1982 millwork contract and disputed Complainant's assertion that he had orally agreed to sign said contract on or about July 10.

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

CONCLUSIONS OF LAW

1. As, at all times material herein, Tompa Woodwork Inc. had no employees within the meaning of Sec. 111.02(3) of the Wisconsin Employment Peace Act (WEPA), Tompa Woodwork, Inc. is not an employer within the meaning of Sec. 111.02(2) of WEPA.

2. As Tompa Woodwork, Inc. is not an employer within the meaning of Sec. 111.02(2) of WEPA, the Commission lacks jurisdiction to determine whether Tompa Woodwork, Inc. committed unfair labor practices within the meaning of Sec. 111.06(1)(a)(d) or (f) of WEPA.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the undersigned makes and issues the following

ORDER

That the instant complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 24th day of July, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Peter G. Davis, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Complainant alleges that Respondent has refused to execute and implement a collective bargaining agreement in violation of Sections 111.06(1)(a)(d) and (f) of WEPA. Respondent denies that it ever agreed to execute the bargaining agreement in question and, in any event, asserts that the Commission lacks jurisdiction over the dispute because Respondent never had any employees and thus is not an "employer" within the meaning of Section 111.02(2) of WEPA. Complainant responds to the jurisdictional question by arguing (1) that Respondent failed to deny "employer" status in its Answer and failed to raise the issue until the last page of its post hearing brief; (2) that the NLRB found Respondent to have one employee; (3) that Respondent hired Prem; and (4) that Prem's not having actually worked does not extinguish the employer-employee relationship evidenced by Respondents having made health, welfare and pension payments on Prem's behalf. A consideration of these arguments follows.

As to Respondent's tardy denial of "employer" status, it must initially be noted that ERB 2.04 1/ does not require that an Answer be filed and does not require that the Commission find an undenied allegation to be true. If there is no obligation to Answer, it can hardly be concluded that a failure to meet this non-existent obligation constitutes an admission. 2/ Furthermore jurisdictional issues maybe raised at anytime. 3/ Thus Complainants argument in this area is found to be unpersuasive.

As to the Complainant's contention regarding the NLRB's one man unit determination, the letter from Joseph A. Szabo, Acting Regional Director, Region 30, to Mr. Alan Levy, legal counsel for Complainant, which dismissed Complaint's charge against Respondent stated the following:

"As a result of the investigation, it appears that the Employer herein does not meet the jurisdictional standards of the National Labor Relations Board. Rather, it appears that during its first 6 months of operation, between June and December 1980, the Employer made no purchases from or sales to businesses outside the State of Wisconsin, and during the same period of time, the Employer's purchases from, or sales to firms within the State of Wisconsin which may have directly made purchases from, or sales to, firms

1/ ERB 2.04 Answer. The person or persons complained of may file an answer not later than 8 days after the mailing by the commission of a complaint addressed to their last known post-office address. The answer shall contain a clear and concise statement of the facts which constitute a defense. The answer shall specifically admit, deny, or explain each of the allegations in the complaint unless the person complained of shall be without knowledge, in which case he shall so state, such statement operating as a denial. Any allegation in the complaint not specifically denied in the answer, unless it is stated in the answer that the respondent is without knowledge, shall be deemed to be admitted to be true, and may be so found by the commission.

2/ Flambeau Plastics Corp. (7987) 4/67.

3/ Lucas Livestock & Implement Co., 3 Wis. 2d 464, Snap-On Tools Corp. (5762) 6/61.

outside the State of Wisconsin were less than \$20,000. The Employer's non-retail sales during the same period were approximately \$15,000.

It further appears that since commencing its business, the Employer has never employed more than one nonsupervisory employee; nor is the Employer a member of any collective-bargaining association.

Accordingly, I find that the Employer does not do sufficient business in interstate commerce to meet the Board's jurisdictional standards. I further find, in accordance with the Board's policy on one employee units, that it would not effectuate the purposes and policies of the Act to issue a complaint alleging a refusal to bargain in this matter. I am, therefore, dismissing the charge filed herein."

Assuming arguendo that his letter represents some finding that Respondent had one employe, the Examiner is nonetheless obligated to make a jurisdictional finding based upon the record which the parties established during proceedings under WEPA. As it is that record which controls, any NLRB finding is not determinative.

Turning to Complainant's arguments which focus upon the status of Martin Prem, the record demonstrates that Prem was hired by Respondent. However, the record also contains Joseph Tompa's unrebutted testimony that Prem never actually performed services for Respondent. The record is also devoid of evidence that Respondent has ever had any other employe. While Respondent's payment of health and welfare contributions for Prem certainly raises an inference that Prem was indeed employed, said inference is insufficient to overcome the weight of Tompa's testimony. Indeed it would appear probable that Prem's contributions were made to insure that Tompa himself could continue his eligibility for health and welfare benefits. Section 111.02(2) of WEPA defines an "employer" as "a person who engages the services of an employe. . ." Section 111.02 (3) of WEPA defines an "employe" as "any person, other than an independent contractor, working for another for hire . . ." As the instant record does not establish the existence of any "employes", it must be concluded that Respondent is not an "employer" under WEPA and thus that the Examiner lacks jurisdiction to resolve the merits of the instant dispute. The complaint has therefore been dismissed on that basis.

Dated at Madison, Wisconsin this 24th day of July, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 

Peter G. Davis, Examiner