STATE OF WISCONSIN CIRCUIT COURT BRANCH 19 MILWAUKEE COUNTY

TOMPA WOODWORK, INC.,

Petitioner,

vs. Case No. 583-310

WISCONSIN EMPLOYMENT RELATIONS COMMISSION Decision No. 18498-B

MEMORANDUM DECISION

This case originated with a complaint filed on February 26, 1981, with the Wisconsin Employment Relations Commission. The complaint was filed by the Carpenters District Council of Milwaukee County and Vicinity and alleged that Tompa Woodworking, Inc., had committed certain unfair labor practices within the meaning of the Wisconsin Employment Peace Act. Examiner Peter G. Davis was appointed to hear the case. A hearing was held on April 16, 1981, briefs were filed by June 12, 1981, and the Examiner issued his Findings of Fact, Conclusions of Law, and Order on July 24, 1981. On August 11, 1981, the Union filed a Petition for Review with the Commission. The Commission issued its decision on April 19, 1982, revising the Examiner's decision. Tompa Woodwork, Inc., petitioned this court for review on May 13, 1982. It is the decision of this court to affirm the Findings, Conclusions, and Order of the Commission.

FACTS

Joseph Tompa was employed by Prem Woodwork, a millwork company whose employees were represented by the Union. In June, 1980, Martin Prem, the owner of Prem Woodwork, decided to go out of business. Tompa thereupon decided to form his own millwork company. Pursuant to this end he organized a corporation and leased the premises of Prem Woodwork from Martin Prem. Tompa, out of a desire to maintain the welfare, vacation, and pension benefits he had enjoyed as a Union employe, confered with John Scioli, the Union's business representative. Scioli advised him that in order to maintain such benefits Tompa Woodwork would have to employ at least one person (other than Tompa) and sign a collective bargaining agreement. Tompa then hired Martin Prem and signed a copy of the 1978-1980 collective bargaining agreement. Tompa Woodwork made contributions to the Union fund for welfare, vacation, and pension benefits on behalf of Tompa and Prem for the months of July, August, and September, 1980. Subsequently, Tompa Woodwork claimed that Prem had never been an employe, that the company had not given its approval to the 1980-1982 collective bargaining agreement, and that as a consequence the Union and the Commission had no authority over Tompa Woodwork. Litigation followed.

ISSUES

Three issues are raised on this appeal:

(1) Does sec. 111.07(5), Stats., render void a Commission

decision that is issued more than 45 days after the filing of a petition to review the decision of an examiner? (Court's answer: No.)

(2) Did Tompa Woodwork employ an employe within the meaning of sec. 111.02(3), Stats., such that Tompa may be properly classified as an employer within the meaning of sec. 111.02(2), Stats.? (Court's answer: Yes.)

(3) Is there substantial evidence in the record to support the Commission's finding that Tompa agreed to sign the 1980-1982 collective bargaining agreement? (Court's answer: Yes.)

DELAY IN THE COMMISSION'S DECISION

The petitioner argues that the Commission's decision is void because it was not issued within 45 days of the filing of the petition for review. The relevant statute, sec. 111.07(5), Stats., provides:

> The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. . . . Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony.

In the present case the Commission did not issue its decision until over eight months after the filing of the petition. This court finds the Commission's decision not void, however, because

the relevant statutory limit is directory and not mandatory.

The controlling case is Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 32 Wis2d 478 (1967). In that case a statute stated that the Wisconsin Employment Relations Board "shall" make and file its decision "within 60 days after hearing all testimony and arguments of the parties." The Wisconsin Supreme Court, after quoting numerous precedents, ruled that such a statute may be directory depending on legislative intent. The court stated that,

> . . . A statute prescribing the time within which public officers are required to perform an official act is merely directory, unless it denies the exercise of power after such time, or the nature of the act, or the statutory language, shows that the time was intended to be a limitation.

This court believes that the statute in question is directory. This is a question of law and this court is not bound by the Commission's decision on this issue. The court is convinced that the Commission reached a correct conclusion in interpreting this statute, however, by the wording of the statute itself, the lack of any clause specifically penalizing the Commission or rendering its decisions void in cases of delay, and previous Supreme Court decisions. See also sec. 757.025, Stats. For these reasons the court affirms the Commission's interpretation of this statute.

STATUS OF THE EMPLOYE

The petitioner argues that it is not an employer because it never retained an employe within the meaning of the statutes. Apparently, Martin Prem was hired on July 1, 1980, but two days

later was granted an extended leave because of his wife's illness. According to the Commission, Prem was paid during this leave, Tompa Woodwork paid Prem's vacation, welfare, and pension premiums to the Union fund, but Prem did no actual work for the company. This court believes that there is substantial evidence in the record to support these findings of fact by the Commission. The only question before the court is whether these facts are within the definition of employe under the law.

Section 111.02(3), Stats., defines employe as follows:

> The term "employe" shall include any person, other than an independent contractor, working for another for hire in the state of Wisconsin in a nonexecutive or nonsupervisory capacity . . .

According to the petitioner, this definition requires that work actually be performed by the employe. The findings of the hearing examiner agreed with the petitioner on this point; the Commission reversed. This court agrees with the Commission's interpretation of the statute.

There are few Wisconsin precedents on this issue. The petitioner refers to certain foreign authorities defining the employer-employee relationship. These authorities, however, are concerned with general concepts of agency and not with the meaning of employee under the context of labor relations statutes. The Commission points out that "employe" has been liberally defined under the relevant Wisconsin statutes but has no precedent on the specific issue of whether the actual performance of work is required to satisfy that definition.

This court believes that a sufficient number of the employer-employe elements are present here to conclude that Martin Prem was an employe of the petitioner. Tompa informed the Union that Prem was an employe, he paid the Union premiums as if he were an employe, and he paid Prem wages during his extended leave. When a company carries a man on its payroll in this way it cannot claim he is not an employe simply because it chose not to use his services. An employe is still an employe for purposes of the labor relations statutes even when he is on vacation.

The employment relationship between Tompa Woodwork and Martin Prem may have been contrived solely for the mutual benefit of the parties in obtaining Union benefits. Tompa cannot have it both ways, however. If Tompa is a Union employer for purposes of Union benefits it is also a Union employer for other aspects of the labor relations statutes.

This court concludes that under the circumstances of the case the Commission was correct in deciding that Martin Prem was an employe of the Petitioner.

COLLECTIVE BARGAINING AGREEMENT

The Wisconsin Employment Relations Commission maintains that the petitioner gave its consent to the 1980-82 collective bargaining agreement and is therefore bound by its terms. This is primarily a question of fact. According to John Scioli, the Union's business representative, Joseph Tompa conferred with him some time after

July 10, 1980 and agreed to sign the 1980-82 collective bargaining agreement. Because that agreement had not yet been printed, Tompa signed a copy of the 1978-80 agreement and at that time received a copy of a letter dated July 10 which explained the changes between the old and new agreements. According to Scioli the 1978-80 agreement which Tompa signed was ante-dated July 1 in order to assure that Tompa's Union benefits would not be disrupted. When the 1980-82 agreement was sent to Tompa several months later he said he did not want to continue as a Union employer and refused to sign. Tompa testified that the conference with Scioli took place on July 1, 1980, that he signed the 1978-80 agreement but did not receive the July 10 letter until August and never consented to sign the 1980-82 agreement.

The Commission apparantly chose to believe the testimony of Scioli rather than that of Tompa, for the Commission's Findings of Fact are in accordance with Scioli's testimony. Neither man's testimony is inherently incredible. According to sec. 227.20(6),

> . . . the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

After examining the record in this case it is clear that substantial credible evidence exists to support either side on this issue. This court cannot substitute its judgment for the Commission's

in giving greater weight to the testimony of Scioli. Consequently, this court refuses to set aside the Commission's finding that Tompa agreed to sign the 1980-82 collective bargaining agreement.

Granted that Tompa consented to sign the agreement, neither side disputes that he was then obliged to sign that agreement when a copy became available. To refuse to sign a collective bargaining agreement previously agreed upon is a prohibited labor practice. See H.J. Heinz Co. v. NLRB, 311 U.S. 514 (1941); sec. 111.70(1)(d) and 3(a)4, Stats.

THEREFORE, it is the decision of this court to affirm the Findings of Fact, Conclusions of Law, and Order of the Wisconsin Employment Relations Commission dated April 19, 1982.

Dated at Milwaukee, Wisconsin this 12th day of August, 1983.

BY THE COURT

John E. McCormick
Circuit Court Judge