

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Case I
No. 31843 Ce-1982
Decision No. 20882-B

Case II
No. 31844 Ce-1983
Decision No. 20880-B

Appearances:

Mr. Mark A. Silverman, Attorney at Law, on behalf of Complainants.

Mr. Robert W. Mulcahy, Mulcahy & Wherry, S.C., Attorneys at Law, on behalf of Respondent - Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-named Complainants having filed with the Commission complaints alleging that the above-named Respondent has violated one or more provisions of Ch. 111, Wis. Stats., and on July 7, 1983, subsequent to the filing of said complaint, the Respondent by its Counsel, having filed a Motion with the Commission, together with attending documents issued by Region 30, National Labor Relations Board, wherein Respondent requested the Commission to dismiss the instant complaints on the basis that the NLRB asserted its jurisdiction in the matter and issued a settlement agreement, disposing of similar allegations of claimed violative conduct on the part of Respondent, in a proceeding previously initiated by Complainants before the NLRB; and on July 13, 1983, a representative of the Commission having mailed copies of said Motion, together with the attending NLRB settlement agreement, to Mr. Mark A. Silverman, Counsel for Complainants; and on July 29, 1983, the Commission having issued its Order authorizing Robert M. McCormick, an examiner on the Commission's staff to conduct hearing and to make and issue Findings of Fact, Conclusions of Law and Order in the matters, as provided in Section 111.07, Wis. Stats.; and Counsel for Complainants having, on July 19, 1983, filed a written objection to Respondent's Motion for Dismissal, wherein Complainant avers that the Commission may assert concurrent jurisdiction in the matter, contrary to Respondent's submission of July 7, 1983; and the parties having advised the Examiner that briefs should be submitted on the question of whether the Commission may assert jurisdiction over the allegations set forth in the instant complaints and the Examiner having directed that the parties submit briefs in the matters to be confined to the question of whether the Commission's jurisdiction is ousted by the National Labor Relations Board's disposition of similar complained of matters as those contained in the instant complaints; and the Examiner being satisfied that the briefing procedure together with letter motions and submissions from the parties over the period June 28, 1983, through September 9, 1983, in lieu of a Chapter 227-type hearing otherwise

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controlled by Section 111.07, Stats., is in accordance with the Commission's authority to determine whether in fact there exists a contested case, and whether there exists a Complainant's interest to be protected under the Wisconsin Employment Peace Act, as provided in Section 227.064, Wis. Stats., and the parties having submitted timely briefs in the matter by September 9, 1983, and the Examiner having considered the parties' pleadings and submissions on jurisdiction and the arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Patrick M. Gonyo, hereinafter P. Gonyo or Complainant, was an individual employee of Trucker's & Traveler's Restaurant of Richfield, Wisconsin, and who resides at 2668 Highway J, Slinger, Wisconsin.

2. That Jeffery M. Gonyo, hereinafter J. Gonyo or Complainant, was an individual employee of Trucker's & Traveler's Restaurant, and who resides at 2668 Highway J, Slinger, Wisconsin.

3. That Trucker's & Traveler's Restaurant, hereinafter Respondent is a corporation, operating a truckstop-type restaurant located at 2900 Highway 167, Richfield, Wisconsin; and that Respondent is engaged in a business affecting commerce within the meaning of the National Labor Relations Act, as amended, and is covered by the jurisdictional standards of the National Labor Relations Board (NLRB) pursuant to Section 14(c)(1) of that act.

4. That on June 28, 1983, 1/ Complainants Jeffery Gonyo and Patrick Gonyo filed complaints of unfair labor practices alleging that Respondent had made a discriminatory discharge of Patrick Gonyo on February 4; that Respondent had threatened to discharge Jeffery Gonyo on January 28, for said Complainant's lawful concerted activity, and, in addition, on February 4, Respondent had discharged J. Gonyo for his protests, in concert, over wages, hours and working conditions of Respondent's employees.

5. That on July 1, the Commission's Staff Director, Mr. Tom Yaeger, mailed copies of said complaints of unfair labor practices to the Respondent; that on July 7, Counsel for Respondent filed with the Commission a letter-answer to said complaints, together with an eight part submission which includes, inter alia, four documents prepared by Region 30 of the National Labor Relations Board which are material herein; that on July 13, the Commission's Coordinator of Complaints mailed a letter to Counsel for Complainants enclosing therein copies of Respondent's letter-answer together with said submissions material herein, which documents reflect, inter alia, that Complainants, on or near April 4, filed charges with Region 30 - NLRB, challenging the discharges made by Respondent as discriminatory discharges violative of the National Labor Relations Act.

6. That the aforementioned letter-answer with submissions filed by Respondent on July 7, included therein a letter dated May 25 and signed by the Regional Director of Region 30 - NLRB and addressed to J. Gonyo, which reflects therein that the NLRB asserted jurisdiction over the charges filed by J. Gonyo protesting his own discharge and further advised J. Gonyo that said charges remained outstanding; and that the Regional Director further advised Complainants that it would not issue a complaint with respect to the charges filed by Complainants involving Respondent's discharge of P. Gonyo. 2/

7. That Respondent's answer-submission of July 7 further included therein a two-page letter dated June 21 and signed by said Regional Director and addressed to Counsel for Complainants, wherein the NLRB advised Counsel for Complainants that a settlement agreement had been reached with Respondent which contained an

1/ All dates hereinafter, refer to the year 1983, unless otherwise specified.

2/ See Appendix A, attached to Findings of Fact, Conclusions of Law and Order, *infra*, p. 5.

offer of reinstatement and back pay to J. Gonyo; and that said settlement agreement had been approved by Region 30 - NLRB over the objection of Counsel for the "charging party." 3/

8. That Region 30 - NLRB, by its written advise to the Complainants named herein, on May 25, who were the "charging parties" in the NLRB proceeding, Case No. 30-CA-7705, wherein the NLRB declined to issue a complaint involving the charge against Respondent for the claimed violative - discharge of Patrick Gonyo, constitutes the assertion of jurisdiction by the NLRB over matters claimed by Complainants named herein, as being violations of the National Labor Relations Act, (NLRA); and that by at least May 25 the NLRB determined that the Respondent was an employer satisfying the NLRB's jurisdictional standards under the NLRA.

9. That Region 30 - NLRB by its written advice of June 21 wherein it advised Counsel for Complainants named herein that Region 30 - NLRB had approved a settlement agreement with the Respondent remedying the discharge of J. Gonyo, including its approval of certain back pay to J. Gonyo, constitutes the assertion of jurisdiction by the NLRB over matters claimed by Complainants as being violations of the NLRA attributed to the Respondent - Employer, which employer the NLRB has adjudged to be an "employer in commerce".

10. That the aforementioned matters disposed of by Region 30 - NLRB, involving the charges filed by J. Gonyo and processed by the NLRB in Case No. 30-CA-7705, are substantially identical to the allegations set forth in the instant complaints filed herein by Complainants with this Commission, involving the claimed violations of the Wisconsin Employment Peace Act by Respondent.

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

CONCLUSIONS OF LAW

1. That the Respondent Trucker's and Traveler's Restaurant is an employer engaged in interstate commerce within the meaning of the National Labor Relations Act, as amended and within the jurisdictional standards of the National Labor Relations Board, and that the activity which is the basis for the complaints filed herein by Patrick Gonyo and Jeffery Gonyo, is an activity which is protected or prohibited by Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act.

2. That the exercise by Region 30 - NLRB of its jurisdiction over matters relating to the discharges of Complainants Patrick Gonyo and Jeffery Gonyo by Respondent, Trucker's and Traveler's Restaurant, involving activity which is arguably protected or arguably prohibited by the National Labor Relations Act as amended, operates to preempt the Wisconsin Employment Relations Commission from asserting its jurisdiction to regulate the Respondent's conduct, which is the basis for the complaints filed herein by Complainants.

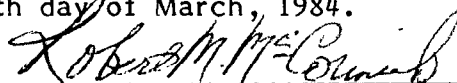
Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER 4/

That the complaints of unfair labor practices filed herein by the above-named Complainants be, and the same hereby are, dismissed.

Dated at Madison, Wisconsin this 19th day of March, 1984.

By



Robert M. McCormick, Examiner

3/ See Appendix B, attached to Findings of Fact, Conclusions of Law and Order, infra, p. 6 and 7.

4/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.
(Continued on Page 5)

4/ (Continued)

Section 111.07(5), Stats.

(5) 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. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. 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. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

APPENDIX A



NATIONAL LABOR RELATIONS BOARD

REGION 30

Henry S. Reuss Federal Plaza, Suite 1240

Telephone (414)

291-3876

310 West Wisconsin Avenue

Milwaukee, Wisconsin 53203

May 25, 1983

Mr. Jeffrey M. Gonyo
2668 Highway J
Slinger, WI 53086

Re: Truckers & Travelers Restaurant
Case No. 30-CA-7705

Dear Mr. Gonyo:

The above-captioned case, charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it does not appear that further proceedings on the charge are warranted with respect to the discharge of Patrick Gonyo, inasmuch as it does not appear that he was discharged because he had made complaints about working conditions or engaged in any other protected concerted or union activities. It appears that his discharge was motivated only because other employees complained that he had harassed them. The allegation regarding your own discharge, however, remains outstanding. I am, therefore, refusing to issue a complaint with respect to Patrick Gonyo's discharge.

Pursuant to the National Labor Relations Board Rules and Regulations, Series 8, as amended, you may obtain a review of this action according to the enclosed instructions.

Very truly yours,

George Squillacote
Regional Director

Enclosures

CERTIFIED MAIL

Return Receipt Requested

cc: Truckers & Travelers Restaurant
Attn: Mr. Jack McLean
2900 Highway 167
Richfield, WI 53076

General Counsel, Office of Appeals
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, DC 20570

/
Mulcahy & Wherry
Attn: Robert W. Mulcahy, Esq.
615 East Mason Street, Suite 1600
Milwaukee, WI 53202

APPENDIX B



NATIONAL LABOR RELATIONS BOARD

REGION 30

Henry S. Reuss Federal Plaza, Suite 1240

310 West Wisconsin Avenue

Milwaukee, Wisconsin 53203

Telephone (414)
291-3876

RECEIVED

JUL 7 1983

June 21, 1983

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

Mark A. Silverman, Esquire
610 North Water Street, Suite 110
Milwaukee, WI 53202

Re: Truckers & Travelers Restaurant
Case No. 30-CA-7705

Dear Mr. Silverman:

The Settlement Agreement and your objections thereto have been considered, and I have concluded that the settlement appropriately remedies the violations found and effectuates the purposes of the National Labor Relations Act. In your letter of June 16, 1983, you raised four objections to my approval of the settlement.

The complaint in this matter issued on May 20, 1983. Respondent's answer was filed on June 2, 1983. Contrary to your assertion, the Answer was timely filed. In any event, this office will not institute summary judgment proceedings when a party enters into a settlement.

It does appear that the Charging Party was, by letter dated May 20, 1983, offered reinstatement to his former job to begin on May 27, 1983 and the Charging Party did not report for such reinstatement. His 13 reinstatement conditions, as set forth in your May 24, 1983 letter do, in my determination, constitute a rejection of the May 20th reinstatement offer.

The rulings of the State Courts do not establish precedent in the decisions of the National Labor Relations Board and thus your contention that a conditional reinstatement within 7 days is an unreasonably short interval to accept such offer, is rejected.

Lastly, it appears that Jeffrey Gonyo's backpay was properly computed on the basis of 16 hours weekly. Since September 1982, he had worked 16 hours weekly, from 2 to 10 p.m. on Saturdays and from 6 a.m. to 2 p.m. on Sundays. The settlement agreement provides, on that basis, full backpay.

As a result of the investigation, and in view of the undertaking contained in the attached settlement agreement, it does not appear that it would effectuate the purposes of the National Labor Relations Act to institute further proceedings in this matter. Accordingly, I am, therefore refusing to reissue a complaint in this matter.

APPENDIX B (Continued)

Mark A. Silverman, Esquire
30-CA-7705

-2-

June 21, 1983

Pursuant to the National Labor Relations Board Rules and Regulations, Series 8, as amended, you may obtain a review of this action according to the enclosed instructions.

Very truly yours,



George Squillacote
Regional Director

Enclosures

CERTIFIED MAIL

Return Receipt Requested

cc: Truckers & Travelers Restaurant
Attn: Jack A. McLean, President
2900 Highway 167
Richfield, WI 53076

Mulcahy & Wherry
Attn: Robert W. Mulcahy, Esquire
815 East Mason Street, Suite 1600
Milwaukee, WI 53202

Mr. Jeffrey M. Conyo
2668 Highway J
Slinger, WI 53086

General Counsel (Office of Appeals)
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, DC 20570

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER

PLEADINGS, SUBMISSIONS AND BRIEFING PROCEDURE:

The Complainants filed complaints of unfair labor practices setting forth allegations that Respondent by threats to discharge J. Gonyo and the actual discharges of both P. Gonyo and J. Gonyo violated Sections 111.06(1)(a) and (1)(c) of the Wisconsin Employment Peace Act (WEPA). Complainants attached letter-submissions to both complaints, which contained descriptions over the merits of the discharges, as well as matters relating to claimed sex discrimination charges involving P. Gonyo's discharge, which matters are not material to the jurisdiction issue joined herein. In addition, the Department of Industry, Labor and Human Relations, not the Wisconsin Employment Relations Commission, is the only State agency which disposes of sex discrimination complaints. Commission agents mailed to both Counsel for the parties the respective complaints and submissions and letter-answers with submissions by July 13.

This Examiner was appointed by the Commission on July 29 to make and issue Findings of Fact, Conclusions of Law and Order in the matters pursuant to Section 111.07 of WEPA. On said date, the Examiner's Order Setting Briefing Schedule In Lieu Of Hearing was mailed to the parties.

The Examiner is satisfied as indicated in my interim order of July 29 that no Chapter 227-type hearing is necessary under Section 111.07, Wis. Stats., and further satisfied that the briefing procedure with pleadings and submissions attached to the complaints and answer, in lieu of hearing, is in accordance with the Commission's authority to determine whether there exists a Complainant's interest to be protected under WEPA, and whether in fact there exists a contested case as provided in Section 227.064, Wis. Stats.

The Examiner on July 29 directed Complainants' Counsel to file a written brief with the Commission within thirty (30) days of the July 29 Order, limiting argument to the question of possible WERC jurisdiction to hear and decide the matters raised in the instant complaints. Respondent was directed to mail its reply brief within seven (7) days of the filing date of Complainants' brief. The Examiner and Respondent received Complainants' brief on August 29. On September 1, the Examiner granted Respondent's Counsel's telephonic request for an extension to September 8, as the mailing date for the reply brief. On September 2, the Examiner telephonically advised the Complainants' Counsel of said extension, by leaving such a message with his office secretary.

After timely receipt of Respondent's brief, Complainant objected to the Examiner's receiving and considering Respondent's reply brief as being late under the Examiner's Order. The Examiner has rejected Complainant's objection and concludes that both parties' briefs and pleadings with submissions should be considered in deciding the jurisdiction question joined herein.

POSITIONS OF THE PARTIES:

The Complainants argue that P. Gonyo's rights against harassment by another employe are protected by Section 111.06(2)(a) of WEPA, so that where another employe wrongfully induces Respondent's agents to discharge P. Gonyo based upon malicious charges of a fellow employe, the Respondent's activity in making the discharge of P. Gonyo was not prohibited by Sections 7 or 8 of the National Labor Relations Act. Therefore, Complainant urges that since P. Gonyo's actions were not protected by federal labor law, and his rights against harassment by other employes are protected by WEPA, that there is no preemption of federal labor law at stake.

The Complainants urge that when the NLRB refused to issue a complaint with respect to P. Gonyo's discharge, this indicates that P. Gonyo's claim or "charge" did not come within the federal labor act.

Complainant, in its brief, conceded that this Commission did not have jurisdiction over J. Gonyo's complaint of unfair labor practice. However, in written correspondence dated October 14, Counsel for Complainants advised the Examiner that there was . . . "indeed a need for further proceedings before your agency." In view of the ambiguity of said advice, which reference a so-called "review proceeding" involving J. Gonyo's settlement agreement previously approved by Region 30 - NLRB, the Examiner will dispose of both complaints filed herein.

Respondent argues that J. Gonyo filed the NLRB charge on behalf of both Gonyo brothers, and the NLRB by declining to issue a complaint on P. Gonyo's charges because it was without merit, does not constitute the NLRB's having declined jurisdiction. From its answer and brief, Respondent urges that the NLRB has asserted jurisdiction over the Gonyos' charges filed with the NLRB, by finding no merit in P. Gonyo's claim and in effectuating a settlement agreement of the J. Gonyo discharge.

Respondent requests that the instant complaints be dismissed on the basis that jurisdiction over the matter raised in said complaints is vested exclusively with the NLRB.

DISCUSSION:

The submissions and briefs filed herein reveal that the NLRB, on May 25, advised the parties that it would not issue a complaint involving P. Gonyo's discharge. Thereafter, at least by June 21, the NLRB advised Counsel for Complainants that it was approving the settlement agreement with Respondent, over Complainants' objection, to remedy the discharge of J. Gonyo.

The proceedings initiated by J. Gonyo with the NLRB are substantially similar to the matters set forth in the instant complaints, namely, allegations complained of in this forum of alleged "interference" and the making of "discriminatory discharges," all violative of Section 111.06 of WEPA.

The United States Supreme Court, in 1959, spelled out the axiom in potential "preemption cases" which governs the State vs. Federal relationship in regulating the activity of employers in interstate commerce. In San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 (1959), the Court stated:

"When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by subsection 7 of the National Labor Relations Act, or constitute an unfair labor practice under subsection 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law."

The submission filed herein with the pleadings, Appendix A and Appendix B, supra, clearly indicate that Region 30 - NLRB investigated the charges and effectuated a settlement agreement of J. Gonyo's charge. Complainants urge a novel axiom that the NLRB's declination to issue a complaint in the P. Gonyo matter is tantamount to its declining jurisdiction over the P. Gonyo discharge.

The Examiner rejects said contention and concludes that the NLRB treated Respondent as an employer "in commerce" within its jurisdictional standards. The NLRB by overtly refusing to issue a complaint on the P. Gonyo charge, and by entering into a settlement agreement to remedy the J. Gonyo discharge, has effectively adjudged that the matters involving Respondent's conduct, in dealing

with the Complainants, is protected by Section 7 or prohibited by Section 8 of the NLRA. State intrusion in such matters, involving similar conduct claimed violative of WEPA, is at an end once the NLRB acts on such charges. 5/

The Examiner has therefore, dismissed the complaints filed herein on the basis that this Commission is preempted from asserting its jurisdiction over the matters by force of the NLRA.

Dated at Madison, Wisconsin this 19th day of March, 1984.

By Robert M. McCormick
Robert M. McCormick, Examiner

5/ Strauss Printing Company, Inc. 20115-B, (1/83).