STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| ROBERT W. NELSON,<br><br>Complainant,<br><br>vs.<br><br>PEMBER EXCAVATING, INC.,<br><br>Respondent. | Case 1<br>No. 44508 Ce-2109<br>Decision No. 26672-A |

Appearances:
Mr. Robert W. Nelson, 1231 Tainter Street, Menomonie, WI 54751, appearing pro se.
Melli, Walker, Pease and Ruly, S.C., Attorneys at Law, 119 Martin Luther King,

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Coleen A. Burns having on November 5, 1990, issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein she dismissed a complaint filed by Robert W. Nelson based upon her conclusion that the Commission was preempted from asserting its jurisdiction over the alleged conduct of Pember Excavating, Inc., which gave rise to Nelson's unfair labor practice complaint; and Complainant Nelson having on November 19, 1990, filed a petition for review with the Commission pursuant to Sec. 111.07(5), Stats.; and the parties thereafter having been given the opportunity to file written argument in support of and in opposition to the petition; and Complainant Nelson having elected not to file any such written argument while Respondent Pember Excavating, Inc. filed written argument on December 21, 1990; and the Commission having considered the matter and being fully advised in the premises makes and issues the following

ORDER 1/

The Examiner's Findings of Fact, Conclusions of Law and Order are hereby affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 13th day of February, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairman

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

(See footnote 1/ on page 2)

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any

contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

PEMBER EXCAVATING, INC.

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Examiner's Decision

The Memorandum accompanying the Examiner's decision states in pertinent part:

PLEADINGS AND SUBMISSIONS

> On September 5, 1990, the Complainant filed a complaint alleging that Respondent has engaged in unfair labor practices contrary to the provisions of Chapter 111 of the Wisconsin Statutes by accusing the Complainant of theft and criminal damage during the month of July, 1990 and by suspending the Complainant on August 3, 1990 for two weeks without pay. An affidavit of July 9, 1990, which Complainant had submitted to the National Labor Relations Board in their Case No. 18-CA-11369, was attached to the complaint and referenced therein. Complainant seeks to recover the two weeks pay and indicates a desire to pursue charges of harassment, slander and defamation of character. 2/

2/The Complaint refers to "difintion of character". The

On September 28, 1990, Respondent filed an Answer to the Complaint, Notice of Motion & Motion for Dismissal or Summary Judgment, Affidavit of Larry Pember, Affidavit of James K. Pease, Jr., Memorandum Supporting Motion for Dismissal or Summary Judgmemt, and Notice of Motion & Motion for Postponement or Adjournment of Hearing Pending Decision on Motion. By letter dated October 5, 1990, the Examiner advised Complainant that if he wished to file a response to the motions filed by Respondent, such response was due by Friday, October 12, 1990. Complainant's response was filed on October 10, 1990. On October 17, 1990, the Examiner granted Respondent's Motion to Postpone Hearing pending the Examiner's decision on Respondent's Motion for Dismissal or Summary Judgment.

DISCUSSION

Respondent's Motion to Dismiss is premised upon the argument that federal preemption precludes the Commission from asserting jurisdiction to determine whether the Respondent has committed any unfair labor practice whithin the meaning of the Wisconsin Employment Peace Act. While Complainant, acting pro se, has filed a response to Respondent's Motion to Dismiss, he has not addressed the jurisdictional issue of federal preemption.

The Examiner is satisfied that no Chapter 227-type hearing is necessary under Sec. 111.07, Wis. Stats., and that it is within the authority of the Commission to determine, on the basis of the pleadings and submissions, the question of whether the Commission has jurisdiction to hear and decide the merits of the complaint

In San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 (1959), the U.S. Supreme Court designed a general rule of preemption by stating:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by Sec. 7 of the National Labor Relations Act, or constitute an unfair labor practice under Sec. 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 Court went on to state:

> When an activity is arguably subject to Sec. 7 or Sec. 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted. 3/

The Court has recognized exceptions to the Garmon preemption rule when the state regulation or cause of action involves behavior that is of only peripheral concern to the federal law or touches interests deeply rooted in local feeling and responsibility. 4/ The Court has held that state jurisdiction to enforce its laws prohibiting violence 5/, defamation 6/, the

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Examiner has assumed that the Complainant is referring to "defamation of character".

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3/Id. at 245.

4/Farmer v. Carpenters, 430 U.S. 290 (1977)

5/Youngdahl v. Rainfair, 355 U.S. 131 (1957) and United Construction Workers v. Laburnum, 347 U.S. 656

intentional infliction of emotional distress 7/, or obstruction of access to property 8/ is not preempted by the NLRA.

In Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 83 LC 10,582 (1978), the Court recognized that, in determining the applicability of federal preemption, the critical inquiry is not whether the State is enforcing a law relating specifically to labor relations or one of general application to labor relations, but whether the controversy presented to the state court is identical to that or different from that which could have been, but was not, presented to the NLRB and that it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the NLRB which the arguably prohibited branch of the Garmon doctrine was designed to avoid. 9/ The Court further stated that "Where applicable, the Garmon doctrine completely pre-empts state court jurisdiction unless the Board determines that the disputed conduct is neither protected nor prohibited by the Federal Act." 10/

In previous Commission cases, the Commission has recognized that the preemption doctrine set forth in Garmon is effective to preempt jurisdiction in cases where the National Labor Relations Board has asserted jurisdiction over matters involving substantially identical allegations. 11/ However, the Commission has not expressly stated, and the Examiner does not conclude, that assertion of jurisdiction by the National Labor Relations Board is a necessary precondition to preemption. Rather, the Examiner is persuaded that where the employer is subject to the jurisdiction of the National Labor Relations Board and the unfair labor practice allegations contained in the complaint involve conduct that is actually prohibited or protected by the National Labor Relations Act, the Garmon doctrine precludes the Commission from asserting jurisdiction over such allegations unless and until the National Labor Relations Board declines to assert its jurisdiction in the matter.

A review of the complaint and attached affidavit, as well as Complainant's written response to the Motions filed by Respondent, reveals that Complainant is alleging that Respondent's President, Larry Pember, retaliated against the Complainant for engaging in union activity involving, inter alia, the signing of a union authorization card, when during the month of July, 1989, Pember repeatedly accused the Complainant of theft and criminal damages and, on August 3, 1990, suspended the Complainant for two weeks without pay.

The pleadings and submissions filed herein establish that the Respondent is an employer engaged in interstate commerce within the meaning of the National Labor Relations Act, as amended, and meets the jurisdictional standards of the National Labor Relations Board. Indeed, it is evident that the NLRB asserted jurisdiction over the Respondent when it investigated the matters raised in its Case No. 18-CA-

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(1954).

6/Linn v. Plant Guard Workers, 383 U.S. 53. (1966).

7/Farmer v. Carpenters Union, 430 U.S. 290 (1977).

8/United Automobile Workers v. Russell, 350 U.S. 634 (1958).

9/LC at 18,258.

10/Id. at Footnote 29.

11/Trucker's & Traveler's Restaurant, Dec. No. 20880-B, 20882-B (McCormick, 3/84) and Strauss Printing Company, Inc., Dec. No. 20115-A (Schoenfeld, 12/82).

11369 and issued a proposed settlement agreement concerning allegations that it had deemed to be meritorious. 11/ Complainants claim that Respondent committed unfair labor practices in violation of Chapter 111 of the Wisconsin Statutes by retaliating against the Complainant for engaging in union activity involves conduct which is protected by Section 7 or prohibited by Section 8 of the National Labor Relations Act. Since it has not been shown that the National Labor Relations Board has declined to assert jurisdiction over the allegations of unfair labor practices contained in the complaint, the Examiner has dismissed the complaint of unfair labor practices filed herein on the basis that this Commission is preempted from asserting its jurisdiction over the allegations.

While it is not entirely clear, it appears that the Complainant is requesting the Commission to determine whether the Respondent has commited acts of harassment, slander and/or defamation of character. It is the judiciary, and not the Commission, which has jurisdiction over such claims. To the extent that Complainant is claiming that the alleged acts of harassment, slander and defamation of character are in retaliation for engaging in union activity, the Commission's jurisdiction to determine whether such conduct is an unfair labor practice in violation of Chapter 111 of the Wisconsin Statutes is preempted by the National Labor Relations Board.

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11/Complainant alleges that Respondent committed an unfair labor practice when it suspended the Complainant for two weeks without pay on August 3, 1990. Inasmuch as this act occurred after the NLRB Field Examiner had issued a proposed settlement agreement on the issues that the NLRB had deemed to be meritorious in NLRB Case No. 18-CA-11369, it is not clear that the NLRB has asserted jurisdiction over all of the allegations contained in the complaint filed with the Commission.

POSITIONS OF THE PARTIES

Complainant Nelson seeks reversal of the Examiner's decision. Respondent Pember Excavating urges affirmance of the Examiner and reiterates its argument that the Commission's jurisdiction is preempted.

DISCUSSION

In Local 248 v. WERB, 11 Wis.2d 277 (1960), cert. denied 365 U.S. 878 (1961), our Supreme Court held that the Commission is preempted from exercising its jurisdiction under the Wisconsin Employment Peace Act where the conduct at issue arguably falls within the scope of the Labor Management Relations Act administered by the National Labor Relations Board. See also Moreland Corp. v. Retail Store Employees Union, 16 Wis.2d 499 (1962); Markham v. American Motors Corp., 22 Wis.2d 680 (1964); Hanna Mining Co. v. District 2, etc., Asso., 23 Wis.2d 433 (1964); and Klotz v. Wathen 31 Wis.2d 19 (1966). Given the Court's holding, we have consistently concluded that we have no jurisdiction over unfair labor practice complaints involving conduct and parties as to which the National Labor Relations Board would exercise its jurisdiction. 12/ We are satisfied from our review of the record that the Examiner correctly concluded that the complaint filed by Nelson alleges that Respondent engaged in conduct arguably prohibited by the Labor Management Relations Act and that Respondent is an employer as to whom the National Labor Relations Board would (and did)

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12/ Local 244, Bakery Workers', Dec. No. 5743 (WERC, 5/61); Nopak, Inc., Dec. No. 5708-B (WERC, 7/61); Local 200, Teamsters, Dec. No. 6375 (WERC, 6/63); Local 444, Meat Cutters, Dec. No. 6791 (WERC, 7/64); Portage Stop N' Shop, Inc., Dec. No. 7037 (WERC, 2/65); Napiwocki Construction, Inc., Dec. No. 11941-B (WERC, 3/76); Trucker's and Traveler's Restaurant, Dec. No. 20882-C (WERC, 10/84).

assert jurisdiction. As Nelson's complaint falls squarely within the holdings noted above, the Examiner correctly dismissed his complaint because we lack jurisdiction to decide same. Therefore, we have affirmed the Examiner.

Dated at Madison, Wisconsin this 13th day of February, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairman

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner