

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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ROBERT W. NELSON,	:	
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Complainant,	:	
	:	Case 1
vs.	:	No. 44508 Ce-2109
	:	Decision No. 26672
PEMBER EXCAVATING, INC.,	:	
	:	
Respondent.	:	
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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, Jr., Boulevard, Suite 600, Madison, WI 53703, by Mr. James K. Pease, Jr., appearing on behalf of the Respondent.

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

Robert W. Nelson, hereinafter referred to as Complainant, having on September 5, 1990 filed an unfair labor practice complaint with the Wisconsin Employment Commission, hereinafter referred to as the Commission, wherein it was alleged that Pember Excavating, Inc., hereinafter referred to as Respondent, had committed unfair labor practices in violation of Chapter 111 of the Wisconsin Statutes; and the Commission having appointed Coleen A. Burns, a member of the Commission's staff, to act as Examiner in the matter and issue Findings of Fact, Conclusions of Law and Order; and the Respondent, by Counsel, having on September 28, 1990 filed a Motion for Dismissal or Summary Judgment; and the Complainant, having on October 10, 1990 filed a reponse to Respondent's motion; and the Examiner being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. Complainant Robert W. Nelson, an individual whose address is 1231 Tainter Street, Menomonie, Wisconsin 54751, is an employe within the meaning of Sec. 111.02(6), Wis. Stats., and is employed by Pember Excavating, Inc.

2. Respondent Pember Excavating, Inc. is an employer within the meaning of Sec. 111.02(7), Wis. Stats., maintaining its principal office at Route 4, Box 100B, Menomonie, Wisconsin 54751, and 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.

3. On September 5, 1990, Complainant filed a complaint with the Wisconsin Employment Relations Commission alleging that

Respondent had committed unfair labor practices contrary to the provisions of Chapter 111 of the Wisconsin Statutes. Attached to the complaint, and referenced therein, is an affidavit of July 9, 1990, which Complainant had provided to National Labor Relations Board Agent Craig D. Akins-Leffler during the course of the Board's investigation of NLRB Case No. 18-CA-11369. In the complaint, Complainant alleges that on June 14, 1990, he signed a union card; that on July 2, 1990, Larry Pember accused the Complainant of theft and criminal damages as stated in the affidavit; that Complainant had informed Larry Pember that he did not commit the alleged theft and criminal damage and did not know who had committed such acts; that every week for three weeks following Pember's accusations, Pember called the Complainant into his office and accused him; and that on August 3, 1990, Pember suspended the Complainant from work for two weeks without pay. In the complaint, Complainant states that he believes that he should receive two weeks pay and pursue charges of harassment, slander, and defamation of character against Larry Pember.

4. On September 28, 1990, Respondent, by its Counsel, filed a Motion for Dismissal or Summary Judgment, with supporting documentation, arguing, inter alia, that federal preemption precludes the Wisconsin Employment Relations Commission from asserting jurisdiction to determine whether Respondent has committed any unfair labor practices. The supporting documentation includes an affidavit of Larry Pember, President of Pember Excavating, Inc., stating that Pember Excavating, Inc. operates an excavation business and that during the previous twelve months, Pember Excavating, Inc. has had gross revenues in excess of \$50,000 from performance of services directly to customers outside the state and has purchased over \$50,000 worth of goods and services directly from businesses outside the state. The affidavit also states that Larry Pember had received a letter dated June 26, 1990, from the National Labor Relations Board (NLRB) which stated that unfair labor practice charges had been filed against Pember Excavating, Inc. Attached to the affidavit, was the letter of June 26, 1990 and a copy of the complaint filed in NLRB Case No. 18-CA-11369 establishing that, on June 26, 1990, International Union of Operating Engineers, Local 139, AFL-CIO, CLC, hereinafter the Union, filed charges with the National Labor Relations Board, alleging that the Respondent had violated Section 8(a)(1) and (3) of the National Labor Relations Act. The charges included the allegation that, on or about June 16 and June 18, 1990, Respondent, by its President Larry Pember and other supervisors, threatened employees with reduction in wages if they engaged in union activity on behalf of the Union; that on or about June 16 and June 18, 1990, Respondent, by its President Larry Pember, threatened employees with reduction in hours and loss of jobs if they chose union representation; that, on or about June 22, 1990, Respondent, by its supervisor Bob Long, announced and implemented changes in employees' working conditions in retaliation for their union activities; and that on or about June 22, 1990, the Respondent, by its President, Larry Pember, threatened an employee with a reduction in wages because he had engaged in union activities. The letter dated June 26, 1990 notified Pember that NLRB Field Examiner Craig D. Akins-Leffler would be investigating the charges which had been filed by the Union. The supporting documentation includes an affidavit from Respondent's counsel, James K. Pease, Jr., stating, inter alia, that his firm had represented Respondent in NLRB Case No. 18-CA-

11369; and that he had received a letter from Field Examiner Akins-Leffler dated July 26, 1990. In this letter of July 26, 1990, attached to Pease's affidavit, Field Examiner Akins-Leffler advised Respondent's Counsel and the Union's counsel that following the investigation of the charges filed by the Union, the NLRB Regional Office determined that the Respondent had violated Section 8(a)(1) of the NLRA and that there was insufficient evidence of any violation of Section 8(a)(3) of the NLRA and that the Field Office was requesting that the Respondent and the Union sign an enclosed proposed settlement agreement, or a substantially similar agreement, and return the same to the Regional Office no later than August 3, 1990. Field Examiner Akins-Leffler also requested the Union to withdraw those allegations of Section 8(a)(1) and (3) conduct where the investigation disclosed insufficient evidence of violations, or amend the charges accordingly. The Field Examiner also advised the Respondent that if the Respondent declined to settle by August 3, 1990, he would recommend that the Field Office issue a formal Complaint and schedule an unfair labor practice trial. The Field Examiner advised the Union that if the Union declined to amend the charges or withdraw the unsubstantiated allegations, the Union would have the right to appeal the dismissal of that portion of the charges to Washington, D.C. In his affidavit, Pease stated that, following his receipt of the July 26, 1990 letter, Pease, acting on behalf of Respondent, signed a settlement agreement on August 9, 1990 to resolve those charges NLRB Case No. 18-CA-11369 which had been deemed to have merit.

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

#### CONCLUSIONS OF LAW

1. The Wisconsin Employment Relations Commission does not have jurisdiction to determine claims of harassment, slander and defamation of character.

2. Respondent Pember Excavating, Inc. 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.

3. Complainant's claim that Respondent committed unfair labor practices in violation of Chapter 111 of the Wisconsin Statutes by retaliating against Complainant for engaging in union activity involves conduct which is protected by Section 7 or prohibited by Section 8 the National Labor Relations Act.

4. It has not been demonstrated that the National Labor Relations Board has declined to assert jurisdiction over the conduct which gives rise to the complaint of unfair labor practices.

5. The Wisconsin Employment Relations Commission is preempted from asserting its jurisdiction to regulate the Respondent conduct which gives rise to the complaint of unfair labor practices.

ORDER 1/

That Complainant's complaint of unfair labor practices be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 6th day of November, 1990.

WISCONSIN EMPLOYMENT RELATIONS  
COMMISSION

By Coleen A. Burns /s/

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

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.

PEMBER EXCAVATING, INC.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

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/

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 Judgment, 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 within 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

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2/ The Complaint refers to "difintion of character". The Examiner has assumed that the Complainant is referring to "defamation of character".

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 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

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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 (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.

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.

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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).

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-11369 and issued a proposed settlement agreement concerning allegations that it had deemed to be meritorious. 12/ 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 committed 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.

Dated at Madison, Wisconsin this 6th day of November, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns /s/

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12/ 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.