STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, LOCAL 599, Complainant,

vs.

CHARLIE BOWMAN, CT CONSTRUCTION, AND/OR ITS ALTER EGO AND/OR ITS SUCCESSOR TC CONSTRUCTION, Respondents.

Case 1
No. 70914
Ce-2256

Decision No. 33602-B

Appearances:

Charles Bowman, 1409 Little Dan River Road, Claudville, Virginia, 24076, appearing on behalf of Charlie Bowman, C-T Construction, and/or its alter ego and/or its successor TC Construction.

Sara Geenen, The Previant Law Firm, S.C., 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin, 53212, appearing on behalf of Operative Plasterers' and Cement Masons' International Association, Local 599.

ORDER ON REVIEW OF EXAMINER'S DECISION

On June 29, 2012, Examiner Stanley H. Michelstetter II issued Findings of Fact, Conclusions of Law and Order in the above captioned matter, concluding that the above-named Respondents had committed certain unfair labor practices within the meaning of the Wisconsin Employment Peace Act. He ordered Respondents to cease and desist from committing unfair labor practices and to take certain affirmative action.

On July 8, 2012, Respondents filed a petition with the Commission asking for review of the Examiner's decision pursuant to Sec. 111.07(5), Stats. No argument was filed in support of or in opposition to the petition, and the record was closed August 3, 2012.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

A. The Examiner's Findings of Fact are set aside and the following Findings of Fact are made:

1. C-T Construction, herein C-T, is an employer headquartered in Virginia, nominally owned and operated by Charles Bowman.

2. TC Construction, herein TC, is an employer headquartered in Virginia, nominally owned and operated by Teressa Bowman, Charles' wife.

3. Charles and Teressa Bowman jointly manage and financially control both C-T and TC, and no other person or entity has any managerial or financial control over either corporation.

4. Operative Plasterers' and Cement Masons' International Association, Local 599, herein Local 599, is a labor organization.

5. On July 22, 2008, Charles Bowman signed a document by which C-T agreed to be bound by the provisions of a June 1, 2008-May 31, 2012 collective bargaining agreement between Local 599 and the Southeastern Wisconsin Drywall and Plastering Contractors Association. The agreement required C-T to pay certain wage rates and fringe benefits to C-T employees performing work covered by the agreement.

6. By letter dated September 29, 2010, Bowman advised Local 599 in pertinent part as follows:

> . . . I no longer wish to be part of Local 599 in the state of Wisconsin. I am withdrawing from Local 599 as of today.
>
> . . .
>
> Should I travel to Wisconsin in the future to work; it will be for a non-union company and for non-union jobs. I've had all I can take.

7. In November and December of 2010 and January 2011, C-T employed Claude Smith to perform work at a site in Milwaukee, Wisconsin, that was covered by the 2008-2012 agreement. On November 17, 2010, at Charles Bowman's request, Smith signed a document which stated:

> I, Claude M. Smith, Jr., by signing this agreement, do hereby declare I am working for C-T Construction for the hourly rate of $26.50 per hour on this non-union job. I am working on this job because there are no union jobs available. At no time will I go to the union seeking benefits as this is a non-union job.

8. C-T did not pay the contractually required fringe benefits and/or contributions for the work referred to in Finding 7, above. When confronted on or about January 17, 2011 on the Milwaukee work site by representatives of Local 599 regarding the non-payment, Charles Bowman called Teressa Bowman, in the presence of a Local 599 representative, and asked her to put C-T in her name so that the 2008-2012 agreement would not apply. He then told the Local 599 representative that the company was now "TC Construction."

9. Respondents created TC for the purpose of avoiding the terms of the collective bargaining agreement with Local 599.

10. On January 18, 2011, Claude Smith resigned from Local 599 at the request of C-T.

11. On January 18, 2011, C-T Construction advised Local 599 that it would be closing January 31, 2011. However, C-T Construction did not close and continued to exist at least until January 23, 2012 so that C-T could bid on any future work covered by the 2008-2012 agreement.

12. On or about February 1, 2011, TC Construction began operations.

13. In February 2011, Claude Smith performed plastering work as a TC Construction employee in Waukesha, Wisconsin. TC did not pay the contractually required wages and/or fringe benefits and/or other contributions for this work.[1]

[1] It is not clear from the record precisely what contractually required payments TC failed to make for the Waukesha work. Our remedy, therefore, contains typical non-specific "make whole" language, intended to remedy any discrepancy between what the Respondents owed and what they actually paid.

B. The Examiner's Conclusions of Law are set aside and the following Conclusions of Law are made:

1. C-T violated the 2008-2012 collective bargaining agreement by failing to make the contractually required fringe benefit payments for the plastering work performed by Smith in Milwaukee, Wisconsin, set forth in Finding 7, above, in violation of Sec. 111.06(1)(f), Stats.

2. TC and C-T are a single employer for purposes of Sec. 111.02(6)(a) and Sec. 111.05, Stats.

3. TC violated the 2008-2012 collective bargaining agreement by failing to make the contractually-required wages and fringe benefit payments for the plastering work performed by Smith in Waukesha, Wisconsin, set forth in Finding 13, above, in violation of Sec. 111.06(1)(f), Stats.

4. By requesting that Smith sign the document quoted in Finding 7, above, and encouraging him to resign from Local 599 as set forth in Finding 10, above, C-T committed unfair labor practices within the meaning of Secs. 111.06(1)(a) and (1)(c)1, Stats.

5. By the conduct set forth in Findings 6, 7, 8, and 9, above, C-T and TC withdrew recognition from Local 599 and repudiated their collective bargaining agreement with Local 599, both in violation of their duty to bargain in good faith with Local 599, which constitutes an unfair labor practice within the meaning of Sec. 111.06(1)(d), Stats.

C. The Examiner's Order is set aside and the following Order is made:

C-T Construction, TC Construction, and their officers and agents, shall immediately take the following action to remedy the unfair labor practices committed:

a. Cease and desist from:

(1) Violating the 2008-2012 collective bargaining agreement with Local 599;

(2) interfering with the rights of employees under Sec. 111.04, Stats.; and

(3) refusing to bargain in good faith with Local 599.

b. Make whole Local 599, Smith, and other bargaining unit employees (if any) for any wages, fringe benefits, and other contributions owed to them under the 2008-2012 collective bargaining agreement as to the plastering work referenced in Conclusions of Law 1 and 3.

c. Within 20 days of the date of this Order, notify the Wisconsin Employment Relations Commission and Local 599 of the action taken to comply with the Order.

Given under our hands and seal at the City of Madison, Wisconsin, this 15th day of January, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/
James R. Scott, Chairman

Judith Neumann /s/
Judith Neumann, Commissioner

Rodney G. Pasch /s/
Rodney G. Pasch, Commissioner

C-T Construction

MEMORANDUM ACCOMPANYING ORDER ON REVIEW OF EXAMINER'S DECISION

The basic issue in this case is whether the 2008-2012 collective bargaining agreement between C-T Construction and Local 599 was violated as to certain plastering work in Milwaukee and Waukesha.[2] As to the Milwaukee work, the Examiner clearly concluded that the agreement was violated. As to the Waukesha work, the Examiner's decision is obscure as to whether the contract was violated, but, read as a whole, seems implicitly to reach that conclusion – largely because the Examiner devoted considerable effort to examining the "double-breasted" or "alter ego" issue, which would only have relevance to the Waukesha County work ostensibly performed by TC rather than C-T. The Examiner also concluded that C-T's conduct, as described in our Findings 6 through 9, above, violated the Respondents' duty to bargain in good faith with Local 599. The Examiner did not consider that portion of Local 599's complaint that alleged a violation of Secs. 111.06(1)(a) and (c), Stats.[3]

We have set aside the Examiner's Findings and Conclusions in order to refine and clarify them, but we essentially affirm his conclusions as to the contractual violations and the refusal to bargain. We also conclude that the Respondents violated Secs. 111.06(1)(a) and (c), Stats. We have set aside the Examiner's Order and replaced it with a narrower and more conventional one.[4]

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[2] The 2008-2012 agreement contained a grievance arbitration provision applicable to alleged violations of the agreement. However, during a pre-hearing telephone conference call, the Examiner advised the parties that, absent objection, he would treat that contractual provision as having been waived and would assert the Commission's jurisdiction under Sec. 111.06(1)(f), Stats., to determine if a 2008-2012 agreement had been violated. Neither party objected.

[3] In its September 9, 2011 complaint, Local 599 alleged violations of Secs. 111.70(3)(a)1,2,3,4 and 5 of the Municipal Employment Relations Act by "Charles Bowman, CT Construction, and/or its alter ego and/or its successor TC Construction." In an October 24, 2011 letter to the parties, Examiner Michelstetter indicated that because the complaint allegations only referenced private employers, "Unless I hear otherwise, I will treat the complaint as having been filed under the similar provisions of the Wis. Employment Peace Act." In the Notice of Hearing, the Examiner identified those "similar provisions" as Secs. 111.06(1)(a),(c), (d) and (f), Stats. Respondent Charles Bowman, C-T Construction and TC Construction did not file a pre-hearing answer to the complaint. At hearing, Local 599 did not dispute the Examiner's identification of the unfair labor practices to be litigated and answered all allegations by asserting that C-T and TC are separate employers.

[4] The Examiner's Order, inter alia, required the Respondents to provide Local 599 with an accounting of all work performed in Wisconsin between September 29, 2010 and May 31, 2012. The January 23, 2012 hearing before the Examiner was the opportunity for Local 599 to establish any violations of the 2008-2012 agreement by the Respondents that had occurred prior to the hearing date. The record created establishes that the Milwaukee and Waukesha projects were the only potential violations that had not been resolved prior to the hearing. Any alleged post-January 23, 2012 violations can be raised and litigated by Local 599 pursuant to the conventional cease and desist Order that we have issued.

The Respondents' petition for review argues that the Examiner was wrong to find a violation as to the Milwaukee plastering work and also takes issue with the Examiner's conclusion that C-T and TC are a single "double breasted" employer and/or *alter egos*.

As to the Milwaukee plastering project, it is undisputed that C-T did not pay the contractual fringe benefits required by the agreement. C-T argues on review that it was not obligated to make those payments because the affected employee (Smith) had resigned from Local 599. The evidence presented during the hearing indicates that the resignation occurred January 18, 2011 and that the project began before that date. Thus, for the Milwaukee project work that occurred prior to January 18, 2011, the resignation could have had no impact. As to work performed after the resignation, Article XXIV, Section 2 of the 2008-2012 agreement states:

> Section 2. The Employer's obligation under this Agreement to make payments and contributions to Fringe Benefit funds for all employees covered by this Agreement applies to all employees regardless of membership or non-membership in the Union and is from the employee's first hour of employment.

Given this contractual language, it is clear that C-T's obligation to pay the contractual fringe benefits continued even after Smith's resignation. Thus we affirm the Examiner's conclusion that C-T violated the 2008-2012 agreement by failing to pay the fringe benefits as to the Milwaukee plastering project. We have modified the Examiner's Order to direct that those payments be made.

As to the Waukesha County work site, where TC, rather than C-T, performed/directed the work, Respondents argue that these are two separate legal entities and that only C-T had entered into an enforceable collective bargaining agreement with Local 599. In the absence of specific precedent under the Peace Act (subchapter I of Chapter 111, Wis. Stats.), which governs private sector labor relations in Wisconsin, the Examiner properly looked for guidance to case law developed under the National Labor Relations Act (NLRA).

Here, as the Examiner noted, both C-T and TC are for all practical purposes owned and operated in a completely interrelated fashion by spouses Charles and Teressa Bowman. Operations for both are conducted exclusively by Charles and the employees he hires and by use of his truck and other equipment. The two entities are essentially a classic "Mom and Pop" operation. Teressa Bowman performed the bookkeeping, payroll and accounting operations out of the couple's home in Virginia. Charles Bowman supervised the performance

of the work here in Wisconsin. While they maintained separate checking accounts for each company, they withdrew from one account or the other depending upon which one had funds in it. Neither company owned properties, equipment or other tangible assets. Literally the only difference was the name.

The Examiner characterized the relationship between C-T and TC as being the "epitome" of an "alter ego" relationship as that term is used in labor relations. We conclude that C-T and TC are a "single employer" for purposes of determining their responsibilities under the collective bargaining agreement. International Operating Engineers Local 150 v. Centor Contractors, 831 F.2d 1309, 1313 fn. 2 (7th Cir. 1987) ("the single employer doctrine in contrast to the successorship and alter ego doctrine, is used to determine whether two presently existing entities are in fact so related that they should be treated as one employer for purposes of collective bargaining.") It follows that the Respondents violated the collective bargaining agreement to the extent they failed to pay the contractually designated wages, fringe benefits and other contributions for work performed at the Waukesha site.

Respondent's clumsy attempt at "double breasting" by renouncing their relationship with Local 599 is, as a matter of law, ineffectual. Once we conclude that C-T and TC are a "single employer" the two entities are treated as one and are liable for each other's financial obligations to employees under the collective bargaining agreement. NLRB v. International Measurement and Control, 978 F.2d 334, 340 (7th Cir. 1992).

As such the attempt to withdraw recognition itself constitutes an unfair labor practice within the meaning of Sec. 111.06(1)(d), Stats.

Lastly, it is necessary to address alleged unfair labor practices that the Examiner's decision left unresolved: those arising under Sec. 111.06(1)(a) and (1)(c)1, Stats. Section 111.06(1)(a), Stats. states in pertinent part that it is an unfair labor practice for an employer "to interfere with, restrain or coerce the employer's employees in the exercise of the rights guaranteed in s. Section 111.04." Section 111.04 in turn provides in pertinent part that "Employees shall have the right of self-organization and the right to form, join or assist labor organizations. . . ." When the Respondents encouraged Smith to act as reflected in Findings of Fact 7 and 10 (resign from Local 599 and try to give up his rights under a collective bargaining agreement), it is clear that the Respondents interfered with Smith's rights under Sec. 111.04, Stats. and thereby violated Sec. 111.06(1)(a), Stats.

As to Section 111.06(1)(c) 1., Stats., it provides in pertinent part that it is an unfair labor practice for an employer "To encourage or discourage membership in any labor organization . . . in regard to hiring, tenure or other terms and conditions of employment. . . ." When the Respondents encouraged Smith to act as reflected in Findings of Fact 7 and 10 (resign from Local 599 and try to give up his rights under a collective bargaining agreement), it is clear that they thereby discouraged membership in Local 599 in plain violation of Sec. 111.06(1)(c)1, Stats.

To remedy these two additional unfair labor practices, we have ordered the Respondents to cease and desist from such conduct.

Dated at Madison, Wisconsin, this 15th day of January, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/
James R. Scott, Chairman

Judith Neumann /s/
Judith Neumann, Commissioner

Rodney G. Pasch /s/
Rodney G. Pasch, Commissioner