STATE OF WISCONSIN : IN CIRCUIT COURT : DANE COUNTY

#83-CV-5814

AMERICAN TRANSIT, INC.,

Plaintiff,

-vs-

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION,

Defendants.

MEMORANDUM DECISION

I

On June 18, 1979, the Department of Industry, Labor and Human Relations (DILHR) levied an unemployment compensation tax on American Transit, Inc. for the period 1975 to 1979. American appealed the levy to DILHR's Appeal Tribunal. The appeal, however, was never heard. Instead, American's levy was set aside because DILHR decided to pursue a different employer for the tax it believed to be due.

DILHR did pursue that other employer, but was only partially successful in recouping the tax. To collect the remainder, DILHR again levied an unemployment compensation tax on American for 1975-1979. This second levy was made on June 24, 1983 and DILHR expressly stated that American had until July 15, 1983 to appeal. On July 2, 1983, DILHR informed American that it would audit American's books for the period 1979 to date. American's president responded with a letter, dated July 11, 1983, which will be described later in the decision. On July 27,1983, DILHR received American's notice of appeal from the second levy. The notice was 12 days late.

After soliciting American's reasons for the late filing, the Appeal Tribunal found that American had not shown probable good cause that the reason for their failure to file a timely appeal was beyond their control. Based on that finding, the Tribunal dismissed the appeal under s. 108.09(6) Stats. American appealed the dismissal to the Labor & Industry Review Commission. The Commission adopted the findings of the Appeal Tribunal and affirmed the dismissal of American's appeal. American responded by seeking judicial review under chs. 102 and 108 Stats.

II

American's main argument is that when DILHR set aside the first levy, the issue of back taxes owed by American was conclusively settled. The second levy, American argues, was void. Thus, American asks this Court to set aside the second levy on the ground that DILHR acted without and in excess of its powers. See s. 102.23(1)(b) Stats.

The administrative decisions being reviewed in this case are short and to the point. The Tribunal set forth the date on which the second levy was made, the last date on which an appeal could be filed and the date on which American's appeal was filed. It then stated that American had failed to show probable good cause that the reason for their failure to file a timely appeal was beyond their control. The Commission adopted the Tribunal's findings with little comment.

American's argument, which appears to have merit, speaks to an issue that was not presented to the Tribunal or to the Commission because of American's late filing. Issues cannot be raised for the first time upon judicial review of an

administrative agency. Omernick v. DNR, 100 Wis. 2d 234, 248, 301 N.W.2d 437 (1980); Charter Mfg. Co. v. Milwaukee River Restoration, 102 Wis. 2d 521, 527-8, 307 N.W.2d 322 (Ct. App. 1981). Rather, a court can review only those issues raised before the agency being reviewed. Omernick Id., Charter Mfg., Id. Thus, the only questions in this case which can be reviewed are those relating to the dismissal of American's appeal for lack of timeliness.

III

American argues that its president's July 11 letter constitutes timely notice of appeal. The Commission, by adopting the Tribunal's finding that DILHR received American's appeal on July 27, implicitly found that the July 11 letter was not a notice of appeal. Under s. 102.23(6) Stats., this Court can set aside the Commission's finding only if it is not supported by substantial evidence. Evidence is substantial if it allows a reasonable fact-finder to reach the same conclusion reached by the Commission. Princess House v. DILHR, 111 Wis. 2d 46, 54, 330 N.W.2d 169 (1983). Thus, the issue presented is whether a reasonable fact-finder could conclude that the July 11 letter was not an appeal.

The letter in question states:

> I received your notice dated 7/2/83 about a payroll audit to be conducted on 7/25/83 covering the period 1/1/79 to date.
>
> American Transit, Inc. has received a notice of the large assessment for prior years and has filed timely notice of appeal. The questions involved in this matter have dragged on for a period of several years now. It is the intention of American Transit, Inc. that we will pursue this matter as far as necessary. Since we are in the midst of possible litigation with your

> department and since your audit notice states in part "Please arrange to have someone who is familiar with these records spend some time with our auditor so the results of the audit can be discussed.", and since such discussion might possibly be prejudicial in the event of future litigation, I feel that it is essential that American Transit, Inc., at least seek the advice of counsel before participating in the audit. I shall request that counsel be present at the audit.

American stresses the sentence, "It is the intention of American Transit, Inc. that we will pursue this matter as far as necessary." It believes that this sentence constitutes notice of appeal. However, the first sentence of that paragraph, which incorrectly states that American had already appealed the first levy, undermines American's argument. The letter cannot logically be the notice of an appeal which the writer believes has already been brought.

The audit which lead to the Commission's decision, and in turn to this review, spanned the period 1975 to 1979. The July 11 letter was sent in response to a proposed audit of the period 1979 to date. The letter's purpose was to advise the auditor that American wanted to have its attorney present at that second audit. Thus, a reasonable fact-finder could conclude that the July 11 letter was not a notice of American's appeal. Accordingly, the Commission's finding to that effect is affirmed.

IV

Finally, American asks that the Commission's dismissal be set aside in the interests of equity. This request cannot be granted. An order issued by the Commission may be set aside only if (1) the Commission acted without or in

excess of its powers; (2) the order was procured by fraud; (3) the findings of fact do not support the order; or (4) the findings of fact are not supported by substantial evidence. Ss. 102.23(1)(b) and 102.23(6) Stats. A reviewing court is not given the power to set aside a Commission order which is correct but which arguably might be inequitable. Thus, the Commission's order must be, and is, affirmed.

Dated: October 17, 1984.

BY THE COURT:

P. Charles Jones, Circuit Judge