

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS BOARD

LOCAL 33, AMERICAN FEDERATION OF STATE,
COUNTY & MUNICIPAL EMPLOYEES, AFL-CIO
and MILWAUKEE DISTRICT COUNCIL 48, AMERICAN
FEDERATION OF STATE, COUNTY & MUNICIPAL
EMPLOYEES, AFL-CIO,

Complainants,

v.

CITY OF MILWAUKEE,

Respondent.

Case XXXIV
No. 10293 MP-22
Decision No. 7950

Appearances:

Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. John S. Williamson, Jr., for the Complainants.
Mr. John J. Fleming, City Attorney, by Mr. Harry G. Slater, Deputy City Attorney, and Mr. John F. Kitzke, Assistant City Attorney, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above entitled matter having come on for hearing before the Wisconsin Employment Relations Board on September 16, 1965 and June 22, 1966 at City Hall, Milwaukee, Wisconsin, and on October 6, 1966 at the Hill Farms State Office Building, Madison, Wisconsin, Chairman Morris Slavney being present; and the Board having considered the evidence, arguments and briefs of Counsel, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law, and Order.

FINDINGS OF FACT

1. That Local 33, American Federation of State, County and Municipal Employees, AFL-CIO and Milwaukee District Council 48, American Federation of State, County and Municipal Employees, AFL-CIO, hereinafter jointly referred to as the Complainants, are affiliated labor organizations, in that Complainant Local 33 is a member of the Complainant Milwaukee District Council 48, and said Complainants have their offices in Milwaukee, Wisconsin.

2. That the City of Milwaukee, hereinafter referred to as the Respondent, is a municipality in the County of Milwaukee, duly incorporated under the laws of the State of Wisconsin.

3. That said Complainants are the duly certified collective bargaining representatives of certain employees of the Respondent, including truck drivers and other employees in various departments of the Respondent, including Forestry, Street Sanitation, and Parks and Public Buildings; that on November 19 through 22 and on November 26, 1963, certain truck drivers, who were members of Complainant Local 33, and who were in the employ of the Respondent, engaged in a concerted refusal to work, and as a concomitant thereof, also engaged in picketing activities at the City Hall and two garages of the Respondent; that on said dates certain employees of the Respondent appeared at the garages; that, however, many of said employees refused to cross picket lines established by the truck drivers, and as a result did not perform their normal duties on said dates; and that also certain other employees reported to the garage facilities in order to be transported by truck to their respective job sites, but because of the strike and picketing activities, were not so transported, and were thus unable to perform their normal duties.

4. That in December, 1963, after the termination of the strike and picketing activities, the Respondent, by its various supervisory personnel, made a determination that certain employees who did not work on the days of the strike and picketing activities had reported for work and were ready, willing and able to work, but did not do so because of the strike and picketing activities; that in said regard, the Respondent paid said employees the amount of wages that they would have earned, except for such activities, and that in consideration of such payment, said employees were considered as "owing" the Respondent work in the form of hours over and above those hours paid to them for call-in time; that at the same time said supervisory personnel made a determination that certain other employees who appeared at the garages and who did not work on the days of the strike and picketing activities were not ready, willing and able to work on said dates, and in that regard said employees received no pay for said days, nor were they permitted to "owe" the Respondent any work time.

5. That in June, 1964, following the adoption of an ordinance and a resolution by its Council, the Respondent cancelled out the work time "owed" by those employees who were paid for, but did not work, on the days of the strike and picketing activities; and that further, those employees who, prior to such cancellation, had worked any time so "owed", were paid additional wages for such "owed" time worked.

6. That the determination of the Respondent to pay certain employees, and to cancel work "owed" time and the payment for any work "owed" time, affecting employees who did not work on the dates of the strike and picketing activities, was based solely on the judgment of Respondent's supervisory personnel that said employees had reported for work and were ready and willing to work on the days in question; and that the determination not to pay other employees who did not work on said dates was not based on their activity or membership in the Complainants.

Upon the basis of the above and foregoing Findings of Fact, the Board makes the following

CONCLUSION OF LAW

1. That the Respondent, City of Milwaukee, has not committed any unfair labor practices within the meaning of Section 111.70(3)(a) of the Wisconsin Statutes with respect to its failure to pay wages to certain of its employees who were members of Complainants, Local 33, American Federation of State, County and Municipal Employees, AFL-CIO and Milwaukee District Council 48, American Federation of State, County and Municipal Employees, AFL-CIO, as a result of the failure of such employees to work on November 19 through 22, and November 26, 1963.

Upon the basis of the above and foregoing Findings of Fact, and Conclusion of Law, the Board makes the following

ORDER

IT IS ORDERED that the complaint filed in the instant matter be, and the same hereby is, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 20th day of March, 1967.

WISCONSIN EMPLOYMENT RELATIONS BOARD

By Morris Slavney
Morris Slavney, Chairman

Arvid Anderson
Arvid Anderson, Commissioner

El S. Rice II
El S. Rice II, Commissioner

STATE OF WISCONSIN

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MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Pleadings

In their complaint filed on March 25, 1965, the Unions allege that the Municipal Employer committed acts of prohibited practices in violation of Section 111.70 of the Wisconsin Statutes by refusing to make wage payments to certain of its employees in December, 1963 in order to discourage membership in the Unions and in interference with the right of employees to be represented by labor organizations of their own choosing. After the matter had been set for hearing, and on June 30, 1965, the Municipal Employer filed an answer to the complaint, wherein it alleged that Sections 111.70(4)(a) and 111.07(14) of the Wisconsin Statutes prohibits any right of the Complainants to proceed before the Board since more than one year had elapsed beyond the dates of the alleged prohibited practices, and that, in any event, the Municipal Employer did not commit any prohibited practices with respect to its refusal to pay various employees who did not perform services for the Municipal Employer. While hearing in the matter was commenced on September 16, 1965, at the mutual request of the parties the hearing was adjourned on various occasions and finally conducted on October 6, 1966. Final briefs were filed with the Board on January 31, 1967.

Background

As related in the Findings of Fact certain employees of the Municipal Employer, who were members of the Complainants, engaged in a concerted refusal to work and in picketing activities on various dates in the latter part of November, 1963. In the next month, after such activities had ceased, the Municipal Employer did not deduct any pay from the pay

checks of some of the employees who did not work during the aforementioned activity, and in connection therewith the Municipal Employer permitted such employees, who were paid, to "owe" work time. The total of such owed work time approximated 22,637 hours. The employees who received their wages and who were permitted to owe work time were those employees who did not work, but who were considered by the supervisory personnel of the Municipal Employer as having reported for work and had been ready, willing and able to work on the days in question, and would have worked, had it not been for such activity. Other employees, who were not otherwise absent from work because of vacation, illness and the like, and had not, in the opinion of supervisory employees, been ready, willing and able to work on said dates were not so paid, and they were not permitted to owe work time. In addition to the man-days lost by those truck driver employees who engaged in the strike and picketing activities, approximately 69 full man-days and 49 partial man-days were not worked as a result of such activities by employees who were not paid nor permitted owed work time. Some of the employees who did not work, but who were paid and permitted to owe work time were members of the Complainants. All those employees who were not paid and not permitted to owe work time were members of the Complainants.

On June 12, 1964 the Municipal Employer adopted an ordinance ^{1/} affecting the matter, the material portions thereof being as follows:

"Part 1. Section 14-a is hereby created to read as follows:

14-a. Any employee who reported for work during the period between November 19 to November 26, 1963, and who was ready, able and willing to work but who was deprived of the opportunity of work because of the failure of other city employees to report for work and perform their assignments, shall be compensated for such time during said period that they were unable to work as though they had reported for work and carried out their municipal assignments. In addition to the above provisions, the following apply:

- (1) Employees who did not appear for work or who were not ready, able and willing to work shall not be paid for time lost.
- (2) Employees who worked all or a part of their regular schedule between November 19 to November 26, 1963, shall not receive extra compensation for such work.
- (3) Employees who lost time during this period and who subsequently made up the time lost without additional compensation shall be paid in cash for such make-up work; provided, however, that such payments shall be made without the computation or addition of interest payments.

^{1/} Ordinance No. 57, file no. 63-2641-1

- (4) This ordinance shall apply only to employees who were on work status during the period of November 19 to November 26, 1963, and who are currently employed by the City of Milwaukee or on layoff or leave of absence as of the effective date of this ordinance. The provisions shall not apply to any employees who were not on work status, such as employees on vacation, sick leave, layoff, leave of absence, or any other status in which the employee was not ready, able and willing to work."

On June 30, 1964 the Common Council of the Municipal Employer adopted the following Resolution material to the issues herein:

"Resolution relative to payment of 1963 wages:

Whereas, The Common Council has created Section 14-a of Ordinance No. 503-531-563-594-608-622-623-659-679-700; and

Whereas, Section 14-a provides that any employee who reported for work during the period between November 19th to November 26, 1963, and who was ready, able and willing to work but who was deprived of the opportunity to work because of failure of other city employees to report for work and perform their assignments, shall be compensated for such time during said period that they were unable to work as though they had reported for work and carried out their municipal assignments; and

Whereas, Employees who were ready, able and willing to work, but who were deprived of the opportunity to work were paid for a full day, with a liability of "time owed" the City accumulated for hours in excess of reporting hours; and

Whereas, As a result of the creation of Section 14-a, the "time owed" the city accumulated between November 19th to November 26, 1963, for employees who were ready, able and willing to work, but who were deprived of the opportunity to work, is to be liquidated; and

Whereas, Employees who accumulated "time owed" during the period between November 19th and November 26, 1963, and who subsequently made up the time without additional compensation are to be paid in cash for such made up work; now, therefore, be it

Resolved, by the Common Council of the City of Milwaukee that the proper city officers are authorized and directed to pay employees for "time owed" and subsequently made up without additional compensation resulting from "time owed" accumulated during the period from November 19th to November 26, 1963, now liquidated by passage of Section 14-a of ordinances, such payment of wages to be charged against the current year's appropriation of the departmental account for which services were rendered; and be it

Further Resolved, That wages due employees are to be computed on the basis of 1963 rates; and, be it

Further Resolved, That should a shortage of funds occur as a result of this action, such shortage shall be made up by a transfer of funds or a contingent fund appropriation."

Subsequent to the adoption of this resolution, the Municipal Employer liquidated the "time owed" by employees who were paid for the days on which they did not work because of the picketing. In addition, the employees who accumulated "time owed" during the period in question, and who made up such time without additional compensation, were paid for the additional made-up work.

POSITION OF THE PARTIES

The Complainants contend that in implementing the ordinance and resolution the Municipal Employer unlawfully discriminated against members of Local 33 who refused to cross the picket lines. They assert that such refusal, in the absence of evidence that those not paid acted differently than other employees who honored the picket lines but who were paid, was motivated as a result of their membership in Local 33 and not by their conduct during the course of the strike, and that such disparate treatment, based upon their union membership, constitutes unlawful discrimination in violation of Section 111.70(3)(a)2.

The Complainants argue that the Municipal Employer's discriminatory intent is evidenced by the fact that only members of Local 33 were refused compensation. The Complainants contend that they have met the burden of proof to establish a violation and that the burden therefore rests upon the Municipal Employer to prove that union membership is not the cause for the alleged discriminatory act.

The Municipal Employer denies any unlawful discrimination in denying payment to any of its employees. The Municipal Employer moved that the Board dismiss the complaint for the reason that Section 111.07 (14), Wisconsin Statutes, precludes the right of the Complainants to proceed in a prohibited practice before the Board on the basis that the specific act of prohibited practice alleged to have occurred, occurred more than one year prior to the filing of the complaint. The Municipal Employer argues that the acts resulting in the alleged prohibited practice occurred in November, 1963, and that the complaint was filed with the Board in March, 1965. The Municipal Employer further contends that the Board should dismiss the complaint filed by labor organizations which engaged in an unlawful strike, such strike being specifically prohibited in Section 111.70(4)(1), Wisconsin Statutes, and therefore Complainants should be precluded from making any claim with respect to any alleged violation of the Municipal Employee-Employer Labor Relations Law arising from prohibited conduct. The Municipal Employer argues further that the Board is without jurisdiction to determine whether the

Municipal Employer owes any employee wages for days not worked, however, that, in any event, any claim with respect to wages should be processed as a money damage claim in the state courts. Finally, the Municipal Employer contends that the record supports the conclusion that it did not engage in any discriminatory act in implementing the aforementioned ordinance and resolution, particularly since some employee members of Local 33, who did not work during the period involved, were paid for said days not worked after it had been determined that said employees were ready, able and willing to work on said days but were unable to do so because of the picketing activities. The fact that certain employee members who did not work and were paid, as argued by the Municipal Employer, negates the allegation of discrimination against other employee members of Local 33.

DISCUSSION

While the payment of wages to certain employees who did not work as a result of the strike and picketing activities occurred in November, 1963, the alleged acts of discrimination occurred in the implementation of the ordinance and resolution in June, 1964. The complaint, having been filed in March, 1965, was timely filed within the statutory period since the one year period commenced to run in June, 1964 and not in November, 1963.

The Municipal Employer would have the Board apply a "clean hands doctrine" by requesting the Board to dismiss the complaint on the basis that the Complainants engaged in unlawful strike activity and therefore Complainants should be precluded from obtaining any type of relief for their membership. The fact that the Complainants may have engaged in an unlawful act does not permit the Municipal Employer a license to violate its legal obligations under the law. The Board does not condone strikes in public employment, however the unlawful acts of one party do not excuse unlawful acts by another party and, therefore, we reject the argument of the Municipal Employer in this respect. While the complaint concerns the non-payment of wages to certain employee members of Local 33, the action before this Board is not primarily an action to recover wages due and owing, but rather concerns itself with prohibited practices alleged to have been committed by the Municipal Employer. The Board has sole and exclusive jurisdiction to determine whether such prohibited practice occurred. If the Board should so determine, the fact that the Board may order the Municipal Employer to make the employees whole by requiring the Municipal Employer to pay back wages is purely

a remedial matter for the purpose of placing the employes in the same position that they would have been had the prohibited practice not been committed. ^{1/}

We conclude that the record fails to substantiate the allegations in the complaint to the effect that the determination of the Municipal Employer not to pay certain employe members of Local 33 was discriminatorily based upon union membership. Some of the employe members of Local 33 who honored the picket lines were refused subsequent compensation for the days not worked based upon their supervisors' determination respecting their willingness to work. It is not clear from the record that all employe members of Local 33 who reported for work were not in fact refused payment. The Complainants in their brief said "some, possibly all, employes of Local 33 who honored the picket line were not (paid)". The record clearly does not establish that all employe members of Local 33 who reported for work during the picketing were not paid. More importantly the record does not indicate that the employes who were not paid expressed any willingness to work during the picketing.

The burden of proving the violation alleged in the complaint rests upon the Complainants. We conclude that they have not met such a burden. The Municipal Employer indicated that the determination to make payments to employes who did not work was based on the determination by supervisors as to what employes were ready, willing and able to work, based upon the conduct and statements made by various employes during the picketing activity. The Complainants have not established otherwise and therefore we have concluded that there was no discriminatory intent in not paying certain employe members of Local 33 for days not worked as a result of the strike and picketing activities, and therefore the Municipal Employer has not committed any prohibited practice within the meaning of Section 111.70 of the Wisconsin Statutes.

Dated at Madison, Wisconsin, this 20th day of March, 1967.

WISCONSIN EMPLOYMENT RELATIONS BOARD

By Morris Slavney
Morris Slavney, Chairman

Arvid Anderson
Arvid Anderson, Commissioner

Zel B. Rice II
Zel B. Rice II, Commissioner

1/ Rice Lake Creamery Co. (4997-A), 5/61