

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of	:	
	:	
GENERAL DRIVERS, DAIRY EMPLOYEES AND	:	
HELPERS LOCAL 579, affiliated with	:	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,	:	Case II
CHAUFFEURS, WAREHOUSEMEN AND HELPERS	:	No. 13430 MP-79
OF AMERICA,	:	Decision No. 9440-C
	:	
Complainant,	:	
	:	
vs.	:	
	:	
CITY OF EVANSVILLE	:	
	:	
Respondent.	:	
	:	

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

Examiner John T. Coughlin having, on October 21, 1970, issued his Findings of Fact, Conclusions of Law and Order in the above entitled matter, wherein the Examiner concluded (1) that all employes of the Public Works Department, Water and Light Department and nonuniformed employes of the Public Safety Department of the City of Evansville, the Respondent herein, excluding all supervisors, confidential employes and clerical employes constituted an appropriate unit within the meaning of Section 111.70 of the Wisconsin Statutes, (2) that since October 15, 1969, continuing at all times thereafter, General Drivers, Dairy Employees and Helpers Local 579, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Complainant herein, has been, and is, the exclusive representative of the employes in said unit for the purposes of conferences and negotiations with said Respondent within the meaning of Section 111.70 of the Wisconsin Statutes, and (3) that said Respondent committed unfair labor practices within the meaning of Section 111.70(3)(a)1 of the Wisconsin Statutes by threatening its employes with loss of benefits if they voted for the Complainant in an election pending before the Wisconsin Employment Relations Commission, by promising said employes future benefits if they opposed the Complainant, by interrogating one of its employes concerning his concerted activity, and by threatening to subcontract work if its employes supported the Union; and that in his Order the Examiner ordered said Respondent (1) to cease and desist from (a) refusing to recognize said Complainant as the exclusive representative for all the employes in the aforementioned collective bargaining unit, (b) threatening its employes with loss of benefits previously enjoyed by them for the purpose of discouraging their activity on behalf of and membership in said Complainant, or any other labor organization, (c) promising employes improved benefits to discourage their activity on behalf of and membership in said Complainant, or any other labor organization, and (d) interrogating employes concerning their affiliation with said Complainant, or any other labor organization, and (2) to take the following affirmative action to effectuate the policies of Section 111.70 of the Wisconsin Statutes: (a) to recognize said Complainant as the exclusive representative of the employes in the aforementioned

employee with respect to the order below and (c) to notify the Wisconsin Employment Relations Commission within 20 days from the date of receipt of the order as to the steps taken by it to comply therewith; and the Respondent having timely filed petitions for review of the Findings of Fact, Conclusions of Law and Order issued by the Examiner, as well as a brief in support thereof; and the Complainant also having filed a brief with respect to the petitions for review; and the Commission having reviewed the entire record, petitions for review and the briefs filed thereafter, and being fully advised in the premises and being satisfied that the Findings of Fact, Conclusions of Law and Order issued by the Examiner in the instant proceeding be sustained;

NOW, THEREFORE, it is

ORDERED

That pursuant to Section 111.70(5) of the Wisconsin Employment Peace Act the Wisconsin Employment Relations Commission hereby adopts the Examiner's Findings of Fact, Conclusions of Law and Order issued in the instant proceeding as its Findings of Fact, Conclusions of Law and Order, and, therefore, the Respondent, City of Evansville, shall notify the Wisconsin Employment Relations Commission within ten (10) days of receipt of a copy of this as to what steps it has taken to comply therewith.

Given under our hands and seal at the City of Madison, Wisconsin, this 15th day of March, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Zel S. Rice II
Zel S. Rice II, Commissioner

I dissent to the extent noted in the Memorandum.

Jos. B. Kerkman
Jos. B. Kerkman, Commissioner

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GENERAL DRIVERS, DAIRY EMPLOYEES AND
HELPERS LOCAL 579, affiliated with
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA,

Complainant,

vs.

CITY OF EVANSVILLE,

Respondent.

Case II
No. 13430 MP-79
Decision No. 9440-C

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

In his decision the Examiner concludes that the Union is the designated majority representative of all employes of the Public Works Department, Water and Light Department and nonuniformed employes of the Public Safety Department of the Municipal Employer, and that the Municipal Employer "by threatening its employes with loss of benefits if they voted for the Union; by promising them future benefits if they opposed the Union; by interrogating one of its employes concerning his union affiliation while in the presence of said employe's fellow workers; and by threatening to subcontract unit work if its employes supported the Union at a time when the Union enjoyed majority status, interfered with, restrained and coerced its employes in their rights under 111.70(2), Wisconsin Statutes, and accordingly have committed prohibited practices within the meaning of Section 111.70(3) (a)1 of the Wisconsin Statutes."

The Examiner ordered the Municipal Employer to cease and desist from such unlawful activity and to recognize the Union as the exclusive representative for the employes in the above described appropriate collective bargaining unit. The Municipal Employer timely filed a petition requesting the Commission to review the Examiner's decision, and therein alleged that the basis and in support of its exceptions to the Examiner's decision, that (1) there were no violations established by the record, (2) that the remedy ordered by the Examiner does not fit the violations found, and (3) that the recommended remedy is inappropriate as a matter of law.

Following the filing of the Municipal Employer's brief in support of its petition for review, the Union also filed a brief with the Commission, wherein it argued, in effect, that the Examiner's Conclusions of Law were correct, but that his remedy should have also included an order requiring the Municipal Employer to bargain collectively with the Union.

With respect to its argument that no violations were established, the Municipal Employer contends that the Examiner's determination that the contents of the newspaper article published on November 27, 1969, threatened the employes with loss of fringe benefits if the Union won

... reporting to make a statement of fact, were operating under a misunderstanding of law, i.e., that by operation of law the fringe benefits would have to be negotiated."

Even assuming that the writers of the article were operating under a misunderstanding of law, such misunderstanding is not a defense to unlawful threats.

Further, with respect to the article, the Municipal Employer contends that "The writers were saying that an outside force would cause the City to cease providing fringes until they were negotiated with the Union. That statement, when taken in the context of the entire letter, though erroneous, was not coercive." On the contrary when taken in consideration of the context of not only the letter, but the other activity of the Municipal Employer, we believe, as did the Examiner, that such statement is coercive and unlawful. Further, with respect to the statement in the article that "If a union were to be accepted, it is conceivable that many new problems and hardships would be created not only on the City, but on the employee's (sic) as well. Some examples might be the installation of time clocks, regulated coffee breaks, and the possible loss of certain freedoms that the employee's (sic) now enjoy. . .", the Municipal Employer argues that the Examiner's finding that such a statement was unlawful was also erroneous since such statement was "an accurate statement of what the Union could negotiate" and that such statement was not intended as a threat, particularly in view of the statement in the article that the writers did not intend to prevent its employes from petitioning the Union, from downgrading the Union generally, and further in light of the last statement of the article to the effect that no reprisals would be taken against the employes for their concerted activity.

We reject the Municipal Employer's argument in this regard. Its attempt to camouflage its threats of loss of benefits by inferring that the installation of time clocks, regulated coffee breaks, and possible loss of presently enjoyed freedoms would be bargained for by the parties. While the employer is permitted to inform its employes of the disadvantages of unions it cannot threaten employes with reprisals because of their concerted activity. Such threats are unlawful and the responsibility for such unlawful conduct cannot be excused on the claim that the employer is merely predicting the future.

The fact that the unlawful statements of coercion might have been known to the Union prior to the election does not excuse the violation even though the Union did not respond in an attempt to controvert same. Further, as alleged, the fact that the Union representatives might have been more sophisticated with respect to knowledge of the labor law than was the Municipal Employer, does not excuse violative statements.

The Municipal Employer further contends that the Examiner's finding with respect to the threat of subcontracting, was only a casual and informal statement made in the absence of any established anti-union animus. We disagree with such argument. Such statement was made during the pendency of an election proceeding and the Employer was attempting to interfere with the rights of employes who were engaged in lawful concerted activities. While the Municipal Employer might have a legal right to subcontract certain of its municipal functions, the threat to do so under the circumstances herein, was found by the Examiner to be unlawful and we agree. The statements made by the representative of the Municipal Employer do not fall within the protection of the exercise of free speech and we agree with the Examiner that the threats of reprisals interfered with the right of the employes to engage in concerted activity.

The Municipal Employer further argues, even assuming that all of the violations found by the Examiner did exist, the Examiner's conclusion that the Union is the representative of the employes without an election is in error. We agree with the Municipal Employer in its contention that the function of the Commission is to assist in the creation and maintenance of peaceful employer-employee collective bargaining relationships, and that the Commission is required to balance the interests of the public, the employes and the employer. Section 111.70 protects the rights of municipal employes to freely select their bargaining representative and sets forth employer prohibited practices which would interfere with said rights. The Municipal Employer would have the Commission conduct an election regardless of prohibited practices committed by it. It argues that the certification of election is not "sound" and therefore the collective bargaining structure cannot be "sound." However, an election certification cannot be sound if prior to an election there is unlawful conduct on behalf of the employer which interferes with the right of employes to cast free and unfettered ballots.

The Municipal Employer contends that the Commission should direct a municipal employer to recognize an employe organization without an election, only where the municipal employer has "destroyed all possibility of a free secret ballot election." If this argument were to prevail an employer could avoid any involvement in public employment collective bargaining except in very rare cases where his unlawful activity is overtly blatant.

The Municipal Employer argues that the Municipal Employer's activity prior to the election was due to the lack of sophistication by its representatives and not a manifestation of malicious intent to interfere with the rights of employes. In a finding of violative interference, no malicious intent is necessary. The timing of the activity engaged in by the Municipal Employer convinces us that the activity, as found by the Examiner, was motivated to discourage the employes from engaging in lawful concerted activities and from selecting the Union as their bargaining representative. To require the employes to cast a ballot to determine their bargaining representative after the unlawful acts committed by the Municipal Employer, would permit the Municipal Employer to take advantage of its own unlawful activities.

Finally, the Municipal Employer contends that the remedy recommended by the Examiner is inappropriate as a matter of law, specifically that the only procedure for certification of representatives is that provided in Section 111.70(4)(d) which incorporates Section 111.02(6) and Section 111.06 of the Wisconsin Employment Peace Act.

However, the Municipal Employer completely ignores Section 111.70(4)(d) which provides that Section 111.07 of the Wisconsin Employment Peace Act shall govern prohibited practice cases. Section 111.07(4) provides in part that final orders issued in unfair labor practice cases (prohibited practice cases) may require the person complained of to cease and desist from the unfair labor practices (prohibited practices) committed and require the person found to have committed such practices to take such affirmative action as the Commission deems proper. In order to remedy the acts of interference found herein, which occurred during the pendency of an election proceeding at such time where a majority of employes had executed authorization cards on behalf of the Union, the Examiner properly concluded that the Union is the exclusive bargaining representative of the employes involved.

Following the filing of the Employer's petition for review the Union filed a brief wherein it supported the decision of the Examiner, but therein contended that in addition to the remedies ordered by the

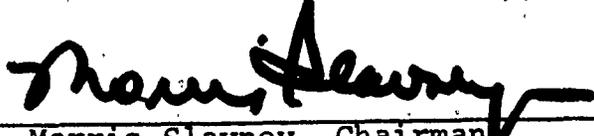
Examiner, the Commission should issue an order directing the Municipal Employer to bargain in good faith with the Union.

In his decision the Examiner correctly set forth that Section 111.70 "does not impose upon a Municipal Employer any enforceable duty to bargain in good faith with the Union representative over wages, hours and conditions of employment." Such determination was made by the Commission in various cases cited by the Hearing Examiner, and as affirmed in Madison School Board 37 Wis. 2d 483, 12/67. If the Municipal Employer should refuse to bargain in good faith with the Union as the representative of the employes involved herein, the Union can pursue its rights under the fact finding provisions of the statute.

Dated at Madison, Wisconsin, this 15th day of March, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Slavney, Chairman


Zel S. Rice II, Commissioner

PARTIAL DISSENT OF COMMISSIONER KERKMAN

I concur with my fellow Commissioners that the Municipal Employer has interfered with, restrained and coerced its employees' rights under Section 111.70(2), Wisconsin Statutes and have committed prohibited practices within the meaning of Section 111.70(3)(a)1 of the Wisconsin Statutes. I dissent, however, with the remedy found by the Examiner and upheld by my fellow Commissioners.

This Commission has held that "if the Union loses the election it may nevertheless secure bargaining rights through an unfair labor practice proceeding wherein it proves (1) its majority status in an appropriate bargaining unit at the time of the demand for recognition, (2) Employer conduct aimed at dissipating the majority and (3) the futility of conducting a new election in view of the Employer's effective misconduct." 1/ In this case the record clearly establishes authorization cards from a majority of the employees prior to the time of the election and Employer conduct aimed at dissipating the majority. The record does not, in my opinion, prove the futility of conducting a new election in view of the Employer's effective misconduct.

The record clearly establishes that the threat of loss of benefits if the employees voted for a Union was limited to (1) an erroneous statement on the part of the Employer that if a Union were certified, all fringe benefits would have to be suspended until a contract was bargained and (2) a published statement by the Employer in the Evansville Review that "if a Union were to be accepted, it is conceivable that many new problems and hardships would be created not only on the city but the employees as well." The Employer then gave the examples of installation of time clocks, regulated coffee breaks and the possible loss of freedoms that the employees now enjoy.

With regard to the promise of future benefits if they opposed the Union, these promises were limited to an inferential conclusion drawn by the Examiner that a statement by the Employer to the effect that "if the employees paid \$94 to join the Union they would have no guarantee that Respondent's offer would or would not be improved" really meant that the Employer would improve the offer in the event the Union were defeated in the election. I can draw no such inference from this statement. The record does, however, indicate that the employees should reconsider their position and by talking with an aldermanic committee completely resolve this situation and I believe a promise of benefit is included in this statement.

It is a fact that the Employer did interrogate one employee in the presence of his fellow employees regarding his status in the Union, however, the record limits the interrogation to this one incident and does not carry with it the classic threat of discharge or actual discharge which this Commission has found to be violative of 111.70(2) of the Wisconsin Statutes. 2/ In fact, the Employer specifically made a public statement in the Evansville Review as follows, "Lastly, there should be no animosity shown or reprimand given to any employee who has taken an active part in trying to procure Union services."

1/ Hotel, Motel, Restaurant Employees and Bartenders Union, Local 122 vs. Colonial Restaurants, Inc., Decision No. 7604-C.

2/ Green Lake County, Decision No. 6016; Rock County, Decision No. 6655; and Marathon County, Decision No. 6826.

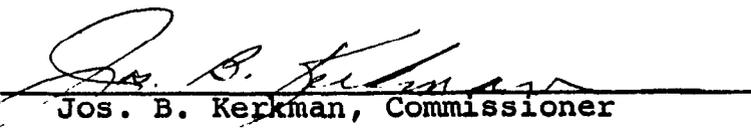
The threatening of subcontracting work if its employees supported the Union was limited to one occasion and the record shows conflicting testimony over that subject. The Employer admits that prior to negotiations and prior to the petition for representation by the Union, subcontracting was discussed. Mr. Schwartzlow, the Director of Public Works, denies having discussed subcontracting during the pendency of the representation election with the employees. Employee Grenwalt testified that Schwartzlow had discussed subcontracting with the employees at a meeting and the Examiner has credited Mr. Grenwalt's testimony based on the physical demeanor of the witnesses. The Examiner is the only person who can make the decision of credibility based on the physical demeanor of the witnesses since he was the only party present at the hearing and I therefore accept his judgment in this matter.

The above recapitulation of the issues is the basis on which the Union has asked for a bargaining order from this Commission and it is the basis on which the majority has ordered recognition of the Union. It is my opinion that the Union has fallen short of proving the "futility of conducting a new election in view of the Employer's effective misconduct." I would therefore have ordered the City to cease and desist from those practices enumerated above and to proceed to a new election on a timely basis. It is my opinion that the cease and desist order would have provided a sterile laboratory type climate in which a free election could have determined the issue of representation and that an election is the appropriate way to determine the question of representation.

Dated at Madison, Wisconsin, this 15th day of March, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Jos. B. Kerkman, Commissioner