STATE OF WISCONSIN : COUNTY OF ROCK : CIRCUIT COURT

Wisconsin Employment Relations Commission,

Petitioner,

vs

City of Evansville,

Respondent.

MEMORANDUM DECISION

Case No. 14159

Decision No. 9440-C

City of Evansville,

Petitioner,

vs

Wisconsin Employment Relations Commission,

Respondent.

MEMORANDUM DECISION

Case No. 14478

Decision No. 9334-E

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(1) Hearing in Case No. 14159 of both the petition of the Wisconsin Employment Relations Commission seeking enforcement of its decision and order, and the cross petition of the City of Evansville seeking review by this Court of the same decision and order.

(2) Hearing in Case No. 14478 of the petition of the City of Evansville seeking review of the order of the Wisconsin Employment Relations Commission, dated July 14, 1971, which set aside the election results of December 9, 1969, and ordered that the petition filed earlier by the General Drivers, DAiry Employees and Helpers Local 579 be dismissed.

Present and Presiding: Hon. Arthur L. Luebke, Circuit Judge.

Appearances: Robert W. Warren, Attorney General, by William H. Wilker, Assistant Attorney General, on behalf of the Wisconsin Employment Relations Commission;

Melli, Shiels, Walker and Pease, by Joseph A. Melli; and

W. H. Bewick, City Attorney, on behalf of the City of Evansville;

Goldberg, Previant and Ulemen, by Kenneth R. Loeble, amicus curiae, on behalf of General Drivers, Dairy Employees & Helpers Local 579.

BY THE COURT:

The facts are involved and lengthy and are set forth in great detail in both the record and briefs of counsel and for the most part need not be repeated in this decision.

Briefly, Local 579 filed a complaint of prohibited practices wherein it alleged that the City violated Section 111.70 (3) (a) 1, Wis. Stats., by engaging in acts of intimidation and coercion of its employees, thereby restraining and interfering with their rights to affiliate with and be represented by a labor organization of their own choosing.

This is a proceeding for the review of related decisions and orders of the WERC upholding certain findings of its Examiner that the City had in fact committed certain prohibited practices, that possibilities of holding a fair election were at best marginal, and that the Union should therefore be certified without a new election.

In opposing the petition of the WERC in this Court to enforce its decision, the City asks for a review of the Commission's findings and orders. The City maintains that (1) the record fails to establish that the City committed any prohibited practices; (2) the remedy ordered by the WERC is in excess of its authority and jurisdiction; and (3) the conduct complained of, even if unlawful, does not justify the Commission's drastic remedy.

The Circuit Court's scope of review in proceedings of this kind is set forth in Sections 111.07 and 227.20, Wis. Stats. In addition, two cases clarify the role of the reviewing court and set up guidelines between the two extremes of judicial rubber-stamping on one hand and judicial meddling on the other.

Muskego- Norway v. WERC, 35 Wis. 2d 540, for instance, emphasizes that the Court should show some deference to the expertise of the Commission and give due weight to its experience, technical competence, and specialized knowledge in determining whether the Commission's findings are supported by substantial evidence in view of the entire record. If so, then the Court must not substitute its wisdom for that of the Commission merely because the Court doesn't agree in every detail with the Commission's findings.

Kenosha Teachers Union v. WERC, 39 Wis. 2d 196, however, makes it clear that the Court must not abdicate its judicial power to the Commission. The Commission exercises administrative and not judicial authority. Therefore, substantial evidence must be further defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in view of the record as a whole, rather than of just that portion of the record which tends to support the Commission's decision.

1. Is the Commission's finding that the City engaged in prohibited practices, within the meaning of Section 111.70 (3) (a) (1), Wis. Stats., supported by substantial evidence in view of the entire record?

Section 111.70 (2), Wis. Stats., provides that municipal employees shall have the right of self-organization and to affiliate with and be represented by a labor organization of their own choosing.

Section 111.70 (3), on Prohibited Practices, provides, in part, that municipal employers, their officers and agents are prohibited from

"(1) Interfering with, restraining or coercing any municipal employee in the exercise of the rights provided in sub. (2)."

Determinations of unfair labor practices normally involve a consideration of the totality of the conduct undertaken by the employer and its agents. Isolated facts taken out of context must be treated cautiously. Conduct and acts may be harmless in one situation and prejudicial in another. Here the Examiner has an advantage over both the Commission and the Court in evaluating the nuances of credibility in the testimony of the witnesses.

A study of the transcript of testimony and the documents submitted at the Examiner's hearing clearly supports the finding by the Commission that the employer's conduct had an actual tendency to coerce or intimidate its employees. Acts that under other circumstances might individually create merely an aroma of coercion, or a strong suspicion of intimidation, when examined together in the entire context of their dealings amply support the Commission finding that the employer engaged in a low-key but no less persistent campaign of public and private threats and coercive conduct designed to undermine the Union's majority status before the election. Among others, the following Commission findings of prohibited practices are affirmed by the Court or are otherwise established to the satisfaction of the Court.

1. The contents of the newspaper article published on November 27, 1969 threatened the employees with loss of fringe benefits if the Union won the election. Even assuming that the writers of the article were operating under an innocent misunderstanding of law that fringe benefits would have to be negotiated, such misunderstanding is not a defense to an unlawful threat. This statement, taken in consideration of the entire context of the letter and the other conduct of the employer, could be reasonably determined to be chillingly coercive in its consequences.

2. From another statement of the employer in the same letter, notwithstanding its disclaimers that no threats were intended, it appears that the employees were threatened with the loss of certain specific benefits, such as the future installation of time clocks, regulated coffee breaks, and possible loss of presently enjoyed freedoms. Here, again in the entire context of the letter and all of the employers conduct, this statement could be found to be much more than a mere pointing out of the disadvantages of Union membership and what the Union could negotiate. Instead, there was ample basis for the Commission to find that it was a threat designed to intimidate.

3. The employer's statement dealing with possible subcontracting, made during the pendency of an election proceeding, could be found to be under the circumstances then existing to amount to a threat coercive in its consequences. While the employer may have had a legal right to subcontract certain municipal functions, the threat to do so under these circumstances was unlawful and interfered with the right of the employees to engage in concerted activity.

4. While this Court questions the inferential conclusion of the Examiner that the employer would improve its offer if the Union were defeated in the election, the record does support a finding that there was a promise of benefit to the employees if they would reconsider their position and by talking with an aldermanic committee completely resolve this situation, without Union interference.

2. Did the WERC have statutory authority to issue a bargaining order without an election?

In order to remedy the violations which it found, the Commission ordered the City to recognize the Union, without an election, as the bargaining representative of all the employees for whom an election had been directed.

To this extreme remedy, the City strenuously objects, emphasizing that the order not only deprives the employees of their statutory right to vote by secret ballot on whether they want to be represented by the Union, but also deprives them of their ability to determine the description of the bargaining unit. The statute provides that the majority status of labor organizations seeking to become bargaining representatives is to be established by a government conducted secret ballot election.

The WERC, in turn, relies on its general remedial authority to go beyond the mere granting of a cease and desist order. The Commission's statutory authority to issue remedial orders stems from Section 111.07 (4), Wis. Stats., wherein it is provided that if the Commission finds that prohibited practices have been committed it can then require the City

> " . . . to take such affirmative action, . . . as the Board may deem proper . . ."

Section 111.70 (4) (h) (2), Wis. Stats., states in part:

> "only labor unions which have been certified . . . or which the employer has recognized . . . shall be proper parties in initiating fact finding proceedings . . . "

Thus, it seems clear from the above statute that the City could have chosen voluntarily to recognize the Union as being the representative of its employees. What the City can do voluntarily, the Commission obviously can direct it to do.

The Commission has held that if the Union loses an 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. Hotel, Motel, Restaurant Employees and Bartenders Union, Local 122 vs Colonial Restaurants, Inc., Decision No. 7604-C.

The City contends that the Commission should order a municipal employer to recognize an employee organization without an election only when the employer has "destroyed all possibility of a free secret-ballot election." Such a theory, however, would appear to be an open invitation to the employer to engage in as much minor misbehavior as he could get away with (knowing that some acts would go undetected or unreported anyway), and only to be careful not to be caught doing anything so flagrant as would destroy all possibility of a free secret-ballot election. Such an interpretation would condone, not discourage, minor abuses and irregularities by the employer.

For instance, what would an employer have to lose? If the Union wins the election, the employer's misconduct would be moot. If the Union loses the election, it is obliged to appeal to the Commission and the Courts at great loss of time and expense, where time is on the side of the employer, and with loss of interest or discouragement on the part of employees.

In the last analysis, we must also recognize that a municipal employer, with its elected and appointed public officials who do not own the business, should be able to behave more like Caesar's wife than the private owner (or his agents) who feels this is his business and that he has a personal concern in its future that outweighs at times his prudence and respect for the letter of the law. At least his excesses are more understandable than those of public officials who are presumed to be more responsive to the necessity of respecting and obeying the Employment Relations law as established by the Legislature, whether they agree with its wisdom or not.

Admittedly, 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 employees, and the employer in doing so. The instant case is an eloquent example of the sad consequences to the public interest resulting from a municipal employer's failure to recognize the sensitivity of its role in informing but not manipulating its employees and public opinion around them.

Under all the circumstances, the Commission was entitled to find that the timing of the acts engaged in by the City was motivated to discourage the employees from engaging in lawful concerted activities and from selecting the Union as their bargaining representative. The Court agrees with the Commission that to require the employees to cast a ballot to determine their bargaining representative, after such unlawful acts had occurred, would permit the City to take advantage of its own misconduct. Prior to the City's having engaged in prohibited practices the great majority of employees had selected and designated the Union to be their bargaining representative. The Commission was entitled to believe from the entire record that after these prohibited practices had taken place the consequences flowing from such misconduct could not reasonably be expected to be expunged from the minds of the employees by a new election, simply upon subsequent reassurances of the municipal employer made in response to an order of the Commission.

Accordingly, as to Case 14159, counsel for the WERC is instructed (1) to prepare for the Court's signature an appropriate order granting the Commission's petition for enforcement of its decision and order, and also dismissing the City's petition for review of the same; and, as to CAse 14478, (2) to prepare an order denying the City's motion for review of the Commission's order dismissing the Union's petition because the City is not an aggrieved party in that particular proceeding and has no standing to interfere, and also because the Commission's order is not an appealable order and this Court therefore has no jurisdiction to review the same.

Dated this 22nd day of May, 1972.

Arthur L. Luebke /s/
ARTHUR L. LUEBKE
Circuit Judge