

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Respondent.

No. 9781-A

Respondent a letter requesting that it be recognized as the collective bargaining representative for Respondent's employees.

5. That sometime in April of 1970, the Union and Respondent commenced negotiations and that said negotiations have continued during the time in question in this case.

6. That on June 3, 1970, Schultz and fellow employe Dick Scheffer, during the course of their work day delivered a large refrigerator; that during the unloading of this refrigerator Schultz injured himself whereby he was unable to finish the final delivery that was scheduled for that day.

7. That on the morning of June 4, 1970, Schultz went down to see a physician who told him that he had a severe muscle strain; that later that same morning Schultz notified Respondent that he would be unable to work for an unspecified period of time.

8. That on June 5, 1970, Schultz went to work to pick up his paycheck and was informed by Respondent that he considered Schultz to have quit his job because of his inability to finish his work on June 3, 1970.

9. That on June 16, 1970, Schultz filed a charge with the National Labor Relations Board alleging that he had been discriminatorily discharged and on that same day he gave the National Labor Relations Board's field examiner an affidavit concerning his discharge.

10. That on June 22, 1970, the National Labor Relations Board sent a letter to Schultz wherein it stated that it did appear that the Employer's (Wetenkamp) business operation did not satisfy the Board's jurisdictional standards; that shortly after this Schultz withdrew his charge from said Board.

11. That on June 22, 1970, Schultz contacted Respondent and told him that his physician had released him and that he was not available for work; that Respondent informed Schultz that he considered him to have quit his job and that in any event there was no work available.

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

CONCLUSION OF LAW

That Respondent did not discriminatorily discharge Floyd Schultz because of his Union activity and that therefore said Respondent did not violate Section 111.06(1)(c) of the Wisconsin Statutes.

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

ORDER

That the complaint filed in this matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 31st day of March, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By John T. Coughlin
John T. Coughlin, Examiner

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FLOYD SCHULTZ, :
 :
Complainant, :
 :
vs. : Case I
 : No. 13927 Ce-1311
EARL WETENKAMP d/b/a WETENKAMP : Decision No. 9781-A
TRANSFER & STORAGE, :
 :
Respondent. :
 :

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

PLEADINGS

The complaint alleges that Respondent Wetenkamp discriminatorily discharged Complainant Schultz because he signed a Union authorization card and because he was instrumental in having Respondent's only other two full time employees also sign said Union authorization cards. 1/ The Complainant also alleges that his position was filled by another individual who had not signed a Union authorization card and that the second of the three signers quit his job resulting in a dissipation of the Union's majority status.

COMPLAINANT'S POSITION

At the hearing Schultz testified that, ". . .I feel that I was discharged illegally, due to the circumstances that I was hurt the day that he (Wetenkamp) claims that I supposedly quit." 2/ Complainant also testified that he felt that he was discriminated against because he was, ". . .instrumental in getting the Union in." 3/

Complainant entered into evidence a sworn affidavit that he gave the National Labor Relations Board's field examiner in conjunction with the charge that he had filed with that agency. 4/ In the aforementioned affidavit the following relevant statements were made:

"About two or three weeks later (this would be sometime in May of 1970) I approached Earl Wetenkamp

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- 1/ To discharge an individual because of his union activity is violative of Section 111.06(1)(c) of the Wisconsin Statutes.
- 2/ Transcript, page 2.
- 3/ Transcript, page 11.
- 4/ Respondent did not object to this being entered into evidence. However, the probative value or weight of the statements contained in this document will be decided by the Examiner.

in his office to get more work. Dick Scheffer, my partner was with me. Earl handed us 10 or 12 delivery slips. I said, 'Holy man, this is going to take us all night.' Earl replied, 'So what?' I swore and said, 'why should we work overtime when we are not paid overtime?' I added, 'why should we cooperate with you when you don't cooperate with us?' Earl replied, 'Drop that damn union and I'll cooperate with you.' I then picked up the slips and Dick and I left."

. . .

"About a month after we'd signed cards (again, this would be sometime in May of 1970) I was off one day because of the flu. Earl's nephew, Ricky, worked with Dick in my absence. The next day, when I returned to work, Dick told me that the day before Ricky had asked him who had started the Union. Dick told me he'd told Ricky, 'we all did' and Ricky replied, 'You know, Earl can lay you all off.'"

In addition, as noted previously, Schultz alleged that he was replaced by another man who supposedly had not signed a Union authorization card and that yet another individual of the three man unit had quit thereby effectively dissipating the Union's majority status being as only one member of the original three man unit that had signed the aforementioned cards was still on the job.

Finally, Complainant alleges that he did not quit on June 3, 1970 but that he merely could not finish the final delivery on that day because he had injured himself while making an earlier delivery.

RESPONDENT'S POSITION

Respondent contends that on June 3, 1970 Schultz did not complain of muscle spasms but that he did not complete his work because of his usual complaints, namely, headache, stomachache and fatigue. Respondent avers that Schultz by failing to complete his assigned work on June 3, 1970 did in effect quit his job. Respondent further alleges that in April of 1970 he employed three full time men namely, Richard Scheffer, driver; Floyd Schultz, driver; and James Scheffer, helper. Respondent contends that shortly after the Union started to organize its employes, James Scheffer quit his job; that after Schultz was injured he rehired James Scheffer and that due to a slowdown in business he did not rehire Schultz after Schultz had recovered from his injury. Consequently, Respondent argues that the Union's majority status has not been dissipated being as he now employs Richard and James Scheffer, both of whom had previously signed Union authorization cards at the same time as did Schultz.

DISCUSSION

The initial question existing in the instant case is whether Schultz quit his job on June 3, 1970 or was terminated by Respondent. The Examiner, however, finds the question to be for all practical purposes moot. Even assuming arguendo that it was found that Respondent did in fact discharge Schultz, said discharge must be discriminatory in order for it to be illegal. It is well settled that an employer may discharge an employe for any reason or for no reason under

Wisconsin Statutes 111.06 or similarly under the National Labor Relations Act as amended, provided only that the discharge was not in any way motivated by a desire to encourage or discourage union membership. 5/ In addition, it is equally well settled that the burden is on the Complainant to prove by a clear and satisfactory preponderance of the evidence that an employee's discharge resulted from his union activity. 6/

As noted previously, there was no testimony adduced at the hearing to show the Respondent was motivated by any anti-Union animus concerning his dealings with Schultz other than Schultz's bald-faced conclusion that he felt that the reason he was replaced by James Scheffer was because he was, ". . . instrumental in getting the Union in." In fact, Schultz's Union activity was substantially the same as that of Dick and Jim Scheffer, both of whom are still employed by Respondent. It is uncontradicted that in April of 1970 the three full time employees of Respondent, namely, Dick and Jim Scheffer and Floyd Schultz all drove to the Union's Manitowoc office and that all three of them signed Union authorization cards at that time. The only activity that distinguishes Schultz from the other two employees was that he was the one that went into the Union's office to get the Union authorization cards while the others remained outside. Also, even assuming arguendo that this distinction without being a difference is somehow significant, there was no showing that Respondent knew of Schultz's "special" activity in this regard.

As to the statements quoted above that were contained in the affidavit given to the National Labor Relations Board, the Examiner finds that the first one relating to Respondent's telling Schultz and Dick Scheffer to, ". . . drop the damn union and I'll cooperate with you", to be an isolated remark and as such it does not establish by a clear and satisfactory preponderance of the evidence that Respondent was motivated by anti-Union animus regarding its actions toward Schultz. 7/ Furthermore, the Examiner finds that the remark made by Ricky (Respondent's nephew) to Dick Scheffer that, "You know, Earl (Wetenkamp) can lay you all off", to also be of no probative value. There was no evidence adduced at the hearing to show that Ricky was anything other than a casual part-time employee or that he was in any way Respondent's agent. In addition, the record is clear that two out of the three individuals that signed Union authorization cards are still employed by Respondent. Finally, it should be noted that there is not even a scintilla of evidence that demonstrates any sort of general hostility by Respondent toward the Union while it was organizing Respondent's employees or while the matter involving Schultz was taking place. In fact, Respondent at all times relevant continued to negotiate with the Union.

5/ St. Joseph's Hospital vs. WERB, 264 Wis. 396 (1953); Wonder State Mfg. Co. v. N.L.R.B. (5th Cir. 1964) 331 F. 2d 737, 738; N.L.R.B. v. Symons Mfg. Co. (7th Cir. 1964) 328 F. 2d 835, 837; Marshfield Steel Co. v. N.L.R.B. (8th Cir. 1963) 324 F. 2d 333, 337; Fairchild Cafeteria, 92 NLRB 809

6/ Sage Nursing Home, Dec. No. 8179-B, 3/68; H.E. Dec. Aff. WERC 4/68

7/ See Ostertag Optical Service, Inc., 171 NLRB No. 182, 68 LRRM 1258 where isolated remarks similar in character to the one found in the instant case were held to be of an isolated nature and as such did not warrant issuance of a remedial order.

In view of the foregoing, the Examiner finds that the Complainant has failed to show by a clear and satisfactory preponderance of the evidence that Respondent has discriminated in any way against Floyd Schultz because of his Union activity and that consequently Respondent did not violate Section 111.06(1)(c) of the Wisconsin Statutes. Therefore, the complaint filed in this matter is without merit.

Dated at Madison, Wisconsin, this 31st day of March, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By John T. Coughlin
John T. Coughlin, Examiner