STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY		
MERRILL MOTOR SERVICE, INC.,		
Petitioner,		
-vs-		Case No. 406-651
WISCONSIN EMPLOYMENT RELATIONS COMMISSION,		
Respondent.		
WISCONSIN EMPLOYMENT RELATIONS COMMISSION,		
Petitioner,		
-vs-		Case No. 407-067
MERRILL MOTOR SERVICE, INC.,		
Respondent.		Decision No. 10844-B

OPINION

Merrill Motor Service, Inc., petitioner, in Circuit Court Case No. 406-651 seeks an order of this court reversing and vacating the findings of fact, conclusions of law, and order of the Wisconsin Employment Relations Commission finding the petitioner guilty of unfair labor practices.

The petitioner, Wisconsin Employment Relations Commission, in Circuit Court Case No. 407-067 seeks a judgment and decree pursuant to Sec. 111.07 (7) Stats. confirming and enforcing all of the provisions of the order of the petitioner.

Pending the hearing on the petitions of the respective petitioners a temporary restraining order was entered restraining Merrill from selling, pledging or otherwise disposing of any of its assets.

At a Status Conference, previously set by this court, Charles D. Hoornstra, Assistant Attorney General for Wisconsin, appeared for and on behalf of the Commission, and John R. Collentine, attorney for Merrill, and Goldberg, Previant & Uelmen by Alan M. Levy appearing for Teamsters "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America; and at such conference the attorneys waived oral arguments and stipulated that this court could dispose of the issues in the above-entitled cases upon the existing records in this case as well as the briefs submitted by counsel.

A transcript of the proceedings had before the Commission has been filed with respect to both of the above-entitled actions. Briefs have been submitted by the attorney general in behalf of the Commission and by John R. Collentine in behalf of Merrill.

For the sake of brevity in this opinion, the Wisconsin Employment Relations Commission will be referred to as the "Commission"; Merrill Motors Service, Inc., as "Merrill"; Teamsters "General" Local Union No. 200 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as "Union". It is contended by Merrill that it attempted to bargain in good faith with the Union as required by Chapter 111 of the Wisconsin Statutes, but that the Union failed, refused, and neglected in any way to bargain with Merrill.

The Commission contends that it correctly found and concluded that not only did Merrill violate its duty to bargain in good faith with the Union but was also guilty of other unfair labor practices as appears from findings, conclusions and order of the Commission.

The Union pursuant to stipulation has been authorized to intervene in these proceedings and adopted the same position as the Commission.

It appears from the record that on the 1st day of March, 1972, that the Union filed a Complaint against Merrill with the Commission alleging among other things that Merrill had engaged in conduct in violation of Sec. 111.06 (1)(a), (c), (1), and (d) of the Wis. Stats. by refusing to recognize and bargain in good faith with the Union as the exclusive bargaining representative of the employee, by interrogating and otherwise interfering with the employees in the exercise of their rights to participate in collective bargaining and further by discharging employees because of the sympathies and activities on behalf of the Union.

Pursuant to notice a hearing was held on the petition of the Union before hearing examiner George R. Fleischli. Following the hearing the examiner made his findings of fact and conclusions of law and executed an order pursuant to such findings and conclusions. In substance the examiner found that since January the 17th, 1972, the Union had been and was the voluntary recognized bargaining representative of all drivers and helpers employed by Merrill, and that Merrill failed to bargain in good faith with the Union and was guilty of unfair labor practices by interfering with the rights of the employees to join the Union and by discharging all of its employees because they joined the Union, and further by reason of its termination of its contract with its remaining customers but three, and that Merrill is continuing to commit unfair labor practices.

Predicated upon such findings and conclusions of law the examiner issued the following order:

"IT IS ORDERED that the Respondent, Merrill Motor Service, Inc., its officers and agents shall immediately:

1. Cease and desist from:

a) Interferring with the rights of its employes guaranteed to them by Section 111.04 of the Wisconsin Statutes by interrogating said employes with regard to their membership in or reasons for joining Teamsters "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America or by making implied or express threats or promises of any kind with regard to their exercise of those rights.

b) Discouraging its employes from becoming members of or being represented by Teamsters "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America or any other labor organization by dischargin or otherwise discriminating against any employee in regard to his hire tenure of employment or terms and conditions of employment.

c) Refusing to bargain collectively with Teamsters "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the exclusive bargaining representative of all of its employees in the bargaining unit consisting of all drivers and helpers excluding office clerical, salesmen, guards and supervisors with respect to wages, hours and other terms and conditions of employment.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Wisconsin Employment Peace Act:

a) Immediately place Thomas L. Verney, Thomas Rowe, William Byrnes and Victor Sachen on a preferential hiring list according to their length of service as employees and offer employment to each of said employees in accordance

with their relative length of service (the greatest in length of service to be given the first offer) before it hires any employees within the meaning of Section 111.02 (3) or employs any person other than Thomas Biedrich or Keith Stankiewicz to perform the work or substantially equivalent work performed by said employees prior to January 24, 1972. All offers of employment shall be in writing and directed to the Complainant by registered mail, with a copy to the employee's last known address.

b) Pay Thomas L. Verney, Thomas Rowe, William Byrnes and Victor Sachen a sum of money equal to that which they would have earned as employees from the date of their discharge on January 24, 1972, until the date on which their names are placed preferential hiring list and the notice requirements of this order have been met, less any money they may have earned or received during said period which they would not have otherwise earned or received had they not been discharged.

c) Maintain written records of all employment offered to any person and all work performed by any person which employment or work would involve work which had been performed in whole or in part by Thomas L. Verney, Thomas Rowe, William Byrnes and Victor Sachen before January 24, 1972, and, upon request, make the contents of those records available to representatives of Teamsters "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

d) Notify Teamsters "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America that it is willing to bargain collectively and, upon request, bargain collectively with Teamsters "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the exclusive bargaining representative of all employees employed in the collective bargaining unit consisting of all drivers and helpers excluding office clerical, salesmen, guards and supervisors with regard to wages, hours and other terms and conditions of employment.

e) Notify all of its employees by posting in conspicuous places on its premises, where notices to all its employees are usually posted, a copy of the notice attached hereto and marked Appendix A. Such copy shall be signed by Thomas Biedrich and Keith Stankiewcz and shall be posted immediately upon receipt of a copy of this order and shall remain posted for one year thereafter. Reasonable steps shall be taken by Merrill Motor Service, Inc. to insure that said notice is not altered, defaced or covered by any other material.

f) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days of the date of this order as to what steps it has taken to comply herewith."

Following this order Merrill requested a review by the Commission. Upon Merrill's petition for review the Commission adopted the examiners findings of fact and conclusions of law and order with its accompaning memorandum. The findings and conclusions of the examiner then became the findings and conclusions of the Commission.

Findings of fact of the Commission are conclusive, if supported by credible and competent evidence in the record. Section 111.07 (7) Wis. Stats. Wisconsin Labor R. Board v. Fred Rueping L. Co. 228 Wis. 473; Century Building Co. v. Wisconsin E. R. Board, 235 Wis. 376; Retail Clerks; Union v. Wisconsin E. R. Board, 242 Wis. 21. The sole function of this court in reviewing the record in this case, "Is to see that there is credible and competent evidence to sustain the Board's findings", Century Building Co. v. Wisconsin E. R. Board, Supra, 384. This court, "may not weigh the evidence to ascertain whether it preponderates in favor of the findings". Retail Clerks' Union v. Wisconsin E. R. Board, 242 Wis. 21. The extent of this courts powers upon review of the record in these two cases is set forth in Wisconsin Labor R. Board v. Fred Rueping L. Co. 228 Wis. 473, 494: "* * *The requirement is that there must be some evidence tending to support the finding of the board, and, if this is discovered, the court may not weigh the evidence to ascertain whether it preponderates in favor of the finding.* * *"

The credibility and weight to be given to the testimony given before the examiner as well as the reasonable inferences to be drawn there from lies solely within the province of the Commission, and upon review this court has no power to substitute its judgment for that of the Commission. Wisconsin Employment Relations Board, v. Milk & Ice Cream Drivers & Dairy Employees Union, Local No. 225, 238 Wis. 379; International Union, United Automobile Workers, Local No. 386, et al. v. Wisconsin Employment Relations Board et al, 258 Wis. 481; St. Joseph's Hospital v. Wisconsin E. R. Board, 264 Wis. 396; St. Francis Hospital v. Wisconsin E. R. Board, 8 Wis. (2d) 308.

A review of the record in this case requires the application of the rules of law as well as the applicable statutes.

Thomas R. Biedrich, Keith Stankiewicz and Valentine Luljack, caused to be organized in 1969 the Merrill Corporation. Later on Valentine Luljack withdrew from the corporation and sold his interest to Thomas R. Biedrich. Merrill had been engaged in the cartage business. This business had proved not to be a profitable venture. Merrill had four drivers who made the deliveries. During the forepart of December, 1971, Merrill truckdrivers, Thomas L. Verney, Thomas Rowe, William Byrnes and Victor Sachen sought to confer with Biedrich concerning wages and fringe benefits, but without success. On the 17th day of December, 1971, employees, Byrnes and Verney signed Union Representative Authorizations and on the 21st day of December, 1971, Rowe signed a similar authorization. Sachen signed an authorization on the 29th day of December, 1971. Section 111.05 (1) provided as follows: "Representatives chosen for the purposes of collective bargaining by a majority of the employes voting in a collective bargaining unit shall be the exclusive representatives of all of the employes in such unit for the purposes of collective bargaining, provided that any individual employe or any minority group of employes in any collective bargaining unit shall have the right at any time to present grievances to their employer in person or through representatives of their own choosing, and the employer shall confer with them in relation thereto." The record is not in dispute that not only was there a majority of the truckdrivers but all of the truckdrivers had authorized the Union to represent them in collective bargaining. On the 11th day of January, 1972, the Union notified Merrill by letter that it was the collective bargaining representative of the truckdrivers of Merrill and demanded recognition as such. The record satisfactorily establishes that Merrill did in fact recognize the Union. On the 17th day of January, 1972, the officers of Merrill and its attorney participated in a collective bargaining conference at the office of the Union with Union representatives. While the request was made by Merrill to see the Union representative authorization by the employees, they were not produced. Subsequent conduct of the officers of Merrill in speaking to its employees relative to their identification with the Union satisfies this court that the officers of Merrill were fully cognizant of the fact that their four drivers had voluntarily authorized the Union to represent them in collective bargaining with Merrill. It then became the duty of Merrill to bargain collectively with the Union. Section 111.06 provides in part as follows: "(1) It shall be an unfair labor practice for an employer individually or in concert with others: * * * (2)(d) To refuse to bargain collectively with the representative of a majority of his employes in any collective bargaining unit; provided, however, that where an employer files with the commission a petition requesting a determination as to majority representation, he shall not be deemed to have refused to bargain until an election has been held and the result thereof has been certified to him by the commission."

Sections 111.02 (5) provides as follows: "'Collective bargaining' is the negotiating by an employer and a majority of his employes in a collective bargaining unit (or their representatives) concerning representation or terms and conditions of employment of such employes in a mutually genuine effort to reach an agreement with reference to the subject under negotiation."

The mere fact that the Union representatives stated at the conference that it would require Merrill to sign a "Cartage Agreement" form of contract, did not relieve Merrill from the obligation of submitting a counter proposal. It is the duty of both the Union as the bargaining representative of employees and Merrill as the employer to bargain in good faith. After the initial conference with the

Union, no further contact was made by Merrill with the Union. Instead Merrill proceeded to reduce its customers from twelve to three. The record indicates that in the forepart of January, 1972, Thomas R. Biedrich, Keith Stankiewicz made a decision to "weed out" unprofitable customers. The right to weed out unprofitable customers was certainly within the rights of Merrill. From the circumstances surrounding the reduction of customers the Commission might well infer that this was done for the primary purpose of avoiding bargaining with the Union. It is said in St. Francis Hospital v. Wisconsin E. R. Board, 8 Wis. (2d) 308, 312-313: "Sec. 111.06 (1)(d), Stats., condemns as an unfair labor practice the refusal of an employer to bargain collectively with a majority of his employees in any collective-bargaining unit. The collective bargaining so ordered by the statute does not compel either party to surrender to the demands of the other, but such bargaining does require the parties in good faith to engage in a mutually genuine effort to reach a collective-bargaining agreement. Construing the requirements of the National Labor Relations Act expresses substantially in our own sec. 111.06 (1)(d), the United States court of appeals has said:

.'An unpretending, sincere intention and effort to arrive at an agreement is required by statute; the absence thereof constitutes an unfair labor practice.' National Labor R. B. v. Stanislaus Imp. & H. Co. (9th Circ. 1955), 226 Fed. (2d) 377, 380."

The Commissions findings and conclusions of the interrogation by Biedrich of Victor Sachen after he had joined the Union, was an unlawful interference with the employees' right to join a Union is supported by the record in this case. During the course of the conversation between Sachen and Biedrich reference was made about certain benefits such as insurance and paid holdiays. The implication to be drawn from such conversation is that Sachen and the other truckdrivers would receive these benefits if they had not joined the Union. This was in clear violation of Sachen's rights under Sec. 111.04 Wis. Stats. and constituted an unfair labor practice within the meaning of Section 111.06 (1)(a).

It is said in National Labor Relations Board, Petitioner, v. Automotive Controls Corporation, Respondent, 406 Fed. 2d, 221, 223: "We begin with the premise that employers' statements that are not coercive are protected by the Section 8(c) and cannot be the basis for finding a violation of section 8(a) (1). Although on occasion the coerciveness of a statement is patently obvious, generally the test of coerciveness is one of total impact to be determined in light of the background in which the statement is made. Hence, a speech that is deemed threatening in one situation may be wholly protected in another. The issue then is one of determining whether there is substantial evidence to support the Board's finding that this particular speech, when viewed in light of the totality of employer communications, was such as to convey a threat of reprisal in the event the union campaign proved successful."

There is substantial evidence in this record sufficient to sustain the finding of the Commission that Merrill had unlawfully interfered with the rights of the employees with respect to their right to join a Union.

On January the 24th, 1972, Merrill discharged its four truckdrivers who had joined the Union. The reasons for the discharge are in dispute. The employees claim that they were advised that their employment was being terminated by reason that Merrill was being liquidated. The reasons given for the termination by Merrill was due to the incompetency on the part of the drivers, a cutting back of its work, and the inability to operate the company at its present status. The Commission resolved this conflict by accepting the reasons for discharge given by the drivers. Merrill had a right to terminate its business. Textile Workers of America v. Darlington Manufacturing Company et al, 383 U. S. 363. But it did continue to operate its trucks with the assistance of two of its officers and for a brief period with the assistance of an employee who is identified as "Tom".

At the time of the hearing, Merrill had reduced its customers to three. These customers at that time were being serviced by the two officers of the company.

Considering the totality of the circumstances as appears from the record the finding and conclusion of the Commission that the discharge of the four employees constituted a discrimination against such employees because of their membership in the Union are supported by substantial evidence.

A careful examination of the records by this court satisfies this court that Merrill has been guilty of unfair labor practices and that all of the findings and conclusions made by the Commission are supported by substantial evidence. This court therefore affirms the findings and conclusions of the Commission. The remaining question for this courts consideration is whether the Commission's remedial order is reasonable. Section 111.07(4) provides in part as follows: "Within 60 days after hearing all testimony and arguments of the parties the commission shall make and file its findings of fact upon all of the issues involved in the controversy, and its order, which shall state its determination as to the rights of the parties***"

It is said in Libby, McNeill & Libby v. Wisconsin E. R. Comm. 48 Wis. 2d, 272, 286-287: "The reasonableness of the order must be viewed in the light of the finding by the WERC that respondent was guilty of an unfair labor practice in refusing to bargain.

The order of the WERC should be affirmed unless the respondent can show that the order has no tendency to effectuate the purposes of the Employment Peace Act. Wisconsin Employment Relations Board v. Algoma Plywood & Veneer Co. (1948), 252 Wis. 549, 32 N.W. 2d 417, affirmed, 336 U.S. 301, 69 Sup. Ct. 584 93 L. Ed. 691.

The precise remedy chosen here, placement of the displaced employees on a preferential hire list and an order to bargain with the union with respect to other aspects of the displacement, has been sustained by courts of appeal. Cooper Thermometer Co., supra; NLRB v. Rapid Bindery, Inc. (2d Cir. 1961), 293 Fed. 2d 170. The labor board has consistently affirmed the preferential hire remedy in similar circumstances, a failure to negltiate an economically motivated decision to eliminate jobs. Plymouth Industries, Inc. (1969), 177 NLRB No. 71; Royal Plating & Polishing Co., supra; Drapery Mfg. Co. (1968), 170 NLRB No. 199; and McGregor Printing Corp. (1967), 163 NLRB 938.

An attitude of deference by courts to administrative agencies is well established. This principle was most recently affirmed in NLRB v. Drapery Mfg. Co. (8th Circ. 1970), 425 Fed. 2d 1026, 1028, where the court stated:

". . .It is an established principle that a Board order 'should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' Virginia Electric & Power Co. v. NLRB, 319 U.S. 533, 540, 63 Sup. Ct. 1214, 1218, 87 L. Ed. 1568 (1943). The rationale for the rule is that the Board, as an administrative agency, 'must draw on enlightenment gained from experience' in fashioning its remedies, NLRB v. Seven-Up Co., 344 U.S. 344, 73 S. Ct. 287 (1953) . . ."

It is the considered opinion of this court that the order of the Commission is in all respects reasonable. This court therefore affirms and sustains the findings and conclusions and order of the Commission.

A restraining order prohibiting Merrill from selling or in any manner incumbering its property shall continue in force and effect until the order of the Commission has in all respects been complied with. The attorney general shall prepare an order in accordance with this opinion.

Dated, at Milwaukee, Wisconsin, this 10 day of April, 1974.

BY THE COURT

William I. O'Neill /s/
RESERVE CIRCUIT JUDGE