

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BAKERY & CONFECTIONERY WORKERS UNION
LOCAL 244, AFL-CIO,

Complainant,

vs.

ERNIE HUTCHINSON, d/b/a LARSEN BAKERY,

Respondent.

Case II

No. 15432 Ce-1409

Decision No. 10872-A

Appearances:

Mr. E. H. Snyder, Attorney at Law, appearing on behalf of the
Union.

Mr. Fred Wheeler, Attorney at Law, appearing on behalf of the
Employer.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Bakery & Confectionery Workers Union Local 244, AFL-CIO, having filed a complaint alleging that Ernie Hutchinson, d/b/a Larsen Bakery has committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act; and the Commission having appointed Herman Torosian, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusion of Law and Order as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and hearing on said complaint having been held at Racine, Wisconsin, on April 20, 1972, before the Examiner; and the Examiner having considered the evidence and arguments 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 Bakery & Confectionery Workers Union Local 244, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization having its office located at 3711 West National Avenue, Milwaukee, Wisconsin.

2. That Ernie Hutchinson, d/b/a Larsen Bakery, hereinafter referred to as the Respondent, is an adult, the owner and operator of said bakery business located at 3311 West Washington Avenue, Racine, Wisconsin.

3. That during all times material herein Respondent had in its employ the following employees: John Dumas, Antonette Eckert, Irene Jensen, Ann Lema, Gordon McLeod and Nancy Christopherson.

4. That Hutchinson, sometime during the latter part of December, 1971, became dissatisfied with the job performance of his apprentice baker, John Dumas; that Hutchinson had two meetings concerning same with Dumas, one in January 1972 and another in February 1972; that

Hutchinson discussed with Dumas his apparent lack of cooperation and antagonistic attitude toward himself (Hutchinson) and the fact that Dumas' quality of work was deteriorating; that during their second meeting Dumas was also told that if his attitude persisted and his quality of work continued to deteriorate he (Hutchinson) would request the State of Wisconsin Industrial Commission 1/ to transfer his indenture; that Hutchinson discussed said problem with Mr. Wells of the Industrial Commission in the latter part of December 1971 and again in the latter part of March 1972; and that effective March 5, 1972 Dumas' wage rate was reduced from \$2.50 to \$2.10 per hour.

5. That Nancy Christopherson had been an employe of Respondent since August 1971; that her normal working hours were 2:00 a.m. to 7:00 or 8:00 a.m. Sunday through Thursday and 8:00 p.m. to 2:00 or 3:00 a.m. on Fridays.

6. That the bakery building consists of a front room where retail sales are made, a middle room where most of the work is performed and is referred to as the "workshop", and a back room where there is an exit from the building; that on March 3, 1972 Christopherson left work at approximately 7:00 a.m.; that prior to leaving she went to the front of the store and bought some hamburger buns; that she then walked through the workshop on her way to the back room where she exited from the rear door; that working in the workshop at the time were John Dumas, Gordon McLeod, Ann Lema and Hutchinson; that all of said employes and Hutchinson saw Christopherson pass through the work room on her way out but none actually saw her leave through the rear door.

7. That just prior to Christopherson's departure Hutchinson counted ten day old Kringles (a type of Danish bakery) on the Kringle rack, located by the back door; that immediately after Christopherson's departure Hutchinson, who was in the workshop and heard the rear door slam, returned to the back room and again counted the day old Kringles and discovered there was one Kringle missing; that Hutchinson then went to the front of the store and asked the sales girl, Diane Ratell, if Christopherson had purchased a Kringle; Hutchinson was informed that Christopherson had purchased hamburger buns but not a Kringle; Hutchinson got in his car and followed Christopherson and caught her in a nearby parking lot carrying a bag containing hamburger buns and a white bag containing a Kringle; Hutchinson got out of his car and asked Christopherson if she had bought the Kringle; Christopherson answered that she had not but that she was going to tell Diane (the sales girl) the following day; Hutchinson told Christopherson he did not think she had any intention of telling Diane because she could have told Diane same at the time she told her about the hamburger buns; Hutchinson also told Christopherson that as far as he was concerned she had stolen the Kringle and that she replied that "it was only \$1.00"; and that Hutchinson said that as far as he was concerned it was the same as taking a dollar out of the till and that she was fired; that Christopherson stated she needed her job but Hutchinson said he was sorry and claimed she had also stolen other goods and had been warned on previous occasions; Hutchinson then asked Christopherson to get into his car and told her that he was taking her to the plant and calling the police; but that Christopherson refused to get into the car.

1/ Now known as the Department of Industry, Labor and Human Relations.

8. That Hutchinson returned to the bakery and in passing through the workshop area told Dumas and McLeod that he had fired Nancy for stealing a Kringle; that Hutchinson then called the police and informed them he wanted to file a complaint against an employe caught stealing bakery and requested an officer be sent to his bakery; that police officer Mahaffy visited Hutchinson at the bakery and recorded his complaint; that Mahaffy asked Hutchinson if he wanted Christopherson arrested and that Hutchinson responded that he did not want Christopherson arrested; that Mahaffy then informed Hutchinson that the incident was a civil matter and that if he wanted to prosecute he should contact his attorney; and that at no time did Hutchinson make any statement to employes Dumas or McLeod concerning their union activity.

9. That police officer Mahaffy also visited Christopherson's home and informed Christopherson that he had a complaint from Hutchinson alleging that she had stolen some bakery; that Christopherson denied stealing bakery as alleged and claimed that Hutchinson stopped her in the parking lot and threatened to fire her for union activity; that police officer Mahaffy looked around Christopherson's house but did not find a Kringle; and that officer Mahaffy filed the following report of the incident:

"Officer responded to a theft complaint at Larsen's bakery and spoke with the complainant, and he reported that an employee of his, MRS. CHRISTOPHERSEN, who works from 3 AM to 7 AM had stolen a kringle valued at \$1.05. He reports that he has been having all kinds of trouble with this employee of petty theft in the past few months and today he came to work early to see if she took anything and after she left she had a dozen hamburger buns but he followed her and stopped her at the old North Shore parking lot and she had a Kringle and he reports that this kringle was stolen from his place of business. He was advised that this was a civil matter and if he wanted prosecution he should consult his attorney. He stated that he did not want to prosecute but he would like to terminate the employee.

The officer went to the CHRISTOPHERSEN residence at 912 Chicago St. and spoke with NANCY and her husband and she reports that she did not take this kringel, (sic) that she works at the bakery and they are in the process of forming a union and MR. HUTCHINSON has been trying to get rid of her.

. . ."

10. That on March 2, 1972 Hutchinson received a letter from complainant labor organization over the signature of Robert A. Willms, Business Manager, dated February 29, 1972 wherein Hutchinson was advised that the Union had authorization cards from Respondent's production employes authorizing complainant to enter into collective bargaining agreement for them; that Hutchinson prior to said letter had no knowledge of any union activity by any of his employes.

11. That Respondent discharged Christopherson on March 3, 1972 for stealing a Kringle and not for her union activity in or on behalf of the Complainant.

12. That Respondent's reduction of Dumas' wage rate from \$2.50 to \$2.10 per hour was not motivated by his union activity but rather was due to his poor work performance.

Based upon the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That the Respondent's discharge of Nancy Christopherson on March 3, 1972 was not due to her activities in or on behalf of the complainant and Respondent did not commit and is not committing any unfair labor practices within the meaning of the Wisconsin Employment Peace Act with respect to the termination of the employment of Nancy Christopherson.

2. That Respondent did not threaten employees John Dumas and Gordon McLeod for their union activity in or on behalf of complainant labor organization and the Respondent did not commit and is not committing any unfair labor practices within the meaning of the Wisconsin Employment Peace Act.

3. That Respondent's reduction of John Dumas' wage rate from \$2.50 to \$2.10 per hour was for cause not related to his activities in or on behalf of complainant labor organization and the Respondent did not commit and is not committing any unfair labor practices within the meaning of the Wisconsin Employment Peace Act with respect to said wage reduction.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

The complaint in the above entitled matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 25th day of September, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Union on March 16, 1972, filed a complaint of unfair labor practices alleging that Ernie Hutchinson, d/b/a Larsen Bakery had committed unfair labor practices within the meaning of Section 111.06, Wisconsin Statutes. Specific acts of unfair labor practices alleged were as follows:

1. "On March 3, 1972, Respondent stopped one of said employees in the parking lot, berated her because of her involvement in union activities, threatened to accuse her of theft if she didn't stop her union activities, caused the Racine police to come to her home allegedly because she had stolen bakery products from Respondent and on March 3, 1972 fired her when she refused to resign from Complainant union."

2. "Also on March 3, 1972 Respondent threatened to discharge or other wise harm 2 of the bakers who are members of Complainant union and employed by Respondent."

Prior to said complaint, on March 13, 1972, the Union filed an election and referendum petition with the Wisconsin Employment Relations Commission claiming to represent employees in the collective bargaining unit of "all production, shipping and maintenance employees excluding store clerks and part time school workers", and requesting an election and referendum be conducted among employees employed in said unit. 2/

Ernie Hutchinson, owner of Larsen Bakery, first became aware of the Union's presence on March 2, 1972. On said date Hutchinson received a letter dated February 29, 1972 over the signature of Robert A. Willms, Business Manager of Local #244, wherein the Union advised Hutchinson that they had signed authorization cards from the production employees and that said employees had authorized the Union to enter into a collective bargaining agreement for them.

The following day, March 3, 1972, at approximately 7:00 a.m. Hutchinson reported to work at his bakery shop. As usual one of his first duties was to count Kringles left over from the previous day. Said Kringles were kept on a rack near the rear door and on March 3 Hutchinson counted ten day-old Kringles. At about the same time Nancy Christopherson completed her 2:00 - 7:00 a.m. shift and was leaving work. Christopherson departed work using the rear door and Hutchinson after hearing the rear door slam returned to the back room and discovered one Kringle missing. Hutchinson then went to the front of the store and asked the sales girl, Diane, if Christopherson had purchased a Kringle. Hutchinson was informed that Christopherson had purchased hamburger buns but not a Kringle. The credible evidence establishes that Hutchinson then got in his car and caught Christopherson in a nearby parking lot with a brown bag containing hamburger buns and a white bag containing a Kringle. Hutchinson asked Christopherson if she had bought the Kringle. Christopherson told Hutchinson that she did not buy the Kringle but that she was going to tell Diane the following day. Hutchinson told Christopherson he did not think she had any intention of telling Diane because she could have told Diane

at the same time she told her about the hamburger buns. He further told Christopherson that as far as he was concerned she had stolen the Kringle. She replied that "It was only \$1.00" and Hutchinson said that as far as he was concerned it was the same as taking \$1.00 out of the till and that she was fired.

Hutchinson returned to the bakery and in passing through the work shop area told employees John Dumas and Gordon McLeod that he had just fired Nancy for stealing bakery. He then called the police and informed them he wanted to file a complaint against an employee caught stealing bakery and requested an officer be sent to the bakery. Police officer Mahaffy visited Hutchinson at the bakery at which time Hutchinson reported the incident. Mahaffy then visited Christopherson's home and informed her that he had a complaint from Hutchinson alleging that she had stolen some bakery. Christopherson denied stealing bakery as alleged and claimed that Hutchinson stopped her at a nearby parking lot and threatened to fire her for union activity. Officer Mahaffy looked around the Christopherson's house but found no Kringle.

The Union claims that Christopherson did not steal a Kringle as claimed and that the real reason for her discharge was her union activity. Christopherson testified the following conversation between herself and Hutchinson took place when she was stopped by Hutchinson at the parking lot:

"A He got out and he was sort of pacing up and down and he said "What's this I hear about you joining the Union?" And, I said, "Yes, it's true." He said, "Well, you either get out or I'll fire you." I said, "You can't do that." He said, "Oh, yes I can." He says, "I will have John and Gordy swear you were stealing."

Dumas and McLeod testified that when Hutchinson returned to the bakery after following Christopherson, Hutchinson also threatened action against them for their union activity. Both Dumas and McLeod testified that said threats were made to them in the presence of each other. Hutchinson denies making any threatening statements as alleged.

The record establishes the only union activity Hutchinson was aware of was the claim made by the Union in the above mentioned letter dated February 29 that it was authorized by the Employer's production employees to negotiate a collective bargaining agreement for them. Other than that there is no evidence that Hutchinson had any knowledge of any other union activity by his employees or if in fact Christopherson, Dumas or McLeod signed such a card.

In considering the conflicting testimony outlined above, the Examiner finds it incredulous that Hutchinson would threaten to frame Christopherson because of her union activity and then, a few minutes later, return to the bakery shop and openly threaten to fire two other employees. In other words if Hutchinson, on the one hand, knew he could not discharge Christopherson for her union activity and therefore needed a pretext, in this case stealing, it seems reasonable to conclude he, on the other hand, also knew he could not lawfully threaten action against Dumas and McLeod for their union activity and would not have openly threatened them as alleged.

The Examiner also notes that although Dumas and McLeod testified that they were together when they were threatened by Hutchinson both testified to different versions of the conversation. Dumas testified

that Hutchinson said, "I'm going to get both of you guys too." (P. 25) He further testified that this was their entire conversation.

McLeod in response to a leading question on direct examination testified to the following:

"Q Now, after he finished talking to the Police and before the Policeman came in there, did he say anything to you and John Dumas?

A No, I don't think so.

Q Did he say anything about getting you?

A Yah, he said he was going to get us.

Q When did he say that?

A Right after he had told us about Nancy.

Q And can you remember fairly closely what it was he said?

A Well, he said, "I've got my house and home. I've got everything I own in here." He said, "You're not going to get a Union in here." (P. 32)

The Examiner, based on all of the above and in observing the witnesses' manner of testifying, demeanor, hesitancies and inflections, credits Hutchinson's testimony that he caught Christopherson stealing a Kringle and that she was discharged for said reason and also his testimony that he did not threaten action against Dumas and McLeod for their union activity as alleged.

Viewing the entire record as a whole the undersigned finds that Complainant has failed to establish by a clear and satisfactory preponderance of the evidence that Christopherson was discharged for discriminatory reasons violative of Section 111.06(1)(c) or that Hutchinson threatened employes Dumas or McLeod. The undersigned is convinced that even if there had been no union activity at the time, Christopherson would have been discharged.

Complainant further argues that the Respondent reduced John Dumas' hourly wage rate because of his union activities. Although Complainant did not specifically allege said act in its complaint, Complainant did offer proof concerning same and the issue was fully litigated at the hearing with no objections raised by the Respondent. The Examiner will therefore consider said allegation.

The record establishes that employe John Dumas' work had been deteriorating and that Hutchinson had to speak to him twice concerning same, once in January 1972 and again in February 1972. Hutchinson discussed with Dumas his apparent lack of cooperation and antagonistic attitude toward himself (Hutchinson) and the fact that Dumas' quality of work was deteriorating. During the second meeting Dumas was told that if his attitude persisted and if his quality of work continued to deteriorate he would request the Industrial Commission to transfer his indenture. Hutchinson also discussed said problem with Mr. Wells from the Industrial Commission in late December 1971 and late March 1972. Effective March 5, 1972 Dumas' wage rate was reduced from \$2.50 to \$2.10 per hour. Although no explanation for said reduction was

conveyed to Dumas at the time, Respondent claims it was due to Dumas' poor work performance.

Once again the only union activity Respondent was aware of was the Union's claim that it represented Respondent's production employees. Respondent did not know of any union activity by Dumas or if in fact he was one of the employees that signed an authorization card. While the fact that said wage reduction became effective three days after Hutchinson received Complainant's February 29 letter and was done with no immediate explanation to Dumas is suspicious, this alone is not sufficient to meet the burden of proof required. The undersigned is not convinced by a clear and satisfactory preponderance of the evidence that said wage reduction was for discriminatory reasons violative of Section 111.06(1)(a)(c) of the Wisconsin Employment Peace Act.

Dated at Madison, Wisconsin, this 25th day of September, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Examiner