

3. That in the Spring of 1976, Respondent employed three road department employees, Roy Dobbe, William Thompson, and James Kichak; that these three employees had no particular job classification and they generally performed the same kind of duties; that said duties included the maintenance of equipment, snow plowing, hauling of sand and gravel, patching of roads, erecting snow fences, cutting bushes, etc.; that Dobbe and Thompson were employed for about six years and Kichak was employed for about three years; that neither Dobbe nor Thompson had ever been laid off before 1976; that Kichak had taken time off when work was slack before 1976; that Dobbe was the most senior employee, with Thompson next, and then Kichak.

4. That in the latter part of April 1976, the budget for the road department was passed for 1976-1977; that said budget did not provide for the lay off or termination of any employees; and that there were no discussions regarding possible lay offs or terminations when the budget was being discussed.

5. That on or about May 10, 1976 ^{1/} employees Dobbe, Thompson and Kichak signed union authorization cards on behalf of the Complainant for a bargaining unit consisting of all full-time truck drivers, equipment operators, mechanics, and general laborers in the highway department, but excluding all office clerical employees, supervisors, and guards; and that Dobbe, Thompson, and Kichak then comprised Respondent's entire highway department.

6. That Union business representative Jerome Hansen filed a representation petition for the above-described petition with the Commission on May 13.

7. That by letter dated May 13, Hansen notified Kannenberg that a majority of employees in the above-described unit had selected Complainant to represent them for collective bargaining purposes; and that said letter provided:

"This is to notify you that a majority of your employees in the collective bargaining unit described below have designated Chauffeurs, Teamsters, Warehousemen and Helpers Union Local No. 446, Affiliated with I.B.T.W. and Helpers of America as their collective bargaining representative. In view of such designation, we demand recognition, for purposes of collective bargaining, as the exclusive representative of such employees. The collective bargaining unit in which we demand recognition consists of All full time truck drivers, equipment operators, mechanics, gen. laborers in highway department employed by the Employer at Township of Mercer, Wisc, Mercer, Wisc. excluding all office clerical, supervisors and guards as so defined.

One of our representatives will call on you at your office on Tuesday, May 18, at 4PM for the purpose of negotiating a collective bargaining agreement. If such date is inconvenient for you, please notify us so that another more convenient date can be agreed upon. We are willing to permit a neutral person to check our authorization cards at the time of such meeting for the purpose of verifying our majority status.

In the event of any discrimination against any of your employees because of their union activities or in the event of your refusal to bargain with us, we will take prompt action to remedy such discrimination or refusal to bargain."

1/ Unless otherwise noted, all dates hereinafter refer to 1976.

8. That Kannenberg and Gray were aware of the contents of said letter by May 17; and that it is unclear as to whether Sier was also aware of said letter by May 17.

9. That on May 17, Kannenberg, Gray, and Sier notified Thompson and Kichak that they were being laid off "due to economic conditions of the Town," that business representative Hansen thereafter contacted Kannenberg and protested the lay offs; and that Respondent on May 20 reinstated Thompson and Kichak, but at a reduced work week.

10. That Hansen subsequently demanded to meet with Respondent on June 17 regarding the Union's demand for recognition; that on June 17 Hansen visited Respondent's Town Hall; that Hansen then learned that Thompson and Kichak had been terminated; that Respondent's Town Board decided to terminate them on the morning of June 17; that Hansen on June 17 was told by Respondent's attorney, Alex Raineri, "there was only one employe left and he was a foreman and that since there was only one employe left there was no need for the Union"; that Respondent at that time refused to recognize the Union; that Thompson and Kichak were permanently terminated on June 17, that the minutes of the June 17 Town Board meeting provided, inter alia, that "any workers employed in the past for the town and now on lay off be notified of their permanent termination"; and that this marked the first time that Respondent had discussed the permanent termination of said employes.

11. That some members of Respondent's Town Board had discussed laying off road department employes before June 17; that the Board members apparently discussed this issue among themselves as early as 1975; that the employes were told in April 1976 that they might be laid off; that the Town Board on May 5 discussed the road department; that the minutes of said meeting stated that Chairman Kannenberg was authorized "to look into the possibility of using more of the County's equipment instead of worn-out town's equipment, and the possibility of lay off of the town's employes to cut down on costs"; and that at that time Respondent's Town Board was unaware of any Union organizational campaign.

12. That subsequent to May 5, Respondent made no effort to contact Iron County, the County involved, regarding the possibility of using the County's equipment; and that but for snow removal, Respondent did not contact anyone else regarding the cost of subcontracting out work; that even for snow removal, Respondent had no concrete data as to whether it would be cheaper to subcontract out that work; and that despite the terminations herein, Respondent retained all of its equipment.

13. That Thompson and Kichak were both advised by letter dated June 17, 1976, that:

"Due to the new policies put into effect by the Town Board of Supervisors, your employment with the Town of Mercer is hereby terminated as of this date.

We thank you for your past work with the Town of Mercer.";

that Kannenberg at the hearing testified that that letter was incorrectly worded in that it should have stated that Thompson and Kichak had been terminated as permanent employes; that Kannenberg added that it was possible that both Thompson and Kichak might be called back when work became available; that Kannenberg stated that work would become available because Dobbe would not be able to perform it all and that there would be three or four months' work for Thompson and/or Kichak for the remainder of 1976; that Gray initially testified that Thompson and Kichak were permanently severed as of June 17; that throughout his testimony Gray intimated that there would be no work for Thompson and Kichak in the future, because supposedly there is

much less road department work than before; and that Gray asserted that "The work isn't available - we're getting by without it;" and that Respondent's witnesses have given shifting and pretextual reasons regarding the terminations.

15. That Respondent in the Summer of 1976 also laid off two federally funded employees, the time of which is unclear.

16. That on or about June 15, Respondent granted foreman Dobbe a 15 cents an hour raise, retroactive to on or about April 8, when Dobbe succeeded Thompson as foreman of the road department; that when Respondent made Dobbe a foreman on April 8, it did not then promise him a wage increase; and that Thompson, the former foreman, had not received a wage differential for being foreman.

17. That Respondent at the instant hearing voluntarily recognized Complainant, effective as of that date, for the above-described collective bargaining unit on the basis of signed union authorization cards.

18. That Respondent discriminatorily terminated Thompson and Kichak in part because of their Union activities.

19. That Respondent refused to bargain with Complainant regarding its grant of a wage increase to Dobbe.

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

CONCLUSIONS OF LAW

1. That Respondent discriminatorily laid off and/or terminated employees William Thompson and James Kichak in part because of their union activities and that such conduct constitutes a prohibited practice within the meaning of Section 111.70(3)(a)1 and 3 of MERA.

2. That Respondent unlawfully refused to bargain with Complainant regarding its granting of a wage increase to Roy Dobbe, in violation of Section 111.70(3)(a)1 of MERA.

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

ORDER

IT IS ORDERED that Respondent, Town of Mercer, its officers and agents shall immediately:

1. Cease and desist from discriminating against William Thompson and James Kichak, or any other employees, because of their union activities on behalf of Chauffeurs, Teamsters, Warehousemen and Helpers Union, Local No. 446, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

2. Cease and desist from granting any wage increase to unit employees, unless it first bargains over said increases with Chauffeurs, Teamsters, Warehousemen and Helpers Union, Local No. 446, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

3. Take the following affirmative action which the undersigned finds will effectuate the purposes of MERA:

(a) Immediately offer reinstatement to William Thompson and James Kichak to their former positions without prejudice

to their seniority and other rights which they may enjoy and make them whole by paying them a sum of money equal to that which they would have earned or received, including all benefits, less any amount of money that they earned or received that they otherwise would not have earned or received, but for their terminations.

- (b) Notify all employees, by posting in conspicuous places in its offices where employees are employed, copies of the notice attached hereto and marked "Appendix A". That notice shall be signed by Respondent, and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by Respondents to ensure that said notices are not altered, defaced or covered by other material.
- (c) Notify the Wisconsin Employment Relations Commission, in writing within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 2nd day of March, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Complainant asserts that Respondent committed prohibited practices by: (1) discriminatorily terminating employees Thompson and Kichak; and (2) granting a wage increase to Dobbe after Complainant had demanded recognition as the collective bargaining representative of the petitioned-for employees.

Respondent denies the complaint allegations. It argues that the decision to terminate Thompson and Kichak was based on economic considerations and that the decision was unrelated to the Union's organizing drive. As to Dobbe's wage increase, Respondent contends that he was given the increase because he was given more duties after his elevation to foreman on or about April 8.

In resolving these issues, the undersigned has been presented with some conflicting testimony regarding certain material facts. Accordingly, it has been necessary to make credibility findings, based in part on such factors as the demeanor of the witnesses, material inconsistencies, and inherent probability of testimony, as well as the totality of the evidence. In this regard, it should be noted that any failure to completely detail all conflicts in the evidence does not mean that such conflicting evidence has not been considered: it has.

Turning to the first issue, the record establishes that the Employer in fact had discussed laying off employees before the Union's organizational campaign. For, as noted in the above Findings of Fact, the record shows that the question of lay off was raised in 1975 among the members of Respondent's Town Board. Thereafter, some members of the Town Board discussed the possibility of lay offs with at least some of the employees in the Spring of 1976. Respondent's Town Board subsequently considered this possibility on May 5, before the Complainant appeared on the scene.

Since Respondent therefore had discussed a possible lay off well before the Union appeared on the scene, it would appear that the June 17 terminations were not based on anti-union considerations. If that were all that there were in this case, the case would be a simple one. But, there is more.

Thus, the penultimate question herein is not whether Respondent had a valid reason for terminating Thompson and Kichak. Rather, the real issue here is whether Respondent in fact terminated those employees for that reason or whether, instead, Respondent's decision to terminate was affected at least in part by discriminatorily related union considerations. This point has been expressly noted by the Wisconsin Supreme Court in Muskego-Norway Consolidated Schools v. Wisconsin Employment Relations Board, 35 Wis. 2d. 540 (1967), wherein the Court noted:

"An employee may not be fired when one of the motivating factors is his union activities, no matter how many other valid reasons exist for firing him."

Moreover, it is well established that the search for motive at times is very difficult, since oftentimes direct evidence is not available. For, as noted in a leading case of this subject, Shattuck Denn Mining Corp. v. NLRB, 362 F. 2d. 466, 470 (C.A. 9, 1966):

"Actual motive, a state of mind being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive

Appendix "A"

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employees that:

WE WILL NOT discriminate against William Thompson and James Kichak, or any other employees because of their union activities.

WE WILL offer immediate reinstatement to William Thompson and James Kichak to their former positions and we shall make them whole.

WE WILL NOT refuse to bargain with the Union regarding wage increases.

Dated this ____ day of _____, 1977

By _____
Town of Mercer

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE
HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

from the total circumstances proved. Otherwise, no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book."

Here, Thompson, Kichak and Dobbe all signed union authorization cards on May 10 and the Union thereafter demanded recognition on May 13. Town Board members Kannenberg and Gray testified that they knew of the Union's demand for recognition before they laid off Thompson and Kichak on May 17. However, there is no evidence that either Kannenberg or Gray knew which employees had signed union authorization cards. As a result, the record shows that while Respondent did not know who had signed cards before May 17, it did have general knowledge that a union was on the scene. The same is true as of June 17 when Respondent terminated Thompson and Kichak.

Furthermore, Respondent terminated and/or laid off Thompson and Kichak immediately before the Union demanded recognition. Since Respondent had talked, and merely talked, of laying off employees for such a considerable period of time, the question immediately arises as to why Respondent only acted after the Union had reared its head on the scene?

If Respondent had acted in that way once, it could be chalked up to perhaps mere coincidence. Yet here, this happened not once, but twice. Thus, the Complainant by letter dated May 13 stated that it would be demanding recognition on May 18. However, one day before that May 18 meeting was to occur, Respondent laid off Thompson and Kichak on May 17. Later, the Union through business agent Hansen, arranged to meet with Respondent on the afternoon of June 17, at which time Hansen again intended to ask for recognition. Yet, when Hansen appeared at the Town Hall on the afternoon of June 17, he was then told that Respondent had decided that very morning to terminate Thompson and Kichak, effective immediately.

At the hearing, Respondent offered absolutely no justification as to why it had to decide on either May 17 or June 17 regarding the fate of the two affected employees. Absent such justification, it is inherently implausible to believe that the decisions to lay off and/or terminate were not influenced by the fact that the Union was then demanding recognition.

Indeed, this is reflected by Attorney Raineri's statement to Hansen on June 17 that:

"since there was only one employe left there was no need for the Union."

Raineri's statement is an incorrect statement of the law. Nonetheless, this remark is significant as it was the reason which Raineri gave for declining recognition on June 17. Accordingly, Respondent, through Raineri, must have believed that their troubles with the Union would disappear once Thompson and Kichak had been terminated.

That this was one of the reasons underlying their discharges is evident through other evidence which shows that Respondent's June 17 discharge decision was hastily made in a factual vacuum. In this connection, the May 5 Town Board minutes show that Kannenberg was directed to

"Look into the possibility of using more of the County's equipment, and the possibility of lay off of the Town's employees to cut down on costs."

It is fairly clear, then, that the possibility of lay offs was coupled with receiving information regarding increased use of County equipment.

For, if County equipment could not be utilized more frequently, it probably would have been necessary to use Town equipment and Town employees to perform requisite tasks. Thus, the decision to lay off was inextricably tied into receiving information from the County. Yet, as of the instant hearing, Respondent had not received this crucial information. Furthermore, Respondent has not offered any plausible reason as to why it did not seek such information before it decided to terminate Thompson and Kichak on June 17. In such circumstances, it can be inferred, and I so find, that Respondent terminated Thompson and Kichak at a time when it admittedly lacked certain critical information.

Similarly, the record shows that Respondent's own witnesses disagree among themselves over the nature of the terminations and whether work will be available for Thompson and Kichak in the future. Gray for example intimated that the terminations were permanent and that Dobbe would be able to adequately run the department. Kannenberg, the Chairman of the Town Board, had a contrary view. He stated that Thompson and Kichak had not been terminated and that the June 17 termination letter incorrectly stated that they had been terminated. In fact, said Kannenberg, the men had only been laid off. Going on, Kannenberg added that Dobbe could not run the road department by himself and that Thompson and/or Kichak would have to be recalled for three or four months for the remainder of 1976.

Based upon the totality of the record, the Examiner finds, in accordance with Kannenberg's testimony, that work will be available for Thompson and Kichak in the future. 2/ In so finding, the Examiner first notes that Kannenberg has been on the Town Board for a much longer period than Gray and that, apparently because of that experience, Kannenberg was the much more knowledgeable of the two regarding the operations of the road department. Furthermore, based upon an analysis of the composite testimony of the various witnesses, including that of Thompson and Kichak, the record indicates that Dobbe will not be able to perform all of the required road department duties in the future. Instead, and as noted by Kannenberg, Respondent will probably have to hire additional help in the future. That being so, it is readily apparent that Respondent did not have grounds to permanently terminate Thompson and Kichak on June 17, as there is a substantial likelihood that they will be recalled, at least on a temporary basis. Yet, despite that fact, Respondent chose to terminate Thompson and Kichak on June 17, only hours before the Union was to demand recognition. It must therefore be concluded that the June 17 termination notice was inaccurate and hastily drawn up, as the record in fact fails to show that their terminations were justifiable.

In this same connection, it is most significant that June 17 marked the first time that Respondent ever discussed the possibility of terminating any employees. Thus, the record clearly shows that Kannenberg, Gray, and Sier before that date had merely discussed the possibility of laying off employees, 3/ as opposed to permanently terminating them. Yet, despite that fact, Respondent notified Thompson and Gray on June 17 that they had been terminated, without giving them any indication that work might be available for them in the future. The June 17 termination notice was sent pursuant to the

2/ Subsequent to the hearing, Respondent forwarded to the Examiner an ex parte communication regarding the availability of work for Thompson and Kichak. Since that communication did not constitute evidence, it is not properly a matter in this proceeding. Accordingly, the Examiner has given it no consideration.

3/ TR. 60, 64, 81, 93, 102, and 120.

June 17 Town Board minutes which stated that "any workers in the past for the town and now on lay off (i.e., Thompson and Kichak) be notified of their permanent termination." Respondent here has offered no plausible justification as to why it suddenly decided to permanently terminate Thompson and Kichak shortly before the Union was to demand recognition.

Furthermore, the Examiner notes that there are certain major internal inconsistencies in the testimony adduced by Respondent's witnesses. Gray, for example, initially indicated that Thompson and Kichak were in part terminated because of the increasing cost of repairing road equipment. 4/ Later on in his testimony, however, Gray admitted that he had never seen the repair bill to ascertain whether the cost of repairs had increased. 5/ In fact, it appears that the repair bill for the last two years has remained about the same, 6/ which is consistent with the credited testimony of Thompson and Kichak to the effect that the condition of the road equipment was about the same. Furthermore, since Respondent has retained all of its equipment, it is somewhat difficult to see how Respondent can significantly cut down on its repair bill, particularly where, as here, it appears that that equipment will be utilized in the future. Moreover, Gray asserted that when the Town Board decided to reinstate Thompson and Kichak on May 20, that the Board then was "almost certain that there would be further reduction yes." This testimony, however, was not corroborated by either Kannenberg or Sier, both of whom testified. In fact, Kannenberg indicated that Thompson and Kichak were reinstated in response to the Union's plea, and he gave absolutely no indication that the Town Board on May 20 believed that further reductions were in order. Similarly, Gray testified that Kannenberg told Dobbe on April 8 that he would be laid off if he did not assume the foreman's job. Again, neither Kannenberg nor Sier corroborated this specific allegation. Gray also claimed that the Town Board told the employees in January 1976 that they would be laid off in the Spring. 7/ Sier, on the other hand, testified that it was not until April, 1976 that the Town Board first told the employees of a possible lay off. 8/ Absent corroboration from either Kannenberg or Sier, the Examiner is therefore unable to credit much of Gray's testimony.

In review, why then did Respondent act so hastily on June 17, at a time when it admittedly lacked certain crucial information from the County, and why did it then state that Thompson and Kichak had been terminated, when according to Kannenberg they had only been laid off? Furthermore, why did Gray and Kannenberg offer such diametrically contradictory testimony on this issue? Additionally, why did Respondent decide on June 17 to permanently terminate Thompson and Kichak, when before that time it had merely discussed laying them off? And, why is it that much of Gray's testimony is uncorroborated by fellow Town Board members?

4/ Transcript (TR) 66-67, 89.

5/ TR. 88.

6/ TR. 87.

7/ TR. 93.

8/ TR. 102.

Here, the record shows that Respondent generally knew of the Union's organizing drive before it terminated Thompson and Kichak, both of whom had signed union authorization cards. Furthermore while Respondent for five months had toyed with the idea of laying off some employees before the Union appeared, Respondent twice laid off and/or terminated these employees immediately before the Union demanded recognition. Moreover, Respondent has offered no explanation as to why it made those two decisions on the two days that it did. Additionally, it is most significant that Respondent declined recognition on June 17 on the ground that only one employee was left in the petitioned-for bargaining unit. Since Respondent itself had engineered that situation by virtue of its hasty terminations of Thompson and Kichak only hours earlier, the Examiner finds, based upon the totality of the foregoing factors, particularly the precipitous timing of the terminations, that Respondent decided to lay them off and/or to terminate them in the hope that that would defeat the Union's organizing drive. Accordingly, it must be concluded that Respondent discriminatorily laid off and/or terminated Thompson and Kichak in part because of discriminatorily related Union considerations in violation of Section 111.70(3)(a)3 of MERA. 9/ To rectify that conduct, Respondent shall take the remedial action noted above.

Turning to the second issue herein, it is undisputed that Respondent on or about June 10 gave Dobbe a fifteen cents an hour wage increase retroactive to April 8, when Dobbe became foreman. Respondent gave that increase despite the fact that the road department foreman never before received such a wage differential and despite the fact that Respondent said nothing about a wage increase to Dobbe when it made him a foreman. Since this benefit was not automatically provided for, and because the Union's representation petition was then pending with the Commission, Respondent was precluded from granting such a unilateral increase. 10/ By doing so, Respondent thereby violated Section 111.70(3)(a)1 of MERA. As a remedy, Respondent shall take the action noted above.

Dated at Madison, Wisconsin this 2nd day of March, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Amedeo Greco

Amedeo Greco, Examiner

9/ In so finding, the Examiner is aware that Respondent voluntarily granted recognition to the Union at the instant hearing. This factor can be interpreted to mean that Respondent bore no ill will against the Union. On the other hand, it can just as easily be argued that Respondent belatedly granted recognition in the hopes that that voluntary grant of recognition would cover up its true motivation in terminating Thompson and Kichak. Indeed, Respondent has offered no explanation as to why it declined recognition on June 17 and then later agreed to such recognition. Because the grant of recognition can be viewed in such different lights, and since the case herein turns on Respondent's earlier motivation in terminating Thompson and Kichak, Respondent's actions at the hearing two months later are not dispositive of the issues herein.

10/ Dane County, (11622-A) 10/73.