

EVCO PLASTICS and LOCAL NO. 1406 OF
THE INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO,

Petitioner,

v.

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION,

Respondent.

MEMORANDUM DECISION

Case Nos. 82-CV-414 &
82-CV-457

Decision No. 16548-D

This is a consolidated action to review a decision and order of the Wisconsin Employment Relations Commission ("WERC"), dated December 28, 1981. In that decision, the WERC held that Evco Plastics ("Evco") had violated the terms of its January, 1978, Strike Settlement Agreement ("SSA") with Local No. 1406 of the International Association of Machinists and Aerospace Workers ("Union"), by failing to recall certain striking employees to jobs for which they were qualified. Both Evco and the Union find fault with certain portions of the decision.

The petitioners have presented four issues to this Court: (1) whether the WERC had jurisdiction over the dispute between Evco and the Union; (2) whether it erred in concluding that Evco's actions constituted a violation of the SSA; (3) whether it erred in its determination of the date on which the SSA became effective; and (4) whether it erred in concluding that Evco was not in violation of the SSA with respect to its failure to rehire Paul Kozlowski.

I. WERC JURISDICTION

Whether the WERC had jurisdiction over the instant dispute depends on whether the SSA was a "collective bargaining agreement". Sec. 111.06(1)(f),

Wis. Stats. This, in turn, depends on whether the provisions of the SSA may be characterized as related to "terms and conditions of employment". Sec. 111.02(5), Wis. Stats. Evco contends that the SSA may not be so characterized, and that as a result the WERC was without jurisdiction. This Court disagrees.

The SSA prescribes the procedure by which Evco was to re-hire striking employees following the settlement of a 1977 strike. Thus, it declares terms by which employment was to occur. In the opinion of this Court, there is no plausible rationale for characterizing such an agreement as other than one relating to "terms and conditions of employment". The WERC did have jurisdiction.

II. WHETHER EVCO VIOLATED THE SSA

There appears to be no dispute that Evco hired some 40 new employees between January 23 and September 11, 1978. There also appears to be no dispute that these jobs were not offered to striking employees even though they were qualified to perform them. Evco, however, claims that it was justified in doing this because none of the jobs was listed as a preference by any of the strikers. It contends that its obligation to re-hire the strikers did not extend to any work which a given employee was qualified to do, but rather extended only to work listed as a preference by the employee.

This contention is specious. There is no support in the SSA itself, the labor agreement, or the NLRA for the proposition that Evco's duty to re-hire was limited to jobs for which the employee expressed a preference. In addition, there is nothing in the January 23, 1978, letter from Evco to its striking employees which would let the employees know that by indicating a job preference, as they were asked to do in the letter, they would be rendering themselves ineligible for any other work.

The asserted limitation on Evco's duty to re-hire appears to have been made up out of whole cloth. Properly construed, the SSA obliged Evco to make a good faith effort to re-hire its striking employees when any job for which

the employee was qualified became available. In the opinion of this Court, the WERC was quite justified in concluding that Evco's failure to do so constituted a breach of the SSA.

III. THE EFFECTIVE DATE OF THE SSA

The Union asserts that the hearing examiner and the WERC erred in finding that the SSA became effective on January 17 or 23, 1978. It contends that the SSA actually became effective on January 7, the date it was signed by a representative of the Union. Evco argues that since this objection was not presented to the WERC, it may not be made now. Evco relies on sec. 111.07(7), Wis. Stats., which provides in pertinent part:

"No objection that has not been urged before the Commission shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

Although there appears to be no dispute that it failed to raise this issue before the WERC, the Union argues that it is properly before the Court because it is subsumed in the question of whether Evco violated the SSA. This is not correct. The finding that Evco violated the SSA is in no way contingent on a finding that January 7 was its effective date. Irrespective of whether January 7, 17, or 23, 1978, is determined to be the effective date of the SSA, a finding that Evco violated it would still be required.

The Union is quite correct that a proper determination of the SSA's effective date "is necessary to determine the extent of the Employer's backpay liability".¹ However, this argument begs the question. The point is that if the Union was not satisfied with the examiner's determination of the extent of Evco's backpay liability, it was required by sec. 111.07(7), Wis. Stats., to present its objection to the WERC. Since it did not do so, it may not raise the issue now.

IV. THE FAILURE TO REHIRE PAUL KOZLOWSKI

Evco hired Paul Kozlowski in 1973 as a mold maker. In late 1974, he was laid off, and was eventually recalled to another job as a machinist. He then

¹May 20, 1983 Reply Brief, at p. 1.

worked as a machinist until the Union went on strike in June, 1977. In May, 1978, a position as a mold maker became available, but was not offered to Kozlowski. The WERC held that this was not a violation of the SSA because:

"The only reference in the record as to Kozlowski's qualifications to perform duties as a moldmaker was the fact that he was originally employed in such classification. However, he was employed as a machinist from February, 1975 to June 4, 1977, on which date he went on strike. Under such circumstances we conclude that the Company had no obligation to offer him the moldmaker position when it became available in May, 1978." WERC Findings and Conclusions, at p. 13.

The Union contends that the WERC's finding in this regard was error. This Court agrees. No evidence whatsoever was presented to the WERC to indicate that Mr. Kozlowski's work as a machinist had somehow rendered him unqualified to work as a mold maker. On the contrary, Kozlowski's testimony that he had worked "for years" as a mold maker in Illinois was uncontroverted. Tr., at p. 46. Without more, his classification as a machinist immediately prior to the strike was proof of nothing concerning his qualifications as a mold maker.

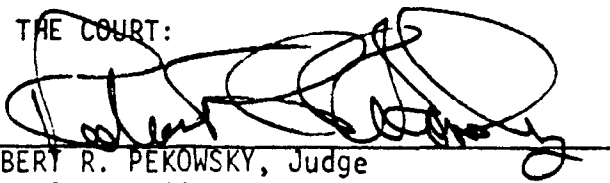
The WERC also erred in failing to consider whether Kozlowski was qualified for any of the other positions filled by Evco between January and September, 1978. As it appears to have recognized with respect to the other striking employees, the availability of any particular position during that period was not significant. The issue was whether any position was available for which a given employee was qualified. Consequently, the Court must conclude that the WERC's findings with respect to Paul Kozlowski should be set aside, and this matter remanded to the WERC for further proceedings consistent with this opinion.

The decision and order of the WERC dated December 28, 1981, is, therefore, affirmed in all respects except as it relates to Paul Kozlowski. Counsel for the WERC shall draft an order consistent with this Memorandum Decision.

Dated this 11th day of July, 1983

cc: Atty. William Haus
Atty. Paul H. Hahn
Asst. Atty. Gen. David Rice

BY THE COURT:


ROBERT R. PEKOWSKY, Judge
Dane County Circuit Court, Branch 5