

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

UNITED BROTHERHOOD OF CARPENTERS	:	
& JOINERS OF AMERICA,	:	
	:	
Complainant,	:	Case II
	:	No. 26729 Ce-1879
vs.	:	Decision No. 18160-A
	:	
SPILEDE CONSTRUCTION, INC. <u>1/</u>	:	
	:	
Respondent.	:	
	:	

Appearances:

Mr. Thomas D. Hohman, C. H. O. P. Organizer, United Brotherhood of Carpenters & Joiners of America, 1602 South Park Street, Madison, Wisconsin 53715, on behalf of the Union.
Kuehling & Kuehling, Attorneys at Law, by Mr. Robert W. Kuehling, 131 West Wilson Street, Madison, Wisconsin 53703, on behalf of the Company.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

AMEDEO GRECO, HEARING EXAMINER: United Brotherhood of Carpenters & Joiners of America, herein Complainant or Union, filed the instant complaint on September 4, 1980 and amended complaints on October 2, 1980, and November 21, 1980, with the Wisconsin Employment Relations Commission, herein Commission, wherein it alleged that Spilde Construction, Inc., herein Respondent, had committed certain unfair labor practices under the Wisconsin Employment Peace Act, herein WEPA. On October 17, 1980 the Commission appointed the undersigned to make and issue Findings of Fact, Conclusions of Law and Order, as provided for in Section 111.07(5) Stats. Hearing on said matter was held in Madison, Wisconsin on December 30, 1980. The parties thereafter filed briefs and Complainant filed a reply brief. Having considered the arguments and the evidence, the Examiner makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainant labor organization has its principal offices at 1602 South Park Street, Madison, Wisconsin 53715. At all times material herein, William Barreau, Robert Risky, and Thomas Hohman have served as business representatives for Complainant.
2. Respondent, which is engaged in intrastate commerce, operates a construction business from its offices at 2599 West Star Road, Route 1, Cottage Grove, Wisconsin, 53527. At all times material herein, Steven Spilde has served as Respondent's President and has acted as its agent.
3. Respondent's employes are not represented by any union. In the Spring of 1980, Respondent employed three full time employes - William Christoph, Robert Severson, and Walter Ninneman. Christoph was hired on July 7, 1979, at \$4.00 per hour. Thereafter, he received the following wage increases:

<u>Date</u>	<u>Raise</u>	<u>New Wage</u>
8/03/79	.25	4.50
11/09/79	.25	4.75 <u>2/</u>

1/ Respondent's name was corrected at the hearing.
2/ It is unclear whether Christoph also received a twenty five (25) cents raise on January 11, 1981.

Severson was initially hired in August, 1977, at \$6.00 per hour. Thereafter he apparently received wage increases of either 25 cents or 50 cents on several occasions. The record is silent as to when Ninneman was initially hired and whether he thereafter received any wage increases.

4. In the Spring of 1980, Severson met with Spilde and discussed a possible future wage increase. Spilde brought up the subject and told Severson that he would grant a wage increase in the future. However, Spilde then neither indicated what the exact amount of the increase would be nor when it would be granted. Spilde at that time had no such similar conversation with Christoph.

5. On May 2, 1980, business representative Risky met with Christoph, Severson, and Ninneman about joining a union. All three employes that day signed union authorization cards which in part provided:

AUTHORIZATION CARD

UBC

A.F.L. - C.I.O

UBC

"I hereby authorize the UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA to act as my collective bargaining agent in dealing with my employer in regard to wages, hours and other conditions of employment. All previous authorizations made by me are revoked. . . ."

Later on in the month, the three employes also signed union membership cards at the Union's monthly meeting. At the same time, each employe paid \$92 for dues and an initiation fee. A fourth employe, John Knutson, who apparently only worked during the summer, also signed a card on July 11, 1980.

6. In the last week of May, Risky and Holman visited Spilde's home and informed him that all of his employes had signed union authorization cards and demanded that Spilde recognize the Union. Spilde refused to look at the authorization cards, refused to recognize the union, and said that he did not want to be a union contractor.

7. On or about June 11, ^{3/} Christoph visited Spilde's home to pick up his pay check. There, Spilde asked Christoph why he had joined the Union. Christoph replied that he had joined because he wanted more money. Spilde then told Christoph that he would be getting a raise, but he neither indicated the amount of the raise nor when it would be granted. On June 18, Spilde gave Christoph a dollar an hour raise. On the same date, Spilde also gave Severson a 75 cents an hour raise. Ninneman, who quit his employment in July, did not receive any wage increase.

8. In the last week in August, union representative Barreau met with Severson and several other employes at a job site. Severson then told Barreau that the employes no longer needed a union to represent the employes because of the wage increases they had received. In a separate telephone conversation at about this time, Severson and Christoph also advised Holman that they had changed their minds and that they did not want the union to represent them.

9. On July 2, Complainant filed a representation petition covering Respondent's employes with the National Labor Relations Board (NLRB), which was subsequently dismissed by the NLRB because Respondent was engaged in intrastate commerce. Complainant thereafter filed a representation petition with the Commission on July 15 and a subsequent hearing on the matter was held before Hearing Officer Sherwood Malamud, on August 4, 1980. Respondent did not attend said hearing. On September 2, the Commission advised the parties that a mail ballot

^{3/} Unless otherwise noted, all dates hereinafter refer to 1980.

election would be sent out on September 4. The Union filed the instant complaint on September 4. On the next day, the Commission indefinitely postponed its scheduled representation election because of the pendency of the instant complaint. On October 2, the Union filed an amended complaint.

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

CONCLUSIONS OF LAW

1. Respondent violated Section 111.06(1)(a) of WEPA when it granted wage increases to Severson and Christoph, as said increases were granted for the purpose of influencing their actions during the Complainant's organizing campaign.

2. Respondent never promised its employees during the representation campaign that it would give them health insurance benefits and, as a result, Respondent thereby did not violate Section 111.06(1)(a) of WEPA.

3. Respondent did not violate Section 111.06(1)(a)5, nor any other section, of WEPA when it refused to recognize and bargain with the Union.

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

ORDER

It is ordered that those parts of the complaint relating to Respondent's alleged refusal to bargain and its alleged promise of health insurance are hereby dismissed.

IT IS FURTHER ORDERED that Respondent, its officers, agents, successors, and assigns shall immediately:

1. Cease and desist from:
 - A. Granting pay increases or any other benefits to employees for the purpose of influencing their vote in any union representation campaign.
2. Take the following affirmative action which will effectuate the policies of the Wisconsin Employment Peace Act:
 - A. Immediately cease and desist from giving pay increases or any other benefits to employees for the purpose of influencing their vote in any union representation campaign.
 - 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 Respondent to insure 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 23rd day of October, 1981.

By Amedeo Greco
Amedeo Greco, Examiner

APPENDIX A

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

WE WILL NOT grant wage increases or any other benefits to employees for the purpose of influencing their vote in any union representation campaign.

By _____
Spilde Construction, Inc.

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

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Complainant alleges that Spilde unlawfully: (1) told employees that he would grant them health insurance benefits; (2) granted pay increases to Severson and Christoph for the purpose of influencing their actions during the union organizing drive; and (3) refused to recognize and bargain with Complainant. As a remedy, Complainant contends that Spilde's extensive unfair labor practices have undermined the union's former majority status, thereby making a fair election impossible. Accordingly, Complainant requests that a remedial bargaining order be issued under Gissel 4/ and several Commission decisions. 5/

Respondent, in turn, denies committing any unfair labor practices and, moreover, it states that any unfair labor practices it may have committed were de minimus in nature and that a remedial bargaining order is unnecessary.

Turning first to the health insurance allegation, the record fails to establish that Spilde ever promised his employees that he would give them health insurance during the course of the Union's campaign. Thus, Spilde denied ever making such a promise and all employees who testified on this issue has similarly denied that any such promise was made. The only possible evidence to the contrary was Holman's assertion that employees had told him that Spilde had promised them health insurance coverage. Absent any corroboration of such hearsay testimony, it must be concluded that Complainant has failed to meet its burden of proof that such a promise was made. As a result, this complaint allegation is dismissed.

We now consider the pay raises Spilde gave to Severson and Christoph during the course of the Union's organizing campaign. Both parties agree that the resolution of this issue hinges on whether Spilde would have granted such increases to these employees irrespective of whether the union campaign was under way. In other words, were the two wage increases granted to influence the employees' free choice during the organizing campaign or, instead, were the raises promised ahead of time and granted with no eye to influencing that campaign?

In this connection, it is clear under both Commission 6/ and NLRB cases law 7/ that an employer acts unlawfully if it announces a pay increase or withholds one for the purpose of influencing an ongoing representation campaign. This rule, however, is easier to state than to apply as an employer who wishes to influence an election will rarely say so. As a result, an employer's denial of its motives must be determined by weighing the credibility of its denial against the attendant facts and circumstances.

Here, the record shows that Christoph received 25 cents an hour increases on August 3, 1979 and November 9, 1979. There is a dispute, however, as to whether Christoph received another 25 cents an hour

4/ NLRB v. Gissel Packing Co., 71 LRRM 2481.

5/ Chuck Wagon Industrial Catering Service (7093-B) 8/66, (aff. Milw. Co. Cir. Ct., 2/68); Colonial Restaurants, Inc., (7604-C) 1/67; and Tony's Pizza Pit (8405-B) 10/68.

6/ See, for example, Kress Packing Co., Inc., Decision No. 5580 (8/60); Rice Grocery Co., Decision No. 5632 (11/60); Portage Stop N' Shop, Decision No. 7037 (2/65).

7/ See, for example, NLRB v. Exchange Parts Co., 375 U.S. 405, 409, 84 S. Ct., 457, 55 LRRM 209P (1964).

increase on January 11, 1980, with Spilde asserting that that raise was given, and Christoph denying that he received such a raise. In the absent of any corroborative testimony to support either claim, it is impossible upon the basis of the instant record to resolve this testimonial conflict. The record is also unclear regarding the nature of Severson's past raises. He testified that he received three raises of 25 cents each and that he subsequently received a 50 cents raise in January 1979 and a 75 cent raise in June, 1980. Spilde, on the other hand, asserted that he gave Severson a 50 cent raise on November 18, 1977, and that he subsequently gave 25 cent raises on March 9, 1979, November 24, 1980, and January 11, 1980. Spilde did agree that he gave Severson 75 cents raise in June 18, 1980.

While there is a dispute as to the timing and exact amounts of past increases to Severson and Christoph, the record nonetheless does show that Spilde continually granted wage increases of either 25 or 50 cents in the past, albeit at different intervals. It is the intermitant nature of those raises which forms the basis of the instant dispute. For, since past raises were not automatically given at fixed times during the year, how can we decide whether the raises in June, 1980, would have been granted but for the Union's presence, especially when it is remembered that the increases given in June were greater than any past increases?

On this matter, Severson testified that he first spoke to Spilde about a raise in April or May, and that Spilde then promised him a raise. However, it is undisputed that Spilde then did not indicate when the raise would be given or what amount it would be. Absent any such explanation, this history is therefore unconvulsive, as Spilde may or may not have given the subsequent June raise to Severson pursuant to their earlier understanding.

As to Christoph's raise, Christoph testified that he visited Spilde's house on June 11 to pick up his pay check. There, Spilde asked him why he had joined the Union. 8/ Christoph replied that he joined because he wanted a wage increase. Spilde said that he would take care of that by giving Christoph a wage increase, the amount of which was not discussed. It is therefore clear that Spilde granted the subsequent dollar an hour raise to Christoph on June 18 only because Christoph on June 11 had told Spilde that it was the wage issue which drove him to the Union. Since, as noted above, an employer cannot grant a wage increase when its purpose is to influence the outcome of a union representation campaign, Spilde's action was therefore violative of Section 111.06(1)(a) of WEPA. 9/

It is in this context - which shows that Spilde's raise to Christoph was unlawfully motivated - that we must consider Spilde's motive in giving Severson a 75 cents raise on June 18. Although Spilde asserted that the latter raise was given only because of

8/ Since Complainant neither alleged nor argued that this exchange constituted unlawful interogation, it is unnecessary to rule upon this issue.

9/ Spilde testified that he had an earlier discussion with Christoph in the Spring of 1980 regarding a possible wage increase. Christoph, on the other hand, denied that any such conversation occurred. Since Christoph had no reason to shade his testimony on this point, his testimony is credited.

legitimate business reasons, 10/ this claim must be discredited, as it is simply too implausible to believe that Spilde had purged himself of the improper motivation which dictated his raise to Christoph only one week earlier. Rather, it is much more likely that Spilde granted the second raise for the very same reason he granted the first one to Christoph - i.e. to defeat the union's representation campaign. Accordingly, it follows that Spilde's grant of a wage increase to Severson was also violative of Section 111.07(a)(1) of WEPA. 11/

Turning now to the refusal to bargain allegation, Complainant claims that Spilde unlawfully refused to recognize and bargain with it when Risky and Holman met with Spilde and there told him that a majority of employes had signed union authorization cards. In fact, and contrary to Complainant's contention, an employe is not required to recognize and bargain with a union when it has been presented with union authorization cards, as the law imposes no requirement that an employer even look at the cards. This complaint allegation is therefore dismissed.

This brings us to the question of remedy. As noted above, Complainant seeks a bargaining order because, in its view, Respondent's unfair labor practices have made it impossible to conduct a free election. In this connection, Complainant argues that Respondent's unfair labor practices have had a particularly devastating effect on the small three (3) man unit herein. In support of its request for a bargaining order, the Union cites numerous Commission and NLRB cases where such orders have been granted. However, a close reading of those cases establishes that they are not really controlling, as they all involve substantial employer misconduct which, unlike here, was not limited to the granting of wage increases.

Absent any clear Commission precedent, this case therefore turns on whether the wage increases herein alone were of such a nature as to render impossible the holding of a full and fair election.

On this point, there is no question but that employes herein joined the Union because they wanted wage increases and that they thereafter withdrew their union support because Spilde had granted increases to Severson and Christoph. As a result, it is clear that Spilde's misconduct did affect the Union's election campaign. On the other hand, however, it is also true that Spilde told Severson in the Spring of 1980 that he would be receiving a wage increase. Accordingly, even though Spilde acted unlawfully in granting the wage increases when he did, it is also true that Severson expected a wage increase sometime in 1980.

10/ The record does show, as contended by Respondent, that Spilde's business experienced a substantial pickup in the summer of 1980 and that, as a result, he was then able to grant wage increases to his regular employes. That question, however, is a separate question of whether Spilde granted the wage increases in question when he did for the purpose of undermining the union organizing drive then underway. Furthermore, although Spilde asserted at the hearing that he gave Christoph a wage increase because Christoph's duties had changed with respect to installing styrofoam, the record fails to show that such duties in fact require greater skills.

11/ At the hearing, Holman testified that Spilde once told him that he, Spilde, had granted the wage increases in issue in order to defeat the Union's organizing drive. In light of Spilde's denial that he ever made this statement, and because it is implausible that any employer would ever make such an admission, even if it were true, I am unable to find that Spilde made this admission.

Although a close question, 12/ I conclude that the unique facts of this case - which at least show that Severson was promised a raise before the Union appeared on the scene - do not warrant the imposition of a remedial bargaining order, as Spilde's unlawful conduct is not so egregious as to render impossible the holding of a fair representation election. Such a conclusion is consistent with numerous NLRB cases which have denied the issuance of bargaining orders in the face of an employer's isolated misconduct. 13/ Rather, Respondent shall only be ordered to undertake the remedial action noted in the Order. Furthermore, if Complainant still wishes to represent the employees herein, it is free to seek an election in that unit in the companion representation case which has been held in abeyance pending resolution of the case herein.

Dated at Madison, Wisconsin this 23rd day of October, 1981.

By Amedeo Greco
Amedeo Greco, Examiner

12/ In resolving this issue, it is immaterial that both Severson and Christoph testified that their wage increases would not influence their votes in a representation election, since the Supreme Court noted in Gissel, supra, that:

"We also accept the observation that employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union."

That is especially so regarding Christoph's denials, since he is now engaged in a business relationship with Spilde.

13/ See for example, Rockland Chrysler Plymouth Inc., 209 NLRB 1045; The May Department Stores Company d/b/a The M. O'Neil Company, 211 NLRB 150; Franklin Park Moll Inc., 212 NLRB 21; Abitibi Corporation, 198 NLRB 1249; and Central Diagnostic Laboratory, 206 NLRB 754.