

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LODGE 437, INTERNATIONAL
ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS,
AFL-CIO,

Complainant,

vs.

RACINE COUNTY,

Respondent.

Case LXV
No. 30948 MP-1426
Decision No. 20327-B

Appearances

Goldberg, Previant, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 788 North Jefferson Street, P. O. Box 92099, Milwaukee, Wisconsin 53202, by Mr. Robert E. Gratz, appearing on behalf of the Complainant.
Mr. William R. Halsey, Deputy Corporation Counsel, Racine County Courthouse, 730 Wisconsin Avenue, Racine, Wisconsin 53403, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Lodge 437, International Association of Machinists and Aerospace Workers, AFL-CIO, having filed a prohibited practice complaint with the Wisconsin Employment Relations Commission in the above-entitled matter, alleging that the County of Racine committed prohibited practices within the meaning of Section 111.70(3)(a)(1) and (3) of the Wisconsin Statutes; and the Commission having appointed Andrew M. Roberts, a member of the Commission's staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and the County of Racine having denied the commission of said prohibited practices, and hearing on said complaint having been held on April 15, 1983 before the Examiner; and the Examiner having considered the evidence and arguments, and the parties having filed briefs by May 31, 1983, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Lodge 437, International Association of Machinists and Aerospace Workers, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization which functions as the exclusive bargaining representative for certain employees of the Racine County Courthouse; and that it maintains its principal offices at 624 North 24th Street, Milwaukee, Wisconsin 53233.

2. That the County of Racine, hereinafter referred to as the Respondent, is a municipal employer which operates a Maintenance and Engineering Department as part of its functions; that certain employees of that department are members of the Complainant Union; and that the Respondent maintains its offices in the Racine County Courthouse, Racine, Wisconsin 53403.

3. That the Complainant and the Respondent have been parties to a collective bargaining agreement which covers the period of January 1, 1981 through December 31, 1982, which includes a grievance/arbitration provision.

4. That Leonard Ziokowski, County Executive for the Respondent, determined in the summer of 1982 that there was a budget deficit for 1982; that Patrick Carroll, Superintendent for the Maintenance and Engineering Department and agent for the Respondent, was then told by Ziokowski to prepare possible 1983 budgets which considered, among other alternatives, eliminating stationary engineers on the third shift and weekends and while subcontracting to a security firm the duty

of checking boilers during those times; that Carroll then prepared a budget, and on November 10, 1982 1/ he recommended to the Finance Committee of the Respondent's County Board that no layoffs should occur in the Maintenance and Engineering Department; that on approximately November 18 the Respondent's budget was adopted; that said budget required the layoffs of two employees in the Maintenance and Engineering Department; and that Carroll was informed of said layoffs at approximately the same time he received Ziokowski's formal budget, and he then so informed all of the stationary engineers in his department.

5. That Chris Johnson and Edward Vaun, stationary engineers in the Maintenance and Engineering Department, were then notified that they would be laid off on January 1, 1983; and that ultimately Jeff Wade, an electrician in said department, was laid off, along with Johnson, on said date because Vaun bumped into Wade's position.

6. That a security firm was subcontracted by the Respondent in the beginning of December to check the boilers on the third shift; that as a result of the subcontracting, there was a rumor that the stationary engineers would refuse to come in when called for such emergencies; that because of that rumor, Carroll told Glen Napier, a stationary engineer in the Maintenance and Engineering Department, on the morning of December 8, "to get the guys together and meet me in my office;" that Napier then gathered three other stationary engineers, Russian, Lewandowski, and Iverson, to Carroll's office for a meeting at 11:00 a.m. that day; that neither Carroll nor Napier invited Johnson or Vaun to attend the meeting; that during the course of the meeting Carroll asked them if there was: "any truth in this proposed boycott and if there was that I was getting my fill of these nickel, dime problems, that if they didn't want to do this and boycott it please be up front enough with me to say so to my face and I will get contractors to come in and make emergency repairs"; that the four engineers who attended the meeting denied any knowledge of planning a work stoppage; and that Carroll also indicated at the meeting that those who decide which employees to layoff might note where grievances are coming from, and Carroll further stated: "(I)t is possible for somebody that has to make a tough decision between two groups of people, all things being equal, that that person could possibly be human and that be in the back of his mind and be one of the determining factors."

7. That shortly after the December 8 meeting, the four engineers had Johnson draft the following letter to the Complainant:

Dear Sirs,

On December 8, 1982 at 11:00 a.m. Mr. Patrick W. Carroll, Supervisor of Maintenance and Engineering called the undersigned into his office. He informed the engineers "If you don't stop nickel and diming me with grievances I will replace you with contractors." Mr. Carroll also said that the reason he chose to lay off two engineers was because of the grievances that have been filed.

As licensed engineers we feel uncertain about his tampering with the boiler limits and other related controls.

Frank J. Russian
Glen D. Napier
Joe Levandowski
George H. Iverson

and that the record does not indicate if there was a response to said letter.

8. That Carroll's discussion with the four engineers on December 8 interfered with employees in the exercise of their right to engage in protected activity; and that the Respondent's layoff of Wade and Johnson was not motivated by anti-union animus.

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

1/ Unless otherwise specified, all dates hereinafter referred to 1982.

CONCLUSIONS OF LAW

1. That the Respondent committed a prohibited practice within the meaning of Section 111.70(3)(a)1 of the Wisconsin Statutes by its communication to Russian, Napier, Iverson, and Lewandowski on December 8, 1982 because it interfered with employees in the exercise of their right to engage in protective activity.

2. That the Respondent did not commit a prohibited practice within the meaning of Section 111.70(3)(a)3 of the Wisconsin Statutes when it laid off two engineers effective January 1, 1983, or by its communication to Russian, Napier, Iverson, or Lewandowski on December 8, 1982.

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

ORDER 2/

IT IS ORDERED that the Respondent County of Racine, its officers and agents shall immediately:

1. Cease and desist from interfering with employees in the exercise of their rights under Section 111.70(3)(a)1 of the Wisconsin Statutes.
2. Take the following affirmative action which the Examiner finds appropriate under the Municipal Employment Relations Act:
 - (a) Notify all employees by posting in conspicuous places on its premises, where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix A". "Appendix A" shall be and remain posted for sixty (60) days thereafter. Respondent shall take reasonable steps to insure that notices are not altered, defaced or covered by other material.
 - (b) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date hereof, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that all remaining portions of the complaint shall be, and hereby are, dismissed.

Dated at Madison, Wisconsin this 13th day of July, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Andrew M. Roberts
Andrew M. Roberts, Examiner

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- 2/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the

(Footnote 2 continued on Page 4)

(Footnote 2 Continued)

findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

APPENDIX "A"

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

1. WE WILL NOT interfere with our employees in the exercise of their right to file a grievance under the grievance-arbitration provisions of the collective bargaining agreement.
2. ALL our employees are free to become, remain, or refrain from becoming members of Local 437, International Association of Machinists and Aerospace Workers, AFL-CIO, or any other labor organization.

RACINE COUNTY

By _____

THIS NOTICE MUST REMAIN POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Complainant argues that Carroll threatened the four engineers for exercising their contractual and legal right to file grievances. According to the Complainant, Carroll admitted that he suggested to them in the December 8 meeting that the County might layoff employees who file grievances. And the Complainant in its brief states "the union has no objection to dismissal of the claim that the two engineers laid off were in fact not laid off due to any discriminatory motive."

The Respondent, on the other hand, maintains Carroll never threatened to replace or layoff any employees for exercising their protected rights, but, in fact, Carroll tried to avert any layoffs of engineers. In that regard, the Respondent contends that Carroll would have hardly told the four engineers that he was responsible for laying off two other engineers when his intention was to stop any layoffs from occurring. Moreover, there was no evidence that the alleged comments actually interfered with or had a chilling effect on the employees' exercise of their statutorily protected rights. As for the two engineers laid off on January 1, 1983, the record shows that decision by the County did not result from any recommendation by Carroll, but it was instead based purely on economic considerations. If, however, the Examiner finds Carroll did make the alleged remarks then, the Respondent suggests, the appropriate remedy is a cease and desist order from making such comments.

Interference

In the December 8 letter the four engineers claimed that in the meeting with Carroll, he: (1) warned them not to nickel and dime him with grievances or he would replace them with contractors; and (?) told them he laid off two engineers because of grievances that had been filed. 3/ However, at the hearing Carroll recalled telling them in the meeting that he was "being nickel dined with problems" and he "would make arrangements for the contractors to come in if they did not want to respond to emergency calls." He further recalled telling them "(I)t is possible for somebody that has to make a tough decision between two groups of people, all things being equal, that that person could possibly be human and that he in the back of his mind and be one of the determining factors." 4/

There is thus some discrepancy in the recollection of what Carroll said specifically at the December 8 meeting. However, while the exact words Carroll used may differ between the two versions, the intent behind either statement is essentially the same. Whether the decision to layoff is by Carroll or by some one else, Carroll effectively threatened the four engineers not to file grievances, for the inference was clear that they may be laid off if any grievances were filed. Employees who are so threatened would tend to be less likely to engage in such activity. And the Commission has held that using the grievance procedure is a protected activity; as it stated in Harry Rydlewicz and Clarence Quandt (Village of West Milwaukee), 5/: "When a grievance procedure is established by contract, the right to process grievances without coercion or interference along the way from an employer is a fundamental right included within the employees' right to representation."

3/ At the hearing two of the four engineers testified as to what was stated in the December 8 letter; the County stipulated at the hearing that the other two engineers would have testified in a similar fashion. Tr. p. 18.

4/ Tr. pp. 32, 33-34.

5/ Dec. No. 9845-B, 10/71.

While the Respondent argues that there was no proof that employees' rights were actually interfered with or that Carroll's statements had any chilling effect on the filing of grievances, that is not the test to find a violation of Section 111.70(3)(a)1. The legality of an employer's conduct or statement does not hinge on whether coercion results, but rather on whether such conduct has a reasonable tendency to interfere with employee rights. 6/

Accordingly, the undersigned finds that there was a violation of Section 111.70(3)(a)1 of the Wisconsin Statutes when Carroll threatened the four engineers at the December 8 meeting of the possible repercussions if grievances would be filed.

Discrimination

The December 8 letter also claims Carroll told the engineers at the meeting he caused the two other employees to be laid off because of grievances that had been filed, and the Complainant then claimed in its Complaint that the Respondent had violated Section 111.70(3)(a)3 as a result of Carroll's statements at the meeting and by those two layoffs. The Commission and the Wisconsin Supreme Court have long held that an employee may not be discriminated against when one of the motivating factors for the employer's actions is the employees' protected concerted activity. 7/ The evidence here is persuasive, however, that the decision to layoff the two engineers on January 1, 1983 was made by the Respondent's County Executive, not by Carroll, and it resulted solely from the Respondent's 1982 budget deficit, not from any intent to discriminate because grievances had been filed by the engineers. The undersigned therefore finds said layoffs do not constitute a violation of Section 111.70(3)(a)3. 8/

In summary, the undersigned finds that the communication by Carroll to the four engineers in the December 8 meeting is a prohibited practice in violation of Section 111.70(3)(a)1 of the Wisconsin Statutes. However, said communication and the layoffs of the two employees in the Maintenance and Engineering Department are not prohibited practices in violation of Section 111.70(3)(a)3 of the Wisconsin Statutes.

Dated at Madison, Wisconsin this 13th day of July, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Andrew M. Roberts
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6/ See, e.g., Juneau County (12593-B) 1/77.

7/ Muskego-Norway School Dist. No. 9 (7247) 8/65, Affd. 35 Wis. 2d 540, 6/67.

8/ As noted previously, the Complainant stated in its brief that it does not object to the dismissal of its claimed violation of Section 111.70(3)(a)3.