

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
THE INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 139,
Involving Certain Employees of
TOWN OF MERCER.

Case 4
No. 34747 ME-2439
Decision No. 22826-C

Appearances:

Mr. George M. Blauvelt, Attorney at Law, P. O. Box Q, Mercer,
Wisconsin 54547, appearing on behalf of the Town.
Mr. Edward L. Guthman, Business Representative, Operating Engineers Local
No. 139, AFL-CIO, 1007 Tower Avenue, Superior, WI 54880, appearing on
behalf of the Union.

PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER 1/

The Wisconsin Employment Relations Commission having, on August 9, 1985, directed that an election be conducted among certain employees of Town of Mercer to determine whether the employees desired to be represented by International Union of Operating Engineers, Local 139, for purposes of collective bargaining; said election having been conducted on September 13, 1985; the Commission elections agent having challenged the ballot of seven persons who were not on the eligibility list; the Union, having, on September 17, 1985, timely filed objections to the conduct of the elections, and on October 1, 1985, filed a charge wherein it alleged the Town committed prohibited practices by threatening employees with retaliation if they engaged in protected activity and supported the Union; and the Commission, having consolidated the election challenges and objections with the prohibited practice charge for purposes of hearing; and having appointed Jane B. Buffett, a member of its staff, to act as Examiner and to make and issue Proposed Findings of Fact, Conclusions of Law and Order; and the hearing having been conducted on January 29, 1986; and a stenographic transcript having been prepared and received on February 14, 1986; the parties having waived opportunity to file briefs; and the Examiner, having considered the entire record and the arguments of the parties, and being fully advised in the premises, makes and issues the following

PROPOSED FINDINGS OF FACT

1. That International Union of Operating Engineers, Local 139, AFL-CIO, hereinafter the Union, is a labor organization, having its offices at 1007 Tower Avenue, Superior, Wisconsin.
2. That Town of Mercer, hereinafter Town, is a municipal employer, having offices at Town Hall, Mercer, Wisconsin.

1/ Each party adversely affected by the Examiner's proposed decision shall have the opportunity to file objections to the proposed decision with the Commission pursuant to Section 227.09(2), Stats. Said objections must be received by the Commission within twenty (20) days of the date of service of the Examiner's proposed decision. Section 227.09(2), Stats., provides:

(2) In any contested case which is a class 2 or class 3 proceeding, where a majority of the officials of the agency who are to render the final decision are not present for the hearing, the hearing examiner presiding at the hearing shall prepare a proposed decision, including findings of fact, conclusions of law, order and opinion, in a form that may be adopted as the final decision in the case. The proposed decision shall be a part of the (Footnote 1 Continued on Page 2)

3. That pursuant to the Union's petition for election among certain employees of the Town, filed March 12, 1985, a hearing was held on April 25, 1985; that on August 9, 1985 the Commission issued a Direction of Election in a unit consisting of: 2/

All regular full-time and regular part-time employees of the Town of Mercer Street Department excluding supervisory, managerial and confidential employees.

and that on August 27, 1985 the Commission amended said direction to set forth an August 9, 1985 eligibility date.

4. That at the April 25, 1985 representation hearing, the parties stipulated that John Kichak and Joseph Hammond comprised the list of employees of the Town; that on August 9, 1985 the Commission issued a decision determining that Kichak is not a supervisor and is therefore eligible to vote in the representation election; that on September 13, 1985 Kichak and Hammond presented themselves to vote and cast ballots which were not challenged; that the following persons, whose names were not on the eligibility list, also presented themselves to vote:

Herb Bock
Dennis Dwyer
Jon Hahn
Tim Joustra
John Raabe
William Thompson
Marvin Vaughn

that the Commission elections agent challenged their ballots, placed them in sealed envelopes, and impounded them; and that the election results were as follows:

1. Eligible to vote	2
2. Ballots cast	9
3. Ballots challenged	7
4. Ballots cast for Operating Engineers Local Union No. 139, AFL-CIO	0
5. Ballots cast for no representation	2

5. That at the time of their hiring, all of the disputed employees were told the work was seasonal, until the winter weather came, or until the funds ran out; that all employees were paid by the Town, but the Town was reimbursed through governmental agencies for part or all of the wages of employees Joustra and Bock on work experience programs or on-the-job training programs; that the disputed employees were told they were part of a screening program and might eventually receive permanent employment but were never promised permanent employment; and that none of the disputed employees received the health insurance benefits such as are received by Kichak and Hammond.

1/ Continued.

record and shall be served by the agency on all parties. Each party adversely affected by the proposed decision shall be given an opportunity to file objections to the proposed decision, briefly stating the reasons and authorities for each objection, and to argue with respect to them before the officials who are to participate in the decision. The agency may direct whether such argument shall be written or oral. If an agency's decision varies in any respect from the decision of the hearing examiner, the agency's decision shall include an explanation of the basis for each variance.

2/ The Commission also directed that an election be held in a unit consisting of:

All regular full-time and regular part-time employees of the Mercer Sanitary District No. 1, excluding supervisory, managerial and confidential employees.

However, said Mercer Sanitary District election is not at issue herein.

6. That the seven challenged voters have the following dates of hire and termination.

<u>Employee</u>	<u>Date of Hire</u>	<u>Termination</u>
Herb Bock	May 20, 1985	None - still employed at date of hearing (January 29, 1986)
Dennis Dwyer	May 22, 1985	December, 1985
John Hahn	July 29, 1985	December, 1985
Tim Joustra	May 24, 1985	November, 1985
John Raabe	June 21, 1985	December, 1985
William Thompson	May 20, 1985	None - still employed at date of hearing (January 29, 1986)
Marvin Vaughn	May 20, 1985	December, 1985

7. That the Town has had two full-time employees for 13 years; that during the summers of 1983 and 1984, the Town additionally employed two seasonal employees for a total of 65 hours (1983) and 53 hours (1984).

8. That the Town ended calendar year 1984 with a \$70,000 surplus; that the Town Board considered the roads to have suffered 25 years of deterioration; that in 1985 the Board decided to use some of the surplus funds for labor and equipment costs involved in road rehabilitation.

9. That Town Chairman John Raabe directs the work of the Town's street crew, usually by daily contacts with employees during which he gives verbal directions regarding work to be done; that on such a visit to the Town garage, a few days prior to the September 13, 1985 above-mentioned election (see Finding 3, above), Raabe talked to employees regarding the election and told them the Town Board would not appreciate a Union victory; that Kichak and Thompson testified that Raabe additionally said that a Union victory would make it miserable, hard and tough on the employees; that Raabe testified that he did not say a Union victory would make it rough on employees but that if the Union won there would be some changes; that Hammond did not hear the above noted conversation, but during the same time frame, had a conversation with Raabe in which Raabe said to Hammond that he would like to have another year to work with the employees because the employees and the Town Board did not know what each other could do; and that Raabe also said to Hammond that people in Town probably would not like a Union victory, but he himself did not care what the outcome was as long as the work got done.

10. That mechanic Thompson asked Chairman Raabe for an allowance to compensate him for the use of his own tools on the job; that in response to that request, he received \$50 every two weeks as a tool allotment; that one and a half months after the allotment's establishment, but before the election, the Town Board decided to eliminate the allotment, and that Raabe told Thompson he could take home his own tools and not use them while working for the Town.

11. That as of September 13, 1986, the seven challenged voters listed in Finding of Fact 5 were temporary employees and were neither regular full-time nor regular part-time employees and as such were not eligible to vote in the September 13, 1985 election, and that as of January 29, 1986 Herb Bock and William Thompson have a reasonable expectation of continued employment.

12. That Town Chairman John Raabe made threats of reprisals and promises of benefits that made it improbable that employees could freely cast ballots for or against the Union.

Based upon the foregoing Proposed Findings of Fact, the Examiner issues the following

PROPOSED CONCLUSIONS OF LAW

1. That as of September 13, 1985, the seven challenged voters noted in Finding of Fact 5 above were temporary employees and therefore neither regular full-time employees nor regular part-time employees within the meaning of the bargaining unit description set forth in Finding of Fact 3 and therefore, were not eligible to vote in the election conducted on September 13, 1985.

2. That as of January 29, 1986, Herb Bock and William Thompson are regular full-time employees and are eligible to vote in any future election if they are employed on the eligibility date set forth in any Direction of Election which the Commission may, at a future date, issue.

3. That the Town of Mercer, by threats of reprisals and promises of benefits made by Town Chairman John Raabe, interfered with employees' free choice in the representation election September 13, 1985.

Based upon the foregoing Proposed Findings of Fact, Proposed Conclusions of Law, the Examiner issues the following

PROPOSED ORDER

IT IS ORDERED that the election heretofore conducted among employees of the Town of Mercer on September 13, 1985, be, and the same hereby is, set aside.

IT IS FURTHER ORDERED that a new election by secret ballot be conducted, upon request to the Commission by the Union, at such time as the Commission is satisfied that a free and untrammelled election can be conducted, among all employees of the Town of Mercer in the bargaining unit described in Finding of Fact 3 above, on an eligibility date to be subsequently set by the Commission, except such employees as may, prior to the election, quit their employment or be discharged for cause, to determine whether a majority of such employees desire to be represented by the International Union of Operating Engineers, Local 139, for the purpose of collective bargaining on wages, hours, and conditions of employment.

Dated at Madison, Wisconsin, this 16th day of May, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Jane B. Buffett, Examiner

TOWN OF MERCER

MEMORANDUM ACCOMPANYING PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PROCEDURAL BACKGROUND

The Union, on March 12, 1985, filed with the Wisconsin Employment Relations Commission a petition for election involving employees of the Town of Mercer. Pursuant to that petition, a hearing was held on April 25, 1985, during which eligibility lists were agreed to by the parties. On August 9, 1985, the Commission issued a Direction of Election in which it determined the employees in question were employed by two separate employers: Town of Mercer, and Mercer Sanitary District No. 1. 3/ The Commission ordered that a representation election be held in each employing unit among all regular full-time and regular part-time employees employed as of August 9, 1985. On September 13, 1985 the elections were held in Mercer. 4/ In the Town of Mercer election, ballots by the two employees on the eligibility list were cast without challenge, however, the ballots of seven voters not on the eligibility list were challenged by the Commission's election agent. Additionally, the Union timely filed an objection to the conduct of the election, as well as a complaint of prohibited practices (that prohibited practice is addressed in a companion decision issued today, Town of Mercer, Decision No. 23136-B, (Buffett, 5/86)) based on pre-election conduct by the employer. The instant decision addresses the objections to election and the challenged ballots.

POSITIONS OF THE PARTIES

Both parties offered opening statements and waived the opportunity to file briefs. The Union believes statements made to employees by Town Chairman John Raabe as well as the Town's action in eliminating employee William Thompson's tool allotment constituted objectionable conduct. On the other hand, the Town apparently believes Raabe's statements were not threatening within the meaning of the Municipal Employment Relations Act.

DISCUSSION

I. OBJECTIONS TO CONDUCT OF THE ELECTION

The Union's objection to the Town's pre-election conduct raises the question whether the Commission can properly certify the results of the representation election. In cases where misconduct by either a union or an employer is sufficient to render it improbable that a voter will be able to freely cast a ballot either for or against a union, the Commission will set aside the election results. 5/

A. Conversations between Raabe and the Employees

At the town garage, a few days before the election, Raabe spoke to the employees regarding the Town's attitude towards the Union and other related matters. His statements must be scrutinized to determine whether he merely exercised his right to free speech or whether he engaged in speech which tainted the atmosphere surrounding the election, making it improbable that employees could freely cast their ballots for or against the Union. 6/ In making such

3/ Decision Nos. 22826, 22826-A, 22827 and 22827-A (WERC, 8/85).

4/ No objections or challenges were raised as to the Mercer Sanitary District No. 1 and this decision does not concern that election.

5/ Washington County, Dec. No. 7694-C (WERC, 9/67); Town of Weston (Water Utility), Dec. No. 16499-B (WERC, 2/79), WERC v. Evansville, 69 Wis.2d 140 (1975).

6/ West Side Community Center, Inc., Dec. No. 19211-A (Shaw, 4/83) aff'd in relevant part, Dec. No. 19211-B (WERC, 3/84).

determination, the Commission has concluded the employer statements may not include threats of reprisals or promises of benefits based on employees' support or non-support of a union. 7/ There is agreement concerning some, but not all, of the statements Raabe is alleged to have made. Hammond testified without contradiction that Raabe said to him the following:

Q. What if anything was said to you prior to the election held September --

A. The only thing that Mr. Raabe ever said to me was he'd like to have one year to work with us 'cause he didn't know what we could do and we didn't know what he could do and that people in town probably wouldn't like it and he didn't care how we went, just so the work got done. (Tr. 12 & 13)

Similarly, there is no dispute Raabe said the Town Board and townspeople would not appreciate having a union.

There is, however, dispute as to what Raabe said to Kichak, Thompson and Dwyer regarding the likely result of a Union victory. Kichak testified to the following:

A. Well, it was said that we could vote, you know, the way we wanted but the outcome might be hard for us, might make it miserable for us. (Tr. 9)

Thompson testified to the following:

A. Well, what I recall is that things would be tough on us if we did get the union in, the Board wouldn't appreciate it, or the townspeople wouldn't appreciate it either, having union in there. (Tr. 15)

Dwyer did not testify.

Contradicting this testimony, Raabe testified to the following:

A. I don't feel that, making it rough on them, that statement was never made. I said there would be some changes, things would have to, things would probably change, all right? Things change every day. (Tr. 34)

It is unnecessary to resolve this credibility conflict. Even assuming, for the sake of analysis, Raabe's version is correct, and he did not use the words "hard" "miserable" or "rough" to describe the results of a Union victory, and he merely stated that there would be changes, that suggestion, in the totality of the circumstances, constitutes an unlawful threat.

In discussing probable consequences of a Union victory, an employer may lawfully make predictions regarding matters beyond its control; however, threats regarding matters it can control are prohibited. 8/ In this instance, Raabe did not explain what kind of changes he envisioned, 9/ and his use of the word "changes," without more, might be sufficiently ambiguous to be innocent if it stood by itself. However, in both the immediate context of the conversation and the larger context of other pre-election occurrences, the word takes on an ominous tone. Raabe had already said that some of the townspeople and the Town Board were upset about the possibility of Union representation of Town employees. The

7/ Evansville, supra; Auswebenon School District, Dec. No. 14774-A (WERC, 10/77).

8/ Evansville, supra.

9/ At the hearing he gave an example of such a change, but his testimony does not show that he gave that example to the employees during this conversation.

employees could reasonably infer 10/ that the changes mentioned in such context would be changes for the worse. The inference is especially plausible when the changes are mentioned by the Town Chairman, the person in authority who daily supervises employees' work.

The word "changes" takes on additional meaning in light of the elimination of Hammond's tool allowance. Thompson, one of the employees listening to Raabe at the town garage, experienced a loss of his \$25 weekly tool allotment. Whatever the Town's reason for that change, there was no evidence that any reason was offered to Thompson. Consequently, such an act could easily be interpreted by Thompson as a display of the Town's power to control and change his wages, hours, and conditions of employment.

The threatening nature of Raabe's remarks are not diminished by the vagueness of the threat. Even general statements regarding unspecified adverse actions can be coercive. 11/ Likewise, the unlawfulness of Raabe's threat was not cured by his comment that "(1) didn't care how (the employees) went." This disclaimer was made to Hammond, and not to Kichak, Bock and Dwyer and therefore could not dissipate the effects of his statement to them regarding changes. Thus, given the surrounding circumstances, Raabe's remark about changes, spoken shortly before the election, was a threat which interfered with the employee's right to freely cast a ballot on the election.

Another issue is raised by Raabe's comment to Hammond that he wanted one more year because "he did not know what they could do and they did not know what he could do." Since there is no evidence that either Raabe or the employees intended to quit their respective positions, it would be reasonable for the employees to infer that "one more year" meant "one more year without the union." Furthermore, it would also be reasonable for them to infer that Raabe, in his words, "because you don't know what I can do," was suggesting he could create more favorable working conditions. This hint regarding improved conditions, linked to a request that the employees vote against the Union, was an impermissible promise of benefits. (The unspecific nature of the promise does not alter this determination. See footnote 11, above.) The promise, then, interfered with employees' statutory rights to self-organize.

B. Thompson's Tool Allowance

A municipal employer is prohibited from making any unilateral changes in the wages, hours, and conditions of employment during the pendency of an election that would be likely to interfere with the employees' free choice in that election. 12/ It is not necessary to find that the employer acted out of hostility to the Union to establish such a violation 13/; however, a change during the pendency of an election is not a per se violation and no violation is established if the employer can prove a legitimate business reason for the change 14/ or a course of action that pre-dates the Union's organizational campaign. 15/

10/ The Commission standard for evaluating such statements is objective, not subjective. That is, it is not necessary to determine that the words were in fact perceived as threats but it is only necessary that a reasonable person in similar circumstances would perceive them as threatening. Juneau County, Dec. No. 12593-B (WERC, 1/77), Winnebago County, Dec. No. 16930-A (Davis 8/79), aff'd by operation of law (WERC, 9/79).

11/ Green Lake County, Dec. No. 6061 (WERC, 8/62), Brown County Dec. No. 17258-A (Houlihan, 8/80) aff'd by operation of law, Dec. No. 17258-B (WERC, 9/80).

12/ Grant County, Dec. No. 21567-A, (Honeyman, 8/84) aff'd by operation of law, Dec. No. 21567-B (WERC, 1/85). Fond du Lac County, Dec. No. 16096-B (WERC, 9/78).

13/ City of Evansville, Dec. No. 9440-C (WERC, 3/71).

14/ City of Sparta, Dec. No. 12778-A (Gratz, 12/74) aff'd by operation of law, Dec. No. 12778-B (WERC, 1/75).

15/ Fond du Lac County, supra.

In this instance, Thompson asked Raabe for a tool allotment to compensate him for the use of his personal tools while he worked for the Town, which he received. Subsequently, the Town Board decided to eliminate this allotment. The record does not clearly indicate when the allotment was created and eliminated; only that Thompson was hired May 20, 1985 (after the filing of the petition and the related hearing), that it lasted a month and a half, and that it was eliminated before the election. The record could equally well support two conflicting inferences: one, that Thompson asked for and received the tool allotment contemporaneously with the beginning of his employment and, two, that he was already employed by the town and not receiving the tool allotment before he asked for and received it. If the first inference were taken as accurate, the creation of the tool allotment would not constitute a change in the conditions of Thompson's employment. Given this ambiguous record, there is insufficient basis to conclude the creation of the tool allotment was an unlawful granting of a benefit during the pendency of an election.

A second question regarding the tool allotment is whether its elimination during the pendency of the election constituted a reprisal, interfering with employee rights. The Commission has ruled that in order for a withdrawing of a condition of employment to be an unlawful reprisal, the condition withdrawn must, inter alia be a customary condition, rooted in the employer's past practice, or the withdrawal must be accompanied by unlawful remarks. 16/ Since the evidence is unclear whether the tool allotment began contemporaneously with the beginning of Thompson's employment, or was created as a new condition of employment sometime afterwards, and thus was not an established and customary practice, there is insufficient evidence to conclude the removal of the tool allowance was an unlawful reprisal. Similarly, there is no allegation or evidence whatsoever that any Town representative made any statements linking the allotment elimination with union activity or the representation election. Thus, the allotment elimination did not interfere with employee rights.

II. CHALLENGED BALLOTS

There is no dispute that the seven challenged voters were employed by the Town on the day of the representation election. However, the question before the Commission is whether they are employees within the meaning of the bargaining unit description and whether they were eligible to vote as of the August 9, 1985 eligibility date. The Commission has ruled that in order to vote, an employee must have a reasonable expectation that he or she will continue to be employed. 17/ The Commission has reasoned that employees lacking prospect of continued employment do not have sufficient interest in the outcome of a representation election to be entitled to cast a ballot. 18/

When they were hired, the seven voters were told that they had work until the winter came or until the funds were exhausted. The funds in question were a fixed amount, a surplus remaining from earlier town budgets. These funds were not renewable, such as funds from special grants that could be renewed by legislative or congressional action. Thus, the depletion of the surplus fund was merely a question of time. (Although the funds in question were \$70,000, it should be noted that only part of the \$70,000 was spent on wages since a part of the fund was spent on equipment investment.)

A second factor limiting the period of employment was the nature of the work being performed. The work was not on-going maintenance work, but rather repair of deteriorated conditions. Once the conditions were corrected, the services of the challenged voters would no longer be needed. Finally, the Town's history of summer employment reveals that, based on the experience of 65 hours of seasonal employment in 1983 and 53 hours in 1984, there was no likelihood these employees would be hired back for significant hours of work the next summer. Therefore, they could not qualify as seasonal employees who would be regular part-time employees.

16/ Washington County, Dec. No. 7694-C (WERC, 9/67).

17/ City of Rice Lake, Dec. No. 20791, (WERC, 6/83).

18/ Racine Unified School District, Dec. No. 216900 (WERC, 5/84).

Several of the challenged voters were on government-sponsored job training programs of approximately six to eleven months' duration. 19/ Raabe told them their employment under these programs was a kind of a "screening process." "Screening" is not defined on the record, but the suggestion was that some of the summer employees might be permanently hired. However, this was not a probationary period (during which an employee has a reasonable expectation of continued employment as long as job performance is satisfactory) since at the time of the hearing, five of the seven were terminated, without any record evidence of unsatisfactory performance. In this situation, it simply appears that the Town had fewer potential permanent positions than new employees; and, at the time of their hiring, it had not been decided how many permanent positions it would have nor which employees would be offered the permanent positions. That being the case, the employees, at the time they were hired and on the August 9 eligibility date, could not reasonably expect to have permanent employment.

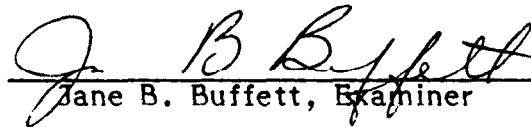
Finally, it should be emphasized that the eligibility date was August 9, 1985 and the relevant evidence must pertain to that date and not the date of the hearing. As of the hearing date, January 29, 1986, Bock and Thompson were still employed. Since they were told when hired in May, 1985 their jobs would cease when the winter came, and they were still employed through the winter, their expectations as of January 29, 1986 could reasonably be different from those of August 9, 1985. Further, since Bock and Thompson continued to work after the other five employees were terminated in December, 1985, it appears that the Town utilized a screening process to select those two employees for retention as regular employees. Accordingly, they would, if still employed at the time of a future election, be eligible to vote in that election.

The seven disputed voters did not, as of August 9, 1985, have a reasonable expectation of continued employment and therefore neither regular full-time nor regular part-time employees and were not eligible to vote in the representation election.

Dated at Madison, Wisconsin, this 16th day of May, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Jane B. Buffett, Examiner

19/ In this regard, the Commission notes that the source of funding and the fact that the Town was reimbursed from other sources for part or all of the wages of two employees does not affect their employer status. Winnebago County, Dec. No. 10305-A and 10304-A (WERC, 9/79).