

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

CHARLES BERANEK

Involving Certain Employes of

**MARSHFIELD ELECTRIC
AND WATER UTILITY**

Case 1
No. 9636
ME-142

Decision No. 6739-A

and

Case 132
No. 56918
ME-3686

Decision No. 29736

Appearances:

Mr. Charles Beranek, 800 East Seventh Street, Marshfield, Wisconsin 54449, appearing on his own behalf.

Boardman, Suhr, Curry & Field, Attorneys at Law, by **Mr. Steven C. Zach**, One South Pinckney Street, P.O. Box 927, Madison, Wisconsin 53701-0927, appearing on behalf of the Marshfield Electric and Water Utility.

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by **Ms. Jill M. Hartley**, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of General Teamsters Union, Local No. 662.

No. 6739-A
No. 29736

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DIRECTION OF ELECTION**

On October 28, 1998, Charles Beranek, a lineman employed by the Marshfield Electric and Water Utility, filed a petition with the Wisconsin Employment Relations Commission requesting an election to determine whether the Utility's craft employees wish to continue to be included in a mixed craft/non-craft employee unit represented by General Teamsters Union Local No. 662, and, if not, whether the craft employees wish to be represented by Local No. 662 in a separate craft unit. The petition was accompanied by a statement signed by nine of the ten Utility craft employees supporting the election. The election petition was subsequently held in abeyance pending unsuccessful settlement efforts.

Hearing on the matter was held on May 26, 1999, in Marshfield, Wisconsin before Examiner Raleigh Jones, a member of the Commission's staff. The Utility opposed the election petition while Local No. 662 supported it. Afterward, Local No. 662 and the Utility filed briefs and reply briefs, whereupon the record was closed on August 23, 1999.

The Commission, having considered the evidence, arguments and briefs of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Direction of Election.

FINDINGS OF FACT

1. Charles Beranek, herein Petitioner, is a municipal employee who works as a lineman for the Marshfield Electric and Water Utility.

2. The Marshfield Electric and Water Utility, herein the Utility, is a municipal employer which has its offices located at 2000 South Roddis, Marshfield, Wisconsin.

3. General Teamsters Union, Local No. 662, herein the Union, is a labor organization which has its offices at 3403 Highway 93, Suite 3, P.O. Box 86, Eau Claire, Wisconsin 54702-0086.

4. In June, 1964, following an election, the then-Wisconsin Employment Relations Board certified Teamsters Union Local No. 446 as the collective bargaining representative for a bargaining unit of Utility employees consisting of ". . . all employees of the Marshfield Electric and Water Department, excluding supervisors and office clerical employees.

General Teamsters Union, Local No. 662 is the successor to Teamsters Union Local No. 446.

In 1981, the office/clerical employees were added to the bargaining unit. The parties' most current collective bargaining agreement describes the unit as follows:

. . .all regular full-time production, construction, maintenance and drafting employees, and all regular full-time and regular part-time clerical employees of the Employer specifically excluding executive, administrative, supervisory, managerial, confidential, salesmen, guards, seasonal or temporary employees as to wages, rates, hours or working conditions.

There are currently 28 employees in the bargaining unit: ten linemen, one groundman, eight water employees, one storekeeper, two meter readers and six office/clerical employees.

5. The linemen employed by the Utility are skilled journeymen craftsmen.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. The linemen are craft employees within the meaning of Sec. 111.70(1)(d), Stats.
2. The existing collective bargaining unit is appropriate within the meaning of Sec. 111.70(4)(d)2.a. Stats. only if a majority of the craft employees vote for continued inclusion in that unit.
3. A question concerning representation within the meaning of Sec. 111.70(4)(d)3, Stats., exists within the following collective bargaining unit deemed appropriate within the meaning of Sec. 111.70(4)(d)2.a. Stats.

all regular full-time and regular part-time craft employees of the Marshfield Electric and Water Utility excluding supervisors and confidential, managerial and executive employees.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

DIRECTION OF ELECTION

An election by secret ballot shall be conducted under the direction of the Wisconsin Employment Relations Commission within forty-five (45) days from the date of this Directive in the following voting group for the following stated purposes:

All regular full-time and regular part-time craft employees of the Marshfield Electric and Water Utility, excluding supervisors and confidential, managerial and executive employees, who were employed on September 21, 1999, except such employees as may prior to the election quit their employment or be discharged for cause; for the purpose of determining (1) whether a majority of such craft employees desire to remain included in the existing collective bargaining unit, and, if not, (2) whether a majority of craft employees voting desire to be represented by General Teamsters Union, Local No. 662, for the purposes of collective bargaining with the Marshfield Electric and Water Utility on questions of wages, hours and conditions of employment, or to be unrepresented.

If a majority of the eligible craft employees vote to continue to be included in the existing collective bargaining unit with non-craft employees, then their representation ballots will not be counted. If a majority of the eligible craft employees do not vote to be included in the existing collective bargaining unit with the non-craft employees, then their representation ballots will be counted. If a majority of the voting employees vote for representation by General Teamsters Union, Local No. 662, the craft employees will constitute a separate bargaining unit.

Given under our hands and seal at the City of Madison, Wisconsin this 21st day of September, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Commissioner Paul A. Hahn did not participate.

MARSHFIELD ELECTRIC AND WATER UTILITY

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DIRECTION OF ELECTION**

BACKGROUND

The Utility currently has a single bargaining unit which includes both craft and non-craft employees.

Petitioner, a craft employee, filed an election petition with us seeking to sever craft employees from the existing bargaining unit and to have craft employees represented by the Union in a separate craft employee bargaining unit.

The linemens' craft status is not an issue herein. At the hearing, the parties stipulated that the ten current linemen are craft employees.

POSITIONS OF THE PARTIES

Petitioner

Petitioner Beranek favors letting the linemen sever themselves from the existing unit. At the hearing, he testified that the reason the linemen were seeking an election was that they "felt that we would be better represented as just a department strictly pertaining to our job than if we continued under the present situation."

He did not file a brief.

Utility

The Utility opposes letting the linemen sever themselves from the existing unit. It notes that it has dealt with one bargaining unit for 35 years. It wants to keep that existing unit intact. In the Utility's view, neither the statute, nor the equities of the situation, merit permitting the linemen to unilaterally vote for severance. It makes the following arguments to support this assertion.

First, it contends that the WERC's certification of the existing unit as an appropriate collective bargaining unit in 1964 bars a craft severance election in 1999. This contention is based on the Utility's reading of Sec. 111.70(4)(d)2.a., Stats. It believes that statute, read on

its face, does not permit a severance vote after the WERC has already determined the appropriate bargaining unit. It avers that the unambiguous construction of this language requires a craft vote be held prior to the certification of the appropriate bargaining unit. It contends that once the WERC has decided or determined that a group of employees constitute an appropriate bargaining unit, the statutory language does not permit the craft employees to unilaterally exclude themselves from a certified unit. The Utility submits that since the WERC certified a unit in 1964 which consisted of craft and non-craft employees, the craft employees cannot now unilaterally sever themselves from the unit. According to the Utility, “the dismantling of a certified unit must be done by a vote of the entire bargaining unit (i.e. the group) and not by one element.”

The Utility acknowledges that several WERC decisions suggest that craft employees are entitled to a post-certification severance vote. According to the Utility, none of these cases involve the circumstances presented by this case and/or the current statutory language. It asserts that the decisions in GREEN BAY SCHOOL DISTRICT, DEC. NO. 23263-A (WERC, 8/86) and CITY OF HARTFORD, DEC. NO. 10645-A (WERC, 11/93), can be distinguished on the former basis (different facts from this case), while the cases of CITY OF MILWAUKEE, DEC. NO. 7885 (WERC, 9/71), SHEBOYGAN COUNTY, DEC. NO. 8256-E (WERC, 4/70), and CITY OF HARTFORD, DEC. NO. 10645 (WERC, 11/71), involve different statutory language. The Utility elaborates on the latter point as follows. It avers that the last three decisions just referenced are based on an earlier version of Sec. 111.70(4)(d), Stats., which then provided thus:

Whenever a question arises between a municipal employer and a labor union as to whether the union represents the employees of the employer, either the union or the municipality may petition the board to conduct an election among said employees to determine whether they desire to be represented by a labor organization . . . (W)here the board finds that proposed unit includes a craft the board shall exclude such craft from the unit.

The Utility maintains that those decisions (which allowed craft employees to have a post-certification severance vote) do not discuss the statutory basis for this conclusion. In the Utility’s view, “what is absent from these decisions is an analysis of the prior statute.” The Utility reads the earlier statute to provide that the right of the WERC to sever craft employees was limited to the period of consideration of the “proposed” unit; if the unit was beyond the “proposed” stage (i.e. was certified), then the WERC did not have the statutory authority to exclude craft employees from non-craft employees. The Utility submits that when Sec. 111.70(4)(d), Stats., was changed into its current form in 1971, the amended statute expressly allowed craft employees to be co-mingled with non-craft employees. The Utility argues this change “effectively overturned the WERC’s position, as reflected in the above cases, that there was an absolute prohibition against such co-mingling.”

The Utility also asserts that the recent legislative change to Sec. 111.70(4)(d)2.a., Stats., dealing with charter schools is further statutory evidence that the legislature did not intend for the WERC to exercise severance powers after certification. That provision provides thus:

The commission shall place the professional employees who are assigned to perform any services at a charter school. . .in a separate collective bargaining unit from a unit that includes any other professional employees whenever at least 30% of those professional employees request an election to be held to determine that issue. . .

According to the Utility, “the use of the word ‘whenever’ in this section as to charter schools and professional employees, and the absence of that word in the provisions dealing with craft employees, reinforces the Utility’s argument that, under the amended statute, the time for craft severance is limited to the initial certification period.

Next, the Utility argues that even if the linemen are entitled to a severance vote, they have waived that right by not asking for severance until now. As the Utility sees it, the factual equities present here should preclude the linemen from being able to include themselves in a non-certified unit, and later decide they want to vote themselves out of the arrangement. The Utility contends that “to allow otherwise would be to permit the possibility of a never-ending ‘in and out’ of craft employees into a municipal unit.” It avers that if the linemen sever, they can also come back in and later leave. The Utility believes it inequitable to permit just one portion of a bargaining unit, which happens to be less than a majority, to compromise a bargaining relationship that has existed for 35 years.

Next, the Utility contends that even if the Union’s contention is correct that the craft employees can vote to sever, Sec. 111.70(4)(d)5 requires that there be “sufficient reason” for another election. The Utility submits that “sufficient reason” has not been shown here. In its view, nothing significant has changed with respect to the existing unit other than the passage of time. It maintains that the only thing that has changed is that in 1964 the linemen wanted to be included with the non-craft employees, and now they have changed their mind and want to be excluded/severed from them (i.e. the non-craft employees). According to the Utility, this change of mind does not constitute “sufficient reason” for an election.

Finally, the Utility asserts that the linemen have already gotten their separate vote. This contention is based on the premise that the 1964 vote reflects that the craft employees (i.e. linemen) voted by a margin of 11 to 2 in favor of representation in a unit consisting of both craft and non-craft employees.

The Utility therefore requests that the election petition be dismissed.

Union

The Union favors letting the linemen sever themselves from the existing unit and form their own unit of craft employees. In the Union's view, this outcome is mandated by Sec. 111.70(4)(d)2.a., Stats., which proscribes mixed units of craft and non-craft employees unless the craft employees give their assent by majority vote. It makes the following arguments to support the contention that the linemens' election petition should be granted.

First, it contends that the fact that the linemen have been included in the current bargaining unit with the other non-craft employees since the unit's inception does not prohibit the present election petition. It cites the cases of CITY OF MILWAUKEE, DEC. NO. 7885 (WERC, 9/67), SHEBOYGAN COUNTY, DEC. NO. 8256-E (WERC, 4/70), CITY OF HARTFORD, DEC. NO. 10645 (WERC, 11/71), and ELKHORN LIGHT AND WATER COMMISSION, DEC. NO. 24790 (WERC, 8/87), to support this proposition. It reads those cases (collectively) to allow craft severance even if the employees at issue have historically been included in a larger bargaining unit which includes non-craft employees. Said another way, the Union believes that the Commission's long-standing position has been that when it is presented with a petition for craft severance, it has allowed the severance of the employees at issue if they meet the MERA definition of craft employees, no matter what unit they are currently in.

The Union acknowledges that when the existing bargaining unit was formulated in 1964, the linemen raised no objection to being co-mingled with the non-craft employees. Be that as it may, the Union argues that is not a reasonable justification for holding the current linemen to the wishes of their predecessors 35 years ago. It notes in this regard that there are no current linemen who voted in the 1964 representation election. According to the Union, the wishes of the current linemen for craft severance should constitute a "sufficient reason" within the meaning of Sec. 111.70(4)(d)5 for a subsequent election, especially in light of MERA's proscription against mixed units of craft and non-craft employees unless the craft employees give their assent.

Next, the Union responds to the Utility's argument that the linemen are not entitled to sever from the existing unit because their job duties have remained essentially the same since the current unit's inception in 1964. The Union asserts this argument is without merit. In its view, the job duties of the linemen have changed significantly since 1964. To support this premise, it cites Beranek's testimony to that effect. The Union also asserts that the training qualifications for linemen have changed over the years. It notes in this regard that in 1964, the linemen were not required to participate in a state apprenticeship program, whereas they are required to do so today.

Next, the Union argues that severing the linemen will not unduly fragment the Utility's work force. It notes in this regard that there are a total of 28 employees in the current unit, and the linemen comprise 10 of the 28. According to the Union, two units of 10 and 18 employees respectively are viable, manageable bargaining units in terms of size. In terms of interaction, the Union disputes the Utility's contention that all (Utility) employees are a unified group. According to the Union, the linemen have little daily contact with the other Utility employees.

Finally, the Union responds to the fact that there have been trade-offs between employee groups during negotiations over the course of the unit's history. The Union notes in this regard that on occasion, the linemen have had to give up increases and benefits in favor of increases for other unit employees. As the Union sees it, this interplay weighs in favor of craft severance because the linemen's interests have been submerged in derogation of their MERA rights. The Union argues that it is exactly these types of trade-offs that the linemen wish to avoid by severing from the existing unit.

The Union therefore requests that the linemen's election petition be granted so they can vote on whether to sever from the existing unit and form a separate craft unit.

DISCUSSION

Section 111.70(4)(d)2.a., Stats., provides in part:

The commission shall determine the appropriate collective bargaining unit for the purpose of collective bargaining and shall whenever possible, unless otherwise required under this subchapter, avoid fragmentation by maintaining as few collective bargaining units as practicable in keeping with the size of the total municipal work force. In making such a determination, the commission may decide whether, in a particular case, the municipal employees in the same or several departments, divisions, institutions, crafts, professions or other occupational groupings constitute a collective bargaining unit. Before making its determination, the commission may provide an opportunity for the municipal employees concerned to determine, by secret ballot, whether or not they desire to be established as a separate collective bargaining unit. . . **The commission shall not decide that any group of municipal employees constitutes an appropriate collective bargaining unit if the group includes both craft employees and non-craft employees unless a majority of the craft employees vote for inclusion in the unit.** The commission shall place the professionals who are assigned to perform any services at a charter school, as defined in s. 115.001(1), in a separate collective bargaining unit from a unit that includes any other professional employees whenever. . . (emphasis added).

Citing the language of the statute itself, the Utility argues that the right to a unit vote among craft employees under Sec. 111.70(4)(d)2.a., Stats. is statutorily available only at the time the Commission determines for the first time whether a proposed unit is appropriate. Where, as here, the Commission has already certified the appropriateness of the existing unit, the Utility asserts the right to a severance vote does not exist.

We acknowledge that the language of Sec. 111.70(4)(d)2.a., Stats., is susceptible to the interpretation proposed by the Utility. However, we conclude that the Municipal Employment Relations Act is most reasonably interpreted as allowing the exercise of craft severance subsequent to certification.

Through the election petition, Petitioner asks us to determine whether the mixed craft/non-craft unit continues to be appropriate. The language of Section 111.70(4)(d)2.a., Stats., does not limit the Commission's authority to consider appropriate unit questions to a single point in time. Indeed, Sec. 111.70(4)(d)3, Stats. provides that "**Whenever**, in a particular case, a question arises concerning representation **or appropriate unit**. . ." Thus, even where we have previously certified a unit as appropriate, we have exercised our authority under Secs. 111.70(4)(d)2.a. and 4(d)(3), Stats. to reconsider whether a unit continues to be appropriate when a new election petition is filed. See, CITY OF MENOMONIE, DEC. NO. 11023 (WERC, 5/72); MILWAUKEE COUNTY, DEC. NO. 19753-A (WERC, 2/83); ROCK COUNTY, DEC. NO. 26303 (WERC, 1/90). Therefore, we reject the Utility's position that we lack the statutory authority to now consider the appropriateness of the existing Utility unit.

The Utility next argues that the craft employees have waived the right to vote on continued inclusion in the existing unit. The Utility argues that by the employees' inaction since the 1971 statutory creation of the right to severance and by their acceptance of the benefits of bargaining within the context of the existing unit, the craft employees should be barred from exercising the right of severance. We do not find this argument persuasive.

The applicable statute is absolute and clear in its direction to us. Section 111.70(4)(d)2.a., Stats. provides that unless a majority of the craft employees so vote, we "shall not decide" that a mixed craft/non-craft unit is appropriate. There are no exceptions – equitable or otherwise. Therefore, we conclude this right is not subject to waiver.

Lastly, the Utility asserts that it can be inferred from the 1968 election results that a majority of the craft employees have already voted for inclusion in a mixed unit and thus that the statutory mandate for a vote has already been met. First, it must be noted that election results which predated the existence of the statutory mandate in question can hardly constitute compliance with said mandate. Second, even assuming that the 1968 results can somehow be

construed to reflect compliance with a 1971 statute, the Utility argument presumes that once craft employees vote on the issue of unit inclusion, they can never thereafter vote on that issue again. There is no statutory support for this presumption. The statute in question does not state that the choice made is irrevocable. Like the municipal employees' right to seek periodic elections to determine whether they wish to be represented by a union, craft employees have the right to seek reconsideration of the issue of inclusion or exclusion from a unit through the timely filing of an election petition.

Given all of the foregoing, we have directed the elections sought by the petitioning craft employees.

Dated at Madison, Wisconsin this 21st day of September, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Commissioner Paul A. Hahn did not participate.

