

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SHEET METAL WORKERS LOCAL NO. 18, Complainant,

vs.

DON'S SHEET METAL, Respondent.

Case 2
No. 60525
Ce-2219

Decision No. 30251-A

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by **Attorney Jonathan M. Conti**, 1555 North RiverCenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of Sheet Metal Workers Local No. 18.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Christopher R. Bloom** and **Attorney Stephen L. Weld**, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing for Don's Sheet Metal.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Sheet Metal Workers Local No. 18 filed a complaint of unfair labor practice with the Commission on November 6, 2001, alleging that Don's Sheet Metal had violated Secs. 111.06(1)(a) and (d), Stats., by engaging in individual bargaining with an employee represented by Complainant and by undermining Complainant as the bargaining representative by encouraging and promoting the decertification of Complainant. On January 4, 2002, Don's Sheet Metal filed its answer to the complaint denying the commission of any unfair labor practice and requesting "that the complaint be dismissed with prejudice in its entirety and that appropriate costs and attorney's fees be awarded to it."

Dec. No. 30251-A

The Commission assigned Dennis P. McGilligan, an examiner on its staff, to hear the case. A hearing was convened in Eau Claire, Wisconsin, on January 8, 2002. Post-hearing briefs were submitted and exchanged through the Examiner on March 4, 2002, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, the applicable provisions of the statute, and the record as a whole, the Examiner makes the following

FINDINGS OF FACT

1. Sheet Metal Workers Local No. 18 (hereinafter referred to as the "Union" or the "Complainant") is a labor organization maintaining its principal offices at 5425 West Vliet Street, Milwaukee, Wisconsin 53208. Brian Crane is a Business Representative for the Union in the Eau Claire, LaCrosse and Wausau areas, Region One. Jeff Bechard is an organizer for the Union.

2. Don's Sheet Metal (hereinafter referred to as the "Company" or the "Respondent") is, at all times pertinent to the complaint, an employer engaged in the business of sheet metal work, with its principal offices located at 206 Elm Street, Eau Claire, Wisconsin 54703. Bob Standard is the Company's President and Brenda Stewart is the Company's Vice-President. Bob Standard is a member of the Union.

3. Steven A. Stewart is a sheet metal worker for the Company, and is the only employee in the bargaining unit represented by the Union. Stewart has been an employee of the Company for seven (7) years.

Bob Standard is Stewart's brother-in-law. Stewart is married to Standard's sister, Brenda Stewart.

4. The previous collective bargaining agreement expired on May 31, 2001, without the Union and Company reaching agreement. As a result, the Union went on strike for four days in early to middle June. Thereafter, the Company signed a letter along with nine other companies to send the contract dispute to the National Joint Board for resolution. The Board ultimately issued a decision. Brian Crane testified that he had a telephone conversation with Bob Standard after the decision by the Board wherein Standard stated: "He was unhappy with the decision that had come back from the labor board and didn't want to be bound by the labor agreement." Crane responded: "I told him that was not the way it works."

The Union and the Company are parties to a collective bargaining agreement which became effective, retroactively, in June, 2001, and is in effect through May 31, 2004.

5. On July 23, 2001, Steven A. Stewart filed a decertification petition with the National Labor Relations Board (“NLRB”). Stewart testified that he was primarily motivated to file the decertification petition by two factors. First, Stewart testified that he was unhappy with the strike that occurred in June. He had “voted not to go on strike” and “to accept the package that had been presented before us.” He honored the strike in order to get strike benefits. He picketed in front of Steve’s Metal Work, but “refused to do it in front of Don’s.” The Union honored his request to picket at one of the other shops.

The second triggering factor, according to Stewart, was his discovery that Union organizer Jeff Bechard was running a non-union shop. Stewart testified:

Q And why were you concerned about this nonunion shop?

A Why? Because it’s taking work away from us. I guess, in my opinion, we got a union organizer that in no way, shape, or form should be associated with a nonunion shop at all. That’s my own personal opinion.

Stewart, however, never discussed his concerns about the non-union shop with Bechard.

Sometime prior to filing the decertification, Stewart told Bob Standard that he would have to repay his scholarship loan (for going through the apprentice program).

A few days before filing the decertification petition, Stewart testified that he asked Bob Standard how to “go about doing this.” Standard told him “to contact the NLRB.”

6. Jeff Bechard is involved with two nonunion shops. First, he is involved with Clearwater Metals. He owns a building which he leases to Clearwater Metals which is run by his brother-in-law, Greg Brunn. He is, with Brunn, one of two officers of Clearwater Metals. He has a key to the building, can enter it at any time, and often works in the area leased by Clearwater at night. He stores his personal tools in a locked cabinet at Clearwater’s. He has used Clearwater tools and supplies to work there at night. He works on product for his building or for Clearwater when working at Clearwater.

In addition, Bechard owns and operates Specialty Sheet Metal, Inc. Specialty Sheet Metal, Inc., is another nonunion shop. Bechard has performed work on the corporation’s behalf. For example, he worked on the heating and ventilation project at Wild Ridge Golf Course, for which Specialty Sheet Metal, Inc., was paid. He did not receive any compensation for this work; instead “profit from the job went for tools.”

7. After Stewart filed the decertification petition with the NLRB, the Board informed him that they were unable to process the petition due to the fact that his employer, Don's Sheet Metal, was considered a one-man shop. Pursuant to the Board's recommendation and with information supplied by them, Stewart filed a petition with the Wisconsin Employment Relations Commission.

8. Steven A. Stewart testified that he never discussed pension, wages or health insurance with Bob Standard. Stewart did inform Standard sometime in August that he would need some kind of insurance. Standard's reply was that it was "something we will have to look into."

9. Brian Crane testified that he spoke with Bob Standard in person on August 15, 2001. According to Crane, Standard told him "how difficult it was to operate a two-man business with the rate increases in the present contract." Standard added that he was not happy with being bound by the labor agreement and realized there was no way out of the agreement. Standard concluded by stating "That's why I'm doing this." I said at the time: "Do you mean the decertification?" And he said, "Yes. You left me no choice. This is the only thing I have left to do."

10. On October 5, 2001, Brian Crane spoke to Steven A. Stewart in person. Crane testified that during this conversation Stewart said "that he worked nonunion before, and if you were taken care of nonunion, you'll get along fine, and if you are in the union, you get along fine." Crane added: "He just said he thought it would be the same either way and if that's what Bob wants."

11. The Union filed the instant unfair labor practice complaint on November 6, 2001, alleging that the Company engaged in individual bargaining with employee Steven A. Stewart represented by Complainant, and sought to undermine Complainant as the bargaining representative by encouraging and promoting the decertification of Complainant. As a result, the requested decertification election was blocked.

12. The Company, its officers and agents, did not take any action to sponsor and/or encourage Steven A. Stewart to file the decertification petition.

13. The Company, its officers and agents, did not engage in individual bargaining with Steven A. Stewart.

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

CONCLUSIONS OF LAW

1. The Respondent, Don's Sheet Metal, is an employer within the meaning of Section 111.02(7), Wisconsin Employment Peace Act ("WEPA").

2. The Complainant, Sheet Metal Workers Local No. 18, is a labor organization, and is a "representative" of employees within the meaning of Sec. 111.02(11), WEPA.

3. By the acts described in Findings of Fact Nos. 4-13, *supra*, the Respondent did not interfere with, restrain or coerce its employee, Steven A. Stewart, in the exercise of the rights guaranteed in Sec. 111.04, Stats., and therefore, Respondent has not committed an unfair labor practice within the meaning of Sec. 111.06(1)(a), WEPA.

4. By the acts described in Findings of Fact Nos. 4-13, *supra*, the Respondent has not refused to bargain collectively with the representative of a majority of the employer's employees in any collective bargaining unit with respect to representation or terms and conditions of employment, and therefore, Respondent has not committed an unfair labor practice within the meaning of Sec. 111.06(1)(d), WEPA, and a derivative violation of Sec. 111.06(1)(a), WEPA.

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

ORDER

IT IS ORDERED that the complaint filed in Case 2, No. 60525, Ce-2219, is dismissed.

Dated at Madison, Wisconsin, this 15th day of April, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Dennis P. McGilligan /s/

Dennis P. McGilligan, Examiner

DON'S SHEET METAL

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Interference

Complainant claims that Respondent sponsored and encouraged Steven A. Stewart to file the decertification petition.

Sec. 111.06(1)(a), Stats., makes it an unfair labor practice for an employer, individually or in concert with others to “interfere with, restrain or coerce the employer’s employees in the exercise of the rights guaranteed in s. 111.04.”

Sec. 111.04, Stats., describes the rights protected by Sec. 111.06(1)(a), Stats., as being:

111.04 Rights of employes. Employes shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employes shall also have the right to refrain from any or all of such activities.

Complainant argues that the above statutory provision was violated by Respondent’s aforesaid involvement in the decertification petition.

The parties are in general agreement over the standard to be applied.

Thus, according to Complainant, “it is clear that an employer is prohibited from sponsoring or actively participating in . . . a decertification effort.” *HERCULES AUTOMOTIVE*, 285 NLRB 944, 949 (1987).

Respondent notes that the NLRB has determined that the “preparation, circulation, and signing” of a decertification petition must constitute the “free and uncoerced act of the employees concerned.” *EASTERN STATES OPTICAL CO., INC.*, 275 NLRB 371, 372 (1985) (citing *KONO-TV-MISSION TELECASTING*, 163 NLRB 1005 (1967)). Thus, according to Respondent, it is unlawful for an employer to initiate a decertification petition or lend more than minimal support and approval to obtaining signatures and filing the petition. *Id.*

In support of its position that Respondent improperly sponsored and encouraged Stewart to file the decertification petition, Complainant claims Bob Standard solicited Stewart, his only employee and his brother-in-law, to file the decertification petition as a means for allowing Standard to get out from under his collective bargaining agreement with the Union.

In support thereof, Complainant first argues that Stewart's testimony as to why he filed the decertification is "beyond reason."

Stewart testified at hearing that he decided, on his own, to file the decertification petition because he was upset with the fact that the Union went on strike during the summer and because Jeff Bechard was "running a nonunion shop." (Tr. p. 13).

Complainant argues that this testimony "is suspect" because Stewart chose to honor the picket line (Tr. p. 12) and because the strike occurred over a month prior to his filing of the decertification with the NLRB. Complainant asks rhetorically: "If Stewart was so disillusioned with the Union following the strike, why did he wait over a month to file the decertification petition?"

First, it is clear that Stewart was against the strike; he voted not to go on strike; and he walked out on a union meeting discussion on setting up a strike committee while stating that he "couldn't do this because Bob was my brother-in-law." (Tr. pp. 11-13). Stewart "voted to accept the package that had been presented before us." (Tr. p. 12). He "thought it was a fair package." (Tr. p. 17). He "was ready to go back to work." (Tr. p. 31). Based on the foregoing and the record as a whole, the Examiner is persuaded that Stewart was strongly opposed to the strike, and this was the main reason he filed the decertification petition. (Tr. p. 13).

Complainant asks if Stewart was so unhappy about the strike, why did he wait a month to file the decertification petition? One of the reasons it took so long was that Stewart discussed the matter with his wife, got her input, and then made the decision to file the petition. (Tr. p. 32). Whatever the reason it took so long, it is clear that he filed the petition so that he would not have to go through a strike again. (Tr. pp. 27, 34).

Complainant also points out that Stewart never discussed his concerns about the nonunion shop with Bechard (Tr. pp. 25, 57). It is also true, as Complainant points out, that *Standard* wrote a letter to the Union protesting Bechard's involvement with Clearwater (Emphasis in original) (Tr. pp. 62-64). However, the record supports a finding that Stewart was very unhappy about the fact that a labor organizer was involved with a nonunion shop (Tr. pp. 13, 15-17, 24-25, 30). In addition, Bob Standard had the same concerns for twice the reasons – not only is he the owner of Don's Sheet Metal, he is a Union member, too. (Tr. p. 63).

Finally, Complainant argues that, based on the testimony of Brian Crane and Jeff Bechard, it is clear that Bob Standard “had a significant role in suggesting or encouraging Stewart to file the decertification petition.” It is true that Crane testified he had a phone conversation with Standard in July, 2001, after the interest arbitration award had been issued by the Board, wherein Standard informed him that he was unhappy with the June strike and the Board’s decision, and that he did not want to be bound by the labor agreement. (Tr. pp. 36-37). Crane also testified that when he spoke with Standard in person on August 15, Standard again indicated that he was not happy with the aforesaid agreement, and then stated: “That’s why I’m doing this.” (Tr. p. 38). Crane asked, “Do you mean the decertification?” to which Standard responded, “Yes. You left me no choice. This is the only thing that I have left.”

It is also true that an adverse inference could be made from the fact that Bob Standard chose not to testify at hearing as alleged by Complainant.

However, Complainant introduced no other persuasive evidence to support the above contentions. In addition, Complainant could have subpoenaed Bob Standard to testify in order to corroborate the above testimony, but chose not to. In contrast, Complainant subpoenaed Steven A. Stewart to testify and called him as its first witness. (Tr. pp. 8-9). Finally, Stewart testified forcefully and persuasively that Standard played little other than a *de minimis* role in his filing of the decertification petition. In this regard, the record indicates that Stewart asked Standard how to go about filing such a petition. (Tr. p. 14). In response, Standard told him “to contact the NLRB.” *Id.* Standard did not help Stewart fill out the forms. (Tr. p. 24). Stewart did not indicate that Standard had any other involvement in the decertification petition.

The involvement by Bob Standard in the filing of the decertification petition by Steven A. Stewart was minimal. It does not violate the standard set forth in *EASTERN STATES OPTICAL CO., INC. supra.*, which provides that the filing of such a petition must constitute the “free and uncoerced act of the employees concerned.” Therefore, the Examiner rejects this claim by Complainant.

For the same reasons, the Examiner rejects Complainant’s reliance on the testimony of Jeff Bechard who also testified that Bob Standard told him that he was upset about the negotiations and terms of the new collective bargaining agreement, the strike, and about Bechard having a stake in a nonunion shop. (Tr. 43)

Based on all of the above, the Examiner finds that Respondent’s conduct relative to Stewart’s filing of the decertification petition did not interfere with, restrain or coerce its employee in the exercise of his Sec. 111.04, Stats., rights. Therefore, the Examiner dismisses the Sec. 111.06(1)(a), Stats. charge.

Refusal to Bargain

Under Section 111.06(1)(d), Stats., it is an unfair labor practice for an employer “to refuse to bargain collectively with the representative of a majority of the employer’s employees in any collective bargaining unit with respect to representation or terms and conditions of employment.”

Complainant argues that Respondent engaged in individual bargaining with Steven A. Stewart. Specifically, Complainant argues that as part of his plan to encourage Stewart to decertify the Union, Standard promised Stewart certain benefits should he file the decertification petition.

Complainant contends that “where an implicit promise of substantial benefit to employees is made,” the Board will set aside an election, “because such a promise is deemed to interfere with employees’ free choice in that election.” COCA-COLA BOTTLING CO., 318 NLRB 814 (1995); *See also* STROEHMANN BAKERIES, INC., 318 NLRB 1069, 1081 (1995). Complainant adds that an employer violates the duty to bargain when it negotiates an employee’s terms and conditions of employment directly with him, rather than through the union. OCONOMOWOC PLUMBING SYSTEMS, INC., DEC. NO. 20214-A (6/83).

In support of the above, Complainant first maintains that Stewart “discussed his scholarship loan agreement with Standard” *prior* to Stewart’s filing of the original NLRB decertification petition. (Emphasis in the original) (Tr. pp. 18-20). However, Stewart was adamant that he did not have a “discussion” with Standard about his scholarship loan agreement with the Union. *Id.* According to Stewart, he merely made a statement to Standard that he “would have to pay that back.” *Id.* Nor is there any persuasive evidence in the record that Standard made any promises to Stewart to assist him in any way in paying back the money he owed on the scholarship program. (Tr. pp. 18-20, 44). Therefore, the Examiner rejects this argument of the Complainant.

Complainant next cites Jeff Bechard’s testimony that Stewart informed him that Standard had offered him \$1.50 in wages, and that Standard would “take care of him” on the pension and health insurance. (Tr. p. 45). However, as pointed out by Respondent, the “conversation” between Stewart and Standard when this occurred was not witnessed by Bechard. Thus, Bechard testified to what Stewart told him that Standard told him. Such testimony constitutes double hearsay. It is not persuasive particularly in light of Stewart’s direct testimony to the contrary. He testified that paragraph 3 of the Complaint is not a correct statement of fact. (Tr. p. 29). That paragraph asserted that Don’s Sheet Metal had engaged in individual bargaining with Stewart and encouraged and promoted the decertification process. *Id.* Stewart was never asked by Complainant whether the Complaint was accurate; he never spoke to anybody at the Union regarding that allegation. *Id.*

Stewart testified emphatically and persuasively that he never spoke with Standard about the manner in which he would get paid if no union was there. (Tr. p. 17). Complainant's double hearsay testimony to the contrary, absent any other persuasive evidence, does not support a different conclusion.

Finally, Complainant points out that Standard also told Stewart that they could look into insurance options for him. (Tr. p. 21). Stewart testified that he told Standard that "I would need some kind of insurance. And Bob just said that is something we will have to look into." Id. Stewart added: "We never discussed coverage. We never discussed pension. We never discussed wages. We never discussed any of that." Id.

The mere statement by Bob Standard that he would "look into" the matter of insurance without promising to provide insurance or any specifics as to health insurance coverage does not amount to individual bargaining.

Based on all of the above, the Examiner finds no violation of Sec. 111.06(1)(d), Stats., or derivatively, Sec. 111.06(1)(a), Stats.

Attorney's Fees and Costs

Respondent requests attorney's fees and costs. However, Respondent cites no authority for this request. Under current Commission law, no such award is appropriate to the Company as the responding party. See DEPARTMENT OF EMPLOYMENT RELATIONS, ET. AL, DEC. NO. 29093-B (WERC, 11/98) and SQUARE D COMPANY, DEC. NO. 29661-A (McLaughlin, 11/99).

Based on all of the foregoing, and the entire record, the Examiner finds that the allegations of unfair labor practices by the Complainant are without merit, and the Examiner has dismissed the complaint in its entirety.

Dated at Madison, Wisconsin, this 15th day of April, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Dennis P. McGilligan /s/

Dennis P. McGilligan, Examiner

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