

BEFORE THE BOARD OF PERSONNEL APPEALS  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF )  
LABORERS INTERNATIONAL UNION )  
OF NORTH AMERICA, LOCAL NO. )  
1334, )  
Complainant, )  
-vs- )  
MONTANA PUBLIC EMPLOYEE'S )  
ASSOCIATION, )  
Respondent. )

ULP-10-1974

OPINION,  
FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER AS RECOMMENDED  
TO THE BOARD OF PERSONNEL APPEALS

The above-entitled matter came on for hearing before me as hearings examiner for the Board of Personnel Appeals on August 14, 1974, upon the complaint of the complainant and the answer of the respondent. The complainant was represented by its attorney, Joseph W. Duffy, and the respondent was represented by its Executive Director, Thomas E. Schneider. Both parties called and examined witnesses and submitted documentary evidence at the hearing. Subsequent thereto, each party submitted a brief and proposed findings of fact and conclusions of law.

OPINION

The basic charges contained in the complaint are:

(1) That the respondent restrained or coerced employees in the exercise of their rights guaranteed by Section 59-1605(2) (a) and,

(2) That the respondent violated Section 59-1605 by encouraging employer domination.

The first charge is based on the distribution of certain printed materials by respondent. Copies of these materials are attached to the complaint and designated Exhibits "A" through "H". The second charge is also based on the distribution of

1 a printed document which is also attached to the complaint and  
2 designated Exhibit "A".

3 Section 59-1605(2) (a) provides as follows:

4 "It is an unfair labor practice for a labor organiza-  
5 tion or its agents to: (a) restrain or coerce employees  
6 in the exercise of the right guaranteed in subsection (1)  
7 of section 3 (59-1603) of this act, or a public employer  
8 in the selection of his representative for the purpose  
9 of collective bargaining or the adjustment of grievances;  
10 ..."

11 Section 59-1603(1) provides as follows:

12 "(1) Public employees shall have, and shall be protected  
13 in the exercise of, the right of self-organization to  
14 form, join or assist any labor organization, to bargain  
15 collectively through representatives of their own choosing  
16 on questions of wages, hours, fringe benefits, and other  
17 conditions of employment and to engage in other mutual  
18 aid or protection, free from interference, restraint or  
19 coercion. ..."

20 Section 59-1605(1) (b) reads as follows:

21 "(1) It is an unfair labor practice for a public employer  
22 to: ... (b) dominate, interfere, or assist in the forma-  
23 tion or administration of any labor organization; however,  
24 subject to rules adopted by the board under section 12(3),  
25 an employer is not prohibited from permitting employees to  
26 confer with him during working hours without loss of time  
27 or pay; ..."

28 Because of the relative newness of Title 59, Chapter 16,  
29 (which provides for collective bargaining between public employers  
30 and their employees) there are no Montana Supreme Court decisions  
31 setting forth what facts constitute restraint or coercion of  
32 employees' rights guaranteed by Section 59-1603 or employer domin-  
ation as defined by Section 59-1605. Because of the similarities  
between Title 59, Chapter 16 and the Federal Labor Management  
Relations Act, and because of the many years of experience the  
National Labor Relations Board has had in interpreting the federal  
act, the decisions of the NLRB will be considered here.

By way of background, the respondent filed a petition for  
decertification seeking to decertify the complainant as the  
collective bargaining agent for the custodians of the physical  
plant at Montana State University in Bozeman, Montana. An

1 election was scheduled for June 27, 1974. The documents referred  
2 to above (Exhibits "A" through "H") concerned this election and  
3 are the documents upon which the unfair labor practice charges  
4 are based. The complainant obtained a court order enjoining the  
5 holding of the election on June 27, 1974.

6 The first issue involves the charge of restraint or coer-  
7 cion by the respondent organization of rights guaranteed to  
8 employees free from interference by Section 59-1603. Specifi-  
9 cally it is charged that the dissemination of Exhibits "A"  
10 through "H", copies of which are attached to the complaint,  
11 unlawfully restrained or coerced employees. In determining  
12 this issue, complainant has urged that the standard set forth  
13 in Celanese Corp. v. NLRB, 291 F 2d 224, be utilized. It is  
14 as follows:

15 "(1) there has been a material misrepresentation  
16 of fact, (2) this misrepresentation comes from  
17 a party who had special knowledge or was in an  
18 authoritative position to know the true facts and  
19 (3) no other party had sufficient opportunity to  
20 correct the misrepresentation before the election.  
21 US Gypsum Co., 130 NLRB No. 99; The Cleveland  
22 Trencher Co., 130 NLRB No. 59; Kawneer Co., 119  
23 NLRB No. 1460; The Calydine Co., 117 NLRB No.  
24 1026. Where these elements are present, the Board  
25 has found that the legitimate limits of campaign  
26 propoganda have been exceeded and has set aside  
27 the election on the ground that it does not reflect  
28 the free desires of the employees without further  
29 requiring that prejudice to the fairness of the  
30 election be shown."

31 In Hollywood Ceramics Co., 140 NLRB 221, the Board preserved  
32 the criteria set forth in Celanese Corp. v. NLRB, supra, and re-  
stated the rule as follows:

33 "a misrepresentation or other similar campaign  
34 trickery which involves a substantial departure  
35 from the truth at a time which prevents the other  
36 parties from making an effective reply, so that  
37 the misrepresentation, whether deliberate or not,  
38 may reasonably be expected to have a significant  
39 impact on the election."

40 The standard set forth in Celanese Corp. v. NLRB, supra,  
41 will be utilized here for determining whether an unfair labor  
42

1 practice has been proved even though the standard as set forth  
2 in Celanese was for the purpose of determining whether the  
3 "laboratory conditions" for an election had been interfered  
4 with, and such standard is more restrictive than the usual  
5 test for determining the existence of an unfair labor practice.

6 Applying the standard in Celanese to the instant case and  
7 assuming that the first two elements of said standard have been  
8 proved, it appears the complaint must fail for lack of proof of  
9 the third element. There is no proof in the record attempting  
10 to show that complainant did not have an opportunity to correct  
11 any misrepresentations contained in Exhibits "A" through "H"  
12 before the election. (The election had not been held as of the  
13 date of hearing on this matter.) In addition, respondent's  
14 Exhibit "B" appears to be a response by complainant to certain  
15 allegations made by respondent in Exhibits "A" through "H".  
16

17 Further, the NLRB in interpreting the federal act has been  
18 reluctant to undertake the censorship of election propaganda.  
19 The board has stated that "exaggeration, inaccuracies, half-truths,  
20 and name calling, though not condoned, will not be grounds for  
21 setting aside an election". It appears to be the NLRB's view  
22 that absolute precision of statement and complete honesty are not  
23 always obtainable in an election campaign, nor are they expected  
24 by employees. (Cleveland Trencher Co., 130 NLRB 600; Merck and  
25 Co., 104 NLRB 891; Gummed Prod. Co., 112 NLRB 1092; and Hollywood  
26 Ceramics Co., supra).

27 Since in my opinion Exhibits "A" through "H" contain some  
28 inaccuracies, I have also considered the question of coercion  
29 without reference to any court decision. The complainant's  
30 brief states that it established said coercion through the  
31 testimony of Forsberg and Davis. (Complainant's brief, page 6)  
32

1 I have read and reread the testimony of both witnesses and fail  
2 to find proof of coercion. The testimony of Mr. Forsberg in  
3 this regard is as follows:

4 "Q Mr. Forsberg, showing you what are, for the  
5 record, Complainant Exhibits A-H, I would  
6 like to ask you if you have ever seen any of  
7 those materials?

8 A Yes I have.

9 Q And on what occasion did you see them?

10 A They were mailed to me.

11 Q You received those in the mail?

12 A Yes.

13 Q To your knowledge, did anyone else that is a  
14 custodian at the college receive that corres-  
15 pondence?

16 A Yes.

17 Q It was sent to you through the United States  
18 Mail?

19 A Yes.

20 MR. DUFFY: I have no further questions."

21 The witness Forsberg states only that he received Exhibits  
22 "A" through "H". He does not in any manner claim restraint or  
23 coercion.

24 Mr. Davis testified regarding said exhibits as follows:

25 "Q Showing you what are identified for the record as  
26 Complaint Exhibits A-H, have you ever seen those  
27 before?

28 A Yes.

29 Q You have seen those?

30 A Yes.

31 Q On what occasion did you see them?

32 A They sent them to me in the mail.

...

Q During these meetings, in light of the correspon-  
dence that you received, did you have any apprehen-  
sion about your job security or what might happen?

A Yes, I did.

1 Q How would you describe it?

2 A Well, I figured that if MPEA come here, you  
3 know what I mean, we'd have, you know what I  
4 mean, and another thing I didn't like is that  
5 I belong to this union a long time and the MPEA  
6 claims they've done all the things like this  
7 college that this union has done down there and  
8 I don't and that's why I didn't go for it. If  
9 that answers your question.

10 Q Was there any thought in your mind about loss of  
11 representation.

12 A Yes, there was.

13 Q What fear did you have about losing your repre-  
14 sentation?

15 A Well, I just figured that we would be classified  
16 or something like that, you know what I mean, and  
17 we wouldn't all get the same wages and, you know,  
18 different, have a different setup altogether.

19 Q Was there any fear that the jobs here might be  
20 sub-contracted out to another outfit?

21 A That's right, I did."

22 Mr. Davis does state that he had some apprehension about  
23 job security, loss of representation, and sub-contracting. He  
24 does not state what, if anything, contained in Exhibits "A"  
25 through "H" caused this apprehension and when asked by his attorney  
26 to describe his apprehension regarding job security he stated  
27 as follows:

28 "Well, I figured that if MPEA came here, you know  
29 what I mean, we'd have, you know what I mean, ..."

30 There is nothing in Mr. Davis's testimony to indicate any  
31 tie-in between the fears he expresses and Exhibits "A" through  
32 "H". Rather it would appear Mr. Davis's only fear was that  
changes might occur if the employees chose a new collective bar-  
gaining agent. His fears do not indicate any restraint or coer-  
cion in choosing that collective bargaining agent.

The second issue involves the charge that the respondent  
violated Section 59-1605 by encouraging employer domination.  
Section 59-1605 (1)(b) states that it is an unfair labor practice  
for a public employer to dominate any labor organization. This

1 charge is based on a statement in Exhibit "B", attached to the  
2 complaint, which reads as follows:

3 "P.S. You have the right to ask either Mr. C. C.  
4 Dye or Mr. Johnston about anything. If you are  
5 still unsure about how you stand if you vote MPEA,  
6 ask them!!!"

7 It would appear that in order to have an unfair labor  
8 practice under Section 59-1605(1)(b), as charged, that an  
9 employer must actually dominate or assist the employee organiza-  
10 tion. If such an act took place, then we would have an unfair  
11 labor practice by the employer. There is no charge against the  
12 employer in this case. It would appear from a strict reading  
13 of the statutes in question that encouraging employer domina-  
14 tion is not an unfair labor practice. It would appear such domina-  
15 tion must actually exist. In other words, the statutes (so far  
16 as this issue is concerned) are for the protection of employees  
17 and, if no domination occurs, the employees' rights have not been  
18 affected. However, for purposes of this decision I will assume  
19 that encouraging employer domination constitutes an unfair labor  
20 practice.

21 The statement from Exhibit "B" quoted above appears merely  
22 to advise employees that they have a right to confer with repre-  
23 sentatives of the employer regarding MPEA. The statute (59-1605)  
24 appears to permit employees to confer with the employer. There  
25 is nothing in the record to show that respondent in advising  
26 the employees that they may confer with their employer requested  
27 or encouraged the employer to favor the respondent's position in  
28 such conferences.

29 The overriding consideration to me in deciding this matter  
30 has been the protection of the employees' rights in choosing a  
31 bargaining representative. It would appear from the record that  
32 such rights have not suffered from either coercion by the res-  
pondent or domination by the employer. Further, the record does

1 not establish encouragement of domination by the employer from  
2 the respondent.

3 Accordingly, I find as follows:

4 FINDINGS OF FACT

5 1. That the respondent has not restrained or coerced  
6 employees.

7 2. That respondent has not encouraged employer domination  
8 of the employee organization.

9 Based on the above findings of fact, I conclude as follows:

10 CONCLUSIONS OF LAW

11 That the allegations of the complaint that respondent has  
12 engaged in unfair labor practices have not been sustained by  
13 evidence. Accordingly, I recommend the following order:

14 ORDER

15 IT IS ORDERED, upon the basis of the foregoing findings  
16 of fact, conclusions of law and the entire record in this case,  
17 that the allegations of the complaint have not been sustained  
18 by evidence and that the complaint be dismissed on its merits.

19 DATED this 22 day of May, 1975.

20  
21   
22 Jerome T. Loendorf  
Hearings Examiner

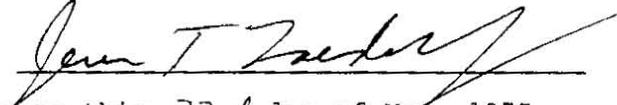
23 CERTIFICATE OF MAILING

24 I, Jerome T. Loendorf, hereby state and certify that I  
25 did on the 22 day of May, 1975, mail a true copy of the  
26 above Opinion, Findings of Fact, Conclusions of Law, and Recom-  
27 mended Order to:

26 Mr. Joseph W. Duffy  
27 McKittrick & Duffy  
28 Attorneys at Law  
315 Davidson Building  
Great Falls, Montana 59401

Mr. Thomas E. Schneider  
Executive Director  
Montana Public Employees Assoc.  
P. O. Box 1184  
Helena, Montana 59601

29  
30  
31 SUBSCRIBED AND SWORN to before me this 22nd day of May, 1975.

32   
NOTARY PUBLIC for the State of Montana  
Residing at Helena, Montana  
My commission expires: June 15, 1978