

1 BEFORE THE BOARD OF PERSONNEL APPEALS

2
3 INTERNATIONAL UNION OF OPERATING)
ENGINEERS, LOCAL NO. 400, AFL-CIO,)
4 Complainant,)
5 -vs-)
6 STILLWATER COUNTY COMMISSIONERS,)
Defendant.)

ULP-15-1974

)
) FINDINGS OF FACT,
) CONCLUSIONS OF LAW,
) AND RECOMMENDED ORDER

7
8 I STATEMENT OF CASE

9 As a result of an unfair labor practice charge filed December 5, 1974 by
10 the International Union of Operating Engineers, Local No. 400, AFL-CIO, a
11 Notice of Hearing was served on the above-captioned parties on January 22,
12 1975 by the Executive Secretary of the Montana State Board of Personnel
13 Appeals.

14 In an order dated January 3, 1975, a Motion to Dismiss filed by the County
15 Commissioners, hereinafter referred to as the Employer, was denied. A ten (10)
16 day extension to file an answer to the charge, hereinafter referred to as
17 ULP No. 15, 1974, was granted. The answer to ULP No. 15, 1974 was subsequently
18 filed with the Board of Personnel Appeals, hereinafter referred to as the Board,
19 on January 17, 1975.

20 Local No. 400, hereinafter referred to as the Union, basically alleges in
21 ULP No. 15, 1974, that ten (10) employees of the Stillwater County Road and
22 Bridge crew were discharged because of union activity. Further, the Union
23 alleges that this action by the Employer was in violation of section 1605(1)(a)
24 and (c), Revised Codes of Montana 1947. Section 1605(1)(a), in substance, deals
25 with the interference and coercion of employees in exercising their right to
26 organize for collective bargaining purposes, and section 1605(1)(c), the dis-
27 crimination in regards to hire, or tenure of employment, or any term or con-
28 dition of employment, in an effort to discourage membership in a labor organiza-
29 tion.

30 Employer's answer to ULP No. 15, 1974, denies the charge on the contention
31 that the Union is not a proper "party" as defined by the Montana Administrative
32 Procedures Act, section 82-4202(6), and further that the employees named in the

1 charge were not discharged for union activities.

2 The hearing was held February 6, 1975 by Cordell R. Brown, appointed agent
3 of the Board. Said hearing was conducted in accordance with the provisions of
4 the Montana Administrative Procedures Act (section 82-4201 to 82-4225, Revised
5 Codes of Montana 1947).

6 After thorough review of the entire record of the case, including sworn
7 testimony, evidence and briefs, I make the following:

8 II FINDINGS OF FACT

9 The Unfair Labor Practice Charge

10 1. On November 1, 1974, the Union petitioned the Board for unit determination
11 proceedings and an election pursuant to section 59-1606, Revised Codes of Montana
12 1947. The Union's petition followed an organizational meeting held October 31,
13 1974. At the meeting, authorization cards were signed by at least thirty (30)
14 percent of the members of the proposed unit. The Board duly notified the Employer
15 of the pending unit determination proceedings on November 6, 1974, and the
16 Employer subsequently furnished to the Board a list of the employees in the pro-
17 posed unit as of November 1, 1974.

18 2. Towards the end of November, ten (10) members of the proposed unit were
19 laid off. The Union filed an unfair labor practice charge on January 5, 1975,
20 alleging violation of section 59-1605(1)(a) and (c). The Union based their
21 allegations on the assumption that the ten (10) men in question were laid off
22 because of their union activities. It appears that Mr. Johnston, Business
23 Representative for the Union, formed this assumption on the basis that all of
24 the employees on the list of employees laid off were present at the organizational
25 meeting of October 31, and that road and bridge crew employees in other counties
26 where the Union was established were not laid off en masse in the winter. Mr.
27 Johnston stated:

28 "Because it seems to me, that a county the size of
29 this Stillwater County would require a certain
30 amount of their road maintenance and in bridge
31 maintenance. It is a certainty that there is snow
32 to plow at this time." (transcript, page 6)

31 Past Employment Practices - Stillwater County Road and Bridge Crew

32 3. Mr. Art Waltermann, foreman for the Stillwater County Road and Bridge

1 crew, testified that it has been an established practice to lay-off "hourly"
2 employees every winter dependent on budgeted road funds, the weather, and the
3 amount of work which has to be done. The "hourly" designation refers to
4 employees hired on a part-time basis. Mr. Walterman referred to these employees
5 as "extra help".

6 At the request of counsel for the Employer, Mr. Walterman submitted, into
7 evidence, a list of dates that showed when the ten (10) employees in question
8 were laid off over the last five years.¹ (Employer's Exhibit B.) The list
9 shows that "hourly" employees are laid off sporadically from as early as the
10 end of August to the end of December each year. The record shows that the fiscal
11 situation in 1974 was the most important factor in the late November lay-offs
12 of the men in question. All the "hourly" men that worked for the county were
13 laid off and they formed the nucleus of the "shaling", "bridge", and "crushing"
14 crews. These crews are limited in their operation either by the weather, or
15 as in 1974 by fiscal considerations. This fact will be illustrated further
16 in discussing the budget. The point should be emphasized that five of the ten
17 men supposedly laid off for union activities, were rehired each year for the
18 last five years following winter lay-offs.

19 4. In November of 1974, the Employer also laid off "monthly" men in order
20 to trim expenses. The "monthly" designation refers to employees employed on a
21 more permanent basis. Mr. Walterman testified that the Employer, in past years,
22 has attempted to retain at least five of these "monthly" men throughout the
23 winter, however, in 1974 only four men were retained. Mr. Russell Loughney
24 and Mr. George Campbell, the "monthly" employees in question were laid off in
25 late November of 1974, and were the last two "monthly" employees hired and
26 therefore the lowest men in an informal seniority system.

27 The Budget

28 5. Ms. Mabel Shott, County Treasurer, testified that the Stillwater County
29 Road Fund showed a \$37,757.28 deficit as of November 1974. This deficit was the
30 result of the combined deficits of September (\$9,733.71) and October (\$28,023.57).

31 ¹This list was not signed as being valid by the employees in question,
32 however, the Union did not challenge its admissibility and I have no reason to
doubt its accuracy especially in view of collaborating testimony given later.

1 The deficit after collection of taxes in November and December was \$3,246.00.
2 Registered warrants² had to be issued as a result of deficit in 1974 as in
3 recent years, but 1974 was the worst year on record fiscally for the Stillwater
4 County Road Fund.

5 6. Although the Employer was somewhat aware of the budget problem in the
6 months of September and October, only at the early November meeting of the
7 County Commissioners, was the seriousness of the problem fully recognized.

8 From the extensive testimony of the Employer, it is apparent that for a
9 number of reasons, not the least of which was inflation, 1974 was an extremely
10 difficult year for the County Road Fund. In past years it appears that the
11 Employer has kept on as many men as funds and the weather would permit, and
12 the fact is well established that funds just did not exist.

13 Anti-Union Animus

14 7. After repeated and thorough examination of the Employer, I could not
15 detect anti-union animus. From my understanding of the record, the Employer was
16 unaware of union activities until receipt of the Board's notice of unit deter-
17 mination proceedings on November 6, 1974. Moreover, the Employer does not con-
18 test the right of the employees in question to vote in an election because they
19 were employees eligible to vote as of November 1, 1974. It also appears that
20 the Employer intends to follow past hiring practices and many of the employees in
21 question could be rehired as they have been for a number of years in the spring.

22 DISCUSSION

23 From the foregoing and after thorough review of the record, I am dismissing
24 the charge. It is apparent that insufficient communication and investigation on
25 the part of the Union, combined with the fiscal situation in Stillwater County
26 and the timing of the petition for unit determination in this proposed unit, have
27 resulted in this unfair labor practice charge.

28 I could not detect anti-union animus nor could I see any contradiction of
29 past employment practices in this case. Mr. Johnston's reply to the question,
30 "Do you have any evidence that there was discrimination in regards to hire or
31 tenure of employment, during the condition of employment, to encourage or discourage

32 ²See title 16, chapter 18, 19, and 20 R.C.M. 1947, concerning county budget procedures, etc.

1 membership in the Union?" was simply "nothing, only laying off these people and
2 this is all that I have."

3 It was coincidence which motivated the Union to file the charge. It appeared
4 to the Union, that the Employer was blatantly engaging in anti-union activities.
5 Mr. Johnston held a meeting on October 31, 1974, and shortly thereafter men who
6 were present at the meeting were laid off. The Union did not look into the past
7 employment practices of the Employer. The Union mistakenly assumed that the
8 employment practices of the counties where it was already established were the
9 same as the employment practices of this smaller county.

10 One issue raised by the Employer, perhaps the result of unfamiliarity with
11 the collective bargaining process, was that the Union was not a proper party in
12 the case as defined by the Administrative Procedures Act, section 82, 4202(6).
13 The Employer contends that because the Union had not been certified by the Board,
14 that it could not represent the employees in question in an unfair labor practice
15 charge. Further, the Employer objected repeatedly to my ruling during the hear-
16 ing that authorization cards are confidential. The Employer contends that by
17 not knowing specifically which employees were engaged in union activities, this
18 hampered defense of the charge.

19 From what I can ascertain from the arguments and brief presented by counsel
20 for the Employer, the definition of "party" in section 82-4202, R.C.M. 1947, as it
21 pertains to hearings held in accordance with the Montana Administrative Procedures
22 Act, is referenced to section 82A-1014(4), R.C.M. 1947, which deals with one of
23 the Board's functions in the State Employees Classification and Wage Act or,
24 Title 59, Chapter 9. The case in question deals with another of the Board's
25 functions, providing remedies for unfair labor practices under section 59-1605
26 (1) and (2).

27 As long as I have been presented with this confusion, I will take the
28 opportunity to explain why the Union is a proper party to an unfair labor practice
29 case before it has been certified as the exclusive representative for a pro-
30 posed unit.

31 The definition of "party" in section 82-4202, R.C.M. 1947 reads:

32 "Party means any person or agency named or admitted
as a party, or properly seeking and entitled as of

1 right to be admitted as a party; but nothing
2 herein shall be construed to prevent an agency
3 from admitting any person or agency as a party
 for limited purposes." (emphasis added)

4 This wording permits an agency to determine who is in fact a proper party in
5 contested cases. The Union in this specific case, initiated unit determination
6 proceedings. They were attempting to organize the proposed unit through the
7 procedures prescribed by the Board of Personnel Appeals. Further, the Union
8 qualified as a labor organization as defined by section 59-1602(1). It is only
9 logical that the Union is a party to the unit determination proceedings with
10 real interest therein.

11 The Board's certification of an exclusive representative cannot be rendered
12 if an employer is engaging in unfair labor practices which are impeding the
13 unit determination proceedings. The NLRB has, in fact, established at least
14 three alternatives for remedying the situation where severe unfair labor prac-
15 tices are impeding the unit determination. This was clarified by the Supreme
16 Court when it stated in its decision in *NLRB V. Gissell Packing Co.*:

17 "In one instance the Union did not seek a represen-
18 tation election but filed unfair labor practice
19 charges against the employer; in a second, an
20 election sought by the Union was not held because
21 of unfair labor practice charges filed by the Union
22 as a result of the employer's antiunion campaign;
 and in a third, an election petitioned by the Union
 and won by the employer was set aside by the National
 Labor Relations Board (NLRB) because of the employer's
 pre-election unfair labor practices."³ (emphasis
 added)

23 The NLRB has used bargaining orders to rectify gross unfair labor practices
24 in these matters.⁴ Even noting the basic differences between the NLRA and
25 Montana Public Employees Collective Bargaining Act, the similarities in the
26 area of unfair labor practices are so obvious, it would be senseless to ignore
27 the precedent set by the NLRB and upheld by the Courts.

28 The Union's thirty (30) percent proof of interest filed with the Board
29 logically makes them a party to this case. This is a fundamental conclusion
30 necessary to the success of the collective bargaining process. The reason:

31 ³*NLRB V. Gissell Packing Co. Inc. etal.* 395 US p.575.

32 ⁴*Kinter Bros. Inc.,* 167 NLRB 57, 66 LRRM 1004(1967).

1 why authorization cards are confidential is obvious, and I do not intend to
2 belabor this point.

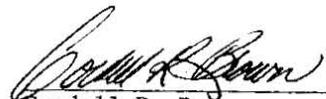
3 CONCLUSIONS OF LAW

4 The allegations of ULP No. 15, 1974, that the Employer has engaged, and
5 is engaging in unfair labor practices within the meaning of section 59-1605
6 (1)(a) and (c), R.C.M. 1947 have not been sustained by the Union.

7 RECOMMENDED ORDER

8 It is my recommended order, upon the basis of the foregoing Findings of
9 Fact, Conclusions of Law, and upon the entire record of the case, that the
10 charge be dismissed in its entirety.

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13 DATED this 21st day of March 1975.

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21 Cordell R. Brown
22 Hearing Examiner
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