

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 75-95:

LABORERS' LOCAL NO. 254, )  
Affiliated with the LABORERS' )  
INTERNATIONAL UNION OF NORTH )  
AMERICA, AFL-CIO, )

Complainant, )

vs. )

STATE OF MONTANA, DEPARTMENT )  
OF ADMINISTRATION, GENERAL )  
SERVICES DIVISION, )

Defendant. )

FINDINGS OF FACT;  
CONCLUSIONS OF LAW;  
AND RECOMMENDED ORDER

\* \* \* \* \*

**I. INTRODUCTION**

A formal hearing in the above-entitled matter was conducted on August 21, 1995, in Helena, Montana before Stan Gerke, Hearing Officer. The hearing was conducted under authority of Section 39-31-406, MCA, and in accordance with the Montana Administrative Procedures Act, Title 2, Chapter 4, Part 6, MCA. Complainant, Laborers' Local No. 254, Affiliated with the Laborers' International Union of North America, AFL-CIO, was represented by Karl Englund, Attorney at Law, Missoula, Montana. Present for Complainant during the morning portion of the hearing was Eugene Fenderson, Business Manager, Local Union No. 254. Present during the afternoon portion was Wayne Guccione, Mail Clerk, Central Mail Bureau, General Services Division, Department of Administration, and member of Local Union No. 254. Defendant, State of Montana, Department of Administration, General Services Division, was represented by Vivian Hammill, Legal Counsel, Labor and Employee

1 Relations Bureau, State Personnel Division, Department of  
2 Administration. Present for Defendant were Kenneth McElroy, Labor  
3 Relations Specialist, Labor Relations and Employee Relations  
4 Bureau, State Personnel Division, Department of Administration, and  
5 Debra Fulton, Administrator, General Services Division, Department  
6 of Administration. Witnesses included Eugene Fenderson (referenced  
7 above); Kenneth McElroy (referenced above); Debra Fulton  
8 (referenced above); Mickey Street, Mail Clerk Supervisor,  
9 Department of Public Health and Human Services; Dennis McAlpin,  
10 John H. Morgan, and Terry Strum, Mail Clerks, Larry Higgins, Mail  
11 Clerk Floor Supervisor, and William T. Spurzem, Supervisor, all of  
12 the Central Mail Bureau, General Services Division, Department of  
13 Administration. Complainant's Exhibits Nos. A, B, C, and D and  
14 Defendant's Exhibits Nos. 1 through 10 and No. 14 were entered on  
15 the record. Pursuant to a post-hearing briefing schedule, the  
16 matter was fully submitted on October 2, 1995.

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1 II. ISSUE<sup>1</sup>

2 The issue in this matter will be to determine whether  
3 Defendant violated Section 39-31-401(1), (3), and (5), MCA. More  
4 specifically, the only factual issues in this matter are whether  
5 Mr. William T. Spurzem threatened mail room employees with the loss  
6 of their jobs if they participated in a strike and whether Mr.  
7 Spurzem threatened Mr. John H. Morgan by making a remark about a  
8 bullet-proof vest.

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19 <sup>1</sup>This Hearing Officer understands that Complainant's members  
20 ultimately are seeking to receive unemployment benefits for the  
21 time they were on strike. In order to secure unemployment  
22 benefits, Complainant must prove that Defendant failed or refused  
23 to conform to a State or Federal law and that non-compliance  
24 caused the strike. Section 39-51-2305(3), MCA, states:

25 If the Department, upon investigation, shall find that  
26 such labor dispute is caused by the failure or refusal  
27 of any employer to conform to provisions of any law of  
28 the state wherein the labor dispute occurs or of the  
United States pertaining to collective bargaining,  
hours, wages, or other conditions of work, such labor  
dispute shall not render the workers ineligible for  
benefits.

A determination on the unemployment issue is not before this  
Hearing Officer.

1 III. FINDINGS OF FACT<sup>2</sup>

2 1. Complainant, Laborers' International Union of North  
3 America, Local No. 254, is the exclusive bargaining representative  
4 for non-supervisory employees employed by the Central Mail Bureau  
5 of the General Services Division of the Department of  
6 Administration of the State of Montana (Defendant).

7 2. Complainant and Defendant have been parties to a series  
8 of collective bargaining agreements. In January 1995, Complainant  
9 and Defendant began collective bargaining for a new agreement to  
10 replace a two year agreement that expired on June 30, 1995. The  
11 chief negotiator for Complainant was its Business Agent, Eugene  
12 Fenderson. The chief negotiator for Defendant was Department of  
13 Administration Labor Relations Specialist, Kenneth McElroy.

14 3. Several issues were discussed during the course of  
15 collective bargaining, including a job bidding procedure, training  
16 programs, the scheduling of vacations, verbal abuse of Central Mail  
17 Bureau employees by Central Mail Bureau supervisors, and the  
18 establishment of a labor/management committee (Defendant's Exhibit  
19 No. 5). The most contentious issue was the issue of pay.  
20 Complainant wanted the employees to be placed on the blue collar  
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23 <sup>2</sup>All proposed findings, conclusions and supporting arguments  
24 of the parties have been considered. To the extent that the  
25 proposed findings and conclusions submitted by the parties, and  
26 the arguments made by them, are in accordance with the findings,  
27 conclusions, and views stated herein, they have been accepted,  
28 and to the extent they are inconsistent therewith, they have been  
rejected. Certain proposed findings and conclusions may have  
been omitted as not relevant or as not necessary to a proper  
determination of the material issues presented. To the extent  
that the testimony of various witnesses is not in accord with the  
findings herein, it is not credited.

1 classification system (Complainant's Exhibit No. D), whereas  
2 Defendant strongly resisted such a change.

3 4. The parties met on several occasions in January and  
4 February, 1995 (Defendant's Exhibit No. 5), but were unable to  
5 reach agreement. In mid-February 1995, Complainant's members voted  
6 to authorize their Business Agent to call for a concerted work  
7 stoppage.

8 5. Complainant did not strike immediately after the strike  
9 vote. Instead, the fact of the strike vote was communicated to  
10 Defendant's negotiators for the purpose of demonstrating that the  
11 employees were willing to strike. Additionally, the strike vote  
12 was common knowledge in the Central Mail Bureau.

13 6. On April 24, 1995, Complainant's members began a work  
14 stoppage against Defendant. The strike lasted for about six weeks  
15 until a new contract was agreed to between the parties.

16 7. Privatization of the Central Mail Bureau has been a topic  
17 of discussion among the employees of the Central Mail Bureau since  
18 at least 1990. The State's mail system has been previously  
19 reviewed for the possibility of privatization. In the recent past,  
20 a Helena area business, Security Armored Express, placed a bid with  
21 then Governor Stan Stephens to privatize the State mail system. As  
22 recent as the 1995 Legislative session, members of a Legislative  
23 Committee toured the mail room as part of their privatization  
24 review of the State's mail system. Currently, Governor Racicot's  
25 administration has privatization on its agenda and has ordered all  
26 State agencies to review all provided services.

27 8. Debra Fulton is opposed to the privatization of the  
28 Central Mail Bureau. In her capacity as administrator, General

1 Services Division, she has prepared reports and other documentation  
2 and testified before past Legislative standing committee(s) in  
3 opposition to the privatization of the Central Mail Bureau.

4 9. The privatization of the Central Mail Bureau has been and  
5 remains a real possibility.

6 10. Should the Central Mail Bureau be privatized, the real  
7 possibility exists that all employees, including the supervisors,  
8 would lose their positions as State employees.

9 11. Some employees believed that should the Central Mail  
10 Bureau be privatized, they may retain employment with the private  
11 sector employer and earn a higher wage equivalent or similar to  
12 that paid to employees of the U.S. Postal Service, United Parcel  
13 Service, or Federal Express.

14 12. During early morning work hours, many Central Mail Bureau  
15 employees and supervisors work together sorting mail. During this  
16 daily morning period, many topics of interests are discussed. As  
17 noted in Finding of Fact No. 7, the topic of privatization was  
18 frequently discussed during these morning mail sorting sessions.

19 Beginning in January 1995, much discussion took place within  
20 the Central Mail Bureau concerning the progress of the collective  
21 bargaining sessions and the strike votes. Tension had risen among  
22 the employees because of the pending contract talks and the  
23 opposition to a work stoppage expressed by some of the affected  
24 employees.

25 13. Witness Larry Higgins, Mail Clerk Floor Supervisor, is a  
26 former U.S. Postal Service worker. Sometime in January 1995, Mr.  
27 Higgins commented on a certain newspaper article during a usual  
28 morning mail sorting session. The newspaper article concerned a

1 U.S. Postal Service worker in another state who shot his supervisor  
2 at the work site. In a humorous fashion, Mr. Higgins suggested  
3 that William T. Spurzem (because he was the supervisor) should get  
4 a bullet-proof vest. Other Central Mail Bureau employees,  
5 including John H. Morgan, were present and had opportunity to  
6 witness the conversation.

7 14. Sometime in early April 1995 (prior to the strike by the  
8 Central Mail Bureau employees), William T. Spurzem made a comment  
9 to Mickey Street, Mail Clerk Supervisor, Department of Public  
10 Health and Human Services, while delivering mail to Mr. Street's  
11 place of work. The comment related to the possibility of the  
12 privatization of the Central Mail Bureau should the employees  
13 strike. The exact phrase spoken by Mr. Spurzem is not clear. Only  
14 Mr. Street and Mr. Spurzem were present at the time and Mr. Street  
15 testified at the hearing and at his deposition that he believed Mr.  
16 Spurzem was joking or just letting off steam. Mr. Street is not an  
17 employee of the Central Mail Bureau nor a member of the  
18 Complainant's labor organization.

19 15. William T. Spurzem is not a member of Defendant's  
20 negotiating team and did not attend any negotiating sessions  
21 between Complainant and Defendant.

#### 22 **IV. CONCLUSIONS OF LAW**

23 1. The Board of Personnel Appeals has jurisdiction over this  
24 unfair labor practice charge by a labor organization against a  
25 public employer. Section 39-31-405, MCA.

26 2. The Montana Supreme Court has approved the practice of  
27 the Board of Personnel Appeals in using federal court and National  
28 Labor Relations Board (NLRB) precedence as guidelines interpreting

1 the Montana Collective Bargaining for Public Employees Act as the  
2 State Act is so similar to the Federal Labor Management Relations  
3 Act. State ex rel Board of Personnel Appeals v. District Court,  
4 183 Mont. 223, 598 P.2d 1117, 103 LRRM 2297 (1979); Teamsters Local  
5 No. 45 v. State ex rel Board of Personnel Appeals, 195 Mont. 272,  
6 635 P.2d 1310, 110 LRRM 2012 (1981); City of Great Falls v. Young  
7 (III), 211 Mont. 13, 686 P.2d 185, 119 LRRM 2682.

8 3. A leading United States Supreme Court case on the issue  
9 of free speech versus threatening speech that results in an unfair  
10 labor practice is NLRB v. Gissel Packing Co., 395 U.S. 575, 71 LRRM  
11 2481 (1969). The case sets the standard that employer predictions  
12 are protected free speech, but threats are not protected by the  
13 First Amendment. To be "predictions" the utterance must have some  
14 objective basis in fact. In Gissel, supra, the Court found that  
15 the employer had committed an unfair labor practice by giving  
16 speeches, handing out pamphlets, leaflets and letters that stated  
17 the company was in such precarious financial condition that it  
18 would have to shut down if the employees' unreasonable demands were  
19 met, as other unionized plants in the areas had done. There was no  
20 factual basis for the employer's predictions. The Court in Gissel  
21 states:

22 ...we do note that an employer's free speech  
23 right to communicate his views to his  
24 employees is firmly established and cannot be  
25 infringed by a union or the Board...expression  
26 of "any views, argument of opinion" shall not  
27 be "evidence of an unfair labor practice," so  
28 long as expression contains "no threat of  
reprisal or force or promise of  
benefit....Thus, an employer is free to  
communicate to his employees any of his  
general views about unionism or any of his  
specific views about a particular union, so  
long as the communications do not contain a  
"threat of reprisal or force or promise of

1 benefit". He may even make a prediction as to  
2 the precise effects he believes unionization  
3 will have on his company. In such a case,  
4 however, the prediction must be carefully  
5 phrased on the basis of objective fact to  
6 convey an employer's belief as to demonstrably  
7 probable consequences beyond his control or to  
8 convey a management decision already arrived  
9 at to close the plant in case of unionization.  
71 LRRM 2497

6 As stated elsewhere, an employer is free only  
7 to tell "what he reasonably believes will be  
8 the likely economic consequences of  
9 unionization that are outside his control" and  
not "threats of economic reprisal to be taken  
on his own volition." 71 LRRM 2497

10 In applying the Gissel criteria, the NLRB found in M.K. Morse  
11 Co. and United Steelworkers, AFL-CIO, 302 NLRB 147, 138 LRRM 1245  
12 (1991) that the employer had crossed the protected free speech line  
13 by promising different benefits to employees who voted against the  
14 union; by telling employees that they would be fired for specific  
15 union activities, and for telling employees that remarks they made  
16 concerning promised wage increases caused their firing.  
17 Conversely, the Board in M.K. Morse, supra, also ruled that the  
18 employer's statements that two union supporters were liars and the  
19 company Vice President's comment that "you don't know what a good  
20 screwing is" in reference to a union election was not an  
21 unspecified threat of reprisal if the union won the election, but  
22 rather a comment made in the middle of a bawdy conversation that  
23 employees were participating in with the Vice President. The  
24 former two statements were protected by the First Amendment and  
25 were found to be non-threatening statements. Gissel, 138 LRRM at  
26 1247. In Benjamin Coal Co. v. Mine Workers, 294 NLRB 44, 133 LRRM  
27 1058 (1989), the Board, among other First Amendment issues, decided  
28 that the company's pre-election written materials that suggested

1 the possibility of plant closure, and dire economic consequences as  
2 a possibility of unionization, were protected as the company's  
3 economic outlook was bad.

4 There is no dispute a real possibility exists that the Central  
5 Mail Bureau may be privatized at some point. Privatization is a  
6 strong element on the Governor's agenda and all State agencies have  
7 been instructed to review the services they provide.

8 There is also no dispute that privatization of the Central  
9 Mail Bureau has long been discussed among the employees and  
10 supervisors. Legislative Committee members have toured the  
11 facility exploring the possibility of privatization. Administrator  
12 Debra Fulton has testified before Legislative Committee(s)  
13 concerning privatization and a local business has presented a "bid"  
14 to handle the State's mail system.

15 The record indicates the possibility of privatization is  
16 viewed differently by Central Mail Bureau employees. Some view  
17 privatization as a threat to continued employment; others view it  
18 as an opportunity for higher pay. Regardless of individual views,  
19 the record shows both employees and supervisors have thoroughly  
20 discussed the possibility, probability, disadvantages, and  
21 advantages of privatization.

22 In this instant matter, Complainant alleges that soon after  
23 the strike vote, Central Mail Bureau Supervisor William T. Spurzem  
24 let it be known to Union members Dennis McAlpin and John Morgan  
25 that if the employees participated in a strike, management would  
26 hire a private contractor to deliver the mail and the employees  
27 would lose their jobs. Complainant also alleges that Mr. Spurzem  
28 also made a similar statement to Mickey Street employed by a

1 different State agency. Privatization is a real concern and has  
2 been a primary topic of discussion for more than five years. It is  
3 understandable that Mr. Spurzem, or others, could have, and may  
4 have, voiced an opinion predicting a work stoppage could add to the  
5 arguments in favor of privatization of the Central Mail Bureau and  
6 that the State might privatize the mail service if the cost of  
7 providing the service increased to the point where it would make  
8 good business sense to hire a contractor to deliver the mail.  
9 Although Mr. Spurzem would have no control as to whether the  
10 Central Mail Bureau would be privatized, there is a factual basis  
11 for the prediction of privatization. The possibility of the  
12 privatization of the Central Mail Bureau existed long before a  
13 strike vote was taken or the work stoppage commenced. Mr.  
14 Spurzem's alleged comments can only be interpreted as "predictions"  
15 as defined in Gissel, supra.

16 The record shows that the allegation that Mr. Spurzem  
17 suggested that John Morgan should get a bullet-proof vest was a  
18 misunderstanding. Larry Higgins, the former U.S. Postal Service  
19 worker, reported on a newspaper article during the usual morning  
20 mail sorting period. The article concerned the shooting of a  
21 supervisor in a U.S. Post Office in another state. The bullet-  
22 proof vest comment resulted from the intended humorous banter  
23 between Mr. Higgins and Mr. Spurzem and was misunderstood by Mr.  
24 Morgan.

25 4. Complainant has not violated Section 39-31-401(1), (3),  
26 and (5), MCA.

\* \* \* \* \*

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day served upon the following parties or such parties' attorneys of record by depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

Karl Englund  
Attorney at Law  
P.O. Box 8358  
Missoula, MT 59807-8358

Eugene Fenderson, Business Manager  
Montana District Council of Laborers  
Local Union No. 254  
P.O. Box 702  
Helena, MT 59624

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day, served upon the following parties or such parties' attorneys of record by means of the State of Montana's Deadhead mail service.

Vivian Hammill, Legal Counsel  
Labor and Employee Relations Bureau  
State Personnel Division  
Department of Administration  
Room 130 - Mitchell Building  
Helena, MT 59620

Debra Fulton, Administrator  
General Services Division  
Department of Administration  
P.O. Box 200110  
Helena, MT 59620

DATED this 16<sup>th</sup> day of January, 1996.

Christine A. Roland

1 V. RECOMMENDED ORDER

2 IT IS ORDERED, Unfair Labor Practice Charge No. 75-95 is  
3 DISMISSED.

4 DATED this 16<sup>th</sup> day of January, 1996.

5 BOARD OF PERSONNEL APPEALS

6  
7 By: Stan Gerke

8 STAN GERKE  
9 Hearing Officer

10 NOTICE: Pursuant to ARM 24.26.215, the above RECOMMENDED ORDER  
11 shall become the Final Order of this Board unless written  
12 exceptions are postmarked no later than February 8, 1996.  
13 This time period includes the 20 days provided for in ARM  
14 24.26.215, and the additional 3 days mandated by Rule 6(e),  
15 M.R.Civ.P., as service of this Order is by mail.

16 The notice of appeal shall consist of a written appeal of the  
17 decision of the hearing officer which sets forth the specific  
18 errors of the hearing officer and the issues to be raised on  
19 appeal. Notice of appeal must be mailed to:

20 Board of Personnel Appeals  
21 Department of Labor and Industry  
22 P.O. Box 6518  
23 Helena, MT 59604  
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