STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
BRANCH 32

TODD W. BRAUNEIS, et al.,

Petitioners,

v. Case No. 97-CV-007679

STATE OF WISCONSIN,
LABOR AND INDUSTRY REVIEW COMMISSION;
and THE ILLINGWORTH CORPORATION,

Respondents.

FILED
34 JUN 30 1998 34
JON W. SANFILIPPO
Acting Clerk of Circuit Court

DECISION AND ORDER

BACKGROUND

The petitioners are employees of the Illingworth Corporation (Illingworth) who belong to Local 18 of the Sheet Metal Workers International Association (Local 18) for the purposes of collective bargaining. During negotiations, Illingworth is represented by a collective bargaining organization known as the Sheet Metal and Air Conditioning Contractors' Association of Milwaukee (the Association).

Members of the Association assign exclusive rights to the Association to negotiate contracts with Local 18. Members also agree to act as directed by the Association in the event of a labor dispute, i.e. closing the doors to their facilities.

On June 6, 1996, the collective bargaining agreement between Local 18 and the Association expired. The following day, Local 18 members employed at Construction Supply and Erection Corporation (CS&E), also a member of the Association, commenced a

strike at CS&E's facilities. At no time were petitioners directly involved with the strike at CS&E, nor did petitioners commence a strike at the Illingworth facility.

On June 11, 1996, the Association instructed its members, including Illingworth, to bar their union employees from reporting to work.[1] The petitioners were not permitted to return to work until the strike at CS&E ended on June 14, 1996.

Petitioners applied for unemployment compensation benefits for the period they were not permitted to report to work. The Petitioners were granted benefits in the initial determination. Illingworth appealed, but the Appeal Tribunal affirmed. Illingworth again appealed and the State of Wisconsin Labor and Industry Review Commission (LIRC) reversed the Appeal Tribunal. The petitioners now appeal LIRC's decision to deny them unemployment compensation benefits arguing that they were "locked out" as defined by section 108.04(100(b), Stats..

STANDARD OF REVIEW

LIRC's findings of fact will be upheld if they are supported by credible and substantial evidence. Hagen v. LIRC, et al., 210 Wis. 2d 12, 23, 563 N.W.2d 454 (1997). In reviewing a LIRC decision regarding a question of law, there are three levels of deference which may be applied: great weight, due weight, or de novo review. Harnischfeger Corp. v. LIRC, 196 Wis. 2d 650, 660, 539 N.W.2d 98 (1995).

The great weight standard is applied when four requirements are met:

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[1]To eliminate any confusion, the term "lock out" will only be used in a manner consistent with section 108.04(10)(d), Stats.

1) The agency must be charged by the legislature with the duty of administering the statute;

2) The interpretation of the agency must be one of long-standing;

3) The agency must have employed its expertise or specialized knowledge in forming the interpretation; and

4) The agency's interpretation must provide uniformity and consistency in the application of the statute.

The due weight standard is applied when the agency has some experience in the area, but not enough to put it in a better position to interpret the statute than the court. UFE Inc. and Pacific Indemnity Co. v. LIRC and Jerry Huebner, 201 Wis. 2d 274, 286, 548 N.W.2d 57 (1995). The court may overturn the agency's interpretation, even if it is reasonable, if the court believes there is a better interpretation of the statute. Id. The court only applies the de novo standard in situations where the issue before LIRC is clearly one of first impression, or where the LIRC's position on the issue has been so inconsistent as to provide no guidance. UFE at 285.

The issues before the court are certainly ones of first impression. The first issue currently before the court involves an interpretation of section 108.04(10)(d), Stats., regarding what is meant by "a union or group of employees of the employer". While LIRC may have experience in interpreting much of section 108.04 Stats., the statutory provision has not been extensively examined. To date, only one published case, Trinwith et al., v. LIRC, 149 Wis. 2d 634, 439 N.W.2d 581(Ct. App. 1996), examined the language of section 108.04(10)(d), and even then, the court only addressed the issue of whether a failure to

extend a wage rate constituted a "lockout".[2]

The second issue deals with whether a strike against one member of an employer association constitutes a strike against all. LIRC has not demonstrated any lengthy experience in addressing this issue. Therefore, because the issues before the court are one of first impression, the court's review in this action is de novo.

ANALYSIS

I. According to Wisconsin Statutes, no strike occurred against the Association or Illingworth.

LIRC presumed that a strike against one member of the Association was a strike against all members of the Association and therefore, a strike against the Association itself. However, because the Local 18 members employed at CS&E are only employes of CS&E and not of the Association or Illingworth, it would be impossible for CS&E employes to commence a strike against the Association .

The Association is a corporation, separate and distinct from its member companies. It is an agent of the individual employers; it does not own the member companies. The Association was formed for the sole purpose of representing the individual companies in negotiations with Local 18. There is no evidence in the record to support a finding that the

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[2] LIRC cites Piller et al v. LIRC et al., LC88-CV-8-591, an unpublished decision that was reversed on appeal, to support its interpretation of section 108.04(10)(d) Stats. It should be noted that pursuant to section 809.23(3) Stats., unpublished Court of Appeals decisions may not be used as precedent, nor can it be used as persuasive authority. Such use of unpublished decisions has been found to be sanctionable. *See* Beaupre v. Aireiss, 208 Wis. 2d 238, 244 (Ct. App. 1997), Tamminen v. Aetna Cas. and Surety Co., 109 Wis. 2d 536, 563-564 (1982).

individual employers were ever agents of the Association. Therefore, the employes of the individual companies cannot be said to be employes of the Association.

Section 108.02 (12), Stats., defines "employe" as "any individual who is or has been performing services for an employing unit, in an employment, whether or not the individual is paid directly by such employing unit..." Section 108.02(15) defines "employment" as "any service, including service in interstate commerce, performed by an individual for pay."

The employees of the individual companies are not employees of the Association. They do not perform services for the Association nor are their wages paid by the Association. Pursuant to section 108.02(15), Stats., the members of Local 18 are only employees of the individual companies for whom they work. Consequently, the strike could not have been against the Association.

Throughout the statutes, "strike" is defined as "any concerted stoppage of work by employes, and any concerted slowdown or other concerted interruption of operations or services by employes, or any concerted refusal of employes to work or perform their usual duties as employes for the purpose of enforcing demands upon an employer." Secs. 49.141(1)(L), 49.19(1), 111.15(1)(b),111.70(1), &111.81, Stats. Because the CS&E employees were not employees of the Association, they could not strike against the Association. Thus, the concerted work stoppage was against CS&E only and done only by CS&E employes.[3]

By this same token, the employees who went on strike against CS&E could not be said to be employes of Illingworth. First, CS&E employes do not perform services for

[3]Conversely, an act by the employer could not be considered at act against all union members, regardless of whether they are employed by the employer.

Illingworth, either paid or unpaid. Second, given the definition of "strike" discussed above, it would be impossible for CS&E's employees to go on strike against Illingworth because, they are not Illingworth's employes and could not promulgate a work stoppage at Illingworth. Therefore, no strike took place against Illingworth.

II. Section 108.04(10)(d) is ambiguous.

Section 108.04 Stats. states in relevant part:

> (a) An employe who has left or partially or totally lost his or her work with an employing unit because of a strike or other bona fide labor dispute, other than a lockout, is not eligible to receive benefits based on wages paid for employment prior to commencement of the dispute for any week in which the dispute is in active progress in the establishment in which the employe is or was employed, except as provided in par. (b).
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> ...
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> (d) In this subsection, "lockout" means the barring of one or more employes from their employment in an establishment by an employer as a part of a labor dispute, which is not directly subsequent to a strike or other job action of a labor union or group of employes of the employer, or which continues or occurs after the termination of a strike or other job action of a labor union or group of employes of the employer.

In other words, pursuant to Section 108.04(10)(d), the act of barring employees from their employment constitutes a "lock out" when the act 1) is a part of a labor dispute, 2) is NOT directly subsequent to a strike or other job action and 3) the strike or job action precipitating the act was committed by a labor union or group of employees of the employer.

Ambiguity arises in the phrase,"subsequent to a strike or other job action of a labor

union or group of employes of the employer". The disjunctive could be read in two different ways. First, it could be read: a strike by a labor union of employes of the employer or a group of employes of the employer. The disjunctive could also be read as: a strike by a labor union or group of employes of the employer.

"A statute is ambiguous if reasonable, well-informed persons could disagree as to its meaning." Trinwith v. LIRC, 149 Wis. 2d 634, 642, 439 N.W.2d 581, 585 (Ct. App. 1989). Section 108.04(10)(d) Stats. is subject to at least three interpretations. Under one interpretation, a strike by any union is enough to disqualify the barring of employees from being a "lock out". LIRC's interpretation would be that a strike by the employees' union, regardless of the location and regardless of whether the employees were striking at their own place of employment, would be enough to remove the barring of employees from the definition of a "lock out." A third version would interpret that statute to mean that a strike by the unionized employees would remove Illingworth's actions from the definition of a "lock out". Thus, the statute is ambiguous.

"A cardinal rule of statutory construction is that statutes must be construed to avoid an absurd or unreasonable result." In Re P.A.K., 119 Wis. 2d 871, 881, 350 N.W.2d 677, 683 (1984) *citing* State v. Mendoza, 96 Wis. 2d 106, 115, 291 N.W.2d 478 (1980). In seeking a reasonable interpretation of section 108.04(10)(d), one must keep in mind that by enacting section 108.04 Stats., the legislature intended to protenct an employer from financing a labor dispute in which it is a principal. De Leeuw v. DILHR, 71 Wis. 2d 446, 450, 238 N.W.2d 706, 709 (1976).

To interpret the statute to mean simply a labor union, without requiring a connection

to the employer or its employees, would lead to absurd results. Given this broad construction, any union could go on strike and any employer could close the door on its employes and claim that it did so directly subsequent to a strike by a union. The employer could then claim that its barring of its employes would not constitute a lockout under section 108.04(10)(d). In this scenario the danger the legislature wished to prevent, an employer financing a strike against it, is not even present. If some other company's employes go on strike, there would be no way for an employer to finance that strike.

It would also be unreasonable to interpret the statute to say that the strike must have been organized by a union to which the employer's employees belonged, but not require that the employer's employees be involved. Otherwise, in theory, AFL-CIO employees in Colorado could go on strike and any employer in Wisconsin whose employees belong to the AFL-CIO could close their doors and claim that such action was not a lock-out under section 108.04(10)(d). Again, this is an overly broad interpretation, and again, there is no danger of the Wisconsin employer of AFL-CIO workers financing the strike in Colorado.

The only reasonable interpretation of the statute would be to state that the disjunctive language used in Section 108.04(10)(d) was merely used to distinguish between unionized employees who strike and non-unionized employes who might go on strike. This interpretation provides sufficient connection between the employer and employees where the legislative intent is given purpose and is not defeated. It is more logical to permit employers to close the door on its own employees whether the strike against it was orchestrated by the employees union or whether it was organized by the employees themselves. Thus, the employer is not forced to pay wages or unemployment compensation to those who are

striking against the employer.

Applying this interpretation of the statute, Illingworth's act of barring its employees from reporting to work does, in fact, constitute a "lock out".

It is essentially undisputed by LIRC that the strike at CS&E did not constitute a labor dispute at Illingworth. Instead, LIRC asserts that Illingworth's act of barring its employees from reporting for work, in and of itself, constituted a labor dispute. The phrase "labor dispute" is defined as "any controversy between an employer and the majority of the employer's employes in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation or representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute." Secs. 103.62(3), 111.02(9), 111.70(1)(g), 111.81(11), & 939.648(5)(a) Stats. The act of barring employees from reporting to work is, in and of itself, a controversy. The employees wish to work, the employers do not want the employees to report to work. Thus, the first prong of section 108.04(10)(d) is satisfied.

The union to which Illingworth's employees belonged staged a strike at CS&E on June 7, 1997. Four days later the Association instructed Illingworth to close it's doors to its employees. Thus, Illingworth's conduct was directly subsequent to a strike, but not subsequent to a strike against itself.

The strike was not orchestrated by Illingworth's unionized employees. At no time did Illingworth's employees who belonged to Local 18 promulgate a work stoppage at Illingworth. Thus, Illingworth's act of barring its employees from reporting to work was not subsequent to a strike by its unionized employes, and thus, constituted a "lock out".

CONCLUSION AND ORDER

For all the foregoing reasons, it is the finding of this court that the strike at CS&E was not a strike against either Illingworth or the Association. It is further determined that Illingworth's act of barring its employees from reporting to work did constitute a lock out pursuant to section 108.04(10)(d), Stats.

THEREFORE, IT IS HEREBY ORDERED that the decision of the Labor and Industry Review Commission is reversed and remanded for proceedings consistent with this decision.

Dated at Milwaukee, Wisconsin, this 30 day of June, 1998.

BY THE COURT:

Jacqueline D. Schellinger
Circuit Court Judge
Branch 34

Editor's Note: Circuit Court decision affirmed by the WI Supreme Court in Brauneis, et al. v. LIRC and The Illingworth Corp., 2000 WI 69, 236 Wis. 2d 27, 612 N.W.2d 635