BEFORE THE BOARD OF PERSONNEL APPEALS

OF THE STATE OF MONTANA

IN THE MATTER OF: THE MONTANA PUBLIC EMPLOYEES CRAFT COUNCIL, Complainant, versus MONTANA STATE DEPARTMENT OF HIGHWAYS, Respondent.	ULP-3-4-1974 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above matter came on for hearing before the Board of Personnel Appeals on March 5, 1974 in the courtroom of the Lewis and Clark County Courthouse, Helena, Montana. The complainant appeared through its counsel Benjamin W. Hiller and Emilie Loring. The respondent appeared through its counsel Jack A. Holstrom. Testimony was given on behalf of both the complainant and the respondent.

The complainant, hereinafter Craft Council, has alleged that the respondent hereinafter the Department, violated § 59-1605 (1) (a) and (e) by refusing to bargain collectively in good faith with the Craft Council. The Department counter-claimed that the Craft Council violated § 59-2605 (2) (b) and § 59-1605(4) by refusing to bargain collectively in good faith with the Department by failing to recognize the bargaining limitations imposed by sub-section (4) of §59-1605.

Upon the entire record in this case and from the Board's observation of the witnesses and their demeanor on the witness stand the Board makes the following:

FINDINGS OF FACT

1. The Department is a public employer within the meaning of §59-1602 and the Craft Council is a labor organization representing public employees within the meaning of §59-1602.

2. The parties, up until the time of this hearing, had met sixteen (16) times more or less for the purpose of negotiating a collective bargaining contract.

3. At the time the negotiations began, Mr. H. J. Anderson, Director of Highways, had the authority with the concurrence of the Highway Commission pursuant to the executive reorganization plan, to enter into a collective bargaining agreement with the Craft Council.

4. During the course of negotiations, Department was informed that any collective bargaining agreement would ultimately have to be signed by the Department of Administration. Craft Council was also informed of this requirement. It appears from the testimony that the Department of Administration did not interfere with the Department and its Director and generally acted only as an observer to the negotiations. The record is void of evidence that the Department of Administration ever interfered with meaningful contract negotiations.

5. During the course of negotiations, proposals and counter-proposals were submitted by both sides.

6. The Department made concessions to the Craft Council during the course of the negotiations on such items as five percent (5%) salary increase for all members, shift differential for all employees, agreed to a letter of understanding on Maintenance Man I position, and agreed to a checkoff of monthly dues and initiation fees.

7. That the Director of the Department or his representative attended any and all negotiations sessions.

8. While the concurrence of the Board of Highway Commissioners with the Director of the Department was essential to the settlement of contract matters, it appeared that the Board generally concurred with the Director and that the Director's authority to negotiate was not pretextual or a sham, that this method of negotiating by the Department has been employed for some years, and that the Craft Council acquiesed in it.

9. That a number of the Craft Council's proposals for wage and salary increases were in excess of five percent (5%) per fiscal year.

10. While it is obvious that there is a certain amount of ambiguity as to whether or not the Legislature imposed a five percent (5%) per year salary and wage ceiling on highway maintenance workers it is clear that the Department and its Director believed they did. The Board specifically finds H. J. Anderson, Director of the Department, to be a credible witness when he said he believed the Department could not exceed a five percent (5%) appropriation for wages and salaries and that such belief was reasonable and genuine.

11. The matter of whether the Legislature had imposed a five percent (5%) restriction on salaries for each of the fiscal years concerned herein is unclear and ambiguous.

12. Taken as a whole, the overall negotiating technique employed by the Department, the Board finds that it was not pretextual, but genuinely intended to produce a workable agreement with the Craft Council.

Based upon the above Findings of Facts the Board now makes the following:

CONCLUSIONS OF LAW

1. That the Department did not violate §59-1605 by refusing to bargain collectively in good faith with the Craft Council. This conclusion is based upon what the Board believes to be a process of negotiating by the Craft Council with the Director, the Craft Council knowing that the concurrence of the Highway Commission was necessary, upon the Union's failure to object to this procedure, upon the fact that the Department met often and regularly with the Craft Council and in concurrence with the Highway Commission made concessions and counter-proposals to the Craft Council and upon the reasonable belief of the Department that the Legislature had through its appropriation put a five percent (5%) salary and wage restriction upon highway and maintenance employees. While there may or may not have been an error in judgment on the part of the Department, it is the express finding of the Board that no bad faith was shown with regard to the five percent (5%) wage increase problem.

2. That the Craft Council, faced with the same ambiguities and lack of clarity in determining whether or not there was a five percent (5%) legislative salary restriction for the affected workers did not violate §59-1605 in as much as their belief, whether mistaken or not was that the Legislature had not imposed such a limitation.

ORDER

It is hereby ordered that the complaint of the Craft Council is hereby dismissed and the counter-complaint of the Department is hereby dismissed.

DATED this 11th day of January, 1975.

Patrick F. Hooks

PATRICK F. HOOKS, Chairman
Board of Personnel Appeals

No. 12765

IN THE SUPREME COURT OF THE STATE OF MONTANA

1974

ULP-3-4-1974

THE STATE OF MONTANA, ACTING BY AND THROUGH THE DEPARTMENT OF HIGHWAYS OF THE STATE OF MONTANA,

Plaintiff and Appellant,

-vs-

PUBLIC EMPLOYEES CRAFT COUNCIL OF MONTANA, REPRESENTING THE MONTANA DISTRICT COUNCIL OF LABORERS, THE JOINT COUNCIL OF TEAMSTERS NO. 23, THE MONTANA MACHINISTS COUNCIL, OPERATING ENGINEERS, AND PAINTERS; VIRGIL BUETTNER AS PRESIDENT OF SAID COUNCIL AND JAMES L. MURRAY AS SECRETARY-TREASURER OF SAID COUNCIL,

Defendants and Respondents.

Appeal from: District Court of the First Judicial District, Honorable Peter G. Meloy, Judge presiding.

Counsel of Record:

For Appellant:

Jack Holstrom argued, and Daniel J. Sullivan appeared, Highway Legal Department, Helena, Montana

For Respondents:

Hilley and Loring, Great Falls, Montana
Benjamin W. Hilley argued and Emilio Loring argued, Great Falls, Montana

Submitted: November 18, 1974

Decided: DEC 9 1974

Filed: [illegible] 1974

Thomas J. Kearney Clerk

Mr. Chief Justice James T. Harrison delivered the Opinion of the Court.

This case involves a strike by approximately 285 teamsters, operating engineers, machinists, laborers, and painters employed by appellant Montana Department of Highways to perform all highway maintenance functions on interstate, primary, and certain secondary roads in the Butte, Great Falls, Missoula, Bozeman, and Helena areas. These employees were responsible for the repair, reconditioning, and general upkeep of roughly 3,000 miles of roads. Their major duties were: removing snow and ice from the traveled surfaces and applying traction materials such as sand and chemicals; patching, resurfacing, and regrading road surfaces; repairing bridges and other highway structures; repairing, replacing, or installing snow fences, culverts, ditches, fences, traffic safety devices, signs and signals, guardrails, and traffic delineators within right-of-way limits; stockpiling traction materials for snow season use; repairing and maintaining roadside rest areas, litter barrels, and campsites; repairing and maintaining state motor pool vehicles, snow plows, road patrols, caterpillars, and other equipment utilized in appellant's maintenance operations; and performing services during emergencies, such as assisting stranded motorists, removing obstructions (overturned vehicles, rock slides, etc.), and providing traffic control. Of necessity, these activities were performed on a 24 hour basis.

The strike by respondent Public Employees Craft Council against appellant occurred on January 21, 1974, and appellant applied to the district court of Lewis and Clark County the same day for a temporary restraining order prohibiting the strike. The district court granted appellant's request and scheduled a show cause hearing to determine whether the strike should be permanently enjoined. Respondent filed a motion to dismiss appellant's complaint, and a show cause hearing thereon was scheduled for March 28, 1974.

At the hearing on the motion to dismiss, the allegations contained in appellant's complaint--including those relating to disruption of highway maintenance programs and injury to the health, safety, and welfare of the traveling public--were admitted. It should be noted here, however, that the issues before us and discussed hereafter in this opinion, do not involve injury to the health, safety and welfare of the traveling public. Nevertheless, the district court granted the motion to dismiss and dissolved the temporary restraining order. Appellant appeals from that order.

There is but one issue: Did the district court err in determining that the maintenance employees of the Montana Department of Highways have the right to strike under Montana's PublicEmployees Collective Bargaining Act?

The portion of the Public Employees Collective Bargaining Act in dispute, section 59-1603(1), R.C.M. 1947, provides:

> "Public employees shall have and shall be protected in the exercise of, the right of self-organization, to form, join or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours, fringe benefits, and other conditions of employment and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint or coercion." (Emphasis added).

This language is almost identical to that found in the Labor Management Relations Act (Taft-Hartley Act), 1947, which at 29 U.S.C.A., § 157, provides:

> "Employees shall have the right to self-organization, to form, join, or assist in labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *." (Emphasis added).

The phrase "concerted activities" does not appear in any other Montana statute, and this Court has never been called upon to interpret it. The phrase first appeared in the Norris-LaGuardia Anti-Injunction Act, 1932, at 29 U.S.C., § 102; then in the National Labor Relations Act (Wagner Act), 1935, at 49 Stat.449, 452; and again in the Taft-Hartley Act, 1947, 29 U.S.C.A., § 157.

Consequently, some forty years of federal interpretation is behind this language. The United States Supreme Court, as well as innumerable lower federal courts, has consistently held that "concerted activities" includes strikes. Automobile Workers v. O'Brien, 339 U.S. 454, 94 L ed 978, 70 S.Ct. 781; Bus Employees v. Wisconsin Board, 340 U.S. 383, 389, 71 S.Ct. 359, 95 L ed 364; Weber v. Anheuser-Busch, 348 U.S. 468, 75 S.Ct. 480, 99 L ed 546. These cases all involved state legislative attempts to limit the right to strike in the private sector. The Supreme Court found such efforts to be in conflict with the protections afforded by the Taft-Hartley Act and thus unconsitutional under the Supremacy Clause (Article VI) of the United States Constitution. In Bus Employees, the Supreme Court stated:

> "We have recently examined the extent to which Congress has regulated peaceful strikes for higher wages in industries affecting commerce. Automobile Workers v. O'Brien, 339 U.S. 454 (1950). We noted that Congress, in § 7 of the National Labor Relations Act of 1935, as amended by the Labor Management Relations Act of 1947, expressly safeguarded for employees in such industries the 'right * * * to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection, e.g., to strike.'"

Appellant contends that a different interpretation of "concerted activities" ought to prevail here, since public rather than private employees are involved. The California Supreme Court considered the same proposition in Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, 8 Cal.Rptr. 1, 355 P.2d 905, 907. In that case the Los Angeles Metropolitan Transit Authority Act created a public authority for transportation of passengers in a four county area in and around Los Angeles. Stats. 1957, ch. 547, as amended by Stats. 1959, ch. 519. Subdivision (e) of section 3.6 of that Act provided that employees of the Transit Authority had the right, among others, to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." When the employees struck, the Transit Authority sought a declaratory judgment that they were without the legal right to strike because they were public employees.

The court held unequivocally that the grant of the right to engage i "concerted activities" meant the same thing for public employees as it did for private employees, that is, it included the right to strike:

> "When legislation has been judicially construed and a subsequent statute on the same or an analogous subject is framed in the identical language, it will ordinarily be presumed that the Legislature intended that the language as used in the later enactment would be given a like interpretation. This rule is applicable to state statutes which are patterned after federal statutes. [Citing cases] Although the cases which have interpreted the italicized words involved private employees, the act before us incorporates the exact language, consisting of 16 words, found in the earlier statutes, and it is unlikely that the same words would have been repeated without any qualification in a later statute in the absence of an intent that they be given the construction previously adopted by the courts."

We think similar standards of judicial construction apply in the present case. For example, section 19-102, R.C.M. 1947, provides:

> "Words and phrases used in the codes or other statutes of Montana are construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, as amended, are to be construed according to such peculiar and appropriate meaning or definition." (Emphasis added).

After more than forty years of construction by federal and state courts, "concerted activities" indisputably has become a labor law term, a technical phrase which has "acquired a peculiar and appropriate meaning in law". That meaning includes strikes.

Appellant may wish that the statute read otherwise but this Court is not at liberty to amend our statutes. State v. Midland National Bank, 132 Mont. 339, 343, 317 P.2d 880. This Court concludes that Montana's legislature meant the phrase "concerted activities" to have a meaning identical to that found in analogous statutes of other jurisdictions. To hold otherwise would flaunt a cardinal principle of statutory construction.

This conclusion is reinforced by the fact that employees under Montana's Collective Bargaining Act, Sections 59-1601 through 59-1616, R.C.M. 1947, are nowhere prohibited from striking. Two

other classes of Montana public employees---nurses and teachers--have specific restrictions or bans on their right to strike. See sections 41-2209 and 75-6120(2)(c), R.C.M. 1947.

We comment further that the purposes expressed in the nurses, teachers and public employees acts are similar. As to the nurses, section 41-2201, R.C.M. 1947, enacted in 1969, the purpose was expressed "* * * to encourage the practice of mutually and peacefully agreeing upon the establishment and maintenance of desirable employment practices * * *."

In the teachers act, section 75-6116, R.C.M. 1947, enacted in 1971, the purpose was expressed " * * * to establish procedures which will facilitate and encourage amicable settlement of disputes."

In the public employees act, section 59-1601, R.C.M. 1947, enacted in 1973, the purpose was expressed "* * * to encourage the practice and procedure of collective bargaining to arrive at friendly adjustment * * *."

If the legislature had intended to limit respondent's right to strike, it could have done so expressly as it did with nurses and teachers, since as heretofore shown all this legislation had the same expressed purpose.

Since respondent had the right to strike specifically granted its members by the legislature, the order of the district court dismissing the complaint and dissolving the temporary restraining order is affirmed.

James T. Harrison
Chief Justice.

We Concur:

Gene B. Daly

Frank I. Haswell

John Conway Harrison

Wesley Castles

Justices.