STATE OF MICHIGAN

COURT OF APPEALS

DAVID J. ALEXANDER, LOUISE ANDERSON, CHARLES ARNDT, BRUCE BERTHIAUME, WYATT BOYER, ROBERT BUECHEL, PAUL CHOMAS, GEORGE CLARK, RICHARD COURTNEY, CHERYL DEHATE, DEAN FENWICK, GEORGE FITTIG, and JACOB GOTFRYD,

Claimants-Appellees,

v

A.P. PARTS MANUFACTURING COMPANY,

Respondent-Appellant.

UNPUBLISHED
February 23, 1996

No. 168700
LC No. 92-003582-AE

Before: Smoleinski, P.J., and Griffin and A. L. Garbrecht,* JJ.

PER CURIAM.

In this unemployment compensation case, respondent appeals as of right an order of the circuit court that reversed a ruling of the Michigan Employment Security Commission (MESC) Board of Review which held that claimants were disqualified from receiving unemployment benefits under MCL 421.29(8); MSA 17.531(8). We reverse the circuit court and reinstate the ruling of the MESC Board of Review.

Respondent manufactures parts for the automobile and heavy truck industry. During the time period relevant to this case, respondent employed approximately 206 union employees and 75 nonunion employees.

In October, 1989, approximately three months before a collective bargaining agreement was set to expire, respondent hired ten to twelve additional employees and began to operate two shifts. From October, 1989, to February, 1990, respondent worked its staff overtime and began to "warehouse" the product normally produced by the unionized employees.[1]

On December 8, 1989, respondent issued a "WARN" letter advising its employees that some employees may be laid off if a new collective bargaining agreement was reached on or about February 8, 1990, the date the then existing agreement was set to expire.[2] On February 5, 1990, when respondent determined it had a sufficient inventory stockpiled in its warehouse, it laid off the ten to twelve nonunion employees it had hired in October, 1989.[3]

On February 8, 1990, immediately after union employees rejected the collective bargaining agreement that respondent had proposed, respondent announced that its operation would be shut down for the next two working days due to an "inventory adjustment." On February 13, 1990, respondent announced a "lockout" that affected all of its union employees.[4] Claimants immediately began to picket respondent's plant. During the lockout, the product normally produced by the union employees was produced by nonunion employees.[5]

*Circuit judge, sitting on the Court of Appeals by assignment.

On March 30, 1990, after union employees rejected respondent's third proposal for a collective bargaining agreement[6], respondent ended the lockout by notifying its employees to return to work on Monday, April 2, 1990. However, seventy-five employees were laid off one additional week due to "lack of work."[7] A new collective bargaining agreement was ratified on May 15, 1990.

On March 30, 1990, the MESC determined that claimants were disqualified from receiving unemployment compensation because their temporary unemployment was related to a labor dispute. Following an evidentiary hearing, an MESC referee rejected respondent's claim that the lockout was related to a labor dispute and, hence, found that claimants were entitled to unemployment benefits. The MESC Board of Review reversed the referee in a two-to-one decision. The majority concluded that (1) respondent had "warehoused" its product in order to improve its bargaining position in the event of a labor dispute, and (2) claimants were disqualified from receiving benefits under MCL 421.29(8); MSA 17.531(8) because the labor dispute that developed was a substantial contributing factor to the lockout. On appeal, the circuit court reversed the ruling of the board of review.[8] Although the circuit court agreed that a labor dispute had existed, it concluded that the true reason for the lockout was that respondent needed to reduce production to eliminate the excess inventory it had warehoused in the three months before the lockout.

On appeal, respondent argues that the there was substantial evidence to support the decision of the MESC Board of Review. Therefore, respondent contends that the circuit court erred in reversing the decision of the MESC Board of Review. We agree.

Judicial review of the findings of the MESC Board of Review is limited "to a determination of whether the findings of the MESC are supported by competent, material and substantial evidence on the whole record." *Smith v Employment Security Comm*, 410 Mich 231, 256; 301 NW2d 285 (1981), citing MCL 421.38(1); MSA 17.540(1); *Vanderlaan v Tri-County Community Hosp*, 209 Mich App 328, 331; 530 NW2d 186 (1995). "Substantial evidence" means more than a mere scintilla but less than a preponderance of the evidence. *McArthur v Borman's, Inc*, 200 Mich App 686, 689; 505 NW2d 32 (1993); *Becotte v Gwinn Schools*, 192 Mich App 682, 685; 481 NW2d 728 (1992). In other words, so long as the MESC Board of Review selected between two reasonable positions, the judiciary must accord deference to administrative expertise and refrain from substituting its own judgment for that of the administrative agency. *Smith, supra* at 256; *Employment Relations Comm v Detroit Symphony Orchestra, Inc*, 393 Mich 116, 124; 223 NW2d 283 (1974). We apply this deferential standard to the decision of the MESC Board of Review, not the decision of the hearing referee. *Vanderlaan, supra* at 331.

At the time relevant to this case, section 29(8) of the Michigan Employment Security Act provided in part:

> An individual shall be disqualified for benefits for any week with respect to which his total or partial unemployment is due to a labor dispute in active progress, or to shutdown or start up operations caused by that labor dispute, in the establishment in which he is or was last employed . . . . An individual shall not be disqualified under this subsection if he is not directly involved in the dispute.

Thus, pursuant to this state's policy of remaining neutral in labor disputes, the Michigan Employment Security Act disqualifies employees from collecting unemployment compensation when the employer shows that a labor dispute is a "substantial contributing cause" of the unemployment. *Smith, supra* at 257, quoting *Baker v General Motors Corp*, 409 Mich 639, 656; 297 NW2d 287 (1980); see also *Linski v Employment Security Comm*, 358 Mich 239; 99 NW2d 582 (1959). A "labor dispute" is defined as any controversy between employers and employees or their representatives concerning or affecting

hours, wages, or working conditions. *Smith, supra* at 256. Although a labor dispute need not be the sole cause of the unemployment for MCL 421.29(8); MSA 17.531(8) to apply, see *Smith, supra* at 257, our Supreme Court in *Smith, supra* at 266-267, stated that:

> An employer may not use the failure to reach an agreement as a pretext for charging a labor dispute when it would otherwise have curtailed operations because of economic conditions. But where economic conditions would not have otherwise caused the curtailment of operations, but only have played a part in the decision to utilize the lockout tactic, *i.e.*, when the labor dispute is the substantial contributing cause, the employees may properly be disqualified. This determination is necessarily a question of fact.

Here, claimants produced evidence of a disguised layoff while respondent produced evidence that the lockout was a bargaining tactic in a labor dispute. Thus, the case turns on the assessment of the witnesses' credibility and the use of the unique expertise of employment relations possessed by the MESC Board of Review. In our view, it is in this exact situation where deference to an administrative agency is most important. *Smith, supra* at 260; *Detroit Symphony Orchestra, supra* at 124; *Bedwell v Employment Security Comm,* 367 Mich 415, 421; 116 NW2d 920 (1962).

In pertinent part, the MESC Board of Review made the following findings of fact:

> The employer testified that the lock-out notice was given because of "not having an agreement on a new contract." The lock-out was a management strategy to close the distance between the parties regarding the co-pay of health benefits. Additionally, the employer did not want to return employees to work without a contract because without a contract the employer believed the employees would engage in slow-downs and production lags.
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> While there is some evidence that the employer reduced its staff prior to the time of the lock-out by way of a lay-off and that the employer had less of a need for staff during the lock-out period because it had warehoused parts in advance, it appears that the whole warehousing approach and lock-out were strategies designed by the employer to improve its position as it bargained with the union over the collective bargaining agreement.
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> Even if there was less of a need for personnel by the employer at or about the time of the lock-out, the evidence is sufficient to find that the lock-out was a substantial contributing cause to the claimants [sic] unemployment. The lock-out occurred so that the employer could improve its bargaining position in negotiations with the union on a new collective bargaining agreement.

In applying our deferential standard of review to the instant case, we conclude that there exists substantial evidence on the whole record to support the board of review's conclusion that claimants' unemployment was substantially related to a labor dispute. Here, the parties do not contest the issue of whether a labor dispute existed. Therefore, we need only determine whether substantial evidence exists to connect the labor dispute with the lockout. At the evidentiary hearing, respondent's human relations director, Gerald Trudell, testified that the lockout was designed as a measure to improve respondent's bargaining position during the labor dispute. According to Trudell, the goal of the lockout was to

narrow the "distance" in the parties' positions and have the union employees move closer to the terms proposed by respondent. Trudell also testified that the reason respondent warehoused its inventory was to have the lockout tactic as a feasible alternative if contract negotiations turned sour. To the extent that the inventory buildup created an economic situation where the lockout tactic became more feasible, this contributing factor to the decision to use the lockout tactic can be attributed to foresight. Moreover, contrary to claimants' position that the true cause for the shutdown was the fact that respondent had too much inventory in its warehouse, respondent had its nonunion employees produce the product normally produced by the union employees during the lockout. Therefore, after a thorough review, we conclude that the ruling of the board of review is supported by competent, material, and substantial evidence on the whole record. Accordingly, we conclude that the circuit court erred in reversing the decision of the MESC Board of Review.

Reversed. The ruling of the board is hereby reinstated.

/s/ Richard Allen Griffin
/s/ Allen L. Garbrecht

[1] Generally, respondent did not stockpile inventory. Instead, respondent would produce parts only as they were ordered. Respondent only warehoused parts when labor disputes were anticipated.

[2] The notice was given to conform with the federal Worker Adjustment and Retraining Notification Act, 29 USC § 2101(a)(2) and (3), which requires employers to give a sixty-day notice when there is the possibility of a shutdown in operation or a layoff affecting a certain percentage of their employees.

[3] The instant case does not involve any issues pertaining to whether these ten to twelve employees are entitled to unemployment compensation.

[4] Six nonunion employees were laid off during the lockout.

[5] There is no record evidence as to whether production during this period remained consistent with the pre-lockout level.

[6] The contract dispute centered primarily around the percentage of the insurance premium each union employee would be obligated to pay.

[7] The seventy-five workers were given unemployment benefits for the week where they were laid off because of "lack of work."

[8] Prior to rendering its decision, the circuit court certified claimants as a class pursuant to MCR 7.104(B)(5).

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SMOLENSKI, P.J. (dissenting).

I respectfully dissent. I would affirm the circuit court because the record contained insufficient evidence to support the MESC Board of Review's determination that the labor dispute was a substantial contributing cause of the "lockout."

/s/ Michael R. Smolenski

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*Circuit judge, sitting on the Court of Appeals by assignment.