STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

MILWAUKEE COUNTY DISTRICT COUNCIL 48, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES,

Petitioner,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD,

Respondent.

Case No. 313-347

MEMORANDUM DECISION

April 30, 1963, after hearing, the Wisconsin Employment Relations Board certified that the City of Milwaukee Garbage Collection Laborers Independent Local Union had been selected by a majority of the eligible employees in the "collective bargaining" unit as the exclusive "bargaining" representative for the Collection Division of the Bureau of Garbage Collection and Disposal in the Department of Public Works of the City of Milwaukee for the purposes of conferences and negotiations with the City of Milwaukee on questions of wages, hours and conditions of employment. Milwaukee County District Council 48, American Federation of State, County and Municipal Employees has petitioned for review of the certification. The Attorney General, as attorney for W.E.R.B., moved to dismiss the petition for review on the grounds that, 1) the court lacks jurisdiction of the subject matter and 2) the petition does not state facts sufficient to constitute a cause of action.

The motion to dismiss the petition came on for hearing before the Court on July 22, 1963. The City Attorney of the City of Milwaukee has filed a notice of appearance in the proceeding but did not appear either in support or opposition to the motion on July 22, 1963, nor did he file a brief. Milton S. Padway appeared as attorney for the independent union and supported the Attorney General's motion. Mr. Padway, the Attorney General and Goldberg, Previant and Uelman have favored the Court with written briefs.

If the respondent prevails on either ground cited in support of its motion, the sought dismissal must be granted. Because it appears from the face of the petition that it does not state facts sufficient to show that the petitioner is aggrieved and directly affected by the decision, the Court's memorandum will deal primarily with that proposition.

The motion is obviously designed to present to the Court for decision the question of the right to review W.E.R.B's. certification and the question of the correctness of its interpretation of the validity of a specific ballot. The motion was argued upon those propositions and briefs in support of the arguments were submitted. The Court considered the arguments, the briefs, and did its own research in an attempt to discharge its responsibility to resolve the questions. To its dismay, the Court finds that an apparently inadvertent omission from the petition of the number of employees eligible to vote in the bargaining unit precludes the Court from a decision of the questions submitted. It is readily apparent from a reading of the Board's transcript that the controversy involves the interpretation of a single

ballot. If valid, it results in a majority of votes being cast for the independent local union and results in the certification made by W.E.R.B. If invalid, the votes cast are insufficient to establish the Garbage Collection Division as a separate bargaining unit. These facts, however, are gleaned from the argument and a reading of the W.E.R. B. transcript. At this stage of the proceeding on this motion, the Court must confine itself to the facts alleged in the petition. In failing to allege the number of employees eligible to vote, the petition establishes no challenge to the correctness of W.E.R.B.'s certification and establishes no aggrievement of the petitioner.

A proceeding for review under Secs. 227.15 to 227.20, Stats., is a special proceeding.[1] Authority to amend process at any stage of any action or special proceeding is extended by 269.44 Stats. The authority is subject to some limitation; for example, it is not applicable to the administrative stages of a condemnation proceeding.[2]

Sec. 227.16 (1) provides in part:

> "...The petition may be amended by leave of court, though the time for serving the same has expired."

Thus, the Court is granted authority to permit amendment of the petition at some stage later than the 30 days after filing provided for service. However, in connection with a motion to dismiss for failure to state facts sufficient to show that the petitioner therein is aggrieved and directly affected, 227.19 (3) Stats., provides:

> "...Upon the hearing of such motion, the Court may grant the petitioner leave to Amend the petition if the amendment as proposed shall have been served upon all respondents prior to such hearing. If so amended, the Court may consider and pass upon the validity of the amended petition without further or other motion to dismiss the same by any respondent."

The Court appears limited in authorizing amendment of the petition upon the hearing of a motion to dismiss. The quoted provision clearly requires authorization of an amendment prior to the hearing of a motion to dismiss.

Sec. 227.16 (1) and particularly Sec. 227.19 (3) Stats., are limitations upon the authority granted by 269.44 Stats. The Acheson case, supra, presented a parallel problem. The parallel is complicated but not obscured by the fact that the petition was an application to a judge in his administrative capacity rather than a court. That circumstance (not present here) would preclude the application of 269.44 Stats. In the Acheson case, the Court pointed to further evidence of a limitation upon the application of 269.44. Sec. 32.14 authorizes

---

1 Ashwaubenon v. Public Serv. Comm. (1962) 15 Wis. 2d 445 at 448; Baker v. Dept. of Taxation (1947) 250 Wis. 439 at 441.

2 Acheson v. Winnebago County Hyway Comm. (1961) 14 Wis. 2d, 475 at 478.

amendments to a petition[3] at any time. A parallel is found in the sentence above-quoted from 227.16 (1). Sec. 32.06, however, specifically provided that revelation of the jurisdictional offer makes the petition a nullity. The Court in Acheson interpreted that provision of 32.06 as a limitation upon the authority to amend prescribed by 32.14. Similarly, the limitation upon amendment prescribed by 227.19 (3) must be applied to the general authority prescribed in 227.16 (1) and 269.44.

The state of the record precludes the Court from reaching the legal questions for which determination is sought and the Court is without power to permit amendment of the petition in order to supply the factual deficiency.

The Court finds itself torn between the propriety of a gratuitous comment upon the legal aspects of the case not involved in the view that the Court takes and the desirability of an expression by the Court of its view of the law in order to minimize successive appeals. The Supreme Court in matters of nonsuit and directed verdicts, has suggested a method of disposition by trial courts which will minimize successive appeals and the retrial of lawsuits.

It appears the better practice to present in summary form, the Court's view of the law in spite of the belief that the outcome of the case is controlled by procedural interpretations.

It is urged by the petitioner that the particular ballot which is challenged, lends itself to the violation of a secret election. The ballot bore an "x" indicating the voter's support for the independent union and the word "no", indicating its opposition to the petitioner. In Schmidt v. West Bend Board of Canvassers (1962) 18 Wis 2d 316 at 324, the Supreme Court approved this viewpoint of the law:

> "It is the policy of the law to prevent as far as possible the disfranchisement of electors who have cast their ballots in good faith, and while the technical requirements set forth in the absentee-voting law are mandatory, yet in meeting those requirements laws are construed so that a substantial compliance therewith is all that is required."

The Court further indicated that such was to be the policy in the absence of connivance or fraud. Corollary to that proposition is the desirability of secrecy in an election. It is best stated at 8 Wigmore, Evidence, McNaughton rev. (1961) Sec. 2214 ¶ b, p. 162, as follows:

> "The community's interest is that the citizen's vote, the culminating act by which his opinion is made most effective, should be absolutely sincere--i.e., should represent accurately his opinion upon the person or the propositions presented for choice. At the time of voting, a special danger exists that influences of oppression will prevail to coerce the elector into an insincere vote. This danger affects the

---

[3] Filed pursuant to Sec. 32.06.

> welfare of the state itself, as dependent upon freedom of political action. Therefore, there is a need for securing secrecy of voting in order that the vote may correctly represent the voter's opinion."

In this case the parties have stipulated that the intention of the particular voter was to vote for the independent union. The application of the doctrine of secrecy is urged to the exclusion of the doctrine of effectuating the intention of the voter. Although the doctrine of secrecy has been construed as a privilege of the voter which may be waived[4] there are circumstances where maintenance of the secrecy of the election outweighs the effectuation of the intent of the voter. Most of the cases which have applied such a view, have done so only where there is an existing statute regulating the marking of the ballot.[5]

The emphasis of the Supreme Court of Wisconsin has been to effectuate the intention of the voter while maintaining the secrecy of the election to and including the time of election but not thereafter.[6]

The real complaint of the petitioner here is not that the secrecy of the election was violated per se, but rather that it lends itself to fraud and coercion of the voter. This is an extension of the National Labor Board's formulation and development of the "laboratory" concept first announced in General Shoe Corporation[7] in which the Board stated that its function was to provide a laboratory where under as nearly ideal conditions as possible, the uninhibited desire of the employees could be determined.[8]

Actually, the invalidation of ballots containing distinguishing or identifying marks antedated the announcement of the laboratory concept. The first expression is found in Burlington Mills Corporation[9] but became full blown in Ebco Manufacturing Company.[10] The Ohio case cited in Ebco relied upon a statute similar to 12.64 Stats., but the Illinois case

---

4 See 66 ALR 1154; 90 ALR 1362; 113 ALR 1213; 121 ALR 931; State v. Hillmantel (1868) 23 Wis 426; State v. Olin, (1868) 23 Wis. 309.

5 See cases collected, Decennial Digest, Topic Elections Key No. 194.

6 See Petition of Anderson (1961) 12 Wis 2d 530; Kaufman v. LaCross City Board of Canvassers (1959) 8 Wis 2d, 182.

7 77 N.L.R.B. 124 (1948).

8 "Employee Choice and Some Problems of Race and Remedies in Representation Campaigns," 72 Yale Law Journal 1242, 1246 (May, 1963).

9 56 N.L.R.B. 365

10 88 N.L.R.B. 983.

there cited relied simply upon the principle of preservation of secrecy.[11] Subsequently, in Luntz Iron & Steel Co.,[12] Western Electric Co.,[13] Pioneer Electronics Corp.,[14] Securities Enterprise Co., [15] and F. J. Stokes Corp.,[16] the determination to be made by N.L.R.B. in the case of an unsually market ballot came to be:

1. Whether the marking on the ballot was inherently such as to disclose the identity of the voter.

2. Whether the marking on the ballot constituted so significant a departure from the usual manner of marking of ballots as to destroy the secrecy of identity of the voter.

3. Whether the marking on the ballot was made deliverately to identify the voter.

They are questions of fact[17] but their nature is such that the appellate court is as capable of determination of them as the trial court.[18].

Neither the ballot in question nor any other part of the record justify a determination different from that made by W.E.R.B.

The motion to dismiss the petition is granted with costs to the respondent. The attorney for the respondent may prepare an order in accordance with this decision.

Dated at Milwaukee, Wisconsin, this 5th day of September, 1963.

By the Court,

s/ John A. Decker
Circuit Judge

- -

11 A check of the 1905 Ill. Stats., reveals no statutory prohibition of identifying marks although the case is cited in 18 Am. Jur., Elections, ¶ 196, p. 312 as based upon such a statute.

12 97 N.L.R.B. 909.

13 97 N.L.R.B. 933.

14 112 N.L.R.B. 1010.

15 108 N.L.R.B. 605.

16 117 N.L.R.B. 951.

17 18 Am. Jur. Elections, ¶ 197, p. 313; C.J.S., Elections, ¶¶ 183-188, p. 269-276.

18 Ibid.