STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY

SHAWANO COUNTY, WISCONSIN,

Petitioner,

v. Case No. 114-022

WISCONSIN EMPLOYMENT RELATIONS BOARD (Decision No. 6388 - 6/12/63) MEMORANDUM DECISION

Respondent.

Shawano County has petitioned, pursuant to sec. 227.16, Stats., for review of an order of the Wisconsin Employment Relations Board certifying, pursuant to sec. 111.70, Stats., that the union and Shawano County are deadlocked, and instituting fact-finding procedure by the appointment of a fact finder.

Shawano County contends that its adoption of an ordinance[1] prescribing local fact-finding procedure withdraws Shawano County from the jurisdiction of the Wisconsin Employment Relations Board and its appointed fact-finder.

W.E.R.B., in its order and accompanying memorandum decision determined that the ordinance which provided for appointment[2] of a Shawano County fact-finding commission, was not in substantial compliance with sec. 111.70 for the reason that the ordinance prescribed that the Shawano Fact-finding Commission was required to appoint the fact finder. W.E.R.B. further found that the Fact-finding Commission was under the domination and influence of the Shawano County Board Chairman who also served as chairman of the advisory (labor negotiating) committee of the County Board, one of the parties to the dispute. The W.E.R.B. also touched upon the rate of pay prescribed by the ordinance for fact finders, but apparently did not ground its decision on its expression that the prescribed pay rate was unreasonably low.

W.E.R.B. has moved to dismiss the petition for review on the grounds, (a) that the court is without jurisdiction, pursuant to ch. 227, Stats., to review the W.E.R.B. determination and (b) the petition states no basis for review. Shawano County has brought a motion to dismiss the motion to dismiss.[3]

[1] Pursuant to sec. 111.70 (4)(m) Stats.

[2] By the chairman with confirmation by the Shawano County Board.

[3] Upon authority of Gertrude Stein, this motion is construed to be opposition to the Board's motion on the ground that it is prematurely brought.

The questions for decision are:

(1) Is the action of the W.E.R.B. reviewable pursuant to 227.15 to 227.20 Stats?

(2) Is the local fact-finding procedure prescribed by Ordinance 32, adopted by the Shawano County Board October 31, 1962, in substantial compliance with sec. 111.70 Stats?

Reviewability of the Board's Action

The first question to be met concerns the reviewability of the W.E.R.B. order pursuant to ch. 227, Stats.

The Attorney General has made several alternative but related contentions. The first postulation, unassailable, is that sec. 111.70 Stats., is silent about review. From that silence is urged a demonstrable intention of the legislature not to provide review in the field encompassed by the statute. Although review is a creature of the legislature to be granted or withheld within the limits of constitutional guaranties, the legislature's silence cannot be interpreted as an implied repealer of the applicability of Ch. 227 Stats., if the conditions of review proscribed therein are met.[4] The Attorney General, having been assured by counsel for the petitioner that this proceeding is a review pursuant to Ch. 227, contends that Wisconsin Tel. Co. v. Wisconsin E. R. Board (1948) 253 Wis. 584, and United R. & W.D.S.E. of A. v. Wisconsin E. R. Board (1944) 245 Wis. 636, establish its inapplicability.

In the former case, the Telephone Company was held not to be "aggrieved" or "directly affected" by the Board's appointment of a conciliator to mediate a labor-management dispute. The decision points out that the duties of the conciliator were extremely limited. The circumstance that under the statutory labor law applicable to public utilities, failure of the conciliator could result in compulsory arbitration, was given no weight by the Court.

The second case held that a petitioning union was not aggrieved by an order of the W.E.R.B. for the conduct of a referendum election. The decision refers to the ordered certification proceeding as "non-adversary, fact-finding" in character. These terms are not considered precedent to the instant case because the court considers them to be generic in character and not to have the meaning of "fact-finding" as a procedural labor-management tool which came into prominence after the date of the decision.

The Wisconsin Telephone case, supra, quotes[5] from 42 Am. Jur., Public Administrative Law, pp. 577-79, sec. 196:

> " Courts are averse to review interim steps in an administrative proceeding. Whether review is sought in nonstatutory or statutory proceedings, review of preliminary or procedural orders is generally not available, primarily on the ground that such a review would afford opportunity for constant

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[4] "...Whether a statutory remedy of appeal is the exclusive remedy of an aggrieved party to review jurisdictional defects in procedure, or abuse of statutory power, depends upon legislative intent as construed by the courts, and whether such right of appeal is adequate to permit review of such matters...." Perkins v. Peacock (1953) 263 Wis. 644 at 658. Also see n.17, infra.

[5] p.591.

> delays in the course of administrative proceedings for the purpose of reviewing mere procedural requirements or interlocutory directions. Broad language of statutes providing for judicial review of orders of regulatory commissions has been construed as not extending to every order which the commission may make, and mere preliminary or procedural, as distinguished from final, orders have been held not to be within such statutes, especially where the context of the provision indicates that the orders for which review is provided are such as are of a definitive character dealing with the merits of a proceeding and resulting from a hearing upon evidence and supported by findings.... Statutory review has been denied by the courts where, although the action sought to be reviewed may have the effect of forbidding or compelling conduct on the part of the person seeking to review it, this result will follow only if some further action is taken by the administrative authority, on the theory that the order sought to be reviewed does not of itself adversely affect the complainant, but only affects his rights adversely on the contingency of future administrative action."

Formulation of the quoted law is easier than the development of standards for its application. For that reason Professor Jaffe, writing in 61 Michigan Law Review 1273 (May, 1963) "Ripeness and Reviewable Orders in Administrative Law," defines the underlying thesis of his article: "Ripeness should not be determined by formula but by a reasoned balancing of certain typical and relevant factors for and against the assumption of jurisdiction." [6]

He says further:

> "The development and expression of ripeness concepts has become to some extent entangled with the definition of a 'reviewable order.' A statute may provide in particular situations for review of an 'order' or a 'final order'; such review is to be had in a named court pursuant to a specified procedure. The three or four most discussed 'ripeness' cases involved the question whether the administrative action was an 'order' under such a statute. Finally, an inquiry such as this, one primarily into the ripeness concept in administrative law, has become embroiled, obfuscated and distorted by the acute involvement of ripeness doctrines in constitutional adjudication.
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> " The requirement that there be a 'controversy' is applicable generally to the exercise of the judicial function. But the criteria for determining the existence of a controversy are flexible; the judgments are thus ones of degree and balance...." [7]

Committed to the principle that courts will not harass administrative agencies in the discharge of their legislatively-prescribed tasks, the Wisconsin Court nevertheless recognized the fine degree of balance and relevant factors which should be considered in matters of reviewability. In the Telephone Company case, the court pointed out that the conciliator had no power to compel attendance of the parties and that the cost of conciliation was not borne by the parties.

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[6] p. 1275.

[7] Ibid.

In the United case, the court held that the union was not aggrieved by a noncontroversial investigatory procedure.

In the instant case, the appointed fact-finder, by requesting the issuance of subpoenas by the W.E.R.B. (a request to which it is obliged to respond[8]) can compel the attendance of the parties at the fact-finding hearings, and the cost of the fact-finding procedure is shared by employer and employee.[9] Also, the W.E.R.B. has determined the question of its own jurisdiction to proceed with fact finding by determining the Shawano County ordinance an ineffectual establishment of local fact-finding procedure. These are relevant factors which justify a balance favorable to a statutory interpretation supporting reviewability.[10]

Counsel for the W.E.R.B. in effect contends that if those circumstances are relevant factors supporting an interpretation favorable to jurisdiction at this time, then they are to be balanced against these equally relevant factors: a) the petitioner is not aggrieved because of the doctrine announced in Holland v. Cedar Grove (1939) 230 Wis. 177: b) judicial review at the time of appointment of a fact finder would result in self-defeating delay, and c) be premature and harassing to the conclusion of the W.E.R.B. procedure. This poses the problem that Jaffe considered:

> "...The administrative process does not lend itself easily to terminal points. If there is to be review, a point must be chosen which may be in some measure, arbitrary. Nor is this fatal. If the administrative process never has said its last word, neither must the court be put to the election of having only one occasion --and that the indisputably best occasion--to pronounce....
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> "....If there are occasions when early review is inopportune, there is on the other hand, an aspect of much administration which warrants review in situations lacking some traditional aspects of finality.... The public has an interest in early implementation of policy; The regulated person has a legitimate interest whether to plan, or not to plan, his operation on the basis of a regulation. This argues for review as soon as it becomes possible to frame the issues in a form on which the judicial power can act effectively. Behind the reluctance to accept this position has been the feeling--now more or less dormant--that the judicial power is at worst an alien intruder and at best a clumsy resource--a necessary evil--to be avoided whorever and however possible. Now that the judiciary is no longer generally hostile to the administrative process and has established and accepted for itself a limited role, it need no longer operate in the gingerly self-deprecating manner of a guild-conscious, barely-tolerated intruder. It need only ask how, given its limited role, it can provide efficiently,

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[8] 111.70 (4)(g) Stats.

[9] 111.70 (4)(h)(2) Stats.

[10] See 42 Am. Jur. 561, Public Administration Law, Limitations upon Availability of Judicial Review, Sections 189-205.

with due regard for its limited competence, the service which it is duly bound to give to those who have a legitimate interest in the legality of the challenged action." [11]

Let us return to the contentions of the Attorney General.

In Holland v. Cedar Grove, supra, municipal corporations [12] are described as creatures of the legislature with only the most limited protection by the constitution. Their powers, derived from the state, can be deprived by the state by the exercise of the legislature's plenary power. From this, the Attorney General develops an incapacity of the County for "aggrievement" by reason of the resulting charge for fact-finding services. That contention may be paraphrased--what the Legislature giveth, the Legislature can taketh away. However, the legislature has proscribed the W.E.R.B. in the exercise of its administrative function. It is commanded not to initiate fact finding if the conditions of sec. 111.70 (4)(m) relative to local fact-finding, have been met. The latter circumstance determines whether the W.E.R.B.'s jurisdiction has been superseded by local fact-finding. The privilege reserved to municipal employers,[13] to establish local fact-finding procedures is in accord with a long legislative tradition of local self-government. [14]

Although the counties' powers are limited to those granted expressly or by clear implication [15] the delegation in the instant case is express. [16] The legislature in the exercise of its plenary power could have withdrawn the right of judicial review, but its silence cannot be construed as an implied repealer, not favored in the law [17] of the application of Ch. 227.

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[11] 61 Michigan Law Review 1273, 1282.

[12] 230 Wis. 177 at 192. The term is used in its generic sense since it cited as authority Forest County v. Langlade County (1890) 76 Wis. 605. See also Milwaukee v. Sewerage Comm. (1954) 268 Wis. 342, 349.

[13] as defined 111.70 (1)(a) Stats.

[14] Sec. 22 Art. IV Wisconsin Constitution as originally adopted: "The legislature may confer upon the boards of supervisors of the several counties of the state such powers of a local, legislative and administrative character as they shall from time to time prescribe."

[15] Maier v. Racine County (1957) 1 Wis. 2d 384, 385; Dodge County v. Kaiser (1943) 243 Wis. 551, 557.

[16] Sec. 111.70 (4)(m) Stats.

[17] See cases collected in 15 Callaghan's Wis. Digest, Statutes, Sections 322, 323; nor is repeal of a general act by a special act, Id., Sections 324-326. Also see Superior v. Comm. on Water Pollution (1953) 263 Wis. 23, 27.

Review of the instant case pursuant to Ch. 227 is dependent upon a petition by an aggrieved person seeking to review an administrative decision or order in a contested case. The pertinent portions of the statutes involved are:

a) 227.01 (2) "Contested case" means a proceeding... in which...the legal rights, duties or privileges of any party to such proceeding are determined or directly affected by a decision or order in such proceeding....

b) 227.15 "Administrative decisions" which directly affect the legal rights, duties or privileges of any person....

c) 227.16 (1) "...any person aggrieved by a decision specified in sec. 227.15 and directly affected thereby....

The record establishes and the parties agreed on oral argument that this case was contested in the sense that the proceedings were disputed by the petitioner and the jurisdiction of the W.E.R.B. denied at the time of its hearing. Whether the contest affected the legal rights, duties or privileges of the County Board is essentially the same determination to be made in considering whether the County Board was aggrieved, and will be discussed below. Whether the action of the W.E.R.B. sought to be reviewed, is a decision or order as envisioned in 227.01 (2) and 227.13, rather than a preliminary, interlocutory and not "final" or "ripe" is a subject which also will be discussed below.

This brings us to the question of whether the petitioner was aggrieved. In Greenfield v. Joint School Comm. (1955) 271 Wis. 442, at p. 447, the Court said:

> "...A person is aggrieved by a judgment whenever it operates on his rights of property or bears directly on his interest. An "aggrieved party" within the meaning of a statute governing appeals, is one having an interest recognized by law in the subject matter which is injuriously affected by the judgment. (In re Fidelity Assur. Asso. (1945) 247 Wis. 619. The word "aggrieved" refers to a substantial grievance, a denial of some personal or property right or the imposition of a burden or obligation. Bowles v. Dannin (1938 R.I.) 2 A.2d 892." [18]

In the Bowles case, supra, the Court also quoted with approval from an earlier case: [19]

> "...It means that a person to be aggrieved must be one who has an actual and practical, as distinguished from a mere theoretical, interest in the controversy."

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[18] Quoted with approval in Milwaukee v. Milwaukee County School Comm. (1959) 8 Wis. 2d 226, 229; Milwaukee v. Public Service Comm. (1960) 11 Wis.2d 111, 115.

[19] Tillinghast v. Brown University (1902) 24 R.I. 179, 52 A. 891.

It seems clear to this Court that the legislature intended to delegate to the County Boards the authority to invoke local fact-finding procedures that were in substantial compliance with 111.70 Stats. The delegation was in accord with a policy of local self-government which has its basis in the constitution and the history of territorial government prior thereto. The power to determine "substantial compliance" was left with the W.E.R.B. If W.E.R.B. has arrogated to itself jurisdiction over the fact-finding procedure by an erroneous determination of "substantial compliance" then truly the County Board is "aggrieved"[20] and directly affected[21] by the invasion of its "legal right" and "privilege" to local fact-finding procedure and its authority and "duty" to manage its business.[22] Those interests are "actual and practical" and not merely "theoretical." The "obligation" imposed by the W.E.R.B. decision has already been demonstrated.

What then of the argument that judicial intervention by way of review is premature because the administrative action has not achieved the finality or ripeness which makes it well-suited to judicial consideration? The question is best answered by the conciliator appointment case[23] and the certification case.[24] Review was denied because those acts did nothing to aggrieve or act upon the legal rights of the petitioners. Similarly, the remaining fact-finding process in the instant case does nothing to affect the legal rights of the parties to it. Neither the facts found nor the recommended solutions bind the parties, nor provide the basis for further W.E.R.B. action in that specific area. For all practical purposes, the acts of the W.E.R.B. are concluded with the appointment of a fact-finder. A more appropriate time for review of the W.E.R.B. determination that the adopted local fact-finding procedures are not in substantial compliance with sec. 111.70(4)(m) Stats., could not be chosen.

Judicial intervention at this point may work interruption and delay of the fact-finding process. The Court is mindful that the purpose of fact-finding is orderly solution to an impasse in collective bargaining between municipal employer and municipal employees. In enacting sec. 111.70 Stats., the legislature has expressed itself in two areas of long-standing dispute and debate: the rights of municipal employees to bargain collectively and to strike. As quid pro quo for granting the right to collective bargaining, the enactment denied the right to strike. Having been expressly denied the right to strike, the approved collective bargaining procedures should not be unduly hampered. History demonstrates

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[20] The court finds itself unburdened by the expressed doubt whether a town was an "aggrieved" party in Ashwaubenon v. State Highway Comm. (1962) 17 Wis.2d 120, 128. In spite of the doubt, the Supreme Court apparently proceeded to review.

[21] 59.07 (5) Stats.

[22] State ex rel City B. & T. Co. v. M. & I. Bank (1958) 4 Wis.2d 315, 323.

[23] Wisconsin Tel. Co. v. Wisconsin E.R. Board, supra.

[24] United R. & W.D.S.E. of A. v. Wisconsin E.R. Board, supra.

that popular dissatisfaction with early judicial intervention in labor disputes resulted in legislative prohibitions of the exercise of the injunctive power which prompted judicial reluctance at premature intervention in the administrative process.[25] Those inhibitions are now firmly ingrained in the law but must be weighed by a flexible method of balancing those interests against continuing the administrative process (where nothing really remains to be done by the administrative agency) when it may work a substantial sacrifice to a municipal employer's protected interests by delaying a review to the point where it becomes meaningless.

The argument of the Attorney General is in substance the classic one:

> " Although the American court system originated in purely administrative processes and the courts themselves are administrative agencies, law and administration are to some extent antagonistic institutions of government. The one is interested in regularity and the protection of private rights, the other in getting something done. The judges are trained in the tradition of the common law, while administrators deal in highly technical matters of comparatively recent origin. As a result of these conflicting elements, there seem to be two theories of the relations of courts to administrative agencies in Anglo-American law. The one treats the justice dispensed by courts and the social control exercised by administrative tribunals as parts of a single system of law in which the courts wield ultimate authority, while the other recognizes a dual system of public administration of justice and seeks a division of functions between courts and administrative agencies so that some administrative determinations are final...." [26]

The balance of the quoted section recognizes that the judicial function is best served by an appreciation that the courts and administrative agencies are not to be construed wholly independent functions but as a coordinated entity of justice. As Jaffe indicates above, courts and scholars have recognized the need for that interpretive posture. The problem is not extinguished by its recognition.

It is summed up:

> "...While judicial action possesses a degree of security superior to administrative action, administrative action possesses the advantage of dispensing with ordinary formalities and delays usually found unavoidable in court proceedings." [27]

The balancing of those interests in achieving solution to the problem is the recommendation of Professor Jaffe. The scales tip heavily in favor of judicial review at this time because nothing further remains to be done by W.E.R.B.

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[25] Haferbecker, "Wisconsin Labor Laws," p. 161-162.

[26] 42 Am. Jr. 295.

[27] Id., 295-296.

In this case, the counsel for the parties agreed upon oral argument that the petitioner at the W.E.R.B.-conducted hearing in Shawano on April 3, 1963, vigorously objected and contested the W.E.R.B.'s jurisdiction to initiate fact finding. The District Attorney of Shawano County also agreed on oral argument that his petition made his case and would call for no further supporting evidence.

The entire circumstances lead the Court to conclude that the petition herein states a case for Ch. 227 review of the W.E.R.B. order of June 11, 1963.

The Question of Substantial Compliance.

Before the merits of the decision of W.E.R.B. can be reached, three subsidiary legal questions must be settled:

1. Did the legislature intend that W.E.R.B. have jurisdiction to determine whether local fact-finding procedures are in substantial compliance with the procedures prescribed by 111.70 Stats.?
2. If the legislature so intended, is such determination an unlawful usurpation of the judicial power?
3. Can the court at this stage, rule upon the merits of the W.E.R.B. decision?

Addressing the first question, petitioner and the briefs of Arthur M. Wiesender, District Attorney of Green Lake County, and C. Stanley Perry, amici curiae,[28] contend that the legislative history of ch. 663, Laws of 1961 (Bill 336A as amended) which with other enactments created 111.70 Stats., evidences an intent to remove local fact-finding procedures from any jurisdiction of W.E.R.B. Study of the statute and its legislative history leads the court to a contrary conclusion. Sec. 111.70 (4) entitled "Powers of the Board," provides in par. (e) that the Board may initiate fact finding in two circumstances there detailed. Par. (f) requires the Board upon receipt of a petition to initiate fact finding to determine whether one of the conditions precedent exists and certify the results of the investigation. The statute provides, "...If the certification requires that fact finding be initiated, the board shall appoint...a qualified, disinterested person...as a fact finder...."

Clearly, fact-finding is initiated by the appointment of the fact finder. Par. (m) prohibits initiation of fact finding upon establishment of local fact-finding procedures "substantially in compliance with this subchapter." Since the prohibition is the initiation of fact finding, it is clear that divestment of W.E.R.B. authority is at the point immediately prior to the appointment of the fact finder. Since W.E.R.B. has been invested with authority to that point, it is clear that the legislature envisioned that W.E.R.B. would determine whether the established local fact-finding procedures were in substantial compliance with 111.70 Stats. Such an interpretation is consistent with the delegation of the matter of "municipal" labor disputes to an agency with special knowledge.

It has been suggested that it is irrational to claim that a procedure can be divided in such fashion resulting in a determination

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28 Lawton and Cates, attorneys for Shawano County Highway Employes Union, Local 1520, AFSCME, AFL-CIO, also filed a brief amicus curiae.

that "initiation" can come at any other stage than the very beginning. That argument disregards the investigatory nature of the administrative agency generally and this procedure specifically. The exercise of judicial duties as part of the judicial system is equally capable of division.[29]

The arguments of counsel seem inordinately to emphasize the desirability of a local determination of the facts. Local self-government is an axiom of American political science based upon the premise that local people familiar with life in the community are best able to solve its governmental problems. When it is urged, as here, that the fact-finder should be a "taxpayer" "sensitive to local conditions" rather than "someone who is completely and coldly neutral to these pressures and considerations," the argument tends to evince an intention to seek a local fact-finder in the hope that he will not be "disinterested" as the statute provides.

The authority of the W.E.R.B. to determine whether the Shawano County ordinance was in substantial compliance with 111.70 Stats., has been challenged as usurpation of the judicial power. Although the determination in that respect may be a question of fact or law,[30] the authority of the Board to make a determination in either area has been conclusively determined.[31] The determination made is not the exercise of the judicial function but an administrative act,[32] made by W.E.R.B. acting in a quasi-judicial capacity.[33] Since the nature of the determination by W.E.R.B. is predicated upon undisputed fact, it is a question of law reviewable by the court with these admonitory inhibitions:

> " Nevertheless, in fields in which an agency has particular competency or expertise, the courts should not substitute their judgment for the agench's application of a particular statute to the found facts if a rational basis exists in law for the agency's interpretation, and it does not conflict with the statute's legislative history, prior decisions of this court, or constitutional prohibitions." [34]

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[29] The most recent illustration that comes to mind is the distinction between a magistrate and a court. State ex rel Jackson v. Coffey (1963) 18 Wis. 2d 529, 534.

[30] Northwestern Iron Co. v. Industrial Comm. (1913) 145 Wis. 97,104; Lake Superior Dist. P. Co. v. Pub. Serv. Comm. (1940) 235 Wis. 667, 674.

[31] International Union v. Wis. E. R. Board (1951) 258 Wis. 481, 493-494; State ex rel Volden v. Haas (1953) 264 Wis. 127, 132.

[32] Dairy Employees Ind. Union v. Wisconsin E. R. Board (1952) 262 Wis. 280.

[33] Muench v. Public Serv. Comm. (1952) 261 Wis. 492 at 515.

[34] Pabst v. Dept. of Taxation (1963) 19 Wis. 2d 313, 323, quoted with approval in Globe Union, Inc. v. Dept. of Taxation (1963) 20 Wis. 2d 213.

" The whole purpose of arbitration is to substitute a less-expensive and less-formal method of settling differences between parties for normal court litigation. In arbitration greater use may be made of persons who have a particular expertise that may permit them to adjudicate and settle differences that may exist on highly technical matters." (Emphasis supplied.) 35

W.E.R.B. moved to dismiss the petition. Pleadings prescribed by 227.16 through 227.19 are entitled to a liberal construction.36 So much of the motion as relates to the question of whether the petition upon its face states facts sufficient to show that the petitioner is aggrieved, is construed to be brought pursuant to 227.19 (3) Stats.

Fact finding is a labor-management procedure which has developed in the areas of governmental employment where judicial decision has denied the right to strike; in industry which is subject to regulations in the public interest, and in industry wherein a strike would have a substantial impact upon private and public economy.37

As encompassed in sec. 111.70 Stats., fact finding requires the fact finder to determine the facts underlying the dispute and propose remedial solutions. Such a procedure is something less than binding arbitration since it does not resolve the dispute and is something more than mediation or conciliation, which concerns itself primarily with the resolution of the dispute and only casually with the underlying facts.

In the discharge of his fact-finding function, the fact finder performs the role of the arbitrator and in proposing and discharging his function of proposing recommendations for the solution of the dispute, the fact finder performs the role of the mediator.

The role of the arbitrator has been the subject of violent controversy resulting in reams of legal writing. Two recent discussions are found in 1963 Wis. Law Review, p. 3, entitled "Collective Bargaining and the Arbitrator," by Prof. Lon L. Fuller and 61 Michigan Law Review, 1245 (May, 1963) entitled "Reflections on the Nature of Labor Arbitration," by Prof. R. W. Fleming. The argument whether the arbitrator should function in a quasi-judicial fashion or as an industrial innovator, is continued in those articles where citation is made to works of the most prominent and frequent author-participants in the controversy.

Arbitration, as developed in the era of World War I, was a procedural tool, attempting to resolve the contract negotiations dispute prior to strike. Subsequently, and since World War II, it developed into a procedural tool to resolve disputes arising under

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35 Madison v. Frank Lloyd Wright Foundation (1963) 20 Wis. 2d 361, 383.

36 Kubista v. State Annuity & Inv. Board (1950) 257 Wis. 359; Lake Superior Dist. P. Co. v. Pub. Serv. Comm (1947) 250 Wis. 39, 51.

37 Forkosch, "A Treatise on Labor Law" 838,n.27; 840,n.28.

a negotiated contract. Fact finding as here involved, is a cousin to arbitration as developed in the World War I era, because it requires an impartial determination of the facts underlying the dispute. It is hoped that public opinion and the opinion of the parties to the dispute can be marshalled in support of the recommended solutions of the fact finder. Public opinion is a vital factor in matters affecting industry concerned with public interest and government itself.[38]

Possibly it is more important in the area of government as we find it here applied. As set forth in the second report of the Committee on Labor Relations of Government Employees of the American Bar Association (1955):

> " Government which denies to its employees the right to strike against people, no matter how just might be the grievances, owes to its public servants, an obligation to provide working conditions and standards of management-employee relations, which would make unnecessary and unwarranted any need for such employees to resort to stoppage of public business. It is too idealistic to depend solely on a hoped-for beneficent attitude of public administrators...."

There exists a correlative principle that the working conditions and wage rates demanded by government employees be such as will merit the support and approval of the reasonable citizens who pay the price thereof and to whom elected officials are responsible.

Fact finding assumes that an impartial determination, fairly made, of the underlying facts, will persuade the parties to the dispute to consent, in part at least, to the recommendations of the fact finder and will engender the support of the public in the resultant agreement.

The fairness and impartiality of the fact finder is the keystone to the accomplishment of the fact-finding mission. Whether the role of the arbitrator, in this case the fact finder, in that of a judge or an industrial innovator, is not important to this decision, but whether innovator or judge, judicial qualities of integrity, impartiality, fairness and patience are essential to the discharge of the fact finder's function.

Emmanuel Stein, director of the Annual New York University Conference on Labor, writes:

> " It goes without saying that the character and the ability of the arbitrator are the sina qua non of successful arbitration. Unless the arbitrator be a person of the highest integrity, unless he be a

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[38] An author who is skeptical of the existence of public opinion as a force in resolving political or labor disputes acknowledges that fact finding with recommendations is at times effective in resolving a labor dispute. Arthur Lesser, Jr., "Public Opinion in Settling Labor Disputes," Proceedings of New York University Fifth Annual Conference on Labor, pp. 617, 624.

person possessed of insight and understanding, and unless he possess a large fund of experience in the settlement of labor disputes, he falls short of the standards which might reasonably be expected of arbitrators. But it is not sufficient that a man possess these qualities; he must, in addition, be acceptable to the parties. They must be completely satisfied as to his fairness and ability; they must have the right to impose the most exacting requirements and to reject anyone who does not meet them. For arbitration will fail if either of the parties believes that the arbitrator is unfair or incompetent; the willingness to go to arbitration, in the first instance, or to accept the award is largely dependent upon faith in the integrity of the process and of the arbitrator...." [39]

It has been argued that the record is devoid of evidence that the members of the Shawano County fact-finding Commission and the appointed panel of fact-finders are partial or lacking in qualification. Such an argument misunderstands the scope of the W.E.R.B. determination. The integrity of the fact-finders, the Commission or the Chairman of the County Board is in no way impugned. The real issue is whether the method of appointment is self-defeating to the statutory purpose of effective solution of labor disputes. Procedures designed to marshall the support of the parties and public opinion are most effective when reasonable ground for a claim of bias is minimized. The fact of bias has not been found by W.E.R.B. The extent of its decision is that the method of appointment of the established local fact-finding procedure is so open to the claim of bias that the ordinance does not constitute substantial compliance with the appropriate statute requiring the appointment of a disinterested person. Such a conclusion need not rest upon the proof of bias any more than an affidavit of prejudice must bulwark its allegation of prejudice with supporting evidence.

The claim is made that the appointment of commission members and fact finders for terms, accords a tenure and resulting independence. Such limited tenure is an ineffectual refutation of claimed partiality. The same argument made to the legislature in support of legislation limiting an affidavit of prejudice to demonstrable bias would fare no better.

Whether decisions are made in the hearing room, the courtroom or the geometric arena claims of a "bad call" indigenous to the diamond and the squared circle will always be cheered and jeered.[40] The W.E.R.B. determination is a sophisticated acknowledgement of the need for workability rather than a naive attempt to exterminate contention.

The Court is not unfamiliar with the fact that the members of innumerable administrative bodies, including W.E.R.B. are

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[39] "The Selection of Arbitrators," Proceedings of New York University Eighth Annual Conference on Labor, 1955, p. 291, 295.

[40] Stein acknowledges that unfair claims of bias can't be eliminated. Ibid, p. 297. Any judge would agree.

appointed by an executive and confirmed by a legislative body. These administrative boards and commissions have authority to make determinations affecting the interests of the governmental subdivision that they serve. However, the court is aware of no such agency which is incapable of compelling compliance with the decision as in the instant case. In the other circumstances, rights are adjudicated and the adjudication is usually subject to judicial enforcement as well as judicial remedies protecting against unlawful or illegal action. In the instant case, the fact-finding procedure depends upon the voluntary acceptance of the facts found and solution recommended. In the former cases, appeal to the judiciary serves to muffle claims of bias by review of the deductions made by the administrative body and enforcement of its decision where justified. In the instant case the fact-finder's determination is probably not reviewable and certainly not enforceable. One might say that in this case, seduction was as important as deduction.

The findings of W.E.R.B. do not attack or question the qualifications of the Shawano County Commission members or fact finders. Neither the findings of fact nor conclusion of law forms the basis for such an attack. The gratuitous comment of W.E.R.B. in its memorandum decision suggesting that the fact finder's fee schedule is unreasonably low, may infer lack of qualification. Age-old is the argument of the petitioner that an honorarium (certainly $9 per day is nothing more) and civic duty bring more competent people to government service than "adequate" fees. More persuasive is an argument based upon civic duty without an honorarium. However, the issue of scheduled fees requires no resolution for W.E.R.B., although it elected its position, did not choose to ground its decision thereon and its comment is therefore surplusage.

W.E.R.B. correctly determined that Ordinance 32, adopted by the Shawano County Board, is not in substantial compliance with sec. 111.70, Stats.

The temporary restraining order heretofore issued is dissolved.

The attorney for the respondent may prepare an order dismissing the petition, grounding the dismissal upon the failure to state facts sufficient to show that petitioner is aggrieved. No provision is made for an opportunity to amend for the reason that petitioner has acknowledged that its case is made by the petition, and the record heretofore filed by the administrative agency.

Dated at Milwaukee, Wisconsin, this 2nd day of August, 1963.

By the Court,

JOHN A. DECKER /s/
Judge.