No. 405

August Term, 1974

STATE OF WISCONSIN : IN SUPREME COURT

F I L E D

MAR - 4 1975
Robert O. Uehling
Clerk of Supreme Court
Madison, Wisconsin

Lodge 76, International Assn. of Machinists & Aerospace Workers, AFL-CIO, et al.,

Appellants,

v.

Wis. Employment Relations Commission,

Respondent,

Kearney & Trecker Corp.,

Intervenor-Respondent.

NOTICE

This opinion is subject to further editing and modification. The official version will appear in the bound volume of the Wisconsin Reports.

Decision No. 11083-C

APPEAL from a judgment of the circuit court for Milwaukee County: HON. ROBERT W. LANDRY, Circuit Judge. Affirmed.

The judgment appealed from granted enforcement of an order of the Wisconsin Employment Relations Commission which directed the appellant Lodge to cease and desist from authorizing, encouraging or condoning any concerted refusal of the employees of Kearney & Trecker Corporation to accept overtime assignments.

Kearney & Trecker Corporation was a party to a collective bargaining agreement with Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO and District No. 10 International Association of Machinists and Aerospace Workers, AFL-CIO. The agreement terminated June 19, 1971. A second agreement became effective July 23, 1972 and expired July 22, 1973.

During negotiations for this second agreement a bargaining impasse developed concerning the work week. The employer wanted to have a 40-hour week with a time and-a-half pay rate for work over 8 hours in a day and 40 hours in a week. The union wanted to retain the prior schedule of 37-1/2 hours a week with overtime rates applicable for work over 7-1/2 hours a day and 37-1/2 hours in a week.

On March 1, 1972 the employer announced that it was implementing its 40 hour week proposal effective March 12, 1972. On March 7th, the union membership authorized a strike and further resolved that no union member would work overtime, overtime being defined as work in excess of 7-1/2 hours a day or 37-1/2 hours a week. The employer and the union met on March 10th and 11th in unsuccessful attempts to resolve the issue. The employer did not implement its 40-hour week proposal on March 12th or at any time later.

On March 16, 1972 the union "remind[ed]" its members that even though negotiations were still underway, the policies voted on by the membership "will continue in effect until a labor agreement is signed."

Prior to March 7th only 5 percent of the employees declined overtime work. As many as 354 worked on Saturday, March 4th. After the union's March 7th meeting, however, all but three employees refused to work overtime. The employer suffered substantial damages as a result.

The employer's business is the manufacture of machine tools. Its business affects interstate commerce. Labor management relations between the employer and the union are subject to the National Labor Relations Act.

On June 12, 1972 the employer filed with the National Labor Relations Board (NLRB) a charge that the union had violated Section 8 (b) (3) of the National Labor Relations Act, 29 U.S.C. #158 (b) (3), (NLRA) by its ban on overtime. On June 27, 1972 the NLRB Regional Director refused to issue a complaint on the ground that the union's action was not prohibited by the NLRA. That refusal stated, in part:

"Dismissal by this agency does not necessarily preclude the Charging Party [Kearney & Trecker] from pursuing its rights under statutes other than the National Labor Relations Act on matters not covered by said act."

On June 15, 1972 the employer filed a complaint with the Wisconsin Employment Relations Commission (commission) After hearing the examiner found that the union had authorized, encouraged and condoned the employees' concerted refusal to work overtime, that the effect of that action was to interfere with the company's production and that the union had therefore violated Sec. 111.06 (2) (h), Stats. The examiner rejected the union's challenge to the commission jurisdiction, concluding that its refusal to work overtime was neither an activity arguably "protected" under Sec. 7 of the NLRA nor an activity arguably "prohibited" under Sec. 8 of the act. The commission adopted the examiner's findings and orders as its own.

The union petitioned the circuit court for Milwaukee County for review of the commission's order. The commission counter-petitioned for enforcement. The circuit court entered its judgment affirming and enforcing the commission's order. The union appeals.

HANLEY, J. The sole issue involved upon this appeal is whether the state of Wisconsin is precluded from enjoining a concerted refusal to work overtime which is in violation of Sec. 111.06 (2) (h) of the Wisconsin Statutes.

The union's conduct is not denied. They challenge the state's authority to enforce the statute, Sec. 111.06 (2) (h).

The union makes two arguments in support of its position that the state does not have the power to restrain peaceful concerted activities by unions. The first is that such activities are "permitted" by the NLRA and as such are not subject to state restraint. The second is that the state lacks the power to restrain such activities as are involved here because such conduct is arguably protected by the NLRA.

The respondents argue that conduct involved here was not permitted by the NLRA. They further argue that such conduct was not protected by the NLRA and that the permitted category is inapplicable in this case.

In International Union, U.A.W.A., A.F.L., LOCAL 232, v. Wisconsin Employment Relations Board (1949), 336 U.S. 245, 69 Sup. Ct. 516, 93 L. Ed. 651, reh. denied, 336 U.S. 970, 69 Sup. Ct. 935, 93 L. Ed. 1121 (hereinafter Briggs and Stratton) the United States Supreme Court reviewed a decision of this court which had upheld a board order requiring a labor union to cease and desist from instigating certain intermittant and unannounced work stoppages in an employer's plants. The Supreme Court held that it could find no basis for denying this state the power to regulate a cause of conduct neither made a right under nor a violation of federal law. The court stated:

"...While the Federal Board is empowered to forbid a strike, when and because its purpose is one that the Federal Act made illegal, it has been given no power to forbid one because its method is illegal -- even if the illegality were to consist of actual or threatened violence to persons or destruction of property. Policing of such conduct is left wholly to the states." 336 U.S. at 253.

The court went on to determine that the conduct of the union was not subject to regulations by the Federal Board and that the activity was not protected by Sec. 7 of the NLRB.

Subsequent to that decision, the Supreme Court has considered this issue in a number of cases. In Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776 (1953), 346 U.S. 485, 74 Sup. Ct. 161, 98 L. Ed. 228, the Court affirmed a Pennsylvania Supreme Court decision which held that a state court could not enjoin certain picketing by a union. The Court stated:

"Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies..." U.S. at 490.

It was noted that the policy of the Labor Management Relation Act (LMRA) is not to condemn all picketing and that the detailed prescription of a procedure for restraint of specified types of picketing implies that other picketing is to be free of other methods and sources of restraint. "...For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." 346 U.S. at 500. It was recognized though, that the LMRA does leave much to the states.

Garner, the union says, holds that states cannot regulate peaceful economic weapons left free by federal law. However, Garner dealt with an area Congress had "taken in hand", namely, inducements to union membership. Therefore, Pennsylvania procedures and processes could not operate. In Garner, a national labor act purpose was frustrated by the state action. That is not the situation in the instant case.

In San Diego Building Trades Council v. Garmon (1959), 359 U.S. 236, 79 Sup. Ct. 773, 3 L. Ed. 2d 775, a California court had awarded damages for picketing which it concluded violated not only state law but also Sec. 8 (b) (2) of NLRA. The United States Supreme Court reversed holding that:

"When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by sec. 7 of the National Labor Relations Act, or constitute an unfair labor practice under sec. 8, due regard for the federal enactment requires that state jurisdiction must yield...

"...

"...When an activity is arguably subject to sec. 7 or sec. 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." U.S. at 244, 245.

We think Garmon amplified the protected-prohibited test set forth and declined to follow the "approach" of Briggs and Stratton under which the court itself determined the protected or prohibited nature of the activity.

That only the "approach" rather than substantive rulings of Briggs and Stratton was rejected is clear from the statement cited by appellants at p. 14 of their brief.

"The approach taken in that case, in which the Court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application." (359 U.S. at 245, n. 4)

The rules on pre-emption in the area of labor law were stated to be as follows in Hanna Mining Co. v. District 2, Marine Engineers Beneficial Association, AFL-CIO (1965), 382 U.S. 181, 86 Sup. Ct. 327, 15 L. Ed. 2d 254:

"The ground rules for premption in labor law, emerging from our Garmon decision, should first be briefly summarized: in general, a State may not regulate conduct arguably 'protected by sec. 7, or prohibited by sec. 8' of the National Labor Relations Act, see 359 U.S., at 244-246; and the legislative purpose may further dictate that certain activity 'neither protected nor prohibited' be deemed privileged against state regulation, cf. 359 U.S., at 245..." 382 U.S. at 187, 188.

Despite these ground rules, the court reversed a decision of this court which had held that the state court lacked subject matter jurisdiction because the picketing involved arguably violated sec. 8 of the Federal Labor Act. The picketing was part of an effort by a union which had represented supervisors. The court held that because supervisory workers were involved the activity was not arguably protected and also that it was not "in the respects immediately relevant prohibited by it."

It further held that Congress had not taken a policy of laissez faire toward supervisors which would oust state authority. 382 U.S. at 188, 189.

In Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America v. Lockridge (1971), 403 U.S. 274, 91 Sup. Ct. 1909, 29 L. Ed. 2d 473, reh. denied 404 U.S. 874, 92 Sup. Ct. 24, 30 L. Ed. 2d 120, the court reaffirmed the Garmon rules. The court once again pointed out that it could not declare that all local regulations involving the complex interrelationships between employers, employees and unions has been pre-empted and that "...much of this is left to the states." 403 U.S. at 289. The court reaffirmed the "arguably protected-arguably prohibited" test of Garmon, however, and held a state court did not have jurisdiction in an action by an employee against his union based on an alleged breach of conduct by the union in procuring the employee's discharge from employment because the conduct involved was arguably protected or prohibited by the NLRA.

This court has recognized these principales of pre-emption in the area of labor law. It was held in Wisconsin Employment Relations Commission v. Atlantic Richfield Co (1971), 52 Wis. 2d 126, 187 N.W. 2d 805, that the WERC was not prohibited from regulating collective bargaining in one-man bargaining units because the NLRB lacks jurisdiction in such cases and no national labor act prupose was frustrated by such state action.

The union here argues that their activity was arguably protected by the NLRA and, therefore, pre-emption exists. Initially, it had moved to dismiss the complaint before the WERC because the activity was arguably prohibited. The respondents take the position that it is neither.

In this case the only action on the national level was the NLRB's regional director's letter refusing to issue a complaint. The regional director stated that "this action does not appear to be in violation of the act." The trial judge noted in his decision that the failure of the federal agency to take affirmative action does not confer power to act on the state. It is true that a letter from the regional director itself does not resolve the question with the clarity necessary to avoid pre-emption. However, in Garmon it was recognized that "compelling precedent" may provide that clear determination by the board.

The union does not contend here that the conduct is prohibited. The Supreme Court's decision in National Labor Relations Board v. Insurance Agents' International Union, AFL-CIO (1960), 361 U.S. 477, 80 Sup. Ct. 419, 4 L. Ed. 2d 454, makes it clear

The union does, however, argue that the conduct here is protected by Sec. 7 of the NLRA. It relies heavily on the case of Dow Chemical Co. (1965), 152 NLRB 1150. That case involved an employee who had engaged in activity connected with the refusal of employees to volunteer for weekend work. The NLRB held that such activity was protected concerted activity. It said:

"...Here, however, Piatek's discharge was based in substantial part on her activity connected with the refusals to volunteer for work on March 7-8, and on March 7-8 the respondent's new work schedule was not yet in effect and therefore weekend work was still voluntary. In such circumstances, since the employer had already agreed to permit employees to decide for themselves whether they wished to work weekends, we cannot say employees, by refusing to volunteer for work, lost the protection of the Act because they sought to impose on their employer their own conditions of employment..." 152 N.L.R.B. at 1152.

The WERC seeks to distinguish Dow on two grounds. The first is that Dow involved the refusal to volunteer for overtime and in the case at bar the refusal was to work scheduled overtime. The second factor is that Dow involved no union inducement.

There may be a question as to whether Dow is in fact distinguishable. However, a more recent case appears to answer the question. In Prince Lithograph Co., Inc. (1973), 205 NLRB No. 23, 1973, C.C.H. N.L.R.B. Dec. Par. 25,614, the NLRB affirmed the rulings, findings and conclusions of the administrative judge and adopted his recommended order. One of the issues involved was whether the termination and/or replacement of one employee violated the NLRA on the ground that it discouraged union membership. The employee had been discharged for refusing to work overtime as a part of a concerted refusal on the part of union members during contract negotiations and was at the direction of the local union. Overtime was voluntary. The administrative law judge stated:

"In the instant case the purpose of the strike was not ... unlawful but I do not think that distinction controlling. If an overtime strike, protected by a voluntary right to refuse overtime, for an unlawful object constitutes a violation of the statute it would appear to be equally true that an overtime strike to bring economic pressure against a primary employer is unprotected despite the same contractual provision." Slip. Op. at p. 11.

It was held that a concerted refusal to work scheduled or requested overtime is not protected, even if that overtime is voluntary. In Prince as in the case here, the union imposed a ban on overtime as a bargaining tactic.

We think that Prince Lithograph Co., supra, rather than Dow, supra, controls in this case. The activity here, under Prince, was unprotected activity. Therefore, the activity involved in this case is not arguably protected or arguably prohibited by the NLRA. It follows that pre-emption, under this test, is not involved in this case.

The union contends that even if the activity involved in this case is not arguably protected or arguably prohibited, it is "permitted" and the state cannot regulate it. It argues that peaceful concerted activity involved here is such as to be in an area to which there is a federal policy of laissez faire and this policy is part of the balance struck by regulation of these "permitted" activities.

The respondents both argue that the permitted rule only applies to areas where Congress has focused on similar conduct and not touched the particular conduct involved. They assert that this is not the case here and, therefore, if the application of the arguably protected or prohibited test does result in pre-emption, then the states are free to regulate in this area. The WERC also takes the position that the "permitted" category only applies where the NLRB could act and does not apply to the strike tactic situation.

As has already been noted, the Supreme Court in Briggs and Stratton held that it could find no basis for denying this state the power to regulate a course of conduct neither made a right nor a violation of the federal law. The approach taken in that case has been changed, as has been discussed above, by Garmon, supra. The court has not, however, expressly overruled its decision in that case that a state can regulate such conduct.

Appellants rely heavily upon the decision of the United States Supreme Court in Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton (1964), 377 U.S. 252, 84 Sup. Ct. 1253, 12 L. Ed. 2d 280 in challenging the application of the arguably prohibited or protected test. In Morton the action was brought pursuant to Sec. 303 of the Labor Management Relations Act which authorized suit by any person injured as a result of a special secondary conduct prohibited by the act.

The Ohio Federal District Court found the union had violated Sec. 303 by inducing and encouraging employees of a neutral employer to stop using the trucks of the plaintiff in order to force the neutral employer to stop doing business with the plaintiff. The Supreme Court affirmed this finding of a "clear violation of sec. 303." 377 U.S. at 256.

The union in Morton had, however, engaged in another instance of secondary boycott activity, a direct approach by the union to a neutral employer to persuade it not to do business with the plaintiff. Although finding that such activity was not in violation of Sec. 303 since the union had approached the neutral employer directly rather than through its employees, the court, nevertheless, awarded damages on the basis of state common law. The Supreme Court affirmed the district court's award of damages under sec. 303, but it reversed the awards based on the Ohio law dealing with secondary boycotts.

The Supreme Court reversed the latter award even though assuming that at least some of the secondary activity involved was neither protected nor prohibited, noting:

"The type of conduct to be made the subject of a private damage action was considered by Congress, and sec. 303 (a) comprehensively and with great particularity 'describes and condemns specific union conduct directed to specific objectives.'" 377 U.S. at 258.

The Court concluded:

"If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted sec. 303, the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, ..." 377 U.S. at 259-260.

In Morton the fact of congressional focus showed that the activity was beyond state jurisdiction. Such is not the case here. Unlike the very comprehensive statutory treatment of secondary boycotts, Congress has not "focused upon" partial or "quickie" strikes. Policing of such conduct is left wholly to the states.

We agree with the WERC and the trial court that the doctrine of federal pre-emption does not require the WERC to refrain from relating the Union's conduct in authorizing concerted refusal of employees to accept overtime assignments. Since the conduct involved in this case is not protected, prohibited or contrary to any legislative purpose of the federal labor act the judgment appealed from must be affirmed.

By the Court: Judgment affirmed.

No. 410

August Term, 1974

STATE OF WISCONSIN : IN SUPREME COURT

NOTICE
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F I L E D

JUN 30 1975
Robert O. Uehling
Clerk of Supreme Court
Madison, Wisconsin

Decision No. 11271

CITY OF MADISON JOINT SCHOOL DISTRICT NO. 8, City of Madison, Villages of Maple Bluff and Shorewood Hills, Town of Madison, Blooming Grove, Fitchburg and Burke; and its agent the Board of Education, City of Madison Joint School District No. 8

Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Respondent,
MADISON TEACHERS, INCORPORATED,
Intervenor
Respondent.

APPEAL from a judgment of the circuit court for Dane county: WILLIAM C. SACHTJEN, Circuit Judge. Affirmed.

DAY, J. The question on this appeal is, was it error for the circuit court to affirm the conclusion of the Wisconsin Employment Relations Commission that the school board committed a prohibited labor practice in that it "negotiated" or "bargained" with other than the exclusive bargaining representative of the teachers on matters subject to collective bargaining when it allowed a representative of a minority group of teachers to speak at a board meeting, listened to his statements and received the results of a petition circulated by that group--all concerning matters subject to collective bargaining--when this was done at a regular public meeting of the board?

The appellant City of Madison Joint School District No. 8, including the City of Madison, Villages of Maple Bluff and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg, and Burke (hereinafter "school district") operates the school system of said municipalities; the appellant Board of Education of the district is an agent of the district and is charged with the possession, care, control and management of the property and affairs of the school district.

The respondent Wisconsin Employment Relations Commission (hereinafter "WERC") is an administrative body charged with the responsibility of administering statutory policy with respect to both public and private employees.

Madison Teachers, Incorporated (hereinafter "MTI"), intervenor respondent, is a labor organization which was,at the time of the events which give rise to this action, the exclusive majority collective bargaining representative of the teachers of the district.

The Board of Education (board) and MTI were, for the calendar year 1971, parties to a collective bargaining agreement covering wages, hours, and conditions of employment for all bargaining unit personnel, which included all teachers. The agreement terminated on December 31, 1971. Negotiations for a successor agreement began almost as soon as the previous one concluded. Thus, on January 25, 1971, MTI submitted a proposal for a new contract to take effect January 1, 1972. This proposal contained a "fair share" provision, a contractual requirement that all teachers, including those not then members, pay full union dues, i.e., their "fair share" of the costs of collective bargaining.

Such a provision was proposed by MTI the previous year and was rejected by the board. This fair-share provision was discussed throughout the 1971 negotiations and at all times was opposed by the board. Initially, the board objected because such a provision was then illegal. There were frequent requests by the board for MTI to defer fair share for another year.

On November 11, 1971, legislation (ch. 124, Laws of 1971) became effective which allowed inclusion of a fair-share provision in municipal-employee collective-bargaining agreements. This is now codified as sec. 111.70 (1), Stats., and defined in sec. 111.70 (1)(h). Soon thereafter MTI submitted another fair-share proposal to conform to the new law;again it was rejected by the board.

The number of unresolved issues between the parties had been reduced to about 13 by November, 1971. Two of these were considered of overriding importance by both sides: (1) the fair-share provision, and (2) the provision for binding arbitration of non-renewal of teacher contracts and teacher dismissals. The board had opposed both of these issues throughout the negotiations. However, in late October or early November, the chairman of the board's negotiating team indicated, informally and unofficially, to the chairman of MTI's negotiating team that there was "no way" arbitration for dismissals and non-renewals would be accepted by the board, but there was a "distinct possibility" the fair-share provision could be accepted. He said two members of the board said they would approve fair share if MTI would withdraw its arbitration proposal.

On the other hand, at the WERC hearing in this case, the chairman of MTI's negotiating team testified that the union's bargaining strategy was to lead the board to believe that MTI's primary interest was in fair share when in fact it was in arbitration. If this strategem were successful, MTI could at some point offer to "sacrifice" fair share for arbitration and celebrate the result.

On November 14, 1971, Ralph Reed and Albert Holmquist, teachers employed by the district, neither of whom were members of MTI, sent a letter opposing the fair-share provision, which they considered a denial of freedom of choice, to all teachers employed by the district. The letter solicited responses and 200 were received, the majority sympathetic to their position. A meeting of some of these teachers was scheduled for December 2, 1971. Fourteen teachers attended, half of whom were MTI members. They prepared

By December 6, 1971, negotiations between the board and MTI had reached an impasse. For the board's regular public meeting that evening MTI had arranged to have pickets present and 300-400 teachers in attendance at the auditorium. MTI's representative John Mathews knew in advance that Messrs. Reed and Holmquist intended to present the results of their petition and speak to the board against fair share. He encountered Mr. Holmquist and Mr. Reed in the auditorium before the meeting was to begin and tried to talk them out of presenting the petition or speaking to the board.

Soon thereafter, Mr. Mathews met a member of the board, Mr. Yelinek, outside. He informed Mr. Yelinek of what Messrs. Reed and Holmquist intended to do that evening and also showed him underlined portions of the Board of Sch. Directors of Milwaukee v. WERC (1969), 42 Wis. 2d 637, 168 N.W. 2d 92. Mr. Yelinek responded that he "would take care of it."

Mr. Mathews met Messrs. Reed and Holmquist again, soon after talking with Mr Yelinek. He again tried unsuccessfully, to talk them out of presenting the petition and speaking to the board, telling them that the negotiations were delicate and urging them to refrain "or we were going to lose the whole ball game."

At the board meeting, a portion of time was devoted to public appearances. Mr. Holmquist completed a registration form stating that he wished to speak during this period. He did not say on this form what he wished to speak about. Several individuals spoke during this time and then the president of the MTI rose and spoke. At the conclusion of his remarks he presented to the board a statement signed by 1300 to 1400 teachers, declaring "We, the undersigned wish the parties to resume negotiations and reach agreement as quickly as possible."

Immediately following this speaker, Mr. Holmquist was allowed to speak. He said

"'My name is Albert Holmquist. I reside at 5626 Crestwood Place. I am another teacher. I represent an informal committee of 72 teachers in 49 schools. I would like to inform the Madison Board of Education, as I already have the Madison Teachers, Incorporated, about the results of an informational survey regarding one of the thirteen or so items now on the conference table and one of the main items that will certainly be included in some form in the new package.'"

He then read the petition:

"'To: Madison Board of Education, Madison Teachers, Incorporated. We the undersigned ask that the fair-share proposal (agency shop) being negotiated by Madison Teachers, Incorporated and the Madison Board of Education be deferred this year. We propose the following: 1) The fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups. 2) The findings of this study be made public. 3) This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair share proposal. 4) The results of this written ballot be made public.'"

He added:

"'We feel this study necessary because neither the board's negotiators who have placed entirely too much emphasis on this one point nor Madison Teachers, Inc. which speaks euphemistically about the "whole package" and therefore is not issue specific. . . Neither has properly addressed the serious issue of fair-share and agency shop. We find much confusion in the proposal as it stands and even more on the part of teachers' interpretations of it.

For evidence, 417 teachers from the 31 schools which represents 53% of the total number of these faculties of these schools . . . who have called in to this hour have signed the petition on the first day it was taken into their schools. Due to this confusion, we wish to take no stand on the propsal itself, but ask only that all alternatives be presented clearly to all teachers and more importantly to the general public to whom we are all responsible. We ask simply for communication, not confrontation.'"

When he finished, the board president asked Mr. Holmquist whether he intended to communicate the petitions to the board. Mr. Holmquist replied that he did; the petitions, however, were never presented to the board. There was no other exchange between Mr. Holmquist and any member of the board.

After the public meeting, the board went into executive session and considered the unresolved collective-bargaining issues, since a negotiation session had been scheduled for the following day, December 7, 1971. The board adopted the following resolution:

"'It was moved and seconded to accept the total package as presented including arbitration for dismissal of non-probationary teachers and not including agency shop; if the MTI does not accept this as a total package, the offer of arbitration is withdrawn.'" (Emphasis the board's.)

At the next day's negotiations, the board's representatives opened the meeting with the above-quoted resolution and said," ...This is the deal." After some discussion, MTI conceded and tentative agreement was reached. The final agreement was signed December 14, 1971, with no fair-share provision, but with the arbitration provision.

In January, 1972, MTI filed a complaint with the WERC alleging that the board committed a prohibited labor practice when it listened to Mr. Holmquist at its public meeting; this was said to constitute prohibited negotiating with other than the official, exclusive collective-bargaining representative, MTI. The board denied the charge. A hearing was held on February 28, 1972. On September 13, 1972, WERC concluded that the board had committed the alleged prohibited labor practices and ordered the board to cease and desist from the same.

The board petitioned the Dane county circuit court for review under ch. 227, Stats. MTI intervened. On October 2, 1973, the court entered its written decision affirming the WERC conclusion and order. Judgment affirming WERC and dismissing the petition for review was entered October 17, 1973. The board appeals from that judgment.

The basic question on the appeal is, did the board commit an unfair labor practice under the fact situation outlined above? In addition, other questions have been raised on issues of constitutionality and statutory construction.

It could be argued that as a matter of policy the board should hear not only the majority union, but any minority union groups or ad hoc committee representatives to thereby get a cross-section of all views and ascertain what all employees think of the various issues subject to collective bargaining. Under such an argument the board and its bargaining representatives should listen to and exchange ideas with all these various groups and factions within a collective bargaining unit. But that is not how collective bargaining is to be carried out under our law.

This court has held that the majority organization in a particular labor bargaining unit, is under the Municipal Employment Relations Act (MERA), sec. 111.70, Stats., not only the bargaining representative for the members of that majority organization,but is the exclusive bargaining representative of all the employees, members or non-members, of the bargaining unit. Board of Sch. Directors of Milwaukee v. WERC, supra, at 645-647. Accord, Board of Education v. WERC (1971), 52 Wis. 2d 625, 191 N.W. 2d 242. The statute also states that it is a prohibited labor practice for a municipal employer to refuse to bargain collectively with this exclusive majority representative.

Sec. 111.70 (3) (a) 4, Stats. Further, it is a prohibited labor practice for the municipal employer "To interfere with, restrain, or coerce municipal employes in the exercise of their rights . . .," sec. 111.70 (3) (a) 1, one of which is the right ". . . to bargain collectively through representatives of their own choosing . . . ," sec. 111.70 (2). In this case, WERC concluded that the board, in allowing Mr. Holmquist to speak in listening to his statement and his oral presentation of the results of his petition, had committed prohibited labor practices in violation of sec. 111.70 (3) (a) 1 and 4, in that it had violated its duty to bargain in good faith with MTI and had interfered with the rights of employees represented by MTI to bargain collectively through representatives of their own choosing. On this basis, WERC ordered, inter alia, that the board:

"1. Shall immediately cease and desist from permitting employes, other than representatives of Madison Teachers Inc., to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining between it and Madison Teachers Inc."

The WERC decision was affirmed by the circuit court.

The basic question here is whether or not the activities of the board at its public meeting constituted bargaining. The board of education in its brief concedes that bargaining by a minority group of employees with the board is prohibited by our law. In its brief the board states:

"It may well be because of the public interest in stable labor relations permissible to restrict the rights of a minority group or individual teacher to negotiate with their employer. However, we submit to prevent an employee from providing information to his employer orally is beyond the scope of permissible restriction of the Constitutional rights of public employees to speak and petition their government." . . .

The Board of Education does not contest the assertion that it has an obligation to bargain exclusively with the majority representative of its employees of that a 'fair share' agreement is a matter of mandatory bargaining."

The United States [1/] and Wisconsin [2/] Constitutions protect the rights of individuals to speak and to petition their federal and state governments. But it is well established that these freedoms are not absolute.

1/ The First and Fourteenth Amendments to the United States Constitution, in pertinent part, are:

"Article I.

Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

"Article XIV.

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2/ The Wisconsin Constitution provides, in pertinent part, in Article I, Sections 3 and 4:

"Free speech: libel. Section 3. Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be pased to restrain or abridge the liberty of speech . . ."

"Right to assemble and petition Section 4. The right of the people peaceably to assemble, to consult for the common good and to petition the government, or any department thereof, shall never be abridged."

3/ To the extent that the WERC and circuit court decisions in this case infringe upon the freedom to speak and to petition the federal and state governments, they are within the limits imposed on the restriction of those rights by United States Supreme Court decisions and the decisions of this court. What is required to overcome the constitutional proscriptions on abridgement of these rights has been variously described as ". . . a clear and present danger that (the speech) will bring about the substantive evils that (the legislature) has a right to prevent," Schenck v. United States (1919), 249 U.S. 47, 52, 39 Sup. Ct. 247, 63 L. Ed. 470, or ". . . grave and immediate danger to interests which the State may lawfully protect," West Virginia St. Brd. of Educ. v. Barnette (1943), 319 U.S. 624, 639, 63 Sup. Ct. 1178, 87 L. Ed. 1628. Somewhat more recently the court has refined this language into a balancing test.

"'In each case (courts) must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'" Dennis v. United States (1951), 341 U.S. 494, 510 71, Sup. Ct. 857, 95 L. Ed. 1137.

This question has been answered by this court and the United States Supreme Court in the field of labor negotiations. In Board of Sch. Directors of Milwaukee v. WERC, supra, this court recognized the right of the certified majority union to exclusive negotiating rights with the employer. Accord, Board of Education v. WERC (1971), 52 Wis. 2d 625, 633, 191 N.W. 2d 242. The principle of exclusivity, by definition, forbids certain individuals from speaking certain things in certain contexts: the First Amendment rights of those persons are, to that extent, thereby infringed. But the gravity of that evil was considered outweighed by the necessity to avoid the dangers attendant upon relative chaos in labor-management relations.

"The federal labor laws seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining . . . . The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit." Vaca v. Sipes (1967), 386 U.S. 171, 182, 87 Sup. Ct. 903, 17 L.Ed. 2d 842; cf., Medo Photo Supply Corp. v. NLRB (1944), 321 U.S. 678, 684, 64 Sup. Ct. 830, 88 L. Ed. 1007; accord, Texaco, Inc. v. N.L.R.B. (7th Cir. 1971), 436 Fed. 2d 520, 524.

The question of whether speech in the form of bargaining or negotiating for a labor agreement can be constitutionally restricted to representatives of the majority bargaining unit has been answered in the affirmative. None of the parties to this action disputes that. Now the question is whether the activity herein complainted of by MTI, and subsequently proscribed by WERC, qualifies as bargaining and can, therefore, be restricted under the rule of Board of Sch. Directors of Milwaukee v. WERC, supra. In that case, Justice Hanley speaking for a majority of this court defined "negotiating" as follows, p. 652:

"Quite obviously the determination of this issue turns on the interpretation given to 'negotiating.'
'Negotiate' is defined in Webster's New International Dictionary (3d ed.) as:

'. . . 1.: to communicate or confer with another so as to arrive at the settlement of some matter: meet with another so as to arrive through discussion at some kind of agreement or compromise about something: come to terms esp. in state matters by meetings and discussions . . . . '"

In that case, the school board and the majority union were in the midst of negotiations on a new contract. At a public meeting of one of the committees of the school board, a representative of the minority union rose to speak on

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3/ State v. Becker (1971), 51 Wis. 2d 659, 664, 188 N.W. 2d 449: State ex rel. Gall v. Wittig (1969), 42 Wis. 2d 595, 606, 167 N.W. 2d 577; State v. Zwicker (1969), 41 Wis. 2d 497, 509-510, 164 N.W. 2d 512; State v. Givens (1965), 28 Wis. 2d 109, 118, 135 N.W. 2d 780.

a matter which was a subject of negotiations. He was denied the right to speak. WERC considered this denial a prohibited practice. The circuit court reversed the WERC decision and was affirmed by this court; this court finding, in effect, that allowing the minority representative to speak on that subject would have constituted prohibited negotiating or bargaining with him. This court had to determine the interpretation to be given to "negotiating" and relied on the definition cited above. This court placed emphasis on the statutory requirement that no final action should be taken on such negotiated matters until they are made public and discussed in an open public meeting. 4/ The court said that such " . . . open meeting is the necessary and final step in the 'negotiation' process between the school board and the majority teachers' union." Board of Sch. Directors of Milwaukee v. WERC, supra, at p. 653. Thus, it seems the court considered the school board committee meeting in that case to be a part of the "negotiation process." With the impasse that had been reached in the negotiations in the case before us with the majority union, with several members present at the board meeting, with its pickets present, and its representatives addressing the board on subjects of the collective bargaining negotiations, that meeting certainly was part of the negotiation process. The board relies heavily on the statement made by this court in that case, in which this court said:

"If this case involved solely the giving of a position statement at an ordinary meeting of a public body, we would have some difficulty in labeling the conduct 'negotiating.'" 42 Wis. 2d at p. 652.

What was said in the case before us goes beyond the mere giving of a "position statement" because here the statement went to the very heart of the negotiations.

As the trial court in this case pointed out in its analysis of the facts:

"In November, 1971, a Mr. Holmquist and a Mr. Reed, both of whom are teachers employed by the school board and both of whom are not members of MTI, drafted a letter addressed to 'Dear Fellow Madisonian Educator.' Such letter, headed 'E.C. - O.L.O.G.Y.,' meaning 'Educator's Choice - Obligatory Leadership Or Goverance by You,' asked the addressee to 'Save Freedom of Choice' and stated that 'A Closed Shop (agency shop) Removes This Freedom.' The bottom portion of such letter was in the form of a ballot allowing the addressee to express his opposition to 'agency shop.' Said letter was mailed on November 14, 1971 to all teachers in the Madison Public School system by Holmquist and Reed. Approximately two hundred replies to such letter were received, the majority of which were favorable to their position on fair share. . . .

4/ "' . . . the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental affairs and the transaction of governmental business.'" Sec. 14.90 (1), Stats. (1967), renumbered as sec. 66.77 (1), Stats. (1973). See, Board of Sch. Directors of Milwaukee v. WERC, supra, at p. 650.

Mr. Holmquist appeared at the board meeting held on December 6, 1971, and he was permitted to speak to the board. . . .

Even though Holmquist's statement superficially appears to be merely a 'position statement,' the court deems from the total circumstances that it constituted 'negotiating.' The court in Board of School Directors, supra, at page 653 stated:

'On the other hand, if the minority union representative is permitted to influence the decision of the school board by his argument, then he is truly "negotiating."'

In the case at bar, Holmquist in fact desired to have the fair-share proposal deleted from the agreement. . . ."

We agree with the trial court that this was in fact negotiating and one need only read the Holmquist statement to see that the "information" that was being imparted was a request that the whole fair-share issue be deferred along with a counter proposal as to how the issue should be handled for possible future consideration. It also criticized MTI'a handling of the negotiations in this respect.

The statement given by Mr. Holmquist was more than a mere statement of a position; it was an argument for it. Furthermore, though Mr. Holmquist was not speaking for a minority union, as in the case of Board of Sch. Directors of Milwaukee, it is obvious he was speaking for an ad hoc group which was opposed to including a fair-share agreement in any contract being negotiated at that time.

The board also argues that the WERC order must be invalidated because it is vague; it fails to provide adequate guidelines for compliance with its terms. The WERC order directs the board to cease and desist from permitting employees, other than the representatives of MTI, from appearing and speaking at meetings of the board on matters subject to collective bargaining. Matters subject to collective bargaining, as opposed to subjects reserved to management, are defined as "wages, hours and conditions of employment." Sec. 111.70 (1) (d), Stats. The board argues that "conditions of employment" is constitutionally vague and, thus, the order must be voided.

The board, however, has no standing to raise the question. It has conceded in its brief and at oral argument that the matter spoken of by Mr. Holmquist before the board was a subject of collective bargaining. Thus, whatever the vagaries of the WERC order as it may or may not affect others, it is both a plain fact and conceded by the board that there is no vagueness in that order as it affects the board's conduct here.

". . .even if the outermost boundaries of (the prohibition) may be imprecise, any such uncertainty has little relevance here, where appellants' conduct falls squarely within the 'hard core' of the . . . proscriptions . . . ." Broadrick v. Oklahoma (1973), 413 U.S. 601, 608, 93 Sup. Ct. 2908, 37 L. Ed. 2d 830. Accord, Paulos v. Breier (7th Cir. 1974), 507 Fed. 2d 1383, 1387, 1388; Driscoll v. Schmidt (W.D. Wis. 1973), 354 Fed. Supp. 1225, 1229.

The law is clear that "(o)ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." Parker v. Levy (1974) 417 U.S. 733, 94 Sup. Ct. 2547. 2562, 41 L. Ed. 2d 439. The board has no standing to raise the vagueness claim.

Furthermore, "wages, hours and conditions of employment" is the phrase commonly used to describe what are subjects of collective bargaining. It is used in the NLRA, 29 USC secs. 152 (9) and 159 (a). Certainly, "(w)ords inevitably contain germs of uncertainty . . .," Broadrick v. Okla., supra, at p. 608, but the test to avoid unconstitutional vagueness does not require crystal clarity:

"There might be quibbles about the meaning of (certain language); but there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." United States Civil Service Commission v. Nat'l Assoc. of Letter Carriers, - AFL-CIO (1973), 413 U.S. 548, 577-578, 579, 93 Sup. Ct. 2880, 37 L. Ed. 2d 796. See also, Weber v. State, (1973), 59 Wis. 2d 371, 382, 208 N.W. 2d 396.

We conclude the order of the Wisconsin Employment Relations Commission of September 13, 1972, is not vague.

By the Court.--Judgment affirmed.

No. 410

August Term, 1974

STATE OF WISCONSIN : IN SUPREME COURT

NOTICE
This opinion is subject to further editing and modification. The official version will appear in the bound volume of the Wisconsin Reports.

F I L E D

JUN 30 1975
Robert O. Uehling
Clerk of Supreme Court
Madison, Wisconsin

CITY OF MADISON, JT. SCHOOL DIST. NO. 8, et al.,

Appellants,

v.

WIS. EMPLOYMENT RELATIONS COMMISSION,

Respondent,

MADISON TEACHERS, INC.

Intervenor-Respondent.

ROBERT W. HANSEN, J. (dissenting). What is wrong with holding that only the spokesman for the designated bargaining agent of the teachers may speak on employment-related school matters at a public meeting of a public school board? What is wrong is that it denies the constitutional assurances as to freedom of speech and petition to individual school teachers and other teacher groups.

The First Amendment to the United States Constitution guarantees that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." 1/ The Wisconsin Constitution assures the right of every person to ". . . freely speak, write and publish his sentiments on all subjects. . ." and to ". . . petition the government or any department

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1/ Amendments to the United States Constitution, art. I, made applicable to states by the "due Process" clause of the Fourteenth Amendment. See: Joseph Burstyn, Inc. v. Wilson (1952), 343 U.S. 495, 72 Sup. Ct. 777, 96 L. Ed. 1098. See also: Lawson v. Housing Authority of Milwaukee (1955), 270 Wis. 269, 70 N.W. 2d 605, recognizing such applicability.

thereof. . . ." 2/ The United States Supreme Court has made clear that as a constitutional matter teachers may not be ". . . compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work. . . ." 3/ These constitutional guarantees protect all citizens, public school teachers included, with the nature of the teaching profession bringing ". . . the safeguards of those amendments vividly into operation." 4/

We deal here with the right of a teacher to speak at a public meeting of a school board on school matters--during the portion of such meeting set aside for appearances by the general public. 5/ During such citizens-invited-to-present-points-of-view part of the meeting, the president of the teachers' association that was the sole collective bargaining agent spoke for a fair-share proposal, 6/ and presented a petition or statement signed by between thirteen and fourteen hundred teachers urging continued negotiations and early agreement. Then an individual teacher requested permission to speak, without indicating what he intended to talk about. Given such permission, he stated that he represented ". . . an informal committee of 72 teachers in 49 schools," urged further study of the fair-share proposal and stated he would submit a petition signed by teachers who favored delay for study. The school board permitted both the association president and the committee spokesman to speak and listened to both when they spoke.

2/ Wisconsin Constitution, art. 1, sec. 3, providing: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press. . . ." And, art 1, sec.4, providing: "The right of the people peaceably to assemble, to consult for the common good, and to petition the government or any department thereof, shall never be abridged.

3/ Pickering v. Board of Education (1968), 391 U.S. 563, 568, 88 Sup. Ct. 1731, 20 L.Ed. 2d 811.

4/ See: Wieman v. Updegraff (1952), 344 U.S. 183, 73 Sup. Ct. 215, 97 L.Ed. 216, Mr. JUSTICE FRANKFURTER in concurring opinion (page 195) stating: "By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice . . . ."

5/ The meeting involved was the regular and scheduled meeting of the board of education of the city of Madison, joint school district No. 8, on the evening of December 6, 1971. A portion of each regular meeting of this board is opened and devoted to appearances by the public, permitting concerned citizens to present their points of view on school matters to the board.

6/ Sec. 111.70 (2), Stats., provides the procedure by which a union security agreement designated "fair share" may be established or terminated.

The state employment relations board found that the Madison school board, by listening to the teacher who spoke after the president of the teachers' association had concluded his remarks, had committed a "prohibited practice" in violation of sec. 111.70 (3) (1) (1) and (4), Stats. 7/ The employment relations board ordered the school board to ". . . immediately cease and desist from permitting employes, other than representatives of Madison Teachers Inc., to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining. . . ." The circuit court upheld such order, and the majority of our court affirms.

The writer sees three constitutional infirmities in the employment relations board's order, all related to the First Amendment and the corollary state constitutional guarantees as to freedom of speech and right to petition for redress of grievances.

THE RIGHT TO SPEAK. When a school board sets aside a portion of its regular meeting as a public forum where citizens generally may state their views on school matters, the invitation and the right to appear go to all citizens, teachers included. The school board is a public body. The meetings are public meetings. Its open discussion periods are just that--open to the public, teachers included. The majority opinion finds the exclusion of teachers or teacher groups, other than the one designated as collective bargaining agent, was here justified and required by the State Municipal Employment Relations Act, which provides for an exclusive bargaining representative for an appropriate bargaining unit. 8/ As to an individual's right to speak at a public hearing or a public meeting of a public body, we would see any duties or rights deriving from the Employment Relations Act as limited by rights granted by our constitutions, federal and state. If there is a crunch, it is the statute, not the constitutional right, that must yield. However, in the situation before us, the writer sees no crunch or conflict. The association or union, selected as the bargaining agent for the employees, is the sole bargaining representative of the employees in bargaining sessions between employer and such bargaining agent. These meetings are not public. What the group, selected as sole bargaining agent in the election to select such representative, won was the right to represent the employees in the bargaining unit in bargaining sessions and negotiations with the employer. What it did not win was the right to speak, during a public discussion period, at a public meeting of a public body, with all other voices of individual teachers or groups of teachers to be silenced. The school board here is not required to conduct public discussion periods at its meetings while collective bargaining is going on. It is not required, the writer thinks, to hear any discussion of stated and specified topics or issues that are involved in the

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7/ Sec. 111.70 (3) (a) (1), Stats., provides that it is a prohibited practice for a municipal employer ". . . (1) To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2)." Sub. (2) provides that it is a prohibited practice". . . (2) To initiate, create, dominate or interfere with the formation or administration of any labor or employe organization. . . ." Sub. (4) provides that it is a prohibited practice ". . . (4) To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. . . ."

8/ Subch. IV, secs. 111.70 to 111.77, Stats., the Municipal Employment Relations Act.

collective bargaining negotiations between it and the designated collective bargaining agent. But what it cannot do, much less be required to do, is to permit the representative of the employees for bargaining purposes to speak at a public meeting while a gag is placed over the mouths of all individual teachers or other teacher group representatives. This sauce of right to speak at a public meeting cannot be served to one, without being available to the others. It is true that, as to the right of a minority union to speak at a committee meeting dealing with matters involved in collective bargaining negotiations, this court did deny the right of minority unions to be heard at such meeting. 9/ However, in that case, our court held: "If this case involved solely the giving of a position statement at an ordinary meeting of a public body, we would have some difficulty in labeling the conduct 'negotiating' " 10/ In the case now before us we do have ". . . solely the giving of a position statement at an ordinary meeting of a public body." 11/ Restrictions as to length, relevancy or to "giving of a position statement" raises no constitutional questions. They are all implicit in an invitation to appear at a public discussion at a public meeting of a public board. The writer has no quarrel with the Milwaukee case, as limited. However, the writer sees the exclusivity of bargaining representation in employer-employee relations as not here reaching or including the right of the designated representative to speak at a public forum portion of a school board meeting, with all other teacher voices to be silenced. Actually, the employment relations board order does not deny the right of the individual teacher to speak. It only denies the right of the school board to listen. But the right to speak with no one to listen is hardly what the constitutional guarantees envision or protect. The writer, under these circumstances, sees the right of the teacher to speak and the school board to listen as alike constitutionally protected.

CENSORSHIP OF CONTENT. As to the brief presentation here made by the individual teacher and spokesman for the informal teachers' committee, the majority finds it to have been ". . . more than a mere statement of a position; it was an argument for it." Unless a speaker takes a firm stand on both sides of the fence, it is difficult to see where a statement of position would not be for or against a proposal or proposition. Here the teacher who spoke identified himself and then read the text of the petition being circulated which he stated would be filed with the board. The petition asked study by an impartial committee. If this was argumentative, it was only mildly so. But the issue as to content of what was or might be said goes deeper. The majority defends the employment relations board against the charge of vagueness. It finds no vagueness in the board order as it affects ". . . the board's conduct here." That is certainly true, but, in the First Amendment context, the question of scope or uncertainly as to future application goes to the chilling effect of the order upon the right of free speech. The employment relations board concluded that, when a teacher asks to speak to the board during a public discussion period at a regular board

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9/ Board of School Directors of Milwaukee v. WERC (1969), 42 Wis. 2d 637, 168 N.W. 2d 92. See Also: Board of Education v. WERC (1971) 52 Wis. 2d 625, 191 N.W. 2d 242.

10/ Id. at page 652.

11/ The teacher whose right to speak is here challenged also stated that he intended to present a petition signed by teachers in the school system. However, the order of the employment relations board holds only that permitting the teacher to speak exceeded the bounds of permissible conduct, apparently conceding that sec. 111.70 (2), Stats., authorizes and requires a municipal employer to receive a petition of employees as to a fair-share agreement.

meeting, the board must inquire as to the nature of the speech. Then, if the topic is a matter subject to collective bargaining, the board must refuse to allow the teacher to speak. What matters are subject to collective bargaining? The statute provides that a municipal employer must bargain in good faith on matters of wages, hours and working conditions. 12/ As appellant suggests, certain questions arise. Suppose the teacher wishes to speak on class size or teachers' aides, the establishment of summer programs, school reading projects, in-service training, or the special treatment and handling or problem students. Are these matters subject to collective bargaining on which the board is restricted from receiving information from teachers other than the majority representative of its employees? Nothing in the Municipal Employment Relations Act suggests that a teacher does not have a right to speak at a public meeting on these matters, yet all could be covered or affected by a collective bargaining agreement. It is in this sense that the department order is vague, not meaning that it cannot be understood and applied by this school board to the facts here, but because the difficulty of locating its outer limits will have a chilling effect both on the right of teachers to speak and school boards to listen on topics, arguably relatable to bargaining, but directly concerned with the well-being of school children and the community. The prudent school board would resolve doubts against the right of an individual teacher to speak on marginal or in-doubt topics, and that is what is meant by having a chilling effect. The writer would hold the order, in its scope and breadth, to have a constitutionally impermissible temperature-lowering effect on the exercise of First Amendment rights.

JUSTIFICATION FOR INFRINGEMENT. The majority opinion sets forth the federal and state constitutional guarantees of the rights of individuals to speak and to petition government for redress of grievances. It then concedes: "There can be no doubt that the WERC and circuit court decisions in this case infringe upon those protected freedoms." Such infringement of a constitutional right, the majority writes and the writer agrees, may be permitted where there is a ". . . grave and immediate danger to interests which the State may lawfully protect." 13/ The question is whether the gravity of the dangers justifies the admitted infringement. 14/ In the case before us, the majority holds, the gravity of infringing upon two rights, assured by federal and state constitutions, is ". . . considered outweighed by the necessity to avoid the dangers attendant upon relative chaos in labor-management relations." The employment relations board was more restrained, seeing two "salutary purposes" served by its order--i.e., it "stabilizes the bargaining relations" and it serves the "unity of collective clout" which "advances the welfare of public employes." How can either statement of the public purpose served withstand the obvious fact that the danger alluded to could be entirely avoided by permitting no discussion at a public appearance portion of a regular school board meeting--by anybody--of specified topics and areas of discussion, announced and stated in advance of the public meeting. That would avoid treating a public meeting of a public body both as a collective bargaining session and as an opportunity for presentation of points of view by members of the public with only individual teachers silenced and not permitted to speak. Even if this individual teacher, speaking for himself or for his informal committee, were permitted to state his or their position during a public duscussion period at a regular school board meeting, could grave danger, much less "chaos," be a likely or reasonably preductable result? This is no "shouting Fire in a

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12/ Sec. 111.70 (1) (d), Stats., provides: "'Collective bargaining' means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith, with respect to wages, hours, and conditions of employment. . . ." (Emphasis supplied.)

13/ West Virginia State Board of Education v. Barnette (1943), 319 U.S. 624, 639, 63 Sup. Ct. 1178, 87 L. Ed. 1628. (Quoted in majority opinion.)

14/ Dennis v. United States (1951), 341 U.S. 494, 510, 71 Sup. Ct. 857, 95 L.Ed. 1137. (Quoted in majority opinion.)

in a crowded theater" situation. Any conflict between exclusivity in bargaining and the teachers' rights of free speech can be here entirely avoided by advance listing of topics that no one may discuss during the public-invited period of the school board meeting. The writer sees no reason here for holding that anyone except an individual school teacher or minority teacher group may speak freely on school affairs at a school board meeting. Town meeting type discussions at school board meetings are in the American tradition, but town meetings were open to everyone, not everyone except school teachers. Freedom of speech ". . . lies at the foundation of a free society," 15/ and ". . . speech concerning public affairs is more than self-expression; it is the essence of self-government." 16/ The writer would reverse. As to teacher participation in a public discussion at a public meeting of a public body, the writer finds here no showing of acts present or danger threatened that either requires or warrants denying this teacher and any other teacher so situated, ". . . the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work. . . ." 17/

I am authorized to state that Mr. Justice Bruce F. Beilfuss and Mr. Justice Connor T. Hansen join in this dissent.

15/ Shelton v. Tucker (1960), 364 U.S. 479, 486, 81 Sup. Ct. 247, 5 L.Ed. 2d 231.

16/ Garrison v. Louisiana (1964), 379 U.S. 64, 74, 75, 85 Sup. Ct. 209, 13 L.Ed. 2d 125.

17/ Pickering v. Board of Education, supra, footnote 3, at page 568.