STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

HOSPITAL AND SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 150, AFL-CIO, Petitioner, vs. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, Respondent.	Case No. 410-309
HEARTHSIDE NURSING HOME & REHABILITATION CENTER, SURFSIDE MANOR and MADISON CONVALESCENT CENTER, Petitioners, vs. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, Respondent.	Case No. 410-661 Decision Nos. 11809-A and 11810-A 11822-A and 11823-A 11825-A and 11826-A

MEMORANDUM DECISION

Petitioners seek review, pursuant to Sec. 111.07 (8), Stats., of an order of the Wisconsin Employment Relations Commission, hereinafter WERC, dated May 8, 1973, and amended orders dated May 11, 1973. The WERC seeks enforcement of said orders, pursuant to Sec. 111.07 (7), Stats., which directs the petitioners, inter-alia, to reimburse employees for Union dues exacted unlawfully. An order consolidating the above cases for the purpose of this review was entered pursuant to a stipulation of the parties.

STATEMENT OF FACTS

On January 20, 1972, ten complaints were filed with the WERC by United Nursing Home and Hospital Employees Federation Local 222, hereinafter Local 222. Separate complaints were filed against Hospital and Service Employees International Union, Local 150 AFL-CIO, hereinafter Local 150, petitioner herein in Case No. 410-309, and also against five nursing home facilities which were owned or operated by Unicare Health Service, Inc., three of which are petitioners in Case No. 410-661.

In the allegations made against Local 150, the complaints averred:

> "...that since on or about December 2, 1971 and continuing to date [Local 150] has, in violation of Chapter 111.06 (2)(a)(b) of the Wisconsin Statutes, interferred with, coerced and intimidated employees...in the exercise of their right to be represented by a labor organization of their choice or to refrain from such activity. This, by signing a contract without the employees' knowledge or consent, further that prior to signing of said contract no employees had authorized said Union to represent them. That the above named Union has enforced an all-union agreement without a referendum as called for by chapter 111.06 (1)(c) of the Wisconsin Statutes."

Similarly, averring against the employing facilities, the complaints charged:

> "...that since on or about December 2, 1971, and continuing to date the above named employer has in violation of Chapter 111.06 (1)(a)(b)(c)(e) of the Wisconsin Statutes, interferred with, coerced, and intimidated employees in the exercise of their right to be represented by a labor organization, or further their right to refrain from such activity. This, by enforcing an all-union agreement without a referendum as called for by Chapter 111.06 (1)(c) of the Wisconsin Statutes; that the contract was negotiated and signed without the knowledge or consent of the employees, and further that no employees at any time authorized any union to represent them."

The labor agreements ran from January 1, 1971, to January 1, 1974. It provided that all employees must be members of Local 150, and that the employers should deduct dues for Local 150 from the employees' wages.

Local 222 was an organization with self-appointed officers. It had no members because it had not negotiated a complete labor agreement. It had accepted contributions and paid bills in the name of Local 222. Although it had not demanded recognition, and had not engaged in picketing, it had done handbilling and had filed election petitions with the NLRB.

Local 150 answered each of the complaints denying that it had engaged in any unfair labor practices, and further alleging, as an affirmative defense, that the complainant was not a party within the meaning of Sec. 111.07 (2)(a), Wis. Stats., or ERB 2.01. The nursing homes filed motions to dismiss on the ground that Local 222 was not a "party in interest" as required by Sec. 111.07 (2)(a).

After hearings were held on all the complaints on March 2, 8, and 23, 1972, the WERC caused to be issued its Findings of Fact, Conclusions of Law, and Order and Accompanying Memorandum on May 8, 1973. It further caused Amended Orders to be issued on May 11, 1973.

The WERC concluded that in respect to three of the cases involving employees at the Hearthside, Surfside, and Madison Convalescent facilities that Local 150 had engaged in conduct violating Sec. 111.06 (2)(a), Wis. Stats., and that the employer had in each of these three cases engaged in conduct violating Sec. 111.06 (1)(a), and (c), Wis. Stats. The allegation that Local 150 had violated Sec. 111.06 (2)(b), Wis. Stats., was not sustained by the WERC. Also, the WERC found Local 222 not to be a "party in interest" with respect to two of the nursing homes involved and dismissed the complaints as to them. However, the WERC concluded that as to Hearthside, Surfside, and Madison Convalescent, Local 222 was a "party in interest."

In those cases wherein the WERC had found that Local 150 had engaged in conduct violating Sec. 111.06 (2)(a), Wis. Stats., and that the employer had engaged in conduct violating Sec. 111.06 (1)(a), and (c), Wis. Stats., its order provided that Local 150 "be primarily responsible" for the reimbursement of all dues that had been received by Local 150 from the former and present employees involved at the three facilities from January 21, 1971, until May 8, 1973. The order further provided that the employing facilities, because of their participation in the all-union agreements, should be secondarily liable for the reimbursement of such dues.

ISSUES TO BE DETERMINED

1. Does Local 222 have a right to file a complaint as a "party in interest" within Sec. 111.07 (2)(a), Wis. Stats.?

2. Is the order of the WERC, requiring Local 150 primarily and the several employers secondarily to reimburse dues to past and present employees, in excess of the WERC's statutory authority under Sec. 111.07 (4), Wis. Stats; and is said order arbitrary and capricious and punitive in nature rather than remedial?

DETERMINATION OF ISSUES

LOCAL 222 AS A PROPER PARTY

In its decision the WERC concluded that Local 222 was a "party in interest" for purposes of filing a complaint against Madison Convalescent Center, since certain employees of that Petitioner (here) had authorized Local 222 to represent them for the purposes of collective bargaining in seeking a petition before the NLRB.

In regard to Hearthside and Surfside, the WERC also concluded that Local 222 was a proper party complainant because certain employees, during meetings conducted by Local 222, authorized it to seek legal redress against the all-union agreements between the employers and Local 150. The WERC's rationale was stated as follows in its memorandum, at p. 11:

> "In considering our previous decisions, related above, and the definitions contained in Section 111.02 (1) and (4) and the language contained in Section 111.05 (1), WEPA, the Commission determines that in order to be a proper party in interest in a complaint proceeding a labor organization or 'person' must either (1) be authorized by the employes involved to represent them for the purposes of collective bargaining, or (2) said organization or 'person' claims to represent those employes for the purposes of collective bargaining, and (3) or said labor organization or 'person' may be the 'representative' authorized by an employe or employes to seek legal redress with respect to alleged unfair labor practices affecting such employe or employes. Section 111.05 (1) contemplates the latter conclusion, in that the section cited permits an individual employe, or any minority group of employes in any collective bargaining unit, to present grievances to their employer 'in person or through representatives of their own choosing' . . ."

It is our conclusion that the interpretation given "party in interest" by the WERC should stand. We base this decision on the recent case of Chauffeurs, Teamsters & Helpers v. WERC, 51 Wis. 2d 391, 187 N. W. 2d 364, hereinafter Gerovac, which directs that the WERC's interpretation of the statute [111.07 (2)(a) in that case] should be accorded considerable weight.

> "First, considerable weight should be accorded the WERC's interpretation of this statute. The legislature entrusted the interpretation and enforcement of the Peace Act in the first instance to the WERC. It has considerable expertise in the field, with the perspective that comes from continued dealing with labor controversies of all kinds." p. 404. [See also State v. Chippewa Cable Co. (1970) 48 Wis. 2d 341, 180 N. W. 2d 714]

To differentiate the present situation from that in Gerovac it is only necessary to point out that the Supreme Court's interpretation of "party in interest," as used by the WERC, stated:

> ". . . a party in interest is one who is a party to a 'controversy as to employment relations,' and such a controversy requires 'the normal concomitants of disputes between labor organizations and managements, i.e., representative status or a claim thereof . . . .' The WERC has not gone so far as to require the existence of a 'labor dispute' which in turn requires majority status of the union. A 'claim of representation' is enough." p. 402. [Emphasis supplied.]

The court there concluded that the Union neither represented nor purported to represent Gerovac's employees. Here, however, Local 222 was a representative of employees by bringing the complaint on their behalf, and had, at least in our view, a "claim of representation." We thus concur with the WERC that grievances were brought through representatives of employees' choosing.

The employers' contention that the WERC had deviated from the Gerovac standard, which required that a labor organization in order to be a party in interest must at least have a minimal claim of representation, is groundless. The Supreme Court cited with approval Milwaukee Cheese Co. (5792) August, 1961, in which decision the WERC found that a Union which claimed to represent employes was a proper party complainant. In the instant cases we have more than a mere claim of representation. As respects Madison Convalescent Center, Local 222 brought a petition on behalf of certain employees before the NLRB. There was in fact representation as evidenced by the obtaining by a certain employee of a showing of interest among employees. As far as Hearthside and Surfside are concerned, it was the testimony of employee witnesses that Local 222 was authorized to seek legal redress. There seems to be further inuendo that the Gerovac standard was ignored because now only if one employee authorized the Union to represent him, it is a proper party in interest. Both Snap-On Tools Corp. (5762) May, 1961, and Sec. 111.05 (1), Wis. Stats., are the predecessors of this conclusion. In Snap-On Tools Corp. the WERC held that an individual employee who filed a complaint with the WERC was a proper party in interest. Further, Sec. 111.05 (1), Wis. Stats., provides that:

> ". . . any individual employe or any minority group of employes in any collective bargaining unit shall have the right at any time to present grievances to their employer in person or through representatives of their own choosing . . ." [Emphasis supplied.]

We thus conclude that upon the foregoing reasons and upon the weight accorded the WERC's interpretation of the statutes, that the new standard set forth by the WERC is not erroneous.

LEGAL CAPACITY OF LOCAL 222

Local 150 contends that Local 222 lacked legal capacity to bring this action by alleging that Local 222 is simply a name and not a legal entity. The fact that Local 222 is not a legal entity, but rather a voluntary association [made up of three people with outside support] does not prevent it from bringing this suit. There are a number of situations in which a Union is treated as a separate entity. Fray v. Amalgamated, etc., Local Union No. 248, 9 Wis. 2d 631. Similarly, Teubert v. Wisconsin Interscholastic Athletic Asso. (1959), 8 Wis. (2d) 373, 99 N. W. (2d) 100, held that a voluntary association has the attributes of a legal entity, apart from its members.

The Fray case makes it clear in our opinion that a labor association can be bifurcated from its members in certain situations and thus sue and be sued as a separate entity.

> "In such cases [discussing Hromek] the court should regard a union in legal contemplation as separate from its members, which in fact it is, and not apply a legal fiction which leads to an absurd result." Fray p. 637.

In applying this reasoning to the present situation, Local 222, albeit without members because it has not as yet negotiated a labor agreement, has the separate right to bring an action as a representative of certain employees, and conversly to be sued for wrongs committed on its own part. Because Section 111.02 (1), Wis. Stats., regards an "association" or "representative" as a "person," it gives legal existence to any "representative" or "association" for purposes of labor law. As set forth above, Local 222 is a "representative" of the employees making it a party in interest within Section 111.07 (2)(a) of the WEPA, and it further is a legal entity for the purposes of bringing this suit.

ORDER OF WERC TO LOCAL 150 AND EMPLOYERS TO REIMBURSE DUES

Petitioners allege that the WERC's order is without precedent, in excess of the WERC's power.

Sec. 111.07 (4), Wis. Stats., sets forth the WERC's authority to issue orders, and states in part:

> "... Final orders may dismiss the charges or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspended his rights, immunities, privileges or remedies granted or afforded by this subchapter ... and require him to take such affirmative action, ... as the commission deems proper. ..."

In delineating its reasoning for requiring the repayment of dues to employees, the WERC, in its memorandum, stated:

> "The application of the unlawful union security agreements involved herein was not consummated by the discharge or lay off of any employes, but rather constituted coercion of employes to pay dues to the Respondent Local 150, as a condition of employment.
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> ...
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> "We have concluded that, in order to remedy the unfair labor practices found to have been committed, present and former employes should be made whole in sums equal to the amount of dues which they were unlawfully required to pay ultimately to Respondent Local 150. ..." [Memorandum pp. 14-15.]

It is imperative to note that the Supreme Court has adhered to the WERC's conclusions where the WEPA is effectuated. The cases are replete with inferences and conclusions limiting the court's power to overrule the WERC to situations where the WEPA's purposes are not reflected in the WERC's decision. Thus in Folding Furniture Works v. Wisconsin L. R. Board (1939), 232 Wis. 170, 180, the court delineated the Board's procedure in rendering a decision:

> "No particular form of findings is required, but the finding should state the board's conclusion of ultimate fact respecting the acts of the defendant charged in the complaint, as distinguished from a statement of the evidence itself, or particular items of it, state the 'unfair labor practices' under the Labor Relations Act the board considers these acts violated, if any, and order to be done what, if anything, the board considers should be done by the defendant because of the violations found, limiting 'affirmative action' to what is considered by the board reasonably necessary to 'effectuate the policies' of the act." [Emphasis supplied.]

In reemphasizing the WERC's discretion under Sec. 111.07 (4), Wis. Stats., the court held in Appleton Chair Corp. v. United Brotherhood (1941), 239 Wis. 337,343:

> "Sec. 111.07 (4), Stats., says that 'final orders may' do the things stated. It does not say the board shall do them. It clearly vests in the board a power which it may exercise according to its discretion." [Emphasis supplied.]

The most recent statement on the court's part in dealing with orders of the WERC is stated in Libby, McNeill & Libby v. Wisconsin E. R. Comm. (1970), 48 Wis. 2d 272, 286:

> "The order of the WERC should be affirmed unless the respondent can show that the order has no tendency to effectuate the purposes of the Employment Peace Act."

It is our conclusion that the purposes and policies of the WEPA, as set forth in Sec. 111.01, Wis. Stats., are effectuated by the orders issued by the WERC in this case, subject to the following modification:

Pursuant to the Supreme Court's decision in Folding Furniture Works v. Wisconsin L. R. Board, supra, which stated:

"Thus the $100 a day was running, approximately fifty work days according to the board's order before the company had any opportunity to comply with the order and thus stop its running. The amount of back pay ordered should not depend on the time the board took to decide the case. That time has no relation to the amount necessary to effectuate the purposes of the act." p. 184.

we deem the WERC should modify its order so that the termination date of payment is March 23, 1972, the last day of the WERC's hearings.

The WERC shall also issue subsequent orders delineating its ways to effectuate the payments of back dues, and also explaining under what circumstances the employer nursing homes will be held secondarily liable for payment.

We do not feel that Sec. 111.07 (4), Wis. Stats., applies to this situation, since we feel each dues deduction was a specific act under the meaning of Sec. 111.07 (4), Wis. Stats.

Dated, at Milwaukee, Wisconsin, this 4th day of April, 1974.

BY THE COURT

Robert M. Curley /s/

Circuit Judge