

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Respondent.

MEMORANDUM ACCOMPANYING
ORDER DENYING MOTION TO DISMISS

In its complaint the Complainant alleges that the Respondent through its representatives engaged in a course of conduct and certain specific acts during the negotiations leading up to the current collective bargaining agreement between it and the Complainant, which course of conduct and acts constituted bad faith bargaining in violation of Section 111.70(3)(b)3 of the Municipal Employment Relations Act. In addition, the Complainant alleges that by conducting a strike authorization vote the Respondent coerced and intimidated municipal employees in violation of Section 111.70(3)(b)1 of that Act. The Respondent contends that the question of whether the Respondent engaged in good faith bargaining during the period in question was raised and decided adverse to the Complainant's contentions in a proceeding in Circuit Court and that therefore, the Complainant ought to be collaterally estopped from raising that same question in this proceeding before the Wisconsin Employment Relations Commission. In addition, the Respondent contends that since the parties subsequently entered into a collective bargaining agreement the question of the good faith of the Respondent during the negotiations leading up to that agreement is moot.

The Complainant brought an action in the civil division of the Circuit Court of Kenosha County on or about September 11, 1973 for the purpose of seeking an injunction enjoining the Respondent and certain of its officers and agents from engaging in a strike which commenced on or about September 5, 1973. The defendants in that action filed an affidavit signed by Roger Stasik, one of the defendants in that proceeding and an officer and agent of the Respondent, wherein he alleged that the Complainant had violated its duty to bargain in good faith as required by Section 111.70(3)(a)4 which allegation was made in support of the Respondent's contention in that proceeding that an injunction ought not be issued because the Complainant did not come before the Court with "clean hands". A hearing on the matter was held before the Honorable Gordon Myse at which the defendants in that proceeding, including the Respondent, were allowed to present evidence in support of their contention that the Complainant had not bargained in good faith prior to the occurrence of the strike which the Complainant sought to enjoin. The Complainant, as plaintiff in that proceeding, submitted evidence and arguments with regard to its contention that it had in fact bargained in good faith and therefore had "clean hands". It is uncontested herein that much of the documentary evidence and testimony that was considered by the Court in that proceeding would be the same as the evidence that would be presented by the Complainant in this proceeding.

Preliminary to issuing a temporary injunction on September 16, 1973 the Court made the following "finding of fact" which is relevant herein:

"This Court makes a finding of fact that there is no evidence that the Board has failed to bargain in good faith to the date of this hearing. Indeed, the evidence discloses that earnest and sincere efforts at reaching an agreement were engaged in by the Board on a series of occasions.

This Court therefore feels that it is not only proper but necessary to issue an injunction against that strike to be effective as of the beginning of school on Monday.

This Court also feels that the Petitioner must remain in good faith or jeopardize such injunction and therefore orders that the injunction will be temporary in nature and will expire at the conclusion of school on Friday of this week coming."

That on September 18, 1973, the Honorable Gordon Myse signed a temporary injunction which recited, inter alia, the finding of the Court, "that there is no evidence that the plaintiff has failed to bargain in good faith to the date of said hearing and that it is therefore necessary to issue a temporary injunction as of Monday, September 17, 1973."

The transcript of further proceedings before the Court which took place on the afternoon of September 18, 1973 discloses that the Honorable Gordon Myse made the following comments on the record which are relevant herein:

"I have previously found that the Board of Education has negotiated in good faith. The Court sees no reason that the Board will not continue its past practice of bargaining in good faith.

In reviewing the record, this Court is satisfied that at least until the date of the entry of the Order the Association had been bargaining in good faith. It is directed that the bargaining sessions that take place under this stipulation be conducted in good faith by all parties, and a failure to exercise such good faith will be considered by the Court in the hearing to be continued or at the time the injunction is requested to be extended."

RES ADJUDICATA OR COLLATERAL ESTOPPEL

At the hearing the Respondent contended that the question of its alleged violation of the duty to bargain in good faith prior to September 16, 1973 was "res adjudicata" because of the findings entered by the Court in the proceedings for an injunction. In its brief the Respondent contends, correctly in the Examiner's opinion, that the doctrine of res adjudicata is inapplicable and that if the Complainant is barred by a prior determination it is on the basis of the doctrine of collateral estoppel. The Complainant did not allege in its proceeding for an injunction that the Respondent had engaged in bad faith bargaining in violation of Section 111.70(3)(b)3. Instead the Complainant sought relief based on its claim that the Respondent was engaged in an illegal strike. If the question of the good faith bargaining of the Complainant or Respondent was properly raised and decided in the proceeding before the Circuit Court it can be argued that the Complainant or Respondent ought to be estopped from asserting a different conclusion in a proceeding between the same parties on another but related cause of action in a different forum. 1/

1/ The Examiner is unaware of any case where the Commission has applied the doctrine of collateral estoppel.

The right to file a complaint with the Wisconsin Employment Relations Commission alleging a violation of the duty to bargain in good faith is a statutory right that did not exist at common law. That is, there was no such thing as a "cause of action" for a violation of the duty to bargain in good faith since there was no duty to bargain in good faith at common law. Section 111.07, which governs the proceedings in prohibited practice cases, provides in subparagraph (1) that ". . . nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction." That provision recognizes that a party to a labor dispute may have a cause of action at common law or in equity or by virtue of other statutory provisions which remains unimpaired by the creation of the provisions of Section 111.70 providing for certain prohibited practices in labor disputes. In other words, the right of one party to sue another and seek legal or equitable relief for liable, assault, trespass, etc. is not diminished by the statutory provisions outlining certain unfair labor practices or prohibited practices which may result from the same conduct.

The Examiner is satisfied that if an issue of fact is properly raised and decided in the Courts in a civil proceeding and is not appealed or is upheld on appeal the parties probably ought not be allowed to argue that the Commission should make a contrary finding on the same issue if it is raised in an unfair labor practice or prohibited practice proceeding involving the same parties. Although the Commission enjoys primary jurisdiction for the purpose of interpreting and applying the provisions of the Municipal Employment Relations Act, the Courts can and do make determinations involving the application of the provision of that Act when necessary to the determination of a case properly brought before the Courts. 2/

It is unnecessary to decide whether the question of the Complainant's compliance with its duty to bargain in good faith was properly before the Court in the injunction proceeding since the Respondent has not seen fit to file a complaint against the Complainant alleging that the Complainant has violated its duty to bargain in good faith. However, because the Court did find that the Respondent, acting through its agents, did not violate its duty to bargain in good faith it is necessary to consider whether that finding was necessary for a determination of the case pending before the Court at that time.

The Examiner is satisfied that the Court's finding that the Respondent did not violate its duty to bargain in good faith was not a finding necessary to the determination of any issue properly before the Court and therefore ought not constitute a bar to a determination of that issue in this proceeding. It is inappropriate to apply the doctrine of collateral estoppel under the circumstances present in this case. The Complainant should not be bound by a finding of the Court which was not necessary to the determination of the issues properly before the Court especially since all the issues that were in contention were resolved in favor of the Complainant thereby precluding any appeal of said determination.

MOOTNESS

It is undisputed that the parties reached agreement on the terms and provisions of a new two-year collective bargaining agreement

2/ Firefighters Local #311 v. Madison, 48 Wis. 2d 262 (1970).

subsequent to the filing of the complaint in this case. The settlement agreement reached did not require the Complainant to withdraw its complaint in this matter. Even so the Respondent argues that, in view of the fact that the parties have reached agreement on the provisions of a new collective bargaining agreement, the complaint should be dismissed because the matters complained of are now moot. The Complainant argues that this case has not been rendered moot and cites a number of federal cases in support of its argument. 3/

Although the Commission has not had occasion to determine whether a complaint ought to be dismissed as moot where the complaint alleges a refusal to bargain under Section 111.70(3) and, subsequent to the filing of the complaint, the parties reach agreement on the terms of a collective bargaining agreement, it has in other cases determined that a complaint will not be dismissed as moot merely because the conduct complained of has ceased. 4/ The test for mootness of an unfair labor practice charge was discussed in considerable detail by the Wisconsin Supreme Court in the Allis Chalmers case. 5/ In that case the Court defined a moot case as

" . . . one which seeks to determine an abstract question which does not rest upon existing facts or rights or which seeks a judgment in a pretended controversy when in reality there is none or one which seeks a decision in advance about a right before it has actually been asserted or contested or a judgment upon some matter which when rendered for any cause cannot have any practical legal effect upon the existing controversy." 6/

It would appear that, if the complained of conduct actually occurred and amounted to a violation of a duty to bargain in good faith, the complaint ought not be dismissed as moot merely because the parties have subsequently entered into a collective bargaining agreement unless it can be said that a determination of the question could not have any "practical legal effect". Whether a determination of such a question will have any "practical legal effect" will often depend upon the likelihood of recurrence of the complained of conduct.

It is not unrealistic to assume that this proceeding may take several months for determination particularly if it is appealed by one party or the other. Because collective bargaining is a continuing relationship it is possible that the conduct complained of may recur when the parties attempt to bargain on the terms of a collective bargaining agreement to succeed the current one. It was this possibility of recurrence which persuaded the Wisconsin Supreme

3/ Southern Tours, Inc., 167 NLRB No. 42 (1967); U.S. Gypsum Co. 143 NLRB 1122 (1963) and NLRB v. American National Insurance Co., 343 U.S. 395 (1952).

4/ Kearney & Trecker (11083-B) 2/73, Aff. (11083-C) 4/73 (Aff. Milw. Co. Cir. Ct. No. 410-071 8/73).

5/ WERB v. Allis Chalmers Workers Union Local 248, UAWA-CIO, 252 Wis. 436, 21 LRRM 2699 (1948)

6/ Ibid. at p. 2701. See also Madison School Board v. WERB 37 Wis. 2d 483 (1967).

Court in the Allis Chalmers case that the conduct complained of therein was not moot.

For the above and foregoing reasons the Examiner concludes that the Complainant ought not be collaterally estopped from asserting its claim that the Respondent has violated its duty to bargain in good faith and that the matter in controversy is not moot and therefore has denied the motion to dismiss.

Dated at Madison, Wisconsin, this 14th day of December, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
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