

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE COUNTY HIGHWAY DEPARTMENT,

Complainant,

vs.

HIGHWAY AND PARKS EMPLOYEES,
TEAMSTERS, CHAUFFEURS, AND
HELPERS UNION, LOCAL NO. 43,

Respondent.

Case XXV

No. 17605 MP-325

Decision No. 12450-A

Appearances:

Mr. Dennis J. Flynn, Corporation Counsel, appearing on behalf
of the Complainant.

Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Walter F.
Kelly, appearing on behalf of the Respondent.

ORDER GRANTING MOTION TO HOLD PROCEEDING IN ABEYANCE

The above-named Complainant having filed a Complaint of prohibited practices with the Wisconsin Employment Relations Commission on January 28, 1974; and the Commission having appointed Marshall L. Gratz as Examiner to make and issue findings of fact, conclusions of law and orders in the matter; and the Examiner, on February 5, 1974, having served the parties with a Notice of Hearing providing for an answer date of February 18, 1974 and a hearing date of March 5, 1974; and Respondent having filed with the Examiner an Answer on February 19, 1974; and, on March 4, 1974, Respondent having filed a Motion requesting that the Examiner enter an Order ". . . defer[ing] a hearing on the Complaint until such time as the Honorable Circuit Court for Racine County shall determine whether it will exercise its jurisdiction over the identical factual and legal matters, presently pending before it, which are also before the Commission in this matter"; and the matter having come on for hearing on March 5, 1974 at the Racine County Courthouse, Racine, Wisconsin; and at the outset of said hearing, the Complainant having argued, orally and in writing, in opposition to said Motion, and Respondent having presented oral arguments in support of its Motion and Respondent having requested that, in the alternative,

the Examiner treat said Motion as a motion to amend answer so as to include the contents of the Motion to Defer in Respondent's Answer; and ^{the} Examiner having deferred ruling on Respondent's Motion and having adjourned the hearing in order to rule on said Motion; and the parties having submitted briefs in support of and in opposition to the Motion; and the Examiner having considered the Complaint, the Answer, Respondent's Motion and supporting documents submitted therewith, and the arguments and briefs of Counsel, and being fully advised in the premises and being satisfied that the instant petition should be held in abeyance until the Honorable Circuit Court for Racine County determines whether it will exercise primary jurisdiction over those factual and legal matters which are the same as those alleged in the Complaint; and being further satisfied that the Respondent's Motion should be granted;

NOW, THEREFORE, it is

ORDERED

That the instant proceeding be, and the same hereby is, held in abeyance either until (1) the Honorable Circuit Court for Racine County has determined whether it will exercise primary jurisdiction over those factual and legal matters pending before it which are the same as those raised by the instant Complaint or (2) the Examiner is shown that there is no longer pending before said Honorable Court factual and legal matters which are the same as those set forth in the instant Complaint.

Dated at Milwaukee, Wisconsin, this 18th day of March, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner

MEMORANDUM ACCOMPANYING
ORDER GRANTING MOTION TO HOLD PROCEEDING IN ABEYANCE

BACKGROUND

The Complaint, filed on January 28, 1974, alleges that Respondent committed prohibited practices

" . . . in that it has, through the concerted actions of its members on repeated occasions refused to allow its members to work necessary overtime for the purpose of clearing ice from those highways under the jurisdiction of the Complainant, . . . [which refusal] . . . is contrary to the terms and conditions of the existing 1973 Labor Agreement between Racine County and Respondent, and further constitutes a refusal to bargain collectively and in good faith with Racine County concerning a new 1974 Labor Agreement . . . [and which refusal] . . . constitutes a prima facie case of improperly attempting to influence the outcome of negotiations for the 1974 Labor Agreement."

By way of remedy, Complainant requests that the Commission " . . . take immediate action to determine and abate the prohibited practices of Respondent and its members so as to cause, at all times, the opening of highways in Racine County under the jurisdiction of Complainant. . . ."

In its Answer, filed on February 19, 1974, Respondent joined certain issues of fact and alleged three affirmative defenses, to wit: that the Complaint fails to state facts sufficient to constitute a prohibited practice; that the 1973 labor agreement between the parties does not, by its own terms, presently govern the relationship between the parties; and that the instant dispute is nonjusticiable in that there is presently no concerted refusal to work overtime authorized by Respondent or engaged in by its members.

On March 4, 1974 (one day before the scheduled date for hearing) Respondent filed a "Motion to Defer Hearing on Prohibited Practice Until Court Disposition of Question of Primary Jurisdiction" along with a letter citing authorities in support thereof and numerous documents relating to a matter involving the parties before the Racine County Circuit Court. 1/

The hearing was convened, as scheduled, on March 5, 1974. At the outset of the hearing, the Examiner heard arguments with respect to the Motion, offered Complainant an adjournment to allow Complainant additional time to prepare its response to the Motion ^{2/} and decided to defer ruling and adjourned the hearing for the purpose of consideration of the Motion and arguments and any briefs which the parties chose to file. Both parties submitted such briefs.

POSITIONS OF THE PARTIES

Respondent argues that factual and legal issues identical to those raised by the Complainant are pending in an action presently before the Racine County Circuit Court; that said Court action was pending prior to the filing of the instant Complaint; that since the Court and the Commission have concurrent jurisdiction of such matters, it is for the first-in-time forum (i.e., the Court) to determine whether it shall exercise primary jurisdiction with regard to the common matters or whether it shall defer to the Commission; and that there is a serious danger of vexatious, repetitive litigation and the possibility of conflicting findings of fact, conclusions of law, interpretations of labor statutes, and elaborations of public employment labor relations policy if the Commission were to proceed with a hearing before the Court disposes of the primary jurisdiction question.

Complainant, contrary to Respondent, asserts that Respondent's Motion should be denied for the reasons that said Motion was not timely served or filed; that the Respondent waived its right to file such Motion by failing to plead such matter in its Answer; that the Commission is not prohibited by Wisconsin Statutes and case law to proceed in the face of a pending court action with respect to the same cause; and that the Circuit Court action and the WERC proceeding are not ". . . suits for the same cause . . ." and therefore the principle of "abatement of actions commenced second-in-time but raising identical questions of law and fact" is not applicable herein.

DISCUSSION

Complainant has raised two procedural objections to Respondent's Motion. In doing so, Complainant has relied heavily upon Chapters 263 (Pleadings) and 269 (Practice Regulations) of the Wisconsin Statutes.

^{2/} Complainant's Counsel expressly chose not to avail himself of such additional preparation time offered.

Such provisions govern pleading and practice before the courts but do not govern Commission proceedings. Instead, Commission procedures are, pursuant to the authority set forth in Sec. 111.71(1) of the Wisconsin Statutes, governed by the rules of the Commission as set forth in the Wisconsin Administrative Code, specifically in ERB 12.01 et seq. and generally in ERB 1.01 et seq. and 10.01 et seq.

1. Timeliness of Service and Filing of Motion

Commission Rule ERB 10.11(1) permits motions to be filed shortly prior to and even at the hearing, and it contains no deadline for such filing or service. That general provision would appear to govern since the particular motion involved herein does not fall within any of the particular motions described in ERB 10.12 or elsewhere in the Rules. Even if the instant motion were considered to ^{be} a motion to reschedule within the purview of ERB 10.12(1), ^{3/} the Examiner would waive the two-day requirement therein in accordance with ERB 10.01 ^{4/} since any possible prejudice to Complainant due to its receipt of the Motion only one day before the hearing was obviated by the Examiner's offer of an adjournment to permit Complainant's Counsel additional preparation time.

2. Waiver of Right to Move for Deferral by Failure to Request Same in Answer

Complainant argues that the issue of whether a matter ought to be deferred must be affirmatively pleaded in Respondent's Answer and that if not so pleaded, it must be deemed to be waived. Whether or not that is the law under Sec. 263.06(3), Wisconsin Statutes and the Wisconsin case law concerning abatement for prior-action-pending, it is not required by the Wisconsin Administrative Code provisions applicable to this proceeding. Commission Rule ERB 12.03(4) mandates that certain

^{3/} ERB 10.12(1) provides in part: "Except for good cause shown any motion for rescheduling must be received at least 2 days before the date set for hearing."

^{4/} ERB 10.01 reads in part as follows: "The commission . . . may waive any requirements of these rules unless a party shows prejudice thereby."

matters be included in the answer. ^{5/} The Examiner does not consider the issue of deferral to constitute an affirmative defense within the meaning of ERB 12.03(4)(b) since the instant Motion does not challenge jurisdiction or the merits affirmatively but rather seeks only a postponement in the exercise of the Commission's power. Therefore, the Examiner does not deem Respondent to have waived its deferral position by reason of the absence of a statement thereof in Respondent's Answer.

Even if it were the case that a deferral position is required to be alleged in the answer, ERB 10.01 would permit the Examiner to waive such requirement unless such waiver worked a prejudice against Complainant, and the Examiner would so waive said requirement. For in the instant case, Complainant's Counsel appeared to have had sufficient time to prepare a thorough-going analysis of the legal issues raised by the Motion and was, in addition, offered the opportunity to remedy any possible prejudice through the taking of an adjournment.

3. The Court Action and the WERC Proceeding
Involve the Same Cause

Complainant asserts that its court action and its WERC Complaint do not involve "suits for the same cause" and that deferral ought not be granted for that reason. ^{6/} In that regard, Complainant has not taken issue with Respondent's assertion that a comparison of the pleadings before the Court and those before the Commission indicates

^{5/} ERB 12.03(4) reads as follows:

"CONTENTS: The answer shall contain the following:

(a) A specific admission, denial, or explanation of each allegation of the complaint, or if the filing party is without knowledge thereof, he shall so state to that effect, such statement operating as a denial; admissions or denials may be to all or part of an allegation but shall fairly meet the substance of the allegation.

(b) A specific detailed statement of any affirmative defense.

(c) A clean and concise statement of the facts and matters of law relied upon."

^{6/} If the two cases did not involve the same matters of fact and law, the deferral would not be appropriate. See, Monona Grove Joint School District No. 4, Dec. No. 11614-A at p. 18 (7/73).

that the Court has been presented with matters of fact and law identical to those pending before the Examiner. ^{7/} Instead, though it has filed with the Court a request for a permanent injunction as well as a request for a temporary injunction, Complainant stresses that the ". . . overriding concern of the Circuit Court is directed toward the temporary injunction which is now before the Court for dispositive action. . ." rather than toward the permanent injunction request which ". . . is only at the stage of joinder . . ." and for which trial is many weeks away. From that perspective, Complainant focuses upon asserted differences in practical approach and procedures between the Commission complaint proceeding and the temporary injunction proceeding. Respondent's arguments in this regard are not supported by any cited authority and are not adopted herein by the Examiner. Instead, the Examiner concludes that both the requests for a temporary injunction and that for a permanent injunction must be considered herein since both were--regardless of precise present status--pending before the Court at the time the instant Complaint was filed with the Commission and remain so. Comparison of the pleadings before the Court with those now before the Examiner satisfies the Examiner that the Court has been presented with, inter alia, the same issues of fact and law that are now before the Examiner herein. For deferral purposes, therefore, it may be said that the extant Court cases and the instant proceeding involve the same cause.

4. Availability of Exercise of Commission's
Concurrent Jurisdiction Simultaneous with
Judicial Exercise of Such Jurisdiction

Wisconsin law allows both the Court and the Commission cases to proceed simultaneously. The parties agree that the Commission and the courts have concurrent jurisdiction to hear complaints of prohibited

^{7/} At Complainant's request, Racine County Circuit Judge Howard J. DuRocher signed an Order to Show Cause on January 27, 1974 which is attached hereto (sans affidavit) as Appendix "A". In addition, on or about January 27, 1974, Complainant also caused to be served and filed with the Court a Summons and Complaint requesting a permanent injunction against Respondent and others. Said Complaint (sans Summons and attachments) is attached hereto as Appendix "B". Respondent's

practices specified in Sec. 111.70(3). On that basis and on the basis of Sec. 111.07(1), ^{8/} Complainant asserts that Respondent is not entitled to a deferral order as a matter of right. In that regard, the Examiner finds Complainant's arguments are well taken.

5. Propriety of Going Forward with Instant WERC Proceeding

Nevertheless, nothing in Sec. 111.07(1), construed in accordance with the express legislative policy declared in Sec. 111.70(6), ^{9/} prohibits the Commission from taking jurisdiction over a case but deferring, at its discretion, the exercise of its powers with respect thereto pending disposition of the question of primary jurisdiction by a judicial forum presented with the same case prior in time. ^{10/}

In determining whether to exercise the Commission's deferral discretion, the Examiner looks for guidance from the legislative policy

^{8/} Section 111.07(1) reads as follows:

"Any controversy concerning unfair labor practices may be submitted to the commission in the manner and with the effect provided in this subchapter, but nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction."

^{9/} Section 111.70(6) reads as follows:

"DECLARATION OF POLICY. The public policy of the state as to labor disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining. Accordingly, it is in the public interest that municipal employes so desiring be given an opportunity to bargain collectively with the municipal employer through a labor organization or other representative of the employes' own choice. If such procedures fail, the parties should have available to them a fair, speedy, effective and, above all, peaceful procedure for settlement as provided in this subchapter."

^{10/} Complainant has presented no authority to the contrary, and certain dictum in City Fire Fighters Union v. Madison, 45 Wis. 2d 262 (1970) suggests that the Wisconsin Supreme Court concurs in the view expressed in the text. In that case, the Court held that the trial court therein had the power to decide the question of primary jurisdiction in a case involving prohibited practices under Sec. 111.70(3) and in the course of its opinion, the Court noted that the municipal employer had had its "choice" of forums (between the Court and the WERC). The Court's use of the term "choice" suggests that a complainant has available either the court or the Commission as a prohibited practice forum but does not suggest and in fact is contrary to the notion that such complainant may insist upon simultaneous hearings and determinations in both such forums.

underlying the Municipal Employment Relations Act. That Act calls for both a "fair" as well as "speedy" procedure for settlement of labor disputes arising in municipal employment which disputes are not resolved voluntarily through the procedures of collective bargaining. ^{11/} The Examiner concludes that, on balance, the adverse impact upon the "fairness" of the instant proceeding that would or could well arise from nondeferral ^{12/} outweighs the fact that deferral would make the instant proceeding less "speedy".

For the foregoing reasons, the Examiner has decided to defer the instant matter as noted in the Order.

Dated at Milwaukee, Wisconsin, this 18th day of March, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner

^{11/} See note 9 above.

^{12/} As described in "Position of Respondent" noted above.

APPENDIX A

STATE OF WISCONSIN

CIRCUIT COURT

RACINE COUNTY.

RACINE COUNTY HIGHWAY DEPARTMENT,
AND RACINE COUNTY,

Plaintiff,

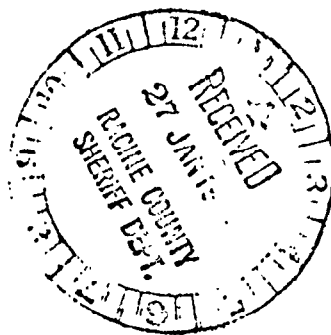
"VS"

HIGHWAY AND PARKS EMPLOYEES, LOCAL NO. 43, affiliated with Teamsters, Chauffeurs, and Helpers Union, LEO LOTHARIUS, President of Local No. 43, CHARLES SCHWANKE, Business Representative for Local No. 43, GERALD NELSON and WILLIAM REESMAN, Stewards for Highway and Parks Employees, GARY CHART and ARTHUR IVERSON, Committee-men for Highway and Parks employees, individually and as officers and representatives of said Highway and Parks employees, and ALL HIGHWAY AND PARKS EMPLOYEES as listed in Exhibit "A" attached hereto individually and as Members of said Highway and Parks Employees Local No. 43,

Defendants,

FILED NO. 2774
JAN 27 1974
Sheriff, Racine County, Wisconsin
2:28 PM

ORDER TO SHOW
CAUSE



Upon the reading and filing of the Complaint, verified upon information and belief herein, and of the Affidavit of Earl Skagen, Highway and Parks Commissioner of the said County of Racine, which indicates that the said Plaintiffswill be irreparably damaged without an adequate remedy at law if the Defendants herein are allowed to continue their refusal ^{to work overtime} and on motion of Dennis J. Flynn, Attorney for Plaintiffs,

IT IS HEREBY ORDERED THAT:

The above-named Defendants show cause before me at my Court Room in the Court House in the City of Racine, Racine County, Wisconsin, on the 27th day of January, 1974, at 7:30 o'clock in the fore noon of said day, or as soon thereafter as counsel may be heard, why a temporary injunction should not be issued to be effective until a final decision is made by the Court in this matter enjoining and restraining the Defendants and all members, officers, agents and representatives of the Local No. 43, affiliated with the Teamsters, Chauffeurs and Helpers Union and all

Highway and Parks Employees as listed on Exhibit "A" attached hereto as follows:

- (1) From refusing to work overtime in the performance of Highway Department duties necessitated by severe weather conditions and as directed by Supervisors at the Racine County Highway Department; and further from slowing down in the performance of work duties under any guise whatsoever, including any mass absenteeism from duty for sickness or other reasons or considered failure to report for duty, or from willfully absenting themselves from their positions, stopping work, or abstaining in whole or in part from the full, faithful and proper performance of their duties of employment for the purpose of inducing, influencing or coercing a change in the conditions or compensation or the rights, privileges or obligations of employment.
- (2) From encouraging, inducing or persuading other members of the bargaining unit representing Highway and Parks Employees Teamsters, Chauffeurs and Helpers Union, Local No. 43 to refuse to work under any guise whatsoever, including any mass absenteeism from duty for sickness or other reasons, or considered failure to report for duty, or willfully absenting themselves from their positions, stopping work, or abstaining in whole or in part from the full, faithful and proper performance of their duties of employment for the purpose of inducing, influencing, or coercing a change in the conditions or compensation or the rights, privileges or obligations of employment.

(3) From doing any act, or from encouraging, advising, inducing or persuading any member of said Teamsters, Chauffeurs, and Helpers Union, Local No. 43, to do any act at any time which would constitute a prohibited practice against the Plaintiffs.

~~IT IS FURTHER ORDERED, that pending further Order of the Court, the Defendants, jointly and severally be, and they hereby are temporarily enjoined and restrained from committing any of the acts stated in paragraphs (1), (2) or (3) above.~~

The pleadings and papers on file herein may be withdrawn for service upon the Defendants.

Let a copy of this Order and of the Complaint and Affidavit be served upon each of the above-named Defendants in the manner prescribed by law at least 24 hours before the time fixed for hearing thereon.

Dated at Racine, Wisconsin, this 27th day of January, 1974,
at 1:15 o'clock P.M.

BY THE ORDER OF THE COURT:

1st Howard J. DuRocher
Circuit Judge

RACINE COUNTY HIGHWAY DEPARTMENT,
AND RACINE COUNTY,

Plaintiff,

-vs-

HIGHWAY AND PARKS EMPLOYEES, LOCAL NO. 43, affiliated with Teamsters, Chauffeurs, and Helpers Union, LEO LOZHARIUS, President of Local No. 43, CHARLES SCHWANKE, Business Representative for Local No. 43, GERALD NELSON and WILLIAM REESMAN, Stewards for Highway and Parks Employees, GARY CART and ARTHUR IVYERSON, Committee men for Highway and Parks employees, Individually and as officers and representatives of said Highway and Parks employees, and ALL HIGHWAY AND PARKS EMPLOYEES as listed in Exhibit "A" attached hereto individually and as Members of said Highway and Parks Employees Local No. 43,

A F F I D A V I T

Defendants.

STATE OF WISCONSIN)
) ss.
COUNTY OF RACINE)

EARL SKAGEN, being first duly sworn on oath, deposes and says:

1. That he is the Highway Commissioner for the County of Racine and that he is the Department Head responsible for the operation of the Racine County Highway Department, Plaintiff above, and that he is personally aware of the refusal of Defendants above to work duly assigned and necessary overtime ice removal tasks.

2. That Highway and Parks Employees, Local No. 43, affiliated with Teamsters, Chauffeurs and Helpers Union is the duly recognized collective bargaining representative for the said Highway and Parks Employees who, as Racine County Municipal employees, are members thereof.

3. That the Highway and Parks Employees, Local No. 43 and its

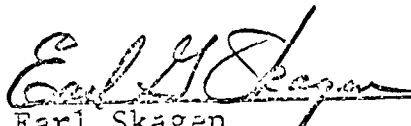
members, as set out in the Complaint herein, have caused and continue to cause great and irreparable harm and injury to Plaintiff, Racine County, and the County's citizens because their refusal to work deprives the community of the ability to travel upon public roadways. The citizens of the Racine County community are estopped from traveling on public roadways in motor vehicles because the Defendants, individually and as members of Local No. 43, refuse to operate highway ice removal equipment and as a result, after the rain on January 26, 1974 and the subsequent freeze on January 27, 1974, the Racine County Trunk Highway system was not safely usable by the motoring public due to the presence of ice on the roads. On January 27, 1974, the effective utilization of the Racine County Trunk Highway system was denied especially to ambulances, fire protection vehicles, school buses and other motor vehicles whose deployment is necessary to the general good. The effective use of State Trunk Highways and the Interstate Highway in Racine County was also diminished substantially in terms of access and availability to necessary highway travel.

4. That affiant is of the opinion that the continued refusal of Defendants to work overtime hours in the performance of necessary highway tasks, caused by winter weather conditions, will result, or has high probability of resulting, in injury to the economy, health and well-being of the citizens of Racine County.


5. That affiant makes this Affidavit in support of an Order to Show Cause why an Order should not be made and entered:

- (a) Directing the Defendants be enjoined and restrained from refusing to work overtime for the Plaintiff and from doing any act at any time which would constitute a work slowdown against the Plaintiff.

- (b) Temporarily enjoining and restraining the defendants, jointly and severally, from engaging in a work slowdown against the plaintiff.
- (c) Allowing plaintiff to withdraw the pleadings and papers on file herein for service on the defendants.
- (d) Ordering plaintiff to serve a copy of the Complaint and of the Order to Show Cause upon the defendants in the manner prescribed by law within a stated time before the Hearing is held.


Earl Skagen

Subscribed and sworn to before me
on the 27th day of January, 1974.


G. Harrison

Notary Public, Racine County, Wi.
My Commission expires 8/1/76.

STATE OF WISCONSIN

CIRCUIT COURT

RACINE COUNTY

RACINE COUNTY HIGHWAY DEPARTMENT,
AND RACINE COUNTY,

Plaintiff,

-vs-

HIGHWAY AND PARKS EMPLOYEES, LOCAL
NO. 43, affiliated with Teamsters,
Chauffeurs, and Helpers Union,
LEO LOTBARIUS, President of Local
No. 43, CHARLES SCHWANKE, Business
Representative for Local No. 43,
GERALD NELSON and WILLIAM REESMAN,
Stewards for Highway and Parks Employees,
GARY CHANT and ARTHUR IVERSON, Committee-
men for Highway and Parks employees,
individually and as officers and
representatives of said Highway and
Park employees, and ALL HIGHWAY AND
PARKS EMPLOYEES as listed in Exhibit
"A" attached hereto individually and
as Members of said Highway and Parks
Employees Local No. 43,

SUMMONS

Defendants,

THE STATE OF WISCONSIN TO SAID DEFENDANTS:

YOU ARE HEREBY summoned and required to serve upon DENNIS J.
FLYNN, Plaintiffs' attorney, whose address is Racine County Court-
house, an Answer to the Complaint which is herewith served upon
you within twenty (20) days after service of the Summons upon you,
exclusive of the day of service, and in case of your failure so to
do, judgment will be rendered against you according to the demand
of the Complaint.

DENNIS J. FLYNN
Attorney for Plaintiffs

P. O. ADDRESS:

Racine County Courthouse
Corporation Counsel
Racine, Wisconsin 53403

RACINE COUNTY HIGHWAY DEPARTMENT
and RACINE COUNTY,

Plaintiffs,

-vs-

HIGHWAY AND PARKS EMPLOYEES, LOCAL NO. 43, affiliated with Teamsters, Chauffeurs, and Helpers Union, LEO LOHARTUS, President of Local No. 43, CHARLES SCHWANTKE, Business Representative for Local No. 43, GERALD NELSON and WILLIAM REESMAN, Stewards for Highway and Parks Employees, GARY CHART and ARTHUR IVERSON, Committeemen for Highway and Parks employees, individually and as officers and representatives of said Highway and Parks employees, and ALL HIGHWAY AND PARKS EMPLOYEES as listed in Exhibit "A" attached hereto individually and as Members of said Highway and Parks Employees Local No. 43,

C O M P L A I N T

Defendants.

NOW COME the above-named plaintiffs, Racine County Highway Department and Racine County, by Dennis J. Flynn, their attorney, and for their Complaint against the above-named defendants, hereby allege and shows unto the Court as follows:

1. That the Plaintiff Racine County Highway Department, hereinafter referred to as the Highway Department, is and at all times material hereto has been, a Department of Racine County government. Racine County is a quasi-municipal corporation existing under and by virtue of the laws of the State of Wisconsin with principal offices at the Courthouse, Racine, Wisconsin. Plaintiff Department's principal administrative offices are located at P.O. Box 226A, Sturtevant, Racine County, State of Wisconsin. Plaintiff's further are municipal employers within the meaning of section 111.70 (1) (a) of the Wisconsin Statutes and that, Plaintiff Highway Department's principal duties are the maintenance, construction and servicing of Racine County's Trunk Highway system and the maintenance and servicing of those highways in Racine County that are a part of the Wisconsin State Trunk Highway System and the Interstate Highway System.

2. That Highway and Parks Employees Local No. 43, affiliated with Teamsters, Chauffeurs and Helpers Union, hereinafter referred to as Local No. 43, is and at all times material herein, has been an association of employees at the Racine County Highway Department, formed and existing to confer with, negotiate and bargain with the County of Racine or its representatives regarding wages, hours, conditions of employment and other working benefits, and is a labor organization within the meaning of section 111.70(2) of the Wisconsin Statutes. Plaintiff alleges upon information and belief that Defendant Local No. 43 has a principal place of business at 1624 Yout Street, Racine, Wisconsin, 53404.

3. That at all times material herein, Local No. 43 has been recognized by the County of Racine as the official bargaining representative for the members of the aforesaid Highway and Parks Employees for the purposes of engaging in conferences and negotiations with their municipal employer, or its representatives, on questions of wages, hours and conditions of employment pursuant to section 111.70(2) of the Wisconsin Statutes.

4. That the Highway and Parks Employees whose names and addresses appear in Exhibit "A", which is attached hereto and incorporated herein, are members of Defendant Local No. 43 and are employed by the County of Racine as members of the Highway and Parks Department, and are recognized by the County of Racine as represented by Local No. 43 as municipal employees within the meaning of section 111.70(1)(b) of the Wisconsin Statutes.

5. That the individual defendant Leo Lotharius is and at all times material has been President of Local 43 and that his business address is 1624 Yout Street, Racine, Wisconsin, 53404, and that the defendant Leo Lotharius is an adult resident of Racine County.

6. That the individual defendant Charles Schwenke is and at all times material has been Business Representative for Local No. 43,

and that his business address is 1624 Yout Street, Racine, Wisconsin, 53404.

7. That the individual Defendant Gerald Nelson is an adult and that he resides at Route 1, Box 232A, Union Grove, Racine County, Wisconsin, and that said Defendant Gerald Nelson is and at all times material has been Steward for the Highway and Parks Employees.

8. That the individual Defendant William Reesman is an adult and that he resides at Route 1, Box 781, Waterford, Racine County, Wisconsin, and that said Defendant William Reesman is and at all times material has been Steward for the Highway and Parks Employees.

9. That the individual Defendant Gary Chart is an adult and that he resides at Route 2, Box 468, Burlington, Racine County, Wisconsin. That the said Defendant Gary Chart is and at all times material has been a Committeeman for the Highway and Parks Employees.

10. That the individual Defendant Arthur Iverson is an adult and that he resides at 1604 Quincy Avenue, City of Racine, Racine County, Wisconsin. That the said Defendant Arthur Iverson is and at all times material has been a Committeeman for the Highway and Parks Employees.

11. That this action is brought against all the above-named Defendants individually in their own right and as representatives and members of Local No. 43.

12. That the members of Local No. 43 involved herein are employed by the County of Racine in accordance with the Racine County Code of Ordinances, the Rules and Regulations of the County Highway Commissioner, the Wisconsin Statutes and under the terms and provisions of a contract entered into between Highway and Parks Employees, Local 43 and Racine County on the 1st day of February, 1973, a copy of which Agreement is marked as Exhibit "B", attached hereto and made a part hereof by reference.

13. At 7 o'clock a.m. on the 27th day of January, 1974, Defendants commenced, and have since been engaged in, a refusal to work overtime for Plaintiff. On the said date and at the said time, Plaintiff

Defendant Highway and Parks Employees to work overtime for the purpose of removing ice from County Trunk Highways, State Highways and the Interstate Highway systems which were and are under the jurisdiction of the Plaintiff. The presence of said ice on the said highways of Racine County did then and there constitute a hazard to traffic.

14. That the aforsaid refusal of Defendants to work overtime for ice removal purposes as directed by Plaintiff is illegal and contrary to the provisions of Wisconsin Statutes, section 111.70 (3) (b) (3) in that it constitutes a refusal to bargain collectively in good faith. In addition, said refusal to work overtime is contrary to and in violation of the terms and conditions of the Labor Agreement (Exhibit "B"), and particularly Articles 3, 7, 8 and 11. In addition Defendants' refusal to work overtime is in violation of section 111.70 (4) (1), Wisconsin Statutes, which provides as follows:

"Nothing contained in this subchapter shall constitute a grant of the right to strike by a county or municipal employee and such strikes are hereby expressly prohibited."

15. That on the 27th day of January, 1974, each of the Defendants have refused, and do now continue to refuse, individually and in concert, to work overtime at the job of removing ice from public roadways for which each was employed by the Plaintiff, and, upon information and belief, Plaintiff is informed that Defendants all will continue to refuse to work requested overtime in the future for ice and snow removal purposes.

16. The officers of the Defendant Local No. 43, to-wit: GWARNS SCHWANKE, Business Representative; GERALD NELSON, Stewart; WILLIAM REESMAN, Stewart; GARY GIBBY, Committeeman; and ARTHUR EVERSON, Committeeman, have induced and advised the Defendants, members of said Highway and Parks Employees Local No. 43, to do and perform acts which constitute a work stoppage and a refusal to work overtime, and have themselves actively participated and encouraged refusal to work overtime and continue to do so all to the great injury of Plaintiff.

17. That the said refusal to work overtime will cause the Plaintiff, the County of Racine and the citizens of this County, to experience substantial losses in their receipt of necessary services, particularly in the areas of fire protection, police services, health protection and risk in necessary citizen travel. This loss of necessary citizen service over a period of time could result in the further actual loss of lives and property within the Racine

18. That all of the individual Defendants are residents of Racine County, Wisconsin.

19. That the aforesaid conduct of the aforesaid Defendants is contrary to state law and the labor contract in effect between Plaintiff and Defendants.

20. That the refusal of Defendants to work overtime will constitute a substantial, immediate and irreparable injury to the Plaintiffs and the County of Racine and the citizens of Racine County, and will result in substantial and irreparable injury to the health, welfare, economy, safety and life-style to the residents of the County of Racine unless said refusal to work overtime by Defendants is restrained.

21. That the County of Racine is unable to furnish adequate conditions for safe highway travel or adequate protection against possible loss of life or property in the absence of an order restraining said illegal acts of Defendants.

22. That the unlawful acts of the Defendants will be continued unless restrained.

23. That as to each item of relief requested, greater injury will be inflicted upon the Complainant by denial thereof than will be inflicted on the Defendants by the granting thereof.

24. That the County of Racine and its public officers charged with the duty to protect the lives and property of the people of the County of Racine are unable to furnish in snowy, icy winter weather

and use public travel services so long as Defendants noted acts go unpermitted.

25. That the aforesaid refusal to work overtime under the terms of the aforesaid Labor Agreement (Exhibit "B") is contrary to the rights of the people of the County of Racine.

26. That the Defendants, and each of them by their concerted action in violating the terms of the Labor Agreement (Exhibit "B") with the County of Racine and by violating and continuing to violate the provisions of section 111.70 (3) (b) (3), Wisconsin Statutes, have damaged the Plaintiff in an amount that is not presently determinable but which will be capable of being determined at final judgment and which will be substantial.

WHEREFORE, the Plaintiffs pray that the Court enter judgment enjoining and restraining the named Defendants and all members, officers, agents or representatives of Highway and Parks Employees, affiliated with Teamsters, Chauffeurs, and Helpers Union, Local No. 43, and all persons acting in concert with them or any of them:

1. From refusing to work overtime on snow or ice removal duties for Plaintiff or from withholding work under any guise whatsoever, including any mass absenteeism from duty for sickness, or other reasons, or considered failure to report for duty, or wilfully absenting themselves from their positions, stopping work, or abstaining in whole or in part from the full, faithful and proper performance of their duties of employment for the purpose of inducing, influencing or coercing a change in the conditions or compensation or the rights, privileges or obligations of employment.

2. From encouraging, inducing or persuading other members of the bargaining unit represented by said Local No. 43, affiliated with Teamsters, Chauffeurs, and Helpers Union, to refuse to work overtime or withholding work under any guise whatsoever, including any mass

abstention from duty for sickness or other reason or considered failure to report for duty, or wilfully absenting themselves from their positions, stopping work, or abstaining in whole or in part from the full, faithful and proper performance of their duties or employment for the purpose of inducing, influencing or coercing a change in the conditions or compensation or the rights, privileges or obligations of employment.

3. Permanently enjoining Defendants and each of them from refusing to work overtime now or at any time or doing any act which would constitute a prohibited practice.

4. Permanently enjoining Defendants, officers of Local No. 43 by themselves or in concert with others from ordering or calling for a refusal to work overtime of the Local membership now or at any time.

5. Ordering the Officers, Stewards and Committeemen of said Local No. 43 to immediately call an end to the present refusal to work overtime and to use their best efforts to persuade the Defendants, members of the Union, to work overtime as directed by Plaintiffs or its agents to effect the removal of snow on County Trunk Highways, State Highways and the Interstate Highway System insofar as any of same are located in the County of Racine.

6. For costs and disbursements of this action, and,

7. For such additional or alternate relief as may appear to the Court to be equitable, just and proper.

Dennis J. Flynn
Plaintiff's Attorney

P.O. ADDRESS:

Courthouse
Racine, Wisconsin

STATE OF WISCONSIN)
) ss
COUNTY OF RACINE)

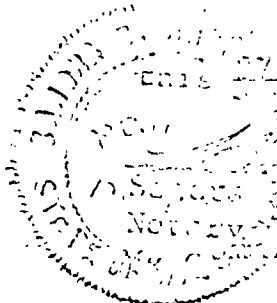
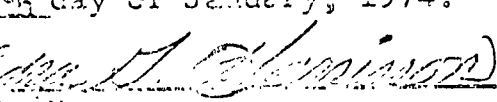
VERIFICATION

EARL SKAGEN, being first duly sworn on oath, deposes and says that he is the Highway Commissioner for the County of Racine; that he has read the foregoing Complaint; that the same is true to the knowledge of the affiant except as to those matters therein alleged on information and belief, and as to those matters, he believes it to be true; and that the reason why this Verification is not made by Plaintiffs, is that the said Plaintiffs are the Racine County Highway Department and Racine County.


Earl Skagen

Subscribed and sworn to before me

this 22nd day of January, 1974.



Edward A. Harrison
Notary Public, Racine County, WI.
Commission expires 8/2/76.

Peter Adamowicz 1912 Rapard Blvd. Racine	Arthur Iverson 1604 Quincy Ave. Racine	Alex Palm Oakdale States #29 Sturtevant
Frank Aiello 5429 Taylor Ave., Racine	Kenneth Janke 1610 Millorum Union Grove	Lloyd Pedersen Route 2, Box 232 Union Grove
Arthur Andersen 1100 Kinzie Ave. Racine	Harrison Kastler 1716 Mt. Pleasant St. Racine	Alfred Podoll 1441 Villa St. Racine
George Antross Route 1, Box 143 Union Grove	Jon Kayon 4117 Washington Ave. Racine	Kenneth Price 1333 Center St. Union Grove.
Leslie W. Lower 3467 - 103rd St. Franksville	Bruce Ketterhagen Route 3, Box 113 Burlington	Kenneth Robinson 5227 Shirley Ave. Racine
Peter Christensen 3402 Washington Ave. Racine	David Kosterman 2616 Cottonwood Court Racine	Claude Rognerud 3611 Mercury Lane Racine
Charles Couchart 4300 Blue River Ave. Racine	John LaPoint 11335 Washington Ave. Racine	Paul Rohner, Jr. 317 S. Green Bay Rd. Racine
Van Deneka 3643 Hwy. 38 Franksville	Joseph Manto 1212 W. Road Sturtevant	Charles Rowntree Route I, Box 847 Burlington
Ervin Dieringer 2017 Charles St. Racine	Raymond Mertens 2620 Air Line Rd. Racine	Alvin Schattner Route 2, Box 609 Franksville
James Dykstra 5011 Hwy. 38 Caledonia	Alvin Mertz 2937 - 93rd. St. Sturtevant	Albert Stardy, Jr. 102 Emmertsen Rd. Racine
Wayne Egresi 1635 Hwy. 1 Sturtevant	James Miller 1431 Erie St. Racine	Allen Stieber 1423 Villa St. Racine,
Evan Fergus 2607 S. Green Bay Rd. Racine	Anthony Mueller 12930 - 6½ Mile Rd. Caledonia	Robert Strelow Route I, Box 331 Franksville
Walter Fregien 504 Racine St. Waterford	Donald Mundt, Jr. 712 N. Memorial Drive Racine	Alvin Streuli 729 - 15th Ave. Union Grove
John Friesema 3212 - 92nd. St. Sturtevant	Arnold Nelson Route I, Box 69 Caledonia	Joseph Tapley 1123 Rode Ave. Racine
Andrew Hansen 11 - 71st. Drive Union Grove	Gerald Nelson Route I, Box 232A Union Grove	Philip Trimberger Route I, Box 201 Kansasville
Ediel Harbach 1444 Rosemary Lane Racine	Arthur Osinga Route 2, Box 607 Franksville	Willis Vanderhoef 1439 Ellis Ave., Racine

Arnold Wilton
Route I, Box 882
Waterford

Richard Washburn
2309 Seven Mile Rd.
Waterford

Bernard Waets
Route 5, Box 92
Burlington

Donald Welch
918 Sycamore Ave.
Racine

Raymond Zechel
322 Forest Drive
Burlington

Eve Zickus
3031 White Chapel Dr. Apt. 2
Sturtevant

Larry Chart
Route 2, Box 468
Burlington

William Chart
327 N. Main St.
Burlington

Gustav Christiansen
P.O. Box 2
Rochester

Ronald Dixon
275 Chapel Ter.
Burlington

Russell Dobson
Route I, Box 833
Burlington

~~William Chart~~
~~Route 2, Box 468~~
~~Burlington~~

Thomas Hubbard
357 Origen St.
Burlington

Gilbert Kaebisch, Jr.
Route I, Box 863
Burlington

~~William Chart~~
~~Route 2, Box 468~~
~~Burlington~~

Frank Matezevich, Jr.
604 Edmond St.
Waterford

George Mutter
Route I
Kansasville

Willard Noble
Route I, Box 880
Burlington

Wallace Prott
332 Henry St.
Burlington

Philip Redel
Route I, Box 463
Burlington

William Reesman
Route I, Box 781
Waterford

Carl Rubach
325 Garfield St.
Burlington

Harvey Rutkowski
Route I, Box 624
Burlington

~~Harold Chart~~
~~Route 2, Box 468~~
~~Burlington~~

James Schneider
234 S. Jefferson St.
Waterford

~~Donald Strelow~~
~~18090 S. Wind Lake Rd.~~
~~Wind Lake~~

Donald Strelow
18090 S. Wind Lake Rd.
Wind Lake

Jerome Vogt
332 Garfield Ave.
Burlington

Kenneth Warren
Route 2, Box 498
Burlington

Richard Zubrod
Route 8, 6034 Circle Dr.
Burlington

EXHIBIT "A"

1973

AGREEMENT

SETTING FORTH

TERMS AND CONDITIONS
OF EMPLOYMENT

AS AGREED TO BETWEEN

RACINE COUNTY

AND THE

NIGHTWAY AND PARKS
EMPLOYEES

TEAMSTERS, CHAUFFERS, AND
HELPERS UNION, LOCAL NO. 43

EFFECTIVE JANUARY 1, 1973

STATE OF WISCONSIN

CIRCUIT COURT

RACINE COUNTY

RACINE COUNTY HIGHWAY DEPARTMENT,
AND RACINE COUNTY,

Plaintiff,

vs.

HIGHWAY AND PARKS EMPLOYEES, LOCAL
No. 43, affiliated with Teamsters,
Chauffeurs, and Helpers Union,
LEO LOTHARIUS, President of Local
No. 43, CHARLES SCHWANKE, Business
Representative for Local No. 43,
GERALD NELSON and WILLIAM REESMAN,
Stewards for Highway and Parks Employees,
GARY CHART and ARTHUR IVERSON, Committee-
men for Highway and Parks employees,
individually and as officers and
representatives of said Highway and
Parks employees, and ALL HIGHWAY AND
PARKS EMPLOYEES as listed in Exhibit
"A" attached hereto individually and
as Members of said Highway and Parks
Employees Local No. 43,

ANSWER

Defendants.

NOW COME the Defendants, Highway and Parks Employees,
Teamsters, Chauffeurs and Helpers Union Local No. 43, affiliated
with the International Brotherhood of Teamsters, Chauffeurs,
Warehousemen and Helpers of America, Leo Lotharius, Charles
Schwanke, Gerald Nelson, William Reesman, Gary Chart and
Arthur Iverson; and the unnamed individual defendants solely
and exclusively for the purpose of contesting the jurisdiction
of the Court; by their attorneys, GOLDBERG, PREVIANT & UELMEN
and Walter F. Kelly and for their Answer allege as follows:

1. Admit the allegations of Paragraph 1; except that
they are without knowledge or information sufficient to form
a belief with respect to the allegations that the plaintiffs
are municipal employers or that the plaintiffs principal duties
include maintenance and service of highways in Racine County
that are a part of the Wisconsin State Truck Highway System
and the Interstate Highway System.

2. Admit the allegations of Paragraph 2 of the Complaint.

3. Admit the allegations of Paragraph 3 of the Complaint.

4. Deny the allegations of Paragraph 4 of the Complaint except to admit that certain individuals whose names are included in Exhibit A are members of the Defendant Local No. 43. Allege further that as will be shown more fully by way of affirmative defense, this Court lacks power over all the individual employees whose names and addresses appear in Exhibit A; and further that said individual employee Defendants have not been adequately noticed respecting this action so that any exercise of power by the Court over them is a violation of the Fourteenth Amendment to the United States Constitution.

5. With respect to the allegations of Paragraph 5, 6, 7, 8 and 10, admit the allegations thereof.

6. Admit the allegations of Paragraph 9 of the Complaint; except deny that the Defendant, Gary Chart, is or has at all material times been a committeeman for the Highway and Parks Employees.

7. Deny the allegations of Paragraph 11 of the Complaint.

8. With respect to Paragraph 12 of the Complaint allege that they are without knowledge or information to form belief with respect to the truth of the allegations therein; and deny specifically that members of the Defendant Local Union No. 43 are employed presently in accordance with the contract which is marked as Exhibit B to the Complaint.

9. Deny all the allegations of Paragraph 13 of the Complaint.

10. Deny the allegations of Paragraph 14 of the Complaint; and allege further with respect to Paragraph 14 of the Complaint

as Exhibit B is by its own terms¹⁰⁶ in effect at this time; and further that any action taken by any of the Defendants either individually or concerted to decline to work hours other than those in the past required by collective bargaining agreement is not in violation of Section 111.70(4)(1), Chapter 124, Laws of 1971, State of Wisconsin.

11. Deny the allegations of Paragraph 15 of the Complaint.

12. Deny the allegations of Paragraph 16 of the Complaint.

13. Deny the allegations of Paragraph 17 of the Complaint.

14. With respect to Paragraph 18 of the Complaint, allege that they are without knowledge or information to form a belief to the truth thereof.

15. Deny the allegations of Paragraph 19 of the Complaint.

16. Deny the allegations of Paragraph 20 of the Complaint.

17. Deny the allegations of Paragraph 21 of the Complaint.

18. Deny the allegations of Paragraph 22 of the Complaint.

19. Deny the allegations of Paragraph 23 of the Complaint; and allege further that Plaintiff's Complaint is designed for the purpose of effecting the economic relationship between the Plaintiffs and the Defendants respecting the negotiation of a collective bargaining agreement for the year 1974 which design imposes significant injuries upon the Defendants in connection with the negotiation of said agreement.

20. Deny the allegations of Paragraph 24 of the Complaint.

21. Deny the allegations of Paragraph 25 of the Complaint.

22. Deny the allegations of Paragraph 26 of the Complaint.

AS AND FOR their affirmative defenses, the above-named Defendants allege as follows:

1. That the Court lacks in personam jurisdiction over the individual employee Defendants who are not named in the Complaint and who have not been served with any process in this matter.

2. That any exercise of in personam jurisdictional power over the individual employee Defendants constitutes a violation of the Fourteenth Amendment to the United States Constitution because said Defendants have not been served with process in this action.

3. That the Court lacks subject matter and personal jurisdiction over Defendants because Plaintiffs have posted no bond pursuant to Sections 103.56 (5) or 268.06, Wis. Stats., nor have law enforcement officers of Racine County received notice of these proceedings.

4. That the Complaint fails to state facts sufficient to constitute a cause of action because (1) the collective bargaining agreement marked as Exhibit B is by its own terms no longer effective; (2) the Complaint fails to state facts respecting the Defendants alleged failure to bargain collectively in good faith and (3) individual or concerted refusals to work overtime do not constitute a violation of Section 111.70(4)(1), Chapter 124, Laws of 1971, State of Wisconsin.

5. That injunctive relief cannot be issued in this action because this action does not satisfy the requirements of Sections 103.51 through 103.62, Wis. Stats., "The Little Norris LeGuardia Act", nor the provisions of Chapter 268, Wis. Stats., respecting the issuance of injunctions.

6. That primary jurisdiction over this dispute exists pursuant to Chapter 124 in the Wisconsin Employment Relations Commission and that the commencement of an action before that Commission by the plaintiffs on or about February 5, 1974 requires the abatement and/or the deferral of this action to the Commission action.

7. That adequate remedies exist at law for the remedies of the alleged wrongful action of the Defendants.

WHEREFORE the Plaintiff's Complaint and application for temporary injunction should be dismissed with costs to the Defendants

GOLDBERG, PREVIANT & UELMEN
211 West Wisconsin Avenue
Milwaukee, Wisconsin 53203

BY

Walter F. Kelly
Walter F. Kelly

