STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

RACINE EDUCATION ASSOCIATION, JAMES ENNIS, SUSAN GRIEGO, ALAN PIRK, and JAY NEWELL,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent,

RACINE UNIFIED SCHOOL DISTRICT NO. 1, OF RACINE COUNTY, WISCONSIN,

Co-Respondent.

MEMORANDUM DECISION

Case No. 158-408

Decision No. 14308-D
Decision No. 14389-D
Decision No. 14390-D

BEFORE: HON. GEORGE R. CURRIE, Reserve Circuit Judge

This is a proceeding initiated by petitioner Racine Education Association (hereafter REA) and certain individuals under ch. 227, Stats., to review an order dated June 14, 1977, an order amending findings of fact and order dated June 13, 1977, and an order denying in part and granting in part request for rehearing/reconsideration dated July 21, 1977, of the respondent Wisconsin Employment Relations Commission (hereafter WERC) entered in two proceedings which WERC has referred to in its records as Cases XXXIII and XXXV. The school district in its pleadings has requested review of certain portions of these orders.

STATEMENT OF FACTS

WERC's orders which are the subject of this review were entered in three consolidated proceedings initiated by the filing of prohibited practice complaints involving REA and the school district.

In Case XXXIII REA filed a prohibited practices complaint with WERC alleging that the school district committed certain prohibited practices. The primary assertion was that only union members can vote in the senior high school curriculum committee (hereafter the "SHSCC" or "curriculum committee") elections and serve on the curriculum committee. The establishment of the curriculum committee is provided in Article XVII of the parties' collective bargaining contract. (Exh. No. 1).

The school district for a number of years has maintained a senior high curriculum committee composed of parents, school administrators and teachers. The committee bylaws state that the teacher representatives must be selected by the faculty from each school and that teacher participation on the committee is entirely voluntary. One of the committee functions is to recommend curriculum changes to the superintendent of schools who in turn reports such recommendations to the board of education.

In approximately November, 1975, a vacancy arose with regard to the J.I. Case High School representative to the curriculum committee. J.I. Case principal James Coles announced plans for the selection of another J.I. Case representative to the committee. In making plans for the election, Coles announced that the entire J.I. Case faculty would vote in the election, including non-REA members.

Representatives from the REA sub-council at J.I. Case, which represented all association members at J.I. Case, met with Coles and stated that the sub-council would like to be involved in the election procedure but Coles refused that request. REA subsequently reiterated this demand to Coles on or about January 6, 1976, and stated that the curriculum committee representative had to be a member of REA. The REA sub-council on or about January 7, 1976, conducted its own election for a J.I. Case representative to the curriculum committee; that election was limited to REA members. Teacher Paul Noelke was elected as REA's representative to the curriculum committee. Coles subsequently informed the sub-council that the results of the election were not official since it violated the curriculum committee bylaws and that Noelke would not be excused from school to attend committee meetings. Coles subsequently announced that the curriculum committee election which he had planned and which was open to all teachers including non-union members would not be held.

At a January 16, 1976, meeting of the J.I. Case sub-council, representatives from other senior high school sub-councils and members of the curriculum committee, it was agreed that all REA representatives on the curriculum committee would walk off the committee if Noelke were not seated. Subsequently, REA members on the curriculum committee refused to participate in committee meetings. The action of REA committee members was pursuant to the request of REA in accord with an October 2, 1975, resolution which stated that only union members would select representatives to district wide committees.

By letter dated March 12, 1976, superintendent of schools Nelson, advised James Ennis, REA's executive director, regarding the concerted refusals by teachers to perform work.

WERC concluded that the school district by insisting that all teachers be allowed to vote and be eligible to serve on the curriculum committee did not violate the parties' collective bargaining contract or the provisions of the Municipal Employment Relations Act (hereafter MERA). Section 111.70 et seq., Stats. Accordingly, the complaint in Case XXXIII was dismissed in its entirety.

In Case XXXV the school district alleged that REA violated the contractual no strike prohibition by engaging in certain conduct including: (1) the union's boycott of a Title VII workshop, (2) the union's encouragement of teachers not to turn in their lesson plans, (3) the union's advice to teachers not to turn in Title I needs assessment questionnaires, (4) the union's advice to its members to boycott curriculum committee activities, (5) refusal of teachers to turn in certain English compositions, (6) refusal by teachers to return certain surveys, as well as several other alleged actions not at issue in the instant review.

The effect of WERC's findings of fact, conclusion of law, and order was to determine that REA's conduct with respect to the Title VII workshop did nto violate the contractual no strike prohibition, but its conduct with respect to the other five of the above listed six instances of conduct did. The result is that the school district seeks review of that part of the orders pertaining to the Title VII workshop, while REA seeks review of the orders with respect to the other five above listed matters.

The third proceeding which was consolidated with those in Case XXXIII and XXXV was that in Case XXXIV. In that case the school district was the complainant and the four individual petitioners in the instant review were the respondents. WERC's order dismissed the complaint in this proceeding on the ground that the respondents acted in their REA representative capacity and not as individuals. The school district has not sought review of this portion of WERC's orders.

THE ISSUES

The court deems that the issues to be decided are whether WERC's construction of the contract was reasonable and its findings of fact supported by substantial evidence with respect to the following matters:

(1) The curriculum committees

(2) The lesson plans

(3) Title I needs assessment questionnaires

(4) English compositions

(5) Surveys

(6) The Title VII Workshop.

REA raises an additional issue that the district was required to exhaust its remedies under the contract before filing a complaint with WERC.

The school district's brief raises an additional issue with respect to REA's filing of its complaint in Case XXXIII. This issue is whether the filing and prosecution of such complaint did not in itself constitute coercion of employees' rights in violation of sec. 111.70(3)(b)(2), Stats. The district contends WERC's failure to so find constituted a material error of law.

It necessarily follows that if REA violated the no strike prohibition clause of the contract it also violated sec. 111.70(3)(b)4, Stats., as WERC found by its conclusion of law 4. Therefore, no issue has been framed with respect to violation of sec. 111.70(3)(b)4.

THE COURT'S DECISION

A. Standards of Review.

On judicial review under sec. 111.07(8) and ch. 227, Stats., the WERC's findings of fact are conclusive if supported by substantial evidence in view of the entire record. Chicago, M. St. P. & P. RR. Co. v. ILHR Dept., 62 Wis. 2d 392, 396, 215 N.W. 2d 443 (1974). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Copland v. Department of Taxation, 16 Wis. 2d 543, 554, 114 N.W. 2d 858 (1962); see also Stacy v. Ashland County Dept. of Public Welfare, 39 Wis. 2d 595, 603, 159 N.W. 2d 630 (1968). In Robertson Transport Co. v. Public Serv. Comm., 39 Wis. 2d 653, 658, 159 N.W. 2d 636 (1968), the court observed that:

> "Substantial evidence is not equated with preponderance of the evidence. There may be cases where two conflicting views may each be sustained by substantial evidence. In such a case, it is for the agency to determine which view of the evidence it wishes to accept . . . ."

The weight and credibility of the evidence, and the inferences which may be drawn from it, are matters for the agency to determine. St. Francis Hospital v. Wisconsin E.R. Board, 8 Wis. 2d 308, 318, 98 N.W. 2d 909 (1949). When more than one inference reasonably can be drawn, the finding of this agency is conclusive. Pabst v. Department of Taxation, 19 Wis. 2d 313, 322, 120 N.W. 2d 77 (1963).

A reviewing court may not make an independent determination of the facts, Hixon v. Public Service Comm., 32 Wis. 2d 608, 629, 146 N.W. 2d 577 (1966), nor may it substitute its judgment for that of the agency. St. Joseph's Hospital v. Wisconsin E.R. Board, 264 Wis. 396, 402, 59 N.W. 2d 488 (1953). Moreover, due weight must be accorded the experience, specialized knowledge and discretionary authority of the agency. Section 227.20(10), Stats.; Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis. 2d 540, 562, 151 N.W. 2d 617 (1967).

B. Construction of No Strike Clause of Collective Bargaining Contract.

The construction of a collective bargaining agreement is a conclusion of law. Tecumseh Products Co. v. Wisconsin E.R. Board, 23 Wis. 2d 118, 129, 126 N.W. 2d 520 (1964). In Tecumseh, the court stated at 129 that:

"* * * If the board's construction of the agreement is reasonable, this court will sustain the board's view, even though an alternative view may be equally reasonable. . . . The reasonableness of the board's determination will be assessed not only from the point of view of the express criteria for judgment set forth in the agreement, but, because the express standards of the agreement are often purposefully general and indeterminate, the board's determination must also be evaluated in terms of the 'common law of the shop'--general practices and principles of industrial relations which are a part of the context in which every collective agreement is negotiated, although not expressed in the contract as criteria for judgment."

Although this court is not bound by WERC's conclusions of law, Milwaukee v. WERC, 71 Wis. 2d 709, 714, 239 N.W. 2d 63 (1976), where

". . . The WERC's determination is neither without reason nor inconsistent with the purposes of the statute, [and] since that is the ultimate test . . . the determination of the WERC will be affirmed." Milwaukee v. Wisconsin Employment Relations Comm., 43 Wis. 2d 596, 602, 168 N.W. 2d 809 (1969).

The construction of a collective bargaining contract is to be distinguished from cases of first impression involving either the interpretation of a statute or the application of that statute to a particular set of facts. In such cases the court is not bound by the WERC's interpretation of the statute where the WERC has limited experience with the issues involved even though such interpretation would have "great bearing" and would be accorded "due weight" in the court's determination as to what the appropriate interpretation should be. Beloit Education Assoc. v. WERC, 73 Wis. 2d 43, 67-68, 242 N.W. 2d 731 (1976); Unified S.D. No. 1 of Racine County v. WERC, 81 Wis. 2d 89, 93, 259, N.W. 2d 724 (1977).

Thus, in the instant case, since the issues are not of first impression, the petitioner REA must show that the WERC's construction of the contract in view of applicable law is either without reason or inconsistent with the purposes of the law.

Article II, paragraph 6 of the collective bargaining contract provided in part:

"b. Accordingly, the Association [REA] agrees that there should be no strikes, work stopages, or other concerted refusal to perform work by the teachers covered by this agreement.

c. Upon notification of the [School] Board of any unauthorized work stoppage, the Association shall make public that it does not authorize such violation and will direct its members to cease and desist."

In WERC's "Memorandum Accompanying Findings of Fact, Conclusions of Law and Order" it stated (at page 17):

"The Association also claims that the concerted activities herein do not constitute a strike and that the actions herein 'fell far short of the definition of a strike.' The contractual no-strike ban, however, is extremely broad as it prohibits 'strikes, work stoppages, or other concerted refusal to perform work . . .' (Emphasis added.) This underlined phrase makes it most clear that the contractual prohibition covers not only strikes, but also 'other concerted refusal to perform work . . . .' Accordingly, the activity herein may be prohibited if it constitutes a 'concerted refusal to perform work,' even though it does not constitute a full scale strike."

The court is of the opinion that this construction of the contractual no strike provision by WERC is a reasonable one, and the court therefore approves the same.

REA's brief at page 58 thereof contends that WERC had no authority to find any activities of REA to be prohibited practices under the contractual no strike prohibition because, "It is our understanding, based on the answer of the District's counsel during the hearing, that no allegation is made that such alleged 'strikes' were in themselves prohibited practices, but rather that they imposed certain contractual obligations upon the District which were not fulfilled." This statement makes no sense unless "REA" be substituted for "District." In any event the court is satisfied in this record that WERC had authority to find as it did in finding of fact 21 that REA breached the contractual no strike prohibition, if there was substantial evidence to support the same.

C. The Curriculum Committees.

The material facts with respect to the senior high curriculum committee have been set forth under STATEMENT OF FACTS, supra.

The REA argues that WERC erred by concluding that non-association members could vote in the senior high curriculum committee election and serve on the curriculum committee. The REA asserts an exclusive right under the collective bargaining agreement to select teacher representatives to this curriculum committee. WERC rejected this argument.

The school district in its complaint charged REA with violating the collective bargaining agreement's proscription against unauthorized work stoppages because REA admittedly refused to participate in the curriculum committee activities when the school district refused to allow the teacher selected by REA to serve as a representative on the committee. WERC agreed with the school district's position and concluded that REA's boycott was a violation of the collective bargaining contract.

Article XVII of the contract entitled "Curriculum And Instruction" provides:

"1. The Board and the Association recognize the important role the teachers play in the development of curriculum and instruction if a quality education program is to be attained.

2. The Board and the Association will insure the continuing participation of teachers in an advisory capacity on committees which are formed for making recommendations to the Board concerning, but not limited to, the following:

   a. Texts and supplementary materials

   b. Courses or curricula for teaching

   c. Student-teacher ratios

   d. Pupil progress reporting and student records

3. When a teacher representative of the Association is mutually scheduled to meet during the school day on any unified school district committee discussing items of curriculum and instruction, a substitute teacher shall be provided and the teacher shall suffer no loss in pay."

REA offers two theories in support of its position. First, it argues that the Article XVII of the contract limits participation of teachers on advisory committees to only association members. Second, it argues that the committee considers mandatory subjects of collective bargaining and that under the Municipal Employment Relations Act REA is the exclusive bargaining representative for the teachers.

WERC concluded that Article XVII was silent on the question of whether non-REA members can participate in the curriculum committee. In view of such ambiguity, WERC considered extrinsic evidence in order to ascertain the true intent of the parties. Patti v. Western Mach. Co., 72 Wis. 2d 348, 241 N.W. 2d 158 (1976); H & R. Truck Leasing Corp. v. Allen, 26 Wis. 2d 158, 131 N.W. 2d 912 (1965). The primary extrinsic evidence relied upon by WERC was the past practice of the parties. Cutler-Hammer, Inc. v. Industrial Commission, 13 Wis. 2d 618, 109 N.W. 2d 468 (1961).

It is undisputed that non-REA members have participated in curriculum committee elections in a number of schools over the past several years. REA correctly points out in its statement of facts that in the past, since at least 1969, it has repeatedly expressed its position that only association members should be allowed to participate in such committees. The school district, however, during that same time period has "violently disagreed" with REA's claim and as noted has continued to include non-association members in curriculum committee elections and as members in the committee. (Finding of fact 12).

In view of the parties' past practice and the fact that the Article XVII language has not changed since 1969, WERC's construction of the contract is reasonable and should not be disturbed by this court. Tecumseh Products Co. v. Wisconsin E.R. Board, supra, 23 Wis. 2d 118 (1964); Milwaukee v. Wisconsin Employment Relations Comm., supra, 43 Wis. 2d 596 (1969).

WERC's second argument should likewise be rejected. It argues that as the exclusive collective bargaining representative for teachers in the Racine School District, no other committee or group of teachers can bargain over wages, hours and conditions of employment. WERC agrees with this statement. REA further argues that since the curriculum committee discusses matters and makes recommendations to the administration and school board that impact on wages, hours and conditions of employment, that activity constitutes collective bargaining and therefore only REA members can serve as the teacher representatives to the committee.

WERC concluded that although this curriculum committee does on occasion deal with matters affecting the hours, wages and working conditions of teachers, it nonetheless does not engage in collective bargaining. The function of the committee, which is composed of not only teachers, but also parents and school administrators, is to make recommendations to the board of education concerning courses or curricula for teaching. (Article XVII, Tr. pp. 298-200.) These teacher representatives do, however, consult with other staff members and do bring staff impact to committee meetings.

It is important to note that WERC's finding that the committee does not engage in collective bargaining has no effect on the school district's duty to bargain collectively with REA. It is undisputed that the school district is required to bargain with REA before it can implement curriculum committee proposals dealing with wages, hours or conditions of employment. For purposes of this review, it is immaterial whether the school district in fact bargains over proposals after the curriculum committee has acted since the issue here is whether REA has a statutory right to have REA representation on the curriculum committee.

As a result of the controversy over the senior high curriculum committee some REA members on junior high and elementary school curriculum committees boycotted their committees at the request of REA. This is conceded at page 19 of REA's brief.

There does not seem to be any issue with respect to whether the findings of fact (Findings of fact 9, 10, 11 and 12) made as to what actually occurred with respect to REA's conserted efforts to persuade its members not to serve on curriculum committees are supported by substantial evidence. Thus under WERC's construction of the no strike prohibition of the contract the boycotting of curriculum committees constituted a "concerted refusal to perform work" which the district had the right to expect of teachers selected to serve on such committees under this provision of Article XVII of the contract:

"The Board and the Association will insure continuing participation of teachers in an advisory capacity on committees which are formed for making recommendations to the Board concerning, but not limited to, the following:

* * *

b. Courses or curricula for teaching."

Thus, WERC's dismissal of REA's complaint in Case XXXIII was proper, and its determination in Case XXXV that REA violated the collective bargaining contract by its efforts to discourage its members from serving on curriculum committees is upheld by the court.

D. The Lesson Plans.

As set forth in WERC's finding of fact 14, the district has a mixed practice regarding the turning in of lesson plans with the principal at each school deciding what the policy should be at his or her school (Tr. 542-543). Lesson plans were required to be turned in at the Jerstad-Agerholm and James Elementary School (Tr. 534, 553). It is undisputed that at least some teachers refused to turn in their lesson plans at those two schools pursuant to a REA policy which stated that such plans did not have to be turned in (Tr. pp. 535, 536, REA's brief pp. 33-35).

John Brosseau, the principal at Jerstad-Agerholm Elementary School, informed teachers at the outset of the school year that lesson plans are required to be turned in at his school. (Tr. 534) Teachers at Jerstad-Agerholm in the past had always turned in their lesson plans (Tr. 535). In January, 1976, George Alfsen, a teacher at Jerstad-Agerholm, informed Brosseau that he would not turn in his lesson plans pursuant to a REA resolution adopted December 4, 1975, which provided:

"The representative assembly recognized the need for lesson plans, but, because teachers are professional,teachers will not be required to turn in lesson plans." (Exh. No. 53, p. 3).

Teachers at James Elementary School were also required to turn in their lesson plans to the office and had done so without objection in the past. Pursuant to the REA resolution noted above, however, several teachers at James refused to turn in their lesson plans, which positions they maintained notwithstanding numerous requests from the administration to turn in the plans (Tr. 556). It was not until March, 1976, approximately three months after they were initially asked to turn in their lesson plans, that the teachers complied with the district directive.

One argument advanced by REA for REA's opposition to school principals requesting lesson plans to be handed in was that these plans would be used for evaluation of teachers outside of the contractually defined basis for evaluation of teachers. In the absence of some evidence that such plans were so used for a purpose not permitted by the contract, such fear would not have justified REA in adopting its resolution of December 4, 1975.

However, REA's principal argument on the lesson plan issue is that since the school board did not notify it regarding the so-caled work-stoppages as required by the contract it, therefore, had no obligation to dissassociate itself from what it characterized as individual activities and likewise had no obligation to direct its members to cease and desist from engaging in such refusals to perform work (REA's brief, pp. 35-37, 74-76).

Article II, subsection 6.c. of the contract provides:

"Upon notification by the Board of any unauthorized work stoppage, the Association shall make public that it does not authorize such violation and will direct its members to cease and desist. Having given such public notice, the Association shall be freed from all liability for any breach of this article."

WERC in its Memorandum Accompanying Order Denying in Part and Granting in Part Requests for Rehearing/Reconsideration dated July 21, 1977, stated (at page 9):

> "Accordingly, and because such an interpretation gives full meaning to all of Article II, Section 6, the Examiner concludes that the District is not required to notify the Association of a work stoppage if such a stoppage has been authorized by the association. As a result, the association violates the contractual no strike ban whenever it encourages or sanctions such stoppages irrespective of whether the District has notified it that such a stoppage has occurred."

This is a reasonable interpretation of this provision of the contract with which the court agrees.

No contention has been made that there is no substantial evidence to support findings of fact 14, 15, 16 and 17 covering the lesson plans controversy.

E. Title I Needs Assessment Questionnaires

The record shows that Superintendent Nelson on January 27, 1976, requested teachers to fill out a Title I Needs Assessment questionnaire (Exh. 74). Several teachers contacted James Ennis, the association's executive director, regarding the questionnaires and he advised them that they were not compelled to fill out and return such forms (Tr. 471-472). Knapp principal, J.R. Ferguson, reiterated the request to REA representatives and to all teachers in an announcement over the school public address system on February 6, 1976. As stated in his memo dated February 17, 1976, which he sent to the superintendent (attachment to Exh. 75), the announcement on the P.A. system asked teachers "who had not yet turned in the questionnaires to please do so before leaving from school on that day." Superintendent Nelson on February 18, 1976, advised REA by letter (Exh. No. 75) that the continuing refusal to complete the questionnaire violated the collective bargaining agreement. Ennis investigated the matter and shortly thereafter the questionnaires were completed and turned in (Tr. 465-466).

In its defense REA argues that the teachers were only asked but never ordered to turn in the questionnaires, and that without such a direct order there cannot be a concerted refusal to perform work.

Apparently, REA believes that its membership need not perform any work unless ordered to do so in writing and in clear and unmistakable language similar to commands used in the military. As WERC noted, this is not the military but rather a relationship involving professional persons. Common sense suggests that the REA's position is untenable.

Teachers had been frequently called upon in previous years to fill out reports and questionnaires concerning student information and various teaching functions. The teachera had always completed such work without objection and in full cooperation with the school administration. (Finding of fact 18; Tr. pp. 649, 682-684, and 722). There is nothing in the record to indicate that written orders were prerequisite to work prior to the February 23, 1976, memorandum (Exh. 61) from REA which suggested for the first time that the teachers could adopt such policy.

WERC's conclusion that work orders need not be in writing and in certain situations such as in this case can be requests rather than directives is certainly reasonable. It would be unreasonable to adopt REA's position that the entire employment relationship be conducted by written directive in the nature of orders. Further, there is nothing in the record to support the argument that teachers did not know they were supposed to perform the work.

WERC's determination that the turning in of these questionnaires was work which the teachers were required to perform, and REA's action in ordering teachers that they were not required to fill them out, was a violation of the contractual no strike prohibition, are reasonable conclusions with which the court concurs.

There is no contention that there was not substantial evidence to support finding of fact 18 dealing with the questionnaire issue.

F. English Compositions

In September, 1975, Joe Pappenfuss, a secondary ready language arts coordinator, informed certain English teachers that they were to select their best student composition which were to be turned in to him later in the school year (tr. pp. 650-651). Pappenfuss circulated a memorandum in February, 1976, to junior high school English teachers again notifying them to turn in sample compositions from their students (Exh. No. 110).

Some teachers felt that the composition might be used to evaluate them, others believed that the compositions might be used as a basis for a book, and still others thought that they had not been given sufficient time to complete the project. Because of these concerns, some English teachers met with REA's executive director Ennis, who there stated that teachers should turn in the compositions only if the compositions were related to student needs, but that the compositions did not have to be turned in if they were to be used in either writing a paper or in evaluating teachers (Tr. pp. 501-502.) Ennis recommended that a petition be drawn up which stated: "We respectfully decline to provide student compositions as per your memo of February 9, 1976, because of the inherent potention for evaluation of teachers." (Tr. 488-500, 504, Exhb. 63.) A petition was subsequently circulated among junior high school teachers and signed by numerous teachers, including apparently non-REA members. It was Ennis' testimony that this action was by individual teachers and not by REA (tr. 489).

Pappenfuss testified, however, that there was no purpose of evaluating teachers in requesting these compositions (Tr. 666) and that the teachers were sufficiently put on notice at the beginning of the school year that such sample compositions were required (Tr. 667-673).

On May 10, 1976, Pappenfuss sent a final directive to the teachers wherein he again requested that the compositions be submitted (Exh. No. 114). That memorandum provided in part:

> "On February 9, 1976, I reminded you that I would be collecting from all junior high English teachers student compositions resulting from the Composition lessons to find models to include with the revised Composition Lessons for next year.
>
> * * *
>
> Please turn in to me the student compositions that you select by Friday, June 4, 1976. Please call me if you have any questions."

The district sent at least two letters to REA advising of this concerted refusal to turn in the compositions. The first notification was on March 12, 1976 (Exh. 119) and again on June 9, 1976 (Exh. 122). The June 9, 1976, communication provided in part:

> "Pursuant to Article II, Section 6 of the collective bargaining agreement, I wish to notify you of . . . a concerted refusal to perform work that is being carried on by many junior high school English teachers.
>
> On February 9, 1976, Mr. Joe Pappenfuss, Reading/Language Arts Coordinator Secondary, told English teachers that he was requiring them to submit the best English compositions that their students had done so they could be used as models in the revision of Composition Lessons for grades 7, 8 and 9.
>
> On March 5, 1976, Mr. Pappenfuss received a petition signed by the majority of English teachers saying that they were intending not to turn in the required English themes. On May 10, 1976, Mr. Pappenfuss established June 4, 1976, as the date by which junior high school English teachers were to submit their students compositions, in accordance with his directives.
>
> Pursuant to Article II, Section 6, I request that you carry out your obligation of making public that the REA does not authorize such concerted refusal and that the REA direct its members to cease and desist."

The record shows that REA never publicly stated that teachers were required to turn in the composition nor did the association direct its members to cease and desist from refusing to turn in the compositions. (See Tr. pp. 734, 755-756.)

REA's only argument in this regard is apparently that because the conduct was not sanctioned by REA, it has no responsibility therefor. This position is clearly untenable under the clear contractual language of Article II, subsection 6c, quoted above which required REA to publicly disclaim such activities and to directs its members to cease and desist when informed of any unauthorized work stoppage.

REA maintains that teachers ultimately complied with the request for compositions and also suggest that this relieves it of any liability. The fact that some teachers eventually turned in some of the compositions is of no moment. The issue is whether REA after admittedly being notified of the undisputed refusal to turn in the compositions complied with its contractual obligations as set forth in Article II, subsection 6.c. WERC by finding of fact 19 found REA never publicly stated that teachers were required to turn in the compositions, and this finding is supported by substantial evidence.

The findings and conclusions of WERC on this issue are upheld by the court.

G. Surveys

This issue relates to the alleged concerted refusal to perform work involves a survey designed to test the reading components of the Title VII program. Joe Pappenfuss was responsible for preparing the survey relating to the Title VII program (Tr. pp. 649-653). In previous years similar surveys have been conducted among the teachers without objection (Tr. p. 649). In response to a May 7, 1976, survey (Exh. 111), several teachers at two schools, Jerstad-Agerholm and Gifford refused to complete and return the questionnaire (Tr. 47). This refusal to return the questionnaires was precipitated by the announced REA policy regarding surveys and questionnaires in general (Exh. 61).

REA's junior high caucus on January 12, 1976, adopted a motion which provided:

> "That members of the junior high caucus instruct the teachers that they represent not to participate in administration sponsored surveys in the areas of wages, hours, and working conditions . . . that each representative inform their building principal that he/she . . . will instruct the teachers he/she represents not to respond to administration sponsored surveys in the areas of wages, hours, and working condition." (Exh. 123)

The Jerstad-Agerhold sub-council thereafter decided that teachers should do what they "feel comfortable doing" on this issue. The response from teachers at Jerstad-Agerholm and Gifford was so low that the returned data was unusable. (Tr. 654; Exh. 113).

By letter dated June 9, 1976, the superintendent advised REA regarding the concerted refusal of the teachers to turn in the questionnaires and requested that the association, pursuant to Article II, Section 6, of the collective bargaining agreement, publicly disavow association support for such conduct and direct its members at the two junior high schools to cease and desist from refusing to perform work (Exh. No. 124). There is no evidence in the record that REA either publicly disavowed the conduct or that it directed its members to return the survey.

REA's main defense to this charge is that although the association made general recommendations regarding teacher obligations to fill out and return such surveys, the decision as to compliance or non-compliance with the administrative request was up to the teachers who made them individually. The issue, however, is whether there is substantial evidence in the record to support the WERC's finding in finding of fact 20 that the conduct was sanctioned by the association. In view of the testimony reviewed herein and the exhibits cited, it is clear that the WERC's finding is supported by substantial evidence and therefore must be affirmed.

H. The Title VII Workshop

While the issues with respect to the curriculum committees, the lesson plans, the questionnaires, the English compositions, and the surveys were determined by WERC adversely to REA, this issue involving teacher attendance at the Title VII workshop was decided in its favor. It is the district, therefore, who is seeking to overturn WERC's findings and conclusions with respect to this latter issue.

The facts found with respect to this Title VII workshop issue by WERC in finding of fact 13 are not disputed by the district. In 1975 the district planned on conducting Title VII workshops centered on desegregation and discipline problems. One of these workshops was scheduled for a Saturday in November to be held at Middleton, Wisconsin. A controversy developed between REA and the district with respect to payment of teachers who attended such workshop. Because the district had not agreed to REA's proposal with respect to this pay issue REA urged teachers not to attend these Title VII workshops. As a result approximately 35 of 50 teachers who had signed up to attend the Middleton workshop withdrew their applications to attend, and the workshop was cancelled. Superintendent Nelson by letter dated March 12, 1976, advised Ennis that the boycott violated the contractual no strike prohibition, but REA thereafter never disavowed the boycott and never directed REA members to participate in these workshops.

WERC in its Memorandum Accompanying Findings of Fact, Conclusions of Law and Order found that there was no provision in the contract that teachers attend workshops; and that attendance at the Title VII workshop was entirely voluntary, as no teachers were ever ordered by the district to attend the workshop scheduled at Middleton. The rationale of WERC's determination of this issue was stated in the Memorandum as follows (at page 21):

> ". . . it follows that the teachers herein did not engage in strike related activity or other concerted refusal to perform work when they refused to attend the workshop in issue, as the teachers were not required to attend the workshop. Accordingly, and because the Association was not required to disavow the boycott, this complaint allegation is dismissed."

The district's brief contends it was past practice that teachers attend workshops. No evidence has been cited to support this contention. Ennis testified a Title VII workshop was held at which 125 teachers attended out of approximately 1400 teachers in the district who were theoretically eligible (Tr. 462). Jeanette Bronaugh, director of the Title VII programs in the district, testified that it was contemplated only about 60 teachers in the district would attend the Middleton workshop when she made the reservations for it, and that no disciplinary action was contemplated against those who did not attend (Tr. 630-631).

The absence of any past practice that teachers in the district attend Title VII workshops, or similar workshops, on off-time such as Saturdays, distinguishes this case from Kenosha Unified School District No. 1 (WERC Decision No. 1075-A, B, October, 1972), and cases from other jurisdictions cited in the district's brief.

The district advances the further argument that, even if it were a voluntary matter for the teachers to attend these workshops, the teachers who first signed up to attend the Middleton workshop and then withdrew their application should have made their decision in the exercise of their professional judgment as teachers whether it was advisable they attend and not on the basis of a collective bargaining issue such as pay. It is further argued that, when they acted in concert at the urging of REA to boycott the workshop for reasons having nothing to do with the exercise of their professional judgment, they violated the no strike prohibition of the contract.

The district cites cases involving private industry where concerted refusal to perform voluntary work, such as working overtime, has been held to violations of statutes which prohibit such activities. One of the cases so relied upon is Machinists and Aerospace Workers v. WERC, 67 Wis. 2d 22, 226 N.W. 2d 208. Here the issue is whether there was a contract violation and it was necessary to first find a contract violation in order to find a violation of sec. 111.70(3)(b)4, Stats.

The court is of the opinion that WERC's interpretation of the contract to the effect that the boycott of the Title VII workshop did not violate the no strike prohibition of the contract was a reasonable interpretation which should not be overturned by the court. Therefore, the court holds that WERC properly dismissed the allegations of the district having to do withe the Title VII workshops issue.

I. Exhaustion of Contract Remedies by the District

REA contends WERC should have refrained from entertaining any of the charges filed by the district against REA in case XXXV because the district had failed to exhaust its remedies under the contract. REA contends that there were two contracted remedies open to the district: (1) the filing of a grievance against REA, including taking the matter to arbitration under the grievance procedure of the contract; and (2) disciplining the teachers who participated in work stoppages or refusals to perform work.

The grievance procedure set forth in the contract contained no provision for permitting the district to file a grievance. REA's brief states that the district "could have attempted to grieve the matter directly, and the testimony in the record is clear that the REA would have consented to this procedure and it therefore could have been arbitrated directly." Because there was no provision in the contract entitling the district to proceed in this manner, the district was not required to so proceed even if REA were willing to consent thereto. There certainly was no failure to utilize contracted remedies in the district's failure to attempt to grieve the matter or take it to arbitration.

With respect to REA's argument that the school district should have disciplined the affected teachers, WERC noted that the school district has secured a contractual no-strike ban from the association and that as a result the district has a right to enforce that ban against the association. Even though disciplinary action against individual employees may be available, such action would not necessarily serve as an effective remedy against REA's breach of its contractual obligation. The school district is not required to forego its contractual rights against REA.

J. Filing of Complaint in Case XXXIII as Constituting Prohibited Coercion.

The district contends that REA's filing and prosecuting of the Complaint in Case No. 20115 itself constituted coercion of employees' rights to refrain from union activity and membership in violation of sec. 111.70(3)(b)2, Stats.; and that WERC's failure to so find was a material error of law. In support of this assertion it cites the decision of the National Labor Relations Board in Television Wisconsin, Inc., 224 N.RB No. 96 (June 14, 1976.) This case is abstracted and partially quoted in 1976-77 CCH NLRB Par. 17, 324. In the Television Wisconsin case, a union had sued employees in a federal district court for damages for refusing to participate in a strike, for interfering with the contract between the company and the union, and for circulating a decertification petition. The employees filed an 8(b)(1)(A) charge under the National Labor Relations Act, as amended. The Administrative Law Judge held that since the union's "purpose" was to enforce an unlawful union security clause, therefore, filing the court action constituted a violation of 8(b)(1)(A) of the Act.

The Board agreed, but on a broader theory:

> "We agree with the Administrative Law Judge's finding that the Union's action in filing a suit to enforce an unlawful Union-security clause violated Sec. 8(b)(1)(A) of the Act--not because of the Union's subjective intent but because of the unlawful objective sought by the Union."

REA contends it makes no difference that in the Television Wisconsin, Inc. case the union sued the employees directly while in Case XXXIII REA's complaint was lodged against the employer. The court disagrees. By the union suing the employees directly in Television Wisconsin, Inc. the National Labor Relations Board could reasonably find that the objective of the union was to coerce the employees into the union. In the instant case the WERC was not required to find that REA's objective in filing its complaint in Case XXXIII was to force non-association teachers into REA in order to serve on curriculum committees, but to

establish the principle that any election conducted by the district among teachers was an act of collective bargaining which had to be taken up with REA and an agreement with respect to such an election procedure be mutually agreed upon between REA and the district.

The court determines there was no error in WERC determining that REA's filing of the complaint in Case XXXIII was not in itself an unlawful coercion of employees in violation of sec. 111.70(3)(b)(2), Stats.

Let judgment be entered affirming WERC's orders which are the subject of this review proceeding.

Dated this 30th day of May, 1978.

By the Court:

George R. Currie /s/
Reserve Circuit Judge