STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KENOSHA COUNTY EMPLOYEES LOCAL 1090, 990-WELFARE, 1392, and 70, AFSCME, AFL-CIO, Complainants, vs. KENOSHA COUNTY, Respondent.	:	Case XXVI No. 20784 MP-659 Decision No. 14937-C
KENOSHA COUNTY INSTITUTION EMPLOYEES LOCAL 1392, Complainant, vs. KENOSHA COUNTY, Respondent.	:	Case XXVII No. 20818 MP-661 Decision No. 14943-C

ORDER DENYING PETITION FOR REHEARING

On the basis of the record herein,

IT IS ORDERED that Complainants' January 23, 1978 petition for rehearing in the above-entitled matters be, and the same hereby is, denied.

Given under our hands and seal at the City of Madison, Wisconsin this 8th day of February, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Charles D. Hobornstra, Commissioner

No. 14937-C
No. 14943-C

KENOSHA COUNTY, XXVI, XXVII, Decision Nos. 14937-C and 14943-C

MEMORANDUM ACCOMPANYING
ORDER DENYING PETITION FOR REHEARING

On January 23, 1978, Complainants, hereafter referred to as the Union, filed a "motion for petition for rehearing," asking the Commission to enter an order setting aside its opinion and order of January 3, 1978, and for an order granting a rehearing and reconsideration with opportunity for oral and written argument in support of its "motion/petition." The Commission treated said document as a petition for rehearing within the meaning of sec. 227.12, Stats. The Union thereafter filed a "brief in support of petition for review," which the Commission treats as being a brief in support of petition for rehearing.

In its January 3 decision, the Commission refused enforcement of an agreement between the Union and the Respondent Employer. That agreement apparently was helpful in ending a strike, and provided that all employes would be laid off and recalled in seniority order. Despite that agreement, the Employer paid wages to employes who would have worked but for the strike. The basis of the Union's action was that such payments violated the settlement agreement to treat those employes as being in layoff status, and that such payments constituted a unilateral refusal to bargain with the Union and interference with the rights of employes. The Commission refused enforcement, concluding that the agreement was void as applied in these circumstances, because the agreement's only purpose and effect was to induce employes to strike in violation of law.

Here, the Union argues that the Commission failed to harmonize MERA's strike ban with its prohibitions against refusals to bargain, interference and contract violations. A proper harmonization, the Union asserts, would acknowledge that even in a strike situation, "maintenance of the integrity of the collective bargaining process becomes even more, not less, critical in achieving the legislative goal of industrial peace."

We agree. However, the legislature has specified that strike activity has no legitimacy in the collective bargaining process, and the instant agreement is unenforceable because its only purpose and effect is to foster such strike activity. The "integrity" of the process, as structured by the legislature, is undermined, not promoted, when parties set terms with such purpose and effect.

In respect to the Union's claim of entitlement to support as the exclusive bargaining representative, the Union says: "[I]t is not unlawful strike activity, but legitimate, good faith bargaining for which the Union is entitled to support." We agree, but the key word is "legitimate," and we feel that the particular agreement under discussion does not enjoy that standing.

As to the legitimacy of the agreement, the Union argues:

> "It is unreasonable, arbitrary and capricious for the Commission to characterize the layoff provision as 'having no purpose or effect other than to induce employees to strike,' when, in fact, the Commission can only speculate as to the intentions of the parties. There is no evidence to support this assertion, and every reason to believe it served other justifiable ends--including settlement of the strike and an orderly resumption of work."

Our original decision expressly recognized that recall by seniority agreements at the end of strikes serve valuable purposes of providing a fair and orderly return to work as business gradually returns to its pre-strike level. The problem here, however, is that the Union has brought an action predicated on a violation of that agreement by reason of the Employer's making whole those employes who would have worked but for the

Union's illegal strike. Were the Union to prevail, the Commission would be lending its authority to the goal of dissuading employes who otherwise would work, thereby encouraging them to join the strike. We feel we have no authority to join that effort, and therefore said agreement, as sought to be applied, is wholly unenforceable. Further, it hardly is speculative to discern the natural consequences which would follow were we to enforce this agreement, and the reliability of our view is only enhanced by the Union's failure to offer any evidence, although it asks for rehearing, which might negate this conclusion.

It appears that the Union has misconceived our ruling. Its brief states:

> "The fact that the strike itself was prohibited does not render the provisions of the strike settlement void. And yet, the Commission's decision leads to the inescapable conclusion that all provisions of the 1976 Agreement are voidable as 'inducing support for illegal strike activity', because the Agreement, in effect, expedited the return of striking employees to their jobs.
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> "The implication of this ruling is to make all agreements reached between employer and employees for the purpose of ending an illegal strike voidable, and subject to charges of furthering unlawful strike activity. It is difficult to imagine a principle more in derogation of the legislative goal of employment peace than this."

We do not hold, as the Union apparently would urge us to hold, that any agreement which helps to end a strike is lawful. Otherwise, a "settlement agreement" calling for the discharge of non-Union employes, or permitting employes to strike at will, would be valid.

Nor do we hold, as the Union apparently but mistakenly believes we hold, that an agreement is void because it helps to end a strike. For example, we have no doubt of the validity of a non-recrimination agreement, by which the Employer agrees not to discipline employes who have engaged in an illegal strike. Strikes occur notwithstanding the possibility of such disciplinary sanctions. To conclude otherwise would demonstrate a lack of understanding of the ingredients of employes' motivations in deciding whether to strike. Strikes occur notwithstanding the consequent loss of income to employes; knowledge of the possibility or threat of replacement by new employes; and even in the face of specific court injunctions with their concomitant potential sanctions of fines or incarceration. Strikes are ended, as well as prevented in the first instance, by responsible collective bargaining, effective mediation and other such dispute resolution mechanisms, not by the threat of or imposition of disciplinary sanctions. In fact, such sanctions often inflame the dispute; they do not alleviate the underlying disrepair to the employment relationship which caused the strike; and they can deter peaceful settlements. In light of this, we believe non-recrimination agreements should be encouraged, although we recognize that in certain circumstances, for example, egregious strike misconduct like violence, an employer may properly exercise its discretion to impose discipline.

Thus, the fact that an agreement helps to end a strike assures neither its validity nor its invalidity. It is the terms of the agreement itself which are dispositive.

Here, the instant settlement agreement, as sought to be applied in this case, aimed only to discourage any attempts by an employe to honor the statutory prohibition against strikes by prohibiting the Employer from paying employes who otherwise would have sought to work.

Accordingly, the petition for rehearing must be denied.

Dated at Madison, Wisconsin this 8th day of February, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Charles D. Hoornstra, Commissioner