STATE OF WISCONSIN CIRCUIT COURT KENOSHA COUNTY

LEE BODOH,

Petitioner,

Case No. 82-CV-255

v.

WERC and G&H PRODUCTS, INC.,

Respondents. Decision No. 17630-B

NOTICE OF ENTRY OF DECISION AND ORDER

TO: John Caviale
Joling, Rizzo, Willems, Oleniewski
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PLEASE TAKE NOTICE that a decision and order of which a true and correct copy is attached hereto, was signed by the court on the 24th day of April, 1984, and duly entered in the Circuit Court for Kenosha County, Wisconsin, on the 26th day of April, 1984.

Dated at Madison, Wisconsin, this 4th day of May, 1984.

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STATE OF WISCONSIN : CIRCUIT COURT : KENOSHA COUNTY

LEE BODOH,

Petitioner,

-v.-

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent,

-and-

G & H PRODUCTS, INC.,

Respondent,

DECISION

Case No.: 82-CV-255

Decision No. 17630-B

The petitioner brings this action to review a Wisconsin Employment Relations Commission decision holding that he lacked standing to seek the enforcement of an award under §111.06(1)(f) of the Wisconsin Statutes. The decision of the Wisconsin Employment Relations Commission is affirmed.

Prior to the commencement of the hearing in this matter, the Court advised all parties that it periodically sits as an Arbitrator for the Wisconsin Employment Relations Commission by appointment of its chairperson and offered to recuse itself if any party so requested. All parties, by the counsel, agreed that the Court should hear the case.

The petitioner was the grievant in an arbitration proceeding before Arbitrator George Jacobs. He was an employee of G & H Products, Inc. and was represented by the International Association of Machinists and Aerospace Workers, Lodge 34, which instituted the initial grievance. The Arbitrator ruled that the change in incentive rates by the Company violated the collective bargaining agreement in effect between the Company and the Union at that time.

The petitioner then contended the award entitled him to receive back pay. The Company objected. The Union then sought to have the matter

resubmitted to the Arbitrator for clarification. The Company did not consent to that procedure.

Bodoh then filed a complaint with the Wisconsin Employment Relations Commission alleging that G & H Products, Inc. committed an unfair labor practice under §111.06(1)(f) by refusing to comply with an arbitration award. Bodoh brought this petition to the Wisconsin Employment Relations Commission as an individual. It was not brought on his behalf by the Union. It appears to have been brought with the Union's sanction, but without their active participation. He did not allege at any time that he was not fairly represented by his Union.

The matter was assigned to Wisconsin Employment Relations Commission Hearing Examiner Stuart Mukamal who denied the employer's motion to dismiss the complaint on the ground that Bodoh lacked standing to bring the action. Examiner Mukamal said:

> "...it is clear the Complainant is indeed a real party in interest to these proceedings and possesses a substantial individual claim which may be adjudicated before the Commission by way of a proceeding to confirm the award pursuant to applicable statutory authority contained in Chapter 111, Wis. Stats. This is not a situation in which the Complainant seeks to circumvent the remedies available to him under the opposition of the exclusive bargaining representative,... Rather, it is a case in which the Union on the Complainant's behalf pursued and exhausted all possible remedies under the Agreement..."

In denying the employer's motion to dismiss, Examiner Mukamal further said:

> "There is no public policy or purpose associated with collective bargaining process that would be served by precluding the Complainant at this point from proceeding in his individual capacity or by requiring the Union to be joined as a formal party to these proceedings."

The employer appealed this decision to the Wisconsin Employment Relations Commission. The Commission, in it's decision of January 29, 1982, reversed the Hearing Examiner and said:

> "...where, as here, the employee's bargaining representative has the contractual right to invoke the arbitration process, the bargaining representative's decisions as to the utilization of that process are not subject to a successful challenge by an employe absent a showing that the bargaining representative has breached its duty of fair representation in the handling of the employe's grievance."

The Commission further said:

> "The Employer has persuasively argued that the decision to seek enforcement of an arbitration award is essentially the last stage in the grievance-arbitration process. As the bargaining representative, absent a duty of fair representation claim, has exclusive control over contract administration and enforcement, its exclusive representational rights must logically extend to the decision to seek enforcement of an arbitration award. Thus, the decision of the Union not to seek enforcement of the award must be honored absent a claim that said decision constituted a failure by the representative to fairly represent Complainant Bodoh."

From this decision, reversing the ruling of Examiner Mukamal, by the Wisconsin Employment Relations Commission, the petitioner has now appealed to the Circuit Court under Chapter 227, Wis. Stats.

The petitioner in this case is challenging the decision of the Wisconsin Employment Relations Commission, denying him the right to enforce the award.

It is well established that a Union has the exclusive right to represent the employees in a bargaining unit. In Coleman v. Outboard Marine Corp., 92 Wis.2d 565, 573, 285 N.W.2d 681 (1979) the Court held "The employee does not have an absolute right to arbitration. The fact that the Union settles a grievance short of arbitration does not, without more, constitute a breach of the duty of fair representation."

The right to determine which cases should be arbitrated and how far to proceed are within the province and control of the Union, absent bad faith. The duty to administer the contract is within the Union's domain; public policy cannot allow it to be enforced by an individual member possibly to the detriment of the majority of the membership, so long as they are acting in good faith.

In order to seek to enforce contract provisions without the Union's participation and consent, the petitioner must allege bad faith, i.e., that the Union refused to fairly represent the employee in handling his grievance, Vaca v. Sipes, 386 U.S. 171 (1967), Hines v. Anchor Motor Freight, 424 U.S. 554 (1976).

Labor peace is best preserved by giving the Union the ultimate authority to decide how an arbitration award is to be enforced so as to fulfill its role as exclusive bargaining agent, to maintain employer confidence, and to channel grievance remedies into defined and recognized methods.

The petitioner in this case does not allege that his Union refused to fairly represent him. Absent such an allegation, a decision to allow him to proceed as an individual has been recognized only if he has exhausted all steps and procedures in the grievance-arbitration process.

In DelCostello v. Teamsters, 76 L.Ed.2d 476, 488, __U.S.__, 103 S. Ct. 228, the U.S. Supreme Court said:

> "It has long been established that an individual employee may bring suit against his employer for breach of a collective bargaining agreement. Smith v. Evening News Assoc., 371 U.S. 195, 9 L.Ed.2d 246, 83 S.Ct. 267 (1962). Ordinarily, however, an employee is required to attempt to exhaust any grievance or arbitration remedies provided in the collective bargaining agreement."

The court in DelCostello, supra, dealing with a case in which it was alleged that a union had breached its duty of fair representation, speaks of the need to exhaust contract grievance/arbitration remedies as an exception to the requirement to allege failure of representation.

In his ruling, Examiner Mukamal found that the Union had exhausted its remedies under the contract on the petitioner's behalf. This view was not adopted by the Wisconsin Employment Relations Commission which held that the decision to seek enforcement of the award is the last stage in the arbitration process.

The standard that a reviewing Court must follow in examining an administrative agency's decision is found in Wisconsin Environmental Decade, Inc. v. DILHR, 104 Wis.2d 640, 644, 312 N.W.2d 749 (1981). The Court there said "...the construction and interpretation of a statute by the administrative agency which must apply the law is entitled to great weight and if several rules or applications of rules are equally consistent with the purpose of the statute, the court should defer to the agency's interpretation."

In particular, the Supreme Court has held that the Wisconsin Employment Relations Commission's interpretation of §111.01 to 111.19 of the Wisconsin Statutes should be upheld when they said in Chauffeurs, Teamsters & Helpers v. WERC, 51 Wis.2d 391, 405, 187 N.W.2d 364 (1970), "in the event of differing interpretations of the statute, both reasonable, the agency's construction is accepted by the Court."

Finally, the petitioner cites F.W. Woolworth v. Miscellaneous Warehouseman's Union Local 781, 629 F2d, 1204 (1980) Cert. denied 451 U.S. 937, 101 S.Ct. 2016, 68 L.Ed.2d 324 (1981), and the decision the Supreme Court issued on March 21, 1984 in NLRB v. City Disposal Systems, Inc., (cited as 52 Law Week 4360), in support of his position.

In F.W. Woolworth, supra, the complainant's union had successfully pursued the grievance through the arbitration process. Only after the employer had successfully appealed the decision to the Trial Court did the union choose not to appeal the case to the next level. The employees then attempted to intervene as individuals but that request was denied by the Federal District Court. The 7th Circuit Court of Appeals reversed and allowed their petition to intervene.

It is apparent that the grievance-arbitration process in F.W. Woolworth, supra, had long been exhausted when the employees sought to intervene and the union decided not to appeal. Those facts clearly distinguish that case from the facts in the Bodoh petition.

Bodoh also relys on NLRB v. City Disposal Systems, supra. The Court in City Disposal Systems, supra, is dealing with the definition of "concerted activity" under Sec. 7 of the National Labor Relations Act, a question totally unrelated to the issue here in dispute.

The decision of the Wisconsin Employment Relations Commission is affirmed.

Dated this 24th day of April, 1984.

BY THE COURT:

Frederick P. Kessler

Frederick P. Kessler
Reserve Circuit Judge