STATE OF WISCONSIN CIRCUIT COURT, BRANCH 5 DANE COUNTY



DRIVERS, SALESMEN, WAREHOUSEMEN, MILK PROCESSORS, CANNERY, DAIRY EMPLOYEES and HELPERS LOCAL 695,

Petitioner,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

MEMORANDUM DECISION

Case No. 81-CV-2365

Decision No. 18565

Petitioner seeks judicial review of two decisions issued by respondent (Commission) concerning the County of Sauk's (County) refusal to include a certain "recognition clause" in a labor agreement negotiated with the petitioner in late 1979. Sauk County had petitioned the respondent for a declaratory ruling as to whether the recognition clause was a permissive or mandatory subject of bargaining between the parties. Petitioner subsequently filed a prohibited practice complaint charging that the County was refusing to bargain by its insistence on deletion of the clause from the contract. The declaratory ruling was issued on March 27, 1981 and, consistent with that ruling, an order was issued on April 1, 1981 dismissing the prohibited practice complaint. Upon petitioner's motion to reconsider the latter dismissal order, the Commission issued a further order on May 6, 1981 and included another memorandum explaining the basis for its order denying the motion to reconsider. Further necessary facts are adequately detailed in petitioner's brief in support of the petition for review and will not be repeated here.

I.

Petitioner originally filed its petition for review of the March 27, 1981 declaratory ruling on April 25, 1981. When the Commission denied the union's motion to reconsider its dismissal of the prohibited practice complaint on May 6, 1981, petitioner filed an amended petition for review on June 5, 1981. Pursuant to sec. 227.16(1)(c), Wis. Stats., copies of the petition shall be served upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made not later than 30 days after the filing of the petition. Furthermore, every person served with a petition for review who desires to participate in the proceedings shall serve upon the petitioner a notice of appearance within 20 days after service of the petition upon such person. Sec. 227.16(2).

By affidavit of the secretary to counsel for the Commission and the attached returned receipt of certified mail, it is apparent that counsel for Sauk County was properly served with a copy of the petition for review shortly after June 9, 1981. Given such timely service, counsel for Sauk County's failure to timely serve a notice of appearance in this proceeding now precludes the County from participating in this review. While sec. 227.16(1)(d) does allow the Court to permit other interested parties to intervene apparently at any stage of the proceeding, "other interested parties" cannot be read to mean a party already properly served with a petition for review. To interpret it so would render meaningless the requirements found in sec. 227.16(2). As such, the brief submitted by Sauk County will not be considered in this memorandum decision.

II.

The recognition clause in dispute during negotiations read as follows:

> The County of Sauk hereby agrees to recognize Teamsters Union Local No. 695 as the sole and exclusive collective bargaining representative for hours, wages and other conditions of employment pursuant to the certification of the Wisconsin Employment Relations Commission for the following employees:
>
> All employees of the Sauk County Courthouse and clerical employees of the Sauk County Highway Department, excluding supervisory, professional, confidential and craft employees, and law enforcement employees with the power of arrest.

The declaratory ruling issued by the Commission provided:

> That Sauk County, upon the request of Teamsters Local 695, must include a recognition clause in the new collective bargaining agreement existing between Sauk County and Teamsters Local 695, covering the wages, hours and working conditions of the employes in the appropriate collective bargaining unit involved herein, provided said recognition clause includes a statement to the effect that said provision is set forth merely to describe the bargaining representative and the bargaining unit covered by the terms of said collective bargaining agreement, and is not to be interpreted for any other purpose.

Petitioner argues that the Commission violated the provisions of sec. 111.70(4)(b) when it failed to rule upon the recognition clause as submitted, but instead drafted the alternative language for inclusion in the labor agreement.

In its memorandum accompanying the declaratory ruling, the Commission noted with approval the following language of the United States Supreme Court in NLRB v. Wooster Div. of Borg-Warner Corporation, 356 U.S. 342, 78 S. Ct. 718, 2 L. Ed. 2d 823 (1958):

> (I)t is lawful to insist upon matters within the scope of mandatory bargaining and unlawful to insist upon matters without ... The "recognition" clause ... does not come within the definition of mandatory bargaining.

This discussion in the memorandum strongly suggests that the declaratory ruling in effect determined that the recognition clause as originally submitted to the Commission was not a mandatory subject of bargaining. The ruling thus in essence concluded that it was unlawful for the petitioner to have insisted upon inclusion of the clause, the clause as originally submitted, in the labor agreement at issue.

Further discussion in the Commission's memorandum explains why the declaratory ruling was issued in the form that it was -- requiring the County to include an expanded version of the clause in the collective bargaining agreement. The Commission quoted further from Borg-Warner:

> The statute requires the company to bargain with the certified representative of its employees. It is an evasion of that duty to insist that the certified agent not be a party to the collective bargaining contract.

Since it is a separate breach of duty for an employer to exclude the certified representative of the employees from the contract, a clause to that effect must be inserted into the labor agreement. Apparently the Commission felt the easiest way of doing so was to just use the original recognition clause and add a phrase that further explains the purpose of including the expanded clause in the contract. Such reasoning is reflected in the form in which the declaratory ruling was ultimately issued.

This was substantially the same situation that was at issue in Borg-Warner. Although the NLRB on one hand found that it was unlawful to insist on a pure recognition clause since it is not a mandatory subject of bargaining, it determined on the other hand hat it was proper to insist upon a clause that merely identifies the certified bargaining representative of the employees. The former

issue concerns whether a particular clause is a mandatory or permissable subject of bargaining; the latter requires only the application of the law that precludes an employer from excluding the certified bargaining representative of the employees from the labor agreement. Although on its face the Court's rulings in Borg-Warner almost appear to be inconsistent, they in fact are not. In dispute were two separate bargaining contract issues and the Court merely ruled on each.

Such an analysis of the Commission's reasoning is fully supported by further discussion included in the Commission's memorandum accompanying order denying motion to reconsider. Referring to the separate and distinct issue of an employer's breach of duty to bargain when it excludes the name of the certified representative of the employees, the Commission noted:

> ... that the County had a duty to include such a clause in its new collective bargaining agreement provided it included a statement to the effect that said provision is set forth merely to describe the bargaining representative and the bargaining unit covered by the terms of said collective bargaining agreement and is not to be interpreted for any other purpose.

Commenting then on the issue of whether the recognition clause as originally submitted was a mandatory or permissive subject of bargaining, the Commission added:

> It obviously follows, based on said ruling, that the County did not violate its bargaining obligation by its refusal to include the above recognition clause without the addition of such a proviso.

Thus, contrary to that asserted by petitioner in this review, the declaratory ruling did address the language in the recognition clause as originally submitted to the Commission. It merely ruled additionally on an issue closely linked with the recognition clause -- the right of employees to include a clause in a labor agreement

that identifies their certified bargaining representative. As such, the Commission did not violate its statutory duty under sec. 111.70(4)(b) to resolve bargaining disputes between a municipal employer and a union of its employees.

III.

Petitioner insists that the Commission's decisions dismissing its prohibited practice complaint and denying its motion to reconsider are both unsupported by substantial evidence in the record and erroneous as a matter of law. As explored above, it is apparent that petitioner misreads the Supreme Court's holding in Borg-Warner. First, the Supreme Court ruled that a "recognition clause", however it may be worded or whatever rights it may or may not create, is not a mandatory subject of bargaining and thus it is not lawful to insist upon it during negotiations. This holding was reflected in the Commission's declaratory ruling when it in effect ruled that the petitioner could not insist upon inclusion of the recognition clause in issue. Second, the Supreme Court in Borg-Warner did concede that it would be a breach of duty if the employer refused to allow a provision in the agreement which merely identifies the name of the certified representative of the employees. Conscious that the recognition clause as originally submitted to the Commission might do more than just identify the representative, the Commission restructured the clause so that its effect is only to name Local 695 as the employees' bargaining representative.

Thus, even if the testimony before the Commission did indicate that the County representatives insisted to impasse on the total deletion of the recognition clause from the parties' agreement, the County did not "refuse to bargain" given the first holding

of Borg-Warner as reflected above. The prohibited practice complaint filed by Local 695 focused on this issue -- the County's refusal to allow a standard "recognition clause" to be included in the new labor agreement. Applying the facts as presented to the applicable law, that issue was appropriately decided against the petitioner in the Commission's declaratory ruling and accompanying order dismissing the prohibited practice complaint.

The prohibited practice complaint did not further address directly the secondary issue of the employees' right to an "identification" provision the sole purpose of which is to name their certified bargaining representative. Although the Commission ruled that the County could not prevent the insertion of such a provision, refusal by the County to include a mere identification provision was not technically the conduct complained of in petitioner's prohibited practice complaint. While the declaratory ruling included the Commission's additional comments on inclusion of such an identification provision, the prohibited practice complaint as filed by petitioner was appropriately dismissed and the motion to reconsider was within the Commission's discretion to deny.

IV.

Finally, petitioner alleges that the Commission committed a material error in procedure because the declaratory ruling was issued by two commissioners who were not the same two commissioners who heard the case. Furthermore, it is asserted that the fairness of the entire proceedings was impaired due to a delay in issuance

of the declaratory ruling in violation of sec. 111.70(4)(b). Pursuant to sec. 227.20(4), the Court "shall remand the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure."

As apparent from much of the above discussion, the Commission's decisions appealed from were based almost entirely on two principles of law established by the Supreme Court in Borg-Warner. A review of the memorandums accompanying the declaratory ruling, the order dismissing the prohibited practice complaint, and the order denying the motion for reconsideration reveals that the Commission relied very little on the particular facts of the parties' contract negotiations in reaching its decisions. As such, the commissioners' perceptions of the witnesses at the hearing were not crucial to the decisions ultimately rendered. Even if the petitioner was in part denied of direct input to one of the decision makers, such irregularity in no way impaired the fairness of the proceedings as they were ultimately resolved.

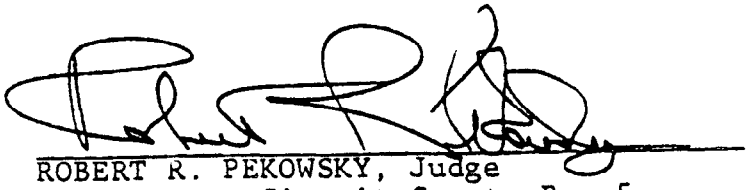
While the Commission should probably be admonished for its delay of nearly a year in issuing its decisions, such failure to follow prescribed procedure did not impair the fairness of the proceedings either. Again, since the particular facts of the parties' labor negotiations as brought out in testimony were not essential to the Commission's declaratory ruling, faded memories or forgotten perceptions likely would not affect the orders as issued. Furthermore, while litigants are always anxious to have the tribunal quickly resolve their dispute, petitioner has not shown that the delay in ruling on this one provision has adversely affected

negotiations on future contracts. It is not appropriate to remand this case to the Employment Relations Commission for further action.

Counsel for the Commission shall prepare Findings of Fact, Conclusions of Law, and Judgment consistent with the findings in this Memorandum Decision.

DATED: May 21, 1982

BY THE COURT:



ROBERT R. PEKOWSKY, Judge
Dane County Circuit Court, Br. 5

cc: Atty. Marianne Goldstein Robbins
Atty. John D. Niemisto
Atty. Robert Hesslink, Jr.