

JUL 25 1985

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

1 STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
2 BRANCH 10

3 MILWAUKEE BOARD OF SCHOOL
4 DIRECTORS,

Petitioner,

-vs-

Case No. 646-304

6 WISCONSIN EMPLOYMENT RELATIONS
7 COMMISSION,

Decision No. 21050-D

8 Respondent.

10 DECISION

12 October 9, 1984, p.m.

HON. RUDOLPH T. RANDA
Circuit Court Judge - Br. 10

14 A P P E A R A N C E S

15 STUART S. MUKAMAL, Assistant City Attorney,

16 appearing for the Petitioner.

17 ALBERT ROZRAN, Attorney at Law, appearing on

18 behalf of the International Union of Operating

19 Engineers, Local 950.

20 DAVID RICE, Assistant Attorney General, appearing

21 on behalf of the Respondent.

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23 HEIDI J. TRAPP - Official Court Reporter

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EXCERPT OF PROCEEDINGS

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THE COURT: The Court has indicated it has read the briefs in this matter, including the letter and now the submission of the 51 Am.Jur.2d section on limitations of actions, particularly Sec. 150 and the footnotes thereto, and is familiar with the facts in this matter, not only from this action but also eliciting prior argument on request for a stay order by the School Board and there is no doubt in anyone's mind that the Statute of Limitations has passed. As to its reference with the July 14th--or 13th--July 13th order, the first question is the motion to dismiss, and if we rule in favor or if there's a decision in favor of the union or the School Board, why, the next issue is on the merits and that is whether the Statute of Limitations has run. But we have in this particular situation, given the factors that the Court has to consider relative to the motion to dismiss, as to whether or not this is something that is within the jurisdiction of the Court. In other words, whether there is a finality here that the Court can consider and when I discuss in this decision that I am going to render now the first question, the motion to dismiss on the lack of jurisdiction, I think I am going to be touching upon some

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1 of those questions that relate to the latter question of
2 whether or not the statute has run. I think that the
3 Nodell case is persuasive authority because I think it
4 does sum up these footnotes, the proper factors that a Court
5 should take into account, because just as a third party's
6 actions in some instances can toll the Statute of
7 Limitations, there are some orders of the Commission,
8 though not deemed or labeled final but interlocutory, can
9 have the effect of being a final order, and
10 it's my judgment that the order appealed from here is a
11 final order and that it does come within the confines of
12 the Nodell precedent. I think that the discussion
13 that we have had relative to the second question of whether
14 or not the Statute of Limitations has been tolled by the
15 actions of W.E.R.C. wherein Mr. Rice has discussed,
16 and very capably so, the fact that the action of a third
17 party can toll the statute as to another party defendant,
18 and because that issue exists, the very existence of that
19 issue means that the Court should not, if it is determining
20 the second question, decide it now but indeed send it back
21 to the Commission or back pursuant to the Commission's
22 order to have a full scale hearing on the matter so that
23 that determination can be made there, with the opportunity
24 as the order indicates for the City or the School
25 Board to bring in facts rebutting the presumption that it

1 has in its order, that its actions misled the Petitioner
2 here, Mr. Kraucunas. The very fact, however, that this is
3 a question that is going to have to be--to get a final
4 answer resolved by the Supreme Court, the very fact that
5 it's been represented by Mr. Rice as a question of law
6 and difficult question of law, leads the Court to
7 conclude that under one of the standards at least under
8 Nodell that--and the Brookfield case cited by Mr. Mukamal
9 and was in Mr. Rozran's brief also which is Sec. 819, that
10 where the W.E.R.C.'s expertise is not an important
11 factor, that that will be a consideration in
12 determining whether or not the question is something that
13 merits the label of final and not interlocutory. I
14 don't think that the W.E.R.C.'s expertise under those
15 precedents and under that reasoning extends to the
16 determination of this question. That has to be
17 looked at also in light of the fact that there are some
18 significant rights involved and we do have people asserting
19 the Statute of Limitations defense and those rights are
20 as indicated by--in Sec. 150 of 51 Am.Jur.2d, not
21 extinguished by the act of a third person generally in
22 concealing a cause of action against a defendant. That
23 concealment does not constitute a concealment as to
24 prevent the running of the Statute of Limitations in favor
25 of the Defendant, and my reading of that section relative

1 to the exceptions to that general rule are when we
2 have things like fraud, we have a case of a clerk who
3 is duty-bound to perform administerial duties as
4 highlighted by Mr. Rice and refuses to do so, that only
5 in these situations and with these exceptions does that
6 right to the assertion of the Statute of Limitations
7 become weakened or does it prevent the party asserting
8 the right from doing it successfully, so if it's not a
9 constitutional right that's involved, it's certainly
10 something that is fairly close to it, which falls into
11 the other categories of Nodell. I might add
12 that no one does have a constitutional right,
13 supposed to participate or use the right not to participate
14 in that proceeding. That makes good sense to the Court
15 and let me state also that the Court is a firm believer
16 for reasons of judicial economy and also for--from a
17 standpoint of personal workload in the idea and principle
18 of exhaustion of remedies, but I think that there is
19 something to be said for the fact that if indeed an
20 assertion of a right is going to obviate the need and
21 prevent someone from engaging in a fruitless and needless
22 hearing, why, that the Court ought to assert--allow
23 that person to assert that right at that time. The
24 Court is also of a mind that the--because it's--that
25 another condition of the Nodell case, that the order

1 is or would be fatally void, that reflects upon a
2 determination as to the merits of the case, really,
3 and given the Court's interpretation of Sec. 150 and
4 at least thrust of this area of the law, its tenor
5 and its tone, it appears that concealment by a third person
6 has to be a concealment of the nature outlined in these
7 cases here and the Court is bound by the record and it's
8 bound by the letters that were sent and exchanged between
9 Mr. Kraucunas and the Commission and it finds that that
10 exchange and the contents therein really doesn't rise
11 to the level of a concealment that would toll the statute.
12 Concealment by a third party that would toll the statute.
13 That leads us to the result that even if the Court
14 ordered a remand or upheld the remand, the examiner would
15 be asking pursuant to that order, asking the Milwaukee
16 Board of School Directors to submit rebuttal testimony
17 as to the presumed misleading of Mr. Kraucunas by the
18 Commission in an effort to determine whether or not the
19 Statute was tolled. And effort to determine whether or
20 not he indeed was misled, but the Court is concluding
21 from the standard that it finds in Sec. 150 and what
22 it thinks is the tenor and tone of these cases, that
23 that would be pointless. That the--it would be fruitless.
24 In fact that falls in with point seven under Nodell, that
25 the hearing would be futile and useless because in the

1 Court's determination under these facts, the taking of
2 that testimony is neither here nor there. It's
3 inconsequential because the Court has said regardless
4 of whether or not the party was misled by the Commission--
5 that is Mr. Kraucunas--it does not prevent either the
6 union or the Milwaukee Board of School Directors from
7 asserting its statute of limitations defense because it --
8 the statute wasn't tolled by such action. What I'm really
9 saying here in ruling on one of the factors in Nodell
10 is that once I conclude here--I'm going to be very short
11 in my arguments on the merits because I am stating those
12 arguments on the merits right now--but in order
13 to provide a record as to why I think first of all that
14 it's not an interlocutory but final order, I have
15 to go through this exercise. The fact that the
16 administrative remedy or the factor that the administrative
17 would not be an adequate remedy or that it would cause
18 irreparable harm is not something that the Court
19 can find exactly but certainly it would not, at least
20 in the Court's structuring of things so far, benefit
21 either the Union or the Milwaukee Board of School
22 Directors to go through the exercise of having to submit
23 evidence and go to a hearing on this matter. All of this
24 has to be considered and the Court is and the record should
25 reflect that the Court is considering it in the light of

1 that there is up to this point or was up to this point
2 really no formal introduction of the Milwaukee School
3 Board in these proceedings until that July 14th order
4 and--July 13th order and it further, I think, highlights
5 the difference between this Commission's proceeding and
6 what would be termed the normal case. I think that it
7 does reflect in that way on the first factor that was
8 outlined in Nodell and that is as to the jurisdiction
9 of the Commission to issue that order. I think that that
10 is seriously subject to question in the form of a remand
11 order and interlocutory order that I think doing something
12 that wouldn't normally be done, although the argument
13 can be made that well, it's because of our interpretation
14 which is that the--if not but for our actions the City
15 would have been a party a long time ago but without any
16 formal complaint or formal notice having been served on
17 the City up to that point, I think there is a question
18 as to its capacity to issue the order.

19 The Court has heard the arguments made
20 from the Union and the Milwaukee Board of School Directors
21 and has obviously read the argument and has thought that
22 perhaps this might have been a better basis for a Writ of
23 Prohibition, but I still think that this case falls within
24 the--that which has been defined as the "exceptional case"
25 which does permit judicial review before the exhaustion

1 of the administrative remedies that the Court has been
2 asked to allow or permit. I know that Nodell also, when
3 I cite the factors from Nodell relative to this first
4 question, reiterates that exhaustion will be required.
5 That that is the standard where an administrative remedy,
6 as cited by Mr. Rice in his letter brief, is available.
7 It's relatively rapid and will protect the party's claim
8 of right but I think that the exceptions made by Nodell
9 or outlined by Nodell, the factors cited therein, the
10 footnote, are so strong in this case that I think that
11 they have a--the right to assert it at this time and the
12 Court having concluded that and in drawing that conclusion
13 having already discussed the second issue which is the
14 merits of the case, that being that the action of the
15 Commission based upon this record is that they have
16 presumed from their analysis of the correspondence
17 between Mr. Kraucunas and themselves, that he was misled,
18 that the only--and it's the Court's opinion that analysis
19 of that testimony does not fall within one of the
20 exceptions that have been outlined by Sec. 150 justifying
21 a tolling of the Statute of Limitations and that offering
22 party to rebut that testimony which would and could only
23 lessen the status of that testimony relative to the issue
24 at hand, it is the Court's conclusion that the Union shall
25 prevail on this matter and prevail because the Milwaukee

1 Board of School Directors is prevailing, I guess.

2 One of the other things that should be mentioned
3 and that I left out I think is important in the Court's
4 decision, is Mr. Rozran's argument which has certainly
5 a degree--a significant degree of impact with the Court
6 and that is that if questions of dismissals or an order
7 dismissing the case is certain and final, one which
8 overturns an order of dismissal can also be considered
9 final. There is a--I think a significant strength to
10 that argument that we are dealing with a dismissal here
11 and overturning a dismissal against the union based upon
12 the Commission's perception that it should be overturned
13 because a party wasn't joined because of their mistake or
14 inadvertence or misadvice to Mr. Kraucunas, but I
15 still think that doesn't detract from the fact that as far
16 as Mr. Rozran's client goes, that that order was pretty
17 final and there is something to be said that the City
18 relative to the finality issue in question, can coattail
19 the Union on that and not saying the decision is based
20 solely on that but it's certainly a significant
21 factor when placed in connection with all the other
22 factors that the Court has discussed in Nodell and has
23 considered otherwise on these facts, so that's
24 the Court's ruling and I'm going to grant the
25 relief sought by the Milwaukee School Board and

1 the Union to set aside the July 13th decision and order
2 and that will mean that the order of December 5th, 1983,
3 ordering the dismissal on its merits of the Complaint
4 in that action will be granted and also that the
5 City of Milwaukee has asserted its defenses to the
6 satisfaction of the Court and they also will be
7 dismissed. When I say City of Milwaukee, excuse me.
8 I mean Milwaukee Board of School Directors represented
9 by the City Attorney's Office of the City of Milwaukee.
10 Any questions?

11 MR. MUKAMAL: Would you like a formal
12 order prepared or how would you wish to proceed, Your
13 Honor?

14 THE COURT: Fine. Fine. The Court will
15 put the burden on the Milwaukee School Board to prepare
16 that order. Under the five day rule submit it to
17 both other parties and go from there.

18 MR. MUKAMAL: Okay. Thank you.

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STATE OF WISCONSIN)
)SS:
MILWAUKEE COUNTY)

I, HEIDI J. TRAPP, an Official Court Reporter
for the State of Wisconsin, do hereby certify that I reported
the foregoing Transcript of Proceedings; that the same is
true and correct as reflected by my original machine
shorthand notes taken at said time and place before the
HON. RUDOLPH T. RANDA.

Dated at Milwaukee, Wisconsin,
this 9th day of November, 1984.

Heidi J. Trapp
Registered Professional Reporter