STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, Complainant, vs. MILWAUKEE BOARD OF SCHOOL DIRECTORS, Respondent.	:	Case 173 No. 36114 MP-1800 Decision No. 23223-B

Appearances:

Perry, First, Lerner, Quindel & Kuhn, S.C., by Mr. Richard Perry, and Ms. Barbara Zack Quindel, 823 North Cass Street, Milwaukee, Wisconsin 53202, appearing for Complainant.

Mr. Stuart S. Mukamal, Assistant City Attorney, City of Milwaukee, City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202, appearing for Respondent.

ORDER DENYING MOTION TO DISMISS

On December 10, 1985 the Milwaukee Teachers' Education Association filed a complaint with the Wisconsin Employment Relations Commission alleging that the Milwaukee Board of School Directors had violated Sec. 111.70, Wis. Stats., by refusing to bargain on a large number of issues raised by Complainant in its then-current collective bargaining with Respondent. Hearing was held on July 8, 1986 before the undersigned Examiner, and thereafter the parties mutually agreed to defer a briefing schedule pending attempts to resolve the dispute informally. On October 7, 1987, Respondent filed a motion to dismiss the complaint on grounds of mootness. The parties filed briefs concerning the motion; the briefing process was completed on March 2, 1988. The Examiner has carefully considered the parties' arguments, and concludes that the complaint is not moot. Accordingly, it is

ORDERED

That the Motion to Dismiss the complaint is denied.

Dated at Madison, Wisconsin this 27th day of April, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Christopher Honeyman, Examiner

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DISMISS

The complaint in this matter essentially concerns an allegation by Complainant that Respondent illegally conditioned bargaining over a small number of contract proposals upon Complainant dropping outright a much larger number of its proposals. The complaint arose during bargaining over a 1985-86 collective bargaining agreement, and at various times since then the parties have opted to concentrate on attempts to settle this and other disputes, rather than pressing for speedy resolution of litigation. During the course of these attempts, the parties reached agreement on the 1985-86 and a successor collective bargaining agreement, without ever resolving the complaint itself. Respondent now argues that the complaint has become moot because of the agreement on a contract and for other reasons noted below; Complainant contends that the issue raised in the complaint is still appropriate for resolution before the WERC.

I must note initially that both parties have departed in some ways from the terms specified for the requested briefs on the mootness issue. In my January 27, 1988 letter stating that because an extended time had lapsed without settlement, it was appropriate to proceed with briefing on the motion, I requested that the parties address in their briefs issues of "mootness in a circumstance where the violation alleged may arise again, and of remedy where the parties have reached an agreement in the interim." The Complainant filed a brief which discussed not only these issues but also Complainant's position regarding all other issues in the case; on March 4, 1988 Respondent filed a motion to strike that part of the Complainant's brief which went beyond the requested issues. Respondent, for its part, filed a brief in which several arguments were predicated on questions of fact apparently to be construed in the light most favorable to Respondent, despite Respondent's position that the mootness issue should be decided prior to any decision on the factual issues before me. The discussion which follows will address only those arguments raised by either party which are specifically relevant to the mootness and remedy issues.

It is plain that, as Complainant argues, a motion to dismiss can only be upheld, in the absence of a full decision on disputed facts, if the matter is found moot even assuming Complainant's factual allegations are upheld in full. As Respondent has vigorously insisted on a ruling specifically on the mootness issue, I will accordingly assume for purposes of this discussion that Complainant's factual allegations would be proven by a full analysis of the record. These factual allegations include, among others possibly relevant, that the District's chief negotiator refused for some period of time to negotiate further on some 200 issues unless the Association dropped all but 10 to 15 of those issues without discussion. Respondent sees the bargaining-table discussion in somewhat different terms; but for purposes of the present motion, as noted above, that is irrelevant. What is relevant is that the parties subsequently reached not one but two collective bargaining agreements, and also received a declaratory ruling from the Commission which found a number of the Association's proposals at issue at the time the complaint arose to be permissive subjects of bargaining. Also relevant is the fact that Complainant offered evidence at the hearing that prior rounds of bargaining between these parties have been characterized by a large number of proposals, numbering in the hundreds, and by lengthy bargaining on repeated occasions.

Respondent contends that the circumstances of this case are unique. Respondent argues that the first unusual factor is that approximately 2/3 of the items alleged as part of the complaint to be mandatory subjects of bargaining were then subject to a declaratory ruling proceeding, initiated by Complainant, which placed the status of these proposals in doubt. Respondent contends that subsequently the WERC determined that most of the 117 proposals submitted for declaratory ruling were non-mandatory subjects of bargaining. Respondent argues that this justified any refusal to negotiate concerning those items. Respondent contends particularly that the "essential assumption" underlying the complaint is that the 185 Association proposals on the table as of that date were mandatory subjects of bargaining, and that subsequent declaratory rulings in many of those issues proved this assumption to be false.

I note, however, that if the Association's version of the facts is accepted (as it must, again, be assumed to be, for purposes of this motion) the District would be found to have refused to bargain on all but 10 or 15 items. That would, even granting the District's point, leave some 50 to 80 items which were mandatory subjects of bargaining, but were not part of the District's "packaging" plans. Moreover, assuming the Association's proposed facts to be true, the District did not define its insistence on packaged negotiations as applying to all mandatory subjects of bargaining or specifically identify the items which it refused to negotiate as being those which it contended to be permissive subjects. Thus it must be assumed for purposes of the mootness argument that the District refused to negotiate on a large number of issues including a least a substantial percentage of mandatory subjects.

Assuming the Association's proposed facts to be true, it must also be accepted for the present purpose that the pattern of large numbers of proposals presented by the Association, followed by reluctance to discuss most of those proposals on the part of the Employer, will probably recur. Thus the question of mootness arises within a context in which recurrence is assumed and refusal to negotiate on mandatory subjects of bargaining is also assumed. The District argues that in Milwaukee Board of School Directors, 1/ Examiner Rothstein, upheld by the Commission, concluded that in a circumstance where a successor collective bargaining agreement had been reached during pending reciprocal bad faith bargaining cases, the cases could "arguably" be dismissed for mootness. That, however, does not determine that those cases would in fact be dismissed for mootness. The District would distinguish Joint School District No. 8, City of Madison vs. WERB, 2/ on the grounds that the Court there faced an "inevitable" recurrence of the bargaining issue, which was the school calendar; in the District's view, the fact that the mandatory or permissive question then raised with respect to the school calendar would inevitably arise again distinguishes it from the present context, in which many of the items proved to be permissive. But as noted, the pattern of bargaining assumed to exist here must also be assumed to be recurring; thus the attempt to limit bargaining by insistence on negotiating only on a small number of items must also be assumed relevant for future rounds of bargaining. In that context, and in view of the protracted negotiations, again, assumed to be the pattern between these parties, the Association's reliance on Unified School District No. 1 of Racine County 3/ seems particularly apt. In that decision, the Commission found that although the activity complained of had ceased, renegotiation of the collective bargaining agreement was likely to trigger the issue again, and stated:

> If the Commission were to dismiss the case as moot at this point in time, the Respondent could engage in the same conduct in the future with the foreknowledge that there would be a considerable time lag between the filing of the complaint and a decision in the matter. Such conduct could frustrate the public policy expressed in MERA and would have the "practical legal effect" of leaving the Complainant without an effective remedy.

A second aspect of a question of mootness is whether any remedy could be devised which would have any meaningful effect. But while the parties' subsequent agreements remove the immediacy normally associated with an order to bargain, I do not agree with the District's implied contention that such an order would be meaningless. In School District of Webster 4/ Examiner Lionel L. Crowley interpreted the standard for mootness expressed by the supreme court in WERB vs.

1/ Decision Nos. 17309-B,C, 17310-B,C, (3/81, 4/81).

2/ 37 Wis.2d 483 (1967).

3/ Decision No. 11315-D (1974), at p. 8.

4/ Decison No. 21312-A (6/84).

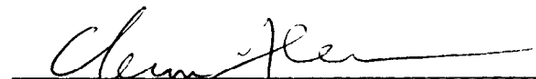
Allis-Chalmers, Corp. 5/ as implying that a moot case does not arise where recurrence is likely and a remedy can serve to forestall it:

> There is no guarantee that a party charged with a prohibited practice, who voluntarily ceases such conduct, will not in the future resume such improper conduct. The imposition of an appropriate order to conform its conduct to law is the best means of preventing such a recurrence.

For these reasons, I conclude that given the factual assumptions which must be made, the present case is not moot, and is capable of a meaningful remedy. Accordingly, the Motion to Dismiss is denied.

Dated at Madison, Wisconsin this 27th day of April, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Christopher Honeyman, Examiner

5/ 252 Wis. 436 (1948).