STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JEROME L. SCHWARTZ, Complainant, vs. CONSTRUCTION & GENERAL LABORER'S UNION, LOCAL 464, AND CONSOLIDATED PAVING CO., INC., Respondents.	Case 7 No. 40526 Ce-2069 Decision No. 26026-A

Appearances:
Mr. Jerome L. Schwartz, W10557 County Trunk "S", Columbus, Wisconsin 53925, on his own behalf.
Mr. Gordon Kraut and Mr. Robert C. Niebuhr, Secretary-Treasurer and Business Manager, respectively, of Local 464, 2025 ATwood Avenue, Madison, Wisconsin 53704, on behalf of the Union.
Mr. Richard B. Jacobson, Borns, Macaulay & Jacobson, 222 S. Bedford Street, Madison, Wisconsin 53703, on behalf of the Employer.

ORDER GRANTING STAY

The above-captioned Complainant filed a complaint of unfair labor practices on April 29, 1988 with the Wisconsin Employment Relations Commission; following attempts by Coordinator of Mediation Services, William C. Houlihan to settle this matter, Hearing Examiner Sharon Gallagher Dobish was assigned to the case on May 9, 1989; following several conversations with all of the parties, including Ms. Barbara Evert representing the Respondent Employer, all parties agreed to a hearing date of August 3, 1989 and the Notice of Hearing issued to that effect on May 29, 1989; on July 22, 1989 the Hearing Examiner was first informed by Barbara Evert that the Respondent Employer was being represented by Attorney Richard B. Jacobson; on that same date in conversation with the Hearing Examiner, Attorney Jacobson took the position on behalf of the Respondent Employer that the instant proceeding should be stayed pending the outcome of Respondent Employer's Chapter 11 bankruptcy proceeding, 11 U.S.C. Section 362(a), filed on or about June 5, 1989; by letter dated July 24, 1989 the Hearing Examiner confirmed her conversation with Attorney Jacobson, sought the parties' written positions by close of business July 31, 1989 regarding Attorney Jacobson's contentions and directed that the hearing proceed as scheduled for August 3, 1989, with regard to Complainant's allegations against the Respondent Union only; Complainant timely filed a position on Attorney Jacobson's contentions; the Respondent Union chose not to file a position thereon; as Attorney Jacobson was not available to attend the August 3rd hearing and since the Examiner wished to research and consider the contentions made by Jacobson and Complainant regarding the Federal Bankruptcy Act, the Examiner specifically reserved ruling regarding whether these proceedings should be stayed against the Respondent Employer and on August 3, 1989, proceeded to hear Complainant's claims against Respondent Union in their entirety; the Examiner then adjourned the proceeding pending her decision on Attorney Jacobson's Motion to Stay the instant proceeding. The Examiner has considered the parties' positions and arguments and she is satisfied that the Respondent Employer's Motion to Stay these proceedings should be granted, but upon different grounds than those raised by the Employer, as follows.

NOW THEREFORE it is hereby

ORDERED

1. That the Wisconsin Employment Relations Commission proceedings be stayed pending the issuance of the Examiner's decision on the merits of the Complainant's claims against Respondent Union which allege inter alia that the Union failed to fairly represent Complainant regarding Complainant's complaints that the pay and benefits he received on the job performed in the City of Middleton by Respondent Employer between April 29, 1987 and November 16, 1987 were in violation of the collective bargaining agreement between the Union and the Employer.

2. That should a violation of Respondent Union's duty to fairly represent Complainant be found, Respondent Employer shall proceed to a Wisconsin Employment Relations Commission hearing regarding Complainant's allegations against the Respondent Employer which assert, essentially, that the Employer violated Sections 111.06(f) and (3) by failing and refusing to pay contractually required wages and benefits on the above-described City of Middleton job.

MEMORANDUM ACCOMPANYING ORDER

Complainant brought this case, pro se, against both the Union and the Employer. At the hearing, on August 3, 1989, Complainant essentially claimed that the Respondent Union (hereafter Union) breached its duty to fairly represent the Complainant by failing to successfully prosecute his pay and fringe benefit claims against the Respondent Employer (hereafter Employer) relating to a particular City of Middleton job on which Complainant worked between April 29, 1987 and November 16, 1987, by otherwise failing to get a properly signed agreement from the Employer covering the City of Middleton job in question and by sending Complainant out to this City of Middleton job without making certain, in advance, that Complainant's pay and benefits would be equal to Union scale.

The Union by its agents Niebuhr and Kraut, presented documentary evidence as well as testimony in the Union's defense at the August 3, 1989 hearing. Neither Respondent Employer nor its Attorney Jacobson were present at the hearing.

The issue presented for decision here is whether a stay of these proceedings against the Employer should be granted, and if so, upon what grounds such a stay should be granted. The Employer has argued by its letter dated July 24, 1989 that 11 U.S.C. Sec. 362(a) operates as an automatic stay of all proceedings against the Employer pending the outcome of its Chapter 11 Bankruptcy case. Complainant opposed Employer's argument on the grounds that the Employer had agreed to the August 3 hearing date and that Complainant had filed the instant complaint prior to the Employer's filing its Chapter 11 petition. Complainant also resisted the Employer's request for a Stay of Proceedings on the ground that claims against both the Union and the Employer should be heard together. The Union took no position on the Employer's request for a Stay on these proceedings.

DISCUSSION

Based upon my research into the meaning and usage of 11 U.S.C. Sec. 362, I believe the Employer's request for a stay of these proceedings based upon the automatic stay provision contained in Sec. 362(a)(1) should be denied. Initially, I note that Sec. 362(b)(4) states an exception to the Sec. 362(a)(1) stay provision, as follows:

> (b) The filing of a petition under Section 301, 302, or 303 of this title, . . . does not operate as a stay --
>
> . . .
>
> (4) under section (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power . . . .

Thus, in my view, Sec. 362(b)(4) specifically allows the continuation of the case before me as it pertains to this Employer. In this regard, it is undisputable that the WERC is a "governmental unit" and that it exerts its police/regulatory powers, properly granted by State statute, when it issues decisions pursuant to claims made under Section 111.06, Stats. Further-more, it is clear, according to long-established precedent, that the WERC is the exclusive forum for claims such as the instant one which allege that an employer has breached a collective bargaining agreement. No other agency or court, in either the State or Federal arenas, has jurisdiction over these matters. Finally, I note that appeals from WERC rulings in cases such as the instant one may only be heard by state courts with the appeal of last resort being from the State Supreme Court to the U.S. Supreme Court. Thus, the WERC must be considered a governmental unit engaged in exercising its police or regulatory powers in this case and the actions of the WERC must therefore be exempt from the automatic stay provisions of Sec. 362(a)(1). See, Marshfield Tire and Rubber Co., 660 F.2d 1108 (6th Cir., 1981).

In addition, I note that the cases are legion which hold that proceedings before the NLRB (a Federal agency analogous in its powers and duties to the WERC) and the Board's ultimate exercise of its police and regulatory power may not be stayed pursuant to Sec. 362(a)(1). See, e.g. In the Matter of Nicholas, Inc. v. NLRB, 55 B.R. 212 (N.J., 1985); In re Rath Packing Co. v. U.F.C.W.I.U., Local 171, AFL-CIO, 38 B.R. 552 (1984); NLRB v. Evans Plumbing Co., 639 F.2d 291 (5th Cir., 1981). Thus, the Bankruptcy as well as the Federal Courts of Appeals that have addressed the issue have generally held that the NLRB falls within the exception to Section 362(a)(1), stated in Section 362(b)(4).

The WERC takes jurisdiction of virtually all cases which fall outside of the NLRB's Interstate Commerce requirements and its statutory/precedential boundaries. As the NLRB polices and regulates within its jurisdictional boundaries, so does the WERC. However, the Commission's powers extend beyond the Board's reach. The WERC polices and regulates alleged violations of collective bargaining/labor agreements such as that alleged in the instant case, while the NLRB does not become involved in such cases.

Based upon all of the above, I conclude that 11 U.S.C. Sec. 362(a)(1) does not operate to automatically stay these proceedings regarding allegations against the Employer since these proceedings fall within the exception stated in 11 U.S.C. Sec. 362(b)(4).

However, a further question, must be answered in this case which was not raised by any party but which I must address and answer. That question is whether these proceedings should be, in effect, stayed against the Employer pending my ruling on the issue whether the Union breached its duty to fairly represent Complainant regarding his pay and fringe benefit claims on the City of Middleton job. Based upon clear precedent, I conclude that these proceedings against the Employer must be stayed pending my decision on Complainant's claims against the Union.

In reaching the above conclusion I have relied upon both State and Federal case precedent which require such an outcome. In Vaca v. Sipes, 386 U.S. 171, 87 Sup.Ct. 903, 17 L.Ed. 2d 842 (1967), the United States Supreme Court held that an employe who has failed to exhaust all steps of the grievance procedure contained in the collective bargaining agreement, is foreclosed from suing his employer on an otherwise arbitrable claim where the employe's union has failed or refused to pursue the employe's grievance through all steps of that grievance procedure. This is true despite the fact that the union generally makes the final decision to take a grievance to arbitration, to settle it short of arbitration or to drop it entirely. Only if the employe can show that the union breached its duty to fairly represent the employe by "wrongfully" refusing to take his case to grievance arbitration, may the employe then sue his employer or the merits of his unfair labor practice claim. Vaca v. Sipes, supra; Moore v. Sunbeam Corp., 459 F.2d 811 (7th Cir., 1972); Mahnke v. WERC, 66 Wis.2d 524, 225 N.W. 2d 617 (1975). As the Wisconsin Supreme Court stated in Mahnke v. WERC, supra,

> If it is established that the grievance procedure provided for in the collective bargaining agreement has not been exhausted, then it must be proven that the Union failed in its duty of fair representation before the employee can proceed to prosecute his claim against the employer. . . . Id. at 532.

It is up to the employe to prove that the union's decision not to arbitrate his case was either made in bad faith or that it was based upon arbitrary or discriminatory reasons. Even if the employe's claims against his employer are meritorious, the union may properly refuse to proceed to arbitration unless the employe can show that the union engaged in arbitrary, discriminatory or bad faith conduct concerning the case. Moore v. Sunbeam Corp., 459F. 2d 811, 820 (7th Cir., 1972). Indeed, it has long been established that an employe has no absolute right to have his grievance arbitrated and the fact that a union drops a grievance short of arbitration, itself does not prove that the union violated its duty of fair representation. Even proof of simple negligence on the part of the union in handling a grievance is insufficient to prove a breach of the duty of fair representation.

The Wisconsin Supreme Court and the WERC have consistently required that unions make decisions as to the merits of each grievance, as follows:

> It is submitted that such decision should take into account at least the monetary value of his (the employee's) claim, the effect of the breach (of the contract) on the employee and the likelihood of success in arbitration. . . .
>
> This is not to suggest that every grievance must go to arbitration, but at least that the union must in good faith weigh the relevant factors before making such determination. Mahnke v. WERC, supra, 66 Wis.2d at

534.

The standard stated above in the Mahnke case has been consistently followed by the WERC. Guthrie v. Local 82, Council 24, AFSCME, AFL-CIO, et al. Dec. No. 11457-H (WERC, 5/84). See also, City of Greenfield, Dec. No. 24776-C (WERC, 2/89).

For the reasons stated herein, I conclude that a stay of these proceedings regarding Complainant's claims against the Employer must be granted, pending my issuance of a decision on the merits of Complainant's allegations against the Union.

Dated at Madison, Wisconsin this 15th day of September, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Sharon Gallagher Dobish, Examiner