

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TILE, MARBLE, TERRAZZO FINISHERS	:	
AND SHOPWORKERS LOCAL NO. 47-T,	:	
affiliated with the UNITED	:	
BROTHERHOOD OF CARPENTERS AND	:	
JOINERS OF AMERICA, AFL-CIO,	:	Case 1
	:	No. 45488 Ce-2115
	:	Decision No. 26904-A
Complainant,	:	
	:	
vs.	:	
	:	
GRAZZINI BROTHERS & COMPANY,	:	
	:	
Respondent.	:	
	:	

Appearances:

Sutton & Kelly, Attorneys at Law, by Mr. Walter F. Kelly, 1409 East Capitol Drive, Milwaukee, Wisconsin 53211, appearing on behalf of the Complainant.

Grossman & Millard, Attorneys at Law, by Mr. Randy G. Millard, 880 Lumber Exchange Building, 10 South Fifth Street, Minneapolis, Minnesota 55402, appearing on behalf of the Respondent.

ORDER DENYING MOTIONS TO DISMISS

On March 14, 1991, Tile, Marble, Terrazzo Finishers and Shopworkers Local No. 47-T, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, filed a complaint with the Wisconsin Employment Relations Commission, alleging that Grazzini Brothers & Company had committed unfair labor practices by failing to submit a grievance to final and binding arbitration and by failing to supply requested information in connection with the grievance. On March 29, 1991, the Respondent filed a Motion to Dismiss the complaint asserting that the National Labor Relations Board had exclusive jurisdiction of the matter. On April 2, 1991, Complainant filed a brief in opposition to Respondent's Motion to Dismiss the complaint. On June 4, 1991, the Commission appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and order as provided in Sec. 111.07(5), Stats. Hearing in the matter was held in abeyance pending the decision in a related Sec. 10(k) case before the National Labor Relations Board. On June 7, 1993, the Respondent filed a second Motion to Dismiss on the grounds that the Complainant was collaterally estopped from re-litigating the same issue decided by the NLRB before the Commission. On June 15, 1993, the Complainant filed a Memorandum opposing Respondent's second Motion to Dismiss arguing that Sec. 10(k) proceedings do not constitute a basis for res judicata/collateral estoppel preclusion.

Upon careful consideration of the complaint and the Motions to Dismiss and supporting documents, the Examiner finds that substantial issues of fact remain which can best be resolved by a hearing.

NOW, THEREFORE, it is

ORDERED

That the Motions to Dismiss the complaint are denied.

Dated at Madison, Wisconsin this 2nd day of July, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/

Lionel L. Crowley, Examiner

GRAZZINI BROTHERS & COMPANY

MEMORANDUM ACCOMPANYING
ORDER DENYING MOTIONS TO DISMISS

In its initial Motion to Dismiss the complaint, the Company argued that the refusal to arbitrate the grievance was within the exclusive jurisdiction of the NLRB and preempted by the National Labor Relations Act. The Respondent asserted that this case was not over the mere refusal to process a grievance to arbitration but was over whether a collective bargaining agreement was in existence at the time the grievance arose. The Respondent submitted that it had filed a Sec. 10(k) proceeding before the NLRB and it would determine whether a collective bargaining agreement existed.

The Union urged dismissal of the Motion to Dismiss on the grounds the complaint alleging a refusal to arbitrate does not come within the exclusive jurisdiction of the NLRB because the Commission has jurisdiction to determine whether a collective bargaining agreement, including the right to arbitrate a grievance, has been violated, but the NLRA does not contain such a provision. Thus, the Union insists that the Commission has jurisdiction to decide the merits of the complaint.

In its second Motion to Dismiss, the Company asserts that the NLRB in a Sec. 10(k) decision concluded that the parties had no collective bargaining agreement after May 31, 1990, and the Union is "estopped by record" from relitigating the issue of the existence of a collective bargaining agreement. It claims that there was no valid and enforceable contract in existence when the February 12, 1991 grievance and request for information were filed and the complaint must therefore be dismissed.

The Union's response to the second Motion to Dismiss is that a Sec. 10(k) proceeding is not a "judicial capacity" proceeding, but a non-adjudicatory determination of jurisdictional disputes and does not constitute a basis for res judicata/collateral estoppel preclusion.

Discussion:

With respect to the Company's argument that exclusive jurisdiction of the complaint lies with the NLRB, the Commission has held that under the NLRA, it is not an unfair labor practice for an employer to violate the terms of a collective bargaining agreement, but under Sec. 111.06(1)(f), Stats., it is an unfair labor practice, and it has been well established that the Commission has concurrent jurisdiction with both state and federal courts to entertain complaints alleging violations of collective bargaining agreements. 1/ The

1/ Metcalfe, Inc. d/b/a Sentry Foods, Dec. No. 17660-B (WERC, 2/82); Transportation Systems, Dec. No. 25074-B (Jones, 7/88), aff'd by operation of law, Dec. No. 25074-C (WERC, 8/88); Aqua-Chem, Inc., Dec. No. 26102-B (WERC, 11/90); Wisconsin CATV, Dec. No. 26515-A (Honeyman,

complaint alleges a violation of the parties' agreement by refusing to proceed to arbitration under the contract. Obviously, an element of the Union's proving its case involves establishing the existence of a collective bargaining agreement. On a Motion to Dismiss, the complaint is construed most favorable to the complaining party because of the dramatic consequences of a dismissal where the facts are in dispute. 2/

11/90), aff'd by operation of law, Dec. No. 26515-B (WERC, 12/90).

2/ Racine Unified School District, Dec. No. 15915-B (Hoornstra, 12/77).

The Company argues that there is no dispute over the facts as it has been established in the Sec. 10(k) proceeding that no agreement between the parties existed when the grievance arose. A review of the NLRB's decision 3/ reveals that the parties argued about whether a contract was in existence based on an addendum with the NLRB stating: "More importantly, they urge different interpretations of the addendum that cannot be reconciled on the state of this record." (Emphasis added). The NLRB further stated that the status and meaning of the addendum is ambiguous and concluded on that basis that no contract existed. 4/ Not knowing the "state of the record" and construing the complaint most favorably to the Union, it is inappropriate to dismiss on the basis of estoppel. Additionally, as pointed out by the Union, the Sec. 10(k) proceeding is not a "judicial capacity" proceeding and is not entitled to res judicata/collateral estoppel effect. The courts have held that Sec. 10(k) proceedings do not possess the attributes of finality and the Sec. 10(k) decision, standing alone, is binding on no one and is not res judicata on later unfair labor practices. 5/ Therefore, it cannot be concluded that there is no contract based on the Sec. 10(k) proceeding. Thus, it must be found that the complaint presents a contested case requiring a hearing on the merits. 6/

Dated at Madison, Wisconsin this 2nd day of July, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

- 3/ Laborers' Local 317, 141 LRRM 1183, 307 NLRB No. 195 (1992).
- 4/ Id.
- 5/ NLRB v. Plasterers' Local 79, 404 U.S. 116, 78 LRRM 2897 (1971); Shell Chemical Co. v. Teamsters Local 676, 353 F.Supp. 480, 82 LRRM 2561 (D.N.J., 1973).
- 6/ Wisconsin Statutes, Section 111.07(2)(a), Section 111.07(4), Section 227. Mutual Fed. Savings & Loan Assoc. v. Savings & Loan Adv. Comm.; (1968) 38 Wis.2d 381; State ex rel. City of LaCrosse v. Rothwell, (1964) 25 Wis.2d 228, rehearing denied; Town of Ashwaubenon v. Public Service Commission (1964) 22 Wis.2d 38, rehearing denied; State ex rel. Ball v. McPhee (1959) 6 Wis.2d 190; General Electric Co. v. Wisconsin Employment Relations Board (1957) 3 Wis.2d 227, 241.

