STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ROXANNE LEFLORE,

Complainant,

vs.

AMALGAMATED TRANSIT UNION, LOCAL 998 AND MILWAUKEE TRANSPORT SERVICES, INC.,

Respondents.

Case 1
No. 51736 Ce-2166
Decision No. 28531-A

Appearances:

Mr. John D. Dries, Attorney at Law, Suite 3, 7251 West North Avenue, Wauwatosa, WI 53213, appearing on behalf of the Complainant.

Mr. Richard Saks, Perry, Lerner & Quindel, S.C., Attorneys at Law, 823 North Cass Street, Milwaukee, WI 53202-3908, appearing on behalf of the Respondent Union.

Mr. Gregg M. Formella, Quarles & Brady, Attorneys at Law, 411 East Wisconsin Avenue, Milwaukee, WI 53202-4497, appearing on behalf of the Respondent Company.

ORDER DENYING RESPONDENTS' MOTION TO DISMISS COMPLAINT AND MOTION FOR SUMMARY JUDGMENT

On September 26, 1994, Complainant RoxAnne LeFlore filed a complaint with the Wisconsin Employment Relations Commission alleging that the Amalgamated Transit Union Local 998 and the Employer, Milwaukee Transport Services, Inc., discriminated against her when the Employer did not post an open position and gave it to another person with less seniority. The parties were offered a period of time for settlement discussions, and on August 21, 1995, the Complainant notified the Commission that she wished to have a hearing on the matter. On September 20, 1995, the Commission appointed Karen J. Mawhinney, a member of its staff, to act as Examiner, to make and issue Findings of Fact, Conclusions of Law and Order as provided in

Sec. 111.07(5), Stats. The Examiner wrote to the Complainant and copied the Respondents on September 23, 1995, asking for a clarification of the complaint, as well as a clarification as to the named respondents. The Complainant responded on October 24, 1995, and the Examiner wrote the parties on December 14, 1995, advising them that she viewed the October 24, 1995 letter and the allegations in it as an amendment to the original complaint, and that such allegations made claims against both the Union and the Company under the Wisconsin Employment Peace Act. The Examiner further advised the Respondents that they had a right to remove the matter to federal court within 30 days from the date of the receipt of the letter. Neither Respondent removed the matter to federal court. A hearing was scheduled for March 12, 1996, which was postponed to May 16, 1996. Before the hearing in the matter started on May 16, 1996, the Complainant notified the Examiner that she had reached a settlement with the Union the previous evening, and that she decided to dismiss her case against the Union, and that she wished to proceed with her case against the Company. The Company objected to proceeding to a hearing without the Union as a Respondent, and the parties agreed to submit briefs on the issue of whether or not the Union is a necessary party in a complaint against an employer for breach of contract under the Wisconsin Employment Peace Act. The parties submitted briefs by June 20, 1996. The Union moved for "Summary Judgment" and the Company moved to dismiss the claim against it.

NOW, THEREFORE, it is

ORDERED

That Respondent Union's Motion for Summary Judgment is denied.

That Respondent Company's Motion to Dismiss is denied.

Dated at Elkhorn, Wisconsin this ___ day of August, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Karen J. Mawhinney, Examiner

AMALGAMATED TRANSIT UNION, LOCAL 998
& MILWAUKEE TRANSPORT SERVICES, INC.

MEMORANDUM ACCOMPANYING ORDER DENYING RESPONDENTS' MOTIONS TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

The complaint as amended alleges that the Respondent Union breached its duty of fair representation owed to the Complainant and that the Respondent Company breached the collective bargaining agreement in effect. The bargaining agreement provides for final and binding arbitration of disputes relating to wages, hours and working conditions.

The Complainant acknowledges that the general rule is that it must prove that the union failed in its duty of fair representation before an employee can proceed to prosecute a claim against the employer, pursuant to Mahnke v. WERC, 66 Wis.2d 524 (1975). However, the Complainant argues that this rule does not apply when the twin issues of employer liability and union liability are commingled, pursuant to State of Wisconsin v. WERC, 65 Wis.2d 624 (1974).

The Company moved to dismiss the claim against it, stating that the entire claim is pre-empted by federal law and the Commission has no jurisdiction over it. The Company asserted that even if the claim were not preempted by Section 301 of the Labor Management Relations Act, it is preempted under the National Labor Relations Act and within the exclusive competence of the National Labor Relations Board, according to Building Trades Union Council (San Diego) v. Garmon, 359 U.S. 236 (1959). The Company argues that when the Complainant dismissed her unfair representation charge against the Union, she abandoned the legal basis for her claim against the Company. The Company also contends that the claim is moot because the Complainant is now employed in the type of job that she sought through her complaint. If the claim against the Company is not dismissed, the Company wants the right to bring the Union back into this action as a necessary party.

The Union moved for "summary judgment" (a decision without a hearing) against the Complainant, stating that no material facts are in dispute, and that all reasonable inferences from undisputed facts lead to the conclusion that the Complainant has not made out a prima facie case that the Union violated its duty of fair representation, and absent such a claim, the Complainant cannot prosecute a breach of contract claim. The Union asserts that Mahnke stands for the proposition that an employee cannot bring an action against an employer under Sec. 111.07, Stats., unless he or she also alleges that the union violated its duty of fair representation. The Complainant's decision to dismiss her claim against the Union should mandate the permanent dismissal with prejudice of her claim against the Union.

The Examiner gave the Respondents an opportunity to remove this action to federal court if they so chose. On December 14, 1995, the Examiner wrote to all the parties and notified them that the Respondents had a right of removal to federal court, pursuant to Section 1441 of Title 28 U.S.C., and that this right of removal had to be filed within 30 days from the date of the receipt of the letter, pursuant to Section 1446(b), Title 28 U.S.C. The Company informed the Examiner on January 10, 1996, that it did not intend to seek removal of the matter to federal court.

The Union did not remove the matter to federal court either.

Section 111.06(1)(f) of the Wisconsin Employment Peace Act, also called WEPA herein, provides that it is an unfair labor practice to violate the terms of a collective bargaining agreement. It has been settled long ago that the WERC has jurisdiction to apply federal common law of collective bargaining agreements in the resolution of disputes under Sec. 111.06(1)(f), Stats. 1/ States have concurrent jurisdiction over suits involving actions under Section 301 of the Labor Management Relations Act, subject to the right of removal to federal court. 2/ Thus, the Company's argument that the Complainant's claim should be dismissed because it is preempted by federal law is misplaced. Federal substantive law is to be applied, but that is no reason to dismiss the complaint where the WERC has concurrent jurisdiction to apply federal law to suits involving breaches of contract under Section 301 LMRA suits, as well as the jurisdiction to apply federal substantive law to breach of contract claims under WEPA.

The Company has argued that the WERC lacks jurisdiction over it because the underlying dispute involves a subject over which the NLRB has exclusive jurisdiction, and that the NLRA pre-empts the WERC from asserting jurisdiction over it. It is true that where a claim is arguably subject to the NLRA, the NLRB has jurisdiction. But here, violations of collective bargaining agreements are unfair labor practices under WEPA and not so under the NLRA. Therefore, the WERC has jurisdiction to determine whether a violation of the contract occurred under WEPA, even though the employer would otherwise be subject to the jurisdiction of the NLRB. 3/

This case has some similarity to Mahnke, particularly since the employee wishes to pursue a claim against her employer, charging that the employer violated a collective bargaining agreement, and the Union has not proceeded to arbitration. The question in Mahnke was whether the employee had the burden of proof to establish a lack of fair representation on the part of the Union before he could proceed to the merits of his claim against the Company. The State Supreme Court held that:

> 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. 4/

1/ Tecumseh Products Co., 23 Wis.2d 118 (1964).

2/ American Motors Corp., 32 Wis.2d 237 (1966).

3/ Id.

4/ Mahnke v. WERC, 66 Wis.2d 524, at 532 (1975).

Mahnke further held that the employer is obligated in the first instance by way of an affirmative defense to allege that the contract grievance procedure has not been exhausted, and if this fact is established by proof, admission or stipulation, the employee cannot prosecute the claim against the employer unless he proves that the union breached its duty of fair representation to him. Applying those principles to this case, the Company has raised an affirmative defense alleging that the contract grievance procedure has not been exhausted. It did so prior to the start of the hearing when the parties met for the hearing on May 16, 1996. Accordingly, the Complainant is now obligated to come forward with proof that the Union breached its duty of fair representation to her before she may proceed against the Company.

The standard to determine whether a union has breached its duty of fair representation is best known from the language of the U.S. Supreme Court's ruling in Vaca v. Sipes, 386 U.S. 171 (1967), where the Court stated:

> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. (Page 190)

Vaca also requires a union to make a good faith decision, weighing relevant factors such as the merits of a grievance. Mahnke added that such a good faith decision should take into account the monetary value of a claim, the effect of the breach on an employee and the likelihood of success in arbitration, before making a determination of proceeding or refusing to proceed to arbitration.

Here, LeFlore alleges that the Union has acted arbitrarily, in bad faith and in a discriminatory manner, when it treated a member of the bargaining unit who was a Union negotiator and whose father was a Union negotiator differently than it treated her. These are not facts which have been developed by a record, but allegations which appear in the papers filed by the Complainant. The Complainant must come forward at hearing with facts which prove that the Union breached its duty of fair representation. The facts in the record only show that the Complainant filed a grievance, the Union's response to her was unsatisfactory, and she did not seek to pursue the grievance through the steps of the grievance procedure.

Mahnke forces LeFlore to prove that the Union breached its duty before a determination can be made against the Company that it breached the contract. LeFlore seeks no remedy against her Union anymore, having negotiated a settlement with the Union. Therefore, LeFlore may go forward with the Company as the sole respondent, so long as she first proves that the Union breached its duty of fair representation in order to show why she did not exhaust the grievance procedure. Then she may attempt to prove that the Company breached the labor contract by not posting the position at issue, and this may be done during the same hearing in the matter. There is no need to bifurcate this proceeding.

However, nothing prevents the Complainant from dismissing the Union as a Respondent. The Complainant seeks no remedy against the Union anymore, just against the Company. The Complainant may seek to prove that the Union breached its duty of fair representation to her without joining the Union as a Respondent. There is nothing that would prevent the Complainant from going forward solely against the Company as long as she first proves that the Union breached its duty of fair representation. The Complainant is not obligated to re-join the Union as a co-respondent in order to proceed, but she is obligated to prove that the Union breached its duty of fair representation before she can proceed to her claim that the Company breached the labor contract. She may do this through calling witnesses and introducing documents, including Union witnesses and documents, and using subpoena powers provided by Sec. 111.07(1)(b)1, Stats., if necessary. Similarly, the Company can respond with such witnesses and documents and also use such subpoena powers.

The Union has been released from this proceeding and dismissed by the Complainant because the Complainant and Union entered into a settlement agreement. Accordingly, the Complainant may not revive her claim against the Union at this point, unless it is determined that the settlement agreement has not been complied with or the settlement agreement is repugnant to the policies expressed in WEPA. 5/

The Company may not join the Union as a necessary party, because the Union is not a necessary party to a breach of contract claim. 6/ While the Complainant must show that the Union breached its duty of fair representation to her and thus frustrated her from exhausting the grievance procedure in the labor contract, the Union need not be named as a respondent in the action for the Complainant to proceed to prove such a breach of duty. Neither the Company nor the Complainant seeks a formal determination from the WERC that the Union has committed an unfair labor practice per se or a WERC remedial order that is directed at the Union.

The standard for a motion to dismiss is:

> . . . an examiner has the power to grant a motion to dismiss a complaint, and thereby deny a hearing to a complainant, if the

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5/ Ellis Stone Construction Co., Dec. No. 11474-A (Examiner Fleischli, 12/72).

6/ Milwaukee Board of School Directors, Dec. No. 16329-A (Examiner Malamud, 2/79), aff'd, Dec. No. 16329-B (WERC, 4/79).

complainant fails to raise a genuine issue of fact or law. Because of the drastic consequences of denying an evidentiary hearing, on a motion to dismiss, the complaint must be liberally construed in

> favor of the complainant and the motion should be granted only if under no interpretation of the facts alleged, would the complainant be entitled to relief. 7/

The parties have made no factual stipulations. It would be inappropriate to dismiss the complaint without a hearing on the issues.

Dated at Elkhorn, Wisconsin this 8th day of August, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Examiner

7/ Unified School District No. 1 of Racine County, Dec. No. 15915-B (Hoornstra with final authority for WERC, 12/77).