STATE OF WISCONSIN CIRCUIT COURT KENOSHA COUNTY

KRISTI LACROIX, et al.,

Plaintiffs

v. Case No. 13-CV-1899

KENOSHA EDUCATION ASSOCIATION, et al.,

Defendants.

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

In 2011, through Acts 10 & 32 (collectively "Act 10"), the Wisconsin Legislature made sweeping changes in the law that governs collective bargaining by public employee unions – changes that substantially limited the matters that can be the subject of collective bargaining and that increased the freedom of public employees to make their own choices about union membership and support. These changes were, to say the least, unpopular with those unions and, in some cases, with their public employers. The efforts to turn back the law have been unceasing, but every legal challenge to Act 10 has been rejected.

On November 15, 2013, the Kenosha Unified School District (the "School District") entered into collective bargaining agreements with all three of the unions that previously represented its employees: the Kenosha Education Association ("KEA"), Service Employees International Union, Local 168 ("SEIU"), and American Federation of State, County and Municipal Employees, Local 2383 ("AFSCME") (collectively the "Union Defendants"). The November 15, 2013 collective bargaining agreements (collectively the "CBAs") are a violation of state law. Act 10 makes it illegal for school districts to negotiate with unions on anything other than base wages, yet the CBAs contain provisions that go well beyond base wages. The CBAs also violate the rights of public employees because, among other things, they require all employees of the School District to pay union dues against their will under a so-called "fair share" provision, which is also specifically prohibited by Act 10.

In June, 2014 the School District entered into a settlement agreement with the Plaintiffs agreeing that the CBAs are void as a matter of law and that the Court could enter an Order in that regard, binding on the parties to the Settlement Agreement. A copy of the Settlement Agreement[1] was filed with the Court on June 18, 2014 as an attachment to a Stipulation and Order. A true and correct copy of the Stipulation and Order (with the Settlement Agreements attached) is attached to the McGrath Affidavit filed herewith as Exhibit A. Based upon that settlement agreement the Plaintiffs dismissed the claims against the School District, the School Board and the individual Board Members . This action is proceeding solely against the Union Defendants.

The Plaintiffs request summary judgment declaring that the CBAs are invalid on the grounds that: (1) the CBAs are the product of unlawful collective bargaining in violation of Wis. Stat. § 111.70(4)(mb); (2) the CBAs violate the rights of school district employees under Wis. Stat. § 111.70(2); (3) the Union Defendants were not the authorized bargaining agents for public employees when the CBAs were negotiated and signed; and (4) the CBAs are unlawful agreements in restraint of trade in violation of Wis. Stat. § 133.03(1).

STATEMENT OF UNDISPUTED FACTS

The Parties

Plaintiff Kristi Lacroix is a resident of the Town of Somers in Kenosha County and is a taxpayer whose taxes are used to fund the School District. (Lacroix Aff. ¶¶2-3, Nov. 21, 2013.)[2] Plaintiff CarrieAnn Glembocki has been employed by the School District as a teacher since January, 2008. (Glembocki Aff. ¶2, Nov. 25, 2013.) She is a "general municipal employee" as defined in Wis. Stat. § 111.70(1)(fm). She chooses not to belong to KEA, objects to the CBAs and does not wish to have KEA negotiate on her behalf. (Glembocki Aff. ¶¶4-6.)

The School District is a "municipal employer" as defined in Wis. Stat. § 111.70(1)(j). (KEA Answer, ¶14; AFSCME Answer, ¶14; SEIU Answer, ¶38.) The Union Defendants claim

[1] There are actually two settlement agreements, one settling the open meetings claim and one settling the other claims. Both settlement agreements are attached to the Stipulation and Order.

[2] References to the Lacroix Affidavit and the Glembocki Affidavit are to the affidavits filed by the Plaintiffs in support of their motion for a temporary injunction.

to represent certain School District employees in collective bargaining with the School District. (KEA Answer, ¶18; AFSCME Answer, ¶20; SEIU Answer, ¶19.) None of the Union Defendants stood for recertification elections under § 111.70(4)(d)3.b. AFSCME and SEIU admit that they did not do so. (AFSCME Answer, ¶38; SEIU Answer, ¶38.) According to communications sent by the Wisconsin Employment Relations Commission ("WERC") to the School District, neither did KEA. WERC has stated that KEA was not the authorized collective bargaining agents for employees of the School District after August 30, 2013. (McGrath Aff. Ex. B.)

History of KEA's Status as Collective Bargaining Agent

The relevant facts related to KEA's status as the bargaining agent for Kenosha teachers are set forth in the WERC February 5, 2014 Notice of Consequences (McGrath Aff. Ex. B.) and the Wisconsin Supreme Court Decision dated November 21, 2013 resolving the contempt issue in the *Madison Teachers* case. (McGrath Aff. Ex. C.) In 2013, KEA could have but chose not to stand for a certification election under Wis. Stat. §111.70(4)(d)3b. As a result, WERC concluded that KEA was no longer the certified bargaining agent for Kenosha teachers. KEA, along with several other unions, filed a motion for contempt against WERC before the circuit court in the *Madison Teachers* case based upon WERC's decision to enforce Act 10 against unions that were not parties to the *Madison Teachers* case. (McGrath Aff. Ex. C, Wis. Supreme Ct. Dec. at ¶9.) The circuit court granted the motion for contempt on October 21, 2013 and followed up with a written order on October 25, 2013.[3]

The circuit court's October 25, 2013 written order provided that to purge the contempt, WERC would have to halt enforcement of Act 10 even as to non-parties to the *Madison Teachers* litigation. (McGrath Aff. Ex. D.) The October 25th Order also required WERC to inform the School District that KEA had the same status it would have had if WERC had not sent an announcement that it would be enforcing the certification/election provisions in Act 10. (*Id.*)

However, on November 21, 2013 the Wisconsin Supreme Court vacated the circuit court's contempt order. (McGrath Aff. Ex. C.) Thereafter, WERC issued its Notice of Consequences stating that:

> Effective on 4:31 p.m., August 30, 2013, the Kenosha Education Association having failed to timely file a petition for election is no longer the collective

[3] A copy of Judge Colas' October 25, 2013 Order is attached to the McGrath Affidavit as Exhibit D.

bargaining representative of certain employees of the Kenosha Unified School District.

(McGrath Aff. Ex. B at page 2.)

Collective Bargaining Between the School District and the Union Defendants

At the time of the passage of Act 10 there was a collective bargaining agreement in place between the School District and the Union Defendants. (Lacroix Aff. ¶5; AFSCME Answer, ¶31; SEIU Answer, ¶31.) That agreement expired on June 30, 2013. (Lacroix Aff. ¶5; School District Answer, ¶17.) A copy of the expired collective bargaining agreement is attached to the McGrath Affidavit filed herewith as Exhibit E. The expired collective bargaining agreement contained numerous provisions that are no longer allowed to be the subject of lawful collective bargaining under Act 10. *See* Wis. Stat. § 111.70(4)(mb) (prohibiting negotiation over "[a]ny factor or condition of employment except wages, which includes only total base wages and excludes any other compensation"). Some examples include teaching hours, schedules and workloads, seniority rules, internal posting of vacancies, promotions, staff reductions, wages other than base wages, group health insurance, early retirement, "early early retirement," long term disability, tenure and dismissal, non-teaching duties, use of school facilities, payroll deductions, "fair share" payments, leaves of absence, teacher evaluations, and grievance procedures. (McGrath Aff., Ex. E.)

In recognition of the changes required by Act 10, on January 29, 2013, the Board approved the adoption of an employee handbook that would replace all school district employee contracts that were created through collective bargaining. The handbook was scheduled to go into effect on July 1, 2013 which was the day after the expiration of the then-existing collective bargaining agreement. (KEA Answer, ¶40; AFSCME Answer, ¶40; SEIU Answer, ¶40.)

But the handbook was not implemented on July 1, 2013. Instead, the Board met with the Union Defendants, initially to discuss what should be in the handbook. (KEA Answer, ¶41; AFSCME Answer, ¶41; SEIU Answer, ¶41.) At an October 22, 2013 regular monthly meeting, the Board voted to, among other things, "bargain with the respective represented groups regarding mandatory and permissive subjects to reach an agreement no later than November 15, 2013." (KEA Answer, ¶¶47-48; AFSCME Answer, ¶¶47-48, SEIU Answer, ¶¶47-48.) This vote was taken the day after the circuit court had verbally ruled on the contempt motion in the *Madison Teachers* case but prior to the circuit court's written order.

After the Board decided to negotiate, the School District began collective bargaining with the Union Defendants by exchanging contract proposals with KEA on Friday, November 8, 2013. (KEA Response to Request to Admit No. 9; McGrath Aff. Ex. F.) On Monday, November 11, 2013, the School District and the Union Defendants met, negotiated, and signed a copy of a Tentative Agreement. (McGrath Aff. Ex. G; KEA Answer, ¶51; AFSCME Answer, ¶51, SEIU Answer, ¶51.) The Board then held a meeting on November 12, 2013, to determine whether it would ratify the Tentative Agreement. (KEA Answer, ¶52; AFSCME Answer, ¶52, SEIU Answer, ¶52.) At the November 12th meeting the Board voted to postpone the decision on whether or not to ratify the collective bargaining agreements until its regularly scheduled meeting on November 26, 2013. (KEA Answer, ¶53; AFSCME Answer, ¶53, SEIU Answer, ¶53.)

However, on November 14, 2013, the Board scheduled a meeting on 24-hour notice to be held on November 15, 2013, to ratify the Tentative Agreement. (KEA Answer, ¶54; AFSCME Answer, ¶54, SEIU Answer, ¶54.) At the November 15th meeting, the Board ratified the terms of the Tentative Agreement. The ratification resulted in a final agreement ("the CBAs"), which consists of all of the terms of the collective bargaining agreements that had expired on June 30, 2013, as amended by the Tentative Agreement. (KEA Answer, ¶56; AFSCME Answer, ¶56, SEIU Answer, ¶56.) New contracts were ultimately prepared between the District and AFSCME and SEIU. (McGrath Aff. Exs, H and I.) For reasons not known to the plaintiffs, a new form of contract was not prepared between the School District and KEA.[4]

ARGUMENT

I. LEGAL FRAMEWORK OF ACT 10

Act 10 became the law in Wisconsin on July 1, 2011. Act 10, among other things, amended Wis. Stat. § 111.70, the statute that governs collective bargaining between municipal employers and municipal employees. Section 111.70(4)(mb), as amended by Act 10, now prohibits municipal employers such as the School District from bargaining collectively with a union representing its employees with respect to any of the factors or conditions of employment,

[4] In response to discovery, AFSCME and SEIU produced their new contracts. (McGrath Aff. Ex. F.) KEA responded by stating that the documents which contain the terms of the collective bargaining agreement between the School District and KEA were the expired contract as modified by the Tentative Agreement. (*Id.*)

including the deduction of union dues or the payment of nonmember "fair share" fees, except for total base wages. Base wages do not include overtime, premium pay, merit pay, pay schedules, or automatic pay progression. §111.70(4)(mb). Act 10 also prohibits municipal employers from "deduct[ing] labor organization dues from the earnings of a general municipal employee or supervisor." §111.70(3g). Unions must now stand for annual recertification elections and obtain approval from more than half of all members of a collective bargaining unit in order to negotiate as the exclusive representative of that unit for the next bargaining year. §111.70(4)(d)3.b.

Pursuant to Act 10, school district employees (such as Ms. Glembocki) have the right, among other things, to: (a) vote in an annual election on the certification of a collective bargaining agent; (b) refrain from union activity; (c) not pay union dues; and (d) not pay any amount under any so-called "fair share" agreements, i.e. provisions in union contracts that require non-union teachers to pay a union a portion of union dues against their wishes. §111.70(2)(4)(d). Furthermore, "[i]t is a prohibited practice for a municipal employer individually or in concert with others: 1. To interfere with, restrain, or coerce municipal employees in the exercise of their rights guaranteed in sub. (2)." §111.70(3)(a)1.

The constitutionality of Act 10 has been firmly established by both the Seventh Circuit Court of Appeals, *WEAC v. Walker*, 705 F.3d 640 (7th Cir. 2013), *Laborers Local 236, AFL-CIO v. Walker*, 749 F.3d 628 (7th Cir. 2014), and the Wisconsin Supreme Court, 2014 WI 99, 851 N.W.2d 337. Since this Court's December 12, 2013 hearing on the Plaintiffs' motion for a temporary injunction, the Seventh Circuit affirmed the district court's ruling that Act 10 was constitutional, *Laborers*, 749 F.3d at 640-641, and the Wisconsin Supreme Court *reversed* Judge Colas' judgment declaring portions of Act 10 unconstitutional, *Madison Teachers*, 2014 WI 99, ¶¶ 160-164.[5] The legal challenges are finished, and Act 10's constitutionality is unimpeachable.

II. THE PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT

A. The Standard for Summary Judgment

Summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

[5] A motion for reconsideration has been filed in *Madison Teachers v. Walker*, but only with regards to the effect of Act 10 on the City of Milwaukee, an issue not relevant to this case.

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. §802.08. Moreover, at the summary judgment stage the defendants may not stand on their pleadings and must set forth admissible evidence that places some material fact in dispute. *See* Wis. Stat. §802.08(3) ("When a motion for summary judgment is made . . . , an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response, by affidavits [or other admissible evidence], must set forth specific facts showing that there is a genuine issue for trial.").

This dispute primarily involves the application of several statutes to undisputed facts. That is an issue of law which makes it appropriate for summary judgment. *Wis. Evangelical Lutheran Synod v. City of Prairie du Chien*, 125 Wis. 2d 541, 549, 373 N.W.2d 78, 82 (Ct. App. 1985) ("Construction of a statute under a particular set of facts is a question of law."); *Lang v. Kurtz*, 100 Wis. 2d 40, 43, 301 N.W.2d 262, 264 (Ct. App. 1980) ("Construction of a statute is an issue of law and can therefore be properly dealt with by summary judgment.").

B. Act 10 Is Constitutional and Applicable to the Parties.

Act 10 is constitutional. The only real issue in dispute is whether the decision of Judge Colas declaring portions of Act 10 unconstitutional, reversed on appeal, has any remaining effect. It does not.

In determining the constitutionality of Act 10, this Court has already concluded that it is not bound by the Dane County Circuit Court's decision in *Madison Teachers*. (December 12, 2013 Hearing Transcript at p.4-9; McGrath Aff. Ex. J.) This Court's determination in that regard is correct as a matter of law. *See Kuhn v. Allstate Ins. Co.*, 181 Wis. 2d 453, 468, 510 N.W.2d 826, 832 (Ct. App. 1993) *aff'd*, 193 Wis. 2d 50, 532 N.W.2d 124 (1995) ("[A] circuit court decision is neither precedent nor authority . . . ."); *Raasch v. City of Milwaukee*, 2008 WI App 54, ¶8, 310 Wis. 2d 230, 750 N.W.2d 492 ("[A]lthough circuit-court opinions may be persuasive because of their reasoning, they are *never* 'precedential.'").

Moreover, now that Judge Colas' decision has been reversed, there is no reason to give it any consideration at all. The fact that Judge Colas' decision carried (and carries) no weight beyond the parties to that dispute is demonstrated most clearly in *Wisconsin Law Enforcement Ass'n v. Walker*, Dane County Case No. 12-CV-4474. *WLEA* was an action filed by another union in Dane County Circuit Court (in a branch other than the branch presided over by Judge

Colas) challenging the constitutionality of Act 10 as applied to state employees. In a decision issued after Judge Colas declared Act 10 unconstitutional, Judge Markson ruled that Act 10 was constitutional.[6]

If the WLEA had been entitled to rely on Judge Colas' decision as if it applied to them, Judge Markson would have been required to rule in the WLEA's favor. But he did not do so. Judge Markson acknowledged the existence of Judge Colas' decision (McGrath Aff. Ex. K; *WLEA* Dec. at 4), but he refused to stay his decision while that case was on appeal (*WLEA* Dec. at 4-5) and he refused to follow Judge Colas' decision.

Judge Colas' order found WERC in contempt for its efforts to apply Act 10 to non-parties (including KEA) and directed the Commissioners to cease and desist from doing so, but the Wisconsin Supreme Court vacated that order on November 21, 2013, finding that the circuit court had exceeded its authority by "expand[ing] the scope of the September 2012 declaratory judgment by granting injunctive relief to non-parties." (*Madison Teachers, Inc. v. Walker*, 2012AP2067, Nov. 21, 2013 Order, ¶20.[7] The court ruled that "by requiring [WERC] to cease application of [the municipal portions of Act 10] against non-parties in order to purge the contempt order, the circuit court granted different relief than it originally granted in the September 2012 order." *Id.* (emphasis added. Because the Supreme Court vacated the circuit court order, it was null and void.

However, even if the circuit court's contempt order in *Madison Teachers* had not been vacated, that would be of little moment with respect to this motion. At most it would mean that KEA was authorized to bargain up to the limits in Act 10. There is nothing in the contempt order that would permit KEA and the School District to bargain on subjects in violation of Act 10. They are bound by the Wisconsin Supreme Court's decision declaring Act 10 constitutional. Their CBAs must therefore be tested against the restrictions of Act 10.

C. The CBAs Violate Act 10

The CBAs are void and unenforceable because they contain numerous provisions that violate Act 10. Wis. Stat. § 111.70(4)(mb) expressly prohibits municipal employers such as the

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[6] A copy of Judge Markson's decision in *WLEA* is attached to the McGrath Affidavit filed herewith as Exhibit K. *WLEA* was a ppealed, and the court of appeals stayed its ruling pending the Wisconsin Supreme Court's decision in *Madison Teachers*.

[7] A copy of the Supreme Court's November 21, 2013 Order is attached to the McGrath Affidavit as Exhibit C.

School District from bargaining collectively with a union representing its employees with respect to any of the factors or conditions of employment except for total base wages. Among other things, the CBAs contain provisions on teaching hours, schedules, and loads, seniority rules, internal posting of vacancies, promotions, staff reductions, wages other than base wages, group health insurance, early retirement, "early early retirement," long term disability, tenure and dismissal, non-teaching duties, use of school facilities, payroll deductions, "fair share" payments, leaves of absence, teacher evaluation, and grievance procedures, all of which are terms of employment upon which collective bargaining is expressly prohibited by Act 10.

The Tentative Agreement also required the lump sum payment of $1,100 to each of the School District's teachers. A lump sum payable to each teacher is not a negotiated increase in base wages, but rather a one-time bonus. "Base wages" do not include overtime, premium pay, merit pay, pay schedules, or automatic pay progression. §111.70(4)(mb). Moreover, bargaining over "base wages" is limited to an increase no greater than the increase in the Consumer Price Index ("CPI"). As can be seen from page 5 of the Tentative Agreement, (McGrath Aff. Ex. G), most of the raises were at 2.07%, because 2.07% was the relevant CPI as of July, 2013. But teachers are given a lump sum payment of $1,100, which is not a CPI-based pay increase of 2.07%. This lump sum payment amount presents several problems. First, any teacher earning $53,140 per year or less would be receiving an increase greater than 2.07%. Second, paying this amount as a lump sum to teachers making more than $53,140 per year would mean that every teacher who leaves the employ of the School District prior to the end of a full year would likely be receiving an increase greater than 2.07% pursuant to a prorated calculation. This is also prohibited by Act 10.[8]

In addition, the CBAs require School District employees to make fair share payments to the Union Defendants against their will. Section XI(B) at pages 19-20 of the previous collective bargaining agreement (McGrath Aff. Ex. E) specifically states that "all employees covered by this Agreement shall become members of the [appropriate union] or pay to the [union] their proportionate share of the cost of collective bargaining process and contract administration …." This provision was not modified or amended in any way by the Tentative Agreement (McGrath

[8]As part of the settlement agreement between the Plaintiffs and the School District, the Plaintiffs have agreed not to challenge whatever future unilateral action the Board takes to set pay and benefit levels for district employees in order to replace these provisions.

Aff. Ex. G). The AFSCME and SEIU contracts have similar provisions. (McGrath Aff. Ex. H at Art. XX, p. 18; Ex. I at Art. III, p. 1.) Such a provision is unlawful as a prohibited subject of collective bargaining, Wis. Stat. §111.70(4)(mb), as a violation of school district employees' rights under Act 10, §111.70(2), and as a prohibited practice, §111.70(3)(a)1. By imposing fair share payments, the CBAs violate the rights of school district employees (including Ms. Glembocki) not to pay union dues under §111.70(2).

Section XI(B) of the KEA contract (McGrath Aff. Ex. E), Article XX of the AFSCME contract (McGrath Aff. Ex. H.) and Article III of the SEIU contract (McGrath Aff. Ex. I.) further contain the procedures for the School District to automatically deduct such forced dues from the employees' payroll checks. As well as being a prohibited subject of collective bargaining, §111.70(4)(mb), such deductions represent another violation of Act 10 because they are expressly prohibited by Act 10. §111.70(3g).

It has been the law of Wisconsin for well over one hundred years that a contract made in violation of the law is void. *Melchoir v. McCarty*, 31 Wis. 252, 254 (1872) ("The general rule of law is, that all contracts which are . . . contrary to the provisions of a statute, are void . . . ."); *see also Abbot v. Marker*, 2006 WI App 174, ¶6, 295 Wis. 2d 636, 722 N.W. 2d 162 ("A contract is considered illegal when its *formation or performance* is forbidden by civil or criminal statute . . . .") (emphasis added).

This is as true for labor agreements as it is for other contracts. *Bd. of Ed. of Unified Sch. Dist. No. 1 v. WERC*, 52 Wis. 2d 625, 635, 191 N.W.2d 242, 247 (1971) ("A labor contract term that is violative of public policy or a statute is void as a matter of law."); *Glendale Prof'l Policemen's Ass'n v. City of Glendale*, 83 Wis. 2d 90, 106, 264 N.W.2d 594, 602 (1978) ("When an irreconcilable conflict exists [between law and a labor agreement], we have held that the collective bargaining agreement should not be interpreted to authorize a violation of law."). Because the CBAs are a blatant violation of Act 10, they are void as a matter of law.

D. The Union Defendants Had No Authority to Bargain with the School District on Behalf of School District Employees

As an alternative and wholly non-exclusive argument, the CBAs are also void because the Union Defendants had no lawful authority to bargain the CBAs with the School District on

behalf of the School District employees' collective bargaining units. Under Act 10, the unions were decertified when they failed to win a recertification election.

Act 10 requires that annually, the Wisconsin Employment Relations Commissions "shall conduct an election to certify the representative of the collective bargaining unit," and that such "election shall occur no later than December 1 for a collective bargaining unit containing school district employees." §111.70(4)(d)3.b. (emphasis added). "If no representative receives at least 51 percent of the votes of all of the general municipal employees in the collective bargaining unit, at the expiration of the collective bargaining agreement, the commission shall decertify the current representative and the general municipal employees shall be nonrepresented." *Id.* (emphasis added).

None of the three Union Defendants received 51% of the votes of all bargaining unit employees in a 2013 election under §111.70(4)(d)3.b. Each of them was decertified as a matter of law when the previous collective bargaining agreements expired, and the employees that they formerly represented have since that time been unrepresented. Therefore, the Union Defendants had no legal authority to represent the School District's employees in negotiations with the School District in November, 2013 when the collective bargaining occurred.

In response, KEA will no doubt argue that its circumstances are different based upon the finding by Judge Colas that WERC was in contempt and the October 25, 2013 Order by Judge Colas (McGrath Aff. Ex. D) that stated that to purge its contempt, WERC must, among other things, notify the School District that KEA's status was unchanged by WERC's contrary conclusion. But Judge Colas' decision was vacated and does not change the legal fact that KEA was decertified as a matter of law based upon the mandatory language of §111.70(4)(d)3.b.

At most, KEA could argue that based upon Judge Colas' erroneous decision, the School District and Union Defendants were acting under a mistaken belief that the unions had bargaining authority. But the relevant question is not whether the School District and Union Defendants thought they could bargain with each other, but rather whether the unions, as a matter of law, had the authority to do so.

This situation does not give rise to apparent authority that might bind the principals (the employees) to the actions of purported agents (the unions). Apparent authority binds a principal where the actions of the principal give rise to the reasonable belief in a third party that the agent has authority. *Everlite Mfg. Co. v. Grand Valley Mach. & Tool Co.*, 44 Wis. 2d 404, 409-10, 171

N.W.2d 188, 190-91 (1969). Here, to the extent the School District may have mistakenly believed that the Union Defendants had authority to bargain on behalf of the employees, that belief was not a result of action by the principal – the employees. The School District and KEA were not lulled into mistakenly believing that KEA had authority to negotiate, they knowingly took the risk that Judge Colas' decision would stand up on appeal but it did not. That intentional decision to take such a risk cannot be used to justify a contract that violates state law and deprives school district employees of their rights under Wis. Stat. §111.70(4)(mb) (to have an election), §111.70(2) (to not join a union and not have to pay "fair share" dues) and §111.70(3g) (to not have dues automatically deducted from their paychecks). Ms. Glembocki, and the thousands of other School District employees, were not parties to the *Madison Teachers* case and under Wis. Stat. §806.04, cannot be prejudiced by the results of that proceeding ("no declaration may prejudice the right of persons not parties to the proceeding"). Their rights cannot be forfeited by a mistaken belief by the School District.

This case is similar to the situation in *Newhouse by Skow v. Citizens Sec. Mut. Ins. Co.*, 176 Wis. 2d 824, 836, 501 N.W.2d 1, 6 (1993). In that case an insurance company had received a declaration that there was no coverage under its insurance policy and, as a result, failed to provide a defense. The insured went to trial and lost. The declaration was later reversed and the Wisconsin Supreme Court said this about the insurance company's decision to rely on the declaration while it was under appeal:

> Citizens argues that it was entitled to rely on the circuit court's determination that there was no coverage under the policy. However, the circuit court's no coverage determination was not a final decision because it was timely appealed. An insurance company breaches its duty to defend if a liability trial goes forward during the time a no coverage determination is pending on appeal and the insurance company does not defend its insured at the liability trial. When an insurer relies on a lower court ruling that it has no duty to defend, it takes the risk that the ruling will be reversed on appeal.

The same should be true here. The School District and the KEA took the risk that Judge Colas' decision would be upheld. They were wrong. Their risk cannot be used to prejudice other parties. The Union Defendants had no lawful authority to represent School District employees in collective bargaining with the School District in November, 2013. As a result, the CBAs negotiated by the School District with the Union Defendants are unlawful, void and unenforceable. But even if the Court disagrees and finds that the Union Defendants had some type of authority to collectively bargain in November, 2013, for the reasons stated in Sections B

and C above, that would only mean that they could bargain up to the limits of Act 10, not that they could bargain a contract with substantive provisions that violate Act 10.

E. The CBAs Violate Wis. Stat. §133.03

The CBAs are also unlawful because they violate antitrust law. The first Wisconsin antitrust statute was enacted in 1893. Amended several times since then, Chapter 133 of the Wisconsin statutes contains analogues to Sections 1 and 2 of the Federal Sherman Act, as well as antitrust rules that are unique to Wisconsin law. Section 133.03 forbids agreements in restraint of trade, as does Section 1 of the Sherman Act. It is well-established that these state and federal antitrust statutes serve the same purposes, and federal court interpretations of the Sherman Act are controlling precedent for Wisconsin courts in their interpretation of Section 133.03. *Grams v. Boss*, 97 Wis. 2d 332, 346, 294 N.W.2d 473, 480 (1980) ("We have repeatedly stated that sec. 133.01, Stats., was intended as a reenactment of the first two sections of the federal Sherman Antitrust Act of 1890 . . . and that the question of what acts constitute a combination or conspiracy in restraint of trade is controlled by federal court decisions under the Sherman Act."); *State v. Waste Mgmt., Inc.*, 81 Wis. 2d. 555, 568-9, 261 N.W.2d 147, 153 (1978) ("[T]he broad variety of anticompetitive practices prohibited by the Sherman Act are illegal under the state act.")

Historically, the U.S. Supreme Court generally held that the organized and concerted activities of employees to bargain as a unit with respect to the terms and conditions of their individual employment violated the Sherman Act as agreements in restraint of trade. *See, e.g.*, *Loewe v. Lawlor*, 208 U.S. 274 (1907). Thus, such activity would also constitute a violation of Wis. Stat. §133.03.

In order to permit collective bargaining, Congress passed the Clayton Act, which provided an exception to the antitrust laws for labor organizations. Congress clarified and expanded this exception in the Norris-Laguardia Act of 1932, and subsequent court decisions have clarified the labor exemption by making it clear that it applies to the concerted activities of labor unions to the extent that their activities fall within the core labor market issues that are the subject of authorized collective bargaining. *See, e.g.*, *U.S. v. Hutcheson*, 312 U.S. 219 (1941); *Connell Constr. Co. v. Plumbers & Steamfitters, Local Union No. 100*, 421 U.S. 616 (1975).

However, but for this legislative exemption, collective bargaining would be unlawful as a matter of antitrust law. Collective bargaining by employees has the purpose and effect of eliminating competition among them and, absent the application of statutory labor market exemptions, the conduct of an employer in negotiating with a union would constitute an unlawful restraint of trade and thus violate the antitrust laws. "Among the fundamental principles of federal labor policy is the legal rule that employees may eliminate competition among themselves through a governmentally supervised majority vote selecting an exclusive bargaining representative." *Wood v. NBA*, 809 F 2d. 954, 959 (2d Cir. 1987) (emphasis added). Markets in which employees offer their services to employers are no different from other markets for antitrust purposes. *See, e.g., In re NCAA I-A Walk-on Football Players Litig.*, 398 F. Supp. 2d 1144 (W.D. Wash. 2005); *Law v. NCAA*, 902 F. Supp. 1394 (D. Kan. 1995), aff'd, 134 F.3d 1010 (10th Cir. 1998). Agreements that restrict competition in labor markets are unlawful unless they are clearly related to and necessary to facilitate the authorized collective bargaining activity of legitimate labor unions. *See, e.g., Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

Like federal law, Wisconsin antitrust laws create an exemption for the otherwise anticompetitive conduct that occurs in the context of *lawful* labor negotiations. Section 133.09 specifically provides that Chapter 133 shall "be so construed as to permit collective bargaining . . . associations of employees." This exception cannot logically apply, however, to circumstances in which the State of Wisconsin has by statute expressly forbidden collective bargaining by representatives not properly certified or over subjects either specifically prohibited or not authorized for collective bargaining. As noted above, Act 10 made it unlawful for the School District to collectively bargain with the union, except for base wages. It also specifically made the negotiation and inclusion of "fair share" provisions prohibited practices and illegal. Their non-base wages negotiations and the subsequent CBAs are not exempt from Wisconsin antitrust law, and under the well-established principles of antitrust jurisprudence described above they constitute unlawful agreements in restraint of trade.

Nor can the exception logically be applied to negotiations by entities that are not lawfully empowered to act as bargaining agents for groups of employees. As noted above, the Union Defendants failed to win (or even hold) recertification elections under Act 10, and therefore had and have no authority to act as exclusive bargaining representatives for School District employees. Section 133.14 provides that any agreement that "is founded upon, is the result of,

grows out of or is connected with" a violation of §133.03 "shall be void." The CBAs are such void agreements.

CONCLUSION

The collective bargaining between the Union Defendants and the School District was illegal under state law. Further, the substance of the CBAs violates Act 10 and Wisconsin's antitrust law. In addition, the Union Defendants lacked the authority to bargain the CBAs on behalf of School District employees. The School District has now acknowledged that the CBAs are void. However, the Union Defendants continue to seek enforcement of the CBAs. The Plaintiffs therefore request summary judgment declaring that the CBAs are void and also request that the Court hold a hearing to determine the attorney fees awardable to the plaintiffs under Wis. Stat. § 133.18.

Dated this 23rd day of September, 2014.

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