STATE OF WISCONSIN: CIRUCIT COURT: KENOSHA COUNTY

KRISTI LACROIX, et al.

FILED Plaintiff(s),

DECISION, ORDER AND JUDGMENT

MAR 19 2015

-V- Case No. 13-CV-1899

REBECCA MATOSKA - MENTINK
CLERK OF CIRCUIT COURT

KENOSHA UNIFIED SCHOOL DISTRICT
BOARD OF EDUCATION, et al.

Defendant(s).

On September 25, 2014, the plaintiffs filed a motion for summary judgment which was heard before this court on November 7, 2014. The motion seeks a judgment, declaring that all Collective Bargaining Agreements (CBAs) entered into between various defendant unions and the KUSD are in violation § 111.70(4)(mb) and §111.70(2) of the Wisconsin Statutes involving collective bargaining and are therefore void and unenforceable. The motion also seeks a judgment that the actions of the defendant unions in entering into such CBAs were a restraint of trade in violation of §133.03(1) of the Wisconsin Statutes.

The Wisconsin Legislature in 2011, passed Act 10 and Act 32 (collectively, Act 10) which amended, recreated and repealed portions of the Wisconsin Municipal Employment Relations Act, §111.70 et seq. (MERA). Wisconsin's public sector labor law was significantly changed by the passage of Act 10. Of import, Act 10 as it related to municipal employees, prohibited: "fair share" dues agreements; payroll deductions for dues; collective bargaining on anything but "total base wages". Act 10 also capped cost of living increases and required annual recertification elections by any bargaining unit.

Following the passage of Act 10 a number of lawsuits were filed in Dane County seeking a declaratory judgment that Act 10 was unconstitutional.[1] In the Madison Teachers, decision, the Honorable Judge Juan B. Colas, on September 14, 2012, found Act 10 to be unconstitutional.[2] In the Wisconsin Law Enforcement Assn., decision the

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[1] Madison Teachers, Inc. et al v. Scott Walker et al, 11-CV-3774, ("Madison Teachers") presided over by Judge Juan B. Colas; Wisconsin Law Enforcement Assn., et al v. Scott Walker, et al, 12-CV-4474, (Wisconsin Law Enforcement Assn") presided over by Judge John W. Markson. None of the defendants in the case before this court were parties to either action, although the Kenosha Education Association (KEA) was listed, along with others, as an interested party.

[2] There were also actions brought in Federal Court challenging the constitutionality of the law in restricting collective bargaining. On January 18, 2013, the 7th Circuit Court of Appeals upheld Act 10 in its entirety.

Honorable Judge John W. Markson on October 23, 2013 found Act 10 to be constitutional.

An appeal was immediately taken from Judge Colas's decision, however, neither Judge Colas nor the Court of Appeals for District III, granted a stay of the enforcement of the decision and order declaring Act 10 unconstitutional. The Wisconsin Supreme Court on July 31, 2014 reversed the decision of Judge Colas and found Act 10 constitutional in its entirety.

Following Judge Colas's decision, a number of events transpired. Firstly, proposed emergency administrative rules[3] were promulgated by defendants in "Madison Teachers" by the Wisconsin Employment Relations Commission (WERC) on April 19, 2013. These rules were in regards to the annual certification of elections of bargaining units that was required under Act 10. Plaintiffs in "Madison Teachers" on April 23, 2013, filed a petition for an injunction which was heard by Judge Colas. Prior to a determination on the injunction, the rules were approved by the Governor on July 3, 2013.[4] In a decision, dated September 17, 2013, Judge Colas denied the request for injunctive relief.[5]

Following the denial of the request for injunctive relief, WERC commenced to enforce the recertification provisions of Act 10. Any "recertification" for a bargaining unit needed to be accomplished by August 30, 2013. On September 6, 2013, the Kenosha Unified School Board (KUSB) requested of WERC written confirmation that neither KEA,SEIU or Local 2383 were no longer the agent of record in Kenosha. On September 23, 2013, KEA and other labor unions filed a motion for contempt in the "Madison Teachers' case. Following a hearing on the contempt motion, Judge Colas issued a written order on October 25, 2013 finding the defendants in that case in contempt.

The order of Judge Colas required the defendants, in part, to "Cease and desist from implementing the emergency rules for administration of annual certification elections"; "Inform the public and all interested parties by posting on the WERC website that Wis. Admin. Code ECR 70.03 was enacted without lawful authority and was therefore void when enacted and has no legal effect…"; Immediately inform the Kenosha

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WEAC v. Walker, 705 F.3rd 640 (7th Cir. 2013); and also on May 22, 2014, in **Labor Local 236, AFL-CIO v. Walker,** 749 F.3rd 628 (7th Cir. 2014).

[3] Exhibit 10, affidavit of Tamara B. Packard, attorney for KEA, filed October 31, 2014, in opposition to plaintiff's motion for summary judgment.

[4] The emergency rules regarding recertification of bargaining units specifically excluded the plaintiffs in Madison Teachers. .

[5] In the decision denying the request for an injunction, Judge Colas commented upon a footnote from the case of **State v. Konrath**, 218 Wis.2d 290 (1998), taken from the Stanford Law Review. The defendants set out the language used by Judge Colas in their brief, noting that WERC, and all parties to the lawsuit, were then made aware and had a "clear mandate" that they could not enforce any part of the statute "against anyone" The quote from the law review confirms this but also notes "unless an appropriate court narrows its application". This court points this out since the case was on appeal at the time.

Unified School District (KUSD) that the prior communications…with respect to the status of the Kenosha Education Association were in error….and affirmatively inform the KUSD that the Kenosha Education Association has the same status it would have had had ECR 70.03 not been enacted.." [6]

Between October 25, 2013 when the order of Judge Colas was entered and November 21, 2013, when the Supreme Court vacated that order, the defendant unions in this action were in discussions with the Kenosha Unified School District regarding entering into a new CBA between the parties.[7]

The court will take this opportunity to address an argument raised by the defendants, SEIU Local 168 and AFSCME Local 2383, in their brief that the plaintiffs have failed to present a prima facie case for summary judgment because they have failed to present to the court any CBA entered into between these defendants and KUSD.[8] In the brief filed by SEIU and AFSCME, at pages 2 and 3, they acknowledge entering into "tentative agreements" on the terms for a collective bargaining agreement; that such "tentative agreement" was ratified by the KUSD on November 15, 2013, but that neither SEIU nor AFSCME ever signed a final contract and thus none exists. These defendants therefore ask that summary judgment be granted in their favor.[9]

However, in the Answer filed by SEIU and AFSCME, these defendants responded to paragraph 57 of plaintiffs second amended complaint as follows:

> **"COMPAINT PARAGRAPH NO. 57:** The Tentative Agreement incorporated all the terms of the Expired Agreements between the School District and the three Unions, which had expired on June 30, 2013, and amended those terms as expressly, set forth in the Tentative Agreement, **creating three New CBA's**. (Emphasis added)

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[6] The Wisconsin Supreme Court vacated the order of Judge Colas on November 21, 2013, noting that "When the circuit court issued its contempt order more than a year after the record had been transmitted to the court of appeals and after we had accepted certification of the appeal, it expanded the scope of the September 2012 declaratory judgment by granting injunctive relief to non-parties." (Emphasis added). The purpose of noting this language is in relation to the argument of statewide applicability of Judge Colas's decision that Act 10 was unconstitutional.

[7] The last CBA between the parties expired on June 30, 2013 (Lacroix affidavit; KUSD Answer #17)

[8] The KEA in its brief makes a similar argument, but in regards to the 2011-2013, contract which this court does not believe is relevant to its decision and secondly, of little merit in light of the affidavit of Kiriaki on the November 11, 2013 tentative agreements, in conjunction with KEA's answers to plaintiff's second amended complaint. Additionally, the KEA in its pleadings brought a cross-claim against the KUSD (no longer a defendant), that alleged a breach of contract for a violation of the collective bargaining agreement. The cross-claim alleged a violation of a requirement for the payroll deductions of member and non members" fair share" contributions which were to be paid to the KEA, seeking $739,688.58, plus additional amounts. It cannot now be claimed that either there is no contract or what has been provided through discovery isn't the complete agreement.

[9] These defendants were not parties to the case initially. The plaintiffs filed a second amended complaint and these defendants made their first appearance in the case on March 12, 2014.

ANSWER TO PARAGRPAH NO. 57: SEIU admits.
AFSCME admits the allegations contained in Paragraph 57 of the Second Amended Complaint."

The plaintiffs have also submitted in support of their motion for summary judgment copies of such tentative agreement that were admitted in response to discovery by all defendants.[10] These documents were forwarded to plaintiffs in response to plaintiffs request for production of documents that asked for the "current bargaining agreement" between the parties.[11] The tentative bargaining agreements were to run through June of 2015, and during these proceedings one of the defendants, KEA, filed a cross-claim against the KUSD for an alleged violation of such agreement. This court does not find on the record before it that no CBAs were arrived at between the defendant unions and the KUSD.

As stated earlier, between October 25th and November 21st, 2013, the KUSD and defendant unions were in discussions regarding a new CBA, which resulted in new CBAs being entered into that would be in effect through June, 2015. The timeline of relevant events, as seen from the documents on file, are:

- June 29, 2011, Act 10 goes into effect[12]
- August 11, 2011, Madison Teachers case, 11-CV-3774 filed[13]
- September 12, 2012, Judge Juan B. Colas enters an order declaring Act 10 is unconstitutional. [14]
- October 22, 2012, Judge Colas declines to stay order of September 12th[15]
- January 18, 2013, 7th Circuit Court of Appeals declares Act 10 constitutional.[16]
- March 12, 2013, Court of Appeals, District III, declines to stay the order of Judge Colas, pending appeal.[17]
- July 3, 2013, WERC emergency rules on recertification of unions approved by the Governor.[18]

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[10] Exhibit F, affidavit of attorney Brian McGrath filed September 25, 2014. In Exhibit F, the defendants SEIU and AFSCME admitted that document as its tentative agreement.

[11] Parties to a lawsuit also have a continuing duty to supplement their discovery responses. If it became the position of any defendant that there is no legally binding agreement, whether you call it a CBA, tentative agreement or anything else, then such defendants had an obligation to supplement such answers.

[12] Prior to the effective date of Act 10, the KUSD and the defendant unions entered into new CBAs that were effective from July 1, 2011 through June 30, 2013. Exhibit E, McGrath affidavit

[13] Exhibit 1, Packard affidavit
[14] Exhibit 2, Packard affidavit
[15] Exhibit 4, Packard affidavit
[16] **WEAC v. Walker**, 705 F.3rd 640 (7th Cir. 2013)
[17] Exhibit 5, Packard affidavit
[18] Exhibit 10, page 1, affidavit of Packard

- August 30, 2013, last day for bargaining units to request recertification.[19]
- September 6, 2013, WERC notifies defendants that failure of unions to request recertification resulted in there being no recognized agents in Kenosha.[20]
- September 17, 2013, Judge Colas declines to issue injunction to block implementation of WERC emergency rules on recertification.[21]
- September 24, 2013, non-parties, including defendant unions, file motion for contempt in the Madison Teachers case, 11-CV-3774.[22]
- October 21, 2013, Judge Colas finds defendants in Madison Teachers in contempt; codified in written order of October 25, 2013, ordering WERC to retract its earlier notifications on decertification and notify interested parties of the same.[23]
- **October 25, 2013, Judge John Markson, enters order declaring Act 10 to be constitutional** in the Wisconsin Law Enforcement Assn. case, 12-CV-4474.[24]
- October 28, 2013, Court of Appeals, District III, denies request for stay of Judge Colas's order of October 25th.[25]
- **November 11, 2013, KUSD and defendant unions reach a tentative agreement on the CBA** for the periods of July 1, 2013 through June 30, 2015, ratified by KEA and KUSD by November 15th[26]
- November 21, 2013, Wisconsin Supreme Court vacates Judge Colas's contempt and purge conditions order of October 25th. [27]
- July 31, 2014, the Wisconsin Supreme Court reverses Judge Colas's September 14, 2012 decision and finds Act 10 to be constitutional.[28]

A motion for Summary Judgment is governed by § 802.08 of the Wisconsin Statutes which provides in part as follows:

> "(2)....The judgment sought 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 genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.....

The procedure requires (1) an examination of the pleadings to determine whether a cause of action has been stated and whether material issues of fact have been presented; (2) an examination of the moving parties affidavits and proofs to determine whether a prima

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[19] Exhibit 2, affidavit of Pines
[20] Exhibit 2, affidavit of Pines
[21] Exhibit 11, affidavit of Packard
[22] Exhibit 12, affidavit of Packard
[23] Exhibits 13 & 14, affidavit Packard
[24] Exhibit K, McGrath affidavit
[25] Exhibit 16, affidavit of Packard
[26] Exhibit G, affidavit of McGrath; Affidavit Kiriaki. The court has already addressed claims by SEIU Local 168 and AFSCME Local 2383 as to the issue of there being a party to a CBA with KUSD.
[27] Exhibit 19, affidavit of Packard
[28] Madison Teachers case, 2014 WI. 99

facie case has been established; (3) an examination of the opposing parties affidavits and other proofs to determine if a material issue of fact has been presented sufficient to entitle the opposing party to a trial. **Marshall v. Miles**, 54 Wis.2d 155 (1972). The court may also, if only legal issues are present, grant summary judgment to the non-moving party. **M&I Marshall Bank v. Town of Somers**, 141 Wis.2d 271 (1987).

As noted earlier, the plaintiffs have plead two causes of action; a declaration that the CBA's of the defendants are null and void, in violation of Act 10, and that the actions of the union defendants in entering into the CBA's were in violation of Wisconsin's restraint of trade statute, §133.03(1). In reviewing the parties pleadings and both parties affidavits and other proofs both in support of and in opposition to the motion for summary judgment that the court has set out earlier, it is clear that there is no genuine issue of material fact. The parties may have a disagreement on how the factual events should be interpreted in light of their sequence and the law, but the only issue is a legal one in its application to those facts.

One of the arguments raised by the KEA is that Judge Colas's declaratory judgment had the effect of an injunction and therefore, the CBAs at issue are valid. In support of this argument, KEA cites language and/or principals of law from various cases. However, these cases are factually dissimilar and/or the principal of law is not applicable to the case before this court.

Hunter v. School Dist. Gale-Ettrick-Tempealeau, 97 Wis.2d 435 (1980), is cited using the quotation, "A legislative act that has been ruled unconstitutional has no legal effect or existence".[29] The argument would seem to be that once Judge Colas, a trial judge who presided over a case in which none of these defendant unions were a party, declared Act 10 unconstitutional, then Act 10 had no legal effect and therefore the defendant unions were free to enter into CBAs without restriction.

The above language taken from the **Hunter, id.**, decision was in reference to the Supreme Court noting that that court had previously declared the predecessor statute involved in that case, unconstitutional. The issue in the case was whether or not the current statute, dealing with limitation of actions, could have retroactive effect. The point to be made is that the unconstitutionality finding and its effect, came from an appellate court, whose decisions are the rule of law statewide; as precedent to be followed.

In **Helgeland v. Wisconsin Municipalities**, 307 Wis.2d 1 (2008), a number of municipalities sought to intervene in a declaratory judgment brought by State employees and their same sex partners. The Supreme Court held that the municipalities did not have a right to intervene in the declaratory judgment action, although acknowledging that their

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[29] The language here is taken from the case of **State ex rel. Kleist v. Donald**, 164 Wis. 454 (1917), also cited in the brief. That case was a very unusual case and it would be difficult to summarize it here. Basically, the case involved a legislative act that shortened the "term" for a judge holding office in Milwaukee County. The Supreme Court found unconstitutional and therefore a person elected under the act could not take office. In the context of that case, by an appellate court, the language has applicability; not in the context of the case before this court involving a trial court's finding of unconstitutionality.

interests may be affected by the outcome of the action.[30] **White House Milk Co. v. Thompson**, 275 Wis. 243 (1957), also cited in the brief, involved the denial of the right of intervention of a milk cooperative to join an action seeking to declare an act unconstitutional. The case in the brief is cited for the proposition that the Attorney General who is defending a statute based on its constitutionality represents all persons having an interest and not just the parties to that particular action. This court does not disagree with that proposition, however it does not support the proposition that non-parties to the Milwaukee Teachers declaratory action can consider the circuit's ruling as having precedential effect.[31]

This court has not found any decision that would support the proposition that a trial courts decision is precedential and has statewide effect. Cases this court has found have in fact stated the opposite. **In re EMMAF, et al**, 2015 WL 292300 (S. Ct. Conn. 2014), "In contrast to an Appellate Court decision, a trial court decision does not establish binding precedent"; **Indiana Dept. of Natural Resources, v. United Minerals, Inc.** 686 N.E.2d 851, (Ct. App. Ind. 1998) "..the decision of one trial court is not binding upon another trial court....Moreover, a conclusion of law by a circuit court in a case from which no appeal has been taken is not binding precedent upon this court"; **Bell v. Com., Cabinet for Health and Family Services, Dept. for Community Based Services**, 423 S.W.3rd 742 (S. Ct. Ky. 2014) "A trial court's decision has no precedential value...such a decision can have effect outside its originating case only under circumstances of res judicata and collateral estoppel"[32]; **Santa Ana Hosp. Med Ctr. V. Belshe**, 56 Cal.App.4th 819, 65 Cal.Rptr.2d 754 (Ct. App. Cal. 1997) "a written trial court ruling has no precedential value"; **Soderberg v. Weisel,** 455 Pa. Super 158, 687 A.2d 839 (Sup.Ct. 1997) "trial court decisions are instructive...but not precedential"; **Kitsap County v. Allstate Ins.Co.**, 136 Wash.2d 567, 964 P.2d 1173 (S. Ct. Wash 1998) "unpublished opinions have no precedential value"; **Fargo Public Library v. City of Fargo Urban Renewal Agency,** 185 N.W.2d 500 (S. Ct. N.D. 1971) "Although the trial court rendered its decision on the principal of stare decisis and followed the decision of a court of equal rank, we are not bound by such decision, and we will proceed to a determination of this case without considering the decision of trial court as precedent binding on this court"; **State Bd. Of Equalization v. Courtesy Motors, Inc.**, 362 P.2d 134 (S. Ct. Wyo. 1961) "...but in any event the judgments of district courts are not precedents and are valuable only to the extent any sound view is worthy of consideration"; and **Shook v. State**, 156

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[30] Such as Stare Decisis.

[31] Judge Juan Colas even acknowledged this in his decision of September 17, 2013, when he denied plaintiff's request of an injunction; stating "Defendants argue that a circuit court decision is not precedential. That is true but irrelevant".

[32] Similarly, the Court of Appeals in its order of March 12, 2013, in denying defendants request for a stay of Judge Colas's decision declaring Act 10 unconstitutional, noted "We acknowledge that the respondents argue that the circuit court's decision here is binding statewide. **But we reject out of hand the proposition that the circuit court's decision has the same effect as a published opinion of this court or the supreme court. The more interesting issue is whether, if a union sues, a different circuit court might exercise its discretion to apply the doctrine of issue preclusion** or a similar doctrine and, thereby, choose to follow the circuit court's decision here. So far, as we can tell, different courts might make different decisions on that topic and, in any event, this is not the sort of statewide effect that would justify a stay order in this case. (emphasis added)

Tex.Crim. 515 (Ct. App. Texas 1951) "It is rudimentary that courts are not bound by the decisions of other courts of equal jurisdiction. The power to establish precedent is logged in courts of superior jurisdiction".

The defendant unions also cite to the court the cases of **Slabosheske v. Chikowske,** 273 Wis. 144 (1956), **Kett v. Cmty. Credit Plan, Inc.**, 228 Wis.2d 1 (1999), and **In re the Marriage of Harris**, 141 Wis.2d 569 (Ct. App. 1987), for the proposition that until Judge Colas decision were reversed they had the right to rely on it.

One of the flaws with this argument is that it ignores the fact that before the defendants entered into the CBAs in November of 2013, Judge John Markson, on October 25, 2013, entered an order declaring Act 10 to be constitutional in the Wisconsin Law Enforcement Assn, case, 12-CV-4474.

There's no question that the plaintiffs in Milwaukee Teachers had the right to rely on the decision of Judge Colas, without a stay and until an appellate court said otherwise. The decision of Judge Colas though had no precedential value or statewide effect, particularly in light of its having been appealed.[33]

The defendant unions in this case, as non-parties to Madison Teachers, could not rely on Judge Cola's decision to enter into contractual agreements with the KUSD that were contrary to the provisions of Act 10. Not only did another State court declare Act 10 constitutional before entry into the CBAs, but the Federal 7th Circuit Court of Appeals as early as January, 2013, had also declared such act constitutional; reliance as a non-party was not legally justified.

Consequently, for the reasons set forth above, the court grants summary judgment in favor of the plaintiffs on their Second Cause of Action, finding that the CBA's entered into by the union defendants during November of 2013, were contrary to the provisions of Act 10 and are therefore null and void. [34]

The plaintiffs also seek summary judgment in regards to their Third Cause of Action, that the defendants by entering into such CBAs were engaged in a restraint of trade in violation of §133.03(1) of the Wisconsin Statutes. That section provides in part:

> "133.03 **Unlawful contracts; conspiracies**
>
> **(1)** Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is illegal"

A compliant alleging a §133.03 Stats., violation must allege 1) actionable conduct, such as the formation of a combination or conspiracy, that occurred within the

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[34] The plaintiffs in their second amended complaint in their fourth, fifth and sixth causes of action also seek to find such agreement void and non-enforceable under an alternative argument that they violate §111.70, Stats. These causes of action set out specific provisions of Act 10 that were violated. Based on the courts decision voiding such CBAs in violation of Act 10, the decision incorporates these into such finding.

state. **Olsad v. Microsoft Corporation**, 284 Wis.2d 224 (2005). The allegations in plaintiffs' second amended complaint allege at paragraph 37 that the CBAs expired on June 30, 2013, and no election was held to recertify defendant unions; paragraph 39 that all unions were decertified; paragraph 50 & 51 that the KUSD engaged in collective bargaining with the defendant unions in November, 2013 that lead to new CBAs; paragraph 57 that the new CBAs incorporated all the terms of the CBA that expired on June 30, 2013; paragraph 92, 94, 95, 98, & 100, allege that the defendant unions by engaging in collective bargaining and in entering into a CBA, prevented the individual plaintiff Glembocki and those similarly situated from being able to negotiate their own conditions and terms of employment.[35]

In **Grams v. Boss**, 97 Wis.2d 332 (1980), the court discussed Wisconsin's law in terms of the federal Sherman Antitrust Act, as follows:

> "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, 15 U.S.C. secs. 1 and 2, with application to intrastate as distinguished from interstate transactions 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" p.346 [36]

Further elaborating on the relationship and analysis of anti-competitive activities under federal law, the court in **Independent Milk Producers Co-op v. Stoffel**, 102 Wis.2d 1 (Ct. App. 1980), stated:

> "...the United States Supreme Court in Standard Oil of New Jersey v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911), ruled that only unreasonable restraints[37] on trade were intended to fall within the scope of the act....

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[35] In reviewing the complaint, the court must accept the facts as plead and the reasonable inferences, and it cannot be said as plead that under no circumstances could the plaintiffs not recover under the third cause of action.

[36] For reference, section 1 & 2 of the Sherman Act provide:

> "(1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal....
> (2) Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

[37] This court raises an inquiry, that even if the defendant unions engaged in a conspiracy to restrain trade, was it "unreasonable". All of the parties were subject to Act 10. Act 10 severely limited what terms and conditions of employment that could be bargained for. Thus the individual plaintiff Glembocki, and others reasonably situated, could obtain only what Act 10 allowed, which was no more or less than that of the defendant unions.

The plaintiffs in support of their motion, cite the case of **Loewe v. Lawlor,** 208 U.S. 274 (1907), for the proposition that union activities to bargain as to terms and conditions of employment were agreements in restraint of trade. This case involved defendant of the United Hatters of North America and subordinate unions, that were attempting, according to the plaintiffs, to unionize their shops, against their will or face a boycott. The court, based on the pleadings in the complaint, held the pleadings set forth enough allegations to fall within the Sherman Act, and the demurrer to the complaint should have been overruled.

Obviously, the decision of the court in **Loewe, id.,** predated the passage of the National Labor Relations Act (1935), and subsequent labor laws. In addition, in 1914, Congress passed the Clayton Act. Section 6 of that act exempted labor organizations from the antitrust laws. As that section provides:

> "**The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed** to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or **to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."** (emphasis added)

Similarly, Wisconsin's Act, under §133.07, provides:

> "(1) **This chapter shall not prohibit** the existence and operation of labor, agricultural or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or organizations permitted under ch. 185 or 193; shall not forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; and **such organizations, or the members thereof, shall not be held or construed to be illegal combinations or conspiracies in restraint of trade, under this chapter**. The labor of a human being is not a commodity or article of commerce." (emphasis added)

The Norris-LaGuardia Act of 1932, also provided for an exemption of labor unions under 29 U.S.C. §§ 101-115 of the Act. In **United States v. Hutcheson**, 312 U.S. 219, 61 S.Ct. 463, 85 L.Ed. 788 (1941), the Supreme Court held that, in light of these statutory provisions, the Sherman Act does not proscribe union activity "so long as (the) union acts in its self-interest and does not combine with non-labor groups." As stated in **Allied Intern., Inc. v. International Longshoremen's Ass'n, AFL-CIO**, 640 F.2d 1368 (1st Cir. 1981):

> "The Sherman Act was a product of "the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the

> monopolistic tendency of which had become a matter of public concern.... The Supreme Court has said that "the Act is aimed primarily at combinations having commercial objectives and is applied only to a limited extent to organizations, like labor unions, which normally have other objectives." pp. 1381-1382

The defendant unions cite the case of **Apex Hosiery Co. v. Leader**, 310 U.S. 469 (1940) for the proposition that the even at common law their actions were not considered a restraint of trade. The court in that case, at page 502, noted: "A combination of employees necessarily restrains competition among themselves in the sale of their services to the employer; yet such a combination was not considered an illegal restraint of trade at common law when the Sherman Act was adopted, either because it was not thought to be unreasonable or because it was not deemed a 'restraint of trade". As noted in their brief, unions forfeit their exemption under the anti-trust laws in situations where they agree with non labor, third parties, to restrain competition. **Allen Bradley Co. V. Local 3, Electrical Workers**, 325 U.S. 797 (1945); **Mine Workers v. Pennington**, 381 U.S.657 (1965); and **Cornell Const. Co. v. Plumbers & Steamfitters Local 100**, 421 U.S. 616 (1975).

An argument raised by the plaintiffs is that the defendant unions were not "lawful labor organizations". As noted earlier, the defendant labor unions were required to be re-certified by August 31, 2013 under Act 10. Initially WERC in September, 2013, declared the defendant unions were no longer recognized as a representative in Kenosha. On October 26, 2013, WERC notified the KUSD and posted on its web page, that its previous determinations were to be disregarded and that the labor organizations were to be accorded the same status with respect to municipal employers as if ERC 70.03 had not been adopted. After the CBAs were entered into in November, 2013, WERC in February, 2014, again decertified the defendant unions and found that such decertification was retroactive to August 31, 2013.

It must be emphasized that this cause of action for anticompetitive behavior in violation of §133.01, Stats. Such a violation is separate and distinct from the enforceability or legality of the CBAs themselves under Act10. The fact that the Supreme Court ultimately upheld the constitutionality of Act 10, and this courts earlier finding that the CBAs were void, is immaterial to a violation of the antitrust act; as is WERC's February, 2014, determination as to retroactive decertification.

At the time the CBA's were entered into, the State of Wisconsin, via WERC, had informed the public, KUSD and the defendant unions that they were able to collectively bargain. There is no question that the collective bargaining agreements were on wages and conditions of employment; traditional areas of union activity. This activity is clearly exempt from the antitrust provisions of Chapter 133, by virtue of §133.07 of the Wisconsin Statutes.

Furthermore, even if it could be argued that the decertification of the defendant unions was applicable, that would not bring their actions within the language of Chapter 133 or under the common law. As noted in an earlier footnote, the plaintiffs or those similarly situated could bargain for no more or less than the defendant unions under Act

10. Thus in any case, there could be no restraint of trade as a practical matter under the facts of this case.

Consequently, the court finds there is no genuine issue of material fact, and that summary judgment dismissing plaintiffs Third Cause of Action is granted in favor of the non-moving union defendants, and is hereby dismissed. **M & I Marshall Bank, supra.**

Judgment is therefore entered in favor of the plaintiffs as to their Second Cause of Action finding the CBAs to be null and void, together with statutory costs and disbursements as authorized by law.

This document is the final document for purposes of an appeal under § 808.03 (1), Stats.

Dated at Kenosha, Wisconsin this 19th day of March, 2015

BY THE COURT:

DAVID M. BASTIANELLI
CIRCUIT COURT JUDGE, BR.1