STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, Sc. SUPERIOR COURT

WARWICK TEACHERS UNION CA 92-1199

C E R T I F I C A T I O N

I, ALFRED GALLUCCI, hereby certify that the succeeding pages, 1 through 24, inclusive, are a true and accurate transcript of my stenographic notes.

ALFRED GALLUCCI

Court Reporter

26 FEBRUARY 1993 - MORNING SESSION

THE CLERK: This is Civil Action 92-1199, Warwick Teachers Union. Are the parties ready?

MR. SKOLNIK: Yes.

THE COURT: This matter is presently before the Court on the appeal of the Warwick School Committee from a decision issued by the State Labor Relations Board after a hearing in October of 1992

The Order entered by the Board compelled the Teachers Union and the School Committee to abide by the terms of the 1988 Collective Bargaining Agreement for the 1992-93 school year. The 1988 Collective Bargaining Agreement is to continue to apply to the teachers' working conditions until a successor Collective Bargaining Agreement is agreed upon, or entered into by the parties. The Board also directed the School Committee to, "Make whole," any teachers who sustained losses due to the School Committee's departure from the terms of the 1988 agreement.

In its conclusions of law, the Board, after hearing testimony and examining documentary evidence, included a finding that the Warwick School Committee had illegally refused to recognize the terms and conditions of the 1988 Collective Bargaining Agreement, in derogation of Rhode Island General Laws 28-7-13(5 6 and 10). The

Board also found that the unfair labor practices engaged in by the School Committee resulted in the denials of the legal rights of the teachers, and lead to strife and unrest, inimical to the public safety, health and welfare.

The School Committee urges this Court to reverse the Board's decision, raising the following issues:

1. The changes implemented in September 1992 were permissible under federal law regarding impasse.

2. The changes were lawful where the Union declined to bargain

3. The Board failed to apply Federal precedent.

4. The Board acted improperly by departing from Federal precedent.

5. The application of Federal principles and sustaining of unilateral implementation upon impasse had occurred consistently in other states.

Also, the allegation was raised that the Complaint was untimely filed, the Union charge was res judicata, and the decision constitutes abuse of discretion.

The Court will first address the procedural objection. The Warwick School Committee argues the time of accrual of the instant action was September of 1991, and that the Union had until March of 1992 to file a charge. Because the charge was not filed until October

of '92, the School Committee argues that the charge should be dismissed as untimely. First of all, prior to the filing of the charge, the Union had a Superior Court decision declaring that the predecessor Collective Bargaining Agreement would apply to the teachers who were then engaged in a strike after a history of failed negotiations. The teachers had, in good faith, raised the issue of applicability in Superior Court, and were given a decision on the issue, only to have it reversed by the Supreme Court, which ruled that this Court had no original jurisdiction to determine which agreement was in force. The Union, thereafter, promptly filed the charge with the Board. The record below provides no elucidation on this point. The only comment just prior to the taking of testimony in this case before the Board, was the comment of the School Committee lawyer and I want the record to be very clear that this lawyer was not Mr. Green - he said, "I can't believe that this Board wants to expedite proceedings in order to expedite a strike. As I say, Mr. chairman, we are at your service. We'll participate in this hearing. I will leave the questions that I ask unanswered."

First of all, there is absolutely no information to support this totally unfair remark. In reality, the Board had agreed to accommodate all of the parties in an

emergency situation, so that a speedy resolution could be effectuated. However, the School Committee lawyer, who found my order for an expedited hearing, "Astonishing," appealed to the Supreme Court, which then stayed the proceeding.

I just want it to be clear that I have reviewed this entire record, and there is not even a remote indication, by even the most fantastic imagination, that the Board in this case acted in anything but good faith. To say that this Labor Board wanted to expedite the hearing in order to expedite a strike in this case, in my mind, is completely ludicrous. And as an aside, I commend the Chairman of the Labor Board, whoever you are, for exercising restraint, neutrality and judiciousness, by not responding to these completely unfair remarks.

In any event, the Federal Labor Act contains a six month statute of limitation. Our state counterpart has no such limitation. The Court is declining to apply the limitation as the School Committee urges. In my estimation, the Board was well within its authority when it chose to entertain this Complaint and to conduct a hearing. Considering the tortuous route this case has taken, and putting the various legal decisions in perspective, the filing of this Complaint in early

October was not untimely, and the Board was well within its right to entertain, at least in my opinion, this particular charge. There is actually no statute of limitations expressed in our statute, and the Board was certainly not required or permitted to legislate in such a six month rule.

Now as to the res judicata issue. The School Committee argues that the Union's failure in ULP 4518 to assert the applicability of the terms and conditions of the 1988 agreement, precludes it from this claim now. The Court does not agree that the Union's failure to posit, what I believe would have been an alternative argument in 4518, is any impediment to raising it in the instant case

In 4518, the Board had decided that there was an agreement in effect, and ordered the parties to comply. This Court reversed that Labor Board decision on the esoteric, isolated, issue of apparent authority being inadequate to bind a municipality. In that situation, a sole member of the School Committee, of the negotiating team, committed to certain terms which had been expressly eliminated by the Committee as contractual provisions. The doctrine of res judicata in no way requires dismissal of the instant Complaint on the grounds that the present controversial issues could

have, and should have been raised. Thus, the Labor Board committed no error in declining to dismiss on that theory. Again, the record below is silent on this point. Regardless of the extent to which these two procedural deficiencies were elaborated before the Board, this Court finds that the Board acted properly in proceeding with the dispute

As to the remaining allegations of reversible error, the Court will discuss them individually. The standard of review of this Court is not whether it might reach a different result, but whether the Board exceeded its statutory authority, or rendered a decision in violation of constitutional or statutory provisions, made upon unlawful procedure, clearly erroneous in view of the record, arbitrary, capricious, or affected by other error of

This Court is not permitted to substitute its judgment for the Board's as to the weight of the evidence, the credibility of the witnesses, the weight of evidence concerning questions of fact, and must affirm the decision, absent clear error

The School Committee contends that the changes in the terms of the 1988 to '91 Collective Bargaining Agreement were lawful under the federal law of impasse. The Committee says that there is ample evidence in the

record for this Court to find that an impasse existed, as a matter of law, thus allowing the committee to implement the pre-impasse proposals.

The Board, in its decision, noted that a question of first impression in this jurisdiction had been presented to it, namely, may an employer unilaterally implement terms and conditions, with or without impasse, pending execution of a new agreement. The Board answered in the negative.

The Board detailed the four alterations of the 1988 Collective Bargaining Agreement, which were made by the School Committee. Specifically in September of '91, the School Committee altered existing contractual provisions with regard to class size, in excess of 26 students, and weighting. Also, from September of '91 to December of '91, an increased leave police was in effect as it pertains to personal days. The Board further found no evidence that either party proposed elimination of the grievance procedure or modification of the School Committee's role in the process.

In February of 1992, the School Committee had ceased processing teacher grievances as it has previously done. Finally, the School Committee, the Board found, abrogated the 1988 Collective Bargaining Agreement concerning reductions in force. There was

evidence that the School Committee had exceeded the cap imposed of twenty layoffs per year.

The Board discerned that there was no compelling need to implement the alterations. The Board explains on Pages 9 and 10 of its decision how the School Committee utilized the terms of the 1988 Collective Bargaining Agreement, or the 1991 tentative agreement, depending entirely upon which provision was most advantageous to the School Committee. The Committee's position is that it was entitled to unilaterally implement any changes in the terms and conditions of the teachers' employment which had been reasonably encompassed in its earlier proposals. The contract negotiations were at an impasse. Impasse, which has been variously described in federal decisions, comprehends a situation where despite good faith in negotiations, the employer and employee are deadlocked, and further discussions would be futile. The Committee's position is that its duty to bargain was suspended, because an impasse existed. The Committee urges this Court to declare that an impasse did exist based on the evidence in the record, and that as of September 10, 1991, there was no agreement between the parties, and subsequently the Chief Union negotiator refused to bargain further, yet the record shows that

negotiations took place on September 10th, September 12th, the 19th, 20th, 22nd, 24th, and 28th, of September; October 3rd, 12th, and 14th. Mr. McElroy was asked if anytime there was any indication from the School Committee that the parties were at an impasse, and he said, "No, not even smoke signals." That is in the transcript at Page 24. Those statements stand unimpeached, as there was no cross-examination by counsel for the School Committee on that, or any other point, of Mr. McElroy. After a review of the entire record presented to the Labor Board, this Court declines to rule that an impasse existed, and such a finding is unsupportable by the evidence.

I feel compelled to emphasize again, that this controversy has a convoluted legal history, and factual history. I am certain that the Supreme Court is aware of it because they have been requested to intervene at almost every stage. Some rulings of this Superior Court were upheld, others were vacated; some decisions were upheld in part, and vacated in part. Many individuals throughout this controversy have expressed uncertainty concerning the precise legal posture of this case, at any given moment

The next issue then becomes whether the unilateral changes implemented by the School Committee were lawful

or unlawful. On this point, the Committee claims that the Board committed reversible error by failing to apply Federal precedent.

The Board explained in its decision that the survival of a Collective Bargaining Agreement after expiration is dependent upon whether federal or state law is applied. Citing NLRB, the National Labor Relations Board vs Katz, 369 U.S. 736. Citing that case, the Board noted that in the private sector, the terms of an expired Collective Bargaining Agreement apply until a new agreement is reached, or the parties bargain in good faith to impasse.

The Labor Board here spurned the School Committee's request that it adopt the federal line of cases without regard to the distinct character of public sector labor relations. Of the cases cited in support of this proposition, the more cogent one is Moreno Valley Unified School District vs Public Employment Relations Board, 191 California Reporter, Page 60. I would note the case is cited in a brief, I think by the Labor Board, as Maureen, the woman's name, O'Valley, making one feel there was a single very Irish plaintiff in this case, but in actuality it is Moreno, M-O-R-E-N-O Valley, which is a place in California. In any event, in that case, the Court upheld a hearing officer's

finding.

MR. GURSKY: I'll take the heat, your Honor.

THE COURT: Thanks, Mr. Gursky. I'm glad you said that. In that case, the Court upheld a hearing officer's finding that unilateral changes in employment conditions within the scope of representation, implemented during the pendency of impasse procedures constituted an unfair labor practice. The Court noted the flawed reasoning of the municipality's suggestion that employees strikes can be equated to unilateral changes in employment conditions made by employers employer equivalent of a strike, of course, is a lockout. At any rate, the municipality in that case argued that the Board failed to distinguish between pre-impasse bargaining and statutory impasse procedures. Citing Katz again to that local board, the District has stated that under the NLRA, unilateral employer actions on subjects of negotiations, taken before impasse is reached, is, per se, unfair, while unilateral action after impasse is not unfair. The Court characterized that argument as one which assumed a correspondence between federal law and the State Act which did not exist.

The School Committee, in our case, claims that Labor Board should have followed Federal precedent

because of the State Supreme Court decisions which "recognized the persuasive force of federal cases which have construed the phrase 'terms and conditions' of employment." Our Labor Board was clearly aware of our Supreme Court's statement that federal law in the area is persuasive, however, the Board noted it is binding. There is absolutely no requirement that our State Labor Board embrace without distinction federal interpretations and holdings

Furthermore, the cases with which our Supreme Court was confronted, did not, in my estimation, present similar issues, and therefore do not compel the conclusion urged by the Committee.

In the Barrington case, the Court held that the abolishment of twelve departmental chairmanships occupied by Union members was an appropriate issue for the bargaining of terms and conditions of employment. In other words, it was not exclusively a matter of educational policy which would have exempted it from mandatory bargaining. In the firefighters case, the Court said that a pension plan was also a term and condition of employment. Belanger vs Matteson, 115 R.I Page 332, a case involving teacher promotions, the Supreme Court endorsed the philosophy of Steele vs Louisville & Nashville Railroad, 323 U.S. 192, and its

progeny, to concur that implicit in our State Act is a duty on the part of an exclusive bargaining agent to adequately and fairly represent the interests of all whom it negotiates and contracts, not only those who members, but any who are a part of the bargaining unit.

Also, another case in this vein, an older one, is Almac's vs the Rhode Island Grape Boycott Committee. The issue of the Almac's vs the Grape Boycott Committee was whether a secondary boycott was included in the definition of labor dispute. In that case, the definition of labor dispute in the Rhode Island scheme was identical to that in the Federal LaGuardia Act

That Act, which is obviously a federal act, in explanation of its refusal to apply Federal precedent, the Board elaborated on the several different methods of collective bargaining. Collective bargaining in a private sector is essentially economic warfare, including the use of strikes and lockouts for economic leverage. Federal Law features Government neutrality; and our State, achieving bargaining results were consistent with public policy.

Specifically, the declaration of policy in Chapter 9.3 contains a statement that, "In pursuance of the constitutional duty to promote public schools, and achieve high quality education, it is indispensable that

good relations exist between teaching personnel and School Committees. Consistent with that expression of legislative intent, our Labor Board stated that, "Where the public interest and safety or education is concerned, if public simply cannot tolerate an obviously bad agreement, or absolute control of employment conditions by one party, neither can the public tolerate a bad result or broken down school system. While the private sector tolerates the extremes of collective bargaining, the public sector could not sustain them." That is contained in the Board's decision on Pages 13 and 14.

In this connection, the Board quoted from an opinion of the Florida Supreme Court explaining the necessity of dichotomous models: in United Teachers of Dade County vs Dade County School Board, 500 Southern 2d, Page 508, a 1986 case, the Court said that, "The distinction between the public and private sectors cannot be minimized. Employers in the private sector are motivated by profit to be returned from the enterprise, whereas public employers are custodians of public funds, and mandated to perform governmental functions as economically and effectively as possible. The employer in the private sector is constrained only by investors who are most concerned with the return for

their investment, whereas the public employer must adhere to the statutory enactments which control the operation of the enterprise

Our board viewed public welfare and equality of bargaining power to have been paramount concerns to the Legislature. The interpretation of a statutory scheme by any specialized agency or board should be entitled to substantial deference as long as that interpretation is not unreasonable or inconsistent with legislative purpose. This Court cannot say that the Labor Board committed reversible error in not following Federal precedent in the manner requested by the petitioner. The Court believes that the Board acted properly, lawfully, and within the scope of its authority and expertise by declining to accept the Committee's argument.

As an aside, I feel compelled to note again that the petitioner's brief contained some completely unnecessary vitriolic remarks. The Board, for example, is characterized as disrespectful and ignorant of the law. It is also accused of being naive. Its members are referred to, in essence, as, by its puppets, which the implication that anyone who concurs with their opinion is in a similar category. There is also a remark in that brief with emphasis that if one had

actually read the cases cited, the implication being only petitioner's counsel has, then one would inescapably share the same enlightened interpretation advanced by the author

There is absolutely nothing before this Court which even remotely suggests that this Board discharged its duties in anything but a conscientious fashion, and I want that record to be clear on that point. It is truly disappointing to observe in a legal forum that a lawyer has such a juvenile intolerance for divergent opinion that emits disrespect for all who do not choose to hold his view. My remarks, again, are intended for the supposed professional person who included these epitaphs in the brief. I hasten to add that Mr. Green and Mr. Skolnik, with whom I have been working since last September, have consistently behaved as gentlemen in this Court, and to each other, in my presence, despite the fact that their intellectual and professional positions could not be more polarized. What they do when I'm not refereeing, I don't know, but in my presence, they have always acted with class, although not always with classes

At any rate, the final portion of the Board's decision address the issue of whether the unilateral changes were illegally implemented. The Board, in

rejecting the Committee's argument that an impasse was created, found that with respect to all implemented terms other than personal days, the School Committee did not bargain to impasse on a proposal it implemented. Thus the Committee's position was incorrect even under federal law. However, rather than resting on Federal precedent, the Board chose to join those jurisdictions which hold that an employer's unilateral implementation of bargaining proposals is, per se, unfair labor practice. The decision relied upon is Wasco County vs AFSCME, the American Federation of State, County and Municipal Employees, reported at 569 Pacific 2d, Page 15, and was affirmed at 613 Pacific 2d, Page 1067. Also referred to as Wasco I and Wasco II.

In Wasco, the Union and County, after unsuccessful negotiations, were assigned a mediator by the Employment Relations Board, which is the analogue to our State Labor Relations Board. The mediator ultimately concluded that the parties were deadlocked. Two days after the deadlock was reported, the County sent the Union a letter saying that the budget had to be formulated for the upcoming fiscal year, and despite the absence of a labor contract, the County was including the 8% wage increase previously rejected by the Union, who wanted a 26% increase, which I think you'll even

think is very high, Mr. Skolnik, even though

MR. SKOLNIK: Probably.

THE COURT: (Continued) -- you had nothing to do with that case. So it's on the record that you can be reasonable. In Oregon, it is required after failed mediation, that a fact finding process be initiated by one or both parties, or the Board itself. If any party rejects the fact finder's recommendation, the parties are at an impasse under Oregon public sector law

The Oregon board noted that while parties could resort to self-help measures, including an employer's unilateral implementation of rejected offers, that such activity was not permissible under Oregon's public sector bargaining law.

In Oregon, public employees do have the right to strike, if they have exhausted the requisite mediation fact finding procedures. The Board in Oregon reasoned in the Wasco case that since the Union could strike only after exhausting other remedies, that an employer could not initiate self-help measures, thus the Board ruled the employer could not make unilateral changes in working conditions consistent with the rejected offers to the Union until certain statutory steps had been completed

The Court in its discussion of the State Board's

decision acknowledged its deference to expertise-based policy formulations, noting that such deference particularly applicable to the Labor Board.

In Wasco, the ultimate holding of the Board was that an employer's unilateral implementation of a bargaining proposal, while the employer had a duty to bargain, constituted, per se, an unfair labor practice The case was then remanded to the Board not because the adoption of such a per se rule was inappropriate, but because the Board had neglected to set forth reasons for the rule consistent with the public employees collective bargaining law. Upon remand, those reasons were recited by the Board, and appear in Wasco II vs AFSCME, Pacific 2d, Page 1067, and they appear on Page 1071. In Wasco II, the Court upheld the labor board's adoption of the per se rule, declaring unilaterally changes by the employer, when the employer had a duty to bargain, to be, per se, unfair

The petitioner in Wasco also contended that the Board abused its discretion by adopting such a rule in a contested case rather than through legislative rulemaking. The Court ruled that it was not impermissible under their statutory scheme, and affirmed the Board's actions.

In Rhode Island, our Board, rather than resting

upon federal law, chose to "Join those jurisdictions which hold that an employer's implementation of bargaining proposals is, per se, an unfair labor practice." In citing its approval of Wasco, our Board noted that the instant situation is even more compelling because public employees have no statutory right to strike. The Board's paramount rationale for adoption of this rule, was to effect a stabilizing impact on labor relations. This stability will be fostered by denying both parties the right to implement a term or condition of employment not previously agreed to. Our Board believed that this would assist in the maintenance of good relations between teaching personnel and School Committees. Such an objective has been declared in the arbitration statute as an indispensable feature in the achievement of high quality education

In sum, this Court concurs not only with the Board's decision and Order, but with its purpose in advancing legislative intent. For all of these reasons the Court has set forth, the Court affirms the Board's actions, and its Order, and the School Committee is ordered to comply with the Labor Board's Order. And, of course, they also have an exception to the Court's decision.

MR. GREEN: Your Honor, if I may --

THE COURT: Sure.

MR. GREEN: Just to save time in coming back, we're required to ask for a stay in this Court, and we're asking for a stay in the Supreme Court. I would move that the Court stay the Order that it just entered, to the extent that the Court's earlier immediate enforcement order was modified by the Supreme Court, the February 3, 1993 Order. Essentially, by granting this motion, it would maintain the status quo as it exists at the moment, pending an appeal of your Honor's Order of today, to the Supreme Court

MR. DEFENDANT: Your Honor, admittedly, the Court entered an order February 3. It did it not on the basis of a final decision, it did it pending a final decision I would think that you have issued the final decision. It should be operative. Mr. Green knows where --

THE COURT: You say final

MR. SKOLNIK: When I say, "Final," I mean with respect to the appeal. There is always a higher authority, and Mr. Green well knows where the Supreme Court is. He's invited me there many times. So that I'm sure he can have a hearing.

THE COURT: You probably invited him a couple of times.

MR. SKOLNIK: Not in this case.

MR. GREEN: Once, I think

MR. SKOLNIK: I don't remember. But I would suggest that the Order be operative, and he can pursue relief elsewhere.

THE COURT: Okay. Mr. Green, for all of the reasons that I have set forth, and consistent with the previously issued denials for a stay, I am going to deny the present motion for a stay, based on my decision today.

MR. GREEN: Thank you, your Honor

THE COURT: Thank you, Gentlemen.