O/A 1-13-84

STATE OF FLORIDA

BEFORE THE SUPREME COURT

PALM BEACH JUNIOR COLLEGE BOARD OF TRUSTEES,

Appellant,

vs.

UNITED FACULTY OF PALM BEACH JUNIOR COLLEGE,

Appellee.

CASE NO. 63,352

APPELLANT'S REPLY BRIEF

Appeal Of Decision Of
The First District Court of Appeal
State Of Florida
Case No. AF-17

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MISCELLANEOUS

THIS COURT HAS PREVIOUSLY DETERMINED THAT PUBLIC EMPLOYER BARGAINING RIGHTS AND POWERS ARE CONSTITUTIONALLY CREATED.

In arguing that the collective bargaining authority and rights of Florida public employers are not constitutionally granted, the Union[1/] (UB, pp. 7-8) misconceives the nature and source of a governmental entity's right or power to bargain collectively with its employees.

The Florida public employer, as an instrumentality of government, has no capacity to act in this or any other area except as it "derives its powers and jurisdiction from the sovereign authority", (Miami Water Works, Local No. 654 v. City of Miami, 26 So.2d 194, 197 (Fla. 1946)), which is the State and, ultimately, the people of Florida (Article I, §1, Fla. Const.).

In Dade County C.T.A., Inc. v. Ryan, 225 So.2d 903 (Fla. 1969), this Court held that Article I, §6 immediately brought public employees within the purview of §839.221(2), Fla. Stat., simultaneously conferring upon the Dade County School Board the authority and power to bargain with its teachers within the limitations of that statute (225 So.2d at 906-907). Section 839.221 had, until the adoption of Article I, §6, been held to have no application to public employment (Dade County v. Amalgamated, Ass'n, etc., 157 So.2d 176 (Fla. 1st DCA 1963)[2/].

1/ "UB" refers to the Union's Answer brief, and "PB" to PERC's.

2/ It is fairly obvious that the Legislature did not see itself as the creator of public employer bargaining rights or powers, since it did not provide any. Chapter 447 speaks only to the ...continued...

IT IS WELL SETTLED IN FLORIDA THAT THE PERA IS PATTERNED AFTER THE NLRA.

It is too late in the jurisprudential day for either the Union (UB, pp. 9-13) or PERC (PB, pp. 16-21) to deny that the PERA is patterned after the NLRA.

In Pasco County School Board v. PERC, 353 So.2d 108 (Fla. 1st DCA 1978), the Court described the PERA as being "patterned after" the NLRA (353 So.2d at 116). The opinion also contains the following:

> "Section 447.501(1)(b) reflects the strong influence of Section 8(a)(3) of the NLRA ..." (355 So.2d at 116).

At 353 So.2d 126, the Court quoted the entire twenty-eight line NLRA definition and discussion of mandatory bargaining subjects from NLRB v. Katz, 369 U.S. 736, 82 S.Ct. at 1111, and adopted it, the question of what is a mandatory subject being, of course, central to the present case.

In Int'l Brotherhood of Painters v. Anderson, 401 So.2d 824, 831 (Fla. 5th DCA 1981), the Court found the PERA to be patterned after the NLRA and identified major sections of the PERA by reference to their "Federal counterparts" (fns. 10, 11). Also see School Board of Polk County v. PERC, 399 So.2d 520 (Fla. 2d DCA 1981), in which the Court followed NLRB case law even though PERC argued for a departure from it.

2/ ...continued...
matter of public employer obligations (§§447.203(14), (17), 447.309, 447.403). Section 447.209 does not provide employer bargaining rights; it instead provides that certain rights shall be protected from the bargaining process.

PERC itself has previously held that the PERA is "patterned after a federal law", i.e., the NLRA, and "reflects the strong influence" of it (Pasco County School Board, 4 FPER 63, 65, 66 (1977)).

Moreover, in its present brief (PB, p. 18), the Commission concedes that the NLRA and PERA provisions on mandatory subjects for bargaining are "practically identical". Comparison will show the Court that this is true of every PERA provision dealing with a subject treated in the NLRA, which is to say, the bulk of the PERA.

The addition to the PERA of the impasse resolution procedure, which does not in any way alter or affect the basic sections on certification of representatives, the duty to bargain, and unfair labor practices -- and a random section or two, such as the employer rights section, §447.209, and the grievance procedure guarantee, §447.401 -- cannot change the fact that the PERA is, in truth and fact, essentially a copy of the NLRA.

Section 447.209 actually does no more than to codify NLRA case law on "core entrepreneurial" rights and "inherent managerial functions" (Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964)), and §447.401 is reflective of NLRA case law to the effect that a grievance and arbitration provision must as a rule be agreed to if a no-strike clause is required as a condition of agreement (Boys Market, Inc. v. Retail Clerks, 398 U.S. 235, 90 S.Ct. 1583 (1970)).

The Union pitches its argument (UB, pp. 9-13) on the fact that the legislative committee files contain research on a Wisconsin public collective bargaining law, and that the NLRA definition of mandatory subjects is repeated in various state laws, a situation which is facially meaningless since they all followed the NLRA.

In point of fact, Wisconsin has three separate public employee relations laws, the State Employees Labor Relations Act, the Municipal Employees Relations Act, and the Wisconsin Employment Peace Act, all found in Chapter 111, Wisconsin Statutes, but enacted at different times. The Section quoted by the Union, §111.70(1)(d)(UB, p. 13) is from the SELRA, enacted not in 1959 (UB, p. 10), but in 1965, and the quote, referring to an obligation to "meet and confer", is dissimilar to the PERA §447.203(14) definition which is, of course, "practically identical" to the NLRA provision. In labor law parlance, "meet and confer" is traditionally used to refer to a process which is much different than collective bargaining, principally because it is attended with no good faith obligation to seek agreement.

If the Court chooses to review Chapter 111, Wisconsin Statutes, it will find that the three Acts are much different among them, and that none of them is strongly reflected in the PERA.

Moreover, the Wisconsin Supreme Court relies on NLRA precedent with reference to the matter of mandatory bargaining

subjects (Libby, McNeill & Libby v. WERC, 48 Wis.2d 272, 179 N.W.2d 805 (1970)), and a University of Wisconsin labor law professor has written that the Wisconsin public sector labor law has "reached the same state of development as federal law fashioned under the National Labor Relations Act by the National Labor Relations Board and the federal courts." (Weisberger, The Appropriate Scope of Bargaining In The Public Sector: The Continuing Controversy And The Wisconsin Experience, 1977 Wisconsin L. Rev. 685).

PERC'S DECISION IS A PROHIBITED ABRIDGMENT, NOT A PERMISSIBLE REGULATION.

We are in agreement with PERC (PB, p. 13) that Article I, §6 of the Constitution, as interpreted by this Court, permits necessary procedural and regulatory variations between the NLRA and the PERA, so long as there is no abridgment of constitutionally created bargaining rights or powers. That distinction, between regulation and abridgment, is patently fatal to PERC's attempted denial of the public employer's constitutionally granted authority and right to insist on the most important of all management proposals, i.e., a management's rights clause.

The same observation applies in converse fashion to PERC's argument that the PERA is not patterned after the NLRA as to those parts which are pertinent to this case (PB, pp. 16-22), despite its concession that the two statutes are identical as to the language which should be dispositive here, i.e., the

definition of mandatory bargaining subjects (PB, p. 18). The argument (PB, pp. 18-22) that the PERA impasse resolution procedure breaks the pattern forgets that that procedure is just that, a procedure, and that it does not alter or abridge the previously provided substantive bargaining process or the rights of parties to decide what they will and will not agree to.

AMERICAN NATIONAL CONTINUES TO BE GOOD LAW AND DOES CONTRADICT PERC'S DECISION.

Both the Union (UB, pp. 14-22) and PERC (PB, pp. 22-24) now seek to disown the Commission's opinion, in the parts where it categorically conceded that "In the private sector this result (denomination of a management-rights, impact-bargaining-waiver clause as a mandatory subject of bargaining) has been viewed as being justified ... N.L.R.B. v. American National Insurance Co. ...." (7 FPER 593, 595) and in which it arrived at the opposite conclusion, that "This proposition simply does not have the same validity in the public sector", on pure policy grounds. The Union describes the quoted language as merely "suggesting" that PERC "may have thought" its holding contradicted American National (UB, p. 14). PERC's present counsel carefully says no more than that PERC did not concede the contradiction "in briefing before the First District Court of Appeal" (PB, p. 22).

This Court, of course, will not hear PERC's counsel to support the Commission's Order on a different basis than that which appears in the decision itself (Burlington Truck Lines v. U.S., 371 U.S. 156, 83 S.Ct. 239 (1962); 2 Am Jur.2d, Admin. Law, §756)).

In any event, neither PERC's decision nor that of the Court of Appeal can be reconciled with American National.

The argument (UB, p. 15) that the American National Company's insistence upon excluding certain matters from arbitration would violate §447.401 is hardly to be taken seriously. In guaranteeing a procedure for grievance and arbitration of contract disputes, §447.401 obviously does not and could not say what may be in the contract. To do so would be contrary to the basic guarantee of freedom of contract (§447.203(14)). Of course, if bargaining parties write into their contract an agreement that the effects of the exercise of given employer rights shall not be questioned in arbitration, that agreement is subject to arbitration, under §447.401, if its "interpretation or application" is later disputed, but the agreement itself is binding and cannot be altered by an arbitrator.[3/]

The Union effectively concedes as much, citing PERC holdings that a public employer can lawfully insist upon contractually exempting certain management decisions from arbitral review (UB, pp. 15-16).

The UF appears, indeed, to have very nearly conceded the case by its ensuing statement that the American National clause is otherwise perfectly acceptable under Florida law (UB, pp.

3/ "However, an arbiter or other neutral shall not have the power to add to, subtract from, modify, or alter the terms of a collective bargaining agreement." §447.401.

In summary, it is clear (1) that §447.401 is not offended by a contract which mentions given areas of mandatory bargaining only by saying that they shall be within the exclusive and non-arbitrable control of management, and (2) that the granting of a statutory right, to bargain, to arbitrate, or to strike, is not inconsistant with its waiver (p. 11, infra).

The UF appears, indeed, to have very nearly conceded the rest of the case by its ensuing statement that the American National clause is otherwise perfectly acceptable under Florida law (UB, pp. 15-16). Its, and currently PERC's, sole remaining argument is that American National only sanctions "listing" clauses, as distinguished from "residuary" clauses (UB, pp. 17-19; PB, pp. 23-24).

The following cases refute that argument: NLRB v. Tomco Communications, Inc., 567 F.2d 871 (9th Cir. 1978), (employer insistence through impasse on a management rights clause which gave the employer exclusive "management rights, powers, authority and functions" except as concessions were made to the union by express provisions in the contract (fn. 4), holding no violation on the authority of American National.

NLRB cases holding insistence through impasse on residuary management rights clauses to be lawful on the authority of American National include Procter & Gamble Mfg. Co., 160 NLRB 334, 349-350 (1966)(management decisions to be final and non-arbitrable except as spelled out in contract); Florida Machine

& Foundry Co., 174 NLRB 1156, 1158-59 (1969)(in addition to a long list of areas, company reserved and retained all rights and prerogatives except as specifically limited by the contract); Alco Plating Corp., 179 NLRB 102, 109 (1969)("Except as explicitly limited by a specific provision of this Agreement, the Employer shall continue to have the exclusive right to take any action it deems appropriate in the management of its plant and direction of the work force in accordance with its judgment."); Long Lake Lumber Co., 182 NLRB 435, 74 LRRM 1116, 1118 (1970) (contrary to UF's assertion (pp. 18-19) company retained all rights "customarily and traditionally exercised" by it, giving union only those spelled out in the contract (fn. 6); Continental Nut Co., 195 NLRB 841, 843 (1972)(direction of work force vested exclusively in the Company, including but not limited to long list of areas, except as specifically provided in the contract).

Both the Union and PERC appear to be unaware that the American National clause itself was a "residuary plus listing" clause. The Supreme Court opinion, becaue the union had offered to agree to the first paragraph of the clause, omitted that paragraph, which read:

> "Nothing in this agreement shall be deemed to limit or restrict the company in any way in the exercise of the customary functions of management, inlcuding the right to make such rules not inconsistent with this agreement relating to its operation as it shall deem advisable, and the right to hire, suspend, discharge or otherwise discipline an employee for violations of such rules or for other proper cause." (American

Nat'l Ins. Co. v. NLRB, 187 F.2d 307, fn. 2 (5th Cir. 1951); American Nat'l Ins. Co., 89 NLRB 185, 196 (1950).

The Union's further argument that American National is no longer good law because it held that the only limitation on bargaining was the good faith rule, whereas NLRB v. Borg-Warner Corp., 365 U.S. 342 (1958) subsequently established the mandatory-permissive-illegal categories for bargaining subjects, and that American National did not hold management rights clauses to be a "term or condition of employment" (i.e., a mandatory subject) (UB, pp. 19-21), is easily shown to be utterly without merit.

The federal Supreme Court considered the Borg-Warner categories to be not only consistent with, but required by, American National:

> "Read together, these (NLRA) provisions establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment...' The duty is limited to those subjects, and within that area neither party is legally obligated to yield. NLRB v. American Nat. Ins. Co., 343 U.S. 395." (356 U.S. at 349).

> "While not determinative, it is appropriate to look to industrial practices in appraising the propriety of including a particular subject within the scope of mandatory bargaining. Labor Board v. American Nat'l Ins. Co., 343 U.S. 395, 408." Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 211 (1964) (emphasis added).

The Supreme Court of Connecticut agrees:

> "In N.L.R.B. v. American National Ins. Co., 343 U.S. 395, 72 S.Ct. 824, 96 L.Ed. 1027, 30 LRRM 2147 the Supreme Court

> of the United States held ... In effect, the court was saying that this type of provision is itself a condition of employment, and a mandatory subject of collective bargaining. Long Lake Lumber Co., 185 NLRB No. 65, 74 LRRM 116." West Hartford Educ. Ass'n v. DeCourcy, Conn. Sup. Ct., 80 LRRM 2422 (1972), at 2432.

Also the NLRB:

> "We are guided in our view of the case by the Supreme Court's holding in American National Insurance Co., 343 U.S. 395. That case also holds that management functions clauses like those herein involved, are mandatory subjects of collective bargaining; ..." Long Lake Lumber Co., 182 NLRB 435, 438 (1970).
>
> "The rule is stated by the Board in Proctor & Gamble Mfg. Co., 160 NLRB 334 at page 338 as follows:
>
> > It is well established that an employer's insistence upon management rights-limited arbitration provisions, which are mandatory subjects of collective bargaining, does not itself violate Section 8(a)(5), N.L.R.B. v. American National Insurance Company, 343 U.S. 395, 409." Continental Nut Co., 195 NLRB 841, 857 (1972).
>
> "..., as a form of waiver, a 'zipper' clause arguably should be mandatory since other waiver-of-bargaining clauses are mandatory where the subjects waived thereby are mandatory. Management rights clauses are examples of such mandatory waiver-of-bargaining clauses. (citing American National in fn. 14)." NLRB General Counsel's Advice Memorandum, Union Hospital Association, 102 LRRM 1677, 1678 (1979).

NLRB v. Sheet Metal Workers Local 38, 575 F.2d 394 (2d Cir. 1978) cited by the Union (UB, p. 22), is not in point. The true reasons why interest arbitration clauses are not mandatory subjects, although they, like management's rights clauses,

operate to waive bargaining rights, are: (1) they are inconsistent with the statutory policy granting bargaining rights to parties (Columbus Printing Pressmen Union No. 252, 219 NLRB 268, 272 (1975)), and (2) they operate beyond the term of the agreement in which they appear (Advice Memorandum, Union Hospital Ass'n, 102 LRRM 1677, 1678 (1979)).

BARGAINING RIGHTS WAIVERS ARE IMPORTANT AND USEFUL BARGAINING TOOLS.

The Union's (UB, pp. 24-31) and PERC's (PB, pp. 25-31) ultimate argument is basically a polemic against the extraction of bargaining rights waivers as a condition of agreement on a contract, on the ground that the continuing right to impact bargaining on every management decision during the term of a contract (with resulting delays and impasse resolution procedures ad infinitum) is essential to "meaningful collective bargaining" (UB, p. 26) or "inconsistent with the principle of voluntary relinquishment" (UB, p. 27).

As to that, the writer is partial to Judge Burns' drily concise opinion in NLRB v. Tomco Communications, Inc., supra:

> "The right to union representation ... does not imply the right to a better deal. The proper role of the Board is to watch over the process, not guarantee the results of collective bargaining." (567 F.2d at 877).
>
> * * *
>
> "The Board cites American National Insurance, but in the next breath accuses the Company of making 'proposals clearly designed to force

> the union into abandoning its statutory rights and duties.' (Cite omitted). We are not sure what force the accusation has, that the Supreme Court has not already answered. If the point is merely that
>
> > absent contractual waiver, the Union has a right to a meaningful opportunity to bargain over any change the Company might wish to make in the employees' wages, hours, or other conditions of employment during the term of the contract.
>
> Brief of Petitioner at 24, we agree, and simply point out the Board's own reference to the possibility of 'contractual waiver.' If the point is that the Union has a duty of representation to its members, which forbids it to concede certain prerogatives to management, and correspondingly forbids management to insist upon these prerogatives, we find the doctrine novel. The Board cites no statutory or case law in its support.
>
> Apparently, even the Board would not complain if there were 'significant economic benefits to compensate for the loss [of representation rights during the contract term].' (Cite omitted). But if the only question is whether a waiver price is right, then the Board is again insinuating its judgment on the terms of an agreement that the parties themselves must reach." (567 F.2d 878-879).

The positive and salutary nature of rights waivers extracted for the term of a contract is recognized by the federal Supreme Court (zipper clauses)(NLRB v. C & C Plywood Corp., 385 U.S. 421, 423 (1967)). Bargaining rights waivers are described by the NLRB, never known as anti-union, as "important, useful bargaining tools" (Advice Memorandum, Union Hospital Ass'n, supra)).

If the Union and PERC cannot prevail here on a straightforward reading of the law, as it seems they cannot, they most assuredly cannot prevail on the premise that there is something inherently bad about bargaining rights waivers.

A "REMEDY OF EXCISION" COMPELS AGREEMENT.

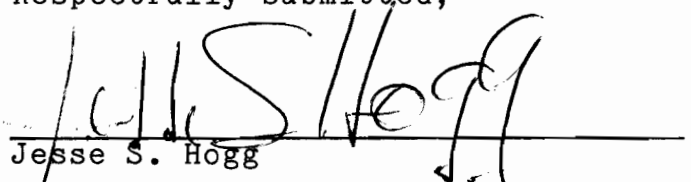
We are gratified that PERC has finally decided to describe its remedy in this case with the words, "remedy of excision", which clearly reflect that it compelled agreement on a contract other than any the College ever contemplated agreeing to, in apparent violation of §447.203(14) and the rule of H.K. Porter v. NLRB, 397 U.S. 99 (1970).

The precedential authority of the Special Master's settlement recommendation (PB, pp. 36-37) may well be daunting, in the eyes of the Commission, but we stand with Porter and the statute.

CONCLUSION

The College respectfully submits that the decision of the Court of Appeals is in error.

Respectfully submitted,



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I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Reply Brief was served, via United States first class mail, postage prepaid, this 2nd day of December, 1983, upon the following:

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