STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DISTRICT COUNCIL 48, AFSCME, AFL-CIO, and LOCAL 366, Complainant, vs. SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, Respondent.	Case XXVII No. 16165 MP-186 Decision No. 11407-A

Appearances:
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. John S. Williamson, Jr., appearing on behalf of the Complainant.
Ropella and Soukup, Attorneys at Law, by Mr. Frank G. Soukup, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter; and the Commission having appointed George R. Fleischli, a member of the Commission's staff to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(5) of the Wisconsin Employment Peace Act and hearing on said complaint having been held at Milwaukee, Wisconsin on December 5, 1972 before the Examiner, and the Examiner having considered the evidence and arguments and being fully advised in the premises makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Local 366, affiliated with District Council 48, AFSCME, AFL-CIO, hereinafter referred to as the Complainant is a labor organization within the meaning of Section 111.70(1)(j) of the Municipal Employment Relations Act having offices at Milwaukee, Wisconsin.

2. That the Sewerage Commission of the City of Milwaukee, hereinafter referred to as the Respondent, is a Municipal Employer within the meaning of Section 111.70(1)(a) of the Municipal Employment Relations Act having offices in Milwaukee, Wisconsin.

3. That at all times relevant herein the Complainant has represented certain employes employed by the Respondent including Engineering Aides for purposes of collective bargaining on questions concerning wages, hours and conditions of employment; that the Complainant and Respondent were parties to a collective bargaining agreement entered into on June 14, 1971, and pursuant to its terms effective from January 1, 1971 until December 31, 1972; that during the negotiations leading up to said agreement the Complainant made a number of proposals in bargaining regarding the incorporation of certain existing

employment practices in the agreement including a proposal that the Respondent would continue to pay "zone fare" to Engineering Aides in accordance with its past practice; that Mryon E. Ropella, attorney and spokesman for the Respondent, assured the Complainant's representative that the Respondent did not intend to change the existing practice with regard to the payment of "zone fare" to Engineering Aides during the life of the agreement.

4. That on January 21, 1971 the Complainant's Representative, John Redlich, met with Ropella in Ropella's offices for the purpose of discussing the issues remaining in negotiations; that prior to said meeting the Complainant's membership had voted to authorize its Executive Committee to reach agreement on the terms of a new agreement if in their judgment those terms were acceptable and that the Executive Committee had authorized Redlich to reach agreement on the remaining issues in bargaining if he could do so within certain defined limitations; that at said meeting Redlich reached agreement with Ropella on terms that Redlich considered acceptable and within the limitations placed on him by the Executive Committee; that Ropella by his conduct and statements to Redlich indicated that the terms agreed to between them were acceptable to the Respondent and that in that regard Ropella spoke on the telephone with Donald E. Murphy, Chairman of the Sewerage Commission of the City of Milwaukee who is also Chairman of the Labor Committee of that Commission who advised that the terms agreed to between Redlich and Ropella were acceptable; that the terms agreed to were reduced to writing and signed by Redlich and Ropella and read as follows:

"Letter of Intent

1. Pay Period
   7 a.m. Sunday to 7 a.m. Sunday

2. Revocation of Union Dues Deduction
   An employee will contact the Secretary of the Local who will issue a Dues Revocation Card to the employee who will submit it to the Personnel Department.

3. Disciplinary Action
   The Union will get a written copy of all disciplinary action.

4. Work Rules
   The Union will get a complete copy of all work rules and the Commission and the Union will discuss them.

5. Past Practice Clause
   Is in effect

6. Travel Pay
   Any employee who uses his own vehicle and who punches in at S. S. Plant and out at Jones Island Plant will get travel pay (vice-versa).

7. Personal Tools and Clothing will continue to follow past practice.

8. Bargaining Time
   Retain same hours in contract with the understanding that all Bargaining Committee members will be paid for

hours spent in negotiations held during such employees work hours.

9. Records and Information
The Commission in cases of disciplinary action of employees will submit to the Union all pertinent information applicable to such disciplinary action.

10. When an employee is transferred or promoted and he is minus time, he will be given the opportunity to make it up.

11. There will be a food locker for the Field and Plant Maintenance Personnel at 32nd and Hampton.

12. The Commission will supply the Union with copies of contract.

13. In the event a temporary or permanent 2nd or 3rd shift is established, we will immediately commence negotiations on the rate.

14. New Operations and Equipment
We agree to immediately commence negotiations the same as we did with S. Shore.

Approved by:

M. E. Ropella /s/

John Redlich /s/ "

5. That since 1929 or before the Respondent has had an established practice of paying Engineering Aides, who perform inspection work on sewage construction performed under contract with the Respondent, "zone fare" or a sum of money equal to so many cents per mile for each mile traveled to and from the construction site if the construction site happens to fall outside the zone from which the Engineering Aide must travel; that for purposes of paying zone fare the zones established by the Milwaukee and Suburban Transport Corporation are utilized; that beginning sometime in 1957 and ending sometime in 1965 the Respondent paid "zone fare" to Engineering Aides who traveled to and from the construction site of its South Shore Wastewater Plant during the construction of the road to the site, the establishment of the revetment wall and the construction of Phase I (primary treatment facility); that beginning in August 1971 the Respondent began inspection work on Phase II (secondary treatment facility) at its South Shore Wastewater Plant and during the first two weeks of said inspection work, paid its Engineering Aides "zone fare" for travel to and from the construction site for the purpose of performing said inspection work; that beginning in September 1971 and continuing thereafter the Respondent has refused to pay the Engineering Aides performing inspection work at the South Shore Wastewater Plant "zone fare" for their travel to and from said facility.

6. That pursuant to the grievance and arbitration procedure contained in the collective bargaining agreement, the Complainant filed a grievance which was ultimately taken to arbitration alleging that the Respondent's refusal to continue paying "zone fare" to the

Engineering Aides doing inspection work at the South Shore Wastewater Plant violated the past practice clause of the "Letter of Intent" set out above; that the Respondent urged that the Arbitrator find and the Arbitrator did find that said grievance was not an arbitrable grievance under the provisions of the collective bargaining agreement; that the Arbitrator dismissed said grievance with the following language, relevant herein:

"AWARD

For the foregoing reasons and based upon the record as a whole, the Arbitrator concludes that the grievance concerning zone-fare payments allegedly due Engineering Aides performing work at the South Shore Wastewater Treatment Plant is not an arbitrable matter under the grievance-arbitration provisions of the parties' Agreement. . . That conclusion makes a determination on the merits of the grievance unnecessary and the grievance shall be, and hereby is, dismissed."

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That Myron E. Ropella was acting as an agent of the Respondent with the apparent authority to enter into agreement on the issues remaining in dispute during the negotiations leading up to the 1971-1972 collective bargaining agreement and that the Respondent by its conduct on and after January 21, 1971 ratified the action of Ropella in entering into the agreement entitled "Letter of Intent" and signed by Ropella on January 21, 1971.

2. That the "Letter of Intent" set out above is part of a collective bargaining agreement within the meaning of Section 111.70 (3)5 of the Wisconsin Statutes.

3. That the Respondent by its action of refusing to pay Engineering Aides doing inspection work on the construction under way at the South Shore Wastewater Plant has violated a provision of a collective bargaining agreement in existence between the Complainant and Respondent and has committed a prohibited practice within the meaning of Section 111.70(3)5 of the Wisconsin Statutes.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

IT IS ORDERED that the Respondent Sewerage Commission of the City of Milwaukee shall:

1. Immediately cease and desist from refusing to pay the "zone fare" to the Engineering Aides in its employ doing inspection work on the construction under way at its South Shore Wastewater Plant which is due and owing to them pursuant to its collective bargaining agreement with the Complainant.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

   (a) Immediately pay its Engineering Aides who have performed work on the South Shore Wastewater Plant a sum of money equal to the "zone fare" which said employes would have received if it had not discontinued its past practice of paying "zone fare" to said employes in violation of the collective bargaining agreement between itself and the Complainant.

   (b) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from the date of this Order regarding what steps it has taken to comply with this Order.

Dated at Madison, Wisconsin, this 20th day of March, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint, as amended at the hearing, the Complainant alleges that the Respondent has violated a collective bargaining agreement within the meaning of Section 111.70(3)5 of the Wisconsin Statutes by terminating its practice of paying Engineering Aides, who perform inspection work on the construction project under way at the South Shore Wastewater Plant, "zone fare" for their travel to and from the job site. In its answer, as amended at the hearing, the Respondent denied that the "Letter of Intent" constituted an enforceable collective bargaining agreement or that it had changed an established past practice as alleged.

The arbitration award, issued on the Complainant's claim that the Respondent's action in September of 1971 violated the basic collective bargaining agreement between the parties, clearly establishes that the arbitration provision of that agreement does not cover the dispute involved herein. If the Respondent's action constitutes a violation of a collective bargaining agreement it must be because the "Letter of Intent" constitutes a separate collective bargaining agreement or is part of the collective bargaining agreement but is not enforceable under the arbitration provision.

RESPONDENT'S POSITION:

The Respondent contends that Ropella did not have authority to enter into a binding agreement with the Complainant and that, in any event, the agreement reached between Redlich and Ropella is not a collective bargaining agreement because it was not properly ratified by the Complainant's membership nor was it ever approved by the Respondent at an open meeting as required by Wisconsin Statutes. In addition, the Respondent argues that the "Letter of Intent" ought not be considered binding since it failed to state its duration or that it was intended to be binding on the parties in conformity with Section 111.70(4)(i) of the Wisconsin Statutes 1/ in effect at the time that the "Letter of Intent" was signed.

In the alternative, the Respondent contends that there is not an established past practice of paying Engineering Aides "zone fare" for doing inspection work when the inspection work involves a construction project under way at an established plant and that any payments made before September 1971 were paid by mistake.

COMPLAINANT'S POSITION:

The Complainant contends that there is an established and continuous past practice of paying Engineering Aides "zone fare" for all inspection work performed at construction sites regardless of whether

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1/ Section 111.70(4)(i). "Agreements. Upon the completion of negotiations with a labor organization representing a majority of the employes in a collective bargaining unit, if a settlement is reached, the employer shall reduce the same to writing either in the form of an ordinance, resolution or agreement. Such agreement may include a term for which it shall remain in effect not to exceed one year. Such agreements shall be binding on the parties only if express language to that effect is contained therein."

there is a permanent facility belonging to the Respondent nearby. The Complainant contends that the "Letter of Intent" signed by John Redlich is binding on it and that the Respondent ought to be estopped from contending that its agent lacked the authority to enter into a binding agreement because its agent was clothed with the apparent authority to enter into said agreement and because the Respondent ratified his action by its subsequent conduct.

DISCUSSION:

Enforceability of the Letter of Intent

The Examiner is satisfied that the "Letter of Intent" constitutes part of a binding collective bargaining agreement within the meaning of Section 111.70(3)(a)5. Although the Complainant's Constitution and By-laws makes reference in Article 6 to the fact that "contracts to be ratified will be subject to secret ballot vote at prescribed time", it is not clear from the record that the procedure followed with regard to the "Letter of Intent" constitutes a violation of that provision even if it could be said that the Respondent has standing to raise a question in that regard.

A more substantial question is raised by the Respondent with regard to its contention that its agent was acting without authority when he signed the "Letter of Intent" in question and that it acted in violation of the open meeting statute when it failed to approve the "Letter of Intent" in accordance with the procedure suggested by the Supreme Court in the case of Milwaukee Board of School Directors v. WERC, 42 Wis. 2d 637 (1968). This argument raises a serious question regarding the enforceability of the agreement reached. Even so the Examiner is satisfied that the Respondent ought to be estopped at this point in time from asserting either claim as a defense. The Chairman of the Commission who was also Chairman of the Negotiation Committee for the Commission was fully aware of Ropella's action and concurred therein. Although the "Letter of Intent" may not have been approved at a public meeting the Respondent has enjoyed peaceful labor relations on the basis of a two year collective bargaining agreement which was arrived at in part by the undertaking of its agent contained in the "Letter of Intent". To allow the Respondent to successfully interpose either defense at this time would be to reward the Respondent for the failure of its agents to act properly in the matter. 2/

In the Examiner's opinion the statement contained in former Section 111.70(4)(i) that "such agreements shall be binding on the parties only if express language to that effect is contained therein" is no longer applicable to the "Letter of Intent" in question since that provision was deleted when Section 111.70 was substantially amended by the Municipal Employment Relations Act. By making "collective bargaining agreements" enforceable pursuant to Section 111.70(3)(a)5 the Legislature established the public policy that a "collective bargaining agreement" as that term has been traditionally defined in the law should be enforceable before the Commission to the end that such enforcement would contribute to peaceful and orderly labor relations. The conduct of the Respondent in this case, if allowed to go without remedy, would clearly violate that policy.

2/ Cf. City of Wisconsin Dells (11646) 3/73.

The Commission has previously held that collective bargaining agreements may take many forms, both oral and written. 3/ Strike settlement agreements have been held to be collective bargaining agreements. 4/ Similarly a shop rule agreement and settlement agreements have been held to be enforceable as collective bargaining agreements. 5/ There is no question that the "Letter of Intent" involved herein is part of the agreement reached in the negotiations leading up to the 1971-1972 collective bargaining agreement and establishes a number of working conditions which are enforceable pursuant to Section 111.70(3)(a)5 as it currently reads.

Existence of a Past Practice

The uncontradicted evidence of record clearly establishes that the Respondent has engaged in a continuous and well-established past practice of paying Engineering Aides "zone fare" for inspection work performed on construction projects performed under contract with the Respondent and that at no time during that long and continuous practice has the Respondent ever made an exception because the construction project happened to be in close proximity to an existing facility being operated by the Respondent. In fact the evidence of record establishes that the Respondent did, on all occasions prior to September 1971, make "zone fare" payments to Engineering Aides who were performing inspection work at the site in question. 6/

While it is true that the evidence did not establish a past practice which requires the Respondent to pay "zone fare" to employes who are permanently assigned to work at the facility, the Engineering Aides are not permanently assigned to the South Shore Wastewater Plant. The fact that they may have been asked to perform inspection work there in order to avoid a layoff or a grievance is immaterial to the question of whether the work they are actually performing comes within the past practice with regard to the payment of "zone fare". If they were assigned to work in the operating portion of the plant along with the other employes their situation might be different. However, so long as the Engineering Aides are performing inspection work on the construction site it is a distinction without a difference to say that they happen to be working in close proximity to an established plant.

The practice of making "zone fare" payments is clearly a past practice within the meaning of that phrase as it is used in collective bargaining agreements and the Respondent ought not be allowed to discontinue that practice in violation of the "Letter of Intent". Although the collective bargaining agreement expired by its own terms on December 31, 1972 there is no indication in the record that the

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3/ Elm Tree Baking Co. (6383) 6/63; Superior Die Set Corp. (7571) 5/66.

4/ Memorial Hospital Association (10010-A & 10011-A) 8/71.

5/ Nash Motors (4118) 12/55 (Shop Rule Agreement); Packerland Packing Co. (7414-C) 11/66 (Unfair Labor Practice); Stolper Industries, Inc. (8157) 8/67 (Grievance)

6/ There was apparently one occasion during which the Respondent did not make any "zone fare" payments for a short period of time but there is no showing that the discontinuance of that case was in any way related to the nature of the construction projects being inspected and the "zone fare" payments were reinstated shortly thereafter.

Complainant or the Respondent has asked that the "Letter of Intent" be terminated or modified and the Respondent is obligated to continue said practice until such time as its obligation is terminated or modified consistent with its duty to bargain in good faith.

Dated at Madison, Wisconsin, this 20th day of March, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner