STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS, Complainant, vs. CHETEK JOINT SCHOOL DISTRICT #5, Respondent.	Case II No. 17540 MP-315 Decision No. 12418-A

Appearances:
Mr. Robert West, Organizational Specialist, Wisconsin Education Association Council, appearing on behalf of the Complainant.
Coe & Heathman, S.C., Attorneys at Law, by Mr. Edward J. Coe, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Northwest United Educators having, on January 9, 1974, filed a complaint with the Wisconsin Employment Relations Commission, wherein it alleged that Chetek Joint School District #5 had committed prohibited practices within the meaning of the Wisconsin Municipal Employment Relations Act, by refusing to bargain with the Complainant as the representative of the majority of its employes in an appropriate collective bargaining unit; and the Commission having appointed Marvin L. Schurke, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and, pursuant to notice, hearing on said complaint having been held at Barron, Wisconsin, on February 5, 1974, 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 Northwest United Educators, hereinafter referred to as the Complainant, is a labor organization having its principle offices at 515 North Main Street, Rice Lake, Wisconsin 54868; and that, at all times pertinent hereto, James T. Guckenberg has been the Executive Director of the Complainant.

2. That Chetek Joint School District #5, hereinafter referred to as the Respondent, is a municipal employer having offices at Chetek, Wisconsin; that Respondent is engaged in the provision of public education in a district in and about Chetek, Wisconsin; that, at all times pertinent hereto, William Mares has been clerk of the Board of Education of the Respondent; that, at all times pertinent hereto, Robert

for all regular full time and regular part time certificated personnel (50% or more) employed by the Respondent as classroom teachers.

4. That, on or about September 16, 1973, the Complainant and Respondent entered into a collective bargaining agreement to be effective for at least the period beginning on July 1, 1973 and ending on June 30, 1974; that said agreement was subsequently reduced to writing and was executed, on October 11, 1973, by the parties; and that the collective bargaining agreement executed on October 11, 1973 contains the following provisions pertinent hereto:

"ARTICLE IV, NEGOTIATION PROCEDURE

"A. If any party desires to modify or amend this agreement, it shall give written notice to this effect within a 30-day period beginning October 1, 1973. Failing such notice, the agreement shall automatically be renewed on a yearly basis until such notice is given within any October period.

"B. The Association and the school board will meet and negotiate within 60 days following the above notice.

"C. An informal meeting of a board committee and NUE will meet on the third Thursday in October to informally discuss any current or foreseeable problems.

. . .

ARTICLE XXI

TERMS OF AGREEMENT

"A. This Agreement shall be in effect July 1, 1973 and shall remain in effect through June 30, 1974.

"B. This Agreement, reached as a result of collective bargaining, represents the full and complete agreement between the parties and supersedes all previous agreements between the parties. It is agreed that any matters relating to the current contract term, shall not be open for negotiations except as the parties may specifically agree thereto.

All terms and conditions of employment not covered by this agreement shall continue to be subject to the Board's direction and control providing that the Board is given the power to direct and control these terms and conditions by Wisconsin Statutes.

This Agreement shall be binding on the parties who are signatories thereto.

Signed this 11 day of October, 1973.

. . ."

5. That there is no evidence of record that a meeting was held between the parties pursuant to Section C. of Article IV of the collective bargaining agreement between the parties, nor is there any evidence of action by either party to effect the scheduling or postponement of such a meeting.

6. That on October 23, 1973 the Complainant directed a letter to the Respondent, as follows:

> "The Northwest United Educators wishes to serve notice that we desire to reopen negotiations on the Master Contract for the 1973-74 contract term.
>
> "Please notify me of possible dates when our initial bargaining meeting can be held. It would be my feeling that the first two weeks in December would be the most appropriate.";

and that no other communications concerning further negotiations between the parties occurred between the parties during the 30-day period beginning October 1, 1973.

7. That the Respondent interpreted the Complainant's letter of October 23, 1973 as a request for re-negotiation of the terms of the collective bargaining agreement then existing between the parties, made under Article XXI of said agreement; and that, on November 7, 1973, the Respondent, by Mares, directed a letter to the Complainant, as follows:

> "The Chetek Area School Board is in receipt of your letter requesting to reopen the master contract for the 1973-74 contract term.
>
> "Since the contract was ratified by both the NUE and the Chetek School Board on September 16, 1973, and subsequently signed, indicating acceptance of the contract, the Chetek School Board can see no valid reason for reopening negotiations for the current 1973-74 contract term as requested. As there are no provisions in the contract to do this, the Chetek School Board is denying your request."

8. That, on November 12, 1973, the Complainant, by Guckenberg, directed a letter to the Respondent, as follows:

> "You have received my letter of October 23, 1973 in which Northwest United Educators served notice of a desire to reopen negotiations on the master contract for the 1973-74 contract term.
>
> "The phrase for the 1973-74 contract term referred to the time in which negotiations did take place, not the duration of the agreement to be negotiated.
>
> "I again request that you notify me of possible dates when our initial bargaining session can be held. According to the agreement, we are to meet and negotiate within 60 days following the notice of October 23, 1973. For clarification, these negotiations are for the purpose of arriving at an (sic) successor agreement."

"It is also suggested any direct board correspondence you have in the future should be sent to Mr. William Mares, clerk of the Chetek Jt. #5 School District, Route 2, Chetek, Wisconsin 54728.

"Mr. Metcalf is no longer a member of the school board."

10. That, on December 3, 1973, the Complainant, by Guckenberg, directed a letter to the Respondent, as follows:

"The bargaining team for Northwest United Educators wishes to commence negotiations as soon as possible. According to the contract, we are to schedule a meeting within 60 days upon notification from either party that it wishes to commence bargaining.

"On October 23, Northwest United Educators initiated such a request. I suggest that we establish a date for a bargaining session as soon as possible.

"The following dates are available to the bargaining team: December 11, 12, 13, 18, 19, and 20. Please inform me as soon as conveniently possible as to whether any of these dates meet with your approval."

11. That, on December 13, 1973, Counsel for the Respondent directed a letter to the Complainant, as follows:

"Article IV, Paragraph A of the 1973-1974 Agreement between the Chetek School Board and Northwest United Educators provides that the Agreement shall be automatic unless notice is given within a 30-day period beginning October 1, 1973, of the desire of one party to modify or amend the Agreement for the subsequent year. No request was received by the Chetek School Board to modify or amend the Master Contract for the 1974-1975 school year and for that reason the contract, for the current school year, by its terms was automatically renewed.

"Since the 1973-1974 Master Contract was by its terms automatically renewed for the 1974-1975 school year, the Chetek School Board declines the invitation contained in your letter of December 3rd to enter into negotiations for the 1974-1975 school year.";

and that at all times thereafter the Respondent has continued to assert the existence of a collective bargaining agreement between the parties for the period ending on June 30, 1975; that the Respondent has not waived any defective notice by the Complainant; that the Respondent has not waived the effect of the automatic renewal provision contained in the collective bargaining agreement between parties; and that the Respondent has refused to engage in negotiations with the Complainant for changes in wages, hours or conditions of employment to be implemented prior to June 30, 1975.

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

CONCLUSIONS OF LAW

1. That the Complainant, Northwest United Educators, failed to give the Respondent, Chetek Joint School District #5, sufficient notice

to prevent the operation of the automatic renewal provision of the collective bargaining agreement existing between the parties; and that, by its terms, the collective bargaining agreement entered into between the parties on September 16, 1973, and executed on October 11, 1973, remains in effect through at least June 30, 1975.

2. That, by refusing to meet with Northwest United Educators for the purpose of negotiating modifications or amendments to the aforesaid collective bargaining agreement to be implemented prior to June 30, 1975, Chetek Joint School District #5 has not refused to bargain collectively within the meaning of Section 111.70(1)(d) and 111.70(3)(a)(4), Wisconsin Statutes, and has not committed prohibited practices within the meaning of the Municipal Employment Relations Act.

On 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 complaint initiating the instant matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 28th day of March, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Marvin L. Schurke, Examiner

CHETEK JOINT SCHOOL DISTRICT #5, II, Decision No. 12418-A

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint filed on January 9, 1974, Northwest United Educators alleges the existence of a collective bargaining relationship between it and Chetek Joint School District #5, alleges that NUE has, since October 23, 1973, sought to bargain with the Municipal Employer concerning a successor agreement to the collective bargaining agreement presently in effect between the parties, and alleges that the Municipal Employer has refused to bargain. In its answer filed on January 31, 1974, the Municipal Employer admits the existence of the collective bargaining relationship and agreement between the parties, but denies that NUE gave timely notice of a desire to modify or amend the collective bargaining agreement presently in effect. The Municipal Employer alleges, therefore, that the existing collective bargaining agreement has been automatically renewed, according to its terms, to at least June 30, 1975, and that the Municipal Employer is under no duty to bargain with NUE on matters covered by that renewed agreement. A hearing was held before the Examiner on February 5, 1974, at Barron, Wisconsin. The transcript of those proceedings was issued on February 19, 1974. Briefs and reply briefs were filed by both parties, the last of which was received by the Examiner on February 27, 1974.

Since the terminology used by the parties constitutes the basis for this dispute, the Examiner has found it advantageous to coin two additional terms having established meanings. When used in this memorandum, "re-negotiation" means negotiations for changes in an existing collective bargaining agreement where the changes are to be implemented immediately or otherwise within the term of the existing agreement. When used in this memorandum, "negotiate a successor agreement" means negotiations for changes in wages, hours or working conditions to be included in a new collective bargaining agreement and to be implemented after the expiration of an existing agreement.

INTERPRETATION OF THE 1973-1974 AGREEMENT

The parties agree that the collective bargaining agreement involved in this dispute was entered into on September 16, 1973, ratified by both parties, reduced to writing, and signed by both parties on October 11, 1973. The "automatic renewal" provision is found in Section A of Article IV of that agreement, and is set out here and in the Findings of Fact:

> "A. If any party desires to modify or amend this agreement, it shall give written notice to this effect within a 30-day period beginning October 1, 1973. Failing such notice, the agreement shall automatically be renewed on a yearly basis until such notice is given within any October period."

Neither party alleged or argued that this automatic renewal provision is ambiguous, illegal or otherwise unenforceable. NUE argues that

Affairs, Inc. indicates, at Section 36.61, that 82% of the collective bargaining agreements sampled by that organization as of February, 1971, contained some form of automatic renewal clause. Of those, 88% specified renewal for annual periods (regardless of the initial contract terms). Clearly, the inclusion of an automatic renewal provision in the collective bargaining agreement between these parties does not give rise to an unusual circumstance, nor is the form of automatic renewal provision used by the parties out of step with the prevailing practices in drafting of collective bargaining agreements.

Collective bargaining agreements are given broad construction, consistent with the view expressed by the United States Supreme Court in Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574, 46 LRRM 2416 (1960). In view of the fact that automatic renewal provisions are so common in collective bargaining agreements, one might anticipate a significant amount of litigation and a range of results or interpretations concerning automatic renewal provisions. The Examiner's initial impression of this case, and all of his instincts as a mediator, indicated a result contrary to the accompanying Order. However, as a legal proposition, automatic renewal clauses have been uniformly and consistently enforced by the courts, by the National Labor Relations Board, and by arbitrators. Any argument or implication that such notice provisions are disregarded is clearly erroneous. In Vapor Recovery Systems, Inc., 311 F.2d 782, 52 LRRM 2262 (CA-9, 1962), denying enforcement of 133 NLRB No. 50, 48 LRRM 1682 (1961), cited by the Municipal Employer, the employer and the union were parties to an agreement with an automatic renewal clause. The union intended to negotiate a successor agreement and sent notice to the employer. However, the union's notice was not actually received by the employer until 6 days after the timely notice date established by the agreement. The NLRB found the notice sufficient to prevent operation of the automatic renewal provision, and ordered the employer to bargain. The Ninth Circuit denied enforcement, finding that the union's failure to give timely actual notice permitted the automatic renewal provision to operate.

The Vapor Recovery case, supra, represents the only case found where the NLRB deviated from an otherwise consistent rule. Compare: Carter Machine & Tool Co., 133 NLRB No. 138, 48 LRRM 1625 (1961), which was decided by the NLRB 11 days prior to the NLRB decision in Vapor Recovery. In Carter the employer and the union were also parties to an agreement with an automatic renewal clause. The union permitted the timely notice period to pass, and the employer did not act to terminate the contract until the last day of the timely notice period. The notice was not received by the union until after the end of the timely notice period, and the NLRB found that the employer had not prevented operation of the automatic renewal provision, so that the agreement continued in effect. In another situation of the same type, the NLRB refused to issue a complaint where the union's notice was received 4 days late. The General Counsel ruling in Case SR-982, reported at 47 LRRM 1039 (1960), indicates that, in the absence of other evidence of bad faith, "Under established Board precedent, the timeliness of notice to forestall operation of a contract's automatic renewal clause depends upon the date of receipt rather than on the date of mailing." See also: Koenig Bros. Inc. 108 NLRB No. 67, 34 LRRM 1017 (1954).

fairly be interpreted only as relating to the negotiation of modifications or amendments to be included in a successor agreement.

Both parties also urge that the so-called "zipper" clause contained in Article XXI of the 1973-1974 collective bargaining agreement has a significant bearing on the outcome of this case. That provision states:

> "B. This Agreement, reached as a result of collective bargaining, represents the full and complete agreement between the parties. It is agreed that any matters relating to the current contract term shall not be open for negotiations except as the parties may specifically agree thereto.
>
> All terms and conditions of employment not covered by this agreement shall continue to be subject to the Board's direction and control providing that the Board is given the power to direct and control these terms and conditions by Wisconsin Statutes.
>
> This Agreement shall be binding on the parties who are signatories thereto."

The positions of the parties regarding the impact of the "zipper" language on the interpretation of the October 23, 1973 letter are set forth and discussed, infra. The Municipal Employer also contends that the existence and nature of the zipper clause reinforces the interpretation, made above, that the notice specified in Section A of Article IV refers only to negotiations for a successor agreement. Taking the cited provisions in their context in the collective bargaining agreement as a whole, it is apparent that re-negotiation of the current agreement is regulated by the "zipper" language and that negotiation of a successor agreement is regulated by the "Negotiation Procedure" set forth in Article IV of the current agreement.

INTERPRETATION OF THE OCTOBER 23, 1973 LETTER

The facts giving rise to this situation are not in dispute. On October 23, 1973 a letter typewritten on the stationery of NUE was directed to the Municipal Employer, as follows:

> "October 23, 1973
>
> Mr. Frederic Metcalf 1/
> P.O. Box 288
> Chetek, Wisconsin 54748
>
> Dear Mr. Metcalf:
>
> The Northwest United Educators wishes to serve notice that we desire to reopen negotiations on the Master Contract for the 1973-74 contract term.
>
> Please notify me of possible dates when our initial bargaining meeting can be held. It would be my

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1/ Examiner's note: The record indicates that Mr. Metcalf was, as of October 23, 1973, President of the Board of Education of the Municipal Employer.

feeling that the first two weeks in December would be the most appropriate.

Sincerely,

James T. Guckenberg (MLB) /s/
James T. Guckenberg
Executive Director

JTG/mlb
10/23/73

cc: Kent Jensen, Pres. NUE Chetek
Robert Crase, Supt." 2/

There is no evidence of any other communication between NUE and the Municipal Employer during the month of October, 1973. The Municipal Employer contends that the decision in this case must turn on the interpretation of NUE's October 23, 1973 letter. While the Municipal Employer did not cite authority for that proposition, it appears to be correct. The Examiner's research discloses few cases in which an ambiguous notice was given in an attempt to forestall operation of an automatic renewal provision. The NLRB Trial Examiner in one such case stated: "The answer [which would determine the outcome of the case] must be found in the words used by the party making the request." South Texas Chapter, Associated General Contractors, 190 NLRB No. 73, 77 LRRM 1211 (1971).

INTERPRETATION MADE BY THE MUNICIPAL EMPLOYER AND ITS SUBSEQUENT CONDUCT

The decision in this case cannot favor the Municipal Employer unless the evidence shows that it interpreted NUE's letter as something other than a notice under Section A of Article IV, and that it has not waived the automatic renewal provision of the agreement. Neither party offered any testimony concerning discussions among members of the Municipal Employer's Board of Education or among its officers or agents. The parties did stipulate to the admission in evidence of the written responses made on behalf of the Municipal Employer to the NUE letter of October 23, 1973. The first such written response was made in a letter dated November 7, 1973 from the Clerk of the Board of Education to NUE, and it indicates that the Municipal Employer had interpreted the NUE letter of October 23, 1973 as a request for re-negotiation of the 1973-1974 collective bargaining agreement. The second such written response, made by Counsel for the Municipal Employer in a letter to NUE under date of December 13, 1973, asserts a failure of notice to modify or amend, and asserts the automatic renewal of the 1973-1974 agreement. The Municipal Employer contends that its Board of Education did interpret the letter of October 23, 1973 as an attempt to re-negotiate the agreement entered into by the parties on September 16, 1973, and the record in this proceeding is devoid of evidence to the contrary.

Where both parties to a collective bargaining agreement containing an automatic renewal clause act to terminate the agreement, even though their actions are taken under mistaken assumptions concerning the validity

been found to have terminated. 3/ Similarly, when one party fails to give timely notice of termination but the other party acquiesces in the commencement of negotiations for a successor agreement, the automatic renewal provision has been found inoperative. 4/ In the instant case there is no evidence of a waiver of the automatic renewal provision by the Municipal Employer, or of any action by the Municipal Employer, its officers or agents, which is inconsistent with its contention that the 1973-1974 collective bargaining agreement between the parties has been extended, according to its terms, for the one year period ending on June 30, 1975. NUE contends that the Municipal Employer mis-interpreted the letter of October 23, 1973, but has not adduced any evidence to show that such mis-interpretation, if any, was a subterfuge to conceal some other interpretation, or was otherwise made in bad faith.

HOW SHOULD THE OCTOBER 23, 1973 LETTER BE INTERPRETED?

NUE contends that the October 23, 1973 letter to the Municipal Employer constituted "timely notice to reopen negotiations for a successor agreement". The Municipal Employer contends that the NUE's claim in this regard is directly contrary to the plain meaning of the October 23, 1973 letter.

The parties have both made arguments in their briefs concerning the choice of words used in the October 23, 1973 letter, and specifically concerning the use of the word "reopen". Article IV, Section A. of the collective bargaining agreement speaks in terms of "to modify or amend", and no instance is found in the agreement where the word "reopen" is used. Article XXI of the agreement states that matters relating to the current contract term shall not be "open for negotiations" except as the parties may specifically agree, but does not specify procedures for reopening. "Reopen" is a common term in the jargon of labor relations, but appears to be without an established meaning sufficiently narrow to constitute a basis for decision here. The Examiner's research discloses numerous examples where "reopen" is used to mean re-negotiation of an existing agreement. "Termination" is the more popular term used to indicate an intention to conclude one collective bargaining agreement and negotiate a successor, but "termination" is not the exclusive word used for that purpose. Instances have been noted where "reopen" has been used to imply the negotiation of a successor agreement. The parties arguments in this regard frame a distinction without a meaning. NUE admits in its brief that the October 23, 1973 letter was confusing. Standing alone, the word "reopen" is ambiguous in this usage, and the NUE's choice of words is clearly one of the factors contributing to any confusion or mis-interpretation made by the Municipal Employer.

NUE contends that the existence of the so-called "zipper" clause in the collective bargaining agreement reveals the intent and proper interpretation of the October 23, 1973 letter. The Agreement "does not allow for a reopener during a contract period by notice", according to NUE, and it follows that a desire to re-negotiate the existing agreement would be expressed in a "request" rather than in a notice. NUE contends that the October 23, 1973 letter is framed as a notice, and not as a request, and that it should be interpreted as the notice required in Section A. of Article IV. The Municipal Employer also relies on the "zipper" clause, but argues (and, for lack of contrary evidence, the

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3/ Napiwocki Construction, Inc. (11941-A) 3/74.

4/ Reimer Sausage Company (10965-A, B) 10/72.

Examiner has found) that the Municipal Employer interpreted the October 23, 1973 letter as a request made under the "zipper" clause for re-negotiation of the 1973-1974 agreement. The Municipal Employer relies on the "zipper" clause as its justification for its refusal to re-negotiate the existing agreement. The Examiner is unable to conclude that the October 23, 1973 letter fits only the interpretation urged by NUE. On the contrary, that letter is found to be ambiguous in this regard, since it speaks in terms of a "notice of a desire". Since Article XXI does not specify the procedures or specific terminology to be used in the event of a request for re-negotiation of the contract, a party making such a request would be free to utilize such terminology as would convey its meaning. The Examiner cannot conclude that a letter stating that the sender "wishes to serve notice [of a] desire" to re-negotiate an existing agreement would be an unlikely or inappropriate vehicle for the communication of a request under Article XXI of this collective bargaining agreement.

The Municipal Employer argues that the October 23, 1973 letter is only subject to the interpretation that the NUE desired to re-negotiate the 1973-1974 agreement, and that the letter contains no hint of a desire to negotiate a successor agreement. NUE admits in its brief that it is technically correct that the letter in question "confused" the Municipal Employer, but urges broad construction and acceptance of the view that the October 23, 1973 letter was sufficient notice. Cases of this type necessarily turn on the actual words of the automatic renewal clause in question and on the words and actions of the parties, but there are well established rules of law which govern where a failure of notice is found. Thus, in Mason City Builders Supply Co., 193 NLRB No. 36, 78 LRRM 1222 (1971), the employer and the union were parties to a collective bargaining agreement containing an automatic renewal clause. The agreement required the party giving notice to include the details of any desired changes. Approximately 15 months before the stated expiration date of the agreement, the union notified the employer that it wished to negotiate certain changes, but did not give any details. Neither party took any action to follow up on that notice. Five days after the end of the timely notice period, the union filed detailed demands for a new contract. The employer invoked the automatic renewal provision, and the NLRB concurred, finding that the first notice did not contain the details required by the contract and that the second notice was untimely. In South Texas Chapter, Associated General Contractors, supra, the AGC and the union were parties to a collective bargaining agreement which had separate notice provisions for automatic renewal and for termination. Neither party acted during the first of those periods, that being the one specified in the automatic renewal provision. During the period specified in that contract for notice of termination, the union sent the following letter to the AGC:

> "In compliance with our present collective bargaining agreement, I hereby notify you of our desire to re-open the contract for negotiations.
>
> "It is our desire to negotiate for all matters pertaining to wages, hours and all conditions of employment. . ."

The AGC invoked the automatic renewal provision and a strike ensued. In discussing that situation, the NLRB Trial Examiner stated:

> "If the union's letter ... be construed as a request for 'modifications or changes', it was untimely and, as no other timely notice was given, the AGC would be correct

in its position that the contract was automatically renewed for another year. If, on the other hand, that letter constituted a notice of 'termination', it was timely, and the AGC's refusal to bargain over a new contract would be an unfair labor practice..."

Recognizing that disinterested authorities may disagree among themselves as to the proper construction of language, and that the Regional Director and the General Counsel had disagreed in that case, the Trial Examiner proceeded to make an interpretation based on the specific words used by the union in its letter. The Trial Examiner found that the language calling for negotiation of "all matters pertaining to wages, hours and all conditions of employment" implied termination of the existing contract and negotiation of an entire new contract. Two obvious distinctions are to be drawn between that case and the instant case. First, the collective bargaining agreement between NUE and the Municipal Employer contains no "termination" provision comparable to that relied upon by the Trial Examiner in the AGC case. Secondly, the October 23, 1973 letter contains no indication of the scope of bargaining sought by NUE and, therefore, nothing comparable to the "all matters" language used by the union in the AGC case and also relied upon by the Trial Examiner.

The same principles applied in the cases cited heretofore have also been applied in the arbitration of disputes concerning automatic renewal provisions. In Aaxico Airlines, 47 LA 289 (Arbitrator: Harry H. Platt, 1966), the employer and the union had a collective bargaining agreement with an automatic renewal clause. Six months after that agreement was entered into, the employer lost its exclusive government contract, suspended operations, laid off all of its employes and leased out its equipment. Thereafter, the employer wrote a letter to the union informing the union of the cessation of operations and purporting to terminate the collective bargaining agreement. As the end of the original term of the collective bargaining agreement approached, neither party gave timely notice to prevent the operation of the automatic renewal provision. At about that time the employer resumed operations without recalling its laid off employes, and the union asserted the automatic renewal provision. The System Board of Adjustment established under the Railway Labor Act found that the loss of the government contract and the cessation of operations did not automatically terminate the collective bargaining agreement. Turning to the letter sent by the employer to the union, the panel found that the letter, which stated termination as an accomplished fact, was not the type of "notice of intent to terminate" which was needed to prevent the operation of the automatic renewal provision. Here, again, the decision was based on the exact words used in the purported notice, and the burden of a failure of communciations rested on the party attempting to give notice.

It is undisputed that, except for the letter of October 23, 1973, no written or oral notice concerning negotiations for a successor agreement was given by NUE to the Municipal Employer during the 30 day period beginning October 1, 1973. The words "for the 1973-74 contract term" are very specific in their use in the October 23, 1973 letter. As noted above, the word "reopen", standing alone, may be ambiguous in its usage in this letter. However, the word "reopen" coupled with the words "for the 1973-74 contract term" very clearly communicates a request for re-negotiation of the existing agreement, and eliminates any ambiguity. Similarly, while the "notice of a desire" format of the October 23, 1973 letter may, standing alone, create some ambiguity, a "notice [of a] desire to reopen negotiations...for the 1973-74 contract term" very clearly communicates a request for re-negotiation of the existing agree-

ment. The letter was so interpreted by the Municipal Employer, and the Examiner finds that the October 23, 1973 letter from NUE to the Municipal Employer does not, on its face, constitute a sufficient notice to prevent the operation of the automatic renewal provision of the collective bargaining agreement existing between the parties.

AMBIGUITY IN THE SURROUNDING CIRCUMSTANCES AS AFFECTING INTERPRETATION OF THE OCTOBER 23, 1973 LETTER

As argued by NUE, the October 23, 1973 letter was mailed and apparently received during the timely notice period specified in Article IV, Section A. of the agreement. While the October 23, 1973 letter does not, on its face, constitute sufficient notice, the Examiner has looked for evidence in the surrounding circumstances which would inject ambiguity into the situation. The timing of NUE's letter is one such factor. Another is the complete lack of evidence or an offer of proof by either party concerning any dispute or issue existing between the parties as of October 23, 1973 which might have motivated NUE to attempt to re-negotiate the 1973-1974 agreement. On the other hand, there is no evidence or offer of proof of any oral communications between representatives of the parties at or about the time of the execution of the 1973-1974 agreement on October 11, 1973. Further, in addition to the automatic renewal provision and timely notice period, Article IV of the agreement establishes procedures for negotiations of a successor agreement. The language of Article IV, Section C. is pertinent here:

> "C. An informal meeting of a board committee and NUE will meet on the third Thursday in October to informally discuss any current or foreseeable problems."

There is no evidence in this record of any effort by NUE to follow through with the conduct of such a meeting. The third Thursday in October of 1973 fell on October 18, 1973. Action to give effect to Article IV, Section C. would have been consistent with a desire to negotiate a successor agreement, while inaction would tend to support a conclusion that NUE did not intend to negotiate a successor agreement.

The circumstances surrounding the October 23, 1973 letter do not inject such ambiguity into the situation as would require a conclusion that sufficient notice was given to prevent the operation of the automatic renewal provision.

INTENT OF NUE AGENTS AND THE RELEVANCY OF INTENT IN INTERPRETATION OF THE OCTOBER 23, 1973 LETTER

All of the evidence adduced through the testimony of witnesses during the hearing in this matter was directed to showing the intent of NUE's officers and agents with respect to the giving of notice to negotiate a successor agreement, and their action to effect such notice. NUE urges in its brief that the intent of the NUE agents, as indicated in that testimony, should prevail. The Municipal Employer objected during the course of the hearing to evidence of the uncommunicated intention of NUE's agents, and argues in its brief that such uncommunicated intentions are not a relevant factor in this decision. Although it now understands what NUE intended to say in the October 23, 1973 letter, the Municipal Employer relies on the fact that such intent was not communicated to it during the timely notice period.

The law relating to communications to forestall operation of an automatic renewal clause in a collective bargaining agreement is somewhat different from the rules of notice relating to other types of contracts,

but is nevertheless well established. In all of the cases cited heretofore by the Examiner, one party or the other intended to give effective notice to terminate the collective bargaining agreement then in effect. In none of those cases was a tardy notice or a timely but insufficient notice found to be effective because of the intent of the party giving notice, nor has intent been considered as a factor. Even efforts to give notice which have been frustrated by the misfeasance of others have failed, with the intent of the moving party being disregarded. See Terra Chemicals, 56 LA 988 (Arbitrator: Sullivan, 1971), where a union's registered letter giving notice to negotiate a successor agreement was mislaid by a Post Office clerk and was not delivered to the employer until after the end of the timely notice period. The arbitrator concluded that the automatic renewal provision was properly invoked by the employer.

The legal requirement for actual notice does not waver; even in a case of mutual mistake. Thus, in Lifetime Shingle Co., 203 NLRB No. 109, 83 LRRM 1161 (1973), the union and an employer association had a contract for a 1967-1971 period which contained an automatic renewal clause. Lifetime Shingle Co. joined the employer association in 1968 and signed a contract with the union which was identical to the association's contract. Lifetime dropped out of the association in 1970. The union gave timely notice to the association but, believing that Lifetime was represented by the association, did not give individual notice to Lifetime. Lifetime did not act to terminate the agreement. The union and the association reached a new agreement, but Lifetime refused to sign and began to make unilateral changes. In proceedings before the NLRB, the Administrative Law Judge found an illegal refusal to execute the 1971 agreement, and ordered a remedy based upon the 1971 agreement. The NLRB reversed, finding that, despite the mistaken assumptions of both parties, the separate contract between the parties had been automatically renewed. The fact that Lifetime heard about the union's notice to the association did not affect the result, since that knowledge was received after the end of the timely notice period.

PROMPT EFFORT BY NUE TO CLARIFY

NUE points out that it attempted to clarify its intent promptly after being advised by the Municipal Employer of the interpretation made by the Municipal Employer of the October 23, 1973 letter. There is some appeal to the proposition that prompt action to correct a defective notice should serve to make the notice sufficient, but the established case law is uniformly to the contrary. NUE is obviously not the first labor organization to miss a timely notice date. In many of the cases cited above, the party attempting to give notice also attempted to promptly clarify its notice, where clarification was needed, or to renew its request for negotiations following the expiration of the timely notice period. In no case has such a move been considered as persuasive. See: General Counsel Ruling, Case SR-982, supra. The letter from NUE to the Municipal Employer dated November 12, 1973 clearly indicates that NUE desired negotiations for the purpose of arriving at a successor agreement, but it is equally clear that the communication was received by the Municipal Employer after the expiration of the timely notice period.

CIRCUMSTANCES WHICH MIGHT MITIGATE A FAILURE OF NOTICE

None of the cases noted by the Examiner during the course of his research on this case are decided on the basis of the actions of the party receiving notice, except where a waiver of defective notice has

been found. Subsequent conduct which constitutes a violation of the duty to bargain by the party invoking an automatic renewal clause has been considered separately from the sufficiency of notice to forestall operation of an automatic renewal clause. However, several of the cases do make reference to the absence of evidence of bad faith on the part of the party receiving notice, and it appears that the actions of the party receiving notice might properly be considered as factors in mitigation of a defective notice.

DELAYED RESPONSE BY MUNICIPAL EMPLOYER

NUE points out that the Municipal Employer waited until after the end of the timely notice period to make any response to the October 23, 1973 letter, and it is implicit in this that a more prompt response might have permitted NUE to clarify its intent and give sufficient and timely notice of negotiations for a successor agreement. NUE also points out that the Municipal Employer waited more than a month to respond to NUE's clarification of its intent. In reply brief, the Municipal Employer defends its delay in responding to the October 23, 1973 letter, saying: "It must be borne in mind that the school board meets but once monthly and it is an elementary principle of school law that no board member, outside of an official board meeting, has any authority to speak for the school board. Accordingly, the only time the board could respond was after a monthly board meeting".

The record is very sparse on this point. There is no actual evidence of any effort by the Municipal Employer to conceal its interpretation of the October 23, 1973 letter from NUE until after the end of the timely notice period. NUE permitted 23 days to pass out of the contractual 30 day period before it acted, and permitted two likely opportunities for notice (one of those being the occasion when the agreement was executed and the other being the meeting called for by the agreement on the third Thursday in October) to pass without any effort to give notice. In Mason City Builders Supply Co., supra, the employer did not make any response to the union's notices, and an argument similar to that made here was advanced on behalf of the union. The NLRB found that the employer had no legal duty to respond to either of the notices, since the first notice lacked the details required by the agreement between the parties and the second notice was untimely. In the South Texas AGC case, supra, the union made a specific request for a meeting to be held on a date within the timely notice period. The AGC let that date pass without a response. Had the meeting been held, any defect of notice would likely have been discovered and timely remedied. The strongest statement that the NLRB saw fit to make in that situation was that the AGC's failure to respond was "faintly suggestive of sharp practice". The record in this case presents no facts warranting a stronger comment than that from the Examiner. The position taken by the Municipal Employer on this point also calls attention to distinctions between private employers and municipal employers which have been recognized by both the Commission and the Courts. 5/ Those distinctions cannot be overlooked.

WAIVER OF RIGHT TO BARGAIN

NUE argues that a waiver of the right to bargain in a collective bargaining setting must be clear and unmistakable, that there is no such evidence in this record, and that there has been no waiver of the right to bargain a successor agreement. The Municipal Employer

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5/ Milwaukee Board of School Directors v. WERC, 42 Wis. 2d 637 (1968); Whitehall Jt. School Dist. No. 5, (10812-A, B) 12/73.

responds with the contention that no waiver is involved, and that the matter is regulated by the notice provisions of the collective bargaining agreement.

The Examiner does not question the authority of the cases cited by NUE on the points for which they stand. However, those cases refer principally to bargaining about particular subjects during a contract term. In this case, NUE acted in a clear and unmistakable manner when it entered into a binding collective bargaining agreement containing a clear and unambiguous automatic renewal clause. Consistent with the uniform case law interpreting automatic renewal clauses, the Examiner finds that NUE has made a clear and unmistakable waiver of bargaining for a successor agreement in Article IV, Section A. of the 1973-1974 collective bargaining agreement, conditioned only upon the right of NUE to give sufficient notice within the specified time period.

BURDENS WHICH FLOW FROM THE DISMISSAL OF THE INSTANT COMPLAINT

Anyone called upon to make a decision in a case of this type quickly becomes aware of the social and economic consequences of the decision. Both parties have called attention to those consequences in their briefs, and many of the cases referred to herein delve into the consequences of an automatic renewal.

NUE'S DISADVANTAGE ARGUMENT

NUE asserts in its brief and reasserts in its reply brief that the Municipal Employer has not been disadvantaged by any failure of timely notice, while contending that an adverse ruling in this case would severely damage NUE and the employes it represents. The Municipal Employer responds with the contention that the parties had a right to negotiate an agreement with a term of more than one year, that the parties did bargain an automatic renewal clause into their agreement, and that the Municipal Employer would be deprived of its rights under the collective bargaining agreement if the automatic renewal clause were to be disregarded.

Similar arguments were advanced by the parties in Terra Chemicals, supra, where the Arbitrator included the following discussion in his Award:

> "Contrary to the union's position that the company suffered no harm by its actual receipt of the notice... [late], it appears that the Company, in the first place, had a right to rely upon the language of ... the agreement as binding on the parties, just as both parties had the right to regard other articles of their agreement as binding upon them. So far as the harm done to the members of the bargaining unit by their failure to be able to negotiate for a wage increase similar to that granted by the company to other employees is concerned, the union apparently assumes that it would have been successful in such negotiations although there is nothing in the evidence to support such statement beyond the mere fact that the company did give such a raise to non-bargaining unit employees voluntarily."

Any assumptions made here concerning what success NUE might have had in negotiations for a successor agreement would be based on pure conjecture. The importance of an opportunity to bargain is self-evident in view of the current rate of inflation, but frozen employment costs and the elimination of bargaining costs for a year might be equally important to the Municipal Employer. No case is found where

a failure of notice has been excused because of the adverse consequences resulting to the party giving the defective notice.

ENFORCEMENT OF AUTOMATICALLY RENEWED AGREEMENT

It is well established that an automatically renewed collective bargaining agreement is enforceable to the same degree as other collective bargaining agreements. In Carpenter Body Works, 57 LA 101 (Arbitrator: Kates, 1971) the Arbitrator ordered the union to terminate a strike in violation of the no-strike provision of an automatically renewed agreement. In Sawyer Stores, Inc., 190 NLRB No. 129, 77 LRRM 1434 (1971) the NLRB refused to order reinstatement of strikers where their strike was found to be in violation of the no-strike provision of an automatically renewed agreement. In Carter Machine & Tool Co., supra, the employer was required to continue recognizing the union for another year, based on the recognition clause in the automatically renewed agreement; and in Aaxico Airlines, supra, the employer was required to reinstate 50 employes who had not been recalled from layoff in accordance with the seniority provisions of an automatically renewed agreement, and was made liable for back pay to those employes for a 5 year period.

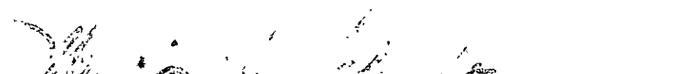
It is also well established that the employer party to an automatically renewed collective bargaining agreement is not at liberty, by reason of the automatic renewal, to make unilateral changes in the wages, hours or conditions of employment of employes covered by the renewed agreement. In both Lifetime Shingle Co. and Sawyer Stores, Inc., supra, the employers made such unilateral changes, and were found by the NLRB to have committed unfair labor practices. Any such changes, whether motivated by competition for the services of employes or by some other factor, must be negotiated between the parties on the same basis as would any other re-negotiation of an existing collective bargaining agreement.

CONCLUSION

Section 111.70(6) states the policy of the State as to labor disputes arising in municipal employment. That policy is to encourage voluntary settlement "through the procedures of collective bargaining". NUE contends that a decision adverse to it in this case would be contrary to the stated policy of the Municipal Employment Relations Act, but that argument overlooks the broad scope of "procedures of collective bargaining" contemplated by the MERA. The enforcement of collective bargaining agreements, as specified in Sections 111.70(3)(a)(5) and 111.70 (3)(b)(4) of MERA, is clearly within the contemplation of the Act. The law requires timely actual notice to forestall the operation of an automatic renewal provision, and the burdens of any failure of communication falls exclusively on the party attempting to give notice. Enforcement of the automatic renewal provision of the parties' 1973-1974 collective bargaining agreement is required in this case, making the dismissal of the refusal to bargain charge appropriate.

Dated at Madison, Wisconsin, this 26th day of March, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Marvin L. Schurke, Examiner