STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SAUK PRAIRIE EDUCATION ASSOCIATION, Complainant, vs. SCHOOL BOARD OF SAUK PRAIRIE PUBLIC SCHOOLS, DISTRICT III, Respondent.	Case V No. 17769 MP-346 Decision No. 12600-A

Appearances:
Mr. Edward B. Hogenson, Attorney at Law, Wisconsin Education Association Council, for the Complainant.
Mr. Jerry W. Jones, Superintendent, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-named Complainant having filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission alleging that Respondent had violated Section 111.70(3)(a)5 of the Municipal Employment Relations Act by allegedly violating certain provisions of its existing collective bargaining agreement; and the Commission having authorized Robert M. McCormick, a member of the Commission's staff, to act as an Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sections 111.70(4)(a) and 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been conducted by the Examiner on May 7, 1974; and the Complainant having filed its initial brief on July 3, 1974, and Respondent after an extension of time for filing, having filed a reply brief on August 21, 1974; and the Examiner having considered the evidence and briefs 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 Sauk Prairie Education Association, hereinafter referred to as the Association, is a labor organization and has its mailing address at the residence of its Local President, Ms. Sue Talg, 204 Spruce Street, Sauk City, Wisconsin.

2. That School Board of Sauk Prairie, hereinafter referred to as the District, is a public school district, organized under the laws of the State of Wisconsin, charged with the management, supervision, and control of the district and its affairs, and in that regard employs, among others, certified teaching personnel; and that its chief administrative officer is District Superintendent Jerry W. Jones, hereinafter referred to as the Superintendent.

3. That the Association and the District were signators to a collective bargaining agreement covering wages, hours and conditions of employment of teachers, which was executed on August 2, 1972, and made effective on July 1, 1972, which by its terms, remained in force until such time as it was revised or replaced by another document, mutually agreed upon by the parties; that said agreement contained among its terms the following provisions relating to management rights, grievance-arbitration procedure, term and school calendar, which read in material part as follows:

"ARTICLE III - BOARD SECURITY

Section 3.1 The Board shall retain exclusive rights and authority to operate and manage the school system. Such powers and rights shall include the determination and direction of teaching force, the right to plan, direct and control school activities of any type; to schedule classes and assign work loads; to determine teacher staff; to create, revise and eliminate positions; to establish and require observance of reasonable policies, rules, and regulations for students and all employees; to select teachers; and to discipline, discharge, and terminate teachers for just and reasonable cause(s).

. . .

ARTICLE VI - GRIEVANCE PROCEDURE

Section 6.1 A grievance is defined as any violation of the provisions of this agreement and must be submitted in accordance with the following procedure:

Section 6.2 An alleged grievance with the individual or group must first be submitted verbally to the Building Principal within ten (10) working days of its occurance [sic]. A verbal answer shall be given within three (3) working days of the submission.

Section 6.3 If a solution is not reached in Section 6.2 above, the grievance shall be reduced to writing and within five (5) working days again submitted to the Building Principal with a copy to the Superintendent of Schools. The parties shall then meet within five (5) working days in an attempt to work out a solution and the Superintendent shall be present at this meeting if possible.

Section 6.4 If a solution is not reached in Section 6.3 above, the Superintendent shall arrange a meeting within four (4) working days at which time he shall be present with the aggrieved and the Building Principal. At this meeting the matter shall be reviewed and an attempt shall be made to arrive at a satisfactory solution.

Section 6.5 If the matter is not resolved in Section 6.4 above, the grievance may be submitted to the Board in writing within five (5) working days after the completion of Section 6.4. The Board shall meet with the parties involved and a written answer shall be given within twenty (20) working days after receipt of the written appeal.

Section 6.6 If a solution is not reached in Section 6.5 such grievance may be submitted to final and binding arbitration by either party. The procedure is commenced by either party filing with the other party a notice of intention to submit the grievance to an arbitrator. It is mutually agreed between the parties that if a notice of intention to arbitrate is not filed within ten (10) working days after the completion of Section 6.5, the matter is deemed resolved. The parties will meet within ten (10) working days of receipt of this notice to attempt to select an arbitrator by mutual agreement. The expense of the arbitrator shall be paid equally by the Board and the Association. If the parties are unable to agree on an arbitrator at this meeting, then the arbitrator shall be selected by the following procedure:

> The Wisconsin Employment Relations Commission shall be asked to appoint a member from the Commission or its staff to arbitrate the dispute.

Section 6.7 The arbitrator shall issue no opinions that will modify or ammend [sic] any terms of this agreement. The decision of the arbitrator shall be final and binding upon both parties.

. . .

ARTICLE VIII - SALARIES AND WORKING CONDITIONS

Section 8.1 The schedules and policy statements attached are made a part of this agreement. (These include salary, sick leave, and professional leave schedules, grievance procedures and payroll deductions of dues, etc. which are agreed to by the Association and the Board.)

. . .

ARTICLE IX - SCHOOL CALENDAR

Section 9.1 The School Calendar shall be set by the School Board following a review by the Association"

"ITEM II

COMPENSATION

. . .

E. EXTENDED EMPLOYMENT

Teachers and professional staff members under contract for extended summer work beyond the established one hundred ninety (190) days shall receive 80 per cent for full-time work and 40 per cent for half-time work. This policy refers to staff members extending their normal school year assignments into or through the summer months. It does not include teachers hired for summer school classes, recreational work, or special extra summer assignments. Contracts other than regular teaching contracts will be issued for these special assignments with the School Board establishing the salary or pay scale. The summer music program will be forty (40) teaching days.

. . .

ITEM V

TEACHER CONTRACTS

. . .

B. ALL CONTRACTS

1. All individual teacher contracts shall be written in accordance with the provisions of this agreement."

4. That the Association and the District executed a successor collective bargaining agreement on September 10, 1973, for the 1973-74 school year which became effective July 1, 1973, and which contained identical provisions relating to management rights, termination of agreement, grievance procedure, extended employment and teacher contracts, as were contained in Articles III, VI, VIII, Items II-E and V, respectively, in the 1972-73 agreement, including a compensation plan based upon 190 contract days; that the 1973-74 successor agreement contained different language governing the school calendar, which reads as follows:

"ARTICLE IX - SCHOOL CALENDAR

Section 9.1 A joint committee of administrators and teachers will establish a calendar for the ensuing school year to be submitted to the board and the SPEA for approval by March 1. The School Board and the executive board of the SPEA shall mutually agree on any calendar changes except in case of emergencies where lack of time would prohibit this."

5. That though the agreement of 1973-74 contained no language describing the details for a calendar for the 1973-74 school year, District representatives advised Association negotiators in late June of 1973, prior to final agreement on a new contract, as to the details of the school calendar for 1973-74; that the District unilaterally adopted a calendar for 1973-74 which included a provision for in-service days, convention days, school start-up and completion dates, pupil contact days, total contract days, and made provision for starting new teachers on August 23; that the calendar was formally adopted by the District Board on July 2, 1973; that said calendar was later reflected in the individual contracts issued by the Board which provided for 190 contract days for purposes of salary.

6. That as a result of said calendar adopted for 1973-74, the District, as of July 2, 1973, planned to open the 1973-74 session on August 27, 1973, and so advised returning teachers in their individual contracts.

7. That on or near July 15, 1973 the Superintendent telephonically advised new teachers to report on August 23, 1973; that on August 7, 1973, the District, by its Superintendent, advised the new teachers in writing to report and start the 1973-74 school session on August 23 and 24, 1974 for orientation and conferences with Building Principals; that the individual teacher contracts issued to the new teachers for 1973-74 provided in part "That said teacher is to perform services . . . for 179 pupil contact days and 190 total days in session . . ." but otherwise set forth August 23, 1973 as the starting date.

8. That on August 28, 1973, representatives of the Association verbally presented a class grievance alleging that the District unilaterally changed the dates for starting the school session for new teachers to a time in advance of the contractually agreed dates of August 27 and 28, 1973, which constituted a violation of the agreement by adding two more days to the 190 contract-day calendar; that the Association requested therein additional monies for the new teachers at 80% of two days' compensation (i.e., 80% x 2/190th's of annual salary) allegedly owed under the terms of Item II - Compensation, Extended Employment - Section E of the master agreement; that the District rejected the grievance at the first step of the grievance procedure on the basis that the dispute was not covered by the collective bargaining agreement.

9. That the Superintendent met with Sue Talg, President of the Association, on September 18, 1973 in the course of which the District rejected the grievance, advised the Association that the controversy did not involve a violation of the master agreement but rather constituted a complaint regarding a clerical error made in some individual contracts for which the District was prepared to rectify by not requiring new teachers to report for work on convention days; and that the District, by the Superintendent, further advised the Association that their discussion over such a complaint constituted the final step of the complaint procedure under terms of the master agreement.

10. That on September 25, 1973, the Association hand-delivered letters to members of the Board of Education describing said grievance and requested that they, the Board, process same pursuant to Section 6.5

of the existing grievance procedure; that on September 26, the Superintendent, on behalf of the Board, advised the Association by letter that the Board believed the matter to be a complaint over a clerical error and not a grievance and further advised:

> "I will be writing each of the new staff members informing them that you had drawn the error to my attention and that they will not be required to work on November 1 and 2 (Teachers Convention) to compensate for the error."

11. That on September 27, 1973, the Superintendent advised the new teachers in writing as follows:

> "It has recently come to my attention that a clerical error was made on your teacher contract. Although the beginning date, August 23, reflected the actual starting date, the number of contract days listed was 190 rather than 192.
>
> In answer to a complaint filed by the Sauk Prairie Education Association in this matter, it has been decided to give you, as a new teacher in our district, two days off from work. These days will be November 1 and 2, those normally used by teachers to attend the WEA convention or to work in their respective schools. As you are not required to work on these days, you will be paid for all or a part of 190 days, as listed on your contract.
>
> We hope this solution meets with your approval and that no misunderstanding or inconvenience has occurred because of this error."

12. That on October 16, 1973, the Association requested the District representative for a meeting to process the dispute to arbitration; that on October 18, the District declined to meet for purposes of selecting an arbitrator, contending that the collective bargaining agreement made no provision for arbitrating such a complaint; that on October 23, 1973, the Association requested the Wisconsin Employment Relations Commission to appoint an arbitrator to hear the aggrieved matter; that on October 30, 1973, the District, in reply to a Commission inquiry on concurrence, advised that the matter was not a grievance covered by the arbitration provision of the agreement and therefore declined to arbitrate; that on March 22, 1974, the Association filed a complaint of prohibited practices with the Commission alleging a violation of the collective bargaining agreement.

13. That the dispute between the Association and the District with respect to the District's directing new teachers to report on August 23 and 24, 1973, prior to the calendar starting date for incumbent teachers and the District's attending denial of the Association's claim of two extra days' compensation over and above their 190-day structured salaries for such new teachers, concerns a claim of a possible violation of the provisions of the 1972-73 and/or 1973-74 collective bargaining agreements then existing between the Complainant Association and the Respondent District.

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

CONCLUSIONS OF LAW

1. That the dispute between the Complainant, Sauk Prairie Education Association, and School Board of Sauk Prairie Public Schools, District III, concerning the grievance affecting new teachers who were directed to report two days early for the 1973-74 school session, wherein the Association

claimed that the District's initial imposition of a 192 contract-day schedule for such new teachers violated the collective bargaining agreement, arises out of a claim which, on its face, is covered by the terms of the collective bargaining agreement which existed between the District and the Association.

2. That School Board of Sauk Prairie Public Schools, District III, by its refusal to proceed to arbitration in the matter of the grievance involving the new teachers, wherein the Association claimed that the Respondent District's direction to new teachers to start two days earlier than other teachers for the 1973-74 school session without granting them additional compensation under the terms of the agreement constituted a violation of the terms of the existing collective bargaining agreement, has violated and is violating the terms of the collective bargaining agreement which existed between it and Sauk Prairie Education Association, and by such refusal has committed and is committing a prohibited practice within the meaning of Section 111.70(3)(a)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 School Board of Sauk Prairie Public Schools, District III, its officers and agents, shall immediately:

1. Cease and desist from refusing to submit the grievance concerning the new teachers having been required to report two days early without additional compensation for the 1973-74 school session to arbitration.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of Section 111.70, Wisconsin Statutes:

   (a) Comply with the arbitration provisions of the collective bargaining agreement existing between it and Sauk Prairie Education Association with respect to the Association's grievance and its claim that the District's denial of two extra days' compensation for new teachers who were directed to report two days earlier than other teachers for the 1973-74 school session, violated the terms of the collective bargaining agreement.

   (b) Immediately notify Sauk Prairie Education Association that it will proceed to such arbitration on said grievance and issues concerning same.

   (c) Participate with Sauk Prairie Education Association in the selection of an arbitrator to hear said grievance and the issues concerning same, and that pursuant to Article VI of the collective bargaining agreement, if the parties are unable to agree upon an arbitrator, both parties jointly file a written request with the Wisconsin Employment Relations Commission to appoint an arbitrator to determine the matter.

   (d) Participate in the arbitration proceeding before the arbitrator so selected or appointed on the grievance and the issues concerning same.

(e) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from receipt of a copy of this Order as to what steps it has taken to comply herewith.

Dated at Madison, Wisconsin, this 31st day of October, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Robert M. McCormick
Robert M. McCormick, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEADINGS AND POSITIONS:

On March 22, 1974, Complainant filed a complaint with the Commission alleging, inter alia:

> "5. The collective bargaining agreement between the Board and the Association contains the following clauses:
>
> B. All Contracts
> 1. All individual teacher contracts shall be written in accordance with the provisions of this agreement. 1/
>
> . . .
>
> ARTICLE IX - SCHOOL CALENDAR
> Section 9.1 A joint committee of administrators and teachers will establish a calendar for the ensuing school year to be submitted to the board and the SPEA for approval by March 1. The School Board and the Executive Board of the SPEA shall mutually agree on any calendar changes except in case of emergencies where lack of time would prohibit this." 2/
>
> 6. Subsequent to the ratification of the above provisions a School Calendar was established by a joint committee of administrators and teachers in accordance with the agreement, a copy of which is amended to and made part of this Complaint as Appendix A.
>
> 7. Certain staff members engaged in teaching employed by the Respondent and represented by the Association as the exclusive bargaining representative have been assigned and worked two full days in excess of the mutually agreed upon calendar.
>
> 8. The Respondent has refused to compensate these teachers for their services in accordance with the master agreement throughout the grievance process the complainant has followed.
>
> 9. The Respondent has refused to arbitrate this matter in accordance with the collective agreement . . .
>
> 10. By the course of conduct complained of . . . the Respondent [District] has violated the collective bargaining agreement previously agreed upon by . . . [the parties]."

1/ Contract provision appears in Item V - Teacher Contracts in the 1972-73 master agreement (Joint Exhibit #1), arguably in effect until September 10, 1973. See Findings of Fact, paragraph 3.

2/ This calendar provision appears in the 1973-74 master agreement (Joint Exhibit #2), executed on September 10, 1973, and by its terms made effective on July 1, 1973. See Findings of Fact, paragraph 4.

The Complainant, in its prayer for relief, requested, inter alia, that the Examiner find a violation of the agreement on the merits, and in the alternative, "order the Respondent [District] to arbitrate the . . . grievance in accordance with the . . . agreement . . .", and made further request, in addition to a make-whole remedy, "that the . . . [District] be ordered to reimburse the . . . [Association] for all costs . . . including all litigation costs and attorney's fees . . ."

The District in its answer denied that it had violated either the collective bargaining agreement or the Municipal Employment Relations Act (MERA) and alleged as an affirmative defense that the Association's grievance was not arbitrable under the terms of the collective bargaining agreement.

At outset of hearing the Association amended paragraph 6 of its complaint deleting reference to the 1973-74 calendar being a product of negotiations "by a joint committee of administrators and teachers" and substituting an allegation that, "the Calendar was agreed to, or acquiesced in, by the Association during negotiations."

At close of hearing, the Association further amended its complaint and prayer for relief and requested that the Examiner only find that the District had violated the collective bargaining agreement by refusing to arbitrate the matter and requested an Order directing the District to proceed to arbitration.

BACKGROUND:

There appears to be no substantial disagreement as to the controlling facts, though the Association averred in its amended pleadings that the 1973-74 calendar was a product, or an adjunct, of bilateral negotiations conducted in June and July of 1973 for a 1973-74 agreement. The facts would indicate that the District unilaterally adopted the 1973-74 calendar in July 1973, after providing the Association bargainers with the details of same in a June bargaining session. At the time of the District's adoption of said calendar, the parties were operating under the provisions of the 1972-73 master agreement.

The District for the first time, in course of the instant hearing and brief raised a question concerning a procedural defect in the Association's service of its demand for arbitration upon the District Board. The Examiner concludes that the evidence pertaining to same is not material to the issues joined herein. Discussion covering the District's contention in that regard follows under Analysis and Conclusions.

POSITIONS:

The Association contends that the grievance-arbitration provision of the agreement clearly provides that the parties proceed to arbitration of unresolved disputes. The Association points out that it presented a demand to the District that it arbitrate the class grievance with respect to the new teachers reporting early and the claim for extra pay. The Association urges that the District raised no procedural defense as to the Association's proper exhaustion of the grievance procedure until the hearing before the Examiner.

The Association argues that the master agreement contains a provision that individual contracts must conform to the collective agreement, that it establishes 190 contract days in Item II - Compensation, E; and further sets forth the method of payment to teachers who perform work beyond such base period. It therefore is irrelevant, argues the Association, as to whether a District secretary erred in typing 190 days on the contracts of new teachers rather than 192, as claimed by the District.

The Association argues that the present controversy is governed by the Commission's decisions which follow Federal substantive law in favoring the enforcement of contractual agreements between parties to arbitrate their unresolved grievances. The present dispute involves an Association claim that the District has violated specific provisions of the collective bargaining agreement, which makes the claim a "grievance" within the purview of the arbitration clause of the agreement.

The District contends that, contrary to the Association's recitation in its brief, the 1972-73 agreement was controlling for the months of July through September 9, including the school calendar clause which permitted the District to unilaterally establish the calendar. Absent a provision requiring mutuality in the development of the calendar structure, the 1972-73 agreement including the management rights clause gives the District the authority to alter the in-service days for new teachers.

The District contends that new teachers were informed in both July and early August of 1973, that they were to report August 23 and 24 for orientation days and the individual contracts issued to them indicated an early starting date. The new teachers did in fact work 190 days as did all teachers, since they took advantage of the District's proposal to rectify the clerical error of 190 days set forth in their contracts by using the two convention days as time off to balance the early starts.

The District contends that the terms of Item II, E, Extended Employment, do not apply to the transaction of starting new teachers two days earlier than the regulars, but merely relates to compensation for those teachers who work beyond the school year into the summer to complete their work, such as librarians and guidance counselors. It argues that new teachers cannot possibly extend their school year assignments "into or through the summer months." The District further urges that the 190 days referenced in Section E only applies to returning teachers. The District also contends that the time for timely filing of a grievance tolls at the end of ten days, from either the July verbal notice, or from the August 7 written notice to new teachers, wherein they were directed to report on August 23. The class grievance was not filed until August 28, 1973. 3/

The District requests that the complaint be dismissed.

ANALYSIS AND CONCLUSIONS:

The District has raised certain procedural defenses to the Association's process of the grievance, both as to the initial filing of the grievance and with respect to the Association's demand for arbitration having been hand-delivered to each Board member, rather than having been mailed to the District Board as an integral entity.

The record discloses that the District never advanced either of such procedural defenses in the course of the steps of the grievance-arbitration procedure. In any event, the state substantive law in the public and private sector is well settled on the proposition that procedural defenses for refusing to proceed to arbitration are for the arbitrator to determine, which long has been black-letter law under the Federal Act, Section 301. 4/

3/ This procedural defense was not raised at hearing, but was advanced by the District for the first time in its brief.

4/ Oostburg Joint School District No. 14 (WERC 11196-B, 12/72), affirmed, Oostburg Jt. School District vs. WERC, Circuit Court (Sheboygan), Case Nos. 2160-2193, 6/74; City of Green Bay, Joint School District No. 1, (WERC 11021-A, 11/72); Seaman-Andwall Corp., (WERC 5910, 1/62); John Wiley & Sons v. Livingston, 376 U.S. 543 (1964), 55 LRRM 2769.