STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN FEDERATION OF TEACHERS AFT, AFL-CIO, Complainant, vs. THE STATE OF WISCONSIN, Respondent.	Case L No. 18305 PP(S)-23 Decision No. 13017-D

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complainant having timely petitioned for review of the decision of the examiner of July 23, 1975; and the commission having reviewed the petition, the briefs of the parties and the record, and being fully advised in the premises;

NOW, THEREFORE, IT IS

ORDERED

That the findings of fact, conclusions of law and order made and filed by the examiner in this case on July 23, 1975, be, and the same hereby are, affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 17th day of May, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Herman Torosian, Commissioner

_____
Charles D. Hoornstra, Commissioner

THE STATE OF WISCONSIN, L, Decision No. 13017-D

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Nature of the case and the examiner's decision

The complainant labor organization, which represents teachers employed in state penal institutions, reformatories and colonies, commenced this action shortly after the respondent employer instituted certain changes in past practice relative to its summer school policy. The past practice, insofar as is germane here, consisted in a virtual right of all teachers to attend summer school every three years with pay, but with the duty to perform extra work and to remain in the state's employ for a certain period of time. The change, which the union challenges in this action, replaced the triennial rotational plan with a policy that deleted the extra work and durational requirements, permitted teachers to attend summer school in pay status only when directed to attend by the employer, and gave the employer the right to determine which courses the teachers will take. 1/

The examiner dismissed the complaint on the ground that the union had waived its right to bargain over such changes during negotiations for, and by the terms of, the collective bargaining agreement for July 1974 to July 1975. The examiner found such waiver from the following: (1) John Stevens, the union's representative during negotiations, knew that the employer intended to assert unilateral control over the summer school policy; (2) nevertheless, the union withdrew its maintenance of standards proposal as well as its summer school proposal, which would have preserved the teachers' right to attend summer school in pay status once every three years; (3) the union accepted the employer's proposed zipper and waiver clause; and (4) the union trusted in the employer's assurances.

The testimony is in dispute as to what assurances the employer gave. The scenario according to Stevens was that the employer refused to agree to a union proposal to continue the past practice of triennial rotation; after discussion the parties agreed that the employer could depart from strict rotation where necessary to meet teacher certification requirements; the employer refused to incorporate this or other agreed upon changes into the collective bargaining agreement because there was too little time to codify all the changes it wanted to make and also to negotiate a full labor agreement in time for the legislature to pass on it before the onset of the new fiscal year; and the employer's representative, Lionel Crowley, told the union to trust in the employer not to make any drastic changes beyond those agreed to. Crowley's version, contrariwise, is that the employer apprised the union of its intent to abolish the previous policy; the employer agreed to pay teachers to attend summer school only when it directed such attendance; the employer assured the union this was its final policy position and that it would be making no immediate changes; the employer did not tell the union to trust it; and the union acquiesced by withdrawing its language proposals and stating it understood the employer's position. The examiner resolved these conflicts by concluding, in essence, that the employer claimed unilateral control over the summer school policy and the union agreed that the employer could exercise such control.

1/ See finding of fact paragraph 23.

Complainant's petition for review

The complainant's petition for review takes exception to the examiner's findings, in whole or in part, in paragraphs 8, 15, 16, 17, 20, 21, as well as both conclusions of law and the order. In its brief, complainant provides fuller discussion of the exceptions, and, in addition, states that the examiner's fundamental error was to treat this case as turning on whether complainant waived its rights rather than whether there was an agreement at the bargaining table not to abolish the rotational plan, breach of which violates the duty to bargain in good faith.

DISCUSSION:

The Issue of Parol Agreement

Complainant argues that the examiner erroneously focused on the question of waiver rather than on whether a parol agreement had been reached during negotiations. Complainant, however, did not allege in its complaint that an oral agreement had been reached during negotiations and that respondent breached said agreement. Rather, complainant, by it complaint, alleged that certain assurances were made by respondent during negotiations which the union relied on to its detriment. Complainant further alleges that respondent, by unilaterally terminating the summer school policy once negotiations had been completed but prior to the effective date of the collective bargaining agreement, without negotiating and reaching an agreement with the complainant, engaged in conduct which constitutes a refusal to bargain in violation of Section 111.84(1)(d).

Given the above pleadings, the commission agrees with the examiner that the question of waiver is dispositive of this case. Complainant's refusal to bargain allegations clearly required a determination of whether the union waived its right to bargain which determination is affected by certain alleged assurances given by respondent during negotiations in March of 1974 for an agreement to commence on July 1, 1974. The nature of the assurances, if any, is critical of course in determining if there was a refusal to bargain by respondent as alleged by complainant.

However even if we were to assume the issue to be whether a parol agreement was reached as argued by complainant, the commission concludes, given the facts herein, that the zipper clause of the collective bargaining agreement precludes any enforcement of such an agreement.

Here, the zipper clause 2/ states that the written agreement is the entire agreement superseding all prior agreement, oral as well as written. While the existence of a parol agreement, assuming there was one, to preserve the rotational plan neither contradicts nor varies any specific term of the written agreement, it contradicts the zipper clause which purports that the written agreement is entire and supersedes all other agreements of the parties. Again assuming a parol agreement

---

2/ See finding of fact paragraph 22.

was reached the commission would not recognize the existence of said agreement on a rotational plan unless complainant could show fraud or illegality in respect to that agreement. Complainant did not allege either in the instant case.

The question of waiver

An employer must bargain before it changes a past practice affecting wages, hours and conditions of employment, 3/ such as the rotational plan here, absent waiver. A zipper clause itself does not waive the duty to bargain. It merely evidences the intent to integrate or merge prior negotiations into the final agreement, and as such a wrap-up clause it "affords no basis for an inference that the agreement contains an implied undertaking over and beyond those actually written into the agreement." 4/

The instant zipper clause, however, is more than a mere wrap-up provision. It also contains a waiver provision which provides: 5/

> "Therefore, the [e]mployer and the [union] for the life of this [a]greement, and any extension, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this [a]greement, or with respect to any subject or matter not specifically referred to or covered in this [a]greement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated or signed this [a]greement."

Blanket waivers of the duty to bargain, such as that contained in the foregoing language, generally have been construed restrictively in refusal to bargain cases, and waiver has been found only where an examination into the background shows that the union clearly and unmistakably waived its interest in the matter. 6/ The reason for not giving blanket waivers an expansive construction, as though these were mere contract interpretation cases, is that the origin of the duty to bargain is statutory, not contractual. Further, the backdrop to this legislation "recognizes that there are 3 major interests involved: that of the public" as well as that of employers and employes. 7/ Moreover, the legislature has found as a fact that collective bargaining is an essential ingredient for labor peace. 8/ Consequently, in view of the public interest and the statutory nature of the duty to bargain, the rule has evolved that waiver of the duty to bargain can be found only on evidence which is clear and unmistakable.

3/ See NLRB v. Katz, 369 U.S. 736 (1962), and City of Madison (15095) 12/76

4/ New York Mirror, 151 NLRB No. 110, 58 LRRM 1465 (1965). See IUE v. General Electric Co., 332 F. 2d 485, 489, n. 3 (2nd Cir. 1964).

5/ Article XII, sec. 1; see paragraph 22 of the findings.

6/ See City of Brookfield (11406-A,B) 9/73, New York Mirror, supra, and Beacon Journal Publishing Co., 164 NLRB No. 98, 65 LRRM 1126 (1967).

7/ Section 111.80(1), Stats. Compare sec. 111.01, Stats.

8/ See secs. 111.01, 111.70(6), and 111.80(4), Stats.

In describing what constitutes clear and unmistakable evidence of a waiver, one line of authority requires that the union have explored and consciously considered the particular item allegedly waived. 9/ The better line of thought, in our opinion, is to give such effect to a blanket waiver as the negotiating history and other surrounding circumstances seem to make appropriate, at least in any case where its application is not repugnant to the basic policies of the law. 10/

The question becomes whether the union clearly and unmistakably waived its right to bargain about abolition of the triennial rotational plan. As noted, the examiner answered affirmatively on the basis of the following considerations: (1) union representative Stevens knew during negotiations that the employer intended to assert unilateral control over the summer school policy; (2) the union withdrew its summer school proposal, which preserved the past practice, as well as maintenance of standards language; (3) the union accepted the employer's proposed zipper and waiver clause; and (4) the union trusted in the employer's assurances.

Each of these reasons, taken singly, is insufficient to find a waiver. Thus, as to the first ground, knowledge of the employer's intent to abolish prior rights is not consent - clearly and unmistakably - that those rights be abolished. As to the fourth ground, agreeing to trust the employer not to exceed agreed upon modifications is not a clear and unmistakable waiver of the right to bargain the employer's decision to exceed those modifications. Further, withdrawal of language proposing retention of the past practice is not such a waiver, since such language only functions to add a contractual remedy to enforce a statutory right that present conditions of employment not be unilaterally altered without further bargaining. 11/

Moreover, even the waiver language within the zipper clause is insufficient to establish a clear and unmistakable waiver of the right to bargain about changes in triennial rotation. Essentially, that waiver language 12/ says two things: (1) the duty to bargain is waived

---

9/ See: Proctor Mfg. Corp., 131 NLRB No. 142, 48 LRRM 1222 (1961); Unit Drop Forge Div., 171 NLRB No. 73, 68 LRRM 1129 (1968); Southern Materials Company, Inc. (IBT 822), 181 NLRB No. 153, 74 LRRM 1046 (1970), enforcement denied, 447 F. 2d 15, 77 LRRM 2814 (4th Cir. 1971), on remand, 198 NLRB No. 43, 80 LRRM 1606 (1972); and T.T.P. Corp., 190 NLRB No. 48, 77 LRRM 1097 (1971).

10/ See, e.g., Sheboygan Joint School District (11990-B) 1/76. Accord: Radioear Corp., 214 NLRB No. 33, 87 LRRM 1330 (1974).

11/ In Timken Roller Bearing Co. v. NLRB, 325 F. 2d 746, 54 LRRM 2785 (6th Cir. 1963), cert. denied, 376 U.S. 971, 55 LRRM 2878), where a union failed to get into the labor agreement language giving it the right to certain information, the court said: "[T]he existence of this right was not dependent upon it being included in the bargaining agreement. It was not a right obtained by contract . . . . The failure to have the right recognized by the Company in the bargaining agreement, which would probably eliminate the necessity of possible litigation over it later, does not mean that it does not exist by virtue of the statute." Cf. Keller-Crescent, 217 NLRB No. 100, 89 LRRM 1201 (1975) (failure of union to successfully include the right to honor a picket line is not a waiver of that right).

12/ Quoted in finding of fact paragraph 22 and this memorandum, p. 4.

as to matters covered by the agreement; and (2) the duty to bargain also is waived as to matters "not specifically referred to or covered" in the agreement even if the parties had no "knowledge or contemplation" of such matter. The first alternative is inapplicable since the agreement does not cover the rotational plan. The second alternative literally encompasses the rotation practice within the first phrase, because the rotation plan is not specifically referred to or covered by the agreement. Such contractual literalism, however, would mean the union has agreed that the employer unilaterally may abrogate the common law of the shop and all employe rights thereunder. It is most unlikely the parties intended such a result for two reasons: first, rights in past practices and customs in the public sector enjoy constitutional protection, 13/ the waiver of which is perceived niggardly; 14/ and, second, in the labor relations context, such an abrogation of the common law of the shop probably is impossible. 15/ "We must assume that intelligent negotiators acknowledged so plain a [point] unless they state a contrary rule in plain words." 16/ Finally, such contractual literalism would jeopardize the objective of labor peace which the legislature sought to secure by imposing on employers the duty to bargain. Just as the courts presume the common law continues unless the legislature expressly provides otherwise, 17/ and strictly construe statutes in derogation of the common law, 18/ so also it is a far more reasonable presumption that the parties intend to continue the common law of the shop, including the rights and duties thereunder, and that the zipper/waiver provision of the labor agreement does not in itself repeal rights under prior practices and customs.

13/ See, e.g., Perry v. Sindermann, 408 U.S. 593 (1972).

14/ See Edelman v. Jordan, 415 U.S. 651, 673 (1974).

15/ In Steelworkers v. Warrior Navigation Co., 363 U.S. 574, 46 LRRM 2416, 2418 (1960), the court quoted favorably from a learned commentator as follows: "* * * [I]t is not unqualifiedly true that a collective bargaining agreement is simply a document by which the union and employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage the enterprise, so that an employee's claim must fail unless he can point to a specific contract provision upon which the claim is founded. There are too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective bargaining process demand a common law of the shop which implements and furnishes the context of the agreement."

16/ Ibid.

17/ See Aaby v. Kaupanger, 197 Wis. 56, 221 N.W. 417 (1928), and In re Phalen's Estate, 197 Wis. 336, 222 N.W. 218 (1928).

18/ Cf. Ekern v. McGovern, 154 Wis. 157, 142 N.W. 595 (1913). Note also that the legislature itself frequently incorporates the common law, see sec. 401.103, Stats., and, indeed, in case of the silence of contractual terms, has provided that custom and practice shall control. See, e.g., sec. 402.208, Stats.

Even though each of the examiner's reasons taken singly fails to show a clear and unmistakable waiver, taken together and in light of the record as a whole, it was not "clearly erroneous" 19/ for the examiner to find such a waiver. The union's withdrawal of language which would have preserved the rotational plan and its signing of the zipper and waiver clauses corroborates the essence of the examiner's finding that the parties in negotiations agreed that the employer could make such changes in the rotational plan, including its elimination, as needed to effectuate its new policy of placing primacy on meeting teacher certification requirements and requiring teachers to take job-related courses. Especially supportive of the examiner's conclusion is the fact that the parties agreed to delete the previous requirement that teachers who had attended summer school must work additional hours and continue in the state's employ for a certain period of time. There would be little reason to make these deletions if the rotational plan, wherein teachers attended school other than to perform an assignment to meet specific employer objections, were to survive. Such deletion attests to the employer's version of the events, that the parties had agreed that attendance at summer school with pay hinged on whether the employer directed such attendance as part of the regular work assignment.

Discussion of complainant's exceptions to examiner's findings of fact

In paragraph 8 the examiner found that the union made no proposals for the period prior to July 1, 1974. Complainant objects only to the materiality of that finding, not its truth, and to the examiner's inference therefrom that the union's waiver was effective March 7, 1974, the date the parties came to a meeting of the minds during negotiations for the new collective bargaining agreement, and not July 1, 1974, the effective date of the new collective agreement.

The absence of a union proposal for the period prior to July 1, taken by itself, is immaterial on the effective date of waiver, since a union does not need to make proposals to protect its rights in past practices; rather, the employer must bargain about its proposal to change those practices. 20/ Nevertheless, the examiner did not rely solely on that finding in drawing the conclusion that the waiver was intended to be effective March 7. He considered, in addition, the necessary relationship between the summer school policy at the beginning of the summer and at the end. 21/ Most of the summer session would occur on July 1 and

---

19/ ERB sec. 22.09 provides: "Review of findings of fact, conclusions of law and order issued by single member or examiner. * * * (2) Petition for review; basis for and contents of. The petition for review shall briefly state the grounds of dissatisfaction with the findings of fact, conclusions of law and order, and such review may be requested on the following grounds:

"(a) That any finding of material fact is clearly erroneous as established by the clear and satisfactory preponderance of the evidence and prejudicially affects the rights of the petitioner . . .

"* * *."

20/ See note 16, supra.

21/ See examiner's memorandum, p. 16.

thereafter. Under the agreed upon policy changes, teachers attending that summer session would not be required for that post-July 1 period to plan to remain in the state's employ for a certain period of time or to perform extra work during the course of the summer session. The parties signed a one year agreement. Since the agreement's terminal points straddled the next two summer sessions, since the parties were negotiating at least two months prior to the first summer session, it was not clearly erroneous for the examiner to conclude that the parties intended the waiver to be effective for that first summer session even though a small portion of that session would have passed by the start of the contract date. Certainly, it would have been a simple matter for either or both of the parties to express a contrary intent and thereby negate the reasonableness of the examiner's inference.

Complainant takes exception to the portion of paragraph 15 of the examiner's findings that Crowley stated he could not guarantee that the rotation practice would be continued. Complainant does not argue that this finding is incorrect. Rather, it argues only that this finding is insufficient to support the inference that the employer claimed unilateral control over the summer school policy, and that a clear claim to such control is an essential finding before the union can be said to have waived its right to bargain about eliminating the rotational plan.

Unquestionably, the refusal to guarantee continuance of the rotational plan itself does not state an intent to scrap the rotational plan, nor is it a claim of power to do so. Nevertheless, it was not clearly erroneous for the examiner to conclude that said statement, together with all the other evidence of record, supports the conclusion that the employer did assert such unilateral control in respect to rotation and that the union waived its right to bargain in that regard. In particular, as noted herein, the employer's claim to such control over the summer school policy is strongly supported by its decision to pay whomever it sent, and to excuse those teachers from the requirements of performing extra work and remaining in the state's employ for a certain time thereafter, inasmuch as such attendance at summer school would become part of an employe's regular work assignment.

Complainant excepts from the finding in paragraph 16 for the failure also to find that the employer had proposed only to modify the rotation plan in order to have greater flexibility in sending teachers with certification deficiencies. Although there is testimony which would support such a finding, there also is contrary testimony, e.g., Stevens' testimony that the employer said the rotational plan could not interfere with the employer's desire to have teachers meet certification requirements. 22/ While Stevens may have inferred therefrom only an intent to modify, the examiner could infer therefrom, in the context of the record as a whole, an intent to subordinate the rotational plan to all of the other employer objectives, including achieving teacher certification.

Complainant apparently abandons its exception in its petition for review to paragraph 17 since its brief does not pursue it. In any event, we find no error in that paragraph.

22/ Tr. 23.

Complainant's objections to paragraphs 20 and 21 and its objections to the conclusions of law involve conclusions of ultimate fact and law which have been discussed throughout this memorandum.

Dated at Madison, Wisconsin this 17th day of May, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Herman Torosian, Commissioner

_____
Charles D. Hoornstra, Commissioner