STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FIRE FIGHTERS LOCAL 1777, Complainant, vs. VILLAGE OF GREENDALE, Respondent,	Case XXX No. 19384 MP-488 Decision No. 13830-A
VILLAGE OF GREENDALE, Complainant, vs. FIRE FIGHTERS LOCAL 1777, Responsdent.	Case XX No. 19479 MP-502 Decision No. 13888-A

Appearances:
Mr. Ed Durkin, IAFF Vice President, appearing on behalf of the Union.
Brigden, Petajan, Lindner & Honzik, S.C., Attorneys at Law, by Mr. Roger E. Walsh, appearing on behalf of the Village.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS GRANTING MOTION TO DISMISS CASE XXX AND DISMISSING CASE XX

The above-named Union filed a complaint with the Wisconsin Employment Relations Commission alleging that the above-named Village committed prohibited practices in violation of Secs. 111.70 (3)(a)4 and 5, Stats. The WERC, by Order dated July 25, 1975, appointed Marshall L. Gratz to act as examiner and to make and issue findings of fact, conclusions of law and order in the matter. Thereafter, the Village filed a complaint with the WERC alleging that the filing by the Union of its Sec. 111.70 (3)(a)4 complaint allegations constituted a prohibited practice in violation of Sec. 111.70 (3)(a)5, Stats. The Village also filed a motion to dismiss the Union's complaint on the grounds that the alleged (3)(a)5 violation constituted a claim that had been settled pursuant to the parties' contractual grievance and arbitration procedure and that the alleged (3)(a)4 violation claimed rights that had been contractually waived by the Union. Without objection by either party, the Village complaint noted above was consolidated for hearing with the Union's complaint. An August 20, 1975 WERC Order appointed the Examiner

to act in Case XX as well, and the consolidated hearing was held on September 2, 1975 at Milwaukee, Wisconsin. A transcript of the proceeding was distributed, and the parties submitted briefs which were, at their individual option, limited to the issues joined with respect to the Village's motion and complaint. The Examiner has considered the evidence, arguments and briefs of Counsel, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Orders Granting Motion to Dismiss Case XXX and Dismissing Case XX.

FINDINGS OF FACT

1. Local 1777, International Association of Fire Fighters, referred to herein as the Union, is a labor organization with a mailing address of c/o Michael Sorkan, President, 6200 West Loomis Road, Greendale, Wisconsin. The Union is represented in the instant proceeding by Ed Durkin whose mailing address is 5606 Old Middleton Road, Madison, Wisconsin 53705.

2. Village of Greendale, referred to herein as the Village, is a municipal employer with offices at 6800 Northway, Greendale, Wisconsin 53219. Fire Chief Earl King and Fire Captain Orlowski have acted in all respects noted herein on behalf of the Village in supervising the operation of the Village's Fire Department.

3. At all material times the Union has been the exclusive collective bargaining representative of "all regular full time salaried fire fighters employed by the Village. . . . excluding the Fire Chief and Captain."

4. At all material times, the Village and Union have been parties to a 1975 collective bargaining agreement referred to herein as the Agreement, which, in pertinent part, provides as follows:

" . . .

ARTICLE III - MANAGEMENT RIGHTS

3.01 The Union recognizes the prerogatives of the Employer to operate and manage its affairs in all respects in accordance with its responsibility, and the powers of authority which the Village has not specifically abridged, delegated or modified by other provisions of this Agreement are retained exclusively by the Village. Such powers and authority in general include but are not limited to the following:

(1) To determine its general business practices and policies and to utilize personnel, methods and means in the most appropriate, efficient and flexible manner possible.

(2) To manage and direct the employees of the Fire Department, to make assignments of jobs, to determine the size and composition of the work force, and to determine the competence and qualifications of the employees.

(3) To determine the methods, means and personnel by which the operations of the Fire Department are to be conducted.

. . .

3.02 The parties agree that such employee shall perform all the duties of his classification and it is understood by the parties that every incidental duty connected with operations enumerated in any job description is not always specifically described. Nevertheless, it is intended that all such duties shall be performed by the employee.

. . .

ARTICLE VII - EXISTING RIGHTS AND PRIVILEGES

7.01 In the event the Employer revises employee rights and privileges which existed as of December 1, 1972 and which have not been modified by mutual consent, the reasonableness of any such revision shall be subject to Article XIII, Grievance Procedure. In the event a grievance is filed, such revision shall be stayed pending determination under the Grievance Procedure.

. . .

ARTICLE XIII - GRIEVANCE PROCEDURE

13.01 The grievance procedure provided for in this article shall apply to grievances involving the interpretation or application of this Agreement. Time limits set forth herein shall be exclusive of Saturdays, Sundays and holidays.

13.02 Grievances shall be processed in the following manner.

STEP 1: The employee and/or the Union representative shall take the grievance up orally with the employee's supervisor within five (5) days of their knowledge of the occurrence of the event causing the grievance, which shall not be more than thirty (30) days after the event. The immediate supervisor shall attempt to make a mutually satisfactory adjustment, and in any event, shall be required to give an answer within five (5) days.

STEP 2: The grievance shall be considered settled in Step 1 unless, within five (5) days after the immediate supervisor's answer is due, the grievance is reduced to writing and presented to the Fire Chief. The Fire Chief may confer with the aggrieved and the Union before making his determination. Such decision shall be reduced to writing and submitted to the aggrieved employee and the Union within five (5) days from his receipt of the grievance.

STEP 3: The grievance shall be considered settled in Step 2 above unless, within ten (10) days from the date of the Fire Chief's regular answer or last date due, the aggrieved employee and/or Union shall request in writing to the Village Manager that the dispute be submitted to the Village Board.

. . .

ARTICLE XXVII - NEW CLASSIFICATIONS

27.01 In the event that the Employer creates a new classification within the bargaining unit, the wage rate established by the Employer for such new classification shall be subject to the parties' rights and obligations to bargain collectively under Wisconsin law existing at the time the dispute arises. It is understood that the initially established wage rate may be paid to employees in the new classification pending any such bargaining process. Nothing herein shall be construed so as to prevent retroactive application of any adjustments arising out of such bargaining.

. . . "

The Agreement in Sec. 25.01 and Appendix "A" specifies the "monthly wage rates" that "will be paid employes in the following classifications: SERGEANT [and] FIREMAN."

5. Prior to June 1, 1975, the Village had never required bargaining unit employes to perform construction-trades-type work. Some such work had theretofore been performed by bargaining unit employes at the Village's request but always with the mutual understanding that it was being performed "voluntarily . . . so there would be no precedent set." Such performance during the employe's normal work hours was compensated by relief from normal nonemergency duties during the performance. Such performance outside the employe's normal work hours was compensated in accordance with contractual call-in pay provisions. On occasion, employes performing such work also received certain additional advantages and privileges therefor. On the more than one occasion when unit employes declined Village requests to perform such work, the Village assigned such work to non-unit personnel, and no disciplinary consequences ensued for those unit employes declining to perform same.

6. On June 17, 1975, Captain Orlowski ordered Richard Kittelson, a member of the bargaining unit in the classification of fireman to perform pre-staining work (sanding, puttying and general cleaning of wood) on some new cabinets in the Fire Department's Dispatch Office. On June 19, 1975, Captain Orlowski ordered Robert Fridrick, also a member of the bargaining unit in the classification of fireman, to stain said cabinets. Before the work so ordered was performed, Kittelson and Fridrick each orally grieved that the assignments made to them constituted a violation of Agreement Sec. 7.01 and each orally requested that such work orders be stayed pursuant to Sec. 7.01 pending the ultimate determination of their grievance in the contractual grievance and arbitration procedure. Captain Orlowski orally denied each man's grievance and ordered each to perform the work assigned. Each man performed the work assigned, and a carefully typewritten Step 2 grievance was signed and filed by Fridrick, the Union Secretary, as follows:

"In compliance with the written contract between the Village of Greendale and Local 1777, Internation Association of Fire Fighters, and under Article XIII therein we submit the following grievance in accordance with sub-section 13.02 step 2.

On June 17, 1975, Local 1777 member Richard Kittelson was ordered to do pre staining work (sanding, putty, general cleaning of wood) on the new cabinets in the Greendale Fire Department dispatch office; also on June 15, 1975, Local 1777 member Robert Fridrick was ordered to stain the above mentioned cabinets.

Those orders are in violation of Article VII, 'Existing Rights and Privileges', sub-section 7.01, in that we have not been required to do this type of work. Both men, on receiving your orders filed grievance's (sic) under Article VII. Article VII states in part and requires that, 'In the event a grievance is filed, such revision shall be stayed pending determination under the Grievance Procedure'. By still ordering these men to do this work you have totally ignored this portion of Article VII."

7. Chief King sent a timely regular answer to said grievance which answer was dated June 26, 1975 and read as follows:

"In compliance with the written contract between the Village of Greendale and Local 1777 I.A.F.F., Article XIII therein I hereby submit my answer to the grievance received by me on June 30, 1975 in accord with sub-section 13.02 Step 2.

It is my feeling that the work required of Firefighters Kittelson and Fridrick is within the 'Management Rights' Article III sub-section 3.01 (2) of the above mentioned contract.

In regard to the mentioned violation of Article VII 'Existing Rights and Privileges' sub-section 7.01, Local 1777 has never had the right or privilege 'to not do' ordered work of this nature. I do not feel that just because work of this nature has been done in the past without a direct order being issued, that Local 1777 now has an 'existing right or privilege' to refuse to do it now.

Based on the above I therefore deny any violation of the contract."

8. Neither Kittelson nor Fridrick nor the Union requested in writing to the Village Manager within ten days from the date of said regular answer or at any other time that the disputes reflected in said grievance and answer be submitted to the Village Board.

9. Said grievance set forth a claim, inter alia, that the Village had violated the stay provision (Sentence 2) of Agreement Sec. 7.01 by its failure to stay the pre-staining and staining work orders pending resolution of the grievances that had been orally filed with respect to same.

10. The Chief's grievance answer denied the claim noted in Finding 9, above.

11. As a result of the nonprocessing of said grievance noted in Finding 8, above, said grievance and the claim noted in Finding 9, above, "shall be considered settled in Step 2", i.e., settled on the basis of the Chief's denial of same, pursuant to Agreement Sec. 13.02, Step 3.

12. On June 24, 1975, at approximately 8:30 a.m., Chief King ordered bargaining unit employes to pour and lay concrete in the rear of the Village fire station. Within 15 minutes after those orders were given, the Union orally notified King that it considered requiring bargaining unit employes to perform such concrete work to be an imposition of new job duties and working conditions and orally requested of King that the Village immediately enter into collective bargaining negotiations with the Union for an increased wage to be paid for such concrete work.

13. Also on June 24, 1975, Chief King received a letter from the Union dated June 23, 1975 which read as follows:

> "It has come to our attention that you may want members of Local 1777 to pour and lay a concrete slab in the rear of the fire station. It is our opinion that this does not come under normal maintenance nor emergency work and therefore is a new working condition. If you intend to have our members do this work we respectully (sic) submit that the parties involved should sit down and collectively bargain out an agreement, that includes increased wages, to both our satisfaction."

14. Despite the Union's notification and requests noted in Findings 12 and 13, above, Chief King and the Village failed and refused to countermand the orders concerning concrete work and/or to bargain collectively with Union concerning 1975 wages to be paid bargaining unit employes for the performance of concrete work.

15. On July 22, 1975, the Union filed a complaint of prohibited practice against the Village, alleging, inter alia, that the Village committed a refusal to bargain in violation of Sec. 111.70 (3)(a)4, Stats., by changing working conditions (requiring concrete laying work to be performed by unit employes as noted in Finding 12, above, without negotiating with the Union.

16. At no time during the hearing or briefing of the instant matters has the Union contended that the rights it has claimed were violated by the Village in contravention of Sec. 111.70 (3)(a)4 were among those expressly reserved under Agreement Sec. 27.01.

17. Since the Union has not contended herein that the Sec. 111.70 (3)(a)4 rights claimed violated herein are among those expressly reserved by Agreement Sec. 27.01, the Union, by agreeing to Sec. 32.03 in the context of its 1975 Agreement with the Village, has waived, in a clear and unmistakable manner and by sufficiently specific agreement language, its right and the Village's obligation to collectively bargain further over wages to be paid in 1975 to employes in the fireman classification.

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

CONCLUSIONS OF LAW

1. The Union's claim, that the Village violated the stay portion of Sec. 7.01 of the parties' collective bargaining agreement when Captain Orlowski continued to order unit employes to do pre-staining work on June 17, 1975 and staining work on June 19, 1975 despite filing of grievances challenging such orders and submission of the requests that such orders be stayed, is a claim that was settled pursuant to the grievance and arbitration procedure of Art. XIII of the parties' contractual grievance and arbitration procedure and specifically by operation of Sec. 13.03 upon the running of the time period set forth therein. In view of said settlement, the Examiner declines to exercise the jurisdiction of the Commission to determine the merits of such claim.

2. Since the Union agreed to Section 32.03 in the context of its 1975 Agreement with the Village and since the Union has not contended herein that the Sec. 111.70 (3)(a)4, Stats., rights claimed violated herein are among those expressly reserved by Sec. 27.01 of said Agreement, the Union has been shown to have waived its right and the Village's obligation to collectively bargain further over wages to be paid in 1975 to employes in the fireman classification. In view of said waiver, the Village did not commit a prohibited practice in violation of Sec. 111.70 (3)(a)4 when its agents unilaterally required employes in the fireman classification to perform concrete work on fire station premises on or about June 24, 1975 and the Village did not commit a prohibited practice in violation of Sec. 111.70 (3)(a)4 on and after June 24, 1975 when its agents refused Union requests to bargain about 1975 wages for such employes.

3. The Union did not commit a prohibited practice in violation of Sec. 111.70 (3)(a)5 when it filed its July 20, 1975 prohibited practice complaint with the WERC against the Village.

On the basis of the foregoing Findings of Fact, Conclusions of Law, the Examiner makes and files the following:

ORDERS

1. The Village's motion to dismiss the Union's Complaint (Case XXX) shall be and hereby is granted, and, therefore, the Union's Complaint in Case XXX shall be, and hereby is, dismissed in its entirety.

2. The Village's Complaint (Case XX) shall be and hereby, dismissed.

Dated at Milwaukee, Wisconsin, this 16th day of March, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz
Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDERS GRANTING MOTIONS TO DISMISS CASE XXX AND DISMISSING CASE XX

On July 22, 1975, the Union filed its complaint in Case XXX alleging that the Village committed two separate prohibited practices. The first Union allegation is that by refusing Union requests that it to stay certain work orders pending the processing of grievances filed challenging same, the Village violated the stay portion of Sec.7.01 of the parties' 1975 collective bargaining agreement in violation of Sec. 111.70 (3)(a)5, Stats. In that regard, the Union requested a WERC order that the Village Fire Chief cease and desist from violating the contractual stay provision.

The second Union allegation is that by ordering unit employes to perform certain concrete slab laying work and by refusing the Union's request to bargain about wages for such work, the Village committed a refusal to bargain in violation of Sec. 111.70 (3)(a)4, Stats. In that regard, the Union requested the WERC to order the Village to bargain before unilaterally changing working conditions.

The Village answered, denying that it committed the alleged violations and presenting affirmative defenses. The Village also filed a motion to dismiss the Union's (3)(a)5 allegation on the ground that the claim involved had been settled purusant to the parties' contractual grievance procedure and to dismiss the Union's (3)(a)4 allegations on the ground that the Union had waived its statutory rights claimed violated by agreeing to a contractual zipper clause, Agreement, Sec. 32.03. In the alternative, the Village moved for deferral of both Union claims to the parties' contractual grievance and arbitration procedure on the ground that each involved matters of the interpretation and application of the Agreement. The Village also filed a complaint against the Union (Case XX[1/]) asserting that by filing the (3)(a)4 allegations, the Union had repudiated and therefore committed a violation of Sec. 32.03 of the parties' collective bargaining agreement, in violation of Sec. 111.70 (3)(a)5, Stats.

1/ Inexplicably, the later-filed Village complaint was numbered Case XX, whereas the earlier-filed Union complaint had been numbered Case XXX.

The Union's complaint and the Village's complaint were consolidated for purposes of hearing. At the hearing, the Union answered the Village's complaint by denying that its own complaint-filing constituted a violation of Sec. 111.70 (3)(a)5, Stats. Contrary to the Village's request, the hearing was conducted with respect to all aspects of both complaints and was not limited to the Village's motion to dismiss. The Examiner, over the Union's objection, granted the Village request that the parties be permitted at their option to limit their briefs to the issues raised in the Village's motion and complaint and to reserve the right to submit written arguments on the merits of the Union's complaint only if the Examiner's ruling on the motion necessitated same. Both parties chose to so limit the scope of their briefs which were submitted after distribution of the transcript.

DISMISSAL OF ALLEGATIONS OF VILLAGE VIOLATIONS OF SEC. 111.70 (3)(a)5

It is undisputed that the June 26, 1975 written grievance filed with the Chief at Step 2 of the Agreement grievance procedure was denied by the Chief in a timely fashion and not thereafter processed to Step 3. It is also undisputed that Step 3 of that procedure provides that "the grievance shall be considered settled in Step 2" if not pursued in subsequent steps within ten days from the date of the Chief's answer at Step 2.

The Union argues, however, that the June 26 grievance asserted only a claim that the Chief's assignment of pre-staining and staining work to unit employes constituted a violation of Art. VII but not the additional claim that the Village's failure to stay said work assignments following the Union's oral demand that it do so was also a violation of Art. VII; and that the Chief understood the grievance to be so limited since his response to it makes no mention of the stay provision or reasons for his failure to invoke it.

It is undisputed that the work orders in question were met with oral grievances and oral requests for staying the orders pursuant to Art. VII. When those oral efforts were denied, the work was performed. Thereafter, the Step 2 (written) grievance of June 26 was submitted to Chief King. That document was a carefully typed letter on Union stationery by the Union Secretary and individual grievant. It was not a hurriedly handwritten expression of an individual unfamiliar with union-management communications or with the facts of the case. That letter (Finding 6), states that

it is a Step 2 grievance, identifies the work orders and the employes to which they were addressed and asserts that the orders are in violation of Art. VII. The text then continues as follows:

> "Both men, on receiving your orders filed grievance's (sic) under Article VII. Article VII states in part and requires that, 'In the event a grievance is filed, such revision shall be stayed pending determination under the Grievance Procedure.' By still ordering these men to do this work you have totally ignored this portion of Article VII. "

That quoted grievance language specifies certain employer conduct (continuing to order certain work after grievances under Art. VII were filed concerning same), asserts that by engaging in said conduct the employer was "totally ignoring" a portion of the Agreement, quotes in full the portion of the Agreement referred to (the stay provision), and characterizes the stay provision as something Article VII of the Agreement "requires". Those elements clearly state a claim that the Chief's failure to stay the pre-staining and staining work orders after the oral grievances were filed constituted a violation of the stay provision of Art. VII. The Union's contention that said language was merely intended to invoke the stay provision seems unlikely since the parties stipulated that the stay provision was invoked orally before the work in question was performed and hence days before the June 26 grievance was presented, and because the draftsman of the grievance was one of the recipients of the disputed work orders.

The reasons stated by Chief King in his Step 2 answer (Finding 7) with regard to what he referred to as the ". . .mentioned violation of Article VII 'Existing Rights and Privileges' sub-section 7.01. . ." were equally applicable to a claimed violation of Sec. 7.01, sentence two as to the claimed violation of Sec. 7.01, sentence one. Moreover, the Chief's stated reasons include the same reason given by Village Counsel for the Village's refusal to comply with the requests to invoke the stay provision herein. The Village position as stated on the record[2/] appears to be that the stay provision applies only to situations in which it is undisputed that a revision has been made in an employee right or privilege which existed as of December 1, 1972 which right or privilege has not been modified by mutual consent; and that only in such situations, if a grievance is filed, would the stay provision apply pending a grievance procedure determination as to the reasonableness of the revision. Under that interpretation, neither the stay provision nor

---

2/ Transcript, p. 5.

any other portion of Art. VII would apply in the instant case because the Village denies that the claimed right or privilege has ever existed. Notably, that is the same denial expressly set forth by Chief King in his answer as one of his bases for denying ". . .any violation of the contract." Hence, Chief King's answer appears consistent with the view that he understood the grievance to assert a claimed violation of the second sentence of the stay portion of Sec. 7.01 as well as the first sentence thereof.

For the foregoing reasons, the June 26 Step 2 grievance is deemed to set forth a claimed violation of the stay provision. The Union's failure to pursue said grievance within ten (10) days after it was denied in the Chief's written answer requires that it be deemed settled pursuant to the terms of Sec. 13.02, Step 3 of the Agreement grievance procedure (Finding 4). On the basis of such settlement the Union's (3)(a)5 allegation has been dismissed.

DISMISSAL OF ALLEGATIONS OF VILLAGE VIOLATION OF SEC. 111.70 (3)(a)4.

The record leaves some doubt as to the matter on which the Union requested in-term negotiations. In its brief, the Union referred only to a proposed wage increase for employes required to perform concrete work. The written demand for bargaining (Finding 2) and the Union's above-noted requested remedy herein could, however, be construed to request bargaining on both the decision and its impact on wages, hours and conditions of employment of unit employes.

The Village, without admitting that it made any unilateral change in a mandatory subject of bargaining, argues generally that Agreement Sec. 32.03 is sufficient under WERC precedents to constitute a waiver of any right the Union may have had to demand in-term bargaining over the subjects and under the conditions requested whether decision and impact or merely impact.

The Union, contrary to the Village, contends that the Sec. 32.01, the zipper clause, does not constitute a Union waiver of the Village's obligation to refrain from unilateral changes in working conditions during the term of the Agreement. Despite Sec. 32.03, the Union argues it had "a right under 111.70, to open negotiations anytime working conditions are being attempted to be changed", and thus it had a right to bargain with the Village as requested before the Village changed an existing working condition by requiring, for the first time, that employes perform concrete work. Furthermore,

the Union contends that when all of the evidence concerning the parties' intended meaning of Sec. 32.03 is considered, including the circumstances under which construction type work was previously performed by unit employes, the conclusion that Sec. 32.03 is insufficient to waive the rights asserted in the Sec. 111.70 (3)(a)4 allegations will be reinforced.

Both parties cited NLRB and federal court interpretations of the National Labor Relations Act in support of their positions. The Union argues that federal law will predicate a waiver of in-term bargaining on a given subject matter upon a zipper clause only where the evidence shows that the allegedly waiving party consciously explored its interests in the specific subject matter involved before waiving same.[3/] The Village argues that more recent cases have found zipper clauses similar to Sec. 32.03 sufficient to be a "clear and unmistakable" waiver of bargaining[4/] and a "conscious, knowing waiver of any bargaining obligation."[5/]

Whatever the current state of the federal law on the point may be, the WERC has expressly indicated that federal law cases are of little persuasive value in making waiver of bargaining determinations under MERA.[6/] Therefore, emphasis is better placed upon precedents directly involving interpretations of the provisions of MERA. In such cases, it has been stated that the waiver by a party of the right to bargain on a mandatory subject of bargaining ought not be readily inferred; and that such waivers must be "clear and unmistakable" and "based upon specific language in the agreement or history of bargaining."[7/]

In Sec. 3.01 of the Agreement, the parties agreed that the Village "retained exclusively" (except as otherwise provided in the Agreement) the rights to ". . .utilize personnel, methods and means in the most appropriate, efficient and flexible manner possible. . .to manage and direct the employes to make assignments of jobs. . . [and]. . .to determine the methods, means and personnel by which the operation of the Fire Department are to be conducted. . ."

3/ Citing, Unit Drop Forge Div., Eaton, Yale & Towne, Inc., 171 NLRB No. 73, 68 LRRM 1129, 1131 (1968) and Press Co., 121 NLRB 978, ____ LRRM ____ (1958).

4/ Citing, NLRB vs. Southern Materials Co., 447 F. 2d 15, 77 LRRM 2814 (CA 4, 1971).

5/ Citing, Radioear, Corp., 214 NLRB No. 33, 87 LRRM 1330 (1974).

6/ Nicolet Union High School District No. 1 School Board, Dec. No. 12073-C (10/75).

7/ See, e.g., City of Brookfield, Dec. No. 11406-A (7/73), -B (9/73), aff'd, Waukesha Co. Cir. Ct., Case No. 31923 (Voss, J. 9/13/74).

The parties further agreed upon specified 1975 wage rates for employes in the sergeant and fireman classifications in Appendix A of the Agreement. In Sec. 3.02, the parties agreed that ". . .each employe shall perform all the duties of his classification and. . .every incidental duty connected with operations enumerated in any job description is not always specifically described. Nevertheless, it is intended that all such duties shall be performed by the employes." The parties also agreed in Sec. 27.01 that "[i]n the event that the Employer creates a new classification within the bargaining unit, the wage rate established by the Employer for such new classification shall be subject to the parties' rights and obligations to bargain collectively under Wisconsin law existing at the time the dispute arises. . .". Finally, in Sec. 32.03, the parties agreed as follows:

> "The parties acknowledge that during the negotiations which resulted in this Agreement, such had the unlimited right and opportunity to make requests and proposals with respect to any subject or matter not removed by law from the area of collective bargaining and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. The Village and the Union for the life of this Agreement each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered in this Agreement, 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 Agreement."

Read in the context of the other clauses cited above, Sec. 32.01 constitutes a clear and unmistakable expression of mutual intent in sufficiently specific contract language to constitute an effective waiver by the Union of its Sec. 111.70 (3)(a)4 right to bargain further about 1975 wages for the fireman classification[8/] and an effective waiver of the Sec. 111.70 (3)(a)4 obligations, if any, that the Village might otherwise have been under to refrain from requiring unit employes to perform concrete work on the fire station grounds during 1975 without first bargaining with the Union.[9/]

8/ See, Nicolet Joint Union High School District No. 1 School Board, Dec. No. 12073-C (10/75) affirming Dec. No. 12073-B (10/74) (zipper clause read together with management rights clause held to be of sufficient clarity to waive duty to bargain over summer school salaries such that unilateral change therein did not violate Sec. 111.70 (3)(a)4.)

9/ Id.

Their inclusion (in Agreement, Sec. 27.01) of the express reservation of statutory in-term bargaining rights with respect to 1975 wages for newly created classifications indicates the parties' understanding and intent that the zipper clause would otherwise have waived such bargaining rights and that the zipper clause waives any such bargaining rights as regards 1975 wages of all classifications other than those that are newly created during 1975. The Union has not contended herein that its (3)(a)4 allegations claim rights reserved in Sec. 27.01. The Union's answer to the Village's complaint asserts the Union position that by assigning the concrete laying work, the Village ". . .has attempted to change the working conditions by adding new work during the life of the Contract to the classification of 'Fire Fighter!'" (Transcript p. 2.) Thus, the Union has not contended that the assignments of the instant concrete work resulted in a newly created classification within the meaning of Sec. 27.01.

This is not a case in which the Village is seeking to enforce the zipper clause to permit it to change a working condition which the employer had previously led the Union to believe was not subject to change. For although no unit employe had ever previously been required to perform construction-type work or disciplined for declining to perform same, several unit employes had performed such work on their own or at the Village's request with the express understanding that such performance was on a "voluntary" and "no precedent" basis. The evident purpose of such understanding was to enable the Village and the employes to have the work performed by willing unit employes, if any, without the necessity of addressing an underlying question of whether and under what circumstances the Village could order such work. Thus, when the parties agreed to the terms of Sec. 32.03, the Union was aware that that issue remained unresolved.[10/]

Consistent with the above conclusion that the Union contractually waived the rights and obligations upon which its (3)(a)4 allegations are predicated, the Examiner has granted the Village's motion to dismiss the Union's Section 111.70 (3)(a)4 allegations.

10/ If no construction work situations had arisen at the time Sec. 32.03 was first agreed upon, then the Union would, of course, have had no historical basis upon which to be potentially misled as to the Village's position as to its right to require same.

DISMISSAL OF ALLEGATION OF UNION VIOLATION OF SEC. 111.70 (3)(a)5

The Village contends, contrary to the Union, that the Union's filing of its prohibited practice complaint alleging a Village refusal to bargain during the term of the Agreement constituted a repudiation of, and therefore a violation of Agreement Sec. 32.03 in violation of Sec. 111.70 (3)(a)5. The Union's filing of its refusal to bargain complaint is an exercise of the right to submit prohibited practice complaints to the WERC for processing, expressly granted to parties in interest by Sec. 111.07, Stats., made applicable to municipal employment by MERA, Sec. 111.70 (4)(a), Stats. Hence, for the Village position to prevail, it must be established in the record that the Union waived said right as regards, e.g., complaints of failure to bargain about wage increases during the terms of the Agreement for unit employes required to perform concrete work.

The Commission has previously stated that waivers of MERA rights ought not be readily inferred and that such waivers must be "clear and unmistakable" and ". . .based upon specific language in the agreement or history of bargaining."[11/] The Village has cited only the provisions of Agreement Sec. 32.03 in support of its position. That section of the Agreement makes no reference whatever to prohibited practice complaints or to limitations upon or waivers of the Union's right to file same. Therefore, Sec. 32.03 does not constitute a waiver of the Union's right to file the complaint in question either by "specific language in the Agreement" or of a "clear and unmistakable" nature.

Moreover, the Village has cited no WERC cases in point interpreting a zipper clause and no cases involving the instant parties wherein Sec. 32.03 was authoritatively interpreted. Thus, the Union was surely not abusing the WERC complaint procedures in filing the allegations in question in the face of Sec. 32.03.

For the foregoing reasons, the Complaint filed by the Village has been dismissed.

Dated at Milwaukee, Wisconsin, this 16th day of March, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz
Examiner

11/ Village of Brookfield, supra, Note 6; Nicolet, supra, Note 7 at p. 14.