STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION,	:	Case LXXXVIII No. 22048 MP-786 Decision No. 15826-B
Complainant,	:	
vs.	:	Case LXXXIX No. 22049 MP-787 Decision No. 15827-B
BOARD OF SCHOOL DIRECTORS OF MILWAUKEE,	:	Case XC No. 22040 MP-788 Decision No. 15828-B
Respondent.	:	

Appearances:
Perry & First, Attorneys at Law, by Mr. Richard Perry, on behalf of the Complainant.
Mr. Nicholas Sigel, Principal Assistant City Attorney, on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Milwaukee Teacher's Education Association having filed complaints on September 14, 1977, with the Wisconsin Employment Relations Commission alleging that Milwaukee Board of School Directors had committed prohibited practices within the meaning of Section 111.70(3)(a) of the Municipal Employment Relations Act; and the Commission having appointed Thomas L. Yaeger, a member of its staff, to serve as Examiner and make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.70(5), of the Wisconsin Statutes; and said complaints having been consolidated for hearing and hearing thereon having been held at Milwaukee, Wisconsin on November 14, 15, 16, 18, 1977, and January 18, 19, 1978; and a brief having been filed by Complainant on July 26, 1978; 1/ 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 Milwaukee Teachers' Education Association, hereinafter Complainant or Association, is a labor organization and the certified exclusive collective bargaining agent for

> . . . all regular teaching personnel (hereinafter referred to as teachers) teaching at least fifty percent of a full schedule or presently on leave (including guidance counselors, school social workers, teacher-librarians, traveling music teachers and teacher therapists, including speech pathologists, occupational therapists and physical therapists, community recreation specialists, activity specialists,

1/ Respondent advised the Examiner on April 26, 1978, that it would file its brief on August 30, 1978, and thereafter on June 14, 1978, due to extensions for filing granted to Complainants, Respondent advised it might request an extension beyond August 30, 1978. To date no request for an extension or brief has been submitted by Respondent.

music teachers (550N) who are otherwise regularly employed in the bargaining unit, team managers, clinical educators, speech pathologists, itinerant teachers, and diagnostic teachers, excluding substitute per diem teachers, office and clerical employes, and other employes, supervisors, and executives. 2/

having its offices at 5130 West Vliet Street, Milwaukee, Wisconsin.

2. That the Board of School Directors of Milwaukee, hereinafter District or Respondent, is a municipal employer having its principal offices at 5225 Vliet Street, Milwaukee, Wisconsin; and that at all times material herein Harrison, District Chief Negotiator, Neudauer, Long and Bennett, Assistant Superintendents, and McMurrin, Superintendent were employed by Respondent and functioned as its agents.

3. That on or about May 9, 1977, the Association and District reached tentative agreement on a proposal for a 1977-79 collective bargaining agreement made by Special Master Dr. John Gronouski on May 6, 1977, and thereafter modified by the mediator; that said agreement was subsequently ratified by the parties; and that among the items agreed to on May 9th, were the following:

VI. SCHOOL DAY

The 1976 contract provisions regarding school day shall be amended as follows:

(a) Secondary school day for faculty may be scheduled to begin no sooner than 7:25 a.m. and no later than 8:25 a.m.

(b) Elementary school day for faculty may be scheduled to begin no sooner than 8:00 a.m. and no later than 9:00 a.m.

(c) Secondary and elementary school day for faculty may be extended by ten minutes - five minutes at the beginning of the school day and five minutes at the end.

. . .

XIII. INSERVICE

All teachers shall attend, over the term of this contract, (a number)* of days of desegregation inservice training and/or staff development (equal to the number of days missed because of the 1977 MPS-MTEA management labor dispute.)*. The dates of these days of inservice shall be negotiated, with teachers paid for such training at their individual daily rate. At least one day of such inservice per year shall be in human relations. Those employees covered by this contract whose work years extend beyond June 16 are included in this provision.

. . .

2/ This unit description resulted from an order clarifying bargaining unit issued by the Commission on March 30, 1978. (Decision No. 13787-C).

* Upon settlement the number of days equal to the number of days missed because of the strike will be substituted.

. . .

XIX. The 191 day calendar shall be retained. The placement of days therein shall be negotiated after an agreement has been reached.

. . .

4. That on June 3, 1977, the Association requested the District to bargain placement of the aforesaid 191 days including make-up inservice and confirmed that request in a letter to Harrison on June 6th; that June 3rd the District presented the Association with its calendar proposals for the next three school years; that on June 20th the Association notified the District that the summary sheets accompanying said calendars were in error; that thereafter the Administration revised said calendar proposals and resubmitted them to the Association on June 21st; that on July 14th the parties held their first negotiation session on the calendar including dates for make-up desegregation inservice; that the parties did not reach agreement on the 14th and met again on the 21st; and that during the meeting on the 21st a dispute arose as to whether there would be a midsemester break and being unable to resolve that difference the Association advised the District it would seek mediation on the calendar and did so that day.

5. That on July 22, 1977, in a meeting between Association and District representatives, the District presented Colter with a letter advising the Association that all District high schools would be going to an eight (8) period day for the 1977-78, school year; that in said letter the District also presented the Association with the proposed pupil and teacher day for the 1977-78, school year which had been modified from the 1976-77, pupil and teacher day in order to facilitate the District's desegregation plans; that on July 26th Laugerman, the Supervisor of Home Economics, lettered six (6) coordinating instructors who were on extended contracts that although calendar negotiations were not finalized inservice for all teachers had tentatively been agreed to begin August 29th, and, therefore, they should plan beginning work under their extended contracts on Monday, August 1, 1977, unless notified otherwise.

6. That on Friday, July 29, 1977, the parties met in mediation; that near the end of said mediation the District advised the Association negotiations were at an impasse, thus, it was going to petition for fact finding and was also implementing its latest calendar proposals; that the District's last calendar proposals did not provide for a midsemester break which is what the Association found most objectionable about said proposals; that after leaving the mediation session, the Association contacted the mediator and made a proposal to resolve the calendar dispute; that said proposal made some minor changes in inservice, and parent-teacher conference dates and did provide for a midsemester break in February 1978; that in addition to those changes, which were similarly proposed for the 1978-79, and 1979-80, calendars, the Association proposed to submit to final and binding arbitration the question of whether the District, by insisting to impasse that there not be a midsemester break for the 1978-79, and 1979-80, school calendars, violated the 1977-79, contract; that on the 29th Harrison advised the Association its proposal would have to be submitted for Administration approval and, thereafter, on August 1st, communicated the aforesaid July 29th proposal to the Administration; that

on August 1st the Association was advised the District could agree to the proposal only if the Association agreed with the District's pupil and teacher day proposals presented on July 22nd; and that because the Association would not agree to said pupil and teacher day proposals no agreement was reached at that time.

7. That because of the Association's disagreement with the District pupil and teacher day proposals the parties met on August 1, 1977, to discuss the District's July 22nd proposed pupil and teacher day; that the parties continued to meet on this and the calendar and on August 8th the District advised the Association that it would shortly be informing the Association as to its final desicion on the teacher day; that the following day, August 9th, the District presented the Association with the finalized teacher and pupil day schedule; that the parties met again on August 10th, but did not resolve their dispute.

8. That the parties met again on August 10th in an attempt to resolve the calendar dispute but were unsuccessful; that on August 11, 1977, the parties again entered mediation; that mediation on calendar and teacher day continued through the 12th with agreement finally being reached on the 12th; that said agreement was reduced to writing and signed on the 12th, but only dealt with the calendar; that said agreement contained no provision relative to pupil or teacher day although proposals exchanged before and during mediation did deal with those subjects; and that the teacher and pupil day presented by the District to the Association on August 9th was implemented for the 1977-78, school year.

9. That included in the agreements concluding negotiations for a 77-79, collective bargaining agreement were the following language items relative to inservice:

> The Board and MTEA agree that annual inservice needs exist for the professional staff. As part of developing an annual inservice training program, teachers once each year shall be surveyed as to suggestions for courses for inservice training. Where teachers are hired to teach the courses, they will paid their individual hourly rate.
>
> Where inservice is deemed to be necessary, teachers will be paid for inservice as follows:
>
> 1) At their regular daily rate when the inservice is done during regular work hours.
>
> 2) At the part time certificated rate when the inservice is done after school during a regular work day.
>
> 3) At their regular daily rate when the inservice is done on Saturdays or during the summer.
>
> The teacher may choose to receive inservice credit rather than payment for the inservice.
>
> All teachers shall attend, over the term of the contract, seventeen (17) days of desegregation inservice training and/or staff development. The dates of these days of inservice shall be negotiated, with teachers paid for such training at their individual daily rate. At least one day of such inservice per year shall be in human relations. Those employes covered by this contract whose work years extend beyond June 16 are included in this provision.

Every attempt will be made to establish inservice courses in exceptional education where sufficient interest is shown; and where teachers take part in the same on their own time, any credit shall be applicable for advancement on the salary schedule.

As needed and where there are sufficient number of persons applying, an inservice course will maintained for teachers interested in the student teaching program.

Prior to June 1 and November 1 of each year, the MTEA may submit to the Administration its recommendations for in-service offerings in the fall and the spring semesters.

Teachers assigned to a specialty school during the 1976-77 school year are qualified for that specialty in terms of the above criteria. One inservice program designed for that specialty and offered for the teachers in the specialty, may be required. Said programs shall not exceed sixty (60) hours over the three years of the contract, the dates of said programs to be negotiated with MTEA;....

that during the summer of 1977; the Association requested the District to advise it of its specific plans for any inservice that was to occur after June 30th, including inservice planned for specialty schools as well as that for the desegregation or staff development make-up in-service; that in late July and August the Association was provided with certain of the District's tentative plans for desegregation inservice that the District was proposing commence on August 29th and run through September 1st; that on August 10th the Association was given a written work copy of the agenda for the inservice proposed for August 29th through September 1st; that on or about August 16th Association and District representatives met and discussed in detail the contents of the agenda presented the Association on the 10th and the Association was advised that the plans outlined in said agenda were being reworked, but that the District would contact the Association once the plans were finalized; that on August 24th, having provided the Association with copies of documents that had been given to the Board of School Directors and Administration setting forth in considerable detail the District's plans for the inservice scheduled for August 29th through September 1st; that the following day August 25th, Bennett and Long, by letter, advised Colter of inservices that had already been held or were then being held and the specifics concerning rate of pay, hours, and duties; that certain inservices held prior to August 29, 1977, were specialty school inservices, but none of said dates for holding those inservices were bargained with the Association; that although the Association had never previously demanded to bargain about dates for specialty school inservice the District never notified the Association prior to August 25th that it planned any specialty school inservice; and that the District did bargain to agreement with the Association on the desegregation inservice held from August 29th through September 1, 1977.

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

CONCLUSIONS OF LAW

1. That the parties' 1977-79, collective bargaining agreement covered the subject of teacher day, and said contract provisions constitute a waiver of Complainant's right to insist that Respondent bargain for its agreement to the proposed teacher day for the 1977-78, school year.

2. That the Respondent by unilaterally establishing the teacher day for the 1977-78, school year did not commit a prohibited practice within the meaning of Section 111.70(3)(a)4, Stats.

3. That the Respondent did bargain in good faith to agreement with Complainant on a calendar for the 1977-78, school year and, therefore, has not committed a prohibited practice within the meaning of Section 111.70(3)(a)4, Stats.

4. That the parties' 1977-79, collective bargaining agreement covered the subject of inservice in sufficient detail to constitute a waiver of the Association's right to bargain the impact of Respondent's scheduling of various inservice programs during the contract term and, therefore, the Respondent did not commit a prohibited practice within the meaning of Section 111.70(3)(a)4, Stats., by not bargaining the impact of its decision to implement several inservice programs in 1977.

5. That the Respondent unilaterally established dates for specialty school inservice without notice and offering to bargain with the Association on the scheduling of said inservice and, thereby, committed a prohibited practice within the meaning of Section 111.70 (3)(a)1 and 4, Stats.

6. That the Respondent did bargain in good faith to agreement with Complainant on the dates for desegregation inservice to be held during the 1977-78, school year and, therefore, has not committed a prohibited practice within the meaning of Section 111.70(3)(a)4, Stats.

7. That the Respondent did not refuse to supply the Complainant with relevant information regarding Respondent's plans for inservice and, therefore, has not committed a prohibited practice within the meaning of Section 111.70(3)(a)4, Stats.

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 Respondent Milwaukee Board of School Directors and its agents, shall immediately:

1. Cease and desist from refusing to engage in collective bargaining with Complainant regarding the dates that specialty school inservice will be held.

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

   (a) Before establishing dates for specialty school inservice give notice to the Complainant of its intent to conduct specialty school inservice, offer to bargain with Complainant about the dates for said inservice and, if requested, bargain with Complainant about said dates.

   (b) Notify all of its employes represented by Complainant of its intent to comply with the Order herein by posting in conspicuous places on its premises where notices to employes are usually posted, copies of the notice attached hereto and marked "Appendix A". Such

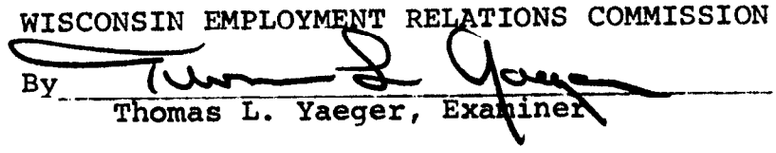
copies shall be signed by the District's Chief Negotiator and shall be posted upon receipt of a copy of this Order. Such notice shall remain posted for sixty (60) days thereafter. Reasonable steps shall be taken to insure that said notice is not altered, defaced or covered by other material.

(c) Notify the Wisconsin Employment Relations Commission, in writing within twenty (20) calendar days following the date of this Order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed as to all violations of MERA alleged, but not found herein.

Dated at Madison, Wisconsin this 27th day of June, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Thomas L. Yaeger, Examiner

Appendix "A"

Notice to All Employes Represented by the
Milwaukee Teachers' Education Association

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify all employes that:

WE WILL NOT establish dates for conducting specialty school inservice without first notifying the Milwaukee Teachers' Education Association of the planned inservice and offering to bargain and, if requested, bargain with the Milwaukee Teachers' Education Association about the dates on which said inservice will be held.

WE WILL refrain from all other forms of interference, restraint and coercion of employes in the exercise of their right under Section 111.70(2) of the Municipal Employment Relations Act.

Dated this day of , 1979.

By_____
Chief Negotiator
City of Milwaukee Public Schools

This Notice Must Remain Posted For A Period of Sixty (60) Days and Must Not Be Defaced, Altered Or Covered By Any Other Material

BOARD OF SCHOOL DIRECTORS OF MILWAUKEE, Cases LXXVIII, XC, LXXXIX, Decision Nos. 15826-B, 15827-B, 15828-B

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The subject complaints were filed individually and consolidated for hearing by order of the Commission. The undersigned has determined that they should also be consolidated for decision inasmuch as the facts giving rise to these complaints are so interwoven that efficiency and clarity dictates consolidation.

TEACHER DAY

The Association contends the District unilaterally implemented substantial change in the employes work day after having bargained from July 22, 1977, through August 12, 1977, without reaching agreement or impasse. It argues that while the parties did bargain for and reached agreement on the "global parameters" of the school day, it left to future negotiation the specifics of the teacher day. Further, it claims the District bargained in bad faith when after several weeks of bargaining with no agreement being reached the District, as a condition to agreeing to the Association's July 29th proposal on calendar, insisted that the Association agree with the District's interpretation of the 1977-79 contract provision on the school day. Additionally, it points to the work day implemented on July 26, 1976, respecting those employes working under extended contracts who were notified to begin work on August 1st.

The District, however, denies that it committed any prohibited practice with respect to its implementation of the pupil and teacher day for the 1977-78 school year. It claims that the Association, by bargaining to agreement on the subject contract provision dealing with the school day, thereby waived any right it had to bargain respecting employe hours during the contract term.

The threshold question therefore, is whether the District had a duty to bargain with the Association about changes it made in the teacher day from what it had been during the 1976-77, school year. It should be noted from the outset that the teacher day both in the past and for the 1977-78, school year varied between the senior high school, middle/junior high school, and elementary schools. In order to determine whether there has been a contractual waiver as urged by the District it will be necessary to interpret the parties' 1977-79, agreement. 2/

That agreement provides:

a. Secondary school day for facutly may be scheduled to begin no sooner than 7:25 a.m. and no later than 8:25 a.m.

b. Elementary school day for faculty may be scheduled to begin no sooner than 8:00 a.m. and no later than 9:00 a.m. 3/

2/ NLRB v. C & C Plywood Corp., 385 US 421, 64 LRRM 2065 (1967).

3/ The parties have yet to reduce to writing and execute the agreements reached pertaining to the contractual term. The quoted language represents initialed language agreed to on May 9, 1977, and subsequently ratified by the parties.

This language explicitly gives the District authority to schedule the school within certain parameters. The Association claims this agreement was merely intended to establish the "global parameters" but the actual starting times would still have to be bargained and mutually agreed upon. The undersigned finds this argument totally unpersuasive.

First, the plain meaning of the language, "may be scheduled" is contrary to the conclusion urged by the Association. "May" denotes discretion, and in this case that discretion obviously extends to establishing a starting schedule within previously bargained limits. Admittedly, were the scheduled starting times determined by the District to fall outside these outer limits, it would have to notice the Union of intention to establish same and bargain over the contemplated change, if requested to do so. 4/ However, that is not the case with the schedule in dispute. The schedule proposed and implemented by the District on August 9th, did not fall outside the parameters bargained for by the parties.

Furthermore, the bargaining history of the teacher day provision modifications included in the parties agreement 1977-79, term indicates the District was seeking flexibility in the starting times necessary to the District's desegregation efforts. The language ultimately agreed to permits that flexibility. It clearly would not, however, were the District obligated to bargain every schedule change with the Association. To conclude that was the District's intent, which is what the Association position implies, is not supported by the record.

Finally, there is additional contract language dealing with teacher day that was hold over language from prior agreements. That language coupled with the above-quoted language leads to the inescapable conclusion that the parties fully discussed the matter of teacher day and reached agreement thereon. Thus, the Association has clearly and unmistakeably waived its statutory right to bargain further on the subject of teacher hours during the term of the 1977-79 contract, insofar as said changes are permissible under said contract. 5/

Consequently, inasmuch as the District had no duty to bargain with the Association on its proposed teacher day for the contract term, it is unnecessary to discuss the Association's charge of bad faith bargaining as that charge relates to the discussions that took place in June, July and August respecting the teacher day.

SCHOOL CALENDAR

The Association charges the District engaged in surface bargaining with respect to bargaining the placement of the previous agreed to 191 contract days. In support of its allegations, it relies upon conduct of the District during the negotiation period. Specifically it argues that (1) principals advising teachers on the last day of school that inservice would start August 29th, (2) Laugerman's letter to extended contract teachers telling them to return to work August 1st, (3) the Madison High School Principal's notice to students and (4) waiting until late July to advise the Association that any agreement on calendar had to be approved by the "Cabinet" were all indicia of the District'

4/ The Association's claim herein, however, is not that the schedule ultimately implemented deviated from the bargained parameters.

5/ City of Appleton (14615-C) 1/78; City of Kenosha (16392-A, B) 12/78; City of Green Bay (12411-B) 4/76.

lack of intent to reach agreement on the calendar issue. Consequently it urges the District be found to have violated Section 111.70(3)(a)4, Stats.

The District, in its pleadings, however, affirmatively asserts that the parties have a contractual agreement on the calendar and any disputes surrounding same are to be resolved pursuant to the contractual grievance procedure. Further, it argues that said contractual agreement on calendar constitutes a waiver of the Association's right to bargain relative to calendar during said contract's term.

The parties agreement for the 1977-79, term with respect to the school calendar provided:

> The 191 day calendar shall be retained. The placement of days therein shall be negotiated after an agreement has been reached. 6/

The essence of that agreement was that there would be 191 teacher contract days, but the placement of those days was left to future negotiation, i.e. the dates for parent conferences, record day, first day of classes, etc.

The District would have the undersigned conclude that by including the aforesaid agreement on calendar in the contract the Association thereby waived any statutory right it had to bargain about calendar in favor of a contractual right. Apparently, it also believes, therefore, any allegations of refusal to bargain over the placement of the 191 calendar days necessarily represents an alleged breach of contract remedied via the grievance procedure. While the latter may be true, it is, in any event, not the Association's exclusive remedy. The undersigned views the contract language as proof of the Association's reservation of its statutory right to bargain during the contract term, after contract negotiations were concluded, about a mandatory subject of bargaining 7/ not waived in the contract. Thus, the subject contractual language relative to calendar precludes any finding of a clear and unmistakeable waiver of the Association's statutory right to bargain placement in the calendar of the 191 contract days.

Turning to the Association's charge of surface bargaining, it should first be noted that an agreement was reached on placement of days on the calendar on August 12th. This agreement was the product of negotiations and mediation that commenced on July 14th, and provided as follows:

MEMORANDUM OF UNDERSTANDING

The undersigned agree on behalf of their respective principals, identified below, as follows:

1. The parties' 1977-1978 school calendar shall be as on the attached Appendix. This calendar applies to teachers, aides, substitute teachers and school accountants pursuant to their master contracts.

2. The Board and the Milwaukee Teachers' Education Association agree to submit to an arbitrator selected in accordance with the MTEA teacher contract grievance

---

6/ See Note 3, supra.

7/ Ashland School District No. 1, 52 Wis 2d 625 (1971).

arbitration provisions, the following issue for final and binding arbitration in accordance with the contract grievance arbitration provisions and further agree not to object to its arbitrability:

> Did the Board violate the provision of the parties' 1977-79 agreement providing "The 191 day calendar shall be retained. The placement of days therein shall be negotiated after an agreement has been reached" by insisting to impasse that two of the calendars for school years covered by said agreement must not contain a mid-semester break day?

The Board agrees to refrain from filing for fact finding concerning negotiations over the 1978-79 and/or 1979-80 school calendars until an award is issued on the above issue and until after post-award mediation.

The Association's surface bargaining claim is based upon four incidents that occurred both prior to and during negotiations that culminated in the abovesaid agreement. It argues these incidents are proof the District had no intention of bargaining in good faith to agreement on placement of the 191 contract days, but rather establish the District was merely giving the appearance of bargaining without intent to reach agreement. The undersigned does not agree.

The Association claims the James Madison High School Principal notified students and parents by letter on August 9th, three days before a calendar was agreed to, as to what the school hours would be. This claim is based upon Deeder's hearsay testimony that said letter was mailed on August 9th and received August 10th, and as such is entitled little if any probative value. Furthermore, the letters do make no reference to the date for the first day of school or any matters pertaining to calendar that were then being bargained. The letters did state what the school hours for the 1977-78, school year would be, but that was not a matter of calendar and as noted earlier herein was a matter about which the District had already fulfilled its obligation to bargain about.

Another incident raised by the Association is the July 26th Laugerman letter to extended contract teachers. This letter advised said teachers as to when their duties were to resume and was based upon the assumption that mandatory desegregation teacher inservice was to begin August 29th. The letter was sent only five (5) days prior to their return date of August 1st, and, was to say the least, last minute notification, particularly in light of an intervening weekend between the 26th and 1st. To assure said employes presence on the 1st, the notice was necessary. Also, at the time the notice was sent, calendar negotiations were essentially stalled on the question of a mid-semester break, whereas the August 29th date for the start of inservice had been tentatively agreed to. 8/ Furthermore, the Laugerman letter contemplated that a last minute change could occur, presumably because of a change resulting from yet unresolved calendar discussions. Consequently, because of the necessity to give some notice to extended contract teachers as to the August 1st return date, the letter could not have been delayed longer. Thus, its mailing will not be considered as indicia of bad faith bargaining on the part of the District.

8/ The Association was not taking issue with the 29th-1st inservice dates.

The remaining incident relates to Harrison's statement of July 29th that any agreement on calendar had to be submitted to the District cabinet for approval. There is no evidence as to whether this procedure deviated from prior District bargaining tactics although the Association claim implies that it did. In any event, even if it was a change in tactics, standing alone in the face of other evidence that the District was intent on reaching agreement, it will not support a finding of surface bargaining.

The Association, in its complaint concerning the teacher day, which was discussed earlier herein, complained the District had illegally conditioned agreement on the Association's calendar proposal of July 29th upon the Association's agreement to the District's interpretation of the contractual school day provisions. That charge has not previously been discussed, but the undersigned believes it appropriate to discuss it here. It has been found to be an unfair labor practice to condition bargaining 9/ or agreement 10/ where the condition is so onerous, unreasonable or unlikely to afford a basis for the advancement of negotiations.

In the instant case, the Association claims it was being asked to agree with a proposal advanced by the District on the teacher day and an accompanying statement that it could be revised at any time by the District, which the Association believed was contrary to what it bargained for and agreed to on May 9th. The Association was of the opinion that the District was obligated to obtain its concurrence to the specifics of the teacher day it was proposing. However, as discussed earlier, the Association, not the District, had misconstrued the May 9th agreement.

Ultimately, the District proceeded upon its understanding of what the May 9th accord permitted regarding scheduling the teacher day and notified the Union of the finalized schedule. Thereafter, an accord was reached on the calendar dispute. Consequently, it is unwarranted to conclude that the District illegally conditioned agreement and thereby engaged in bad faith bargaining.

The history of calendar negotiations shows that the District presented the Association with its first calendar proposals even before school had ended and, thereafter, made several proposals to resolve the issue. Indeed, it even conceded its position on the mid-semester break for the 1977-78, calendar as well as agreed to other modifications from its initial proposals. Further, it met on an almost daily basis from July 29th through August 12th to negotiate calendar. This surely is not conduct evidencing surface bargaining without intent to reach agreement. Thus, the undersigned is satisfied that there is no basis to the Association's charge that the District violated Section 111.70(3)(a)4, Stats., in bargaining placement of the 191 contract days on the school calendar.

INSERVICE

The Association's complaint regarding inservice is multifaceted. First, it charges that it made repeated requests through the summer of 1977, respecting the District's plans for inservice commencing after June 30, 1977, but its requests for the most part went unanswered. Second, it claims it demanded to bargain the impact upon wages, hours and conditions of employment of the District's various inservice work

---

9/ American Flagpole Equip Co., 68 LRRM 1384 (1968).

10/ Kroger Co., 164 NLRB 362, 65 LRRM 1089 (1967).

assignments implemented during the summer of 1977, and for the 1977-78, school year, but that the District has refused to bargain about same, as well as the dates on which said inservices were to be held. Also, the Association charges the District engaged in surface bargaining with respect to scheduling the desegregation inservice ultimately established for August 29th through September 1, 1977.

The District, however, denies it refused to supply the Association with information it requested on inservice plans. Additionally, while denying it refused to bargain, it claims affirmatively that the Association contractually waived any right it had to bargain during the contract term on the matter of inservice except as to the dates they will be held. And, in any event any disputes thereon are subject to resolution in the contractual grievance machinery.

The law with respect to the District's duty to bargain during the term of an agreement is clear. It has a duty to bargain during the term in regard to a mandatory subject of bargaining not specifically covered by the contract and where the Association has not waived its right to demand bargaining. A waiver of the right to bargain must be clear and unmistakeable. 11/ Herein the Association claims a right to bargain the impact inservice work assignments would have on wages, hours and conditions of employment, in addition to the dates when said inservice was to occur.

The parties' 1977-79, agreement 12/ contained considerable language relative to inservice. They had agreed there would be seventeen (17) make-up days as a result of a strike prior to coming to terms and these would be used for desegregation and/or staff development inservice, herein referred to as desegregation inservice. Other agreements, for example, expressly dealt with rates of pay, whether the teacher was to receive credit or pay, the number of days of desegregation inservice that would be held during the term, and the duration of specialty school inservice.

In view of the aforesaid express agreements dealing with inservice, the Association has obviously bargained the subject and reached an accord with the District on wages, hours and conditions of employment of those assigned to inservice. Admittedly, not every conceivable aspect of inservice assignments have been dealt with by contract, but that does not mean the subject of inservice has not been sufficiently covered in the contract to support a finding of a conscious and intended waiver by the Association of its right to bargain during the term of said agreement on the subject. The undersigned believes this to be the case, and this conclusion is reinforced by the specific reservation contained therein with respect to bargaining the dates for desegregation and specialty school inservice. While the Association explicitly reserved its right to bargain dates, no such reservation was made with respect to other matters not mentioned, e.g., travel pay to atten inservice. Thus, in light of this explicit language, I am persuaded the subject of inservice has been fully bargained, and the District's only continuous duty to bargain during the term of the 1977-79, contract on the subject of inservice is with respect to the dates for holding said desegregation and specialty school inservice.

The District, however, claims that its duty to bargain inservice dates is contractual only and, therefore, enforceable only through the

---

11/ City of Menasha (16392-A, B) 12/78; City of Green Bay, supra.

12/ See Note 3, supra.

contractual grievance procedure. The undersigned disagrees. The number of, as well as timing or dates of inservice days are work days and, therefore, mandatory subjects of bargaining. 13/ Whereas, the contractual language relative to duty to bargain dates does not waive the Association's statutory right to bargain about same unless an intent to do so is clear and unmistakeable. In this case, there is no evidence such was the Association's intent in agreeing to said language. Consequently, in addition to its statutory right, there has also been a contractual right created by inclusion of said language in the contract.

The record evidence establishes that the District did not bargain with the Association respecting the dates for conducting specialty school inservice. Indeed, several of these inservices had already been completed or were in progress when the District, on August 25th, advised the Association as to the spedifics of what had been planned for specialty schools. 14/ It was obviously impossible to demand to bargain about dates for inservice that had already been held or were in progress where the District had not noticed the Association of its plans. Consequently, the District by unilaterally establishing dates for conducting specialty school inservice without notice to, or bargaining with the Association, violated Section 111.70(3)(a)4, Stats.

The same, however, cannot be said with respect to bargaining dates for desegregation inservice (make-up days). The parties did agree to a calendar for the 1977-78, school year which contained six (6) so-called desegregation inservice days, four of which were scheduled to occur from August 29th through September 1st. This agreement on inservice dates resulted from negotiation on the 1977-78, school year calendar that began on July 14th and concluded with an agreement on August 12th.

The Association, however, claims that the District had, as early as the last day of school on June 16th, already established, without bargaining, the aforesaid dates for desegregation inservice; and thereafter, the District merely feigned negotiation on the dates and engaged in surface bargaining.

To support its claim, the Association relies upon faculty meetings held at three District schools on June 16th, the last day of school, wherein the teachers were advised they could expect to be required to return to school earlier in the Fall than in past years. Traditionally, the first day for students was the day after Labor Day and also traditionally school began for teachers on the Friday before Labor Day. However, building principals in at least three schools told teachers that they could expect to be returning prior to the traditional Friday before Labor Day.

While the first meeting to bargain calendar (including desegregation inservice) was not held until July 14th, the District had provided the Association on June 3rd, with proposed calendars for the three school years governed by the 1977-79, contract. The Association by June 20th had already advised the District that said proposals contained errors with respect to total days involved. Consequently, said proposed calendars were revised and again given to the Association on June

---

13/ Beloit Education Association (11831-C, D) 73 Wis 2d 43 (1976).

14/ Most specialty school inservices were scheduled to be held between August 22nd and 26th, however, a Second Language Proficiency School Inservice was held from July 11th through the 29th.

21st. These earliest proposals for the 1977-78 calendar proposed inservice for August 29th through September 1st and also on October 21st and March 10, 1978. The calendar ultimately agreed to provided for inservice on the aforesaid dates with the exception of March 10th which was changed to March 23rd, pursuant to the Association proposal of July 29th.

However, the totality of the evidence establishes that although the inservice dates ultimately agreed to were almost identical to those initially proposed by the District in June, and that building principals on June 16th advised teachers they could expect to return in the Fall, do not establish that the District engaged in surface or bad faith bargaining regarding same. When these events are viewed in context of events they are not evidence of bad faith bargaining.

It must be understood that the inservice being proposed by the District for late August and at two other times during the school year were make-up days agreed to as part of the conclusion of contract negotiations and cessation of the strike. There were seventeen (17) days agreed to be made up during the term of the contract. This was not an item which was unbenownst to teachers and administrators alike. Obviously Association members ratified the accord with this understanding. Furthermore, as one school principal testified he was merely trying to do teachers a favor by alerting them to the probability of returning early. Indeed, it was not logical to presume so many days could all be made up during the District's traditional school year. This is supported by reviewing calendars contained in the prior collective bargaining agreement and the District's calendar proposals for the 1978-79, and 1979-80 school years wherein it proposed to also hold four days of inservice the week before Labor Day. Also, the District had given the Association its calendar proposal on June 3rd and it and others presumably had knowlege of the dates proposed for desegregation inservice.

After reviewing the evidence concerning calendar negotiations there is no basis to conclude the District took an unreasonable or intransigent position on scheduling of make-up days. Indeed, the major dispute on the calendar arose over a mid-semester break. On July 29th, the Association made a proposal to end the calendar dispute and one apsect of that proposal was that the inservice proposed for March 10, 1978, be moved to March 23, 1978, which the District agreed to. Furthermore, the only reason the inservice matter was not concluded on that date was that the District would not agree to a mid-semester break, which had nothing to do with inservice. Thus, there is no foundation for concluding the District was bargaining other than in good faith concerning the mandatory subject of the scheduling of desegregation inservice. 15/

There has been discussion elsewhere herein pertaining to the District's legal duty to supply the Association with requested relevant and necessary information pertaining to the District's inservice plans and the following discussion is grounded in that analysis. The Association's requests for information were stated in most general terms in most cases, e.g. what are the District's plans for inservice after June 30, 1977. This information was sought to enable the Association to determine what plans were in the works so it could bargain about the impact of the decision to hold various inservices as well as the dates thereof. Additionally the Association claims it needed the specifics of these plans as to content, rates of pay, hours, etc. to enable it to police the contractual agreements respecting inservice.

15/ Ashland School District No. 1, supra.

An examination of the record herein reveals that the Association was afforded the specifics of all inservices planned, held or being held. On August 24 and 25, Long gave the Association considerable documentation on this subject. Additionally, as early as late July the Association was given information on the District's tentative plans for desegregation inservice on August 29th through September 1st and the District kept the Association informed as those plans were being developed and modified. Ultimately on August 24th it was given the finalized plans for the desegregation inservice.

It may be that certain of the information on what was being planned for inservice was not given to the Association contemporaneous with its first availability. Nonetheless, the delays were not of sufficient length to suggest they were tantamount to a refusal to supply the data. 16/ Except in the case of the plans and duties for specialty school inservice, the other information was timely submitted. Thus, the District did not refuse to timely supply the Association with necessary and relevant information in violation of Section 111.70(3)(a)4, Stats.

Dated at Madison, Wisconsin this 27th day of June, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Thomas L. Yaeger, Examiner

16/ See decision in Milwaukee Schools issued this date (15825-B) 6/79.