STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, Complainant, vs. BOARD OF SCHOOL DIRECTORS OF MILWAUKEE, Respondent.	Case XCI No. 22051 MP-789 Decision No. 15829-B

Appearances:
Perry & First, Attorneys at Law, by Mr. Richard Perry, on behalf of the Complainant.
Mr. Nicholas Siegel, 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 complaints having been consolidated for hearing and hearing having 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 teaching schedule or presently on leave (including guidance counselors, school social workers, teacher-librarians, traveling music teachers and teacher thera-

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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 Complainant, Respondent advised it might request an extension beyond August 30, 1978. To date no request for an extension or a brief has been submitted by Respondent.

pists, includng speech pathologists, occupational therapists and physical therapists, community recreation specialist, activity specialists, 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/

as well as a unit of school aides, and has 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, was employed by Respondent and functioned as its agent.

3. That both the parties 1975-76, and 1977-79, agreements contained the following language at Part I, C. 1.

> . . .The Board and the MTEA for the life of this contract 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 contract or with respect to any subject or matter not specifically referred to or covered in this contract, except as otherwise provided herein....

and that the parties 1977-79, agreement contained the following provisions:

> The 191 day calendar shall be retained. The placement of days therein shall be negotiated after an agreement has been reached.
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> . . .
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> All teachers shall attend, over the term of the contract, seventeen (17) days of desegregation inservice training and/or staff development. The dates for these days of inservice shall be negotiated, with teachers paid for such training at their individual daily rate.
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> . . .
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> Teachers assigned to a specialty school during the 1976-77 school year are qualified for that specialty school 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. (emphasis added)
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> . . .

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

If a final exam schedule is reintroduced, the Board and MTEA shall negotiate the implications for the teacher time schedule.

. . .

4. That both the parties 1975-76, and 1977-79, teacher unit collective bargaining agreements contained Appendices dealing with the matter of extra curricular hours and compensation including summer school; that included within said provisions was explicit language dealing with the use of guidance and vocational counselors outside of regular school hours; that said contracts also contained explicit language dealing with the extension of the school year for teachers and their compensation in the event of such extensions.

5. That on May 26, 1976, the Association and District executed a memorandum of understanding relative to summer employment opportunities; that this agreement explicitly dealt with the wages, hours and conditions of employment of presently existing multidisciplinary teams who were to be employed during the summer of 1976, to complete diagnostic, placement and programming for the 1976 school year of children with exceptional education needs; that in or about early June 1977, Deeder, Association Assistant Executive Director, was informed by the District of its plans for use of multidisciplinary team members during the summer of 1977, and the 1977-78 school year; that shortly thereafter, Deeder, prepared a proposed memorandum of understanding, very similar to that agreed to in 1976, which was to govern wages, hours and conditions of employment for multidisciplinary team members among others; that said proposed memorandum was given to the District on June 16, 1977; that shortly thereafter the District countered the Association memorandum with a memorandum of its own; that at this time, the District advised Deeder that it had problems with what was agreed to in 1976, namely the salary for clinical educators, including team managers in the agreement and how employes who were used in supervisory capacities were to be treated; that Deeder met with the District on June 21, 1977, and countered with an amended memorandum reflecting many of the changes proposed by the District; that later on the 21st, the District countered with a revised memorandum which the Association did not agree to; and that no agreement was even reached on the subject and the Association advised the District it was going to request mediation; that the District did not oppose mediation, but Harrison advised the Association the program had to go forward and therefore it was going to implement its program; the District did so implement the program as it was proposed; and that mediation was not obtained by the Association nor did it request additional bargaining sessions after negotiations had broken off on the 21st.

6. That as early as 1976, the Association and the District were engaged in discussion of the District's Hillside Terrace Project, a program whereby teachers and/or paraprofessionals were to be used in tutoring students living in the Hillside Terrace housing project on an individual basis outside normal school hours; that said discussions were interrupted in the fall of 1976, by contract negotiations; that on June 6, 1977, the Association asked that these discussions be continued; that thereafter, sometime in mid-June, Harrison, Rose, Acting Coordinator - Title I, and Deeder met to discuss the matter; that thereafter the Association proposed a memorandum of understanding governing the teachers and paraprofessionals the District had planned to use in the project; that the negotiations on the Association's

proposal for the Hillside Study Project did not culminate in an agreement inasmuch as the District never responded to the memorandum proposed by the Association; that no further discussion was ever held on the subject; and that the District implemented the program in the fall of 1977, using paraprofessionals but not teachers as it had initially proposed.

7. That in early June 1977, a committee of the District Board of School Directors recommended, and the Board adopted, a program of employing vocational counselors at the Milwaukee Trade and Technical High School during the summer; that said grade level counselors were to work with private industry in the summer to familarize said counselors with the kinds of job opportunities that would be available to students attending said school; that on June 22, 1977, Deeder met with Harrison and presented him with a memorandum of understanding governing the use of the aforesaid counselors; that the District never responded to this proposal despite requests in August and September by the Association that it do so; and that the program was implemented without the District ever bargaining with the Association conerning the wages, hours and conditions of employment of said counselors.

8. That on May 27, 1977, the District advised the Association the programming of students into the high school for the next semester were not able to be completed within the then existing time constraints and, therefore, administrators were going to be working evenings and the District wanted some counselors to work with them; that the District proposed it would be seeking volunteers to work evenings and Saturdays and would pay them the contractual part-time certificated rate; that on June 24, 1977, the Association proposed a memorandum of understanding governing said counselors rate of pay for hours worked after school, on Saturday, and during the summer; and that in a meeting on June 24th, the District advised the Association it did not have to bargain this subject because it was covered by the contract and refused to agree to the aforesaid memorandum.

9. That at the conclusion of the 1976-77 school year some multidisciplinary team teachers were used by the District apart from team work for some Saturday work; that said teachers were used in determining the number of students enrolled in particular education programs; that after learning this, in or about mid-June, Deeder proposed a memorandum of understanding to the District outlining their wages and the selection process to be followed, and that the District rejected this proposal and no agreement or further discussion took place.

Upon the basis of the above Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That the waiver clause included in the labor agreement at Part I, C.1., is a clear and unmistakeable waiver of the Association's right to demand to bargain during its term about mandatory subjects not covered in said agreement.

2. That because the Association waived its right to demand to bargain about the impact of Respondent's decisions regarding the summer employment of multidisciplinary team employes, the Hillside Terrace Study Project, the Milwaukee Trade and Technical High School summer program for vocational counselors, the use of guidance counselors on evenings and weekends, and the use of multidisciplinary team teachers for Saturday work, Respondent did not have a duty to bargain with the Association and, therefore, has not committed prohibited practices within the meaning of Section 111.70(3)(a)4, Stats.

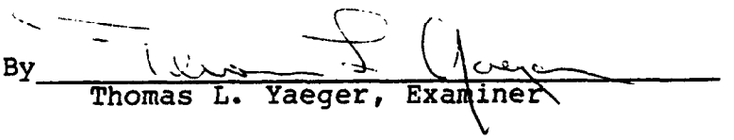
Upon the basis of the above Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

IT IS ORDERED that the complaint in the instant matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 2nd day of August, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Thomas L. Yaeger, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The instant complaint alleges that the District unilaterally implemented five (5) different programs without bargaining to impasse the impact of said programs on the wages, hours and conditions of employment of unit employes. The programs in issue are multidisciplinary team employment for the summer of 1977, a summer program for vocational guidance counselors at Milwaukee Trade and Technical High School, a student counseling program at the Hillside Terrace Housing Project, use of guidance counselors in the evenings and on Saturdays to assist in programming high school students for the 1977, fall semester, and use of multidisciplinary team members independent of the team after normal school hours, Saturday and Sundays. Without reviewing in detail all of Complainant's arguments respecting each allegation it can be said that the thrust thereof is that while it does not argue the District had any obligation to bargain its decisions to implement the various programs, it did have a duty to bargain the impact thereof to the extent that same was not already covered by the parties contract. The District on the other hand, in its answer to the complaint affirmatively asserted that the parties agreed to submit all disputes concerning interpretation, or application of the collective bargaining agreement to arbitration and have waived any right to bargain during its term. Also, at hearing Respondent took the position that some of the work involved with the various programs in dispute was not bargaining unit work.

WAIVER:

Complainant's case, taken in the most favorable light, is that the matters of impact, about which it sought to bargain, were not governed by the parties collective bargaining agreement. 3/ However, an affirmative defense raised by the District is that the parties have agreed to be strictly bound to all provisions contained in the agreement and have waived the right to bargain during its term. Although the District did not file a brief nor make any argument at hearing on this point, the undersigned has concluded this defense is footed in the waiver clause that appears at Part I, C.1. of the agreement.

In its brief, the Association characterizes said clause as a "zipper" or "integration" clause. It claims that this clause is too general and ambiguous to be considered a clear and unmistakeable waiver of the Union's right to insist upon notice and an opportunity to bargain prior to any unilateral changes being implemented by the District. The Union concludes, therefore, that the District, by not giving notice of its plans to the Association and affording it an opportunity to bargain over the impact of these changes on conditions of employment has committed a prohibited practice.

The Commission has repeatedly said it will not find a waiver by a union of its statutory right to notice and an opportunity to bargain

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3/ The Complainants have not argued that the Respondent unilaterally changed conditions of employment that were governed by their collective bargaining agreement.

about changes in matters which are mandatory subjects absent clear and unmistakeable evidence of same. The Commission has dealt with the question of whether a "zipper" clause can constitute a clear and unmistakeable waiver in Sheboygan Joint School District No. 1 (11990-B) 1/76. Therein the contract provided

TERM OF AGREEMENT

. . .

> D. This Agreement reached as a result of collective bargaining represents the full and complete Agreement between the parties and supersedes all previous agreements between the parties. It is agreed that any matters relating to the current contract term, whether or not referred to in this Agreement, shall not be open for negotiations. All terms and conditions of employment not covered by this Agreement shall continue to be subject to the Board's direction and control, provided, however that the (bargaining agent) shall be notified in advance of any changes having a substantial impact on the bargaining unit, given the reason for such change, and provided an opportunity to discuss the matter. (emphasis added)

. . .

The Commission concluded that there had been a clear and unmistakeable waiver by the union of its right to demand to bargain about the impact of the District's decision regarding reductions in staff.

. . .

> We conclude that by the terms of the collective bargaining agreement the SEA did, with sufficient clarify, waive its right and the District's duty, to negotiate with respect to the impact of the District's decision to reduce its teaching staff. The intent to so waive is buttressed by the language in Article VIII B. (sic) granting the SEA advance notice of any 'changes having a substantial impact on the bargaining unit, given the reason for such change and provided an opportunity to discuss the matter.' We do not interpret the term "opportunity to discuss" as requiring bargaining. On the contrary, said term strongly supports a waiver of such statutory duty.

. . .

General waiver clauses, similar to that present in the instant case, have also been the subject of litigation in the federal courts. In NLRB v. Auto Crane Co., 92 LRRM 2363 (CA 10, 1976), the Board found that the Company had unlawfully implemented a wage increase and thrift plan during the term of a collective bargaining agreement. The Court of Appeals reversed that decision, finding that the contractual waiver clause relieved the parties of any obligation to bargain during its term with respect to both subjects that were covered and not covered in the agreement. That clause provided

> Therefore, the Company and the Union for the life of this Agreement, each voluntarily and unqualifiedly waive 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 Agreement, or with respect to any matter or subject not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation gf either or both parties at the time they negotiated or signed this Agreement.

and is very similar to that contained in the subject contract. Although the thrift plan was not dealt with in the contract the court found the following language of the waiver clause clear and unmistakeable evidence of a waiver of bargaining on subjects not discussed in the contract:

> . . .or with respect to any matter or subject not specifically referred to or covered in this agreement. . .

A similar conclusion was reached by the 4th Circuit Court of Appeals in NLRB v. Southern Materials Co., 77 LRRM 2814 (CA4, 1971).

The Association, however, argues that New York Mirror, 151 NLRB 834 (1965) is dispositive of the subject dispute. The undersigned has examined that decision and has found it distinquishable from the aforesaid cases as well as the instant case. Therein the question of whether a waiver existed turned on whether it could be implied from the "zipper" or "wrap-up" clause in the parties contract. The Board concluded that this "boiler plate" language merely indicated the parties embodied their full agreement in the written contract. Nevertheless, the contractual boiler plate or zipper clause in dispute in New York Mirror is far different from the explicit reference to waiver contained in the instant case.

The instant case presents an express waiver, and the undersigned is not required to find one by implication or inference from broad contract language 4/ or bargaining history. 5/ As in Auto Crane Co., the subject agreement provides

> . . .or with respect to any subject or matter not specifically referred to or covered in this contract, except as otherwise provided herein.

The undersigned is persuaded in light of the aforesaid waiver clause that there has been a clear and unmistakeable waiver of the Association's right to bargain during the term with regard to matters not covered by the contract.

4/ General Electric Supply Co. v. NLRB, 71 LRRM 2562 (CA 4, 1969), cert. den. 73 LRRM 2120 (1970); Leeds and Northrup Co. v. NLRB, 67 LRRM 2793 (CA 3, 1969); Tinken Roller Bearing Co. v. NLRB, 54 LRRM 2785 (CA 6, 1963), cert. den. 55 LRRM 2878 (1964).

5/ NLRB v. Everbrite Electric Signs, Inc., 96 LRRM 2129 (CA 7, 1977).

The undersigned's conclusion that the Association intended the waiver clause to operate as construed is further supported by the inclusion of the express reservation of bargaining rights with respect to certain other matters. Specifically, the contract expressly reserves to future negotiation the placement of days on the calendar, dates for inservice and specialty school inservice and the teacher time schedule if final exams are reinstituted by the District. Consequently, because the Association waived its right to demand to bargain during the term of the parties agreement with respect to those matters that are the subject of this complaint, the District had no duty to bargain and, therefore, were it to have refused to bargain as alleged would not have committed a prohibited practice. Consequently, such a finding is unnecessary, and the complaint has been dismissed.

The undersigned is mindful that the Commission in State of Wisconsin (13017-D) 5/77 confronted waiver language identical to that in Auto Crane Co., with respect to subjects not covered in the agreement, but reached a different conclusion. Therein it said:

> Moreover, even the waiver language within the zipper clause is insufficient to establish a clear and unmistakeable waiver of the right to bargain about changes in triennial rotation.
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> . . .
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> 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, the waiver of which is perceived niggardly; and, second, in the labor relations context, such an abrogation of the common law of the shop probably is impossible. 'We must assume that intelligent negotiators acknowledged so plain a (point) unless they state a contrary rule in plain words.' 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, and strictly construe statutes in derogation of the common law, 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.

The undersigned, however, does not believe the aforesaid Commission decision is controlling herein and believes this case to be controlled by Sheboygan Joint School District, supra, particularly

in light of the express contractual reservation herein of bargaining rights on certain matters noted above. This is further support for the conclusion that the waiver clause was intended to be given its "plain and normal meaning" 6/ and thus, enforceable.

Dated at Madison, Wisconsin this 2nd day of August, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Thomas L. Yaeger, Examiner

6/ Simpson on contracts, 1954.