STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE UNIFIED SCHOOL DISTRICT, Complainant, vs. RACINE EDUCATION ASSOCIATION, Respondent.	Case XLI No. 22021 MP-782 Decision No. 15809-D
RACINE EDUCATION ASSOCIATION, Complainant, vs. RACINE UNIFIED SCHOOL DISTRICT, Respondent.	Case XLII No. 22201 MP-796 Decision No. 15914-D

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On the basis of the record, the examiner makes the following

FINDINGS OF FACT

1. Racine Unified School District, hereafter the employer, is a municipal employer within the meaning of the Municipal Employment Relations Act (MERA) and has its offices in the city of Racine, Wisconsin. At all material times, W. Thatcher Peterson, the employer's director of employe relations, has been the employer's authorized agent for labor relations purposes.

2. Racine Education Association, hereafter the union, is a labor organization within the meaning of MERA and is the certified exclusive collective bargaining representative of certain of the employer's employes, largely teachers, and has its offices in the city of Racine, Wisconsin. At all material times, James Ennis, the union's executive director, and Robert Ables, the union's president, have been authorized agents of the union for purposes of dealing with the employer in respect to labor relations matters.

3. On March 16, 1977, as a result of collective bargaining negotiations, the employer and the union arrived at a tentative agreement. That agreement was intended to be, and was, a final agreement not contingent on reaching further agreement in any other substantive areas of dispute, and was to be effective from March 16, 1977, through August 24, 1979. Said tentative agreement formally was ratified by the union's membership on March 16, 1977, and by the employer's governing board within the next two days, and said agreement was binding on the employer and the union.

4. From March 16, 1977, to not later than August 26, 1977, the parties engaged in further negotiations and arrived at further agreements modifying certain of the terms of the agreement reached March 16,

1977, and the March 16, 1977, agreement, together with said modifications, constitutes a final agreement which is binding on the employer and the union.

5. On August 15, 1977, the union submitted to the employer a written draft of the agreement previously reached. The employer has refused and continues to refuse to execute the same. Its refusal is justified since said draft departs from the agreement previously reached in certain material respects concerning the placement of commas, the school year calendar, medical benefits and maternity leave; in addition, said draft departs from the agreement previously reached in respect to the placement of a note in Article XVIII relating to Croft policies; further, said draft makes errors of form which do not affect the substantive rights of the parties in respect to the placement of parentheses in Article XII, statutory reference in Article IV, paragraph lettering in Article VIII, and pagination and reference to Easter on the calendar, all as is more fully detailed in the attached memorandum.

6. On August 26, 1977, the employer submitted to the union a written draft of the agreement previously reached. Said draft correctly states the agreement previously reached between the parties in all material respects. Said draft, however, contains errors of form which do not affect the substantive rights of the parties in respect to typographical errors in Article XII relating to the word "show"; in Article XIX relating to the word "therefore"; in paragraph numbering in Article X; and grammar in Article XII, all as is more fully detailed in the attached memorandum.

7. The union, since at least August 29, 1977, has refused and continues to refuse to execute the employer's said draft of August 26, 1977. Its refusal has not been based on the errors of form contained therein and noted in paragraph 6 of these findings of fact, and the union has waived its right, if any, to condition, and is estopped from conditioning, execution of the agreement on correction of said errors of form. The union's refusal and continuing refusal to execute said draft of the employer of August 26, 1977, is without justification and constitutes a refusal to execute a collective bargaining agreement previously agreed upon.

On the basis of the foregoing findings of fact the examiner makes the following

CONCLUSIONS OF LAW

1. The union, by refusing and continuing to refuse to execute the employer's draft agreement of August 26, 1977, has violated and continues to violate sec. 111.70(3)(b)3., Stats.

2. The employer, by refusing and continuing to refuse to execute the union's draft agreement of August 15, 1977, has not violated and is not violating sec. 111.70(3)(a)4., Stats.

On the basis of the foregoing findings of fact and conclusions of law the examiner makes the following

ORDER

1. The complaint against the employer in Case XLII is dismissed.

2. The union, on request of the employer, shall immediately execute the employer's August 26, 1977, draft of the agreement previously reached by causing its president, executive director and welfare committee

chairman, or other duly authorized officers or agents, to affix their signatures thereto.

Dated at Madison, Wisconsin this 23rd day of February, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Charles D. Hoornstra
Charles D. Hoornstra, Examiner

RACINE UNIFIED SCHOOL DISTRICT, XLI and XLII, Decision Nos. 15809-D and 15914-D

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The employer sues the union for not executing a collective bargaining agreement, and the union sues the employer for the same reason in these consolidated cases. They cannot agree on which proposed draft correctly states the agreement reached, but they agree they came to an agreement on March 16, 1977.

All this evolves from a strike that lasted from January 25 to March 16, 1977. Thereafter, until the employer started this action on September 6, the parties exchanged correspondence and drafts of the contract during which they modified the document mutually initialled on March 16.

Two members of this commission, Chairman Slavney and Commissioner Torosian, served as mediators during negotiations before and during the strike. Since this dispute requires a decision on what was agreed to during negotiations, these members disqualified themselves from participating in the decision of this case and empowered this examiner to make a decision in the name of the full commission.

Discussion of general legal principles

The employer's complaint alleges a violation of sec. 111.70(3)(b)3, MERA, and the union's complaint alleges a violation of sec. 111.70(3)(a)4, MERA, both of which make it a prohibited practice to refuse to bargain collectively, and define such refusal as including "the refusal to execute a collective bargaining agreement previously agreed upon." Collective bargaining is defined in sec. 111.70(1)(d), MERA, as:

> ". . . the performance of the mutual obligation . . . to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment with the intention of reaching an agreement. . . . The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document."

The first principle is that lack of good faith is not a necessary element of an action for wrongful refusal to execute. 1/ Parties might dispute in good faith over what their bargain was, but once it is found what they agreed to they are duty-bound to reduce the agreement to writing and execute it.

Another principle is that, even though good faith is not a necessary element of the cause of action, a bad faith refusal may establish a violation of the duty to execute. As noted, collective bargaining definitionally involves a good faith attempt to resolve differences. Thus, for example, a refusal to sign an agreement because the word "employe" is spelled with one 'e' rather than two, or because of imperfect grammar, issues which go to mere draftsmanship rather than substantive issues, would be violative even if the resisting

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1/ See Worrell Newspapers, 232 NLRB No. 65, 97 LRRM 1029, 1031 (1977).

party's spelling or grammar demonstrates greater erudition. 2/ The legislative objective is to have the parties reduce the substance of their agreement to writing, and a refusal to sign because of grammar, mere typographical errors, misspelling, etc., which cannot affect the meaning of the agreement reached, frustrates the legislative purpose and is violative of the duty to execute, at least where the refusal is not based on a good faith attempt to resolve differences.

A third principle is that the agreement must be final. Many tentative agreements are reached during negotiations which, either expressly or impliedly, are contingent upon reaching agreement in other areas. The intent of the parties is controlling, and there must be a finding that the agreement reached was final and not contingent on reaching agreement on other issues.

A fourth principle is that, even though the agreement reached must have been intended to be final, it is not necessary that the agreement be complete in all particulars or as to all issues separating the parties. Parties many times come to a final agreement but decide to leave certain issues subject to future resolution. Further, the parties to a final agreement may leave certain issues for future ascertainment of a fact, e.g., the determination of an increase in the cost of living as part of the salary formula. Thus, finality does not require completeness. 3/ The parties' intent is controlling.

Fifth the complaining party may choose to have the resisting party also reduce to writing any mutually agreed upon subsequent modifications to the final agreement. Although the resisting party could not, as a matter of right, refuse to sign until agreement has been reached on proposed modifications to a final agreement, once there has been agreement on such modifications the legislative purpose would be frustrated if those agreements could not be forced to a written agreement merely because they are supplementary to the final agreement previously reached.

Finally, a distinction must be drawn between the terms agreed to which concern the substantive rights of the parties, on the one hand, and other agreements concerning only the drafting of such agreements on the other hand. Parties frequently come to an agreement on a point but conclude not to include it within the written draft of the agreement. Typically, such an agreement is handled through what commonly is called a "negotiator's note," usually designed as explanatory material of the language included within the written collective bargaining agreement. Here, this distinction becomes important since some of these drafts contain such negotiators' notes and some do not.

The parties intended the March 16 agreement to be final

The parties intended that the agreement reached on March 16, 1977, be final. It was not made contingent upon reaching agreement in other areas of substantive dispute.

2/ See Wate, Inc., 132 NLRB No. 112, 48 LRRM 1535 (1961), enforced, 310 F.2d 700, 51 LRRM 2701 (6th Cir. 1962).

3/ See Trojan Steel Corporation, 222 NLRB No. 66, 91 LRRM 1368 (1976), enforced, ____ F.2d ____ 94 LRRM 3264 (4th Cir. 1977); Operating Engineers, Local 525 (Clark Oil & Refining Corp.), 185 NLRB No. 72, 75 LRRM 1057 (1970); Intercity Petroleum Marketers, Inc., 173 NLRB No. 222, 70 LRRM 1036 (1968); NLRB v. Huttig Sash & Door Co., 362 F.2d 217, 62 LRRM 2271 (4th Cir. 1966).

Mr. Peterson, the employer's representative, and Mr. Ables, the union's representative, on March 16 initialled a draft of the agreement, exhibit 8 in this record. The fact of initialling evidences intendment of finality. Each page was initialled, and written departures from the typewritten words also were initialled. 4/ During negotiations, the parties agreed to initial the final resolution of the disputed items. 5/ Ables testified that the reason he initialled exhibit 8 was "because we had agreement." 6/

As further evidence of the intendment of finality, the union ratified the agreement on March 16 and the employer ratified it within a few days. It is the custom in labor relations to submit only final agreements to the ratification process. Further, the employes, who had been on strike since January 25, returned to work March 16. The execution page on exhibit 8 has March 16 pencilled in. On May 17, Mr. Ennis, responding to Peterson's March 18 draft, exhibit 9, proposed that page 1 show that the agreement was made and entered on March 16. Finally, Mr. Ennis, on August 15, wrote to Peterson: 7/

> "Your letter of July 29, 1977 sets out a premise with which we agree and for which you are to be commended, and that is that there can be no deviation from the language of the agreement which was negotiated concluding March 16, 1977 without a mutual agreement for that departure."

On the basis of the foregoing, there can be little doubt but that the parties intended the March 16 agreement to be a final agreement.

The association at times has argued that it is excused from signing because of the issues relative to maternity leaves, medical benefits, and minority layoff procedures. At times the association appears to argue that the employer breached the agreement reached in those areas, which argument is not germane since it relates to compliance with the agreement rather than what was agreed to. At other times the association appears to argue that the agreement of March 16 was contingent upon reaching agreement in these three areas, and this argument is rejected as having no persuasive foundation in the evidence. 8/ At still other times the association appears to argue that the signing of the agreement of March 16 was contingent upon the employer's compliance with the agreement reached in these three areas, which argument also is rejected as being without persuasive foundation in the evidence.

Finally, exhibit 8 (circle page 41) contains the handwritten words "verify schedule" next to the salary schedule. In light of the evidence as a whole, this is construed as contemplating the ascertainment of a fact in light of the substantive agreement reached rather than contemplation of further negotiations on salary terms.

4/ Peterson failed to initial the last page. This omission was wholly inadvertent. Ables initialled it. No issue as to what was agreed to hinges on the terms on that page.

5/ Tr. 10/20, p. 81; 10/21, p. 64.

6/ Tr. 10/21, p. 117.

7/ Ex. 15, p. 30.

8/ See discussion below, pp. 14-16.

Finding the correct written draft of the agreement reached

Having found that on March 16 the parties came to a final agreement, the task is to find a correct draft of that agreement.

Exhibit 8 is the document initialled on March 16 by appropriate agents and ratified by the principals. Exhibit 8, however, should not be considered the final written draft of the agreement reached.

First, the parties agree exhibit 8 contains some errors and does not correctly express the agreement reached. For example, it inadvertently omitted the senior high school extra compensation schedule. Further, the exhibit on its face shows further drafting was contemplated. 9/ That further drafting to express the agreement reached was contemplated, of course, does not mitigate against the finding that final agreement was reached; it relates only to what was contemplated as the final draft.

Second, the parties subsequently agreed on some changes in exhibit 8. For example, although not provided for in exhibit 8, the parties subsequently agreed psychologists' salaries should be retroactive to August 25, 1976. Further, there are other agreed upon subsequent changes, such as substituting "his/her" and "he/she" for "his" and "he."

It might be possible to find what exactly was agreed to on March 16 and then search for a written draft among the many exhibits to ascertain which one, if any, is faithful to that agreement. However, doing so would exclude the many modifications agreed to subsequent to March 16. Excluding such modifications from the written draft which the parties should sign cannot be squared with the overall legislative purpose to have the parties sign what has been agreed to.

Accordingly, it appears more consonant with the legislative purpose to search among the exhibits for a written draft, if any, which incorporates the agreement reached on March 16 as well as the modifications agreed to thereafter. Both parties lay claim to the correct draft as incorporating those modifications.

The union submitted only one draft to the employer, exhibit 12, which it later had printed and introduced as exhibit 23. The employer submitted several. Exhibit 14 is the last of the employer's submissions, and these two drafts will be compared to determine whether either correctly states the agreement previously reached. The method utilized is to compare exhibits 23 and 14 where they conflict; and exhibit 8 will determine the resolution of those conflicts, unless there is other evidence in the record requiring a different conclusion.

Comparison of exhibits 23 and 14

- Joint job description committee

Article XVIII creates a joint job description committee which is to recommend job descriptions to the school board under certain

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9/ See e.g., exhibit 8, circle page 45, relative to the exclusion of certain positions from the list of extra-duty responsibility positions. The words "needs to be cleared up for clarity" thereon demonstrate that exhibit 8 was not itself designed to be the final written expression of the agreement reached, at least in this respect.

circumstances. Exhibit 23 contains the following at the end of the article:

> "NOTE: This presupposes the job description in Croft are adopted by the Board."

Exhibit 14 does not contain that note. Exhibit 8 does, although it is located between paragraphs 3 and 4 rather than at the end of the article.

Ordinarily, the controlling force of exhibit 8 would require a holding that exhibit 23 more accurately records the agreement reached. However, it appears that the parties intended the quoted note to be more in the nature of a bargaining history recording than a term within the drafted agreement. This conclusion in part is forced by the use of the word "note" which is redundant if what follows was to be a term of the agreement, and by Mr. Ennis' letter of May 17 to Mr. Peterson in which he stated:

> "Article XVIII, paragraph 3 - note not necessary." 10/

The use of the word "note" in other contexts supports the conclusion that the material following its use was not intended to be included in the final draft of the agreement. For example, in exhibit 8 at circle page 34 there appears:

> "NOTE - This
> language also applies
> to other calendars.
> Ennis says he understands
> 2/2/77 4:17 pm"

On the same page of exhibit 8 there appears:

> "NOTE -
> These dates need
> to be adjusted
> WTP 3/7/77"

Neither note appears on exhibit 23 or 14. For a similar illustration, see exhibit 8 at circle page 30.

Although the note in Article XVIII was included in exhibit 9, an employer's draft, a question mark was placed after it with words inquiring whether the note should be included. Mr. Ennis' May 17 letter saying no was in reply. Exhibits 10 and 11, subsequent board drafts, excluded the note. Exhibit 13, Peterson's notations on Ennis' draft, exhibit 12, contains the following:

> "This note was on the 16 Mar 77 Tentative Agreement. In letter of 17 May, Mr. Ennis proposed the note be deleted. I agreed with him."

Accordingly, the note should be deleted. Ennis and Peterson had a meeting of minds as to its deletion, and the union should not be able to retreat from that position.

Therefore, in respect to the difference in the drafts as to the note in Article XVIII, exhibit 14 is the correct version of the agreement reached.

10/ Ex. 15, pp. 18, 18b.

- Placement of the commas

Exhibit 8, Article VIII, 1.c, states:

> "In elementary schools, the principal*, working with the teaching staff*, shall determine the staffing pattern and staff utilization of the school within the Board's teacher-student ratio policy; so long as students receive the instructional time designated by the Board, the principal*, working with the teaching staff*, may utilize staffing patterns so as to provide a minimum of [140 minutes] per week individual teacher preparation time and/or aides to assist teachers in or to assume supervisory duties." (Asterisks added.)

Article VIII, 1.d, of exhibit 8 states:

> "The school administration*, working with the teaching staff*, shall determine the use of aides in supervisory duties." (Asterisks added.)

These provisions became Article VIII, 1.c and e, respectively, in exhibits 14 and 23. 11/ The asterisks do not appear in exhibit 8; they signal the dispute for the reader. Exhibit 23 deletes the commas where asterisked. Exhibit 14 places the commas indentically as they are placed in exhibit 8.

Arguments, however subtle, might be made that the placement of the commas affects the meaning of the provisions involved. More importantly, each party thinks the placement of commas involves a substantive matter. The union's argument, that deletion of these commas was contemplated by an agreement during negotiations that the initialling of exhibit 8 was subject to subsequent "editing," is rejected. Although placement of commas might well be within the contemplation of an agreement for further editing, the parties' respective positions that the existence vel non of the commas affects the meaning of the agreement precludes their removal pursuant to an agreement to "edit." In labor relations parlance, "to edit" does not relate to alterations which both parties insist will change the meaning of the agreement.

The union argues, however, that there was an agreement reached during negotiations which gives the word "edit" the meaning it advances here. The union contends that the parties agreed to edit exhibit 8 by changing it to be in accord with the 1972-74 agreement, exhibit 1 in this record, except where the changes are separately initialled or marked. The commas on exhibit 8 in Article VIII are not separately initialled or marked. Therefore, the argument goes, the 1972-74 agreement controls the parties' intent, and since the commas are absent from that agreement, the final agreement here was not intended to include them.

The linchpin to this argument is that there was such an oral agreement to edit. Peterson denies it. Ables' testimony supports the union's position, and the examiner must resolve this conflict in testimony in part on credibility grounds.

11/ In exhibit 23, 1.e, is on page 19 as 1.c, an obvious typographical error.

Both Ables and Peterson impressed the examiner has striving to be perfectly honest. Their demeanor credibility was equal, and the examiner cannot resolve the conflict on the basis of demeanor credibility.

Turning to the precise testimony, Peterson was firm in his conviction that no such agreement was reached. 12/ Ables, on the other hand, was not firm. In fact, he retreated from testimony suggesting that he personally observed a discussion between Peterson and Ennis when they made such agreement 13/ to the position that it was his "understanding" through mediators that there was such an agreement. 14/ Thus, testimonial credibility favors Peterson's denial.

Peterson's denial is buttressed by other facts. First, the putative agreement was between Peterson and Ennis and not directly with Ables, and Ennis did not testify. Second, in a letter from Peterson to Ennis on June 25, 1976, Peterson said: 15/

> "4. When the School District makes a counterproposal to the REA's proposal for new collective bargaining agreement, that counterproposal will by definition contain those portions of the collective bargaining agreement and the items that the Board implemented in June, 1975, following the impasse in negotiations, that we desire to be part of a successor agreement."

The June 1975 document contains the commas. 16/ The union made a proposal on August 5, 1976, with the commas out; 17/ the employer produced another so-called impasse document on August 12, 1976, with the commas in; 18/ a union proposal of January 27, 1977, had the commas out; 19/ and another employer proposal of February 2, 1977, had the commas in. 20/ This series of exchange certainly supports the inference that the employer's intent was to have the commas in and that the union always understood that intent.

Third, on March 14, 1977, following the employer's February 2nd proposal containing the commas and just two days before the final settlement, the union offered a proposal with the commas in. 21/ Following the previously noted series of exchange, with each party

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12/ Tr. 11/16, p. 52.

13/ Tr. 10.21, pp. 123-126.

14/ Tr. 11/15, p. 30.

15/ Ex. 15, p. 1a.

16/ Ex. 2, p. 15.

17/ Ex. 3, pp. 61-62. At the time exhibit 3 was offered into evidence, the examiner did not perceive its relevance. Its relevance is now clear.

18/ Ex. 4, p. 15.

19/ Ex. 5, p. 61.

20/ Ex. 7, p. 21.

21/ Ex. 6, p. 18.

hanging tough on the comma issue, the union's March 14th offer containing the commas strongly suggests it had agreed to yield to the employer's position, further rendering unpersuasive the union's contention that the editing agreement removed the commas by an implied incorporation of the 1972-74 contract, exhibit 1.

Fourth, as to the union's argument that the editing agreement was that departures from the 1972-74 agreement, exhibit 1, would be indicated by underlining the changed portions, while there are several illustrations of this practice it did not occur invariably, as a comparison of Article X, sec. 4, in exhibits 8, 12, 23 and 1 will show. Further, comparison of exhibits 1, 8, 12 and 23 in respect to the language the union itself employed in VIII, 1.c, shows that the union departed from exhibit 1 absent underlining.

Fifth, there is at least one illustration showing that when the parties intended to return to the 1972-1974 language their notation was far more express. See ex. 8, p. 5; Tr. 10/20, pp. 83-84.

Thus, since the use of the word "edit" ordinarily does not include changes in the meaning of the agreement reached; since both parties agree the placement of commas affects the meaning of the agreement; since there is no persuasive evidence that the parties had an agreement to make such a change in the commas through the vehicle of editing; and since exhibit 8 and exhibit 14 contain the commas and exhibit 23 does not contain them, exhibit 14 is correct and exhibit 23 is in error in respect to the comma dispute in Article VIII.

- Calendar

An examination of exhibit 23 shows that the material on pages 36 and 38 is reversed: the material on page 36 purports to be a 1977-78 calendar but in fact is a 1978-79 calendar; and the material on page 38 purports to be a 1978-79 calendar but in fact is a 1977-78 calendar. The error would appear to be a mere printer's error, and should cause no substantive confusion. It is an error of form, not substance.

Exhibit 23 departs from exhibit 8 in another respect. Between pages 38 and 39 of exhibit 23 are twenty-six pages of material not contained in exhibit 8. These twenty-six pages comprise a daily, pocket type calendar for the 1977-78 year. One could speculate that, since the union had exhibit 23 printed, it included these pages so that its members could have a copy of their contract in a booklet that also functioned as a pocket calendar. However, these pages also include items not mentioned in exhibit 8. For example, the pocket calendar indicates October 6 is "REA Rep Assembly," although exhibit 8 does not so indicate. Conceivably if the employer were to sign this agreement an issue might arise as to whether it agreed October 6 was to be a day off from work, although nowhere else is there any evidence of such an agreement.

Further, exhibit 8 shows that October 27 and 28 are days for the Wisconsin Education Association (WEA). The pocket calendar in exhibit 23, however, lists the dates as October 26, 27 and 28. The coding in the text (see p. 37, ex. 23) shows the WEA convention days are "teacher day[s] only." Arguably that might mean teachers are not responsible for any student-teacher contact those days. Whereas exhibit 8 and all the other relevant documents show only two such WEA days were intended, the pocket calendar in exhibit 23 might generate an issue as to whether three were intended. Again, then, exhibit 23 is not faithful to exhibit 8 in this respect.

Exhibit 8, unlike exhibit 23, makes specific reference to the date of Easter Sunday in the 1977-78 and 1978-79 calendars. Compare

ex. 8, pp. circle 35 and circle 37, with ex. 23, pp. 36 and 38. Exhibit 14, on the other hand, replicates exhibit 8 precisely in this respect. See ex. 14, pp. 36 and 38. This is an error of form, not substance.

Exhibit 14 departs from exhibit 8 in certain respects, but in each case the departure was agreed to by the union. Exhibit 8, at p. circle 33, contains the statement, "calendar includes make-up days." Exhibit 14 does not include that language; neither does exhibit 23. Exhibit 9, Peterson's first draft on March 18, excluded it, and Ennis raised no objection. Reference to Labor Day and Memorial Day is included in exhibit 14 though omitted from exhibit 8, at pp. 36 and circle 38; however, in each case the union had inserted them into exhibit 12, the union's draft of August 15, and Peterson concurred. See ex. 13, pp. 37 and 39.

On the basis of the foregoing, therefore, exhibit 14 and not exhibit 23 correctly states the agreement reached by the parties in respect to the calendar.

- Statutory reference

Exhibit 23 states Article IV, 4, insofar as material here, as:

> ". . . the Board shall provide the teacher all assistance necessary pursuant to Wisconsin Stats., sec. 895.46. (See page 72.)"

The statute is then reproduced on page 73, not 72, as Appendix I.

Exhibit 14 states the same provision as:

> ". . . the Board shall provide the teacher all assistance necessary pursuant to Wisconsin Stats., sec. 895.46. (See page ____)."

The statute is then reproduced as an Appendix I on pages 72 and 73.

Exhibit 23's error on the pagination invites no confusion, and such error, standing alone would not be a reason justifying a refusal to sign it. Similarly, exhibit 14's failure to include a page number invites no confusion, and also does not justify a refusal to sign. The insertion of a correct page number is merely ministerial for the final printing, which in fact could differ from the draft's pagination.

In this respect, it is a draw between exhibits 23 and 14 as to which correctly states the agreement. Each is substantially correct. Each error is one of form, not substance.

- "Show" versus "whose"

Exhibit 8 at Article XII, 7, states:

> ". . . teachers show employment commences after July 1, 1972, and who are assigned to teach educable or trainable mentally retarded students will be paid a salary differential equivalent to one step above their normal eligible step placement; teachers whose employment commences after July 1, 1973 . . . will not be paid a salary differential."

The parties obviously meant to use the word "whose" instead of the word "show" in line 1 of the above quote. Peterson used "show" in exhibit 9. In exhibit 10 he scratched it out and pencilled in "whose." He typed in "whose" on exhibit 11. Ennis had objected and

suggested "whose" for "show." Ex. 15, p. 18.b. Ennis used "whose" in exhibits 12 and 23. Peterson approved the change in exhibit 13. In exhibit 14, however, Peterson reverted to "show."

There was a mutual agreement to change "show" to "whose." Therefore, exhibit 23 is more faithful to the agreement reached than exhibit 14, although exhibit 14's error is one of form, not substance.

- "Therefore" versus "thereafter"

Article XIX, 8, per exhibit 8, states:

> "A teacher who resigns and is therefore reemployed shall return to his former placement in the five-year credit requirement cycle, unless he otherwise qualifies for different placement." (Emphasis added.)

Peterson's exhibit 9 repeats the "therefore." Ennis objected and suggested "thereafter." Peterson made the change in exhibit 10. Ennis used "thereafter" in exhibits 12 and 23. Peterson in exhibit 14 reverted to "therefore."

Thus, there was agreement on "thereafter" and, even though exhibit 23 departs from exhibit 8, it is more faithful to the agreement reached than exhibit 14, but exhibit 14's error is one of form, not substance.

- Grammar

Exhibit 14 follows exhibit 8 in Article XII, 2.c, 4) which provides:

> "Teachers whose employment with the Board commences or ends during a quarter or who begins a leave of absence without compensation shall receive a pro rata payment for that quarter based on the number of contract days worked in that quarter."

Exhibit 23 substitutes "A teacher" for "Teachers" in the first line of the above quotation. Peterson agreed to accept that change. 22/ Therefore, exhibit 23 is more correct, although exhibit 14's error is one of form, not substance.

- Paragraph numbering

Exhibit 14 and exhibit 8 place an "8" before a paragraph in Article X where exhibit 23 places a "9." Even though exhibit 14 follows exhibit 8, the employer in its brief admits a clerical error in this respect.

Therefore, exhibit 23 is more correct than exhibit 14 in this respect, but exhibit 14's error is one of form, not substance.

- Parentheses

Exhibit 23 places certain parenthetical marks around lettering and numbering not found in exhibit 8 in Article XII, 2.d. Exhibit 14 follows exhibit 8. Exhibit 14, therefore, is more correct, but exhibit 23's error is one of form, not substance.

22/ Ex. 13, p. 46.

- Medical benefits

Article XIII deals with medical benefits. On the bottom of page circle 50 on exhibit 8 there appears the following:

"Side letter
"1 These are the benefits
"2 Their cost is X
"3 They are what is referred to as 'add'l benefits in (a) above,"

Article XIII, 1.a, in exhibit 8 provides:

> "The Board shall provide . . . an opportunity to participate in a group hospitalization and surgical/ medical benefit plan. Participants will pay $5.00 per month per year . . . plus the cost of any additional benefits as well as any future cost increases on such additional benefits. . . ."

In exhibit 9 Peterson added the following to be part of the draft agreement after 1.a:

> "Additional benefits referred to above will include:
>
> "1) Increased major-medical plan to $250,000
>
> "2) Increased Medical Blue Cross to 72-hour emergency
>
> "3) Increased Medical Surgical Care to 72-hour emergency
>
> "4) Unlimited subsequent outpatient care - Blue Cross
>
> "5) Unlimited subsequent outpatient care - Surgical Care
>
> "6) Full outpatient diagnostic, x-ray, and laboratory at the hospital."

On May 17 Ennis responded (ex. 15, p. 18b):

> ". . . does there need to be any statement on dollar cost of the additional insurance benefits?"

Peterson's June 20 draft, exhibit 10, deleted the material added in exhibit 9. At the same time, however, he wrote a letter to Ennis (ex. 15, p. 20.f) confirming that the benefits referred to as additional benefits in Article XIII were those added by exhibit 9, and he enumerated them. In addition, in that letter Peterson also stated the monthly cost of those benefits and noted that in the case of a cost increase the teachers will pay them.

Ennis' exhibits 12 and 23 followed Peterson's deletion in exhibit 10. However, Ennis added an appendix to the agreement which states the matter originally added by Peterson in exhibit 9, but also presages the same with:

> "The following listed Additional Benefits (referred to in Article XIII, 1.a.) are to be in effect for the life of the Contract: * * * ."

In this form, there is a suggestion that the benefits have become part of the contract rather than a side letter.

Ennis issued exhibit 12 on August 15. On August 23 Peterson wrote to Ennis that attaching the letter as an appendix was more consistent with the agreement reached on March 16. See ex. 15, pp. 47b and 53b.

The examiner agrees with the employer. The March 16 agreement called for a "side letter." A "side letter" in labor relations parlance means something not to be included within the final draft of the collective bargaining agreement. Exhibit 14 reproduces Peterson's June 20 letter as an appendix.

Accordingly, in respect to the medical benefits issue, exhibit 14 and not exhibit 23 more accurately states the agreement reached by the parties.

- Minority layoffs

During negotiations the union asked if the employer could write a letter to the union saying that minority teachers would not be adversely affected in the event of a layoff; the employer responded that it could. 23/ On August 26 the superintendent of schools wrote a letter to that effect to Ennis, and Peterson enclosed it as an appendix to exhibit 14.

Exhibit 8 contains nothing about protecting minority teachers in layoff situations. Nor does exhibit 9. Mr. Ennis' May 17 response to exhibit 9 omits any reference to this issue, but his August 15 draft, ex. 12, contains a statement on the matter as an appendix, which is repeated in exhibit 23 and which Peterson described on August 26 as substantially the same as the employer's. 24/

Accordingly, the parties did not intend the minority layoff to be a term of the collective bargaining agreement, and exhibit 14 and exhibit 23, in terms and as appendices, are equally adequate as expressions of the parties' intent in respect to this issue.

- Maternity issue

Exhibit 8, at Article XV, 2.f, deals with maternity leaves of absence (circle pages 56 and 57); however, the language in the draft is vertically interlineated and in the margin there appears:

"Delete this
"Write letter to REA
"explaining what
"USD's practice
"is."

Peterson's and Ables' initials are affixed proximate to the marginal writing. From this, it follows that the parties intended that the original language on exhibit 8 not be included in the collective bargaining agreement and that the employer should write the union a letter stating what its practice is.

Peterson's exhibit 9 omits reference to this matter. Ennis' May 17 response (ex. 15, p. 18.b) states:

"Article XV - maternity practices letter needed from USD".

The employer issued a draft of such a letter on June 20, and on August 26 attached it as an appendix to exhibit 14. The union, however, in both exhibit 12 and 23 stated at Article XV, 2.f:

23/ Ex. 15, p. 28.f.

24/ Ex. 15, p. 53.b.

"Maternity Leave - Past practice will prevail until final court resolution. Court decision will establish the framework for the new policy."

The union's version patently departs from the terms on exhibit 8. Rather than it being, or even purporting to be, a letter explaining what the employer's practice is, it purports to be a term of the agreement that the employer will continue its practice until court resolution. There was no agreement to continue the practice; only to state what the practice is. And, by the use of the words "Write letter to REA", there was no intent that anything be included as a term of the collective bargaining agreement.

Whereas the union's version departs materially from exhibit 8, the employer's version in exhibit 14 contains a letter purporting to state what its practice is and attaches that letter as an appendix to the agreement. Accordingly, exhibit 14, not exhibit 23, substantially states the agreement reached in this respect.

- Extra duty responsibilities

Exhibit 8 at Article XII, 12, contains the following:

"The following titles should be excluded from the list of extra-duty responsibility positions which would be covered by the supplemental contract: (1) High School Dramatics; (2) Junior High Dramatics; (3) Summer Drivers' Education Program; (4) School Social Worker (certified). The compensation and individual contract period should be expressed art [sic] Article XII, section 12."

In the margin there appears:

". . . needs to be cleared up for clarity."

Peterson's exhibit 9 deletes the foregoing but a handwritten note states: "needs clarification." Ennis' May 17 response (ex. 15, p. 18.b) makes two points:

"Article XII, Section 12d - need exclusions"

and

"Article XII, Section 12, paragraph d - was to be rewritten for clarity."

Both exhibit 23 and exhibit 14 asterisk the four enumerated positions on the schedule for compensable extra-duty responsibilities. Exhibit 23 states:

"These positions are not covered by extra-duty position contract referred to in Article XII, sec. 12: positions of high school dramatics, junior high dramatics, summer drivers' education program, and school social worker (certified) given a double asterisk to show the extra-duty contract does not apply to them; this is intended to carry out the intention of the note at the bottom of page 45 of the initialled document."

Exhibit 14 states:

"These positions are not covered by extra-duty position contract referred to in Article XII, section 12: Positions

of high school dramatics, junior high dramatics, summer drivers' education program, and school social worker (certified) given a double asterisk to show the extra-duty contract does not apply to them."

The employer objects to the union's inclusion of the phrase, "this is intended to carry out the intention of the note at the bottom of page 45 of the initialled document." It argues that there should not be a reference in the agreement to another document. The employer does not object to the truth of the phrase. 25/

Each version is substantially identical. The union's inclusion of the note is not shown to prejudice the rights of the employer, nor can the examiner imagine how that could occur. Accordingly, exhibit 14 and exhibit 23 are equally accurate in this respect.

Summary and conclusions of comparison of exhibits 14 and 23

Despite some differences, the two drafts are substantially equal renditions of the agreement reached in respect to the statutory reference (Article IV), minority layoff and extra-duty responsibilities.

Exhibit 14 contains errors in the following areas: "show" versus "whose" (Article XII); "therefore" versus "thereafter" (Article XIX); paragraph numbering (Article X); and grammar (Article XII, 2.c.4). None of these errors could change the meaning of the agreement reached; they are errors of form, not substance.

Exhibit 23 contains errors in the following areas: placement of parentheses (Article XII, 2.d); statutory reference (Article IV); paragraph lettering (Article VIII, 1.e); pagination (calendar); and reference to Easter (calendar). These are errors of form, not substance.

Exhibit 23, however, also contains errors of substance, namely: the absence of commas (Article VIII); the calendar; medical benefits; and maternity leave. The union's versions in these respects not only were not agreed to but also affect the substantive rights of the parties. The error regarding the Croft note (Article XVIII), while not apparently one affecting the substantive rights of the parties, is more than a mere error of form since the parties agreed to delete the same from the final written agreement.

Dismissal of the complaint against the employer

It follows that the complaint against the employer in Case XLII must be dismissed. Its refusal to execute the union's version of the agreement was justified because it contains errors of substance in respect to the agreement that in fact was previously reached.

The union's waiver and estoppel to refuse to execute because of errors of form, not substance

Having concluded that the employer could refuse to execute the union's draft because of its errors of substance in respect to the

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25/ On August 26 Peterson wrote to Ennis (ex. 15, p. 53.b): "As I recall, in earlier correspondence, I said that the footnote was intended to do just that. However, inclusion of that phrase might cause the parties to have to refer to another document to determine the meaning of the footnote."

agreement previously reached, the question becomes whether the union could refuse to execute the employer's draft because of its errors as to form, namely, those involving "show" versus "whose," "therefore" versus "thereafter," the paragraph numbering, and grammar.

Without holding that a union or an employer has the right to refuse to execute a draft of an agreement because it contains errors of form relating to grammar, numbering, typo's, etc., the following recitation of events persuades the examiner that the union has waived its right to condition, and is estopped from conditioning, the signing of the agreement by reason of these errors of form.

The union on March 16 itself initialled the pages of exhibit 8 containing these errors. Although the parties later agreed, at least in respect to two of them, that these errors should be corrected in the final draft, Ennis wrote two letters provoking return to the original draft containing those errors. On July 20 Ennis wrote to Peterson:

> "So you are clear as to my position . . . it is that each comma will be in the right place, every 't' will be crossed, and every 'i' will be dotted. . . .
>
> "As you know, when we agreed to return to school, you agreed to implement per the signatures of the Association and the Board. . . ."

On August 15 Ennis wrote to Peterson:

> "Your letter of July 29, 1977 sets out a premise with which we agree and for which you are to be commended, and that is that there can be no deviation from the language of the agreement which was negotiated concluding March 16, 1977 without a mutual agreement for that departure."

Peterson in exhibit 14 then reverted to the original draft of exhibit 8 in respect to these areas, thereby repeating the errors. On August 29 in a telephone conversation Ennis said to Peterson: 26/

> "The differences are down to the commas. If it weren't for the commas, we'd have a signed agreement now."

The comma dispute refers to the matter discussed throughout this memorandum in connection with Article VIII, 1.c.

Thus, by the union's letters of July 20 and August 15, provoking a return to exhibit 8's errors which the union itself originally had initialled and ratified on March 16, and by the union's subsequent statement on August 29 that the only remaining issue was the comma dispute, the union has waived its right, if any, to refuse to sign the agreement because of these errors of form, and, moreover, is estopped from such refusal.

The alleged illegality of the employer's maternity leave policy

The union claims the employer's maternity leave policy is illegal. The employer's statement of its policy is included as a letter attached to the draft, exhibit 14. Therefore, the union argues, the employer cannot demand that it sign that draft of the agreement.

26/ Tr. 10/20, p. 151; see ex. 15, p. 55.

The employer's statement in exhibit 14 of its maternity leave policy is not part of the contract. It is attached to the agreement in the form of a letter, as exhibit 8 called for, but is not part of the terms to which the union has assented. In fact, the examiner has rejected the union's draft, exhibit 23, in part because it sought to make the employer's policy a term of the agreement, whereas exhibit 14, the employer's draft, does not.

Beyond that, the examiner can find nothing illegal in the policy. Its terms are footnoted. 27/ The union relies on the Ray-O-Vac

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27/ "Dear Mr. Ennis:

This letter sets forth the School District's practice on maternity leaves.

A pregnant teacher who desires either a short-term childbearing leave of absence or a long-term maternity leave must notify the Personnel Department as to which leave she desires:

1. Short-term childbearing leave of absence

   a. A pregnant teacher will be granted a short-term childbearing leave of absence without compensation. The teacher shall provide a statement from her physician that expresses the physician's recommendation as to the time the leave should begin and end. The Personnel Department will determine the duration of the leave, after considering the teacher's wishes and the physician's recommendation.

   b. At the expiration of the leave, the teacher shall return to the position to which she was assigned at the time she began the leave.

   c. The teacher may continue to participate in the medical and life insurance program during the leave upon condition she pays the premium cost thereof to the Payroll Department. The Board pays the premium cost for any month in which the teacher actually works.

   d. Depending upon what happens in various courts, a teacher on short-term childbearing leave of absence may be entitled to use paid sick leave during this leave.

2. Long-term Childrearing leave of absence

   a. A pregnant teacher will be granted a long-term leave of absence without compensation for up to two complete semesters after the semester during which such leave begins. This leave may begin during a semester. The beginning date of the leave will be determined by the Personnel Department, after considering the teacher's wishes and the physician's recommendation.

   b. When requesting the leave, the teacher shall specify the duration. The teacher may return from the leave only at the beginning of a semester, and then only if a position is available, unless the Personnel Department determines otherwise. If a vacant position is not available, the leave shall be extended and the teacher shall be offered the next vacant position for

Case 28/ where the Wisconsin court held that the statutory prohibition against sex discrimination prohibits an employer from treating temporary medical disabilities caused by pregnancy and childbirth different from other temporary medical disabilities, at least under the employer's benefit program there and at least in the absence of an adequate business justification. Here, the union never alleged that the employer's statement of policy was illegal; as a result, the employer had no opportunity to present evidence going to business justification. Consequently, the legality of the issue, simply as a matter of due process, is not properly here. Further, even if it were here, a determination of discrimination would depend on the content of the employer's benefit program for other similar disabilities; the union has failed to adduce proof in that area. Consequently, the union's claim would fail for lack of proof. Further, the policy itself, as to childbearing, is made contingent on the outcome of court decisions, evincing an intent that the employer's policy must be construed consistent with applicable law. Further, as to childrearing, Ray-O-Vac is silent, and cannot be authority for the union's proposition in this respect.

Finally, even were a contractual term involved, even were the question properly here, and even were the policy illegal, the remedy would be to excise the forbidden provision, not to excuse the union from signing. 29/

The union's refusal to sign

The union has argued that it was not expressly asked, "Sign here," and also appears to argue at other times that, even if it was asked,

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27/ (Continued)

which she qualifies, but the leave and the teacher's employment shall terminate if she refuses the position.

c. The teacher may continue to participate in the medical and life insurance program during the leave upon condition she pays the premium cost thereof to the Payroll Department. The Board pays the premium cost for any month in which the teacher actually works.

d. A teacher who requests a long-term childraising leave of absence will not be eligible to use paid sick leave for any part of the leave. In contrast to the short-term leave where the legal claim is made that childbearing is a "disability", a long-term is for the purpose of raising the child and thus the "disability" theory does not apply.

3. Request for Short- or Long-term leave of absence

Teachers who are pregnant and who anticipate requesting a leave of absence should make their request at least three (3) months before the expected date of delivery so the Personnel Department has ample time to arrange to cover the teachers's assignment."

28/ Ray-O-Vac v. ILHR Department, 70 Wis. 2d 919, 236 N.W. 2d 209 (1975).

29/ See Intercity Petroleum Marketers, Inc., 173 NLRB No. 222, 70 LRRM 1036 (1968).

it has not refused to sign. In fact, it says that if signing is necessary, it has signed by having initialled exhibit 8.

The union's claim to have executed by having initialled exhibit 8 makes it tempting to end this case by finding exhibit 8 to be the final draft of the agreement, the union executed it, and then dismiss the employer's complaint. Two problems prevent that, however. First, exhibit 8 contains errors in the agreement in fact reached, as noted above herein. Second, the parties came to subsequent agreements modifying the exhibit 8 draft, and it is more consistent with the legislative policy to have a signed written agreement which embraces all the fruits of the bargaining.

Accordingly, we turn to the questions whether the employer asked the union to sign and, if it did, whether the union refused. The answer to both questions is yes.

The parties engaged in a sizable amount of correspondence concerning what should be in the written agreement. Although the union supplied only one draft on August 15, exhibit 12, the employer supplied four; exhibits 9, 10, 11 and 14, on March 18, June 20, June 30 and August 26. The correspondence concerning these various drafts impliedly contain the request to sign and as to exhibit 14 the request was explicit, and the correspondence explaining why such terms were not acceptable and offering alternative considerations rejects the other's draft and refuses to sign it. Sending a draft to the other party for its consideration, under the circumstances, was a request to sign. A recitation of the events, while cumbersome, should leave no doubt that the employer asked the union to sign various drafts, including exhibit 14, and that the union, by its responses or non-responses, refused to do so.

On March 18 Peterson sent exhibit 9 to Ennis, stating it was a draft copy of the agreement, saying "Please check it over," admitting it might not be wholly correct, and noting certain changes from exhibit 8 intended to conform to the parties' intent. On March 23 Peterson sent Ennis an added provision he said inadvertently had been omitted from the previous draft. On April 15 Peterson wrote another letter to Ennis proposing a change to correct another oversight, one apparently made by both parties. On May 16 Ennis wrote to Peterson criticizing some of his statements to the board, and urging Peterson to issue some letters "so that we can get on with our business," suggesting signing the agreement was to be held up pending those letters, a suggestion without persuasive support in the record.

On May 17 Ennis sent a letter enumerating various objections to Peterson's draft, exhibit 9. Among them were substitution of "his/her" for "his," etc.; end quote on teacher in recognition section; use of "REA" or "Association"; see "appendix" as opposed to see "page"; use of the phrase "director of personnel" as opposed to "assistant superintendent, staff personnel services" or "director of instruction"; grammar as to "a teacher" rather than "teachers" in Article XII, 2.c.4; the necessity of the word "a" in Article XII, 3.a; the "show" for "whose" and "therefore" for "thereafter" errors discussed herein; the need for underlining in Article XIV, 1; failure to insert a page number regarding teacher protection; senior high coaching ratios; omission of a line in Article XIV, 5; and changes in the salary schedule of roughly $1 per year for certain teachers.

On June 13 Peterson sent Ennis some suggestions dealing with two of the problems noted in Ennis' May 17 letter. On June 20 Peterson sent Ennis exhibit 10, asking him to check them over and saying that he would like to get the final copy finished by June 22 "so the parties

can execute the agreement and get it back to the printer." Also, on June 20 Peterson sent Ennis a draft of the maternity leave language, as well as the additional medical benefits.

On June 30 Peterson sent Ables exhibit 11, asking that he advise "whether the REA believes this copy accurately sets forth what the parties have agreed to? If you believe it does not, could you please write in the language that you believe accurately reflects the agreement, for our review?" Peterson wrote to Ables, rather than Ennis, because Ables had made some criticisms of Peterson's previous drafts. Ennis responded on July 30, suggesting that i's be dotted and t's crossed and to implement per the signatures of the union and the board and to "incorporate all of the changes suggested by the Association or explain in detailed written form, why you refused to do so." Peterson responded on July 29 with a ten page, detailed, exhaustive and meticulous explanation of why his drafts had made certain changes and why he could not agree to incorporate all of the union's changes. On August 15 Ennis sent Peterson his draft, exhibit 12, insisting that there be no departure from the March 16 agreement without mutual consent. Also on August 15 Ennis asked the board president to sign the contract and have the school superintendent sign it as well. 30/

On August 19 Peterson wrote Ennis saying the latter's August 15 material had led the employer to believe that the union "intended to avoid causing further delays in getting the new agreement signed," and asking for verification that it had received the material intended. Ennis responded with a succinct "yes" on August 22. Then followed some more conversations and letters trying to iron out the dispute over the $1 or so on the salary schedule.

On August 26 Peterson sent Ennis the employer's final draft, exhibit 14, with a cover letter saying, "Enclosed for REA's signature is a proposed 1976-1979 Professional Agreement," and explaining what appeared to be the remaining differences between the parties. Then followed the August 29 conversation in which Ennis said there would be a "signed" agreement but for the comma dispute, adding that it would be several days before the union would respond. On August 31 Ennis wrote to the board president:

> "Bouvier's Law Dictionary . . . p. 1004 states:
>
> "'Punctuation may be considered in determining the meaning of a contract, when it is doubtful. 138 U.S. 1.'
>
> "The document transmitted to the Racine Education Association on Friday, August 26, is inaccurate. The true version of the settlement is that as transmitted to you on August 15, 1977.
>
> "Before you waste further time, energies, or efforts, I suggest that you search the contractual agreements of March 16 again -- and your conscience."

On September 1 Peterson wrote to Ennis stating his belief that exhibit 14 was correct and that "REA should have signed it. We again request that REA signs the copy already signed by the District."

30/ The record supports the employer's view that the proper officials to execute the contract on behalf of the employer are the president, at the time Michelle Olley, and the clerk, then Bernice Thomsen, not the school superintendent. Tr. 10.21, p. 71; 11/15, pp. 138-140, 162-166; 11/16, p. 8.

The foregoing shows that the employer has requested that the union execute various drafts, and specifically exhibit 14, and that the union has refused to do so.

The union continues to refuse to do so. This is evidenced by its commencement of its own action to force the employer to execute exhibit 23 as well as by specific refusals to specific requests made and exchanged throughout the hearing in this matter.

Allowing time to sign

The employer commenced this action September 6. Its exhibit 14 was delivered August 26. The union has contended that the employer cannot bring such an action after so recent a submission.

No law has been cited supporting the union's position, and the examiner knows of none. Ennis' statement of August 29 that the difference was down to the commas, a difference which had plagued the parties since at least May 17, if not long before, together with his statement that it would be several days before the union responded, and the fact of the length of time involved since March 16 in resolving numerous other differences, warranted the employer in believing that further delays in asserting its rights would be to no avail. This conclusion is reinforced by the fact that during the hearing the union continued to refuse to sign the contract, and does so to this day.

Evidentiary rulings

During the hearing the examiner received certain of the employer's exhibits and refused to receive others under a tentative ruling as to admissibility. The employer argues in its brief that the exclusions were error. Prior to the date for the union's brief, the examiner asked that the union respond to the employer's position, state why the exhibits should not be received and, if received, what evidence the union felt it would have to produce to rebut their effect, if any. The union did not respond. There being no objection, all exhibits are received except those 31/ which purport to record statements made by mediator Torosian. These will not be received on the grounds of public policy requiring that mediators' statements during mediation not become the subject of public hearing.

Remedy

The remedial order dismisses the complaint against the employer. It orders the union to sign the August 26 draft.

Although the order requires the union to sign a draft which contains errors of grammar, numbering, typing, etc., errors going to form and not the substantive rights of the parties, it would not be inconsistent with this order for the employer to offer to correct those errors of form consistent with the discussion in this memorandum Nor would it be inconsistent with this order if the parties agree that in printing the contract those errors be corrected consistent with this memorandum.

In specifying who should sign on behalf of the union, reliance has been placed on the union's signed tender in exhibit 23. An

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31/ To-wit: ex. 15, pp. 46, 57, 58.

alternative signing is allowed in the event exhibit 23 proves to be incorrect in this respect or for other contingencies concerning possible changes in the union's by-laws which are not apparent on this record.

Dated at Madison, Wisconsin this 23rd day of February, 1978.

By 
Charles D. Hoornstra, Examiner