

MEMORANDUM ACCOMPANYING ORDER
CLARIFYING FINAL OFFER

On the evening of July 19th the parties exchanged their final offers in the presence of the Commission's Investigator, Stanley L. Michelstetter. At that time the County had made a proposal to create a special study committee to deal with the problem of rotation of days off and the parties had discussed various aspects of said proposal. During the initial exchange of tentative final offers the parties made proposals and counter proposals which would have created such a committee. At 8:50 p.m. the Union made the following counter proposal, which was ultimately incorporated into its final offer which was submitted at 9:10 p.m.:

1. Article IX - Hours of Work.

Second sentence:

"This Special Committee shall study and attempt to formulate a system of rotation of days off . . ."

2. Article XXVII - General Provisions.

Second Sentence:

"It shall be the purpose of this Committee to study and attempt to plan a system of rotation of days off for these departments that are continuous seven day operations."

Insert after the 4th sentence of County Proposal

"It is understood that if the Special Committee cannot reach agreement on any of the matters under consideration, that the provisions of the 1977-1978 Labor Agreement would control."

It is undisputed that this proposal was based on the County's latest offer which then still included a proposal to create the study Committee. However, 20 minutes after the Union submitted this offer, the County submitted its final offer at 9:30 p.m., which deleted 1/ its proposal on the study committee. In addition the County made a proposal to delete the existing contract language which makes reference to rotation of schedules for LPNs (Article IX, 1st paragraph) and to replace it with the following paragraph which constituted its entire proposal on the subject:

ARTICLE IX - Hours of Work.

Delete the present first paragraph of this Article and replace with the following:

The work week shall normally be Monday through Friday except for those continuous operation departments such as Laundry, maintenance, housekeeping, nursing (LPN's and nursing assistants), ward clerks, and food service. Continuous operation department schedules shall provide for at least every third weekend off.

1/ In fact the County's offer contained a copy of the latest version of its study Committee proposal which was "Xed" out to reflect the deletion.

County's Position:

The County's position is clearly set out in a letter from its Labor Relations Director, Alfred C. Gatzke, to Mediator-Arbitrator Seitz dated December 27, 1979 which reads in relevant part as follows:

This is in reference to your further questions concerning Racine County's view point as to what constituted Local 310's Final Offer at the time the WERC Investigation was closed in this matter on July 19, 1979. It was the County's clear understanding that the document entitled "Tentative Final Offer of 310", as set forth on pages 1 and 2 of the County's Exhibit, was the Union's Final Offer. That document makes no reference to the question of rotation.

The document entitled "Counter Proposals", which the Union contends was a part of their Final Offer, proposes to amend provisions of the initial Personnel Committee proposal dated July 19, 1979. The establishment of a Special Committee to study and plan a system of rotation of days off for continuous seven day operation departments was incorporated in that initial Personnel Committee proposal. The WERC Investigator, Mr. Michelstetter, attempted mediation of the dispute that evening of July 19th. During the course of the mediation effort, there were some counter proposals made by the parties. However, following the "Counter Proposals" in questions made by the Union, the Personnel Committee withdrew their offer to have a Special Committee study and plan a rotation of days off system.

The provision in the Union Counter Proposals that caused the Personnel Committee to withdraw their Special Committee offer was the last proposal in that document. That provision stated "It is understood that if the Special Committee cannot reach agreement on any of the matters under consideration, that the provisions of the 1977-1978 Labor Agreement would control." The Personnel Committee viewed that proposal as a possible scuttling of a rotation of days off system. Therefore, the Committee withdrew the Special Committee proposal and inserted the proposed language amendment which is set forth in Item 1, Article IX - Hours of Work of the Personnel Committee's Final Offer.

All of the provisions in the Union Counter Proposals propose to amend the initial Personnel Committee proposal to establish the said Special Committee. Since the Personnel Committee withdrew that proposal in their Final Offer, it is difficult to understand how the Union Counter Proposals could have the effect of proposing to amend something that isn't there.

Therefore, as to your question concerning the rotation of days off issue, Racine County does not believe the Union addressed that issue in their Final Offer. Further, as I review the time periods of the proposals on the evening of July 19th, the document entitled Counter Proposals (Union) has a notation of 9:10 p.m. The Personnel Committee Final Offer, which withdrew the Special Committee proposal, has a notation of 9:30 p.m. on it. There is nothing to indicate any further proposals made by the Union on the question of rotation following the Personnel Committee's Certified Final Offer.

Union's Position:

The Union's position is likewise clearly set out in a letter from its attorney, Robert K. Weber, to Mediator-Arbitrator Seitz dated December 10, 1979 and in a letter dated December 28, 1979, from Weber to Seitz replying to Gatzke's letter of December 27, 1979. Those two letters read in relevant part as follows:

It is the position of the Union that its final offer on July 19, 1979 included the proposal of a labor management committee, an idea originally advanced by the County, but withdrawn by the County at the eleventh hour when the Union counter-proposed the replacement of the second sentence of Article XXVII of the County's proposed language (commencing at p. 5 of the County's exhibit).

The hour was late, an impasse had clearly been reached and Mr. Stan Michelstetter wished to take the final offers of both parties back to Milwaukee with him. Therefore, he suggested that rather than re-write the entire provision, that I merely initial the section of the County proposal that the Union objected to, and submit the proposed change. The County withdrew its proposal on the formulation of the Committee entirely, the Union never did.

. . .

It is the position of the Union that Mr. Michelstetter took with him on July 19, 1979, a two-page document constituting the Union's final offer. One page contained four circled proposals -- the other, an amendment to the Special Union-Management Committee proposed initially propounded by the County.

This position is borne out by the documents themselves. I believe you have the two-page list of Union offers I referred to above. On the sheet containing the Committee language, I would respectfully direct your attention to the words of Mr. Michelstetter "with this added to 8:15 p.m. proposal this constitutes union's 9:10 p.m. tentative final offer." That is signed by myself, Mr. Lyndell Hayes of the Union, and initialled "W.M." by Mr. William Moore, chairman of the Racine County Board Personnel Committee. On page six of the County's exhibit is a bracketed sentence with my initials and a directive to look to the replacement sentence.

. . .

It is the Union's position that part of its final offer includes the following provision:

There shall be a Special Union-Management Committee established comprised of three Representatives of the Union and three Representatives of Management. It shall be the purpose of this Committee to study and attempt to plan a system of rotation of days off for these departments that are continuous seven day operations. This Committee shall also consider and attempt to resolve matters of past practice that have been raised during negotiations. It is understood that if the Special Committee cannot reach agreement on any of the matters under consideration, that the provisions of the 1977-1978 Labor Agreement would control. Any agreements arrived

at by this Special Committee that conflict with provisions of this contract shall supercede those provisions but must be evidenced by a written agreement duly executed by a majority of the members of the special committee.

(It is recommended that the following items that are still unresolved in the Personnel Committee proposal be taken up by this Special Committee:

1. Article IX - Hours of Work - Committee proposal, Item 5(a).
2. Article X - Overtime - Committee proposal, Item 6.
3. Article XIX - Benefits for Regular Part-Time Employees - Committee proposal, Item 11(b).
4. Additional Points Proposed by the Administrator.)

Mr. Gatzke very simply, and accurately, on page 2 of his letter, notes that the Personnel Committee for the County did not withdraw its proposal of the Special Committee until after the Union had already submitted its final offer, which contained the amendment Mr. Gatzke mentions on page 1 of his letter. By that time, 9:30 p.m., Mr. Michelstetter already had the Union's final offer of 9:10 p.m.

. . . .

At the risk of belaboring the point, Mr. Gatzke's argument is summarized on page 2 of his letter as follows:

All of the provisions in the Union Counter Proposals propose to amend the initial Personnel Committee proposal to establish the said Special Committee. Since the Personnel Committee withdrew that proposal in their Final Offer, it is difficult to understand how the Union Counter Proposals could have the effect of proposing to amend something that isn't there.

Whatever efficacy this argument may have had if the County had withdrawn its Committee proposal prior to 9:10 p.m. (the time the Union submitted its final offer containing special committee language with amendments), it loses in the face of Mr. Gatzke's own assertions that the County submitted its own final offer subsequent to the Union. Mr. Gatzke seems to be arguing that the County had the ability to somehow affect the Union's final offer by subsequently withdrawing a portion of its own tentative final offer. Such an argument is confusing to me at the very least, and I do not believe it is valid.

Discussion:

There is no dispute over the language of the proposal to create a study committee--but rather the sole dispute is over the abstract question of whether one party's final offer can properly include language which is neither included in the wording of the final offer in question or in the final offer of the other party. Stated differently, and as it applies here, the question is whether the Union's final offer can include language which constitutes a counter-proposal to language proposed by the County

and is referenced to the County's proposal once the County has withdrawn its proposal regarding same. Does the County's withdrawal of its special committee proposal have the effect of negating the Union's counter-proposal to said proposal. We think not.

Clearly each party is responsible and in control of the content of its final offer. Here, once the County withdrew its special committee proposal the Union had an opportunity to amend its final offer by withdrawing its counter-proposal regarding same, but it chose not to do so. Since the Union did not drop its counter-proposal from its final offer, the Union, clearly, intended to have the creation of a special committee a part of its final offer. The confusion arises because the Union's final offer regarding the committee is referenced to the County's committee proposal which was withdrawn.

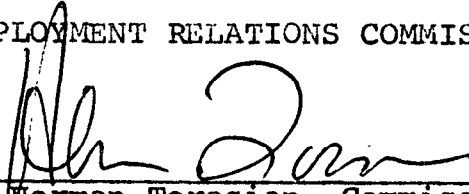
While the practice of incorporation by reference, especially in the manner that it was done in this case, is less desirable in our view than the practice of making such language a physical attachment to the final offer, we conclude that it is not fatal to the legal sufficiency of a final offer for one party to utilize such a drafting technique, especially in view of the parties' knowledge of the exact wording.


We, therefore, find that the Union's final offer properly includes a proposal establishing a special study committee to study a system of rotation of days off for those departments that are continuous seven day operations. In doing so it is our understanding that the actual language of that proposal is accurately reflected in the amended version of the County's original proposal set out in Mr. Weber's letter of December 10, 1979, and quoted above. 2/

Dated at Madison, Wisconsin this 8th day of February, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Commissioner


Gary L. Covelli, Commissioner

2/ It is also our understanding that the Union's final offer properly includes a proposal to amend slightly the second sentence of the County's proposal to add a new paragraph to Article IX - Hours of Work, which also made reference to the study committee. Its proposal in that regard would substitute the words "This Special Committee shall study and attempt to formulate . . ." for the words "This Special Committee shall study and plan . . ."