BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 212, AFT, WFT, AFL-CIO AND LOCAL 587, AFSCME, AFL-CIO, an affiliate of MILWAUKEE DISTRICT COUNCIL 48	Case 299 No. 42588 MA-5741
and	
MILWAUKEE AREA VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT	

Appearances:

Podell, Ugent and Cross, S.C., 207 East Michigan, Suite 315, Milwaukee, Wiscon 53233, appearing on behalf of the Unions.

Quarles and Brady, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, by Mr. David B. Kern, appearing on behalf of District.

ARBITRATION AWARD

Local 587, AFSCME, AFL-CIO, an affiliate of Milwaukee District Council 48 and Local 212, AFT, WFT, AFL-CIO, hereinafter referred to as the Unions, each is a party to a collective bargaining agreement with the Milwaukee Area Vocational, Technical and Adult Education District, hereinafter MATC, the Employer or the District, which provides for the final and binding arbitration of grievances arising thereunder. The Union, with the concurrence of the District, requested the Wisconsin Employment Relations Commission to appoint an arbitrator to hear and decide the instant dispute. The Commission appointed Coleen A. Burns, a member of its staff, to act as Arbitrator. Hearing in the matter was held on March 14, 1990 in Milwaukee, Wisconsin. The hearing was not transcribed and the record was closed on May 1, 1990, upon receipt of post-hearing briefs.

ISSUE:

The parties have stipulated to the following statement of the issue:

Did MATC violate the Parking Agreement when it did not negotiate the allocation of parking spaces in the 8th and State visitor lot?

BACKGROUND:

On March 17, 1972, the Unions and the District entered into the following Parking Agreement:

PARKING AGREEMENT

This Agreement made this 17th day of March, 1972, among DISTRICT 9 AREA BOARD OF VTAE (hereinafter referred to as the "Board"), LOCAL 212, AFT, WFT, AFL-CIO, and LOCAL 587, AFL-CIO.

A. Except as modified by this Agreement, current practices, regulations and charges for parking shall be continued in effect.

B. Parking spaces in parking areas at the Milwaukee Campus of MATC will be allocated in accordance with the following principles:

1. A parking pool (hereinafter called the Pool) shall be established consisting of all employees of the Board whose primary place of employment is the Milwaukee Campus of MATC, excluding therefrom those employees who are classified as administrative or managerial employees.

2. All employees in the Pool will be ranked on the basis of seniority based upon the original date of hire, provided that for any employee who was rehired after the termination of an earlier period of employment, the last date of hire shall be considered the seniority date.

3. The Board shall make available to employees in the Pool ninety-seven (97) spaces in the lower level of the "C" Building, nineteen (19) spaces at the lot on 7th and State Streets, thirty-two (32) spaces in the

lot on 6th and Highland Streets, sixteen (16) spaces in the Crichton lot, and such number of spaces in the Freeway lot as are required to meet all employee parking needs.

4. Regular full-time employees in the Pool (defined as employees working 50% or more of a regular schedule in their respective areas of employment) shall be given the opportunity in order of seniority to select their preference as to parking area. Selection shall be by area only and particular parking spaces may not be selected. Following such initial selection an employee may apply for transfer to a different parking area. Such transfers shall be permitted only at the beginning of a school year and only if (a) the employee has applied in writing prior to the preceding April 1, and (b) the employee is entitled to preference in the requested area on the basis of seniority.

5. If an employee fails to exercise such right of selection, or having made a selection, wishes to change that selection, such employee shall not be permitted to make a new selection until a vacancy occurs in an area which such employee would be entitled to select.

6. If any employee in the Pool shall suffer from a physical handicap, either temporary or permanent, which reasonably justifies the need for priority in selection of a parking space, such employee shall be entitled to claim superseniority in the selection of a parking space during the continuance of such disability, even if such claim requires the bumping of other employees to other locations.

7. If any student requires priority in the selection of a parking space because of physical disability, the parties shall provide an equitable allocation of spaces for such purpose to be selected from among those spaces assigned to the Pool and those spaces assigned to management in proportion to the respective number of spaces utilized by each such group in the particular area involved, provided, however, that not more than ten (10) spaces shall be allotted to handicapped students on a priority basis unless otherwise agreed among the parties.

8. In the event one or more parking spaces in any of the areas presently utilized for parking purposes at the Milwaukee Campus of MATC (including areas utilized for visitor parking and other areas presently in use but not listed above) shall become unavailable for parking because of additional construction or other changed circumstances, the parties shall renegotiate the allocation of parking spaces to achieve an equitable allocation in the light of the changed circumstances. The parties shall similarly renegotiate in the event of any addition of available parking spaces, either in the present locations or any other location available for use at the Milwaukee Campus.

9. All other parking spaces not designated for use by the Pool shall be assigned in the sole discretion of the Board, provided, however, that the Board shall not assign any such spaces on a priority basis to any member of the Pool except as permitted by this paragraph. It is recognized that the Board may wish to assign priority parking to certain employees who would otherwise be members of the Pool where the availability of priority parking will reduce travel time, facilitate movement of materials and equipment and otherwise facilitate the performance of their duties by employees whose assignments require the use of their automobiles during the working schedule. It is the intention of the parties that any such priority shall be granted only when justified by bona fide job requirements and that such priority parking shall not be assigned so as to discriminate unfairly among members of the Pool. No such priority parking shall be permitted unless justifiable need therefor exists at least three (3) days per week, or to meet emergency requirements. Any dispute as to the justification for any assignment of priority parking to an employee in

the Pool shall be subject to final and binding arbitration before a staff member of the WERC. It is understood that the Board has no obligation to provide priority parking to any employee in the Pool and no such employee shall be entitled to claim any such priority, whether or not justified by job requirements.

10. The foregoing allocation of parking spaces shall apply to the regular day school hours during the regular school year. Allocation of parking during evening hours shall continue to be governed by existing rules and regulations. Allocation of parking spaces for the summer school period shall be governed by the foregoing provisions of this Agreement, provided, however, that a separate assignment of spaces will be made for the summer school period following the same principles of seniority and the other procedures established by this Agreement. Assignments for the summer school period shall terminate at the end of the summer school period and the regular procedures will govern the assignments for the ensuing school year.

C. This Agreement shall be implemented as soon as reasonably possible and in any event, parking spaces shall be assigned for September 1972 in accordance with this Agreement. This Agreement shall terminate June 30, 1973 unless extended by mutual agreement of the parties.

DISTRICT 9 BOARD LOCAL 212, AFT, WFT LOCAL 587, AFSCME, VTAEAFL-CIO AFL-CIO

(Signatures Omitted)

The Agreement has been renewed and incorporated in each of the Unions' successor collective bargaining agreements.

Since the establishment of the Parking Agreement, the number of employes provided parking under the Agreement has increased by several hundred. In 1982, student parking was entirely eliminated at the District. 1/

The T-Building lot and the Upper C lot were in existence at the time of the execution of the Parking Agreement. The parking spaces in these lots have never been available to the Pool. In 1986, the District removed a mobile classroom which had been parked in the T Building parking lot. The removal opened up additional parking spaces, which spaces were designated Visitor Parking spaces by the District. The District never negotiated with the Unions over the addition of those spaces and the Unions never grieved that failure to negotiate. In 1989, additional management employe parking spaces were added to the Upper C Lot. The District did not negotiate with either of the Unions concerning this assignment and the Unions never filed a grievance over that failure to negotiate.

In 1989, the District constructed a new parking lot at 8th and State Street on the Milwaukee Campus. The Unions' representatives received copies of the following memos which were issued by the District:

SUBJECT: New Parking Lot - 8th and State Street

DATE:May 9, 1989

Around June 1, 1989, the new "Eighth Street parking lot" will be completed and turned over to MATC. At this point, the asphalt must cure and landscaping, electrical and some general contracting work still remains to be done.

We are working out specific details for use and control of this lot. We will keep you informed as specific procedures are developed.

For now, the use and control of the lot will be:

1.Exclusively for visitors. NO staff parking. NO parking for conferences.

2.A security aid will monitor the lot from about 7:00 a.m. until 4:00 p.m.

1/ At the time of the execution of the agreement existing parking areas included visitor parking, student parking, Pool parking and administrative/ management staff parking.

3.10/36 Friends visitors/volunteers will use some of the lot.

4.Visitors for Executive Committee members will use the lot.

5.Short-term student/potential student parking - for visitors to the student center.

SUBJECT: New Parking Lot - 8th and State Street

DATE:May 18, 1989

We will open up the new visitor parking lot on Monday, May 22nd. The lot will be available for Executive Committee member visitors. We will control the lot with a student monitor from 7:00 a.m. until 4:00 p.m. When visitors enter the lot, they will be asked who they are visiting and will be given a letter/form requesting a signature from an executive committee member. This should provide adequate control with the least inconvenience.

The lot will also be used for visitor/volunteers in 10/36 and for short-term student/potential student parking.

On May 23, 1989, District Representative Paul Vance issued the following to Union Representatives:

RE:PARKING AGREEMENT

As you are probably aware, the parking lot on the corner of Eighth and State Streets, behind the new Student Center, is now open for use. The District recognizes the terms of the 1972 parking agreement and has reviewed its application in reference to the additional parking.

Although the parking agreement states that the parties shall renegotiate additional available parking spaces, it is also clear that the Board may assign parking that is not designated for use by the Pool.

Since it is the intent of the Board to reserve all available parking in the Eighth and State Streets lot for hourly student parking and for visitors to the campus, it is the District's position that the additional spaces are not subject to negotiation.

If, at a future date, it is determined that any of the spaces will be utilized for assigned staff parking, you will be contacted immediately for purposes of negotiating the allocation of the additional available spaces.

Thereafter, the Unions filed grievances alleging that the District violated the Parking Agreement when it failed to negotiate over the parking spaces in the Eighth and State Street lot.

POSITIONS OF THE PARTIES:

UNION

The first sentence of Paragraph Eight of the Parking Agreement refers to the situation in which parking spaces become unavailable due to construction or other changes. The second sentence parallels the first and refers to the situation in which additional spaces become available. The term "available" does not refer to a unilateral designation by MATC that a lot is unavailable or available for use by the pool. As witnesses involved in drafting the Agreement testified, no such meaning was intended.

Paragraph Nine of the Parking Agreement, which paragraph is relied upon by the District, refers to the assignment of space once negotiations have taken place and resulted in some spaces being allocated to the pool and some spaces not being allocated to the pool. Those spaces not allocated to the pool can be assigned in MATC's discretion. To accept the District's argument concerning the construction of Paragraph Nine would be to contravene the purpose of the whole agreement. Taken to its extreme, the District would have the power to designate any lot as not available to the pool without negotiating with the Union and MATC could cancel all employe parking at any time. Clearly, this is not what the parties intended. Rather, the parties clearly intended that the District's discretion to assign parking spaces was to be limited by the Agreement.

It is axiomatic that when there is a conflict between specific language and general language in an agreement the specific language will govern. The language relied upon by the Unions deals directly and specifically with the issue at hand. The language relied upon by the District does not specifically address the issue at hand and therefore should not control. The language relied upon by the Unions clearly and unambiguously requires the negotiation of the parking spaces in dispute.

The District's notice to the Unions regarding the lot in question (Employer Exhibit 2) uses the term "available" but not the way that the District is claiming the Arbitrator should construe the term. The memo states "since it is the intent of the Board to reserve all available parking in the Eighth and State lot for hourly student parking and visitors to the campus, it is the District's position that the additional spaces are not subject to negotiation." By the definition being advocated by the District herein, those would not be available spaces.

The District has not established a controlling past practice in support of its position. Of the two examples cited by the District, one involved the removal of a temporary classroom trailer from the Tech lot and the second involved reassigned spaces from the auto repair shop in the Upper C lot which resulted in a few additional parking spaces. Both of these parking lots were designated as administrative (not pool) lots under the original Agreement and have remained so. The changes in these lots were simply reassignments of spaces not designated for pool use. Assignment of such spaces could be considered as within the Board's discretion.

There is no evidence that the Unions were aware of those changes and concurred in the way they were carried out. Thus, the mutuality of agreement necessary to demonstrate a binding past practice is not present.

Even if the Arbitrator were to determine that these two instances constitute a past practice, such a practice is not sufficient to overcome the clear contract language. Paragraph Eight expressly sets forth the requirement that the allocation of parking space be negotiated with the Unions whenever additional spaces become available as in the instant situation. The Arbitrator does not have authority to go beyond the language of the Agreement when the language is clear and explicit. Nor would the Unions' failure to file grievances overcome the clear language of the Agreement.

The District was obligated to renegotiate the allocation of parking spaces with the Unions when it added a new parking lot at Eighth and State Street. The District should be ordered to cease and desist from letting the lot to the public and to negotiate immediately with the two Unions.

DISTRICT

The Unions' position ignores the specific language of Paragraph Eight of the Parking Agreement and more importantly, ignores the District's discretion as recognized in Paragraph Nine. Paragraph Eight states that the District must negotiate whenever "available" parking spaces arise. In the present case, the parking spaces are not "available" to the pool, and, therefore, could be assigned in the sole discretion of the Board.

Although the Unions assert that the District must negotiate over any additional space, they acknowledge that the District added spaces in 1986 and again in 1989 and that the Unions never claimed that the District had a duty to negotiate over those spaces. Nowhere does it say that newly created lots would be subject to negotiation while expansions of existing non-pool lots will not be. The distinctions which allegedly exist in the Unions' minds simply are not part of the Agreement.

The Agreement means precisely what is says i.e., "if space is available" for the pool, it is subject to negotiations; spaces not designated for use by the pool shall be assigned in the sole discretion of the Board. Practices of the parties, though infrequent, confirm this reasonable interpretation of the language of the Agreement and, therefore, lends evidentiary support to the District's position herein.

It is undisputed that the Eighth and State Street lot is not available to any employes, staff or management. It is therefore undisputed that the lot is not "available" to the pool under Paragraph Eight. In light of the language of Paragraph Nine, reserving to the District the discretion to assign space not designated for use by the pool, and in the context of the practices which have occurred over the years in which the District has not negotiated space not available to the pool, it is clear that the District had no obligation to negotiate the Eighth and State Street visitor lot.

Contrary to the argument of the Unions, adoption of the District's position would not eviscerate the entire Parking Agreement. The District is clearly obligated to provide parking spaces to all District employes who desire them, which it has done. The "taking away" of pool spaces is not at issue. Rather, at issue is the location of the spaces. MATC does continue to provide parking for all MATC employes who desire parking.

The Unions completely ignore unrebutted evidence presented at the hearing that the space which opened up in the T Building lot should have been known to Union representatives since they are occasionally allowed to park in that lot in their capacity as visitors to the campus. Significantly, the Unions did not contradict this evidence and no Union representatives testified that he or she was unaware of the removal of the classroom and the addition of parking spaces in that lot.

The District does not urge the Arbitrator to utilize past practice to contravene specific terms of the Agreement. Rather, the District points to these past practices as further evidence corroborating its reasonable, literal interpretation of the Agreement, which interpretation harmonizes Paragraphs Eight and Nine. In those past instances, as in this case, there was no duty to bargain because the space which was added by the District was not "available" to the pool. That is why the Unions did not grieve those situations and that is why their grievance here has no merit.

In the unlikely event that the Arbitrator rules against the District, the Unions' request that the District be ordered to cease and desist from making use of the Eighth and State visitor lot must clearly be rejected by the Arbitrator. Such an order would be punitive and would, therefore, be beyond the Arbitrator's authority. The appropriate remedy for any violation which would be found here would be to order the District to negotiate with the Unions and to maintain status quo pending the outcome of negotiations. The District respectfully requests that the grievances be denied in their entirety.

DISCUSSION:

The parties executed the Parking Agreement on March 17, 1972. Thereafter, the Parking Agreement was incorporated into successor collective bargaining agreements, without any change in the language of the Parking Agreement. The question to be determined herein is whether the District violated the Parking Agreement when it did not negotiate the allocation of parking spaces in the lot at Eighth and State streets.

Paragraph Three of the Parking Agreement expressly identifies parking spaces which are to be made available to employes in the Pool. Applying the principle of construction known as "expressio unius est exclusio alterius," one may reasonably infer that all other parking spaces are not available to employes in the Pool. However, Paragraph Three does not exist in a vacuum and must be construed in a manner which is consistent with the other provisions of the Parking Agreement.

As a review of Paragraph Eight reveals, the parties gave consideration to the fact that future events could have an impact upon the availability of parking spaces. The first sentence of Paragraph Eight recognizes that existing parking spaces could become "unavailable" and the second sentence recognizes that additional parking spaces could become "available." Upon the occurrence of either event, the parties are required to renegotiate the allocation of parking spaces.

The first sentence of Paragraph Eight expressly references "parking spaces in any of the areas presently utilized for parking purposes at the Milwaukee Campus (including areas utilized for visitor parking and other areas presently in use but not listed above). The areas listed above, i.e., in Paragraph Three, are areas designated for use by the Pool. Given the reference to parking areas designated for use by the Pool and the reference to areas not designated for use by the Pool, one must conclude that the parties intended the negotiation requirement set forth in Paragraph Eight to be applicable to both types of parking areas.

While the Employer would have the Arbitrator construe the term "available", as that term is used in the second sentence of Paragraph Eight, to mean, "designated as available by the District," such a meaning is not expressed in the plain language of the Parking Agreement, nor is it reasonable to imply such a meaning. In the first sentence of Paragraph Eight, the parties have expressly recognized that parking may become "unavailable" "because of additional construction or other changed circumstances". While the parties have not identified all of the "changed circumstances" which could render parking spaces unavailable, the use of the specific example of "additional construction" indicates that the parties considered "unavailable" to mean physically unavailable. The second sentence of Paragraph Eight does not provide a similar example to clarify the meaning of "available". The lack of such an example persuades the undersigned that the parties intended "available" to be construed in the same manner as "unavailable". Accordingly, the most reasonable construction of the word "available", as that word is used in the second sentence of Paragraph Eight, is that it means physically available.

The construction of a new parking lot at Eighth and State Street caused additional parking spaces to become physically available for use at the Milwaukee Campus. Under the provisions of Paragraph Eight, this "addition of available parking spaces" triggered a duty to renegotiate the allocation of parking spaces.

Paragraph Nine does provide the District with rights to assign "all other parking spaces not designated for use by the Pool." Given the provisions of Paragraph Three, allocating parking spaces in existence at the time that the parties executed the Agreement, and the provisions of Paragraph Eight, providing a procedure for allocating parking spaces in the event that the existing spaces became physically unavailable or additional spaces became physically available, it is evident that the District's Paragraph Nine right to assign parking spaces is limited to those parking spaces which have not been designated for use by the Pool pursuant to the provisions of the Parking Agreement. The District cannot assert Paragraph Nine rights over the parking spaces of the Eighth and State lot, unless and until, the negotiation procedure set forth in Paragraph Eight results in the designation that these spaces are not available for use by the Pool.

In summary, the plain language of the Parking Agreement warrants the conclusion that the District violated the Parking Agreement when it did not negotiate the allocation of parking spaces in the Eighth and State visitor lot. Neither the evidence of bargaining history, nor the evidence of past practice, demonstrates that the parties intended the Parking Agreement to be given any meaning other than that reflected by the plain language of the Agreement.

It is undisputed that the T-Building lot and the Upper C lot were in existence at the time of the execution of the Parking Agreement. The parties' failure to designate these lots as available for the Pool in Paragraph Three of the Parking Agreement demonstrates that the parties were in agreement that the T-Building lot and the Upper C lot were not designated for use by the Pool. Under the provisions of Paragraph Nine, the parking spaces contained in the T-Building lot and the Upper C lot could be assigned in the sole discretion of the MATC Board subject to the proviso that the Board "shall not assign any such spaces on a priority basis to any member of the Pool except as permitted by this paragraph."

If construction to the T-Building lot or the Upper C lot or other changed circumstances, had added to the area available for parking, then the plain language of Paragraph Eight would require renegotiation of the allocation of parking spaces. However, if the changes in the T-Building lot and the Upper C lot were not due to an expansion in the area available for parking, but rather involved changes in the use of existing parking area, then the language of Paragraph Nine would govern.

In 1986, the District removed a mobile classroom which had been parked in the T-Building lot. The District converted the area which had been used by the mobile classroom to visitor parking spaces. Since the changes in the T-Building lot were due to changes in the use of the parking area which existed at the time of the execution of the agreement, rather than due to an expansion of such area, Paragraph Nine provided the District with the unilateral right to reassign the parking spaces occupied by the mobile classroom to visitor parking.

The Union argues that the changes in the Upper C lot also involved a change in the use of existing space, i.e., that space assigned to the auto shop was reassigned to visitor parking. While the record indicates that there were changes in the Upper C lot which resulted in more parking for management employes, the record fails to demonstrate that the additional management employe parking had been previously assigned to the auto shop. Indeed, the record is silent on the issue of whether the changes in the Upper C lot in 1989 were due to construction, or other changed circumstances, which expanded the area of this lot, or were due to changes in the use of an area which existed at the time of the execution of the agreement. Accordingly, the undersigned is unable to determine whether the changes in the Upper C lot gave rise to a duty to renegotiate pursuant to Paragraph Eight or were within the sole discretion of the Board pursuant to Paragraph Nine of the Parking Agreement.

Contrary to the argument of the District, the evidence of the "past practice" with respect to the changes in the T-Building lot and the Upper C lot does not persuade the undersigned that the Union has recognized that the District has the unilateral right to designate the use of the parking spaces in the Eighth and State lot. Nor does it demonstrate that the parties mutually intended the Parking Agreement to be given any meaning other than that applied herein.

In summary, the District did violate the provisions of Paragraph Eight of the Parking Agreement when it did not negotiate the allocation of spaces at the Eighth and State lot as requested by the Unions. While the Unions argue that the remedy for this violation should include a cease and desist order to stop using the parking spaces at the Eighth and State street lot, the undersigned is not persuaded that such a remedy is appropriate herein.

It is generally recognized that a cease and desist order is an extraordinary remedy, to be issued only in circumstances of particularly eggregious conduct, such as repeated intentional violations of the collective bargaining agreement or where continued conduct would cause irreparable injury. In the present case, the Union does not claim and the record does not demonstrate that the District has engaged in repeated intentional violations of

any collective bargaining agreement. Nor are the Unions irreparably injured by the District's continued use of the lot for visitor parking. The District continues to provide parking for all Pool employes in the same manner as before the construction of the new lot. Under the circumstances presented herein, the appropriate remedy for the District's contract violation is an order to negotiate pursuant to the provisions of Paragraph Eight of the Parking Agreement.

Based upon the above and foregoing, as well as the record as a whole, the undersigned issues the following

AWARD

1. MATC did violate the Parking Agreement when it did not negotiate the allocation of parking spaces in the Eighth and State visitor lot.

2. MATC is to immediately negotiate the allocation of parking spaces in the Eighth and State visitor lot with the Unions pursuant to the provisions of Paragraph Eight of the Parking Agreement.

Dated at Madison, Wisconsin this 30th day of July, 1990.

By _____
Coleen A. Burns, Arbitrator