STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FENNIMORE EDUCATION ASSOCIATION, WEA, NEA, Complainant, vs. JOINT SCHOOL DISTRICT NO. 5; CITY OF FENNIMORE, ET AL., and BOARD OF EDUCATION OF JOINT SCHOOL DISTRICT NO. 5, CITY OF FENNIMORE, ET AL., Respondents.	Case II No. 16787 MP-238 Decision No. 11865-A

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. Bruce M. Davey, appearing on behalf of the Complainant.

Kramer, Nelson and Azim, Attorneys at Law, by Mr. John N. Kramer and Susan A. Wiesner, Attorney at Law, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter; and the Commission having appointed George R. Fleischli, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(5) of the Wisconsin Statutes and hearing on said complaint having been held at Fennimore, Wisconsin on June 19 and July 19, 1973 before the Examiner; and the Examiner having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Complainant, Fennimore Education Association, WEA, NEA, hereinafter referred to as the Complainant, is a labor organization within the meaning of Section 111.70(1)(j) of the Wisconsin Statutes and the voluntarily recognized bargaining representative of all certificated teaching personnel employed by Joint School District No. 5, City of Fennimore, et al. for purposes of collective bargaining on wages, hours and conditions of employment.

2. That Joint School District No. 5, City of Fennimore, et al., hereinafter referred to as the Respondent District, is a public school district organized under the laws of the State of Wisconsin and a Municipal Employer within the meaning of Section 111.70(1)(a) of the Municipal Employment Relations Act.

3. That the Board of Education of Joint School District No. 5, City of Fennimore, et al., hereinafter referred to as the Respondent Board, is a public body charged under the laws of Wisconsin with the management, supervision and control of the Respondent District and its affairs.

4. That for several years prior to the 1972-1973 school year the Complainant and Respondent Board would engage in collective bargaining concerning wages, hours and conditions of employment, the results of which would be embodied in a negotiated "salary schedule" or collective bargaining agreement but not signed by representatives of either party to the negotiations; that in prior years the parties would agree to a school calendar which would be attached to said agreement, but that certain classroom days would be rescheduled by the Respondent Board as necessary to make up classroom days lost due to inclement weather.

5. That when the parties commenced negotiations for a collective bargaining agreement covering the 1972-1973 school year on or about February 17, 1972, the Complainant made a proposal dealing with the school calendar which read in relevant part as follows:

> "In the event school is closed due to inclement weather, the Association agrees to make up, at a time mutually agreed upon, those days necessary to guarantee the receipt of state aids."

6. That sometime during the course of bargaining, and before the start of the 1972-1973 school year, the Complainant dropped its proposal with regard to make-up days due to inclement weather set out above and the Respondent Board adopted a calendar for the 1972-1973 school year; that the calendar adopted, which was nearly identical in form to previous calendars, read in relevant part as follows:

"FENNIMORE COMMUNITY SCHOOLS
SCHOOL CALENDAR
1972-1973

August	22	Teacher Workshop
	23	Teacher Workshop
	24	Student Registration
	25	Classes Begin
September	4	Labor Day
October	30	Elementary Parent Conference
November	2-3	WEA Convention - Milwaukee
	23-24	Thanksgiving Vacation
December	22	Christmas Vacation - Dismissal 2 P.M.
January	3	Return to School
	12	End of First Semester
February	21	SWEA Convention - Platteville
April	13	Easter Vacation - Dismissal 3:30 P.M.
	23	Return to School
May	28	Memorial Day - No School
	29	Last Day of School
	29	Commencement
	30	Teacher Workshop
	31	Teacher Workshop"

7. That on or about February 13, 1973 the parties reached agreement on the terms of a collective bargaining agreement governing wages, hours and conditions of employment for the 1972-1973 school year which contained the calendar which had been adopted by the Respondent Board and is set out above; that said collective bargaining agreement also contained the following two provisions which are also relevant herein:

"OTHER PROVISIONS OF SALARY SCHEDULE

. . .

3. Emergency Leave

Emergency leave will normally be three (3) days per year and will not be accumulative. The emergency leave must be approved by the District Superintendent prior to the actual leave. In the event of a death in the immediate family, an employee shall receive full salary for not more than three (3) working days. Immediate family is defined as: wife, husband, child, father, mother, brother, sister, grandfather or grandmother of employee or spouse. Unusual situations will be considered by the School Board on their individual merit.

. . .

10. Contract Period

The School Board establishes the length of the school term under this schedule as 187 days which includes 180 classroom days, four (4) days of teacher workshop and three (3) paid holidays."

8. That on Monday and Tuesday, April 9 and 10, 1973, a severe Spring snowstorm blanketed the area wherein the Respondent District is located which necessitated the closing of the schools; that because of said snowstorm none of the teachers represented by the Complainant were required to teach or perform any other duties on April 9 and 10, 1973.

9. That on April 10, 1973, Laurence E. Thurston, who was then President of the Complainant Association and Chairman of its negotiating committee, had a conversation with Willis P. Hamilton, Superintendent of Schools for the Respondent District, probably while Thurston was shoveling his walks in front of his home; that during the course of this conversation, the subject arose as to when Hamilton proposed making up the days lost due to the snowstorm and Hamilton responded with words to the effect:

"I really don't know. It depends on the roads and it depends on whether we get the boiler fixed, but either way, we'll make them up next week and we'll probably shift Easter Monday over to Wednesday if we miss only two days so that we can have Thursday, Friday and Monday plus the weekend."

10. That the Respondent District opened the schools operated by it on April 11, 1973, and that shortly after school opened in the morning, Hamilton located Thurston for the express purpose of discussing the problem of make-up days; that Hamilton asked Thurston, "What should we do about the make-up days?" and Thurston replied that the last time he agreed to set a make-up day with Hamilton he "got too much heat from a bunch of teachers who did not want to come back to school that day" and advised Hamilton that he would not agree to any days proposed but that there was an Association meeting scheduled that afternoon; that during the course of this conversation, probably after Thurston mentioned that he "got too much heat . . .", Hamilton volunteered that he intended to "go ahead and do something about it" and "take the heat"; that shortly after his meeting with Thurston, Hamilton sent a written memorandum to all school personnel, including the teaching personnel represented by the Complainant, which read as follows:

"COMMUNITY SCHOOLS
1397 - 9th Street
FENNIMORE, WISCONSIN 53809

Willis P. Hamilton
Superintendent

TO: Employees of Fennimore Community Schools

FROM: Superintendent Willis Hamilton

SUBJECT: Adjusted Easter Recess

Due to the recent 'April Blizzard' it is necessary to reschedule the Easter Recess to make-up the two days missed. Therefore, regular classes will be held in all Fennimore schools on Monday, April 16, Tuesday, April 17, and Wednesday, April 18. Easter Recess will begin at 3:30 P.M. on Wednesday, April 18, and continue through Easter Monday. Regular classes will resume in all Fennimore schools on Tuesday, April 24, at the regular time.

The cooperation of all bus drivers, custodians, school lunch cooks, secretaries and teachers will be appreciated in making this adjustment."

11. That at 4:00 p.m. on April 11, 1973 the Complainant Association held a previously scheduled meeting of its membership wherein the Respondent's decision to make up the two days lost due to the snowstorm was the subject of heated discussion; that during the course of said meeting Thurston explained that he had had a conversation with Hamilton wherein he declined to agree to make up the days as proposed by Hamilton and suggested that the membership form a committee to meet with Hamilton and, if possible, the Respondent Board, for the purpose of bargaining about alternative ways to make up the snow days; that a committee was formed for said purpose and decided to propose that the days be made up on Saturdays or that the days be added on the end of the school calendar instead of being made up during Easter Vacation; that before said meeting closed, the membership resolved that if the committee was not successful in reaching an agreement to make up the snow days on days different than those selected by Hamilton, a lawsuit would be filed in an effort to stop the Respondent District from implementing its decision.

12. That the Complainant's committee met with Hamilton on Thursday morning around 8:00 a.m. and made the following two proposals:

1. That one class day be made up on Saturday, May 5, 1973 and that June 1, 1973 be designated a "teacher workshop" day thereby making it possible to hold classes on May 31, 1973.

2. That June 1 and 4, 1973 be designated "teacher workshop" days so that May 30 and 31, 1973 could be treated as class days.

that Hamilton discussed both of said proposals with the committee and pointed out certain objections he had to both proposals, specifically, poor attendance experienced by other districts which had attempted to hold classes on Saturday and the impracticality of holding classes after graduation or postponing graduation; that Hamilton advised the Complainant's committee that he would present both proposals to the Respondent Board and advise the Complainant's committee of the Respondent Board's decision; that later that same day Hamilton advised the Complainant's committee that the Respondent Board was unwilling to accept either of its proposals and intended to hold classes on the days previously announced in Hamilton's directive.

13. That thereafter, on Friday, April 13, 1973, the Complainant sought, but failed to obtain, a temporary restraining order in Grant County Circuit Court restraining the Respondent Board from holding classes on April 16, 17 and 18, 1973; that after said Court refused to issue a temporary restraining order as requested, Hamilton advised the Complainant that he would be in his office during the late afternoon of April 13, 1973 and the morning of April 14, 1973 for the purpose of considering individual requests to be absent on one or more of the rescheduled class days; that during the late afternoon of April 13, 1973, Kathleen Bouton, a teacher included in the collective bargaining unit represented by the Complainant, went to Hamilton's office, and requested three days of "emergency leave" pursuant to paragraph three of the collective bargaining agreement set out above; that Hamilton refused to grant Bouton the three days of emergency leave requested because the reasons given by Bouton in her request did not constitute an "emergency" within the meaning of paragraph three of the collective bargaining agreement and not because of her lawful picketing activities more fully described in paragraph 14 below, but agreed to allow her to take three days off without pay instead; that Hamilton did not make any coercive statements to Bouton during the course of this meeting.

14. That sometime during the course of the negotiations for the 1972-1973 collective bargaining agreement, probably on or about November 29, 1972, Bouton and a number of other teachers participated in lawful informational picketing activity connected with the labor negotiations then in progress in front of the Respondent's City Elementary School in Fennimore, Wisconsin, for approximately 15 minutes between 7:45 a.m. and 8:00 a.m.; that while Bouton and the other teachers were picketing, Richard Kruel, President of the Respondent Board, and Hamilton held cameras and either took photographs or pretended to take photographs of the picketing teachers.

Based on the above and foregoing Findings of Fact, the Examiner makes and enters the following

CONCLUSIONS OF LAW

1. That, by the actions of its agent, Willis Hamilton, District Superintendent, of issuing the Memorandum dated April 11, 1973, set out above, which changed the school calendar by scheduling classes on April 16, 17 and 18, 1973 and canceling classes on April 23, 1973, the Respondent District failed and refused to bargain collectively within the meaning of Section 111.70(1)(d) of the Municipal Employment Relations Act, and thereby committed prohibited practices within the meaning of Section 111.70(3)(a)4 and Section 111.70(3)(a)1 of the Municipal Employment Relations Act, but that said action did not constitute a violation of a collective bargaining agreement within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

2. That, by the actions of its agent, Willis Hamilton, District Superintendent, of refusing to grant Kathleen Bouton three days of emergency leave which she requested pursuant to paragraph three of the collective bargaining agreement set out above, the Respondent District did not violate the provisions of a collective bargaining agreement within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act, and did not discriminate against Kathleen Bouton within the meaning of Section 111.70(3)(a)3 of the Municipal Employment Relations Act and that none of the statements attributed to Hamilton during the meeting constituted an act of interference within the meaning of Section 111.70(3)(a)1 of the Municipal Employment Relations Act.

3. That, by the actions of its agents, Willis Hamilton, District Superintendent, and Richard Kruel, President of the Respondent Board, of photographing, or pretending to photograph, employes who were engaged in lawful and protected concerted activities on or about November 29, 1972, the Respondent District interfered with the rights of said municipal employes in violation of Section 111.70(3)(a)1 of the Municipal Employment Relations Act.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and enters the following

ORDER

IT IS ORDERED that Joint School District No. 5, City of Fennimore et al., its officers and agents, shall immediately:

1. Cease and desist from:

(a) Instituting unilateral changes in the school calendar without first offering to bargain and, if requested, bargaining on any proposed change in that regard.

(b) Photographing or pretending to photograph or otherwise conducting surveillance, overt or covert, of employes represented by the Complainant, while engaged in lawful concerted activities.

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

(a) Before instituting changes in the school calendar in the future, offer to bargain with the Complainant regarding the proposed change and, if requested, bargain with the Complainant regarding the proposed change.

(b) Remove and destroy any film, photographs, or other records within its possession which relate to the lawful concerted picketing activities of employes represented by the Complainant which occurred on or about November 29, 1972.

(c) Notify all its employes represented by the Complainant of its intent to comply with the Order herein by posting in a conspicuous place in each of the schools operated by it, a copy of the Notice attached hereto and marked "Appendix A". Such notices shall be signed by the President of the Respondent Board and the Respondent's District Superintendent. The notices shall be posted after the beginning of the regular school term and shall remain posted for sixty (60) days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by other material.

(d) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the

date of this Order as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 14th day of June, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

APPENDIX A

NOTICE TO ALL EMPLOYES REPRESENTED BY THE FENNIMORE EDUCATION ASSOCIATION

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

1. WE WILL NOT institute changes in the school calendar without first notifying the Fennimore Education Association of the proposed change and offering to bargain and, if requested, bargaining with the Fennimore Education Association.

2. WE WILL NOT photograph or pretend to photograph, or otherwise conduct surveillance, overt or covert, of employes represented by the Fennimore Education Association who are engaged in lawful concerted activities.

FENNIMORE JOINT SCHOOL DISTRICT NO. 5, CITY OF FENNIMORE, ET AL.

_____
President, Fennimore Board of Education

_____
District Superintendent

Dated this _____ day of _____, 197____.

THIS NOTICE MUST REMAIN POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its original complaint, the Complainant alleged that the Respondents had violated the collective bargaining agreement and their duty to bargain collectively by unilaterally changing the school calendar and failing to bargain in good faith thereafter. In addition, the Complainant alleged that Willis Hamilton, District Superintendent, acted discriminatorily and in violation of the collective bargaining agreement by denying Kathleen Bouton, a teacher employed by the Respondent District, emergency leave and that his remarks made at the time were coercive and interfered with her rights. In their answer, the Respondents deny that the change in the school calendar constituted a violation of the collective bargaining agreement or their duty to bargain collectively and further deny that the denial of Bouton's request for emergency leave was either discriminatorily motivated, or in violation of the collective bargaining agreement or that Hamilton's remarks to Bouton were coercive or otherwise interfered with her rights.

During the course of the hearing, the Complainant was allowed to amend its complaint to allege, for the first time, that the Respondent had interfered with the rights of employes by conducting surveillance, specifically, by taking photographs or appearing to take photographs of teachers who were engaged in lawful concerted picketing activities. At the hearing, the Respondents indicated their intent to deny this allegation and in their brief denied that the activity engaged in constituted interference.

The evidence and arguments all deal with alleged violations that flow from three separate factual transactions; namely, the change of the school calendar, the denial of emergency leave, and the photographing of pickets. For purposes of analysis, each factual situation will be discussed separately.

The Change of the School Calendar

The evidence of record indicates that the Respondent Board had, in prior years and on one prior occasion during the 1972-1973 school year, made changes in the school calendar as necessary to make up days lost due to inclement weather and that such practice had been a source of dispute between the parties. At the outset of the negotiations for the 1972-1973 school year, the Complainant proposed to put language in the agreement that would not permit the Respondents to make up days lost due to inclement weather unless it was necessary to obtain state aids and then only on days that were mutually agreed upon. During the course of negotiations, the Complainant dropped its proposal and ultimately entered into an agreement which contained a calendar which read substantially the same as the calendars which had been attached to prior agreements.

The Complainant and Respondents draw opposite conclusions as to the effect of the Complainant's failure to obtain a change in the existing contract language. According to the Complainant, the Respondents were not free, in the absence of express language in the agreement, to change the dates for Easter vacation because it would violate the "unambiguous" language of the agreement and the Respondents' duty to bargain in good faith. According to the Complainant, the past practice of changing the school calendar as necessary to make up class days lost due to inclement weather should be disregarded because

the current agreement is unambiguous and prior agreements were not signed.

The Respondents argue that under the several agreements the parties have negotiated in the past, it has always retained the right to change the school calendar due to inclement weather and the Complainant's failure to change the language of the agreement precludes any claim that the Respondents have violated the agreement or their duty to bargain in good faith. The Respondents argue that any distinction between signed and unsigned collective bargaining agreements is spurious and ought not have any effect on its obligations under the 1972-1973 collective bargaining agreement, which it admits was binding.

The Complainant's claim that it is inappropriate to look at past practice or bargaining history because the language of the collective bargaining agreement is "unambiguous" is without merit. The 1972-1973 collective bargaining agreement, like its predecessors, did not purport to deal with the problem of what happens when it is not possible to follow the established school calendar. For that reason, it is appropriate to look to past practice and bargaining history in an effort to determine if there has been a violation of the collective bargaining agreement. Also, the fact that prior collective bargaining agreements were not signed 1/ would seem to have no effect on the relevance of past practice or bargaining history in interpreting the 1972-1973 collective bargaining agreement, which reads the same in all material respects.

Since the agreement contains no provision intended to deal with the problem, it is clear that the Respondents did not violate the agreement by continuing their past practice of changing the school calendar as necessary to make up days lost due to inclement weather, and the evidence that the Complainant sought unsuccessfully to change that practice by agreement supports that conclusion. However, the Respondents argue that the same evidence of past practice and bargaining history justify the conclusion that they are privileged under the terms of the agreement to make changes in the school calendar unilaterally, without regard to the statutory duty to bargain in good faith. If such is the case, it can only be because the Complainants have waived their right to insist on bargaining on the question.

It is not appropriate to find a waiver of a statutory right unless there is a clear and unambiguous evidence that there has been a waiver. 2/ If the 1972-1973 collective bargaining agreement had a clause which gave the School Board the right to make such changes there could be no doubt that, by agreeing to such a clause, the Complainant had expressly waived its right to bargain on such changes. Here, the only basis for finding a waiver is the Complainant's decision to drop its demand that lost days not be made up unless necessary to retain state aids and then only on days that are mutually agreed upon. Such a provision asked for contractual rights far in excess of any statutory rights the Complainant enjoys and the failure to obtain the Respondent Board's agreement to such a proposal does not justify the inference that the Complainant thereby waived its statutory right to insist that the

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1/ Prior to November 11, 1971, the effective date of the Municipal Employment Relations Act, the Respondents were under no statutory duty to sign a collective bargaining agreement.

2/ City of Brookfield (11406 A, B) 7/73, 9/73; Cf. New York Mirror 151 NLRB 834, 58 LRRM 1465 (1965); NLRB v. Item Co., 35 LRRM 2709 (5th Cir. 1955).

Respondent Board bargain about any proposed change in the school calendar. Nor is there any other provision of the collective bargaining agreement such as a waiver of bargaining clause that would justify such an inference.

If the Respondents had merely proposed to change the school calendar on April 11, 1973 rather than implementing the change there can be little doubt that they subsequently complied with the duty to bargain on the subject under the circumstances. Because of the short time period remaining before the scheduled Easter vacation and because of the need to notify all the other groups that were affected (students, parents, bus drivers and other non-professional employes) it is understandable that the Respondents desired to act quickly. However, when Hamilton talked to Thurston on the morning of April 11, 1973, Thurston clearly indicated that he was not in a position to agree to any proposed change and also pointed out that there was an Association meeting already scheduled for that afternoon, wherein the matter could be discussed. From his conversation with Thurston and from prior experience, Hamilton should have been aware that the Complainant would ask to bargain about the matter. Even so, Hamilton immediately sent out a general notification that the decision had been made, thereby foreclosing the possibility of good faith negotiations thereafter. Although the Respondent Board subsequently gave consideration to the two alternatives proposed by the Complainant's committee, it was not possible at that point to overcome the fact that all interested parties had been notified that the proposed change was a fait accompli.

A unilateral change in a mandatory subject of bargaining is a per se refusal to bargain in good faith. 3/ Unless it can be said that the Respondents' failure to bargain before implementing the change was excusable under the circumstances, its actions on April 11, 1973 constituted a per se violation of their duty to bargain in good faith. Although Thurston had knowledge of the Respondents' probable intentions as a result of his chance conversation with Hamilton on April 10, 1973 and the Respondent's handling of similar situations of the past, the earliest notice that the Complainant received as to the actual intentions of the Respondents came in the form of the notice that the change had been accomplished. Thurston had specifically refused to agree to any proposed change and had advised Hamilton that there was a scheduled meeting of the Association later that day. Under these circumstances, it cannot be said that the Complainant "sat on its rights" in such a way as to foreclose its claim that the Respondent refused to bargain about the proposed change. 4/ Even though time was of the essence, it was clearly possible to consider any proposals the Complainant might come up with, on the afternoon of April 11, 1973, before making a final decision in the matter. By acting without giving the Complainant the opportunity to do so, the Respondent foreclosed the possibility of good faith bargaining.

The Denial of Emergency Leave to Bouton

3/ City of Wisconsin Dells (11646) 3/73; City of Brookfield (11406 A, B) 7/73, 9/73; Nopak Inc. (5708) 3/61; LaCrosse Lutheran Hospital (5946) 10/61; Aff. LaCrosse Co. Cir. Ct. 3/62. Cf. NLRB v. Borg Warner (Wooster Div.) 356 US 342, 42 LRRM 2034 (1958).

4/ See e.g. Milwaukee County (11306) 9/72 Cf. U.S. Lingerie Corp., 170 NLRB No. 77, 67 LRRM 1482 (1968).

The contractual provision establishing emergency leave does not specify what constitutes an "emergency". The reference to a death in the immediate family makes it clear that a death involving a relative standing in one of the stated relationships is an emergency but provides little insight as to what other situations might constitute an emergency. According to Bouton, the reasons given by Bouton for three days of emergency leave was the fact that she had an "appointment" on Monday, April 16, 1973 and a "doctors appointment" on Tuesday, April 17, 1973, in her home town, which was approximately 150 miles from Fennimore, and that she did not want to come all the way back in order to teach on only one day, on April 18, 1973. Although her appointment on Monday involved an interview for a job in a third city, (which was approximately 100 miles from Fennimore and 120 miles from Bouton's home) Bouton admits that she did not tell Hamilton the purpose of the appointment or the location, thereby leaving the implication that the appointment was in her home town. Bouton did advise Hamilton that the doctors appointment had been made several months in advance and would be difficult if not impossible to change on short notice.

For absences not involving a death in the immediate family, the contract vests final discretion in the District Superintendent to grant or deny emergency leave since all applications must be approved by him prior to the leave. Unless it can be said that Hamilton's refusal to grant the leave requested on the facts presented to him was arbitrary or contrary to his usual practice in such cases, it would not constitute a violation of that discretion granted to him under the collective bargaining agreement. Furthermore, unless the evidence establishes that his refusal was motivated in whole or in part by a desire to discriminate against Bouton for having engaged in picketing activities, his action did not constitute a prohibited practice of any kind.

Of the eight teachers who requested to be absent during one or more of the rescheduled classroom days, only one, Flossie Stenner, requested and received emergency leave, as opposed to leave without pay. Stenner was granted one day emergency leave on the morning of April 16, 1973 because the melting snow was flooding her basement and she had been up since 3:00 a.m. trying to handle the problem. The only other example given by the Complainant of where the Superintendent had granted emergency leave in the past involved a situation where a teacher, who was very active in the Complainant Association, asked for a day off to take care of a "personal family problem not involving a death in the family." Finally, Bouton admits that when she went into Hamilton's office she did not expect to be granted emergency leave because she had "heard" that one teacher had been denied emergency leave for the purpose of getting married and another teacher had been denied emergency leave for the purpose of taking a sick child to another city for treatment. (According to Hamilton, he had granted emergency leave for serious illness in the immediate family).

On the basis of the plain meaning of the language employed, emergency leave would not seem to be available for the purpose of keeping appointments of the type in question, and the examples given do not support the conclusion that the language had been given a broader application by the Superintendent in the past. Bouton's stated purpose for asking for emergency leave might have constituted

a sufficient basis for requesting leave under a different kind of provision 5/ but it did not constitute an emergency situation.

Nor can it be said that the Complainant has established by a clear and satisfactory preponderance of the evidence that Hamilton's reason for denying Bouton's request was motivated by a desire to punish her for exercising her protected rights rather than the fact that, on the basis of the reasons advanced for requesting emergency leave, she did not have a contractual right to such leave. By her own testimony, the comments relied upon as evidence of discriminatory motivation were made by Hamilton after the short discussion concerning emergency leave had ended, and occurred in the context of a much longer and general discussion of the dispute over the rescheduling of classes and Hamilton's role in the negotiations. The critical portion of Bouton's testimony reads as follows:

> ". . . And I said to Mr. Hamilton after that that I couldn't understand why he wanted to be the one that was always yelled at and I had gone to one meeting of the School Board and the Negotiating Team and the other School Board members never said a word and Mr. Hamilton said that that was because the Board had appointed him spokesman and John Kramer as Counsel and I said 'Why didn't you tell them that you didn't want to be spokesman?' and he said because he'd be out of a job. I told him that it was no fun living in a dictatorship and I told him that this has been a very disillusioning year for me and he said that I shouldn't let these things bother me. That it's not worth it. And I said 'Doesn't it bother you?' and I don't know what he said at that point and he told me that I was putting everything on a personal level and he said 'Do you know why you're upset?' He said 'I'll tell you why you're upset. You're not following the right leaders.' He said 'Talk to Mrs. Brodt and Mrs. Bray.' I said 'I've talked to Mrs. Brodt.' He said 'Well, talk to her again.' I said 'Who are you to say who are the right leaders?' He said 'I didn't say they were the right leaders.' I said 'You said I was following the wrong leaders. I wasn't following.' I told him that I couldn't believe that Mrs. Brodt and Mrs. Bray weren't somewhat emotionally upset by this year too and Mr. Hamilton said 'You chose to pick it' (sic) and something to the effect of, you take the consequences, although those were not his exact words. I said 'Yes, I did and some teachers said 'congratulations, at least you had the nerve to do it.' '

5/ In fact, during the negotiations for the 1972-1973 collective bargaining agreement, the Complainant had asked for an expanded leave policy to cover certain types of "personal business." According to the Complainant, Hamilton's response on behalf of the Respondent was that under the current collective bargaining agreement, where no attempt was made to spell out the various situations which might constitute an emergency, there was no limit on the types of unusual occurrences that might be treated as an emergency. Even if it is assumed that Hamilton's argument in favor of leaving the provision alone played some part in the Complainant's decision to drop its proposal, his comment did not convert the provision into a personal leave provision or change the meaning of the word "emergency" as evidenced by past practice.

Then we went into Saturday teaching . . . ." 6/

In the context of the discussion, Hamilton's alleged statement to the effect that "you chose to picket -- you take the consequences" apparently refers to Bouton's "disillusionment" or "emotional upset". The discussion at that point had turned to the emotional condition of Bouton as a result the protracted negotiations and the change in the school calendar and did not have anything to do with Hamilton's denial of her emergency leave request. His comment does admit knowledge of Bouton's picketing activity, which is not surprising in light of the small size of the professional staff and the fact that Hamilton talked to and photographed the pickets, but mere knowledge of her activities is not sufficient to support an inference that her picketing activity was the motivation behind his earlier denial of her request for emergency leave.

Similarly, the Complainant's claim that Hamilton's statement constituted an independent act of coercion is based on an interpretation of Hamilton's comment which is not supported by the record. In context, the most compelling inference is that the "consequences" that Hamilton was referring to were the sense of "disillusionment" and "emotional upset" which Bouton had just admitted feeling. It is significant in this regard that the discussion ended shortly thereafter, and Bouton was crying when she left the room. Bouton apparently was emotionally upset as a result of her view that she was "living in a dictatorship" and her conversation with Hamilton apparently acted as a catharsis. While Hamilton's statement indicates that he did not have much sympathy for Bouton's predicament, it could hardly be considered coercive in the context of a frank discussion which was initiated by Bouton. If Hamilton had initiated the conversation and advised Bouton that she would have to accept the "consequences" of her picketing activities, or if the statement occurred in the context of a discussion of employment benefits such as emergency leave, the record would support the Complainant's interpretation.

Photographing of Pickets

Taking photographs of employes who are engaged in lawful concerted activities, is an activity which on its face constitutes unlawful surveillance, which is likely to discourage the activity in question. 7/ It is of course possible that the Employer may have a ligitimate reason for taking photographs such as establishing a record for later use in legal proceedings. 8/

No explanation was offered by the Respondents for taking photographs and the Respondents simply argue that it was done in a "good humored way" with friendly conversation occurring between the District Superintendent and the pickets. Regardless of the demeanor of Hamilton while taking pictures (there is no claim that Board

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6/ See Transcript at Page 69. The Transcript inaccurately indicates that Bouton said "pick it" rather than "picket".

7/ Russell Sportswear Corp. 197 NLRB No. 166, 80 LRRM 1495 (1972); Rybold Heater Co. 165 NLRB No. 36, 65 LRRM 1348 (1967) enf. 70 LRRM 3159 (6th Cir. 1969).

8/ See e.g. State Ceramics Inc. 155 NLRB 1258, 60 LRRM 1487, enf. 375 F. 2d 202, 64 LRRM 2781 (6th Cr. 1967).

President Kruel, who also had a camera, was attempting to bantor with the pickets) such activity by an employer is calculated to have a chilling effect on the activity. This is especially true where the employes involved are participating in such activity for the first time and are timid about exercising their legal rights. 9/ It does not matter that there may not have been any film in the camera. In fact, the failure of the Respondents to account for the pictures would support an inference that the motivation was to interfere with the activity, if such an inference were necessary.

Remedy

The Respondent District violated its duty to bargain on the question of when the snow days would be made up by the action of its District Superintendent, Hamilton, in unilaterally acting to change the negotiated school calendar on April 12, 1973, even though he was aware or should have been aware that the Complianant desired to discuss his proposal. In addition, the Respondent's agents, Kruel and Hamilton, engaged in an unrelated act of interference in the latter part of November, 1972, by photographing pickets.

As a remedy for the refusal to bargain violation, the Complainant asks that the Respondents be ordered to pay additional compensation to the teachers for the three days on which they were required to teach during the week of April 15, 1973. Such a remedy would exceed that which is necessary to remedy the violation and would constitute a windfall to the teachers who had agreed to teach 180 classroom days. It is clear that the Complainant did waive its right to bargain about its proposal that only those days required to retain state aids be made up, when it agreed to the continuation of the old contract language. In fact, both of the proposals it presented to Hamilton on April 12, 1973, were based on the assumption that the two classroom days lost due to the snowstorm would be made up.

It is of course true that it is not possible to totally undo the mischief caused by a unilateral change where the facts are such that it is not possible to return the parties to the status quo ante. However, there is no basis for finding that the Complainant would have obtained more through its efforts at persuasion had the Respondents met their duty to bargain before acting unilaterally. In view of the fact that the Respondents had the right to act unilaterally, after attempting to meet their obligation to bargain in good faith within the limits of the short time period involved, a prospective order to bargain in good faith before acting unilaterally on such matters in the future combined with the posting of notices constitutes sufficient affirmative relief under the circumstances.

With regard to the independent, interference violation, the Respondent District has been ordered to cease and desist from engaging in the same or similar conduct in the furutre, and to post

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9/ See, for example, the comments of Bouton above where she indicates that she was "congratulated" by some other teachers for having the "nerve to do it."

notices in that regard and to destroy any film or other records it may have in its possession. Just as in the case of a unilateral change in the calendar, it is not possible at this date to totally undo what was done, but it is possible to attempt to dissipate the chilling effect such activity might have had on the exercise of protected rights in the future.

Dated at Madison, Wisconsin this 14th day of June, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner