STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATION ASSOCIATION, Complainant, vs. UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, WISCONSIN, Respondent.	Case XXXI No. 19161 MP-467 Decision No. 13696-C
UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, WISCONSIN, Complainant, vs. RACINE EDUCATION ASSOCIATION, Respondent.	Case XXXII No. 19442 MP-498 Decision No. 13876-B

Appearances:
Perry & First, Attorneys at Law, by Mr. Richard Perry, appearing on behalf of the Racine Education Association.
Melli, Shiels, Walker & Pease, Attorneys at Law, by Mr. Jack D. Walker, appearing on behalf of the District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in Case XXXI above by the Racine Education Association (REA) on May 14, 1975, wherein it alleged that the Unified School District No. 1 of Racine County (District) had committed certain prohibited practices within the meaning of the Municipal Employment Relations Act (MERA); and the Commission having, on June 3, 1975, issued an order a/ wherein it consolidated the matter of the complaint in Case XXXI for purposes of hearing with a hearing previously scheduled before the undersigned examiner for the purpose of taking evidence on the REA's motion for reconsideration of its request for enforcement in another case, b/ hereinafter referred to as Case XVIII; and after hearing on said complaint, as amended thereafter, had been held on July 9, 10 and 18, 1975, the District having filed a complaint of prohibited practices on August 5, 1975, in Case XXXII above wherein it alleged

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a/ Decision No. 13696. Said order referred to the undersigned as a "hearing officer" to indicate that he was not acting with the authority to issue findings of fact, conclusions of law and orders pursuant to the provisions of §111.07(5), Stats. Because of the amendments to ch. 227, Stats. contained in ch. 414 of the Laws of 1975, the undersigned has the responsibility of issuing such findings, conclusions and order as an examiner in a class 3 proceeding under ch. 227, Stats. See §227.09(2), Stats.

b/ Unified School Dist. #1 of Racine Co., Case XVIII, No. 15996, MP-169.

I N D E X

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

MEMORANDUM ACCOMPANYING FINDGINS OF FACT, CONCLUSIONS OF LAW AND ORDER

STATE OF WISCONSIN

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that the REA had committed certain prohibited practices within the meaning of the MERA; and after further hearing on the REA's complaint having been held on August 7, 1975, the commission having issued an order c/ wherein it consolidated the matter of the complaint in Case XXXII for purposes of hearing before the undersigned examiner; and further hearing on the REA's complaint, as amended, and the District's complaint having been held before the examiner on August 26 and 27, September 4, 5, 11 and 12 and October 2, 3, 21, 22, 28, 29 and 30, 1975; and the transcript of said hearing having been completed and sent to the parties on March 19, 1976; and initial briefs in Cases XXXI and XXXII having been filed with the examiner and exchanged by him on October 13, 1976; and the REA, on December 15, 1976, having advised the examiner that it was waiving its right to file a defensive brief in Case XXXII and the District, on December 20, 1976, having filed its defensive brief in Case XXXI; and the REA having, on January 25, 1977, notified the examiner that it was waiving the opportunity to file a reply brief in Case XXXI; and the commission having, on March 15, 1978, issued an order d/ wherein it authorized the undersigned examiner to issue findings of fact, conclusions of law and orders in the matter of the complaints herein and further providing that said findings, conclusions and orders shall be the final decision of the commission; and the examiner having considered the relevant evidence e/ and arguments of record, and being fully advised in the premises, makes and issues the following findings of fact, conclusions of law and order pursuant to §227.09(2) and (3)(a), Stats.

FINDINGS OF FACT

1. At all times relevant herein, the REA, a labor organization within the meaning of the MERA, has been the certified and recognized bargaining representative of all regular full-time and regular part-time certified teaching personnel employed by the District and James Ennis has been its executive director with authority to represent the REA for purposes of collective bargaining. In addition, certain other officers and agents of the REA, including its president, chairperson of its bargaining committee, and attorney have acted on its behalf in the scope of their authority, actual and apparent.

2. At all times relevant herein, the District, a municipal employer within the meaning of the MERA, has operated a school district employing the teachers represented by the REA. W. Thatcher Peterson, the District's coordinator of employee services has been the District's duly authorized labor negotiator for purposes of collective bargaining with the REA. In addition, its superintendent and other administrative personnel and its board and subcommittees thereof have acted on its behalf within the scope of their authority, actual and apparent.

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c/ Decision No. 13876, 8/14/75.

d/ Decision Nos. 13696B and 13876A.

e/ Tape recordings of certain board meetings were introduced by the REA at the hearing but maintained by the District pursuant to the agreement of counsel. The examiner advised the parties that the commission would only consider so much of said tapes as were reproduced in readable form and then only after the other party had been afforded an opportunity to dispute the accuracy of the written version and the attribution of statements made on said tapes to particular individuals. Neither party offered any such written versions subsequent to the close of the hearing, and only those presented at the hearing have been considered.

3. The District and the REA were parties to a collective bargaining agreement which was entered into on or about November 13, 1972, which by its terms was effective from August 25, 1972 until it expired on August 25, 1974. On December 28, 1973, Ennis, pursuant to the terms of the 1972-1974 agreement, advised the District in writing of the REA's desire to negotiate a changed agreement. On May 7, 1974, the REA made its first proposal for changes in said agreement. Thereafter, the parties met in bargaining for the purpose of discussing the changes proposed by the REA on May 7, 1974 and other, more comprehensive changes proposed by the REA on May 28, 1974 as well as comprehensive changes proposed by the District on June 18, 1974. The parties met on various dates between May 7, 1974 and September 24, 1974 when they entered into a new collective bargaining agreement covering the 1974-1975 and 1975-1976 school years. Said agreement included an explicit agreement to continue to bargain about certain matters on which timely agreement could not be reached. Specifically, they agreed to conduct a joint study and then bargain about problems relating to the hours of work of teachers in all the schools; wages, hours and working conditions for school psychologists; compensation to be paid for coaching and other similar extra duty positions; and compensation for teachers of drivers education. In addition, the parties implicitly agreed to continue to bargain about the school calendars for 1974-1975 and 1975-1976 school years since they had failed to reach agreement on the content of those calendars prior to submitting the agreement reached for ratification by the board and the REA's membership.

4. ADOPTION OF SEN PROGRAM. Sometime prior to May 14, 1974, the District decided to establish a special educational needs (SEN) program for the balance of the 1973-1974 school year. In June 1974 the District decided to extend and expand on said program for the 1974-1975 school year. The decision to establish this program and the decision to extend and expand said program related primarily to matters of educational policy rather than wages, hours and working conditions. In June 1974, prior to the decision to extend and expand the program, the REA sought to bargain about the decision to extend and expand the program but the District did not bargain about said decision. In June 1974, and at other times prior to September 24, 1974, the REA demanded that the District bargain about the alleged impact of the SEN program on wages, hours and conditions of employment of employes represented by the REA but never identified any aspect of the program which affected wages, hours and conditions of employment not already covered by the terms of the 1972-1974 collective bargaining agreement and existing District practices and failed to make any proposal in bargaining with regard to any changes in the 1972-1974 collective bargaining agreement which related to wages, hours and conditions of employment allegedly affected by the SEN program. On or about September 24, 1974 the REA dropped its demand and entered into a new collective bargaining agreement which acknowledged, inter alia, that the agreement represented the entire agreement reached after both the REA and District had exercised their right to bargain about demands and proposals during the course of the negotiations. By its conduct and the terms of said agreement, the REA waived any obligation on the District's part to bargain about the alleged impact of the SEN program on wages, hours and conditions of employment of employes represented by the REA.

5. CREATION OF TITLE IV DEPARTMENT. Sometime in early 1974, possibly in April, 1974, the District created a Title IV Department to aid in its efforts to achieve racial balance in its schools. The decision to create the Title IV Department related primarily to matters of educational policy rather than wages, hours and conditions of employment. Although the REA was aware of the decision to create this department and its possible impact on wages, hours and conditions of employment of employes it represents, the REA never identified

any aspect of this action which affected wages, hours and conditions of employment not already covered by the terms of the 1972-1974 collective bargaining agreement and existing District practices, and the record will not support a finding that there was such an impact. After the creation of the department, the REA failed to make any proposal in bargaining with regard to any changes in the 1972-1974 collective bargaining agreement which related to wages, hours and conditions of employment allegedly affected by the creation of this department. By its conduct, the REA waived any obligation on the District's part to bargain about the alleged impact of the creation of the Title IV Department on wages, hours and conditions of employment of employes represented by the REA.

6. ADOPTION OF A JUNIOR HIGH WORK DAY POLICY. On March 11, 1974, the District adopted a "fixed-variable" class schedule for use in its junior high schools for the purpose of expanding the curriculum and implementing its prior decision to open a new junior high school in order to eliminate the existing "double shift" arrangement in the junior high schools. The decision to adopt said schedule related primarily to matters of educational policy rather than wages, hours and conditions of employment. By the terms of said action, the fixed-variable schedule was to become effective at the beginning of the 1974-1975 school year when the new junior high school was scheduled to be opened. The REA was aware of the content and impact of this proposed change on hours and working conditions in the junior high schools prior to its adoption on March 11, 1974, and at all times relevant thereafter. During the negotiations on proposed changes in the 1972-1974 collective bargaining agreement, which commenced in May, 1974 and continued thereafter, the District made proposals and attempted to bargain about proposals which would have resolved any alleged conflict between the implementation of the fixed-variable schedule and the provisions of the 1972-1974 agreement dealing with hours and working conditions in the junior high schools. In addition, the District bargained about REA proposals dealing with hours and working conditions in the District's schools, including its junior high schools which might be affected by the implementation of the fixed-variable schedule. The District and the REA failed to reach agreement on the terms to be included in the new collective bargaining agreement prior to the expiration of the 1972-1974 collective bargaining agreement on August 25, 1974. The REA refused to meet for purposes of collective bargaining between August 19, 1974 and August 27, 1974 and, when the parties met again on August 27, 1974, an impasse in bargaining occurred. On August 28, 1974, the REA refused to meet and the District acted to establish plans for the opening of schools on August 29, 1974. Said action in effect extended and preserved the wages, hours and conditions of employment established by the expired agreement except that the provisions of Article VIII, Section 2a were not extended and preserved in the case of junior high school teachers. As part of the implementation of the fixed-variable schedule adopted on March 11, 1974, junior high school teachers were required to report forty-five minutes prior to the beginning of classes rather than at least fifteen minutes prior to the beginning of classes as had been the case under said provision of the expired agreement.

7. ADOPTION OF POLICY ON ELEMENTARY HOURS. On August 12, 1974, the District adopted an elementary school schedule and established tentative starting and ending times for classes in the District's schools, including its elementary schools. The decision to adopt said schedule and starting and ending times related primarily to matters of educational policy rather than wages, hours and working conditions. By the terms of said action, the new elementary school schedule and starting and ending times were to take effect at the beginning of the 1974-1975 school year, after the expiration of the 1972-1974 collective bargaining agreement. The REA was aware of the content and the effect of this proposed change on hours and working

conditions in the elementary schools prior to its adoption and at all times relevant thereafter. During the negotiations on proposed changes in the 1972-1974 collective bargaining agreement which commenced in May, 1974 and continued thereafter, the District made proposals and attempted to bargain about proposals which would have resolved any alleged conflict between the implementation of the new school schedule and starting and ending times and the provisions of the 1972-1974 collective bargaining agreement dealing with hours and working conditions in the elementary schools. In addition, the District bargained about REA proposals dealing with hours and working conditions in the District's schools, including its elementary schools which might be affected by the implementation of the elementary school schedule and starting and ending times. The District and REA failed to reach agreement on the terms to be included in the new collective bargaining agreement prior to the expiration of the 1972-1974 collective bargaining agreement on August 25, 1974. The REA refused to meet for purposes of collective bargaining between August 19, 1974 and August 27, 1974 and when the parties met on August 27, 1974 an impasse in bargaining occurred. On August 28, 1974, the REA refused to meet and the District acted to establish plans for the opening of schools on August 29, 1974. When schools opened on August 29, 1974 and classes began on September 3, 1974, there were a number of changes in the hours and conditions of employment of elementary teachers which were the result of the impact of the board's adoption of the elementary school schedule in starting and ending times on August 12, 1974 and not the board's action on August 28, 1974. The REA, by the conduct of its agents, waived any right it had to bargain about the particular hours during the day when classes would be held at the beginning of the 1974-1975 school year.

8. ESTABLISHMENT OF OPENING DATES FOR SCHOOLS. On or about August 12, 1974, the District distributed an orientation pamphlet to employes represented by the REA and others which stated that schools would open for teacher in-service on Monday, August 26, 1974 and that classes for students would begin on Wednesday, August 28, 1974. At the time that this pamphlet was distributed the District had proposed in bargaining that the schools be opened on those dates and the REA had proposed that schools be opened for teacher in-service on August 29, 1974 and that classes for students begin on September 3, 1974. The opening dates proposed by the District were consistent with past practice in the District and the opening dates proposed by the REA would constitute a departure from past practice in the District. After the distribution of the pamphlet, the REA contended that the District had acted unilaterally to establish opening dates for schools and filed a prohibited practice charge with the commission alleging that the District had violated its duty to bargain by such action. Thereafter, even though the District offered to agree to the opening dates for schools proposed by the REA, the REA refused to bargain about that proposal until August 16, 1974 when it offered to agree to the opening dates the REA had proposed provided the District agreed to the balance of its calendar proposal. On August 16, 1974, and thereafter, the District took steps to implement its offer to open schools on the dates proposed by the REA and schools opened on those dates. On September 24, 1974 the parties entered into a settlement agreement whereby the REA agreed to withdraw its complaint alleging that the District violated its duty to bargain by unilaterally setting the opening dates for schools and thereafter, on October 10, 1974, the complaint was dismissed with prejudice pursuant to the terms of that agreement.

9. ADOPTION OF A NEW FACULTY-PUPIL RATIO. In April or May, 1968, the board adopted a staffing ratio policy which provided that most elementary schools would be staffed with the equivalent of one full-

time professional employe for every 26.8 students (in accordance with a formula which included and excluded a number of professional and non-professional personnel and assigned a value of .4 to auxiliary aides and instructional secretaries and .5 to interns) and that certain inner-city schools would ultimately be staffed with the equivalent of one full-time professional employe for every nineteen students. Thereafter, the District and REA agreed to certain language dealing with policy changes during the term of the agreement and recommended class sizes which language has been included with minor modifications in every collective bargaining agreement thereafter, including the 1974-1976 collective bargaining agreement. Under said agreement the District was free to change its policy on staffing ratio provided it did not violate the limitations on class size contained therein and provided it complied with the other provisions of said agreement. On February 10, 1975, after giving the REA notice of its intent to do so and providing the REA with an opportunity to present its views consistent with the terms of the 1974-1976 agreement, the District modified its staffing ratio policy to provide that after the District's schools had been desegregated in the Fall of 1975, the elementary schools would be staffed with the equivalent of one full-time professional employe for each 24.9 students which represented a melding of the existing 26.8:1 and 19:1 ratios. The decision to change the staffing ratio related primarily to matters of educational policy rather than wages, hours and working conditions. Although the District never offered to bargain about the decision to change the ratio, the REA supported the proposed change in staffing ratio and recommended that the board approve the change prior to its adoption.

10. DECISION TO "CLOSE" THREE SCHOOLS. As part of its plan to achieve racial balance in the District's schools, the board decided, on February 10, 1975, to make a number of changes in the educational program contained within three elementary schools. The decision to make such changes related primarily to educational policy rather than wages, hours and working conditions. However, said decision did have an impact on working conditions to the extent that it required the transfer of approximately sixty teachers. This impact was governed by the terms of the 1974-1976 collective bargaining agreement and the District's practices thereunder. The representatives of the District met with the representatives of the REA for the purpose of discussing proper administration of those procedures and possible variations in those procedures which might be acceptable to both parties. In May, 1975 the parties discussed said variations as part of the negotiations on the issues reserved for further negotiations under the terms of the 1974-1976 collective bargaining agreement. No agreement was ever reached between the parties regarding possible variations on the agreed-to procedure for the handling of transfers brought about by the decision to change the educational program in these three schools and the District proceeded to follow the existing procedures when it became evident that no such agreement could be achieved as part of the negotiations on the remaining issues in bargaining.

11. CONSIDERATION OF OPTIONAL EDUCATIONAL PATTERNS. As part of its plan to achieve racial balance in the District's schools, the board decided on February 10, 1975 to develop and place two new optional educational programs in one of the three schools which were to receive different educational programs in the Fall of 1975. Thereafter, the District decided to place a fine arts educational program, and a fundamental educational program at said school. The decision to develop and the decision to place two new educational programs at said school related primarily to matters of educational policy rather than wages, hours and working conditions. However, said decision did have an impact on working conditions in that it created a number of vacancies which could be filled by transfers.

This impact was governed by the existing terms of the 1974-1976 collective bargaining agreement and the District's practices thereunder, and the parties dealt with this impact in the same manner and with the same results as the impact of the District's decision to change the educational program in the three schools in question.

12. ADOPTION OF POLICY REQUIRING MANDATORY IN-SERVICE TRAINING. On February 10, 1975, the board referred a recommendation of a Citizen's Advisory Committee, that a mandatory in-service program dealing with curriculum and human relations be developed for the District's staff to attend on release time, to Superintendent Nelson. Thereafter Nelson sought and obtained the agreement of the REA to conduct such a program during the 1974-1975 school year partly on release time and partly outside the regular school day. At various times between September 24, 1974 and June 3, 1975 the District and REA bargained about the District's proposal that the 1975-1976 school calendar contain an in-service day at the beginning of the 1975-1976 school year for the purpose of conducting in-service programs of the type recommended by the Citizen's Advisory Committee and other in-service programs but no agreement was reached thereon. In June 1975 the board took no action with regard to District policy on in-service training but on June 4, 1975 it did act to adopt its latest proposal in bargaining with regard to the school calendar for the 1975-1976 school year which contained an in-service day at the beginning of the year which was ultimately used, in part, for the purpose of conducting in-service programs of the type recommended by the Citizen's Advisory Committee.

13. CONSIDERATION OF NIGHT SCHOOL PROGRAM. On June 12, 1975, the board adopted a proposal to establish a night school program subject to the proviso that if any aspect of the program required review or negotiations with the REA as specified in the agreement with the REA, such review or negotiations should be accomplished before implementing the night school program. The night school program was never implemented for reasons unrelated to this proviso and no bargaining ever took place between the District and the REA concerning any aspect of this proposal.

14. INDEXING, CODIFYING, REVISING AND MODIFYING SCHOOL BOARD POLICY (CROFT SYSTEM). Beginning in 1974 and continuing through the Summer of 1975, the District undertook an effort to codify its existing policies in a written policy handbook in accordance with a commercially prepared system of numerical organization known as the Croft System. As of the close of the hearing herein, it had not completed that effort and had not acted to adopt any of the statements of policies contained in said handbook other than the policies contained in two series dealing with internal board procedures having no relationship to the wages, hours and working conditions of employes represented by the REA. While it is not clear that the proposed adoption of the balance of the Croft System will result in any changes in policy or whether any such changes will affect wages, hours and working conditions, the District has provided the REA with information sufficient for it to determine whether the proposed codification will change any policies affecting wages, hours and working conditions and has attempted to meet its obligations under the terms of the 1974-1976 collective bargaining agreement to provide the REA with information regarding any possible changes in policy affecting wages, hours and working conditions and has afforded it the opportunity to be heard regarding any possible changes in wages, hours and working conditions that might result from the adoption of said policy statements. The District has, during its development of the Croft System, refused to agree to include any of its policies in the 1974-1976 collective bargaining agreement other than those already included by agreement and has declined to negotiate concerning the content of policies having no relationship to the issues concerning which the parties agreed to continue to negotiate, on the basis of its claim that it is not obligated to do so.

15. ADOPTION OF MEDICAL INSURANCE PROGRAM. Under the terms of the parties' 1972-1974 collective bargaining agreement, the District agreed to provide medical insurance coverage to certain employes represented by the REA and to pay the full cost of said coverage. In its comprehensive proposal of May 28, 1974, the REA proposed to substantially expand the coverage previously provided and to require that the District and the REA agreed to "master policies and contracts" which provided coverage for a number of medical expenses which were enumerated. During the course of the negotiations leading up to the agreement reached on September 24, 1974, the REA dropped all of its demands with regard to medical insurance coverage and agreed to the District's proposal to continue the provisions of the 1972-1974 collective bargaining agreement regarding insurance. The parties did not agree to bargain about the subject of insurance coverage during the term of the agreement. By this conduct and by the terms of said agreement the REA waived any right to bargain about insurance coverage during the term of said agreement. In February 1975 the District solicited bids from certain insurance carriers for continuation of the existing medical insurance coverage. At that time the REA took the position that the District was obligated to bargain with the REA before negotiating or renegotiating any of the insurance agreements. Thereafter the District provided the REA with information with regard to the bidding process and afforded it an opportunity to present its views but refused to bargain about any changes that the REA might desire to make in the coverage provided. Thereafter, on March 10, 1975, the District agreed to renew the insurance policies with identical coverage and to apply a $50,000 credit on premiums previously paid to one of the carriers to the premium payment due that carrier for July 1975. No substantial changes in the insurance coverage resulted from said actions.

16. NON-COMPLIANCE WITH ARBITRATION AWARD (ABLES GRIEVANCE). On January 8, 1975, Arbitrator Edward E. Hales issued an arbitration award wherein he found that the District violated the terms of the 1972-1974 collective bargaining agreement when it paid certain teachers who attended an all-day drug education workshop held on Saturday, December 8, 1973 at the rate paid teachers for curriculum preparation rather than the equivalent of an additional day of contractual employment. Hales directed the District to pay the teachers in question at their daily rate based on their annual salary divided by the number of contract days. Thereafter the District paid the teachers in question in accordance with the award. Sometime during the 1974-1975 school year, either before or after the award of Arbitrator Hales, other teachers attended a two-hour drug education program held after school. The record does not disclose if the content of this program differed in any substantial way from the December 8, 1973 program other than the obvious difference in length. Nor does it disclose how, if at all, the teachers who attended this program were compensated over and above their annual salary. On June 19, 1975, after the complaint herein had been filed and served on the District, the REA demanded that the District pay the individuals who attended the two-hour drug education program held sometime during the 1974-1975 school year in the "same manner" as the individuals who attended the all-day drug education workshop held on Saturday, December 8, 1973, but it has since failed to do so. The District complied with the award of Arbitrator Hales by paying the individuals who attended the December 8, 1973 drug education workshop in accordance with the terms of that award and has not failed and refused to comply with the award by failing to pay the individuals who attended a two-hour drug education program held sometime during the 1974-1975 school year in the same manner.

17. NON-COMPLIANCE WITH ARBITRATION DECISION (DOBKE-BRECKLEY GRIEVANCE). On January 14, 1975, the REA and District entered into a settlement agreement dealing with a grievance filed by two teachers

named Dobke and Breckley. The terms of that settlement agreement required the District to do a number of things, but it did not, by its terms require that the board take any action. One requirement was that the superintendent issue a memorandum to principals defining the obligation to protect the integrity of the grievance procedure and verifying or emphasizing that no one would be reprised against for participating in the grievance procedure. The District complied with all of the requirements of the settlement agreement. However, the requirement that the superintendent issue a memorandum as described was not met until the beginning of the 1975-1976 school year. On or about April 15, 1975, Peterson provided Ennis with a nine-page memorandum to principals which he had drafted for the superintendent's signature. The memorandum dealt with several aspects of the grievance procedure, including the subject of reprisals. Peterson gave Ennis a copy of this memo for the purpose of obtaining his approval or suggestions regarding possible modifications in the memordandum. The first two and one-half pages dealt with the subject of reprisals and was consistent with the requirements of the terms of the settlement agreement. Ennis' response, which was not introduced in evidence, did not indicate his approval of the memorandum and did not suggest any modifications, but consisted instead of his candid and unrestrained comments on other matters. Thereafter, no action was taken with regard to this proposed memorandum until after the complaint herein was filed and summer vacation began. After again contacting Ennis to obtain his response to the proposed memorandum and receiving none, Peterson prepared a new memorandum for the superintendent's signature which was limited to the subject of non-reprisals and was likewise consistent with the requirements of the settlement agreement. It was sent to all principals at the beginning of the 1975-1976 school year. The delay in complying with memorandum requirement of the settlement agreement was due to the initial inaction of Peterson, the subsequent failure of Ennis to either indicate his approval of the memorandum prepared by Peterson or to suggest modifications in that memorandum or an alternative memorandum, and the press of other business being handled by Peterson and Ennis in late April, May and June, 1975.

18. NON-COMPLIANCE WITH ARBITRATION AWARD (NORTH PARK ELEMENTARY SCHOOL GRIEVANCE). On March 5, 1975, Arbitrator Reynolds C. Seitz issued an arbitration award wherein he found the District violated the agreement when the principal at North Park Elementary School changed the school schedule on November 24, 1973, in order to provide one hundred minutes of planning time and to accommodate the bus schedule, without first working with the staff at said school regarding the proposed change. Arbitrator Seitz directed the principal at North Park Elementary School to work with the staff at that school for the purpose of developing a schedule which included planning time to go into effect for the 1975-1976 school year and retained jurisdiction for the purpose of determining whether the actions of the principal constituted compliance with the obligations imposed by the agreement as delineated in his rationale. The award by its terms did not require that the board, or any other agent of the District take any other action. There is no evidence that would support a finding that the principal at North Park Elementary School failed to take the steps required or that the REA ever sought to invoke the Arbitrator's retained jurisdiction for the purpose of determining whether there had been compliance. Although the board took no official action with regard to this award, Sam Castagna, Assistant Superintendent of the District, discussed the award at a meeting of elementary principals and advised them that they should take steps to work with their staff as discussed in the award in preparing school schedules thereafter.

19. REJECTION AND REFUSAL TO CONSIDER GRIEVANCES. Beginning on September 3, 1974, and continuing through March of 1975, approximately twenty-four grievances were filed by the REA and employes represented by

the REA and processed through the various steps of the grievance procedure. On March 4 and 7, 1975 and perhaps on other dates in March, the board's Personnel Committee considered these grievances at Level Three of the agreed-to procedure contained in the 1974-1976 collective bargaining agreement. Thereafter, Peterson, on behalf of the committee, answered at least seventeen of the grievances considered by the committee. On April 14, 1975, Ennis asked the board to consider these grievances and decide each grievance by conducting a roll call vote on each after having obtained a public statement of the facts from the Personnel Committee and the REA. The evidence does not disclose what action, if any, the board took with regard to this request which was inconsistent with the terms of the existing grievance procedure. Under the existing grievance procedure grievances are to be considered by the board's designated subcommittee at Level Three which is its Personnel Committee. On April 23, 1975, the REA advised the District of its intention to arbitrate the approximately twenty-four grievances then pending at Level Three and demanded that the District issue formal answers to approximately eight grievances which had not been formally answered at Level Three. The REA had still not received formal answers to the twenty-four grievances which were pending at Level Three in March 1975 when, on June 18, 1975, it notified the board of its intention to appeal twenty-five grievances to arbitration, including at least twenty-two which had been considered by the Personnel Committee in March, 1975. The REA had not received formal answers from the Personnel Committee on some of these grievances prior to appealing them to arbitration and did so on the basis that the failure to issue formal answers constituted a denial. Consistent with the provisions of the grievance procedure and the parties' practices thereunder, these grievances were moved to arbitration along with the grievances which had received formal answers at Level Three. The failure of the Personnel Committee to issue formal answers to some grievances pending before it in April and May, 1975, and the statement of the chairperson of the Personnel Committee, wherein she expressed the opinion that the president of the REA, who had filed six out of the twenty-four grievances pending at Level Three in March 1975, was taking up too much time of the committee, and the other evidence of record is not sufficient to establish that the District or its agents were refusing to consider grievances in good faith in April 1975 or thereafter.

20. REFUSAL TO BARGAIN IN GOOD FAITH REGARDING UNRESOLVED ISSUES IN 1974 NEGOTIATIONS. After the board and REA's membership had ratified the agreement reached on September 24, 1974, its terms were implemented by the District and the REA. Thereafter, the District and REA entered into negotiations with regard to all of the issues that required further negotiations as described in Finding of Fact No. 3 except for the issues related to the hours of work which were first to be considered by the study committee for the purpose of issuing a joint report. Although the District attempted to comply with the agreement to study the hours of work and issue a joint report, no joint report was ever issued because the REA refused to participate in the study committee on and after December 19, 1974. On February 7, 1975, the District sent the REA a memorandum describing the results of the study from the District's point of view and on February 21, 1975, it notified the REA that it would enter into negotiations with regard to the issues related to the hours of work. Thereafter, the District and REA resumed negotiations on all of the issues that required further negotiations, including the issues related to the hours of work, and reached tentative agreement on all of the issues except for the issues related to the hours of work; one aspect of the calendar for the 1975-1976 school year; and the compensation schedule for coaches and similar extra duty positions. On or after December 23, 1974, the REA advised the District that, notwithstanding statements to the contrary made by Judge Gordon Myse who was functioning as a mediator

in the negotiations which led to the September 24, 1974 agreement, it had not agreed to make five minor changes in the wording of the 1972-1974 agreement which were contained in a draft of the 1974-1976 agreement prepared by the District on December 23, 1974. Thereafter, neither party alleged that the lack of agreement on these items, which was due to a mutual mistake, justified a recision of the 1974-1976 agreement and, on May 20, 1975, the District offered to sign an agreement which eliminated one of those changes. The REA never bargained concerning the possible inclusion of any of these changes except for one which was contained in a provision which was discussed in the course of the negotiations on the hours of work and no agreement was ever reached on those proposed changes. During these negotiations, which began in October 1974 and ended on June 3, 1975, the District engaged in a good faith effort to reach agreement on the issues reserved for further negotiations and the five minor issues which arose as a result of the mutual mistake.

21. UNILATERAL ADOPTION OF COLLECTIVE BARGAINING AGREEMENT. On June 3, 1975, the District and REA reached an impasse in bargaining on the issues that were reserved for further negotiations and, on June 4, 1975, the District's board adopted two recommendations of its Negotiating Committee which, in effect, implemented its last proposals in bargaining with regard to those issues and the five minor changes on which no agreement was reached due to a mutual mistake and the REA's refusal to discuss until all other issues were resolved.

22. REFUSAL TO MEET. At the conclusion of the negotiations meeting held on May 30, 1975, the parties discussed possible dates for the next negotiations meeting. Although the parties discussed the possibility of meeting on June 5, 1975, they agreed instead to meet on June 2, 1975. At the conclusion of the meeting which began on June 2, 1975 and ended at approximately 1:30 a.m. on June 3, 1975, there was no agreement to meet on June 5, 1975 or any other date and the District did not thereafter cancel any negotiations meetings tentatively scheduled for that date or any other date. On June 4, 1975, Ennis asked that the District's entire board enter into negotiations with the REA during a meeting of its Committee of the Whole or on the following day and the board declined to do so. On July 7 or 14, 1975 Ennis asked board member Langdon if she would arrange a negotiations meeting with the board's Negotiating Committee but withdrew said request when Langdon indicated that any such meeting should be with Peterson or at least arranged through Peterson. On July 21, 1975, Ennis wrote Superintendent Nelson a letter dealing with certain proposed policy changes unrelated to the charges herein which contained a request that Nelson arrange a date for "negotiations." This latter request probably referred to Ennis' claim that the District was obligated to bargain about said policy changes rather than the issues which were still unsettled from the 1974 negotiations but, in any event, did not constitute a request for a negotiations meeting with the District's duly authorized representative for purposes of collective bargaining. From June 3, 1975 and continuing through October 29, 1975, the REA failed to make any request to bargain which was not explicitly or implicitly premised on the inclusion of board members or the exclusion of Peterson or both.

23. ADOPTION OF NEW POLICY (UNSPECIFIED). On June 12, 1975 the board adopted a recommendation of its Committee of the Whole that the classes in the junior high schools be organized in a traditional six-period day rather than in accordance with the fixed-variable pattern of organization which existed during the 1974-1975 school year. This decision related primarily to matters of educational policy rather than wages, hours and working conditions. Although the

board notified representatives of the REA of its intent to consider said recommendation and provided them with an opportunity to express their views before making the decision to return to the traditional organization of classes it did not offer to bargain or bargain about the decision to do so.

24. REFUSAL TO BARGAIN IMPACT OF CHANGES IN TEACHER WORK DAY. Even though the REA was aware of the impact of the board's decision of June 12, 1975, described in Findings of Fact No. 23, on hours and working conditions of teachers in the junior high schools, it never identified or sought to bargain with the District's duly authorized representative for purposes of collective bargaining about any alleged impact of that decision which was not covered by those provisions of the 1974-1976 collective bargaining agreement which it had previously agreed to or the resolution implementing the board's last offer on the issues related to the hours of work in the junior high schools. By its conduct of failing to identify or asking to bargain about any such impact of said decision prior to its implementation at the beginning of the 1975-1976 school year, the REA waived its right to bargain about any such impact.

25. REA'S REFUSAL TO MEET IN AUGUST, 1974. Between August 19, 1974 and August 27, 1974, during the negotiations for a successor collective bargaining agreement to replace the 1972-1974 collective bargaining agreement which expired by its terms on August 25, 1974, the REA refused to meet with the District's duly authorized representative for purposes of collective bargaining unless the District would agree that those board members who were on the board's Negotiating Committee would also be present during the negotiations meetings. By such conduct, the REA conditioned its willingness to meet for purposes of collective bargaining on the District's willingness to agree to a proposal which was not related to wages, hours and working conditions, but related instead to the District's right to select its own representatives for purposes of collective bargaining.

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

CONCLUSIONS OF LAW

1. That, by its conduct described in paragraphs four through twenty-four above, the District has not failed and refused to negotiate in good faith with the REA as alleged in its complaint in Case XXXI and has not committed any prohibited practices within the meaning of §111.70(3)(a)4 or 1 of the MERA.

2. That by its conduct described in paragraph twenty-five above, the REA refused to bargain with the District as alleged in its complaint in Case XXXII and has committed a prohibited practice within the meaning of §111.70(3)(b)3 of the MERA.

Based on the above and foregoing Findings of Fact and Conclusions of Law the undersigned enters the following

ORDER

The REA, its officers and agents, shall cease and desist from conditioning its willingness to bargain collectively with the duly

authorized representative(s) of the District on the District's willingness to have board members present or otherwise change its representative(s) for purposes of collective bargaining.

Dated at Madison, Wisconsin this 4th day of April, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

RACINE UNIFIED SCHOOL DIST. No. 1, XXXI and XXXII, Decision Nos. 13696-C and 13876-B

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

HISTORY OF THIS PROCEEDING:

A. The 1972 Complaint in Case XVIII

The tortured history of this proceeding can best be understood by going back to the negotiations between the parties for a successor to the 1971-1972 collective bargaining agreement. During the course of those negotiations certain events transpired which resulted in a complaint of prohibited practices being filed by the REA against the District. In that complaint the REA alleged that the District violated its duty to bargain by:

1. engaging in a course of conduct which makes it clear it has had no intention to make a serious effort to adjust differences and reach a contract agreement upon reasonable terms with REA; and

2. unilaterally making substantial changes in mandatory subjects of collective bargaining by action of its board on August 28, 1972. 1/

The first allegation would appear to be an allegation of surface bargaining. However, at the hearing the REA proceeded to adduce evidence concerning three separate and unstated charges:

1. unilaterally determining that any collective bargaining agreement reached after the expiration of the existing agreement would not be made retroactive;

2. unilaterally eliminating a provision providing for one hundred minutes of planning time for elementary teachers; and

3. unilaterally opening negotiations to certain members of the news media. 2/

In a decision issued by the undersigned examiner 3/ these additional allegations, along with the general allegation of surface bargaining, were found to be without merit. No petition for review of that determination was filed by the REA.

The undersigned examiner did find merit to the REA's claim that the District violated its duty to bargain by adopting a policy at the

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1/ Case XVIII, No. 15996, MP-169, hereinafter referred to as Case XVIII.

2/ A determination of these charges was made because (a) no objection was raised by the District to the lack of notice afforded by the REA; (b) the briefing was responsive and the District was thereby put on notice that the REA was contending these were separate violations; and (c) the charges were deemed to be without merit in any event.

3/ Decision No. 11315-B, dated January 9, 1974.

expiration of the 1971-1972 collective bargaining agreement to the extent that said policy was intended to unilaterally change or eliminate working conditions contained in the expired agreement which were not in issue in the negotiations. A specific example of such intended effect was found where the District thereafter issued a new and changed grievance procedure during the hiatus which existed between the expiration of the 1971-1972 collective bargaining agreement and settlement on the terms of the 1972-1974 collective bargaining agreement. Because the parties had subsequently reached agreement on the affected terms and conditions of employment which were made retroactive, there was no need to enter an order for any affirmative relief other than the posting of notices. The examiner did enter a "cease and desist order" as well. That order read as follows:

> "Cease and desist from refusing to bargain collectively with regard to mandatory subjects of bargaining within the meaning to Section 111.70(1)(d) of the Wisconsin Statutes by unilaterally establishing, modifying or eliminating wages, hours or working conditions or threatening to do so without first offering to bargain and, if requested, bargaining in good faith with appropriate representatives of the Racine Education Association with regard to any such proposed establishment, modification or elimination of wages, hours or working conditions.

B. REA's First Effort to "Enforce" Cease and Desist Order

The cease and desist order in question was entered on January 9, 1974. On January 31, 1974, the REA filed a motion with the commission alleging that during the pendency of the proceeding before the examiner, and prior to the entry of the cease and desist order on January 9, 1974, the District had "violated the provisions of 111.70 MERA in a manner similar to that found by the examiner." The motion did not specify the conduct in question.

On the same day the District requested and was granted an extension of the time for filing a petition for review of the examiner's decision pursuant to the provisions of §111.07(5), Stats. On February 19, 1974, while the REA's motion for enforcement and the District's petition for review were still pending before the commission, the REA filed a complaint against the District alleging:

1. that, in October and November 1973, the District had violated its duty to bargain in good faith by unilaterally extending the work year and altering the rates of compensation of consultants; and

2. that, on January 8, 1973, and thereafter the District had violated its duty to bargain in good faith by unilaterally adopting and implementing a hot lunch program which allegedly had an impact on wages, hours and working conditions. 4/

In its prayer for relief the REA asked, inter alia, that the commission sit as a body and hear the matters alleged in the complaint

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4/ Case XXIV, No. 17679, MP-335, hereinafter referred to as Case XXIV.

and the motion for enforcement then pending before the commission. On March 6, 1974, the commission issued an order 5/ denying the motion for enforcement because it dealt with alleged violations which occurred prior to the examiner's order which was then being reviewed by the commission. On the same day the commission issued an order 6/ appointing an examiner to hear the matters alleged in the complaint filed on February 19, 1974.

A hearing on that complaint was held before Examiner Greco on April 16 and 17, 1974. Thereafter, after the transcript had been prepared and briefs were filed on July 8, 1974, and before the examiner had made his decision, the REA filed a motion on August 12, 1974, seeking to amend its complaint then pending before Examiner Greco. The amended complaint, which was submitted along with the motion, alleged that in June and July, 1974 the District had taken certain further unilateral action with regard to the consultants which were violative of its duty to bargain in good faith.

On August 15, 1974, the REA filed a new complaint 7/ alleging that the District violated its duty to bargain in good faith by unilaterally establishing a starting date for the 1974-1975 school year.

On August 19, 1974 the commission granted the REA's motion to amend its complaint in Case XXIV and authorized Examiner Greco to reconvene the hearing on said complaint. 8/ On August 21, 1974 the commission issued an order appointing Examiner Greco to hear Case XXVII as well, and Examiner Greco scheduled the matters to be heard concurrently.

C. Court Proceeding Involving Case XVIII

Meanwhile, on April 19, 1974, the commission had issued an order amending the examiner's findings of fact and conclusions of law and affirming his order in Case XVIII. 9/ By letter dated May 1, 1974 the District notified the Commission that it did not intend to comply with the affirmative relief (notice posting) ordered by the commission in Case XVIII because of its belief that it was based on errors of law. A timely petition for court review was filed by the District on May 3, 1974. On May 10, 1974, the commission by letter, asked the attorney general to counter-petition the court for enforcement of its order in Case XVIII. While that case was pending before the Circuit Court for Dane County, Honorable George R. Currie presiding, 10/ the REA apparently filed a new "motion for enforcement" dated September 4, 1974 which was similar to the motion which was denied on

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5/ Decision No. 11315-C.

6/ Decision No. 12530.

7/ Case XXVII, No. 18224, MP-388, hereinafter referred to as Case XXVII.

8/ Decision No. 12503-A.

9/ Decision No. 11315-D.

10/ Case No. 142-401.

March 6, 1974, but containing additional reference to the matter alleged in the amended complaint and complaint in Cases XXIV and XXVII then pending before Examiner Greco. 11/ Because the parties entered into a settlement agreement wherein the REA agreed to withdraw its complaints pending before Examiner Greco and the District agreed to withdraw its petition for review pending before Judge Currie, no formal action was taken by the commission on that motion.

D. The 1974 Settlement Agreement

The settlement agreement in question was part of the settlement on the terms of the 1974-1976 collective bargaining agreement which was reached on or about September 24, 1974. Thereafter on October 4, 1974 W. Thatcher Peterson, coordinator of employee services, on behalf of the District submitted a request to the court asking to withdraw the District's petition for review. On the same date Peterson submitted a letter to the chairman of the commission. The second paragraph of that letter was drafted by counsel for the REA. The letter in question reads as follows:

> "On behalf of the Respondent, I wish to inform you that I have withdrawn the Petition for Review that was filed in the above case.
>
> "Since the petition is being withdrawn, it follows that the Respondent will comply with the Commission's Order. Just so we're all clear, it also follows that the WERC retains jurisdiction to seek enforcement of the Order by petition to an appropriate circuit court in the event the WERC should find that, at some time in the future, the Respondent, fails to comply with the Order."

On October 7, 1974 Judge Currie entered an Order dismissing the matter on the basis of the request submitted to him by Peterson. In his order no reference is made to the matter contained in the letter from Peterson to the chairman of the commission.

On October 9, 1974 REA's counsel wrote the chairman withdrawing its amended complaint in Case XXIV and its complaint in Case XXVII then pending before Examiner Greco. That letter read as follows:

> "In consideration of and conditioned upon the Employer's agreement to withdraw its Petition for Review of the decision of the Commission which is presently pending before the Circuit Court for Dane County;
>
> "And further conditioned upon the Employer's agreement to comply with, and in fact to fully comply with, the decision of the Commission in said case, as well as acknowledge that in the event of noncompliance the Commission retains jurisdiction to seek enforcement in the appropriate forum;

11/ The records of the commission and the court do not disclose whether this motion was filed with the commission or with the court. However, a copy, which bore the caption of the commission, was found in the files of the attorney general's office. It was not date-stamped by the commission, the court or the attorney general's office, suggesting that it was hand-delivered.

"The Complainant in the above-captioned cases hereby requests permission to withdraw the complaints filed therein."

On October 10, 1974 Greco issued an order dismissing the complaint and amended complaint in Case XXIV 12/ and the commission issued an order setting aside the appointment of Examiner Greco and dismissing the complaint in Case XXVII. 13/

Thereafter, the parties engaged in bargaining with regard to the issues which were, by agreement, left open for futher negotiations as part of their 1974-1976 collective bargaining agreement.

E. REA's Current Effort to "Enforce" Cease and Desist Order

On February 25, 1975 REA's counsel wrote the commission a letter which read as follows:

"The above-named Employer, after having agreed to obey the Decision and Order of the Wisconsin Employment Relations Commission, has in fact failed and refused to do so. It has instead unilaterally made a series of major changes in work schedules and other conditions of employment while refusing to negotiate concerning such changes.

"Since the Employer's conduct continues the same pattern found by the Wisconsin Employment Relations Commission to have been illegal, it is urgently requested that the Commission immediately initiate proceedings to enforce its Decision and Order."

On March 3, 1975 the chairman of the commission wrote counsel for the REA asking that the REA file, in verified form, a statement of the facts and circumstances which the REA alleged to constitute a violation of the commission's order in Case XVIII and sent a copy of the REA's February 25, 1975 letter to the District. On March 27, 1975 the REA filed an affidavit (hereinafter referred to as the March affidavit) in support of its request that the commission proceed to enforce its order in Case XVIII. That affidavit alleged the following events which the REA contends were in violation of the commission's order in Case XVIII:

"1. That during April and May, 1974, the [District] unilaterally adopted a special educational needs pilot program (SEN) which added new employees to the bargaining unit with greatly changed hours and conditions of employment. At all times since August, 1974, the [District] has refused and failed to negotiate concerning the impact of the implementation of the SEN Program.

"2. That in June, 1974, the [District] unilaterally adopted a junior high school work day policy which materially changed the hours and conditions of employment of members of the bargaining unit. At all times since August, 1974, the [District] has refused to negotiate concerning its implementation of said policy.

12/ Decision No. 12503-B.

13/ Decision No. 12955-A.

"3. That in January and February, 1975, the [District] made the decision to close three schools. It has, since that time, refused to negotiate with the [REA] concerning the impact of that decision on members of the bargaining unit as to transfer, seniority, and other wages, hours, and conditions of employment.

"4. That in January and February, 1975, the [District] unilaterally adopted a policy of requiring mandatory in-service training of members of the bargaining unit. At all times since that decision, the District has failed and refused to negotiate concerning the impact of its implementation upon members of the bargaining unit.

"5. That during February and March, 1975, the [District] is moving toward the adoption of Optional Educational Patterns for schools which will materially, substantially, and necessarily change hours and conditions of employment of members of the bargaining unit. At all times material herein the [District] has failed and refused to negotiate concerning this matter.

"6. That during March, 1975, the [District] is unilaterally moving to establish a night school program. Although this program will directly and substantially affect members of the bargaining unit as to wages, hours and conditions of employment, the [District] has failed and refused to negotiate concerning such program.

"7. That in April, 1974, while the above-captioned failure to bargain charges were [being reviewed by the] Commission, the [District] unilaterally adopted a Title IV two member department to facilitate racial desegregation. Although said department's operations changed the wages, hours, and conditions of employment of members of the bargaining unit, the [District] has at all times, up to and including the present, failed and refused to negotiate concerning this department.

"8. That in January and February, 1975, the [District] unilaterally and while failing and refusing to negotiate, adopted a new faculty-pupil staffing ratio to carry out its recently adopted racial desegregation policy. Said changes in staffing ratio directly and materially affected hours and conditions of employment of members of the bargaining unit.

"9. That the [District] is currently unilaterally indexing ('croft system'), codifying, revising and modifying all School Board policies, while refusing to furnish the [REA] with sufficient information to determine which changes materially affect wages, hours and conditions of employment and while refusing to negotiate concerning such changes.

"10. That in March, 1975, the [District] unilaterally adopted a medical insurance program while refusing to negotiate concerning changes in said program."

After considering the matters alleged in the March affidavit, the commission issued an order 14/dated April 2, 1975 denying said request. In so doing the commission stated in relevant part:

14/ Decision No. 11315-E.

". . . and the Commission having considered said motion and affidavit and being advised in the premises, and having concluded that the factual matters alleged in support of said motion are so materially divergent from the violations found in the aforesaid Commission decision, in that they do not involve unilateral actions by the Respondent during the course of negotiations for a new collective bargaining agreement, that they do not warrant the Commission's seeking enforcement of its earlier Order."

In denying said request, the commission indicated in a footnote that nothing in its order was intended to preclude the REA from filing a new complaint based on the new matters alleged in the affidavit.

On April 9, 1975, the REA, by its counsel, filed a motion asking the commission to reconsider its decision of April 2, 1975 wherein he stated in relevant part as follows:

"1. That the Order of the Commission is based upon a demonstrable mistake of undisputed fact. . . .

"2. That negotiations for a new collective bargaining agreement between the Racine Education Association and Respondent School District commenced March 5, 1974, and that said negotiations continued without resolution through August, 1974, during which the violations of the Order alleged in Paragraphs 1, 2 and 7 of the Affidavit in Support of Request to Proceed to Enforce Commission Order were committed by Respondent.

"3. That at all times since September 1, 1974, the Racine Education Association and the Respondent School District have been without a collective bargaining contract and have, in fact, been extensively involved in the mediation process with a mediator duly appointed by the Wisconsin Employment Relations Commission the next session of which is to occur April 9, 1975.

"4. That the violations of the Commission's Orders set forth in Paragraphs 4, 5, 6, 8, 9 and 10 of the Affidavit in Support of Request to Proceed to Enforce Commission Order were committed during said period after the expiration of the prior collective bargaining agreement and during the negotiation and mediation process by which the parties have been attempting to arrive at a new collective bargaining agreement." (Emphasis Added).

On May 14, 1975 the commission issued an order 15/ setting aside its order of April 2, 1975 and designating the undersigned to conduct a hearing to take evidence material to a determination by the commission as to whether it should proceed to seek enforcement of its order in Case XVIII. On the same date the REA filed a complaint of prohibited practices (Case XXXI) wherein it realleged with minor modifications all of the matters alleged in its March affidavit. In addition, the REA alleged that:

15/ Decision No. 11315-F.

"[1]. Since April, 1975, the Administration and School Board have rejected and refused to consider grievances filed by the [REA].

"[2]. Throughout the 1974-75 school year the [District] has failed and refused to comply with the provisions of a final and binding arbitration award ('Ables Grievance') issued and effective during said year.

"[3]. Throughout the period since January 14, 1975, the [District] has failed and refused to comply with a final and binding arbitration decision (Dobke - Brechlerg Grievance) [sic] which issued and was effective as of January 14, 1975.

"[4]. Throughout the 1974-75 school year the [District] has failed and refused to comply with the provisions of a final and binding arbitration award (North Park Elementary School Grievance) issued and effective during said year.

"[5]. In October, 1974, the [REA] and the [District] entered into an interim agreement to end a work stoppage on the basis of certain agreements including the agreement to negotiate in good faith concerning unresolved issues [sic] at all times since October, 1974, the [District] has failed and refused to negotiate in good faith concerning such issues."

Significantly, this complaint does not allege the existence of a comprehensive collective bargaining agreement or a violation of §111.70 (3)(a)5. Instead, it concludes with the claim that the REA and District entered into an "interim agreement to end the work stoppage on the basis of certain agreements including the agreement to negotiate in good faith concerning unresolved issues [sic] at all times since October 1974 the School District has failed and refused to negotiate in good faith concerning such issues."

On June 3, 1975 the commission issued an order consolidating the hearing on the REA's complaint with a hearing previously scheduled before the undersigned on the REA's motion for reconsideration. On June 19, 1975 prior to the first day of hearing on the complaint and motion the REA filed a notice of intention to amend its complaint. On the first day of hearing the REA's motion was granted and the complaint was amended to allege further:

"1. [O]n or about June 4, 1975, [the District] unilaterally adopted an entire contract covering all teachers in the collective bargaining unit at a time when no agreement had been reached concerning the terms and conditions of said contract nor had any impasse in negotiations with the [REA] been reached in the process of collective bargaining.

"2. That despite requests by the [REA] to do so, the [District] has canceled tentative negotiations and failed and refused to engage in any negotiations since June 4, 1975, the date it unilaterally adopted a contract covering all the wages, hours and conditions of employment of teachers in the collective bargaining unit.

"3. On June 9, 1975, a subcommittee of the Board recommended, and on June 12, 1975, the entire School Board adopted, a policy which materially and substantially changed the hours and conditions of employment of all teachers in the collective bargaining unit while failing and refusing to negotiate with the [REA] concerning such changes.

"4. At all times since June 12, 1975, the [District] has failed and refused to negotiate concerning the impact of the foregoing material and substantial changes it unilaterally made in the hours, terms and conditions of the teacher workday."

At the hearing, the District, which had entered a special appearance by prior notice to the commission, made a motion requesting that the commission vacate its order for hearing in Case XVIII contending, inter alia: (1) that the commission was without jurisdiction to conduct such a hearing; and (2) the simultaneous conduct of a hearing on the complaint in Case XXXI would prejudice the rights of the District.

Because the commission had previously determined to set aside its order of March 2, 1975 and conduct a hearing on the issues raised by the REA's motion for reconsideration, notwithstanding the fact that such a hearing was not legally required, 16/ the examiner denied said motion on the assurance that precautions would be taken to ensure that the rights of the District were not prejudiced thereby. Specifically the REA was put on notice that it would be required to comply substantially with the notice and other due process considerations contained in §111.07, Stats., and that, even though conduct occurring more than one year prior to the filing of the complaint would be considered for the purposes of considering the motion and as background for matters alleged in the complaint, no unfair labor practices would be found which were time barred by the provisions of §111.07(14), Stats.

On the second day of hearing, July 10, 1975, the REA attempted to adduce evidence in an effort to prove a violation not alleged in its complaint or in its March affidavit, i.e., that the District had unilaterally implemented a board policy in August, 1974, which materially changed the hours and conditions of employment of elementary school teachers. Upon timely objection interposed by the District to this lack of notice, the REA was required to move to amend its complaint and affidavit. The REA orally amended paragraph five of its complaint and paragraph two of its affidavit at the hearing and later filed written amendments pursuant to the direction of the examiner. Those amendments alleged that:

". . . a) During August, 1974, the [District] unilaterally implemented a Board policy which materially changed the hours and conditions of employment of elementary school teachers.

"b) In June, 1974, the [District] unilaterally adopted a junior high school work day policy which materially changed the hours and conditions of employment of members of the bargaining unit.

"c) At all times since August, 1974, the [District] has refused to negotiate in good faith concerning its implementation of said policies."

On the third day of hearing, July 18, 1975, the REA attempted to introduce evidence in an effort to show that the District unilaterally established a starting date for the 1974-1975 school year in violation

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16/ WERB vs. UAW 269 Wis. 2nd 578 (1954).

of its duty to bargain in good faith. Upon timely objection interposed by the District to this lack of notice, the REA was directed to further amend or clarify its complaint and advised that any proposed amendment or clarification adding new changes to its complaint or affidavit subsequent to the next date of hearing would only be allowed on good cause shown.

Instead of moving to amend its complaint, the REA elected to clarify it and filed a document entitled "Statement in Response to Make More Definite and Certain" wherein it stated that its July 10, 1975 amendment was intended to allege unlawful unilateral changes with regard to "the actual dates of employment for what is known as the school year calendar" as well as with respect to the time within the work day. By its terms, this amendment would not cover the high schools. This approach to pleading is apparently based on the REA's persistent claim at the hearing that this additional allegation was included in its July 10, 1975 amendment. In fact, as the District's answer points out, this allegation is based on unrelated factual allegations and was the subject of the REA's prior complaint of August 15, 1974 in Case XXVII, which had been dismissed with prejudice.

Finally, on July 30, 1975, the REA filed a document entitled "Motion for Enforcement" in Case XVIII. 17/ In said document, the REA makes reference to:

1. its motion for enforcement dated September 4, 1974, referred to above, which was never acted upon because of the September 24, 1974 settlement agreement;

2. its complaint and amended complaint in Case XXIV described above; and

3. its complaint in Case XXVII.

In this motion the REA alleges that the September 24, 1974 settlement agreement has been violated by the District as evidenced by the conduct complained of in its complaint in Case XXXI, as amended, and its March affidavit, as amended. The motion asks that the commission consider the matter alleged in: (1) the complaint and amended complaint in Case XXIV; (2) the complaint in Case XXVII; (3) the motion for enforcement dated September 4, 1974; and (4) the March 1975 affidavit, as amended, in making its determination of whether to seek court enforcement of its order in Case XVIII.

F. District's Complaint in Case XXXII

On August 5, 1975, after the first three days of hearing on the REA's complaint and motion, the District filed a complaint of prohibited practices wherein it alleged that the REA violated its duty to bargain in good faith in that:

> ". . . between on or about August 19, 1974 and on or about August 27, 1974 [the REA] refused to meet for the purpose

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17/ The REA had been directed by the examiner to amend paragraph two of its affidavit to include the new allegations raised on the third day of hearing with regard to the opening dates for school. Instead it filed a formal motion attempting to revive other matters as well.

of collective bargaining respecting the terms and conditions of employment of employes of [the District] which the [REA] represents with the duly authorized representative of the [District]." 18/

The District moved to consolidate the proceedings on its complaint in Case XXXII with the proceedings on the REA's complaint in Case XXXI. By Order dated August 14, 1975 that motion was granted. 19/

G. The Record in this Case

In total, seventeen days of hearing were held, the last being October 30, 1975. Thereafter, on December 5, 1975, the parties' counsel met with the examiner in Madison for the purpose of organizing the exhibits and making necessary duplicate copies. The record thus consists of approximately two thousand pages of testimony and several thousand pages of exhibits. 20/

After receipt of the final installments of the transcript on March 19, 1976, the examiner established a briefing schedule on the question of whether the commission should grant the REA's motion for reconsideration. That schedule called for the REA and District to file simultaneous briefs on the issues raised by that motion on or before May 3, 1976.

On April 29, 1976 counsel for the REA and District advised the examiner that they had agreed to file simultaneous briefs on the REA's motion to reconsider on May 28, 1976. Thereafter on May 26, 1976 counsel agreed to again postpone briefs on the motion until June 11, 1976. During June, counsel for the REA and District advised the examiner that they would prefer to brief the issues raised by the REA's motion to reconsider simultaneously with their briefs on the merits. Pursuant to that agreement they agreed to file simultaneous briefs on their respective cases on or before August 6, 1976. Defensive briefs were to be filed on August 20, 1976. Each side had the right to request permission to file a reply brief thereafter. These arrangements were confirmed by the examiner on July 1, 1976.

Pursuant to a request from counsel for the REA, the briefing schedule was postponed to August 20, 1976 and September 3, 1976. The District filed its brief on its case in chief on August 20, 1976. The REA's counsel requested and was granted a further extension of the time for filing its brief on August 24, 1976. That extension called for the REA to file its brief on September 17, 1976, with defensive briefs

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18/ Case XXXII, No. 9442, MP-498, hereinafter referred to as Case XXXII.

19/ Decision No. 13876.

20/ In addition, five tape recordings of six meetings of the District's school board were admitted at the insistence of the REA. However, because of the difficulty in listening to said tapes which do not play back properly on machines other than those on which they were recorded, and because of the necessity to have a transcript or some other means to identify the voices, the parties were advised that the commission would only consider those portions of the tapes which were reduced to written form and then only to the extent that the other party had had an opportunity to dispute the correctness of the written version. By agreement between counsel, the tapes and machines were left in the custody of the District.

to be due on October 8, 1976. The REA did not file its brief on September 17, 1976. On October 12, 1976, the REA filed its brief on its case in chief and the briefs were exchanged by the examiner on October 13, 1976.

Because of the tardiness of the REA's brief, the briefing schedule was thereafter amended to reflect that the District would have until November 23, 1976 in which to file its defensive brief. On November 23, 1976, the District was granted an extension until December 13, 1976, in which to file its defensive brief. By agreement between counsel, the District was granted a second extension in the time for filing its defensive brief to December 20, 1976. The REA elected not to file a defensive brief and the District's brief was forwarded to the REA's counsel by the examiner on December 20, 1976.

In a phone call to the examiner, counsel for the REA indicated that it did not wish to waive any right it might have to file a reply brief to the District's brief of December 20, 1976. 21/ The examiner advised counsel for the REA that if counsel could not agree on whether there should be reply briefs, the examiner would rule on the matter. On January 25, 1977 the REA's counsel advised the examiner in writing that he did not wish to file a reply brief to the District's brief of December 20, 1976.

H. Motion to Reopen Hearing

On April 22, 1976 the District filed a petition for declaratory ruling and a motion to reopen the hearing herein and consolidate the hearing on the petition with the hearing herein. The petition alleges that, in spite of the REA's asserted claim here that no collective bargaining agreement existed between the District and the REA: (1) the REA had agreed with the District to "reopen" the existing collective bargaining agreement for purposes of negotiating with regard to health insurance; and (2) the REA was now asserting that the District lacked the right to implement its final offer with regard to health insurance after bargaining to an impasse because an agreement to reopen a contract is a permissive subject of bargaining.

The REA objected to the proposed consolidation of the hearing on the declaratory ruling with the hearing in Case XXXI and the reopening of the record for that purpose. It further pointed out that the REA had sought and obtained an injunction in Racine County Circuit Court preventing the District from implementing its last offer with regard to health insurance for the duration of the existing bargaining agreement or the further order of the court. 22/

On June 18, 1976, the commission issued an order denying the District's motion to reopen the hearing and consolidate the hearing on the declaratory ruling with the hearing herein 23/ and further ordered that a separate hearing be conducted on the District's petition for a declaratory ruling before Examiner Marshall L. Gratz. 24/

21/ Although the dates outlined in the June agreement no longer applied, that agreement did include the right of either party to request permission to file a reply brief.

22/ Case No. 76-028-B2, Order of Honorable William F. Jones, dated April 9, 1976.

23/ Decision No. 13696-A.

24/ Decision No. 14722. A new case was opened (Case XXXVI, No. 20573, DR(M)-72), hereinafter identified as Case XXXVI.

I. Other Related Litigation

On August 20, 1976 the REA filed a complaint of prohibited practice wherein it alleged that the District, "although required to do so by its collective agreement with the Association and despite repeated requests by the Association, has refused to process grievances on numerous occasions and has failed and refused to proceed to arbitration as set forth in the collective agreement." (Emphasis supplied). 25/ The complaint further alleged that by such conduct the District had violated §111.70(3)(a)5 of the MERA. After the REA amended its complain to allege with greater specificity the grievances involved and the District's alleged conduct with respect thereto, the parties settled that case pursuant to an agreement wherein they selected arbitrators for the purpose of proceeding to hearings on the grievances involved. The complaint was thereafter dismissed with prejudice by the examiner. 26/

Finally, on October 20, 1976, the REA filed a complaint wherein it alleged that the District had violated the duty to bargain in good faith by:

1. making changes in the group life insurance program on or about September 22, 1976, while refusing to give notice or negotiating in good faith with the REA regarding same; and

2. adopting a Title IX grievance procedure on or about October 11, 1976, without giving notice or negotiating with the REA with respect thereto. 27/

Thereafter the REA amended this complaint on November 22, 1976, to allege that the District had, on August 25, 1976, unilaterally adopted a proposed three-year collective bargaining agreement which allegedly made material and substantial changes in wages, hours and conditions of employment while refusing to negotiate concerning such changes. Hearing in Case XXXIX was held before Chairman Slavney and Commissioner Hoornstra on January 4, 5, 24, 25 and 26, 1977. Thereafter, Chairman Slavney and Commissioner Torosian participated in extensive mediation. The complaint in Case XXXIX was dismissed at the request of the REA pursuant to a settlement agreement reached between the parties at the conclusion of that effort. 28/

THE DISTRICT'S ANSWER IN CASE XXXI: 29/

On July 2, 1975, the District answered the REA's complaint of May 14, 1975, wherein it denied most of the substantive allegations contained therein and asserted certain affirmative defenses thereto. On July 18, 1975, the District filed its written answer to the REA's July 9, 1975 and July 10, 1975 amendments to the May 14, 1975 complaint wherein it similarly denied the substantive allegations contained there

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25/ Case XXXVII, No. 20740, MP-653, hereinafter referred to as Case XXXVII.

26/ Case XXXVIII, No. 20962, MP-678, hereinafter referred to as

and asserted certain affirmative defenses thereto. Finally, on August 20, 1975 the District amended its answer to assert an affirmative defense to the new matter alleged in the REA's "Statement in Response to Make More Definite and Certain." Taken together and put in modified chronological order the District's answer to the charges contained in the complaint in Case XXXI as amended and "clarified" can be summarized as follows:

1. Adoption of SEN Program (4/74 and 5/74). The District denies this charge and alleges that this matter was settled in September, 1974, and that it is barred as untimely under §111.07(14), Stats.

2. Creation of Title IV Department (4/74). The District denies this charge and alleges that this matter was settled in September, 1974, and that it is barred as untimely under §111.07(14), Stats.

3. Adoption of a Junior High Work Day Policy (6/74). The District denies this charge and alleges that this matter was settled in September, 1974, and that it is barred as untimely under §111.07(14), Stats.

4. Adoption of Policy on Elementary Hours (8/74). The District denies this charge and alleges that this matter was settled in September, 1974, and that it is barred as untimely under §111.07(14), Stats.

5. Establishment of Opening Day for Schools (8/74). The District denies this charge and alleges that this matter was settled in September, 1974, and that it is barred as untimely under §111.07(14), Stats. In addition, the District points out that this charge was the subject matter of a prior complaint (Case XXVII above) and that said complaint was dismissed.

6. Adoption of New Faculty-Pupil Staffing Ratio (1/75 and 2/75). The District denies this charge and alleges that the matter and issues alleged are controlled and resolved by a collective bargaining agreement entered into in September, 1974.

7. Decision to Close Three Schools (1/75 and 2/75). The District denies this charge and alleges that the matter and issues alleged are covered, controlled and resolved by a collective bargaining agreement entered into in September, 1974.

8. Consideration of Optional Education Patterns (2/75 and 3/75). The District denies this charge and alleges that the matters and issues alleged are covered, controlled and resolved by a collective bargaining agreement entered into in September, 1974.

29/ (continued)

order for hearing referred to above. The District takes the position that the commission has no authority to do anything other than to grant or deny said motion. Similarly, when the REA filed the document entitled "Motion for Enforcement" on July 30, 1975 wherein it attempted to revive its motion for enforcement dated September 4, 1974 and the complaints in Case XXIV and Case XXVII, the District filed no formal responsive pleading. The District did file answers in Cases XXIV and XXVII when they were pending before Examiner Greco.

9. Adoption of Policy Requiring Mandatory In-Service Training (1/75 and 2/75). The District denies this charge and alleges that the matter and issues alleged are covered, controlled and resolved by a collective bargaining agreement entered into in September, 1974.

10. Consideration of Night School Program (3/75). The District denies this charge and alleges that the matters and issues alleged are covered, controlled and resolved by a collective bargaining agreement entered into in September, 1974.

11. Indexing, Codifying, Revising and Modifying of School Board Policy (Croft System) (3/75). The District denies this charge and alleges that the matters and issues alleged are covered, controlled and resolved by a collective bargaining agreement entered into in September, 1974.

12. Adoption of Medical Insurance Program (3/75). The District denies this charge and alleges that the matters and issues alleged are covered, controlled and resolved by a collective bargaining agreement entered into in September, 1974.

13. Non-Compliance with Arbitration Award (Ables Grievance) (1974-1975). The District denies this charge and alleges that the matter and issues alleged are subject to the contractual dispute resolution procedure which the REA has failed and refused to exhaust.

14. Non-Compliance with Arbitration Decision (Dobke-Breckley Grievance) (1/14/75). The District denies this charge and alleges that the matters and issues alleged are subject to the contractual dispute resolution procedure which the REA has failed and refused to exhaust.

15. Non-Compliance with Arbitration Award (North Park Elementary School Grievance) (1974-1975). The District denies this charge and alleges that the Arbitrator has retained jurisdiction over the matter and that the matter and issues alleged are subject to the contractual dispute resolution procedure which the REA has failed and refused to exhaust.

16. Rejection and Refusal to Consider Grievances (4/75). The District denies this charge and alleges that the matter and issues alleged are subject to a contractual dispute resolution procedure which the REA has failed and refused to exhaust.

17. Refusal to Bargain in Good Faith Concerning Unresolved Issues in 1974 Negotiations (10/74). The District denies this charge and alleges that the matters and issues alleged are covered, controlled and resolved by a collective bargaining agreement entered into in September, 1974.

18. Unilateral Adoption of a Collective Bargaining Agreement (6/4/75 The District denies this charge.

19. Refusal to Meet (6/4/75). The District denies this charge.

20. Adoption of New Policy (Unspecified) (6/9/75). The District denies this charge and alleges that the allegations are covered controlled and resolved by a collective bargaining agreement entered into in September, 1974.

21. Refusal to Bargain Impact of Changes in Teacher Work Day (6/12/75). The District denies this charge.

Finally, as to all of the charges, the District alleges that beginning in April, 1974, the REA has failed and refused to bargain in good faith.

THE REA'S ANSWER IN CASE XXXII:

The REA denies that it refused to meet with the duly authorized representative of the District for purposes of collective bargaining between August 19, 1974 and August 27, 1974 and alleges that the District has engaged in a course of conduct designed to undermine the collective bargaining process by continued unilateral changes relating to mandatory subjects of bargaining and by an overall pattern of surface bargaining rather than good faith bargaining.

POSITION OF THE REA GENERALLY STATED:

An analysis of the pleadings described above discloses that the REA contends that the District by its conduct in fourteen separate subject areas has failed to comply with the commission's order in Case XVIII and with regard to the conduct in seven of those same fourteen subject areas occurring since September 1974, violated the terms of the settlement agreement in Case XVIII, Case XXIV and Case XXVII. Furthermore, the REA contends that the District, by its conduct in twelve of those same fourteen subject areas and in nine additional subject areas, violated its duty to bargain in good faith and restrained and interfered with employes in the exercise of their rights under the MERA.

In its brief, the REA contends that the District has violated the terms of the September, 1974 settlement agreement in Case XVIII, Case XXIV and Case XXVII and asks therefore that said settlement agreement be set aside and that the District be found to have violated the commission's order in Case XVIII by: (1) its conduct as alleged in the fourteen subject areas covered by the affidavit filed in support of its motion for enforcement as amended; and (2) two charges alleged in its unfair labor practice complaint in Case XXXI but not alleged in its affidavit in support of its motion for enforcement. 30/ In addition, the REA asks that the District be found to have violated its duty to bargain in good faith and to have restrained and interfered with the rights of employes by its conduct in the twenty-one subject areas as alleged in the complaint in Case XXXI, as amended. The REA asks that the commission:

1. vacate the settlement agreement in Case XVIII, Case XXIV and Case XXVII;

2. "reinstate" the REA's request for enforcement of September 4, 1974;

3. seek judicial enforcement of its order in Case XVIII; and

30/ In its brief, the REA indicates that paragraph number ten of the affidavit alleged that the District violated the commission's order by refusing to comply with the arbitration award in the Ables grievance in 1974-1975 and by rejecting and refusing to consider grievances in April of 1975. Those allegations, which are referred to in paragraphs numbered fourteen and fifteen of the complaint, are not mentioned in the affidavit as amended.

4. enter an appropriate remedial order in Case XXXI.

Although the REA elected not to file a brief in Case XXXII, its position is as set out in its answer as described above. For the reason stated therein, the REA asks that the complaint in Case XXXII be dismissed.

POSITION OF THE DISTRICT GENERALLY STATED:

The District contends that the commission has no legal authority to adjudicate the question of whether the District has violated the terms o its order in Case XVIII. According to the District, if the commission believes that the District has violated the terms of its order in Case XVIII the commission may seek judicial enforcement of its order but it cannot make an independent determination of compliance or non-compliance in any of the fourteen subject areas where the REA alleges non-complianc

With regard to the charges in the twenty-one separate subject areas contained in the REA's complaint as amended in Case XXXI, the District does not contend that the commission lacks jurisdiction to consider said charges to the extent that they are not barred by §111.07(14), Stats., but asks that these charges be dismissed for the reasons set out in its answer described above and contained in its brief.

Finally, with regard to is own complaint in Case XXXII, the District asks that the commission find that the REA violated its duty to bargain as alleged and enter an appropriate remedial order.

DISCUSSION:

Before turning to the merits of the charges contained in the two complaints herein, it is first necessary to consider two questions: (1) whether the REA's April 9, 1975 motion to reconsider should be granted; and (2) whether the REA's July 30, 1975 motion for enforcement should be granted. As noted by the District, if those motions are granted, it would be inappropriate to decide the merits of some of the charges contained in the complaint in Case XXXI.

A. Motion to Reconsider

The record establishes that, contrary to the REA's assertion, the commission's order dated April 2, 1975 is not based upon a "demonstrable mistake of undisputed fact." The REA and the District entered into a comprehensive collective bargaining agreement on or about September 24, 1975. Pursuant to the terms of that agreement they continued to negotiate with regard to certain specified proposals to be included in said agreement. However, the record establishes that the commission correctly assumed that the conduct alleged in the REA's affidavit of March 27, 1975 occurred in the context of bargaining obligations arising under an existing collective bargaining agreement rather during the course of negotiations for a new collective bargaining agreement to replace an expired agreement. For this

B. Motion for Enforcement

The gravamen of the violation found in Case XVIII was that the District violated §111.70(3)(a)4 and 1, Stats., when, in the absence of a collective bargaining agreement and during the course of negotiations for a successor agreement, it changed or eliminated certain working conditions which were established by the terms of the expired agreement and were not in issue during the negotiations. In fact, the record in that case disclosed that the District's action in this regard was, at first, ambiguous. On August 28, 1972, the District adopted a resolution which established certain personnel policies dealing with wages, hours and working conditions which were to be followed in the absence of a collective bargaining agreement. Because of certain expectations created by the District's action at the expiration of the prior agreement and because a number of the working conditions which were contained in the expired agreement (such as the grievance procedure) were not adopted as part of the August 28, 1972 resolution, the REA questioned what effect the resolution had on such working conditions. When the District responded by unilaterally establishing a modified grievance procedure, such action confirmed that the District apparently intended to unilaterally change or eliminate working conditions established by the expired agreement by adopting its resolution of August 28, 1972. The conclusions of law which formed the basis for the remedial order in that case read as follows:

> "4. That, by unilaterally establishing a new grievance procedure which, inter alia, more narrowly defined those claims which could be grieved under said procedure and eliminated the provision providing for binding arbitration, the Employer failed and refused to bargain collectively with regard to a mandatory subject of bargaining within the meaning of Section 111.70(1)(d) of the Wisconsin Statutes and committed a prohibited practice within the meaning of Section 111.70(3)(a)4 and Section 111.70 (3)(a)1 of the Wisconsin Statutes.
>
> "5. That to the extent the Respondent's Board of Education intended to unilaterally change or eliminate and did unilaterally change or eliminate any other working conditions established in the collective bargaining agreement which expired on August 25, 1972 which were not in issue in the negotiations by its action of adopting the resolution set out above at its special meeting on August 28, 1972, it failed and refused to bargain collectively with regard to mandatory subjects of bargaining within the meaning of Section 111.70(1)(d) of the Wisconsin Statutes and committed a prohibited practice within the meaning of Section 111.70(3)(a)4 and Section 111.70(3)(a)1 of the Wisconsin Statutes."

None of the conduct alleged in the REA's March 27, 1975 affidavit, as amended, involved changes in working conditions or elimination of working conditions which were established by an expired agreement and occurred without the benefit of prior negotiations. The conduct alleged in the affidavit all relates to alleged changes in working conditions or actions which had an impact on working conditions which occurred during the term of a comprehensive bargaining agreement. Furthermore, the matters alleged raise questions as to: (1) the mandatory or permissive nature of the action taken; (2) whether any changes in wages, hours and working conditions actually took place; (3) whether the REA has waived by contract or conduct, any obligation the District may have had to bargain over the changes in wages, hours and working conditions allegedly made; and (4) whether the District met its duty to bargain in good faith before making the alleged changes in wages, hours and working conditions.

In its motion for enforcement of July 30, 1975, the REA seeks to revive its claim that the District violated the terms of the commission's order of April 19, 1974 by two actions taken in 1973 which were the subject matter of its complaint in Case XXIV described above. This claim was the subject of the REA's first motion for enforcement filed on January 31, 1974, and denied by the commission by an order 32/ dated March 6, 1974. In addition, the REA also seeks to revive its claim that the District violated the terms of the commission's order of April 19, 1974, by its conduct which was the subject matter of its complaint in Case XXVII. This claim was the subject of the REA's second motion for enforcement dated September 4, 1974, which was never formally acted upon by the commission or the court for the reasons noted above. As part of its effort to revive these claims, the REA necessarily alleges that the District has violated the terms of the settlement agreement in Case XVIII, Case XXIV and Case XXVII.

The REA's claim that the District has violated the terms of the settlement agreement in Case XVIII, Case XXIV and Case XXVII is premised on a misconstruction of the legal effect of the commission's order in Case XVIII. Under the terms of the parties' settlement agreement, the District agreed to comply with the commission's order. That order required the District to cease and desist from the conduct found violative of its duty to bargain and to post certain notices in the manner described. There is no claim herein that the District failed to post the notices as required. In addition, as noted above, there is no claim that the District has engaged in conduct similar to that found violative of the act in Case XVIII. As noted in the District's brief, the REA apparently interprets the cease and desist portion of the commission's order in a way that would substantially alter the District's bargaining obligation under the law and the terms of its agreement with the REA. To the extent that said order is subject to such an interpretation, it is subject to the criticism that its wording is overbroad. 33/ However, the

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32/ Decision No. 11315-C. As noted above under the discussion of the REA's first effort to enforce the order in Case XVIII, the REA's first motion related to alleged changes in the consultant's work year and hot lunch program which occurred prior to the examiner's order in Case XVIII.

33/ The examiner is aware that the commission considered and rejected the District's request that the cease and desist order and notice in question be reworded. In this regard, the commission recognized their broad nature but rejected the request at page 9 as follows:

> "With respect to the Respondent's exception to the Examiner's broad cease and desist order, we deny the exception. To limit the order to a specific type of a failure to bargain collectively would not, in our opinion, effectuate the policies of MERA. Likewise, we accept the Examiner's Notice To Employes for the same reason. The fact that the issues may be technical and complex, as argued by the Respondent, does not constitute a basis for revising the Notice, or that it not be posted."

By this rationale and its rationale in its order of April 2, 1975 the commission recognized that its order was enforceable as regards similar conduct. See NLRB v. Express Publishing Co. 312 U.S. 426, 8 LRRM 415 (1941). However, there was no intent to alter its obligations under the law or the agreement.

District's settlement agreement with the REA merely required compliance with the commission's order, and the conduct alleged in the affidavit as amended which has occurred since entering into that settlement agreement, if true, would not indicate that it has failed or refused to do so. Consequently, the REA's motion for enforcement of July 30, 1975 has likewise been denied. 34/

C. Charges in Case XXXI

Having thus concluded that the REA's motion to reconsider and its motion for enforcement should be denied, consideration should next be given to the merits of the twenty-one charges contained in the REA's complaint in Case XXXI as amended. For convenience, these charges will be discussed in the modified chronological order set out above under the heading "The District's Answer in Case XXXI."

(1) Adoption of SEN Program

The REA's charge with regard to the SEN Program contained in its May 14, 1975 complaint is worded in a slightly different manner than the allegation contained in its affidavit of March 27, 1975 which is set out above. In its complaint the REA alleges that:

> "4. During April and May, 1974, the Racine Unified School District No. 1, hereinafter School District, unilaterally adopted a policy including a special educational needs pilot program (SEN) which, as of August, 1974, added new employees to the bargaining unit with greatly changed hours and conditions of employment. At all times since August, 1974, the School District has refused and failed to negotiate concerning the impact of the implementation of the SEN Program."

(a) Background

The evidence discloses that the District has for some time had a program or programs for the purpose of helping those educationally disadvantaged pupils who demonstrated a need for special attention. It has sought and obtained federal funds for this purpose in the past. When state funds became available for this purpose in the Winter of 1973-1974, the District, on February 18, 1974, filed an application for a grant for the balance of its fiscal year which was due to end on June 30, 1974. The primary purpose of the grant was to finance the hiring of twenty-seven aides and two "skills-resource" teachers to work with 324 students for eight weeks in grades three through six in fifteen "target schools". Funds were granted for this purpose. Funds were also requested to hold an in-service program on March 1, 1974 for the purpose of discussing the problems of educating the educationally disadvantaged. It is unclear if funds were granted for this purpose.

As a prerequisite for making application for these funds, the District established a SEN Program Advisory Council. A number of teachers were invited to be members of the advisory council, including Richard Ables, President of the REA. Although James Ennis, Exeuctive Director of the REA, stated his belief that Ables objected to the

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34/ Decision No. 11315-H.

District's proposed implementation of this program without bargaining, there is no direct evidence of what, if any, conversations took place in this regard between Ables and agents of the District.

In April and May, 1974, while the initial application was being processed and the grant was being implemented, the District began making preparations for filing an application for a second, larger grant for the 1974-1975 school year. The application itself was prepared on or about May 31, 1974. The purpose of the grant was to continue and to expand upon the prior program by including certain schools which were receiving outside funds under different programs (Title I and Title VII elementary schools) and to support two new programs (administration of certain tests to students in ten kindergarten classes and the establishment of a bi-lingual, bi-cultural program using cable television in seven schools.) Under this grant, funds were to be provided primarily for the purpose of hiring fifty-three aides and three skills-resource teachers. In addition, funds were provided for hiring a director and a secretary for four months.

On June 3, 1974, Ennis appeared at a meeting of the school board which was sitting as a Committee of the Whole and was considering a number of items including the question of whether to recommend approval of the submission of the SEN proposal for the 1974-1975 school year. Ennis took the position that the District should bargain collectively with the REA before acting on the SEN proposal. On June 7, 1974 Ennis sent a letter to Lowell McNeill, Chairman of the board wherein he indicated that it was his understanding that the board's Committee of the Whole intended to recommend approval of the proposed extension and expansion of the SEN program and alleged that the SEN program contained many items which were mandatory subjects of collective bargaining. In his letter Ennis demanded on behalf of the Association that the board:

> "1. before final adoption of this proposal, by policy action, declare that it will enter into immediate bargaining of this proposal;
>
> 2. establish and adopt implementing procedures to mandate that the Chairman of the Board Negotiation's Committee act immediately to meet and bargain with the Association--all present--the proposed wages, hours, and conditions of work sections of the present program and the proposed expansion of the SEN Program."

On June 10, 1974, at a regular meeting of the board, the board acknowledged receipt of Ennis' letter but did not adopt resolutions of the type demanded by that letter. After hearing the recommendations of the committee of the whole with regard to SEN and a number of other items, the board acted to approve the committee's recommendation that approval be granted for the submission of the 1974-1975 SEN proposal.

At all times when he discussed the matter with Peterson, Ennis took the position that it was the responsibility of the District to initiate proposals with regard to SEN and to negotiate same with the REA. Furthermore, on at least one occasion during negotiations with the REA on August 6, 1974, Peterson advised Ennis that, in the District's opinion, the SEN program had no impact on wages, hours and working conditions which required negotiations, and invited Ennis to raise any issues that required negotiations in his opinion. Again, on August 15, 1974, Peterson suggested that the parties talk about any proposals the REA had regarding SEN on the following week. However, the REA, thereafter, on August 19, 1974, refused to meet with Peterson unless the Board members who were on its Negotiating Committee came to the table with Peterson. Thereafter when negotiations

resumed on August 27, 1974, with board members present pursuant to the REA's demand, the discussion focused on other REA demands. During the balance of the negotiations, the REA failed to make any proposal with regard to the SEN program. No further mention was made of the alleged impact of the SEN program until the March 27, 1975 affidavit was filed.

(b) Discussion

As noted above, in its answer the District denies this charge and contends that the matter was settled in September, 1974 and that it is barred as being untimely. In its brief, the District reiterates these arguments and argues in addition that there was no aspect of SEN which required negotiations since the evidence discloses that the individuals who took SEN positions were existing staff members who were protected from layoff by the terms of the agreement and those SEN teachers who worked beyond the regular school year were given additional compensation on a per diem basis pursuant to the District's practice in the numerous other cases where it contracts with teachers to work beyond the normal school year.

The charge that the District violated its duty to bargain with regard to the SEN program was contained in the REA's original complaint which was received by the commission on May 14, 1975. That charge alleges that the program was unilaterally adopted in "April and May, 1974." The evidence discloses that it was first implemented before May 14, 1974, or more than one year prior to the filing of the complaint. However, the board acted on the proposal to expand the program on June 10, 1974, which was well within one year of the filing of the complaint. In addition, the charge alleges that the implementation added new employes to the bargaining unit in August, 1974 with greatly changed wages, hours and conditions of employment and that since August, 1974, the District has refused to bargain with regard to this alleged impact.

There can be little doubt that the question of whether the District should establish the SEN program was not a mandatory subject of bargaining. It related primarily to educational policy. 35/ Therefore, when the District refused to condition its approval of the recommendation of the Committee of the Whole as requested by Ennis on June 10, 1974, it did not violate its duty to bargain. If the program had an impact on wages, hours and conditions of employment, there was a duty to bargain concerning that impact upon request. The evidence discloses that the REA identified no area of alleged impact that required bargaining. The wages, hours and conditions of employment of the teachers who accepted SEN positions were governed by the existing agreement and practices of the District in similar cases.

Furthermore, the REA, by its conduct, waived any requirement that the District bargain about the alleged impact of the SEN program. By taking the position that it was the District's responsibility to make proposals with regard to SEN for possible inclusion in the agreement before implementing SEN, the REA was effectively taking the position that the District had to seek the prior agreement of the REA before implementing the SEN program. Because it was not a

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35/ See Oak Creek-Franklin Jt. School Dist. No. 1 (11827-D) 9/74, affirmed, Dane County Cir. Ct. 11/75, with regard to establishment of a pilot program for emotionally disturbed students. See also City of Beloit (Schools) (11831-C) 9/74, affirmed 73 Wis. 2d 43 (1976) with regard to establishment of a reading program.

mandatory subject for bargaining there was no such obligation on the District's part. Finally, by declining to formulate any proposals with regard to the alleged impact of the SEN program on wages, hours and conditions of employment and thereafter dropping its demand that the District do so and entering into a new two-year collective bargaining agreement which contained a "zipper clause" the REA waived any right it had to bargain about the alleged impact of the SEN program on wages, hours and conditions of employment for the period of said agreement.

(2) Creation of Title IV Department

The REA's complaint alleges in paragraph ten essentially the same matter alleged in paragraph seven of its March 27, 1975 affidavit, set out above. In essence, this charge is that in April, 1974, the District established a two-member department which allegedly changed wages, hours and conditions of employment of members of the bargaining unit and has since that date failed and refused to negotiate "concerning the department". The District denies this charge and alleges that the matter was settled in September, 1974 and is barred as untimely under §111.07 (14), Stats.

In its brief, the REA asserts that the District not only "failed to offer to negotiate" concerning alleged changes in wages, hours and working conditions, but "refused in fact to negotiate". However, as the District points out in its brief, the record is devoid of any evidence that would support a finding that the REA ever asked to negotiate concerning the alleged changes in wages, hours and working conditions affecting bargaining unit members brought about by the Title IV program.

(a) Background

The only evidence relied upon by the REA in support of this charge consists of the testimony of Ennis. In his testimony, Ennis states that such a department was created and that two individuals by the name of Loretta Life and Orin Taylor were employed for a period of time for the purpose of acting as liasion to the District and community in the process of making the District's desegregation plan go smoothly. He testified further that he was "certain" that Life was a certified professional and "assumed" that Taylor was too. He testified that "to the best of his knowledge" they were "given a salary by the Board"; that they were not on the negotiated salary schedules; and that they did not receive cost-of-living checks.

In its brief, the District points out that certain provisions of the 1972-1974 collective bargaining agreement, which were continued in the 1974-1976 collective bargaining agreement, reflect that the parties have agreed that: (1) job descriptions for such positions will be jointly drafted by a joint job description committee created in Article XVIII; (2) teachers working in such a special program shall have certain job placement rights if the program is reduced; and (3) a posting and bidding procedure for filling vacancies in such positions will be utilized. According to the District, this negotiated language establishes that the parties recognize that such special programs come and go and argues that if there was any special language the REA desired to negotiate with regard to the Title IV program it should have asked for such opportunity at the time and prior to reaching agreement without such language in September, 1974.

(b) Discussion

The question of whether the District should establish a Title IV department, like the question of whether it should establish a SEN program, related primarily to educational policy. Therefore, only the impact of that decision, insofar as it may have had an effect on wages, hours and working conditions, was a mandatory subject of bargaining and then only if it had an impact which was not already covered by the terms of the existing agreement. 36/

The complaint, on its face, alleges that the Title IV department was created more than one year prior to the filing of the complaint. However, if the REA had made a timely request to bargain about any alleged impact of the decision within the one-year period immediately preceding the filing of the complaint, this charge ought not be dismissed as untimely under §111.07(14), Stats. Apparently, because it took the same position with regard to this action as it did with the creation of the SEN program, the REA never identified any aspect of this program that required bargaining or made any timely proposal during the 1974 negotiations. By this conduct the REA must be deemed to have waived any obligation on the District's part to bargain concerning the alleged impact of the decision to create a Title IV department on wages, hours and conditions of employment of employes represented by the REA.

(3) Adoption of a "Junior High Work Day Policy"

Paragraph two of the REA's March 27, 1975 affidavit set out above and paragraph five of the REA's complaint dated May 14, 1975, which were later amended to include additional allegations relating to the adoption of a policy on elementary hours and the starting dates for school, both allege that in June 1974 the District unilaterally adopted a "junior high work day policy" which materially changed the hours and conditions of employment of members of the bargaining unit and that at all times since August 1974, has refused to negotiate concerning the implementation of said policy.

(a) Background

The evidence introduced at the hearing in support of this charge indicates that the policy in question was not a "junior high work day policy" as such and was not adopted in June, 1974 as alleged. In fact, the policy related to curriculum and class schedule and was adopted on March 11, 1974, approximately fourteen months prior to the filing of the complaint.

In the Fall of 1973, the District's Junior High School Curriculum Committee, which was comprised of the District's Assistant Superintendent for Instructional Services, the junior high school principals, teachers selected from the faculty at each junior high school, and several parents of students at the six junior high schools then operating in the District, undertook a study of the existing class schedules in the District's junior high schools. The purpose of this study was two-fold. The District had been operating its

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36/ There is no direct evidence relating to the compensation paid the two individuals involved or whether such compensation was in any way inconsistent with the terms of the agreement or the established practices of the District. Ennis' speculation in this regard is simply not sufficient to establish that it was different.

junior high schools on a "double shift" basis since the beginning of the 1970-1971 school year because of overcrowding. The District had, in the meantime, built a new junior high school (Gilmore) to relieve the overcrowding, and that school was scheduled to open in the Fall of 1974, which meant that it would therefore be possible to abandon the double shift arrangement at that time. Secondly, the District was interested in considering an alternative to the "traditional" class schedule for the purpose of attempting to expand the curriculum in the junior high schools.

In the 1969-1970 school year, and for many years prior thereto, the class schedule in the junior high schools was similar to the class schedule in the high school. That schedule basically provided that students attended six periods of classes at the same time each day and, in addition, were provided with a lunch period and a homeroom period, both supervised by teachers. Teachers normally taught the same classes at the same time each day within a basic five-day (Monday through Friday) cycle. During the four years when the junior high schools were operating on a double shift basis, the class schedule was traditional but there was no homeroom provided and no lunches were served. Under the double shift arrangement, certain grades, (e.g., the eighth and nineth grades) would begin their classes early (e.g. at 7:15 a.m.) and complete them early (e.g. at 2:30 p.m.) and other grades (e.g., seventh grade) would begin their classes later (e.g. at 9:45 a.m.) and complete them later (e.g. at 5:00 p.m.) Lunches were not served and there were no homeroom periods. Even so, the class schedule was still traditional in the sense that classes were scheduled on a five-day cycle (Monday through Friday) with the same classes meeting at the same time each day within that cycle.

In their deliberations, the committee focused on one particular alternative to the traditional schedule known as the "fixed-variable" schedule. The fixed-variable schedule is really a combination of two schedules. The fixed portion of the schedule applies to certain core subjects within the curriculum, i.e., English, social studies and mathematics. Teachers of those subjects would continue to teach five classes each day during a four-day cycle. However, the fixed classes would not necessarily meet at the same hour each day. This portion of the fixed-variable schedule would not have constituted a substantial change from the traditional day as it operated both before and after the double shift was introduced.

The variable portion of the schedule was designed to expand the curriculum by increasing the number of subjects taught and reducing the number of periods during the week when a particular subject was taught. Teachers of these classes would teach five periods one day and four periods the next day, and then repeat that pattern within a four-day cycle. Classes would only meet three out of four days within the cycle and, like fixed classes, would not always meet at the same hour each day. Students would be able to take seven courses (rather than six) per semester.

The differences then, between the fixed schedule and the variable schedule in terms of its impact upon instruction were these:

1. Fixed teachers would be expected to teach twenty periods of instruction of fifty minutes each during each four-day cycle for a total of one thousand minutes of classroom instruction, much as they had done in the past, whereas variable teachers would be expected to teach eighteen periods of instruction of fifty minutes each during each four-day cycle for a total of nine hundred minutes of classroom instruction.

2. Fixed teachers would continue to teach five courses of instruction each semester whereas variable teachers would teach six courses of instruction each semester.

The differences between the fixed schedule and the variable schedule in terms of preparation time were as follows:

1. Fixed teachers would be scheduled to have one preparation period each day for a total of two hundred minutes of preparation during the four-day cycle, much as had been the case in the past. However, the scheduled preparation would not necessarily occur at the same hour each day.

2. Variable teachers would be scheduled to have one preparation period on those two days when they taught five periods of instruction and two preparation periods on those days when they taught four periods of instruction, for a total of three hundred minutes of preparation time during the four-day cycle.

According to James Coles, then principal of Starbuck Junior High School and chairman of the committee, the committee was aware of the terms of the existing 1972-1974 collective bargaining agreement and, in the course of their deliberations, attempted to stay within the limitations set out in that agreement. Although the committee had teachers among its membership, the committee had no authority to bargain collectively.

Sometime in December, 1973, Coles initiated a conversation with James Ennis, who had recently been hired by the REA as its executive director, wherein Coles explained the fixed-variable concept. According to Coles, Ennis seemed unconcerned about the proposed schedule and merely stated that the committee should take care that any proposal not violate any provisions of the existing collective bargaining agreement. According to Ennis, he was emphatic on this latter point and indicated that any proposed changes should be the subject of negotiations which, under the terms of the existing collective bargaining agreement, were scheduled to start on or before January 1, 1974 and conclude on May 1, 1974. 37/

On January 22, 1974, the committee passed a resolution indicating its intent to recommend adoption of the fixed-variable schedule. On that same date, Ervin L. Forgy, then president of the REA, wrote Coles a letter which read in relevant part as follows:

> "The Executive Committee of the Racine Education Association requests that a copy of the working plan for the junior high schools for the school year 1974-75, when written be forwarded to the REA Executive Committee and that at least one copy be posted in each junior high school affected by the plan before it is presented to the Board of Education, Unified School District No. 1 of Racine.

37/ In fact Ennis sent a letter dated December 28, 1973 to the president and clerk of the District's board announcing the REA's desire to negotiate a changed agreement. However, it was not until March 5, 1974 that Marie Thayer, chairperson of the REA's negotiating team, wrote the board's president on behalf of the REA and asked for a meeting to discuss "ground rules and methods of information gathering and exchange." The first negotiations meeting was not held until March 25, 1974 and the first five meetings were concerned solely with the REA's proposed ground rules. The REA did not make its first proposal for substantive changes in the agreement until May 7, 1974.

"Since we realize that curriculum is intertwined with many areas, we are reminded that business that affects wages, hours, or working conditions of teachers is not an appropriate concern of the Curriculum Committee and should be discussed with the Association during the negotiations process.

"If you have any questions, feel free to call me at the Racine Education Association, 637-4788."

On January 24, 1974 Coles sent a copy of a working draft of the proposed fixed-variable schedule to the members of the REA's executive committee. Sufficient copies were sent to each of the junior high schools to provide every member of the faculty with a copy. In addition, copies were posted in each of the junior high schools. Thereafter, on January 28, 1974, the committee met with representatives of the REA, including Ennis, Forgy and the REA building representatives from the junior high schools. The purpose of the meeting was to explain in detail how the fixed-variable schedule would operate. According to Coles, there was no allegation made during this meeting that the proposal would violate any provision of the existing collective bargaining agreement nor was any specific objection to the proposal raised by those in attendance. However, the testimony indicates that at one point during the meeting, the REA representatives caucused and thereafter took the position that their presence was for the purpose of obtaining information only and they were not thereby "agreeing" to the proposal.

In the meantime, Coles had written Nelson a letter dated January 28, 1974, asking that he make arrangements for Coles to be given time on the board's agenda to present the committee's proposal. On February 4, 1974, the committee held an emergency meeting for the purpose of considering a one-month delay in the presentation to the board. The REA had representatives present at this meeting. Thereafter, the committee met one more time in mid-February. The REA had no representatives present at that meeting.

On March 4, 1974, which was the first Monday in March, the board met at a Committee of the Whole meeting pursuant to its usual practice. A number of items were discussed at that meeting which was then adjourned to March 7, 1974. At the March 7, 1974 meeting, Coles and Nelson presented the committee's recommendations and answered questions from board members as to the details of the proposal. The minutes of that meeting reflect that Ennis appeared on behalf of the REA and stated that it was the REA's desire that the District bargain with the REA before adopting the proposal. 38/ Notwithstanding Ennis' stated desire, the board, acting as a Committee of the Whole decided to recommend the proposal at the next scheduled meeting of the board. Five of the board's nine members were present at this meeting of the Committee of the Whole.

On March 11, 1974, which was the second Monday in March, the board met in its regular monthly meeting pursuant to its usual practice.

38/ At the hearing, Ennis testified it was his desire to bargain about the impact of the decision and conceded that the adoption of the proposal was not a mandatory subject of bargaining. See transcript, Volume VIII, at page 138. It is not necessary to resolve this question of fact since the action was taken more than a year before the complaint was filed and the decision was not bargainable in any event.

After presentation of the report of the Committee of the Whole, it was moved and seconded that the recommendation of the Committee of the Whole be approved. Said motion was passed unanimously by the seven board members present. The recommendation of the Committee of the Whole which was approved by the board read in relevant part as follows:

> "[T]he Junior High School Program of Studies for 1974-75 be adopted as presented by the superintendent, the Jr. High School Curriculum Committee, and as stated in memo of February 28 received from Mr. James Coles, Chairman of the Jr. High School Curriculum Committee. The recommendations are as follows:
>
> Beginning with the 1974-75 school year, the student's schedule will be increased from 6 courses to 7 courses.
>
> a. Students will meet only 6 of the 7 classes on any given day.
>
> b. Student's daily schedule will consist of a fixed half and a variable half.
>
> 1. The fixed half will include language arts, social studies, and math. These classes will meet daily for 52 minutes.
>
> 2. The variable half will include the following:

Grade 7	Grade 8	Grade 9
* Phy Ed/Health	* Phy Ed/Health	* Phy Ed/Health
* Science (2 sem.)	* Science (1 sem.)	Semester Electives (6)
	Semester Electives (5)	
** (Instr. Music (2 sem.)		
** (Ind. Arts or Home Ec. (2 sem.)		
** (Foreign lands (1 sem.) Art (10 wks.) Music (10 wks.)		

> * Required of all students
> ** Choose 2 of 3"

Thereafter, the REA made no proposal in bargaining which directly related to the impact of the introduction of the fixed-variable schedule on the work day of the teachers in the junior high schools. In its initial seven-point proposal of May 7, 1974, the REA asked for a "maintenance of standards clause" and asked further that "all remaining language" in the 1972-1974 collective bargaining agreement remain unchanged. The 1972-1974 agreement contained, inter alia, the following provisions directly affecting the work day of junior high school teachers:

> "VIII. STAFF UTILIZATION AND WORKING CONDITIONS
>
> . . .
>
> "2.a. All teachers are expected to be in their respective rooms or assigned places at least fifteen minutes before the time for the tardy signal. Teachers are expected to be present and performing their teaching duties during the times that pupils are required to be there according to the hours of school as presently established by the Board. Teachers shall be available for a period of at least fifteen minutes after regular pupil dismissal.

"b. Every effort will be made to limit the teaching assignment to no more than two subject areas or three preparations per day at the junior and senior high level. The teaching of a specific course shall be considered a preparation.

. . .

"3.a. Every effort will be made to limit the teaching assignment within the teacher's area of certification and/or qualification in subject area or grade level. Secondary teachers will teach a maximum of five class periods a day and have one class period for preparation, or teacher-initiated conferences. A homeroom assignment or similar responsibility shall be in addition to the five class periods.

"b. A teacher who is assigned an additional class on a full-time basis shall be compensated at the rate of 1/5 his regular salary, excluding extra duty compensation.

. . .

"9. A teacher shall receive a daily 30 minute duty-free lunch period, except that the District may contract with a teacher for service during such lunch period at the rate of up to 11¢ per minute payable annually. In the event enough teachers do not contract to provide such lunchroom supervision and it is not feasible to utilize aides or to alter the school day, the building principal may assign teachers to such lunchtime duty."

"XVI MISCELLANEOUS

. . .

8. The school administrator, with the cooperation of the staff in the school, shall design and implement a program to fully utilize supplementary assigned time and facilities in junior high schools with double shift schedules. This program may include, but is not limited to, remedial and enrichment group activities, open laboratories group discussion, special help for individual students, group planning and curriculum development."

In its comprehensive proposal of May 28, 1974, the REA proposed at page five that there be "local bargaining" at each school building. It is the REA's contention that this proposed change would have provided for local bargaining over the impact of the implementation of the fixed-variable schedule. 39/

The District made no proposal specifically identified as dealing with the impact of the new fixed-variable schedule on the workday of the junior high school teachers. It did, however, on June 18, 1974 make a proposal as part of its comprehensive counter-proposal that would have effectively eliminated, inter alia, all of the provisions of Article VIII of the 1972-1974 collective bargaining agreement set out above with the exception of the thirty-minute duty-free lunch provision. Further, the testimony indicates that it was the

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39/ The REA also made a "seven-hour day" proposal which included a thirty minute lunch period and is set out below. This proposal, combined with the existing provisions in Article VIII would have had a restrictive effect on the District's ability to follow the fixed-variable schedule.

District's position in bargaining that teachers be obligated to work a minimum "forty hour week," the hours and content of which would be left to the discretion of the District.

No collective bargaining negotiations took place after June 18, 1974 until about August 6, 1974, when the parties met for several days until the REA broke off negotiations on August 19, 1974. The evidence discloses that the negotiation meetings occurring between August 6, 1974 and August 19, 1974, were concerned with the various issues presented by the REA's comprehensive proposal of May 28, 1974, and the District's comprehensive counter-proposal of June 18, 1974.

On August 9, 1974, the District made a ten-point proposal which included the retention of Article VIII, Section 3b set out above. In addition, a number of tentative agreements were executed on that date, none of which directly related to the junior high work day. On August 14, 1974, the District made a number of proposals. Among those proposals were proposals to retain a number of provisions that it had previously proposed be eliminated from Article VIII, including Section 2b and Section 3b, set out above. It also proposed that, in order to implement its proposal that the board have the discretion to establish the hours and content of its forty-hour week proposal, the board would adopt the following policy:

> "The minimum work week for teachers shall be 40 hours, excluding lunch. A teacher's principal or supervisor is authorized to determine the use to which such time is to be devoted."

There were no negotiations meetings between August 19, 1974 and August 27, 1974, because of the REA's refusal to meet with the District's bargaining team unless the District agreed to change its composition. On August 25, 1974, the 1972-1974 collective bargaining agreement expired by its terms. On or about August 27, 1974, the District agreed to change the composition of its bargaining team in order to resume bargaining with the REA. On August 27, 1974, the District made a proposal which would have retained all of the provisions of Article VIII, set out above, with the exception of Section 2a which would have been replaced with its August 14, 1974 proposal with regard to a forty-hour week and Article XXI, Section 8 which would have been eliminated as superfluous in view of the abandonment of the double shift. The record indicates that the negotiations meeting, which began on August 27, 1974, included a discussion of the board's forty-hour week proposal. However, no agreement was reached with regard to the REA's proposal for local bargaining nor was any agreement reached on the District's forty-hour week proposal. The negotiations reached an impasse and broke off around midnight with the REA refusing to meet again on August 28, 1974.

On August 28, 1974, at a special meeting convened for that purpose, the board's Negotiating Committee reported to the board on the progress of negotiations and made a recommendation to the board which was adopted. It read in relevant part as follows:

> "With respect to plans for the opening of schools for the 1974-75 school year, in light of the facts (1) that the School District and the Racine Education Association (REA) have been unable to reach an agreement on a successor Professional Agreement; (2) that the 1972-74 Agreement expired by its terms on August 25, 1974; (3) that your Committee believes that negotiations with the REA are currently at an impasse following the negotiating session on August 27, 1974; and (4) that it is necessary to provide personnel policies and procedures that will govern in the absence of the Professional Agreement, your Committee recommends:

"1. the School Board adopt as a Board Resolution, effective retroactive to August 25, 1974, the terms of the 1972-74 Professional Agreement with the Racine Education Association, excluding Article XXII, dealing with the Entire Agreement, and Article XXIII, dealing with Duration; and modifying Article XII, dealing with Professional Compensation, to the extent necessary, so that:

a. Returing teachers shall be compensated according to their Level and Step placement during the second semester of the 1973-74 school year;

b. Teachers whose employment with the School District commences on or after August 25, 1974, shall be compensated according to the Level and Step placement for which they qualify; and that Article VIII, section 2.a., be modified with respect to junior high school teachers only so that they will be expected to be in their respective rooms or assigned places in accordance with this schedule, subject to its being negotiated with the REA.

Gifford Jr. High	7:30 a.m. - 2:37 p.m.
Jerstad	7:30 a.m. - 2:35 p.m.
Starbuck	7:30 a.m. - 2:36 p.m.
Washington	7:15 a.m. - 2:19 p.m.
McKinley	7:30 a.m. - 2:36 p.m.
Mitchell	7:30 a.m. - 2:35 p.m.
Gilmore	7:30 a.m. - 2:35 p.m.

"2. That for purposes of the school calendar, returning teachers will commence work on August 29 and 30, 1974, before classes for students begin, and will work again on September 3, 1974, when classes for students begin, and continue working thereafter on the days of Monday through Friday."

The reference to Article VIII, Section 2a related to the fact that under the fixed-variable class schedule previously adopted, teachers were scheduled to report forty-five minutes prior to the arrival of students rather than fifteen minutes prior to the arrival of students, as had been the case in the past. The starting and ending times merely reflected the times that teachers needed to report to be present forty-five minutes before the start of classes pursuant to the tentative starting times set on August 12, 1974. 40/

Although the District and REA met for further negotiations thereafter on August 30, 1974 and over the Labor Day weekend, those negotiations were concerned primarily with the REA's proposals on cost-of-living, maintenance of standards, fair share, and salary in general. On August 30 or 31, 1974, Peterson did propose that any problems with the starting and ending times adopted by the board be agreed to at that time in view of the fact that school was scheduled to open on September 3, 1974. The unrebutted testimony of Peterson indicates that Jay Schwartz, the REA's attorney and acting spokesman indicated that there was no objection to the proposed starting and ending times which had been adopted by the board.

After schools opened on September 3, 1974, the REA began a series of job actions or partial strike activities, wherein teachers refused to perform certain work that fell within their normal job responsibilities. On September 4, 1974, the board adopted a resolution closing the

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40/ As discussed below, the board had adopted tentative starting and ending times for students in all schools on August 12, 1974.

schools. Further negotiations took place at various times between September 4, 1974 and September 24, 1974, when tentative agreement was reached on the provisions of a new collective bargaining agreement. The terms of that agreement called for continued negotiations on certain items. In particular, the parties agreed in writing to continue the negotiations with regard to "hours of work". That agreement, which included the issues related to the impact of the implementation of the fixed-variable schedule, read in relevant part as follows:

> "The parties shall each appoint three representatives to study the hours of work for teachers in all schools and all problems related thereto. The report of this committee shall be made to the REA and the Board no later than 30 November, 1974. Following the completion of the report, the parties agree to bargain the result."

As part of this agreement it was also agreed and understood that when the schools reopened, the hours of work, as they existed on September 3, 1974, would be continued pending the results of the study and further negotiations. It is the REA's contention that the District thereafter violated its agreement and refused to bargain with regard to hours of work and the other issues which were reserved for further negotiations pursuant to the September 24, 1974 agreement. That charge is treated separately below.

(b) Discussion

As noted above, the District denies this charge and alleges that it is barred as untimely and was settled in September, 1974. It would appear that any claim that the District violated §111.70(3)(a)4, of the MERA, by the action of its board on March 11, 1974, is barred as untimely under §111.07(14), Stats. Furthermore, it would appear that the action taken by the board on that occasion, the abandonment of the existing traditional double-shift class schedule in the junior high schools and the adoption of the fixed-variable schedule in those schools, was a decision that related primarily to educational policy rather than wages, hours and working conditions. 41/ However, it is also clear that the decision did have an impact on hours and working conditions in the junior high schools which was bargainable. It is apparently the REA's position herein that even though the District had the right to unilaterally adopt the new schedule, it was obligated to make specific proposals regarding that impact and obtain the prior agreement of the REA before implementing its decision. In the examiner's view, the REA misconstrues the law.

Implicit in a finding that a subject is a non-mandatory or permissive subject of bargaining is the conclusion that the employer may act without obtaining the prior agreement of the union. 42/ To hold

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41/ Cf. Oak Creek-Franklin Jt. School Dist. No. 1, supra, note 35, where the commission held that teacher-pupil contact hours and the number of preparations that may be required of a teacher concern educational policy.

42/ Greenfield School Dist. (14026-B) 11/77. This is not to say that an employer may take unilateral action which has an impact violative of an existing collective bargaining agreement. Oak Creek-Franklin School Dist. (14027-B) 12/77. Here the change arguably had no such impact and in any event was scheduled to be implemented beyond the expiration of the agreement. If it was violative of the 1972-1974 agreement or the September 24, 1974 agreement the REA would, of course, have the right to seek to enforce its provisions through the established grievance procedure.

otherwise would be to reduce the distinction between mandatory and permissive subjects to a nullity. If the District was not obligated to seek the prior agreement of the REA as to the impact of the new schedule prior to its implementation, the only remaining issue is whether the District refused to bargain with regard to the impact as alleged. 43/ The examiner concludes that it did not.

The REA was provided with detailed information with regard to the impact of the proposed fixed-variable schedule on the hours and working conditions of the teachers in the junior high schools as early as February, 1974. At no time prior to the September 24, 1974 agreement did it ever present the District with any proposal directly dealing with that impact. 44/ While it is true that the REA's proposal that there be local bargaining, if agreed to by the District, would have allowed the faculty at each junior high school to bargain with regard to impact (within the limitations of the other provisions of the collective bargaining agreement) the record indicates that the District bargained about that proposal. The record will simply not support a finding that the District ever refused to bargain with regard to any proposal dealing with the impact made by the REA prior to September 24, 1974.

The only colorable claim that the District may have so refused or failed to bargain in this regard, relates to the board's action on August 28, 1974 in failing to continue the status quo established by Article VIII, Section 2a of the expired agreement to the extent that it may have been conflicted with the new fixed-variable schedule. The REA did not specifically allege a violation in this regard. However, even assuming that the allegations contained in paragraph five can fairly be read to cover such action, such claim is without merit since the old agreement had expired and the forty-five minute reporting time requirement was a consequence of the prior decision to implement the single shift fixed-variable schedule.

(4) Adoption of Policy on Elementary Hours

In paragraph 2(a) and (c) of its affidavit and paragraph 5(a) and (c) of its complaint, as amended on July 10, 1975, the REA alleges that during August, 1974 the District unilaterally implemented a board policy which materially changed the hours and conditions of employment of elementary school teachers and that at all times since August, 1974, has refused to negotiate concerning the implementation of said policy. The latter aspect of this charge overlaps with the REA's charge that the District refused to bargain in good faith concerning the unresolved issues in the 1974 negotiations and its charge alleging a similar refusal in June, 1975, which are discussed below. Consequently, only so much of this charge, as relates to the District's actions before September 24, 1975, will be discussed herein.

(a) Background

In the Fall of 1973, the District created a school schedule committee comprised of a number of elementary school principals and certain central office administrators including the administrator in charge of the District's bus scheduling and Assistant Superintendent Sam Castagna, who was chairman of the committee. The purpose of the

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43/ Of course, any such alleged refusal must have occurred within one year prior to the filing of the complaint or it is barred under §111.07(14), Stats.

44/ The record does disclose that the REA made proposals and that the parties bargained about impact after September 24, 1974. The REA's first proposals were made on March 6, 1975.

committee was to study the existing school schedules in the various elementary schools operated by the District and to make recommendations with regard to creating greater uniformity within those schedules to ensure equality of educational opportunity throughout the District. 45/ During the course of the deliberations of said committee, federal legislation was enacted mandating the adoption of daylight savings time to conserve energy. As a result of this change some children attending schools with early starting times were being required to travel to school before daylight. Thereafter, it became an additional concern of this committee that the elementary starting times and bus schedules be coordinated to avoid this problem.

After conducting a survey of elementary principals to determine the existing variations in school schedules, the results were summarized for presentation to the committee. Slide presentations prepared on or about January 3, 1974 disclosed that the survey established that there was considerable variation in the number of minutes of instructional time, recess time and lunch time in kindergarten classes and in grades one through six. The committee met with the curriculum consultants employed by the District with regard to their views and considered existing school board policies and Wisconsin Department of Public Instruction policies for the purpose of establishing recommended time allotments to be devoted to various components of the curriculum within the school schedules ultimately recommended.

On April 12, 1974 Castagna wrote Superintendent Nelson a letter describing the work of the committee and containing the following recommendations:

"As a result of the findings of our study, the School Schedule Committee offers the following recommendations regarding student schedules in the Unified School District:

1. Each school should have a common starting and dismissal time for students in grades one through six. Kindergarten starting and dismissal times should be consistent with other grade levels wherever possible.

2. Weekly instructional time allotments for kindergarten students should total 825 minutes.

3. Weekly instructional time allotments for students in grades one through six should total 1725 minutes.

4. Weekly time allotments in each curricular area should consist of the times listed in the attached statement, 'Weekly Elementary School Time Allotments.'

5. Elementary school starting times should take into account the fact that daylight/savings time is currently instituted on a 12-month basis.

6. All elementary schools need not be on the same schedule, but individual staffs should select any one of the following models that can be accommodated within the framework of possible transportation schedules:

45/ Although the committee was not established for the purpose of developing plans for voluntary desegregation of the District's schools, it is worthy of note in this regard that the District was simultaneously making preparations to implement such a voluntary desegregation program.

(Each model includes a 45-minute student lunch period.)

Model		Starting Time	Dismissal Time
A		8:00 a.m.	2:30 p.m.
B		8:15 a.m.	2:45 p.m.
C		8:30 a.m.	3:00 p.m.
D		8:45 a.m.	3:15 p.m.
E		9:00 a.m.	3:30 p.m.
F	(75 min. a.m. Planning Time)	8:30 a.m. (M,T,Th,F)	
		9:30 a.m. (W)	3:12 p.m.
G	(75 min. p.m. Planning Time)	8:30 a.m.	3:15 p.m. (M,T,W,F)
			2:00 p.m. (Th)"

At that time the existing 1972-1974 collective bargaining agreement contained the following provisions having to do with elementary planning time:

"VIII. STAFF UTILIZATION AND WORKING CONDITIONS

. . .

"2. . . .

"c. Elementary school principals working with their teaching staff shall have the option of organizing their school day in an attempt to incorporate some flexibility which could provide time for preparation and planning as long as this can be done without decreasing instructional time.

"d. The principal working with the teaching staff shall determine the time during which elementary school teachers shall have 100 minutes of planning time per week."

As part of the its comprehensive proposal of May 28, 1974 for changes in the 1972-1974 collective bargaining agreement, the REA made the following proposals which, if agreed to, would have had an impact on the school schedules in the elementary schools:

"ELEMENTARY PLANNING TIME

"1. All elementary school teachers, including specialists and itinerant teachers, shall be provided with a minimum of 40-minute preparation period per day, or a longer period if mutually satisfactory at the building level, during which time they shall be relieved of all their classroom duties.

"2. The teaching staff at each elementary school shall formulate a plan or plans to achieve 200 minutes per week of planning time for each MBU within the school day.

"3. MBU in elementary schools which are organized into units or teams shall submit a plan for reorganization of instructional time.

"4. Planning time plans shall:

a. Provide for unit or team preparation and planning periods.

b. Be arrived at through a concensus of the teaching staff, since the teaching staff will formulate planning time plans and vote on such plans.

c. Such plans for planning time shall be implemented immediately.

. . .

"SCHOOL DAY

"1. While professional personnel consistently work more than eight hours per day, the professional salary schedule is based on a seven-hour work day. The classroom teacher is a keymember of the professional staff, using school day hours as well as many after school day hours to better aid students in their educational experiences. The length of in-building time for teachers shall not exceed seven (7) consecutive hours including a 30-minute duty-free lunch between the hours of 11 a.m. and 1 p.m.

"2. All Elementary MBUs shall receive a 15 consecutive minute break during moring [sic] classes and a 15 consecutive minute break during afternoon classes to take care of personal necessities. (Eq. toilet)

"3. The school day shall end no later than 3:30 p.m. for all teaching staff.

. . .

"6. MBU will be at respective buildings five (5) minutes prior to first class and can leave District buildings five (5) minutes after their last class.

"7. Since student's attention span is important to the learning of subject matter, maximum length of class period shall be no longer than 50 minutes unless a break is provided for within the class period. Teachers shall not be expected to supervise students during class breaks.

"8. All MBUs shall receive 30 minutes duty free lunch between the hours of 11 a.m. and 1 p.m.

"9. MBU will not be expected to be in their respective buildings when they are not assigned to any specific duty which does not require being in their respective building."

On June 14, 1974, Castagna and Nelson initiated a meeting with Ennis wherein they discussed the findings of the committee and the recommendations outlined in Castagna's letter to Nelson set out above. 46/ Ennis stated that he agreed with the proposal to change the starting times in some of the elementary schools to avoid the problem with daylight savings time. Ennis further indicated that he would discuss the other recommendations with REA officials and stated that he believed that he could "sell" the proposed changes. Before leaving the meeting, Ennis indicated that he would let Nelson and Castagna know if there were any problems with regard to the proposals. He never contacted Nelson or Castagna thereafter with regard to the proposals.

In its comprehensive counterproposal of June 18, 1974, the District proposed to eliminate paragraphs c and d of Section 2 of Article VIII set out above. As noted above, under the discussion dealing with the junior high work day, the District's proposals taken together would

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46/ During this meeting they also discussed the proposed junior high starting times.

have established a forty-hour week and left the hours of work and content of the work week to the discretion of the District.

Somewhere in the latter part of July, Castagna called Ennis for the purpose of advising him that the board's Property Committee was scheduled to meet on July 31, 1974 for the purpose of discussing the school schedule committee's recommendations for changes in the elementary school schedules. Neither Ennis nor any other representative of the REA was present at the meeting of the Property Committee held on July 31, 1974. At that meeting the Property Committee decided to recommend to the board that it approve the tentative daily school schedules as recommended by the superintendent and that the matter of planning time be referred to the Negotiations Committee.

On August 1, 1974, Nelson sent a letter to Ennis with regard to the action taken by the Property Committee which read in relevant part as follows:

> "I am writing to inform you that the Property Committee, at its regular monthly meeting on July 31, has taken the following action:
>
> 1. recommended to the Board that the tentative daily school schedules for 1974-75 be approved as presented by the superintendent, and
>
> 2. that the matter of adjusted school schedules for planning time was referred to the Negotiating Committee.
>
> "The starting times of elementary schools have been delayed to allow elementary pupils to be picked up by buses or to walk to school in daylight during the winter months. The length of the school day has been standardized for all students, which should eliminate some of the complaints you have had from various school buildings.
>
> "Finally, you should be aware that with the additional transportation caused by the junior high schools returning to a full day schedule, early dismissal for planning time purposes for bussed in elementary schools created significant costs. The logistics are extremely difficult also.
>
> "Please let me know if we can let you know more about this."

Thereafter, during the negotiations which occurred on August 9, 1974 and August 12, 1974, the REA and District negotiation teams discussed the impact of the District's proposed forty-hour week proposal on planning time in the elementary schools. In the meantime on August 9, 1974, pursuant to its usual routine, the District sent the REA copies of documents providing board members with information concerning matters that may be discussed at the board's regular monthly meeting on August 12, 1974. Included among such information was a memorandum indicating that the Property Committee had tentatively approved an attached list of recommended starting times for students. The memo notes that the proposed starting times for elementary schools were "backed up" due to daylight savings time and that the proposed starting times for the junior high schools were intended to accommodate additional transportation requirements earlier in the morning caused by the "full day" school schedule in the junior high schools. 47/ Finally, the memo

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47/ It would appear that the tentative starting times for the junior high school students recommended by the committee were consistent with the starting times adopted for junior high teachers on August 28, 1974 since the testimony indicates that the fixed-variable schedule in the junior high schools called for teachers to report forty-five minutes before students arrived for classes.

noted that adjustments might be necessary in the starting times due to the fact that bus routes had not yet been finalized. Attached was a list of starting times, including those for non-public schools.

The minutes of the August 12, 1974 meeting reflect that no one on behalf of the REA appeared to speak with regard to the recommendation of the Property Committee that the elementary school schedules, as recommended by the superintendent, be approved. The recommendation of the Property Committee was approved by a vote of five to three. The official minutes do not specifically state that the tentative starting and ending times were also approved. However, the minutes do note that the starting time for non-public schools were listed and a "transcript" of that meeting prepared by an REA representative after listening to the tape of that meeting indicates that the committee understood the tentative starting and ending times to be included as part of the Property Committee's recommendation.

Thereafter, Castagna proceeded to take the necessary steps to implement the new elementary school schedule effective at the start of the 1974-1975 school year. In particular, on August 29, 1974, he wrote a three-page memorandum to elementary principals and teachers, directors of instructions, (formerly consultants), and helping teachers wherein he described the work of the School Schedule Committee, the recommendations which were adopted at the August 12, 1974 board meeting and the details of the new school schedule. The recommendations which Castagna indicated were adopted by the board on August 12, 1974 were the same as those recommended by the school schedule committee and set out in Castagna's letter of April 12, 1974 (above), except that item number six dealing with possible starting and ending times, was omitted. The details of the new elementary school schedule read in relevant part as follows:

"Adopted for Implementation in the 1974-75 School Year

	Reading	Lang. Arts	Sci. & S.S.	Spelling	Hand-writing	Art	P.E.	Health Safety	Math	Library	Guidance & Class Pl.	Music	Recess	Totals
K	--250--		125			90	60	45	100	30	50	75		825
1	645* 100 570**		150	0* 75**	125	100	90	60	150	30	75	100	100	1725
2	570	100	175	75	100	100	90	60	150	30	75	100	100	1725
3	520	100	175	75	75	100	90	60	225	30	75	100	100	1725
4	300	150	320	100	75	100	90	60	225	30	75	100	100	1725
5	300	175	325	100	45	100	90	60	225	30	75	100	100	1725
6	300	175	325	100	45	100	900	60	225	30	75	100	100	1725

* 3 months
** 6 months"

As noted above, under the discussion of the junior high work day, the REA refused to meet with the District's negotiating team between August 19, 1974 and August 27, 1974. The parties met until approximately midnight on August 27, 1974, and the REA refused to meet for further nego-

tiations on August 28, 1974. The parties did meet over the labor day weekend but failed to reach agreement prior to the opening of schools on September 3, 1974. The elementary schools were opened on September 3, 1974. The record does not disclose the exact starting and ending times utilized by the District for opening the various elementary schools on September 3, 1974. Presumably they were consistent with those adopted for students on August 12, 1974. Furthermore, the record does not disclose in what manner the provisions of Article VII, Section 2, paragraphs c and d of the expired agreement were implemented by the principals in the various elementary schools. Because of the uncertainty caused by the lack of agreement on the planning time issues and the confusion caused by the REA's partial strike activities, it is possible that no such steps were taken. However, the record establishes that the REA agreed, as part of the September 24, 1974 agreement, that schools would reopen utilizing the "hours of work" as they existed at the outset of the 1974-1975 school year. 48/

(b) Discussion

It would appear that the allegation that during August, 1974, the board unilaterally implemented "a policy" which materially changed the hours and conditions of employment of elementary school teachers has reference to the board's action on August 12, 1974. Since the complaint herein was amended to include said change on July 10, 1975, the District's contention that this charge is time-barred under §111.07(14), Stats., is without merit.

The principal action taken by the board on August 12, 1974, was to adopt the recommendations of the school schedule committee with regard to school schedules in the elementary schools. The thrust of those recommendations was to: (1) make uniform the starting time for students within particular schools; (2) make uniform the instructional time allotments for students in kindergarten (825 minutes) and grades one through six (1725 minutes); (3) allocate instructional time among the various components of the curriculum as set out in the schedule contained in Castagna's letter of August 29, 1974; and (4) require that the starting times established for the District's elementary schools take into account the need for later starting times due to year-round daylight savings time.

None of these decisions would appear to be a mandatory subject of bargaining. 49/ The recommendation adopted took into account the fact that the decision would have an impact on the scheduling of planning time, a subject that was covered by the existing agreement which was

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48/ In discussing this issue and the question of what information the REA had in August 1974, Ennis frequently contradicted himself. See transcript Volume IX at pages 47, 51, 52 and 60; and Volume XI at pages 71-72, 77, and 95-96. Based on the other evidence of record, the examiner concludes that the REA knew about the new starting times and school schedule by mid-August and agreed to maintain the status quo as of the first week of school.

49/ Oak Creek-Franklin Jt. School Dist. No. 1, supra, note 35.

due to expire before the start of the school year in question and about which the parties were already engaged in bargaining. 50/

In addition to adopting the recommendations of the School Schedule Committee, the board acted to approve the tentative starting and ending times for students recommended by Superintendent Nelson on August 12, 1974. An analysis of these times discloses that they provided a six and one-half hour school day for students. If teachers were to be required to report fifteen minutes before students and were to be allowed to leave fifteen minutes after students, as had been the case in prior years, this represented no change in the length of the work day of the elementary teachers. They still would be required to work a thirty-five hour week, or seven-hour day (including a thirty-minute duty free lunch period.)

The board did not implement its forty-hour week proposal in September, 1974. Although the record does not establish the exact starting and ending times followed by the various elementary schools, there is no indication in the record that they were different than those tentatively adopted on August 12, 1974. The board's action on August 29, 1974, continued and preserved the wages, hours and conditions of employment established by the terms of the 1972-1974 collective bargaining agreement, which provided, inter alia, that teachers should report at least fifteen minutes before the tardy bell for students and should remain at least fifteen minutes after the dismissal of students.

The change in policy with regard to the starting and ending times for students due to daylight savings time necessarily involved a change in starting and ending times for teachers if the fifteen-minute requirement were to be continued. It is therefore true that the decision to establish tentative starting and ending times for students, which were different because of the daylight savings time problem, constituted a change in the actual hours during the day when teachers would be scheduled to work, since it had that practical effect. Viewed in this light, it could be argued that the decision was one involving a mandatory subject of bargaining. 51/

Just as a particular proposal in bargaining must be considered on the individual facts in a given case in order to determine if

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50/ It would be possible to maintain the existing thirty-five hour work week and seven-hour work day (including a thirty-minute duty free lunch) which existed in practice for elementary teachers. Combining 1725 minutes of instructional time with 225 minutes of student lunch time (forty-five minutes multiplied by five) and allowing 150 minutes for arrival fifteen minutes before students and departure fifteen minutes after students are dismissed, equals 2100 minutes, or seven hours per day. Unless some of the 150 minutes before and after classes or the seventy-five minutes beyond the thirty-minute duty free lunch could be utilized for planning time, it would not be possible to maintain the thirty-five hour work week. The District was proposing a forty-hour work week and the REA was proposing a contractual thirty-five hour week with two hundred minutes of planning time and 150 minutes of guaranteed breaks.

51/ A similar argument could be made with regard to the new starting and ending times which were established in the junior high schools as a result of the abandonment of the double shift. However, paragraph two of the complaint, as amended, cannot be fairly read to include such a claim and a similar result would obtain in any event.

it primarily relates to wages, hours and working conditions, so must a particular managerial action be viewed in the facts in a given case. 52/ For example, while it is true that the actual hours during the day when work is to be performed can be a mandatory subject of bargaining, a proposal by law enforcement personnel that they should not be required to work on Saturday night or a proposal by restaurant employes that they should not be required to work during the lunch or dinner hour are not necessarily mandatory subjects of bargaining. 53/ For these reasons, the undersigned concludes that the decision on August 12, 1974 to establish tentative starting and ending times for students because of safety problems posed for students by the imposition of daylight savings time was a decision which primarily related to matters of public policy rather than wages, hours and working conditions.

It should be noted that even if this decision were deemed to relate primarily to wages, hours and conditions of employment, the record warrants a finding that the REA waived bargaining on this subject by: (1) failing to timely assert an interest in bargaining about the proposed change; (2) refusing to meet after the tentative times had been established and during the period when parents and others in the community would have to be notified as to the actual times when students would be required to report for school; and (3) the conduct of its acting spokesman on August 30 or 31, 1974.

(5) Establishment of Opening Dates for Schools

In its complaint of May 14, 1975, the REA alleged in paragraph five that in June, 1974, the District had unilaterally adopted a junior high school work day policy which materially changed the hours and conditions of employment of members of the bargaining unit and that, at all times since August, 1974, the District refused to negotiate concerning the implementation of said policy. As noted above, the REA was permitted to amend paragraph five of its complaint on the second day of hearing, after the District objected to its introduction of evidence in an effort to show that the District had allegedly committed a similar violation with regard to elementary schools in August, 1974. On the third day of the hearing the REA sought to introduce evidence, over the objection of the District, for the purpose of showing that the District had taken certain unilateral actions in August, 1974, with regard to setting the opening dates for school.

Rather than allege this as a separate violation, the REA attempted to "clarify" paragraph five of its complaint. That "clarification" in effect alleges that the District by its action in August, 1974, with regard to elementary school teachers, and its action in June, 1974, with regard to the junior high school work day policy, also changed the actual dates of employment for what is known as the school year calendar and that, since August of 1974, the District has refused to bargain about the effect of these policies on the calendar.

Said clarification, by itself, would appear to constitute questionable notice of the allegation actually being made. The actual allegation being made more clearly emerges from an analysis of the evidence introduced in support of this charge.

52/ See Beloit Education Association vs. WERC 73 Wis. 2d 43 (1976) at page 55. See also Racine Unified School Dist. v. WERC 81 Wis. 2d 89 (1977) at p. 102.

53/ City of Wauwatosa (15917) 11/77.

(a) Background

The evidence introduced at the hearing in support of this aspect of the complaint related primarily to the inadvertent dissemination of an orientation pamphlet signed by Richard C. Nelson, Superintendent of Schools on August 12, 1974, which indicated that, consistent with the District's calendar in previous years, the first day of in-service would be held on Monday, August 26, 1974, which was one week before Labor Day and, that the first day of classes would be held on Wednesday, August 28, 1974, which was the Wednesday before Labor Day. In fact, at the time that this pamphlet was prepared and distributed, the opening dates for schools were still subject to being negotiated with the REA. The REA had taken the position in its May 28, 1974 comprehensive proposal 54/ that the opening dates for schools should be August 29 and September 3, 1974 respectively.

When he discovered that the orientation pamphlet had been distributed, Ennis complained to Nelson that it appeared that the District was unilaterally setting the opening dates for schools. Nelson denied that this was the intent and attributed the distribution of the pamphlet to an oversight on his part. Also on August 12, 1974, during a regular negotiating meeting with the REA, Peterson admitted that the distribution of the pamphlet was an error and asked Ennis if it would be possible to rectify the mistake by either agreeing to the opening dates proposed by the District or the dates proposed by the REA. Ennis declined to negotiate with regard to the opening dates for schools saying instead that the REA was in the process of consulting with its attorney about the matter.

At a board meeting which occurred that evening, Nelson admitted that he had committed a "grievous error" or "administrative oversight" by allowing the orientation pamphlet to be distributed and asked that he be authorized to enter into an agreement with the REA that schools should open either on the dates set out in the District's calendar proposal (August 26 and 28, 1974) or on the dates set out in the REA's calendar proposal (August 27 and September 3, 1974) in order to avoid the need for a special meeting of the board, if agreement could be reached on one of those two sets of opening dates prior to August 26, 1974. No action was taken on Nelson's request at said meeting.

Again, in a negotiations meeting on August 13, 1974, Peterson asked if it would be possible to agree on opening dates. Ennis responded that it was his belief that teachers had been "ordered" to report to work on August 26, 1974, and that the REA would file charges with the commission concerning the alleged violation. Ennis made no proposal with regard to opening dates at that meeting. On August 16, 1974, Peterson again cited the need to give employes and the public advance notice of starting dates for school and asked if it would be possible to agree on opening dates. Peterson again indicated that the District would agree to the REA proposal on opening dates. Ennis offered to accept the District's opening dates if the District was willing to accept the balance of the REA's calendar proposal which contained three fewer work days than the 1973-1974 school calendar. Peterson rejected this offer and stated his belief that the parties would appear to be at an impasse on this aspect of the calendar.

On that same date, Peterson wrote the REA a letter wherein he attempted to accept the proposed starting dates contained in the REA's calendar proposal of May 28, 1974. Later, on August 21, 1974, Nelson

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54/ In its original proposal of May 7, 1974 the REA proposed to retain most provisions of the old agreement, presumably including the calendar.

wrote a letter to the staff announcing that the starting dates were August 29 and September 3, 1974, respectively. Finally, as part of its resolution on working conditions adopted on August 28, 1974, the District formally established the starting dates of August 29, 1974 and September 3, 1974 respectively.

In the meantime on August 15, 1974, the REA had filed its complaint in Case XXVII, referred to above, wherein it alleged that the District had committed a prohibited practice by unilaterally establishing the starting dates for school. The District answered that complaint on September 9, 1974. Hearing on the complaint was originally scheduled for September 17, 1974, but was postponed to October 3, 1974. After the parties had entered into the settlement of existing litigation on September 24, 1974, the hearing was postponed indefinitely. On October 10, 1974, the complaint in Case XXVII was dismissed with prejudice pursuant to that settlement agreement.

(b) Discussion

Although the August 15, 1974 complaint in Case XXVII was never amended prior to its dismissal on October 10, 1974, it is clear that when the REA entered into the settlement agreement, it was aware of the actions taken by Peterson, Nelson and the board subsequent to August 15, 1974 with respect to the starting dates for school. Because those actions, which were referred to in the District's answer in Case XXVII, were mingled with the District's effort to cure the alleged violation complained of in Case XXVII, and were totally unrelated to the District's actions with regard to the junior high work day and elementary hours, the undersigned concludes that the allegations intended to be covered by this charge are barred from further consideration by the terms of the settlement agreement reached on September 24, 1974.

Because the undersigned concludes that further consideration of the allegations intended to be covered by this charge are barred by virtue of the September 24, 1974 settlement agreement, it is unnecessary to determine whether the District acted improperly by its actions with regard to the opening dates for school. It should be noted, however, that if consideration of this charge were not barred by the terms of the settlement agreement reached on September 24, 1974, the following issues, among others, would have to be resolved: 55/

1. Whether the complaint as "clarified" constitutes adequate notice of the charge actually being made;

2. Whether the actions of the District on August 12, 1974 constituted a unilateral change in wages, hours and conditions of employment under the circumstances; and

3. Whether the actions of Peterson and Nelson on August 16 and 21, 1974, or the actions of the board on August 28, 1974, in relation to the starting dates for school, were justified in terms of the compelling need to establish opening dates for school or waiver or exhaustion of the duty to bargain.

55/ It would appear that the actions "complained" of took place less than one year after the REA's clarification of its complaint on July 18, 1975 which was confirmed in writing on July 30, 1975.

(6) Adoption of New Faculty-Pupil Ratio

In paragraph eight of its affidavit and paragraph eleven of its complaint, the REA alleges that in January and February 1975 the District unilaterally, and while failing and refusing to negotiate, adopted a new faculty-pupil staffing ratio to carry out its recently adopted racial desegregation policy and that said changes in staffing ratio directly and materially affected hours and conditions of employment of members of the bargaining unit. At the hearing, the REA acknowledged that this allegation relates to action taken by the board on February 10, 1975. Even so, the REA was allowed to introduce evidence with regard to other, subsequent actions taken by the board with regard to the same subject over the continuing objection of the District, with the understanding that such evidence would not be considered for the purpose of finding independent violations not specifically alleged in the pleadings.

(a) Background

The record does not disclose what staffing ratio policy, if any, the District had prior to April of 1968. In October, 1967 a Committee on Elementary School Organization was formed to help establish a staffing ratio policy for elementary schools. On April 1, 1968, the committee made a recommendation to the board that it adopt the following policy:

"I. Responsibility for Elementary School Staffing Policy

A. The building principal, conferring with his professional staff, shall be responsible for developing a staffing plan to carry out the instructional program. The amount of staff allotted to each building shall be in accord with the pupil-teacher ratio established by the Board of Education.

B. The staffing plan for each elementary school shall be subject to approval of the Superintendent and the Instructional Division Staff, in accord with Board of Education policies.

C. All elementary schools shall teach the district approved curriculum.

D. The organizational plan shall not exceed the 'cost' determined by the pupil enrollment and the established district ratio.

"II. Basis for Determining Enrollment

A. The October enrollment report shall be the final basis on which staffing is allotted to the schools.

B. A tentative staffing plan for each elementary school shall be established in spring of the preceding year based on the anticipated October enrollment. Necessary adjustments shall be made in October and January.

C. The enrollment figure for each school shall be based on the number of children enrolled in grades one through six, plus the number of Kindergarten children divided by two. Children in A-T classes and other special education classes shall not be counted in the building total.

"III. Basis for Determining Staff

A. Each professional staff member shall be assigned a value of 1.0. This includes teachers, librarians, special subject teachers, and administrative assistants.

B. Interns assigned to a building for a semester shall be assigned a value of .5.

C. Other staff, such as auxiliary aides and instructional secretaries shall be assigned a value of .4.

D. The principal, office secretary, instrumental music teacher, remedial speech teacher, and teachers of special education classes shall not be counted in the building totals.

E. In determining staff allotment, all decimal fractions shall be rounded off to the nearest half.

"IV. The Ratio

A. The pupil-teacher ratio for the Unified School District shall be the comparison of children in the district to the staff employed to help those children.

B. The ratio for outer-city schools and county schools shall be 26.8 to 1.

C. The ratio for inner-city schools shall be implemented over a two-year period as follows:

1. 1968-1969 No inner-city school shall have over a 22 to 1 ratio.

2. Schools with a ratio less than 19 to 1 shall work out staffing plans to bring the ratio up to that level. However, under this proposal, no inner-city school shall lose present USD staff paid through district funds.

3. These ratios are exclusive of federal funds.

4. 1969-1970 The ratio for all inner-city schools shall be 19 to 1, exclusive of federal funds.

"V. The Ratio and Federally Employed Staff

A. These ratios shall not include staff hired with federal funds or funds from other sources. They represent only the effort of the Unified School District.

B. The Unified School District does not necessarily commit itself to the continuation of special programs requiring additional staff, in the event that those funds are terminated."

One of the purposes of the proposed policy was to enrich the academic program in approximately seven "inner-city" elementary schools which had a much larger percentage of educationally disadvantaged students by comparison to the approximately twenty-four elementary schools outside the inner-city. This policy statement was adopted by the board in April or May of 1968.

In the following year the REA and District negotiated their first collective bargaining agreement which covered the 1969-1970 school year. That agreement contains certain language regarding class size. That language, with minor modifications, was included in all subsequent agreements, including the 1972-1974 collective bargaining agreement, which read in relevant part as follows:

"VIII. STAFF UTILIZATION AND WORKING CONDITIONS

"1.a. The parties recognize that optimum facilities for both the student and teacher are desirable to insure the high quality of education that is the goal of both the Association and the Board.

"b. Reasonable efforts will be made to maintain academic subject class sizes as follows:

Elementary		
K-3	Recommended	25
	Maximum	30
4-6	Recommended	25
	Maximum	32
Secondary		
7-12	Recommended	30
	Maximum	35

"c. The foregoing standards are subject to modifications for educational organization or specialized or experimental instruction, which shall not violate the intent set forth in VIII, 1, a. and b. It is also recognized that the school administration working with the teaching staff shall determine staff utilization under the ratio policy existing during the duration of the Agreement.

"d. The school administration working with the teaching staff shall determine the use of aides in supervisory duties.

"e. Every reasonable effort shall be made so that the number of students per class shall not exceed the number of pupil stations available in specialized areas, i.e., science laboratory, industrial arts, art and home economics."

Pursuant to a decision in October 1973, that the District should undertake a program to voluntarily reduce racial imbalance in the District's elementary schools by September 1, 1975, the District established a Citizens' Advisory Committee on Desegregation. The committee included some REA representatives but had no collective bargaining responsibilities. During the deliberations of the committee, Nelson urged the committee to recommend that rather than adopt a general 26.8 to 1 staffing ratio after the inner-city schools had been desegregated, 56/ the board should adopt a new 24.9 to 1 staffing ratio which represented a "melding" of the special 19 to 1 inner-city staffing ratio with the general 26.8 to 1 staffing ratio that existed in the District. The Citizens Advisory Committee included such a recommendation among its recommendations with regard to the District's plan for desegregating the schools.

56/ The use of the word "desegregation" herein is for simplicity and in conformity with the District's apparent practice of referring to the existing racial imbalance in that manner. Its use is not intended to imply that the existing racial imbalance was the result of a policy or practice of segregation.

On January 13, 1975 Nelson presented a report entitled "The Plan to Eliminate Racial Imbalance in the Elementary Schools" to the board and urged the board to adopt eleven recommendations contained therein for the purpose of helping to implement its desegregation plan in September, 1975. The fourth recommendation read in relevant part as follows:

> "4. that the present dual staff ratio of 19:1 and 26.8:1 be consolidated over the District into a staff ratio of 24.9:1 which would maintain the same total staff members in the elementary school."

The board did not take action on said recommendations and instead referred them to the board's Committee of the Whole which was scheduled to meet for the purpose of obtaining public input on the District's desegregation plan on February 3, 1975. By letter dated February 3, 1975, the REA's President, Robert Ables, transmitted the REA's policy statement on a number of recommendations contained in the plan presented to the board by Nelson. Said policy statement contained the following with reference to the new ratio policy recommended by Nelson:

> "6. Implementation of state laws which call for specialists in the elementary schools must begin at once. These specialists must not be part of the ratio. Until such time as these specialists are removed from the ratio by negotiations, we reluctantly accept the 24.9 ratio proposed by Mr. Nelson. We demand a Board policy be adopted of a maximum of 30 children per room. The ratio policy does not solve the problem of over crowded classrooms.
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> "7. In some schools (e.g., Lincoln) where the ratio will be raised and where basically the same type of student will remain, the Superintendent must be given the opportunity of hiring additional staff for an initial 3-year period in order that the present programs may continue."

The board's Committee of the Whole met on February 3, 1975 and agreed to recommend that the eleven recommendations outlined by Nelson at the January 13, 1975 meeting and contained in the plan presented to the board by Nelson be adopted. At the board's regular meeting held on Feburary 10, 1975, Ables appeared on behalf of the REA and spoke in favor of the adoption of the desegregation plan as proposed. After a preliminary motion to refer item number four to the Personnel Committee failed on a vote of four to five, the board acted to approve item number 4 by a vote of seven to two. Thereafter the meeting was adjourned to February 13, 1975.

On February 13, 1975 a motion was made to reconsider recommendation number four, which motion failed by a vote of four to four. (Board member Lois Hammes was absent.) Board member Gilbert J. Berthelsen who had voted for adoption of the recommendation on February 10, 1975, voted against reconsideration at that time.

Sometime after this board meeting and during the period when the REA and District were engaged in further negotiations over the items that had been reserved for further negotiations pursuant to the September 24, 1974 settlement agreement, Ennis had conversations with Nelson and Peterson with regard to Ennis' intention to "sue" the District for its action in adopting certain aspects of the desegregation plan including the provision dealing with the staffing ratio. During these conversations, Ennis expressed his view that the District was obligated to bargain about the ratio itself and that he expected by filing an action before the commission, he would be able to convince the board to reduce the staffing ratio to a figure closer to 20 to 1, perhaps 22 to 1. Both Peterson and Nelson advised Ennis that they did not care if he initiated legal proceedings as to other items

but expressed their belief that it would be a mistake to initiate such a proceeding with regard to the staffing ratio because Nelson had experienced great difficulty in obtaining the board's approval for his proposal and that the vote on reconsideration was very close. According to Nelson there was considerable sentiment among members of the board at that time to the effect that there should be a uniform staffing ratio of 26.8 to 1 throughout the District after the inner-city schools had been desegregated.

On Feburary 25, 1975, the REA's attorney wrote the commission a letter wherein he alleged that the District had "unilaterally made a series of major changes in work schedules and other conditions of employment (unspecified) while refusing to negotiate concerning such changes." On March 3, 1975, the commission sent a copy of that letter to the District and requested that the REA's attorney file, in verified form, a statement of the facts surrounding the alleged violations. On March 27, 1975, the REA's affidavit set out above was filed with the commission.

Thereafter, probably at the board's regular meeting on April 14, 1975, Berthelsen made a motion to reconsider the board's action in approving the 24.9 to 1 staffing ratio. Berthelsen's reason for making said motion related to his concern that the REA was contending that the board violated the commission's order in Case XVIII by taking certain actions such as adopting the SEN program and a 24.9 to 1 staffing ratio which, in his opinion, accrued to the benefit of the teachers represented by the REA. He expressed the view at that meeting that the REA members were following poor leadership and that they would realize that this was the case if the board were to revert to a 26.8 to 1 ratio in all schools after desegregation, which action would reduce the number of authorized teaching positions (or equivalent non-teaching positions) by forty. Berthelsen's motion failed on a vote of four to four. The one board member who was absent on that occasion had originally voted in favor of Nelson's recommendation but had voted in favor of reconsideration on February 13, 1975.

In July, 1975, after Berthelsen had left the board, the board did reconsider its ratio policy and decided to maintain a 26.8 to 1 staffing ratio in all the schools after desegregation had been accomplished, but authorized the superintendent to staff the schools at a ratio of 25 to 1 for the 1975-1976 school year, to aid in the implementation of the desegregation program. As noted above, the REA never sought to make a timely amendment to its complaint or affidavit to allege any violations of §111.70 with regard to Berthelsen's action in April, or the board's action in July, 1975.

(b) Discussion

The principal question to be decided in the case of this charge, then, is whether the District violated its duty to bargain in good faith by unilaterally adopting a new staffing ratio 57/ on February 10, 1975 pursuant to the superintendent's recommendation of January 13, 1975. It is clear that it did not.

The first question that must be answered is whether the decision dealt with a mandatory subject of bargaining. Although the commission has never had occasion to rule on the question of staffing ratios as such, the commission has held that class size is not a mandatory

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57/ The District argues, erroneously in the examiner's view, that the board did not "change" the ratio by its action on February 10, 1975.

subject of bargaining. 58/ There would appear to be no significant difference between a decision as to class size and a decision as to staffing ratio which would warrant a different conclusion. In fact it could be argued that the staffing ratio in question is more remote from wages, hours and working conditions than class size, even though both have a substantial impact thereon.

The evidence discloses that, notwithstanding the fact that limits on class size are not mandatory subjects of bargaining, the parties have bargained about said proposals in the past and have included a provision in the agreement dealing with that subject. The evidence will not support the conclusion that they ever bargained about the faculty-pupil staffing ratio prior to January, 1975, or that they had an agreement on that subject. 59/

Furthermore, even though it would appear that the District was not obligated to bargain with the REA before deciding to change the faculty-pupil staffing ratio policy, the evidence discloses that the REA had indicated its approval of the proposed change prior to the February 10, 1975 action. This approval can be found in the REA's policy statement of February 3, 1975 and in the comments of Ables at the February 10, 1975 board meeting. Finally, it should be noted that, insofar as there is no allegation that the District violated §111.70 by the actions of Berthelsen in April, 1975 or the board in July, 1975, no finding is rendered in that regard.

(7) Decision to Close Three Schools

In paragraph three of its affidavit and paragraph six of its complaint, the REA alleges that in January and February 1975, the District decided to close three schools and has, since that time, refused to negotiate with the REA concerning the impact of that decision as to transfer, seniority and other wages, hours and conditions of employment.

(a) Background

The evidence discloses that the three schools in question, Garfield, Bull, and Franklin, were not "closed". The District made a number of changes in the educational programs at those schools to be effective in the Fall of 1975 which were related primarily to its desegregation program.

Prior to the Fall of 1975, Garfield, Bull and Franklin were primarily neighborhood elementary schools which housed some special educational programs in addition to classes for grades K-6. The three schools in question were inner-city schools and each had a high percentage of minority students. As part of its desegregation plan dated January 13, 1975, the District proposed to transfer the students in grades 1-6 from Garfield, Bull and Franklin to other schools in the system for the purpose of achieving a better racial balance. Each school was to

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58/ City of Beloit Schools (11831-C) 9/74, affirmed sub nom. Beloit Education Association v. WERC 73 Wis. 2d 43 (1976) at pp. 63-64. See also Oak Creek-Franklin Jt. School Dist. No. 1 (11827-D) 9/74, affirmed Dane Co. Cir. Ct. 11/75.

59/ This being the case, the District was free, under the terms of the 1972-1974 agreement, to change its faculty-pupil staffing ratio policy so long as it gave any notice required under the terms of the existing collective bargaining agreement and did not otherwise violate the provisions of Article VIII, Section 1. If the REA believed that the District violated the collective bargaining agreement, it was free to file a grievance alleging a violation in that regard.

retain its neighborhood kindergarten classes and the special education programs previously housed therein. In addition, certain specialized programs housed in other facilities were to be transferred to these three schools. Garfield was designated to receive the junior and senior high school "academy", an alternate education program for students who did not perform well in the regular secondary schools due to disciplinary, attendance or other problems. Bull was designated to receive two new elementary "magnet" programs (unspecified) which would be designed to attract voluntary attendance on the part of a racially balanced group of students from throughout the district. Franklin was designated to receive an alternative elementary educational program known as the "Red Apple," an optional junior high program and a secondary program known as "Walden III."

In its February 3, 1975 policy statement on the desegregation plan, the REA indicated that it was its position that Bull should retain its present program and that two other schools, Trautwein and Bartlett, should be considered for the two new optional educational programs. In addition, the REA stated that its position on staffing changes was as follows:

> "14. Discussion on transfer of teachers by this program must begin at once with the Association. We demand the rights of collective bargaining to protect the rights of the individual teacher. At the earliest possible moment teachers need to know where they are going and start working with the present staff for the coming year."

Thereafter, Delbert Fritchen, Assistant Superintendent for Staff Services, wrote Ennis and asked for a meeting regarding transfer problems in the elementary schools which were brought about by the desegregation plan. A number of meetings took place between Fritchen, Castagna and Nelson concerning the problem of transfers. Proposals and counter-proposals were exchanged. It was the REA's position during these meetings that the transfers should be based primarily on seniority and it was the District's position that the transfers should be based on the existing criteria and procedures for transfers contained in the collective bargaining agreement.

In a negotiation meeting held in March, 1975, probably on March 18, 1975, which was held for the purpose of discussing the "hours of work" issues remaining in the 1974 negotiations, the REA made a proposal regarding teacher transfers. At that time, Peterson advised Ennis that the District was not obligated to bargain about changes in the teacher transfer procedures since the REA had dropped its proposal for changes in the teacher transfer language contained in the agreement reached on September 24, 1974 and agreed that further negotiations would be limited to hours of work and the other issues reserved for further negotiations. Peterson further advised Ennis that he should contact Fritchen about the issues raised by the REA's transfer proposal.

At a regular board meeting held on April 14, 1975, the board approved the recommendations of its Property Committee that certain leasing arrangements be terminated and that the programs housed in the leased properties be transferred to other locations. On April 18, 1975, Nelson, who had previously talked to Ennis concerning this matter prior to the board's action, sent Ennis the following letter:

> "I am writing to confirm our recent conversation related to my recommendations to the Board of Education that leasing arrangements for the McMynn Building, St. Rose School, and Trinity United Methodist Church facilities not be renewed for the 1975-76 school year. This recommendation was made by the Property Committee to the Board of Education at its April 14th meeting and approved by the Board.
>
> "I am hereby informing you of this action and will also take steps to inform the teachers involved in these moves as to their building

assignments for next year. Basically, the Walden III staff will transfer to Franklin School, which is becoming our alternative school for grades 1-12. As you know, Franklin became available for this use due to the desegregation plan.

"The teachers of the trainable students at St. Rose School will generally be assigned to the College of Racine, although a few exceptions to that assignment could occur.

"The teachers at the High School Academy will be assigned to Garfield School, which is becoming the site of the academy program. The Wind Point students who previously have been housed in the Trinity United Methodist Church will be transferred to the College of Racine, where a room is being readied for this purpose.

"Will you please contact me if you desire further information related to these changes."

Ennis never contacted Nelson thereafter concerning the information contained in this letter.

On or about May 20, 1975, Peterson indicated that because of the unique circumstances posed by the desegregation program and because of the District's concern that the desegregation program not be disrupted by a labor dispute 60/ the District was willing to establish a special transfer procedure to be applied without precedent for the future which took into account the length of service of teachers in making the assignments. This proposal, which was drafted by Fritchen and dated May 20, 1975, was discussed at length by the parties at a meeting attended by Fritchen, but was never agreed to by the REA.

Thereafter, and before the start of the 1975-76 school year, the District proceeded to follow the existing agreed-to procedures for reassigning the teachers who taught grades one through six in Garfield, Bull and Franklin. Approximately sixty teachers from the three schools were reassigned to teach at other schools in the District based on their expressed preferences and the criteria and procedures set out in the agreement and customarily applied by the District in cases of reassignment and transfers.

(b) Discussion

As noted above, the District did not "close" the three schools as alleged. Instead, it decided, as an integral part of its desegregation program, that the elementary school programs that existed in the three schools should be substantially curtailed in order to facilitate its efforts at achieving greater racial balance in the schools. Although the REA's suggestion that the transfer of other existing programs into Garfield and Franklin and the creation of two new programs at Bull had an impact on the wages, hours and working conditions of the teachers who worked in those programs, no evidence was adduced that would indicate the exact nature of that impact or that the REA ever identified any aspect of that alleged impact about which it desired to bargain.

The only aspect of the impact that the REA ever attempted to bargain about was the effect that the decision had of creating the need to make an inordinate number of reassignments for the 1975-1976 school year. The record clearly establishes that the District met its statutory obligation with regard to that subject.

60/ It was Peterson's belief, and the belief of some of the members of the board, that the REA would engage in a strike or further partial strike activities in the Fall of 1975, thereby upsetting the District's desegregation program.

The 1972-1974 collective bargaining agreement contained a provision dealing with teacher assignments and the handling of transfer requests. Furthermore, the District had an established procedure for dealing with teacher assignments and the handling of transfer requests. The REA had sought to negotiate changes in the provisions of the agreement dealing with those subjects including a prohibition or involuntary transfers and had dropped its proposals as part of the terms of the September 24, 1974 settlement.

As part of its duty to bargain collectively, as defined in §111.70(1)(d), Stats., the District had an obligation to meet with representatives of the REA regarding the proper application of the agreed-to procedures and it did so. In fact, each side apparently made proposals and counter-proposals as to how best to handle the inordinately large number of reassignments. However, the District was under no obligation to agree to change the existing criteria with regard to reassignments to give greater weight or controlling weight to seniority since there were existing criteria and procedures which had been mutually agreed to. Even so, on or about May 20, 1975 the District did offer to give greater weight to length of service in accordance with a proposed procedure developed by Fritchen. That offer was never accepted and the District was therefore justified in relying on the existing negotiated procedures in making the reassignments. If the District violated its obligations, such a violation was of a contractual nature and subject to the grievance and arbitration procedure.

(8) Consideration of Optional Educational Patterns

In paragraph five of its affidavit and paragraph eight of its complaint, the REA alleges that during February and March 1975 the District was "moving toward" the adoption of optional education patterns for schools "which will materially, substantially and necessarily change hours and conditions of employment of members of the bargaining unit and that at all times material herein, the District has failed and refused to negotiate concerning this matter."

(a) Background

The record establishes that for a number of years the District has maintained special educational programs for certain categories of students. A number of these programs are referred to above. As noted therein, in one of the eleven recommendations adopted by the board on February 10, 1975, Bull was designated to receive two new elementary "magnet" programs. Franklin was to receive an alternative elementary program known as the "Red Apple" an optional junior high program and a secondary program known as Walden III.

The record establishes that some variation on the fine arts school and fundamental school, which were among the "options and educational alternatives" suggested as part of the desegregation plan, were ultimately adopted for placement at Bull. 61/ According to Ennis, this charge

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61/ The third recommendation of the eleven adopted by the board provides as follows:

"3. that the selection of the optional programs to be provided at Bull School be determined through parent surveys and staff involvement and follow the time line suggested and that the Board of Education approve these options on or before the April Board meeting. Insuring that parents understand the optional programs is imperative."

relates to these programs and a program known as the junior high academy, which was placed at the Rapids School.

The only aspect of the alleged impact of the assignment of these programs to the various schools involved that the REA sought to bargain about was the problem posed by the inordinately large number of teacher transfers that resulted from the various aspects of the desegregation plan. As noted above, the District did enter into extensive discussions regarding the application of the existing transfer language and procedures to this problem and did later offer to vary that procedure by giving greater consideration to length of service.

At the hearing Ennis testified to a number of alleged differences that exist in the working relationship with students and supervisors on the part of the teachers who teach in the various special educational programs and stated that it was his belief that some teachers reported one to two weeks early and that they may not have been compensated for doing so. However, outside of the REA's efforts to bargain with regard to a different transfer procedure than that provided in the agreement, there is no evidence that the REA sought to bargain regarding any of the wages, hours and working conditions of the teachers who worked in these various programs.

(b) Discussion

A fair reading of this charge would lead to the conclusion that it refers to the board's action on February 10, 1975 of adopting the superintendent's third recommendation regarding the selection of the two optional educational programs ultimately assigned to the Bull School and not to all of the special educational programs referred to by Ennis in his testimony. However, even assuming that this charge could fairly be read more broadly to include other special educational programs that were either created in September, 1975, or moved from one school to another in September, 1975, there is no evidence that would support a finding of a refusal to bargain.

The decision as to the creation or the content of the special programs was not a subject about which the District was obligated to bargain. 62/ Nor was the District obligated to seek the concurrence of the REA before implementing the various changes in its special educational programs in the Fall of 1975. The REA could have demanded to bargain about any identifiable wages, hours or conditions of employment that it believed the District had an outstanding obligation to bargain about. The only such subject that the REA sought to bargain about was the subject of transfers which was covered by the existing agreement and practices thereunder.

Ennis' speculation to the effect that several teachers may have worked one or two weeks without pay, like his speculation regarding the compensation received by the Title IV teachers, is no substitute for hard evidence. The record presented will simply not support a finding that the District made a unilateral change from the terms of the agreement and its established practices with regard to compensating teachers who may have worked outside the normal school year in these programs.

62/ This action would appear to be comparable to the decision to establish a reading program or summer school, both of which were found to be non-mandatory subjects of bargaining in the Beloit case, supra, note 35.

(9) Adoption of Policy Requiring Mandatory In-Service Training

In paragraph four of its affidavit and paragraph seven of its complaint, the REA alleged that in January and February, 1975, the District unilaterally adopted a policy requiring mandatory in-service training of members of the bargaining unit and that at all times since that decision has failed and refused to negotiate concerning the impact of its implementation upon members of the bargaining unit. At the hearing, the REA moved to amend paragraph seven of its complaint to allege that the alleged unilateral action took place in June, 1975 as well and said motion was granted. 63/ The REA did not move to amend paragraph four of its affidavit in this regard.

(a) Background

The Citizen's Advisory Committee which helped develop the eleven-point desegregation plan which was presented to the board by Nelson on January 13, 1975, also promulgated ten recommendations which were presented to the board sitting as a Committee of the Whole, on February 3, 1975. One of those recommendations read as follows:

> "d. That the Board of Education support the development of mandatory in-service programs for all Unified staff members in the areas of curriculum and human relations on release time."

In its position statement dated February 3, 1975, the REA indicated that it favored such a mandatory in-service program on release time. The board, acting as a Committee of the Whole, agreed to recommend that these recommendations be referred to the superintendent for implementation "where feasible and financially possible."

At its regular board meeting on February 10, 1975, the board considered the ten recommendations of the advisory committee and voted to "receive them", and "refer them to the superintendent" but postponed indefinitely the question of whether the referral to the superintendent should be "for implementation where feasible and financially possible." The net result of this action would appear to place the recommendations in the hands of the superintendent with no requirement that he act thereon. 64/ Furthermore, the chair rejected as out of order, several efforts by individual board members to give the superintendent specific instructions.

According to Ennis' understanding, the board's action of February 10, 1975 mandated that additional in-service training be conducted and that said mandate was carried out in two ways: (1) by the addition of in-service training during the 1974-1975 school year, which the REA agreed to; and (2) by the addition of a third in-service day at the beginning of the 1975-1976 school year. It was the latter action, according to Ennis, that "obviously" was covered by the charge in question. 65/

63/ See transcript, Volume II, at pages 43 and 48.

64/ Nelson's recollection at the hearing was apparently incorrect. See transcript Volume XVI, page 55. Some of the recommendations required the commitment of funds and would clearly be beyond the authority of the superintendent to implement.

65/ Transcript Volume IX, page 110. However, it should be noted that the District had not taken any action with regard to the 1975-1976 calendar at the time the affidavit and complaint were filed.

At the hearing, the REA introduced evidence establishing that, after the board's action on February 10, 1975, an agreement was reached between Nelson on behalf of the District and Ennis on behalf of the REA to conduct in-service training programs related to human relations and the desegregation plan. 66/ On May 5, 1975, Nelson sent a memorandum to elementary school principals which referred to this agreement and read in relevant part as follows:

> "A memo of understanding between the REA and the Unified School District has been reached relative to inservice time at the elementary schools in assisting implementation of the 1975 desegregation plan.
>
> "Basically, the agreement states that the elementary school staffs, as represented by the REA, and the Unified School District, as represented by the building principal, agree that a training program will be instituted within the guidelines established below:
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> 1. Those elementary schools that have completed a program of human relations training during the 1974-75 school year, and prior to this memo, will be provided, prior to the completion of the school year, a 90-minute period of time during the regular duty day but free of regular and normal duties, to be used at the option of the staffs.
>
> 2. Those schools that agree to accept the human relations training will be provided a period of 90 duty free minutes by the District in exchange for 90 minutes of their own time.
>
> "Please contact me if you have any questions. I suggest we meet as a group soon with the Title IV and VII personnel so that schedules for these workshops can be arranged."

The evidence with regard to the 1975-1976 calendar indicates that the District did in fact add a third in-service day at the beginning of the 1975-1976 school year in part for the purpose of conducting in-service programs in the elementary schools relating to human relations and the desegregation plan. 67/ The in-service programs in question were similar to in-service programs held during the 1973-1974 school year on an in-service day in February known as "Institute Day".

In years prior to the 1974-1975 school year the calendar contained three in-service days, two at the beginning of the school year and the one in February known as Institute Day. In the 1974-1975 school year the two in-service days were held at the beginning of the school year before the schools were closed but no Institute Day was held after the schools were reopened.

The September 24, 1974 agreement did not resolve all of the questions relating to the school calendar. When the parties left the Sienna Center on September 22, 1974, the REA believed that the District had agreed to accept a calendar proposal outlined to Nelson

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66/ Actually a tentative agreement between Nelson and Ennis which called for approximately six hours of in-service training in lieu of Institute Day (three hours in the form of release time and three hours outside the existing work day) was rejected by the REA. That agreement was apparently renegotiated sometime prior to May 5, 1975.

67/ The in-service programs held at the secondary schools apparently related to other matters.

and Fergeson by two of the REA's bargaining team members, Thayer, and Sue Brings. This was not, in fact the case. When the lack of agreement was discovered by Nelson and Thayer on the following day, Thayer announced her intent to present the REA's version of the 1974-1975 calendar, which contained "186 days" and no "Institute Day" to the REA's membership for ratification. Nelson indicated that rather than risk upsetting the settlment which had to be renegotiated due to a number of other, more important, disputes over what was agreed to, he would attempt to resolve any remaining disputes about the calendar after the schools reopened and classes resumed.

Thayer presented an outline of the REA's version of the 1974-1975 calendar to the membership for ratification on September 24, 1974. She did not present a 1975-1976 calendar to the membership for ratification. According to Thayer, the calendar presented included "186 days" 68/ and therefore, the implication was left that the calendar for 1975-1976 would be also 186 days in length inasmuch as the parties were agreeing to a two-year agreement. In response to a question from board member Harold A. Hay regarding the calendar, Nelson asked for permission to work out the details of the calendar which permission was granted by the board. The record discloses that the calendar actually followed by the District during the 1974-1975 school year was consistent with the REA's proposed calendar except for the addition of the in-service program agreed to by the REA and described in Nelson's memorandum above.

During the negotiations which took place on the issues reserved for further negotiations, Nelson proposed that a third in-service day be added at the beginning of the 1975-1976 school year in place of the Institute Day that was normally held in February. This would have required a calendar of 187 days as in prior years. Thayer, on behalf of the REA, indicated that the REA would be willing to "trade off" something of value in the negotiations for the "additional" in-service day and indicated that adding the in-service day at the beginning of the school year would be preferable to the REA. No agreement was reached on this issue in negotiations prior to the board's implementation of its proposals on the remaining issues in bargaining on June 4, 1975. On that date, the board adopted a calendar which included the additional in-service day at the beginning of the 1975-1976 school year.

(b) Discussion

The record establishes that the board did not act to adopt a mandatory in-service program in January and February, 1975 as alleged in the original complaint. It merely referred the recommendation of the Citizen's Advisory Committee in that regard to the superintendent. 69/ The superintendent on behalf of the District did thereafter develop an in-service program for the 1974-1975 school year which was in lieu of Institute Day and was agreed to by the REA. This charge would therefore

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68/ Actually it contained 185.5 days since it called for one-half day of classes prior to Thanksgiving. This was later changed by agreement between Nelson and Ennis because of the need to have 180 days of contact with students for state aid purposes. However, the REA's Executive Committee refused to go along with that agreement and the teachers only taught a half day of school before Thanksgiving. The calendar for 1975-1976 called for no classes on the day before Thanksgiving.

69/ It also approved item number 5 of the eleven recommendations presented by Nelson which stated "that the Board support the development of in-service programs for all staff members in the areas of curriculum and human relations."

appear to be totally without merit insofar as it was worded at the time that the complaint herein was filed.

At the hearing, the REA was allowed to amend its complaint to allege that the board took unilateral action to adopt a mandatory in-service program in June 1975. There is no reference to a mandatory in-service program in the board's minutes for June. The only action taken by the board in June that in any way relates to this charge was the inclusion of a third in-service day at the beginning of the school year in lieu of Institute Day, as part of the calendar that was adopted by the board. The record establishes that the superintendent intended to utilize this "additional" in-service day in part for the purpose of conducting in-service training programs with regard to desegregation and that this was in fact done.

The question of the content of the in-service program was not in issue and in any event was not a matter about which the District was required to bargain. 70/ The evidence discloses that it did bargain about whether there should be such an in-service day and its placement in the 1975-1976 calendar prior to its adoption. The question of whether the District violated its duty to bargain when it unilaterally implemented its proposal in bargaining is covered by the charge relating to the board's action on June 4, 1975.

(10) Consideration of Night School Program

In paragraph six of its affidavit and paragraph nine of its complaint, the REA alleges that during March 1975, the District was "unilaterally moving to establish a night school program" and that, although said program will directly and substantially affect members of the bargaining unit as to wages, hours and conditions of employment, the District has failed and refused to negotiate concerning such program.

(a) Background

The evidence with regard to the District's abortive attempt to establish a night school program is primarily documentary and somewhat incomplete. The minutes of the board's regular meeting on March 10, 1975, indicate that the superintendent discussed a report from a committee known as the Night School Planning Committee which had been distributed to the board. A motion was made to refer the report to a Joint Curriculum and Finance Committee, which motion failed to carry. A motion was then made to refer the report to the next regularly scheduled Committee of the Whole meeting, which motion carried on a voice vote.

The minutes of the April, 1975 board meetings were not introduced into evidence. The minutes of the board meetings on June 9, 1976 and June 12, 1975 indicate the following sequence of events took place in late May and early June:

1. On May 28, 1975 the board's Joint Curriculum and Finance Committee met and recommended that the chairpersons of the curriculum and finance committees agree to a mutually convenient time to make a recommendation on a night school program to be forwarded to the board for consideration at its regular meeting on June 9, 1975.

70/ See e.g., City of Wauwatosa (15917) 11/77, where the commission held that the assignment of duties which are fairly within the scope of the responsibilities applicable to the type of work being performed is not a mandatory subject of bargaining.

2. On June 6, 1975, the board's Joint Curriculum and Finance Committee met and agreed inter alia that a night school program should be established, but that if any aspect of the program required review or negotiation with the REA as specified in the agreement with the REA, it should be done before implementation.

3. On June 9, 1975 the board did not adopt the recommendations of the Joint Curriculum and Finance Committee. Instead it referred them to a Committee of the Whole meeting to be held to hear the joint committee's report.

4. On June 12, 1975 the board met as a Committee of the Whole, and, after hearing input from the REA wherein Ennis stated that the REA supported adoption of the night school program but indicated his belief that there were a number of provisions that should be negotiated, agreed to recommend to the board that it adopt the night school proposal subject to the following proviso:

> "If any aspect of this program requires review or negotiations with the REA as specified in our labor agreement, it should be done before implementing the night school program."

5. On June 12, 1975 the board adopted the night school proposal recommended by its Committee of the Whole including the quoted proviso.

It was board member Berthelsen's understanding that the proposed night school program was dropped after he left the board on July 1, 1975. The testimony of McNiell and McLennen confirms that the proposed night school program was ultimately dropped.

There is no testimony or other evidence in the record indicating when or why the board ultimately dropped the proposal to establish a night school program. However, both the REA and District assert in their briefs that it was dropped due to a lack of sufficient interest among the potential students (drop-outs).

Ennis, in his testimony, notes that the board did approve the program subject to negotiations but testified that no "offer" to negotiate concerning the program was ever made. He did not dispute the fact that the program was never implemented.

(b) Discussion

The question of whether the District should establish a night school program is not a subject about which the District needed to bargain. 71/ Furthermore, the REA agreed that such a program should be established. If it is assumed, without deciding, 72/ that the REA had the right to bargain concerning any aspects of the program which impacted wages, hours and conditions of employment, it would appear that no violation of the District's duty to bargain took place. The District's action in approving the program was expressly conditioned upon bargaining about any aspects affecting wages, hours and conditions

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71/ See Beloit, supra, at note 35.

72/ The recognition clause in the collective bargaining agreement extends recognition to the REA as the representative of all regular full-time and regular part-time certified teaching personnel.

of employment which were subject to the duty to bargain before implementation. The fact that no such bargaining ever took place was apparently attributable to the fact that the program was never implemented due to a lack of student interest in the program.

(11) Indexing, Codifying, Revising and Modifying School Board Policy (Croft System)

In paragraph nine of its affidavit and paragraph twelve of its complaint, the REA alleges that the District was "currently unilaterally indexing (Croft System), codifying, revising and modifying" board policies while refusing to furnish the REA with sufficient information to determine which changes materially affect wages, hours and conditions of employment and while refusing to negotiate concerning such changes.

(a) Background

Sometime prior to the Spring of 1974, the District decided to organize its policies into a single written policy handbook in accordance with a commercially prepared system of numerical organization known as the "Croft System". Prior to that time, many policies were not in writing and those that were could only be found by searching through the District's records or minutes of various board meetings held since the inception of the District in 1961. Sam Castagna, Assistant Superintendent for Administrative Services, was selected by the board to coordinate the effort of the various board members and administrators who were to work on the project.

The Croft system consists of nine series of numbers dealing with different subject areas as follows:

1000 series - School/Community Relations
2000 series - Administration
3000 series - Non-business Matters
4000 series - Staff Personnel
5000 series - Student Personnel
6000 series - Instruction
7000 series - Utilization and Construction of School Facilities
8000 series - Internal Board Policies
9000 series - By-laws of the Board

Various members of the board and administrative staff thereafter attempted to assign appropriate numbers within the Croft System to written statements, either quoting verbatim, paraphrasing, or referencing existing District policies. Sources which were utilized to compile these written statements were: (1) existing law; (2) minutes of the board; (3) an existing administrative handbook (1966 revision); (4) an existing student code of rights; and (5) the collective bargaining agreement with the REA. In some instances the statements of board policy were written descriptions of existing practices, authored by the administrators responsible for following the practices in question.

The first two series of policies to be considered by the board were series 8000 and 9000. Berthelsen, who was then president of the board, expressed the view that the existing internal board policies and by-laws of the board were in need of revision, and it was agreed that he would head an ad hoc committee of the board for the purpose of revising them. The work of the ad hoc committee was completed and the policies contained in series 8000 and 9000 were adopted by the board, as revised by the ad hoc committee, in October, 1974.

Castagna discussed the progress of the effort to compile the Croft handbook with Ennis in the Spring and Summer of 1974. Specifically, Castagna met with Ennis and the President of the REA, Ables, in August, 1974, to advise them of the progress to date. It was probably during this meeting that Ennis advised Castagna that series 8000 and 9000 dealt with "the board's business" and that the REA had no desire to express its views on the policies contained therein.

Castagna met with Ennis and Ables again on December 27, 1974, for the purpose of advising them of the progress on the Croft System. At that meeting, Castagna gave Ennis and Ables copies of series 8000 and 9000 as they had been adopted by the board and he also gave them draft copies of series 1000 through 7000. In addition, he offered to provide the REA with copies of changes in the drafts of series 4000 and 5000 as they were made, and he subsequently did so.

In the meantime, a Joint Personnel-Negotiating Committee of the board met to discuss the draft of series 4000 on December 13, 1974, and gave its tentative approval to the draft which had been prepared by the staff with the exception of about six sections which it returned to the staff for further revision. On December 16, 1975, the board's Personnel Committee met on series 2000 and 4000 and gave its tentative approval to series 2000 and series 4000 with the exception of about six sections in series 4000. On December 18, 1974, the board's Curriculum Committee met and reviewed series 6000. There is no indication whether any representative of the REA attended any of these committee meetings, but there is testimony to the effect that REA representatives did attend some committee meetings where drafts of the Croft System were discussed.

On January 13, 1975, the Joint Personnel-Negotiating Committee, Personnel Committee and Curriculum Committee reported on the status of their work on the Croft System. On that same date Ennis hand-delivered a letter to the board which read in relevant part as follows:

> "Be notified by this hand-delivered letter (registered copy mailed also on this day) that the Racine Education Association per its rights under Section 111.70, Wisconsin Statutes, again expresses the demand to exercise its rights to 'Conferences and Negotiations on Questions of Wages, hours, and Conditions of Employment' as they relate to the District titled 'Croft Policy Handbook'.
>
> "And further, be on notice that those actions in regard to policy changes that may have been affected prior to this notification, and because of lack of notification per the recently expired Contract between Unified School District No. 1 and the Racine Education Association, page 4, Item III, Section 7, and the WERC decision of January 1974, in reference to your responsibility to bargain with the Racine Education Association are included in this demand."

This letter was read at the outset of the board meeting on January 13, 1975, but action on the letter was deferred to the regular board meeting in February because the letter was not received until shortly before the meeting began.

At the regular board meeting on February 10, 1975, Ennis' letter of January 13, 1975 was referred to Castagna for handling. No action was taken on the suggestion of board member Stanton that the board challenge certain statements contained in the letter and publicly state that the REA had been invited to attend meetings where the Croft System had been discussed. At that same meeting, the Curriculum

Committee reported that it had given its tentative approval to series 6000 at its meeting on February 4, 1975.

On February 11, 1975 Nelson sent Ennis a letter wherein he advised Ennis of the board's action of referring the matter to Castagna who was directly responsible for the work being done on the Croft System. Nelson concluded the letter by saying:

> "It is my understanding that Mr. Castagna has previously been in touch with you on this matter and I ask that you contact him so that a meeting might be set up to resolve any concerns the Association might have."

Ennis did not contact Castagna thereafter. On February 19, 1975, Castagna sent Ennis a letter which read in relevant part as follows:

> "At its meeting on February 10, 1975, the Board of Education received your letter of January 13, 1975, expressing the Racine Education Association's demand to exercise its rights under Section 111.70 relative to the Croft Policy Handbook. The Board referred the letter to me, since I have been involved in co-ordinating matters relating to the Croft Policy Handbook.
>
> "Work on the Handbook has proceeded on the schedule I outlined for you in our meeting of December 27, 1974. At that time you took one copy of each section, 1000 through 7000. I told you those copies were draft copies, subject to change as we worked on them. I will make updated copies available to you as soon as they are ready.
>
> "The Board of Education has adopted only sections 8000 and 9000 with respect to Internal Board Policies and Bylaws of the Board.
>
> "With respect to the various School Board policy proposals contained in the Croft Handbook, I would be pleased to meet with REA representatives to receive an expression of the Association's views relative to these policies before the School Board makes policy changes that have a substantial effect on the wages, hours, or conditions of employment of teachers. This procedure is in accordance with language agreed to in the Agreement negotiated by the Unified School District and the REA during the fall of 1974.
>
> "Please contact me so that we can arrange for meetings to discuss this matter further."

The reference in Castagna's letter of "language agreed to in the Agreement negotiated . . . during the fall of 1974" was to Article III, Section 8 of the September 24, 1974 agreement. 73/ That section was added to supplement Article III, Section 7 of the 1972-1974 agreement, which was referred to by Ennis in his letter of January 13, 1975. Together they read as follows:

73/ At the hearing Ennis expressed the view that this provision was not intended to be implemented until agreement was reached on all of the remaining issues in bargaining. However, nothing in the evidence supports a finding that any provision of the September 24, 1974 agreement was to be delayed in its implementation and in fact monetary benefits and other provisions of the agreement were implemented immediately.

"III. TEACHER RIGHTS

. . .

"7. The Association shall be informed in writing of any contemplated change in policy affecting working conditions in order that the Association may present its views to the Board.

"8. The Superintendent of Schools or his designee will meet with representatives of the Association to hear them express the Association's views before the Board makes a change in policy that has a substantial effect on the wages, hours or conditions of employment of teachers."

Ennis still did not contact Castagna for the purpose of setting up a meeting as suggested in his letter of February 19, 1975, so Castagna contacted Ennis for that purpose. Ennis agreed to meet on March 11, 1975. In the meantime the board's Curriculum Committee had met on February 25, 1975 and given its tentative approval to three sections of the 6000 series and reported that action to the board at its regular meeting on March 10, 1975. Also at the March 10, 1975 board meeting the board was given copies of the latest draft of series 4000 and 5000 and it was unanimously adopted that series 4000 and 5000 be referred to a Committee of the Whole meeting on or before the June 1975 Committee of the Whole meeting date.

At the meeting with Castagna on March 11, 1975, Ennis stated that the District's position, as outlined in Castagna's letter of February 19, 1975, was satisfactory as far as it went, but that Ennis did not believe that it satisfied the District's obligations under the commission's order in Case XVIII. 74/ A procedure was then agreed to whereby Ennis and representatives of the REA would meet with Castagna, acting as "deputy superintendent," to present the REA's view regarding individual sections of the Croft System, and that this input would then be forwarded to the appropriate standing committees of the board. Ennis agreed to contact Castagna for the purpose of arranging such a meeting.

On or about March 25, 1975, Ennis gave Castagna a copy of a memorandum, directed to REA members, which indicated that the REA had charged the District with refusing to bargain with regard to the Croft System. Castagna asked him on that occasion if he would still be willing to meet pursuant to the agreed procedure prior to the next scheduled meeting of the Committee of the Whole and Ennis indicated that he would. Castagna contacted him again with regard to a date and he agreed to meet in early April, 1975.

Castagna met with Ennis and Ables on April 3, 1975 for approximately three hours. During this discussion Ables and Ennis went over series 4000 and 5000 and identified sections of those two series which, in the REA's view, fell into one of the following categories: (1) acceptable as written; (2) acceptable as written but should be included in the collective bargaining agreement; (3) should be negotiated before adoption; and (4) needs minor revision for clarification only. Castagna reported back to Nelson with regard to the results of this conference and recommended that the board consider

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74/ Prior to this meeting, on February 25, 1975, the REA's counsel wrote the commission alleging generally that the District was not complying with the commission's order in Case XVIII. It was after this meeting that the REA filed its March 27, 1975 affidavit wherein it first alleged that the District was violating the commission's order by its actions with regard to the Croft System.

submitting the disputed sections to negotiations. Results of this discussion, i.e., the identification of the various sections of the 4000 and 5000 series which fell into each of the four categories in question, were transmitted to the board and its committees.

The Croft series 4000 and 5000 were not discussed in the Committee of the Whole meeting on June 2, 1975; instead, it was agreed that they should be referred to the July, 1975, Committee of the Whole meeting for discussion. Thereafter, on June 6, 1975, pursuant to a directive of the Personnel Committee, Castagna wrote Ennis a letter indicating that the Personnel Committee was inviting representatives of the REA to a meeting on Wednesday, June 18, 1975, or on any other mutually convenient date, to express the REA's views on series 4000 and 5000 and further indicating that he, Castagna, would be willing to meet again before that date. On June 9, 1975, the board received the report of its Committee of the Whole referring series 4000 and 5000 to the July Committee of the Whole and referred two suggested changes in the 5000 series to the July Committee of the Whole. Ables appeared and restated the REA's demand that the District "negotiate" with regard to 4000 and 5000 series.

It is the contention of Ennis that when the board acted on June 4, 1975 to unilaterally implement its proposals on the remaining issues in bargaining, the language in the 1972-1974 collective bargaining agreement dealing with faculty-student ratio was "deleted" and that this action was therefore related to the board's action on the Croft System which refers to the labor agreement in reference to the subject of ratio policy. However, the record is clear that the board did not eliminate the contract reference to the ratio policy on June 4, 1975, 75/ and took no action on the Croft series 4000 or 5000 in June, other than to refer it to the July Committee of the Whole.

On June 10, 1975, the board's Personnel Committee met and gave tentative approval to a number of sections of the 4000 and 5000 series; agreed to recommend changes in certain other sections; and discussed certain other sections without making any recommendations. On June 18, 1975, the committee met with representatives of the REA, including Ennis and then President Thayer, and reviewed a number of changes that had been made in the latest draft of certain sections in the 4000 and 5000 series which were acceptable to the REA representatives present. The REA then presented their position on the various sections of the 4000 and 5000 series based on the same four categories which had been discussed with Castagna at the meeting in April. Those concerns were apparently set out in writing and given to the Personnel Committee, but the REA never introduced that document into evidence, relying instead on the recollection of Thayer as to the concerns which were expressed at this meeting. Thayer's recollection was that the REA took the position that a number of sections were acceptable to the REA but should be set out in the agreement, and that a number of other sections should be "negotiated."

Finally, on June 24, 1975, the Personnel Committee met and approved a number of sections in the 4000 and 5000 series, taking into account the views of the REA as stated in the June 18, 1975 meeting. No evidence was introduced with regard to what action, if any, the board took at its July, 1975 Committee of the Whole meeting or board meeting, however, the record does indicate that the board withheld action on the entire Croft series so that series 1000 through 7000 could be considered simultaneously. At the close of

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75/ There was a change in the language making reference to the policy on elementary faculty-pupil staffing ratio, which was placed in Section 1c of Article VIII.

the hearing the board had still not taken any final action with regard to any series in the Croft System other than series 8000 and 9000.

At the hearing, Ennis and Thayer both indicated that they had "similar" concerns about the 6000 series. However, the record is devoid of any evidence that the REA ever expressed concern about any section in the 6000 series to Castagna or to the board or its committees, even though the REA was given a copy of series 1000 through 7000 as early as December, 1974 and had discussed those drafts internally through various committees prior to the meeting with Castagna in April of 1975, where Ennis and Ables expressed concerns about the 4000 and 5000 series.

(b) Discussion

It would appear that there is no substance to the REA's claim that the District refused to furnish it with information with regard to the Croft System. On the contrary, the record indicates that the District, through Castagna, supplied the REA with information with regard to the status of the Croft System.

The balance of this charge assumes that the District's actions in developing the Croft System had the effect of changing as opposed to indexing or codifying existing policies which affected wages, hours and conditions of employment and that the District was under an obligation to bargain about the proposed changes. It is the District's position that the Croft series 1000 through 7000 have never been adopted as board policy, but that the District was free to do so pursuant to the terms of the agreement.

As extensive as the record in this proceeding may be, there is no evidence clearly establishing what changes in policy, if any, are contained in the latest draft of the Croft series 4000 and 5000. At the hearing, Thayer identified a number of sections that were "acceptable" to the REA but should be, in the REA's view, included in the agreement, a position that is clearly contrary to the terms of the agreement reached in September, 1974. In addition, she identified a number of sections that the REA believes should be negotiated.

In reaching the agreement in September 1974 the REA dropped its various demands with regard to bargaining over changes in policy during the term of the agreement and agreed that: (1) certain subjects were reserved for further negotiations; (2) the agreement is the entire agreement (Article XXII); (3) the REA has a right to be informed of proposed changes in policy affecting wages, hours and conditions of employment and to meet with the superintendent or his designee to express its views before the board makes such change in policy (Article III, Sections 7 and 8); and (4) the REA has the right to grieve if it believes the provisions of the agreement or an established District policy have been incorrectly interpreted or applied (Article VII, Section 1). Finally, the agreement provides in Article VI, Section 2, that the board retains the right to adopt "such rules, regulations, and policies as it may deem necessary", and was "limited only by the specific and express terms of this agreement". Consequently, it is clear that the District was under no obligation to include additional items of board policy in the terms of the agreement since such a demand was contrary to the terms of the agreement.

With regard to the REA's claim that it had a right to insist on negotiations as to certain other policies, it would appear that this demand was also contrary to the terms of the agreement, wherein the REA waived any such bargaining obligation. Assuming the policies identified by Thayer contained "changes" in existing policies affecting

wages, hours and working conditions, the District was free to make those changes so long as the changes were not contrary to the specific terms of the agreement and provided the District abided by its obligations under Article III and Article VII of the agreement.

It may be that a detailed analysis of all of the various provisions of the Croft series might produce some colorable claims that there is a conflict between the policy statements there and the agreement. However, no such presentation was made at the hearing or in the REA's brief. The REA remained free under the terms of the agreement to present such claims to the board either through the procedures contained in Article III, or through the procedures contained in Article VII, if the District ultimately adopts the Croft System as board policy. In the absence of a clear record establishing that the board has knowingly acted to adopt a policy which it knows to be in conflict with the terms of the agreement, disputes as to whether any such policy actually conflicts with the agreement are best left to the agreed-to procedure for resolving such disputes under Article VII of the agreement.

(12) Adoption of Medical Insurance Program

In paragraph ten of its affidavit and paragraph thirteen of its complaint, the REA alleges that in March 1975 the District unilaterally adopted a medical insurance program while refusing to negotiate concerning changes in said program.

(a) Background

For a number of years the District has provided a health insurance program for employes represented by the REA and has paid the full cost of the premiums of said program. The 1972-1974 collective bargaining agreement contained language to that effect which reads in relevant part as follows:

"XIII. INSURANCE AND RETIREMENT

"1. The Board shall provide each teacher (except where both spouses are teachers, only one will be eligible) an opportunity to participate in a group hospitalization and surgical-medical benefit plan with the premium cost being paid by the Board, and with all benefits thereunder accruing as of September 1. Out-patient diagnostic hospital services shall include benefits up to $200.00 for each yearly period.

"2. Any teacher on a leave of absence will be eligible to participate in the group hospitalization and surgical-medical benefit plan provided he pays the full premium cost."

In the negotiations that preceded the 1972-1974 collective bargaining agreement, the REA proposed language which would have continued the guarantee of fully paid health insurance but would also have guaranteed that neither the benefits nor the insurance carrier would be changed during the term of the agreement. That demand was dropped in the negotiations and the 1972-1974 collective bargaining agreement contained the language set out above, which was substantially the same as the language contained in the prior agreement.

In the Spring of 1973, the District acted to change insurance carriers as to the surgical portion of its insurance package. On March 5, 1973, James S. Clay, then Executive Secretary of the REA, wrote the chairman of the board's Finance Committee protesting the method used in adopting the new surgical benefits carrier. His letter read in relevant part as follows:

"The Racine Education Association would like to express concern over the methods used in the adoption of the new surgical benefit carrier. In the past, the REA's Insurance Committee has been informed when the Board contemplated action such as this. The Committee has been allowed to participate in the discussion surrounding the action and to make recommendations to the Board of Education. Recognizing that insurance is closely tied to the negotiation process to the extent that cost is computed as part of total wage benefit package, we strongly feel REA should have been involved in these considerations. Failure to do so has widened our members [sic] distrust in the Board of Education, creating confusion and, further, leads to deterioration in morale in the teaching staff.

"It would be our hope that the Board of Education would give these factors careful consideration when it contemplates further action of this nature."

In the Spring of 1974, Ennis asked the District to negotiate with regard to the content of the insurance program but was advised that the matter was not then open for negotiations. In its comprehensive proposal of May 28, 1974, the REA proposed the following language to replace the language contained in Article XIII, Sections 1 and 2, set out above:

"HEALTH CARE

"The Board shall provide the MBU, without cost, complete health-care protection for a full twelve-month period for the MBU's entire family. When necessary, premiums in behalf of the teacher shall be made retroactively or prospectively to assure uninterrupted participation and coverage on a basis equivalent to the present coverage.

Provisions of the health care insurance program will be detailed in master policies and contract agreed upon by the Board and the Association and shall include: [emphasis supplied]

1. Hospital room, board and miscellaneous costs;
2. Out-patient benefits, including psychiatric out-patient care;
3. Laboratory fees, diagnostic expenses, and therapy treatments;
4. Maternity costs;
5. Surgical costs;
6. Major medical coverage;
7. Prescription drug costs;
8. Dental care;
9. Optical care;
10. Long-term disability benefits for each MBU. Benefits shall be payable upon the _____ calendar day of disability at _____ percent of annual contractual salary. Benefit payments will continue to age 65 or until termination of disability -- whichever occurs first.

"In the event that a teacher, absent because of illness or injury, has exhausted sick leave accrual, the insurance benefits contained herein will be continued by the Board.

"All insurance coverage under this provision will remain in force until a new contract is ratified.

"All medical or health care protection will continue without cost to any teacher, and/or spouse who retires from the District."

In its comprehensive counter-proposal of June 18, 1974, the District proposed to continue the language contained in Article XIII, Sections 1 and 2, set out above.

Thereafter, during the negotiations in June, July and August, the parties discussed both proposals on several occasions. When the REA inquired as to the District's position on insurance, Peterson stated on several occasions that the District proposed to continue the existing contract language.

According to Ennis, the District, through Peterson, took the position in August, 1974, that it "couldn't" bargain about insurance because the insurance contract came up for renewal in March of 1975. Thayer also testified that the District took this position in bargaining and attributed the statement to Peterson, but could not remember the date on which he allegedly made the statement.

According to Peterson he did not say that the District "couldn't" bargain about insurance, but he did have a discussion with Ennis on August 27, 1974, with regard to the possibility of bargaining about insurance in the Spring of 1975. On that occasion, Ennis asked Peterson if the District intended to change carriers or benefits during the term of the collective bargaining agreement. Peterson responded to the effect that it would be hard to predict since the insurance did not come up for renewal until March of 1975, but assured Ennis there was no present intent to do so. According to Peterson, Ennis then asked him if the District would be willing to bargain about insurance at that time and he indicated that he could not commit the board since he did not know what they might do in March but that Ennis "shouldn't count on it" since, if the language in the agreement remained the same as the District proposed, the District would not be obligated to do so. Notes of this meeting, taken by an agent of the District, support Peterson's version of this particular conversation.

On cross-examination, Ennis denied that Peterson ever said that the District would not be obligated to bargain in the spring. Thayer said that it was possible that Peterson might have said such a thing but that she did not remember it.

According to Ennis, the REA "accepted" the District's position that it "couldn't" bargain about insurance coverage at the time and decided to wait until the Spring of 1975 to bargain about insurance. 76/ However, on September 10, 1974, there was further discussion concerning the REA's insurance proposals and the REA agreed on that date to drop its demand for a group life insurance policy and to eliminate its demand for dental care coverage, optical care coverage, and long-term disability coverage contained in subparagraphs 8, 9 and 10 of its health insurance proposal of May 28, 1974, set out above.

When the parties reached agreement on September 24, 1974, health insurance was not included among the items which were reserved for further negotiations. Thayer admitted that the REA dropped the balance of its insurance proposal as part of the terms of that settlement.

76/ Ennis does not claim, in this regard, that the District ever agreed that bargaining on insurance should be postponed until the Spring of 1975.

Sometime in February, Ennis and Peterson had a conversation wherein Peterson advised Ennis that he should contact the board's Finance Committee if he wanted to present the views of the REA before the District acted to renew the health insurance coverage. This conversation apparently prompted Ennis to write Peterson a letter dated February 19, 1975, which read in relevant part as follows:

"In one of our recent discussions, you stated concern for our lack of position statement in regard to medical insurance. Let us clearly state our position in this matter--

> Prior to negotiations or renegotiating with any and all insurance carriers where 'fringe' monies of teachers are involved or services to teachers are to be offered or provided, we fully expect and, in fact, demand our right under 111.70 to collectively bargain.

"Let us further restate that we are not always able to play the game of 'hide and seek' with the District. We do not always know the policy changes or new policies you're going to make, so we do insist that you follow the ruling of the WERC and the 'posted' statements of Board President Berthelsen which states:

> 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 our employes that:
>
> > WE WILL NOT refuse to bargain collectively with the Racine Education Association by unilaterally establishing, modifying or eliminating wages, hours or working conditions without first offering to bargain and, if requested, bargaining in good faith with the appropriate representatives of the Racine Education Association with regard to the proposed establishment, modification or elimination of wages, hours or working conditions."

On February 24, 1975, Peterson responded to Ennis' letter of February 19, 1975 as follows:

"As a result of collective bargaining, the parties agreed to Article XIII, section 1, which says:

> The Board shall provide each teacher (except where both spouses are teachers, only one will be eligible) an opportunity to participate in a group hospitalization and surgical-medical benefit plan with the premium cost being paid by the Board, and with all benefits thereunder accruing as of September 1. Out-patient diagnostic hospital services shall include benefits up to $200.00 for each yearly benefit.

"As we understand it, the School District is under the obligation to, and will, live up to this provision.

"The School District is in the process of seeking bids on the existing insurance coverage in order to reach a decision in March. Consideration will be given to any ideas the Association has with respect to medical insurance. Could you please get any ideas to me as soon as possible. While the time element is important, it is not critical since the insurance policies can be modified upon one month's notice."

In the meantime the board's Finance Committee, which was aware that the premium on the existing health insurance policies were due to be increased by the carriers, met on February 17, 1975 with two prospective insurance carriers to discuss the possibility of securing bids on the health insurance package. After some discussion, the committee asked the administrative staff to secure separate bids from these prospective carriers for the period March 1, 1975 to March 1, 1976, and the period March 1, 1975 to June 1, 1976, setting out that portion of the premiums quoted which were attributable to hospitalization, surgical care and major medical. On March 3, 1975, the Finance Committee met again to review the bids. According to board member McClennan, the committee was not satisfied that it had received the lowest bids possible and therefore decided to direct the administrative staff to further analyze the bids and present that analysis at the committee's next meeting scheduled for March 10, 1975. The staff was further directed to keep the REA informed of the progress being made to establish a new health insurance agreement. 77/

Thereafter, on March 10, 1975, the Finance Committee met and agreed to recommend that the policies be renewed. That recommendation, which was approved by the board at its regular meeting on March 10, 1975, read as follows:

> "the employee hospital and major medical insurance policy be renewed with identical coverage to Blue Cross, Blue Shield Co. and the surgical insurance policy be renewed with identical coverage to Wisconsin Physicians' Service, Inc. for the period from March 1, 1975 to March 1, 1976, and that the $50,000 credit with Blue Cross, Blue Shield be applied to the premium payment made during the month of July, 1975."

As noted, the board's action specified that the policies were renewed without any change in coverage. Thereafter, the District was notified by letter dated July 30, 1975 from Blue Cross and Surgical Care Blue Shield that it was amending its policy with the District to add certain coverage for pulmonary tuberculosis, which additional coverage was mandated by state law. 78/

As noted above, after the hearing herein was closed, the District filed a petition for a declaratory ruling in Case XXXIV and petitioned to reopen the hearing herein to present additional evidence in a consolidated proceeding. It is the District's contention that the Respondent has taken an inconsistent position with regard to the subject of health insurance since the close of the hearing herein. According to the District, the REA has maintained in a circuit court proceeding that a binding agreement on health insurance coverage was reached on

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77/ McClennan had discussed the REA demand to bargain with Ennis and indicated to him that it was his belief that the District was not obligated to bargain about insurance coverage at that time since the existing agreement covered the subject of insurance and the Finance Committee did not propose to change the existing coverage.

78/ See then §204.323, Stats. At the hearing, the REA was allowed to introduce evidence with regard to this change in coverage, which it discovered through a memo to the teaching staff issued during the course of the hearing, on its claim that such evidence may establish that the District in fact changed the coverage in March, 1975. Subsequent evidence introduced by the District established that this change in coverage was mandated by state law and was unrelated to the board's action on March 10, 1975.

September 24, 1974, and that any proposal to change that coverage is a permissive subject of bargaining. Since the motion to reopen the hearing herein was denied, the findings herein are based on the evidence of record.

(b) Discussion

A reading of the charge in question discloses that there is a basic ambiguity in its wording. It is unclear on the face of the charge whether the allegation is that the District made changes in the health insurance program in March of 1975, and refused to bargain about said changes or whether the allegation is that the District refused to negotiate concerning changes in the health insurance program which the REA desired to make at that time. At the hearing, the REA attempted to prove both theories, but the thrust of the REA's evidence was to the effect that the District refused to bargain about changes that the REA desired to make in March of 1975. In addition, Ennis testified that it was his belief that the REA had the right to bargain about the disposition of a $5,000 credit which was applied to the July premium payment.

Because there is no evidence which would support a finding that the District changed the health insurance program in March 1975, no further consideration need be given to that claim.

There is no real dispute over the question of whether the District refused to bargain in March 1975, over any changes in the health insurance program that the REA desired to make before the insurance agreements were renegotiated. The correspondence between Ennis and Peterson, the conversations between Ennis and McClennan and the actions of the board's Finance Committee make that clear. The District, through the actions of Peterson, McClennan and the Finance Committee, took the position that it would provide the REA with an opportunity to express its views about the matter of insurance coverage prior to the renewal of the insurance policies but that it would not bargain about any proposed changes in the insurance program that the REA desired to make at that time.

The only question presented here is whether the District was obligated to bargain about the insurance program at that time. The examiner is satisfied that it had no obligation to bargain about insurance because it had bargained about insurance and reached an agreement on the subject of insurance in the negotiations that preceded the September 24, 1974 collective bargaining agreement and because the REA waived any rights it had to bargain about changes in the insurance program when it dropped its proposals and agreed to accept the District proposal to continue the existing language which obligated the District to continue to provide a fully paid insurance policy during the term of the agreement. 79/

The REA did not, in August 1974, and does not in its complaint here allege that the District violated its duty to bargain with regard to health insurance coverage in the 1974 negotiations when Peterson allegedly took the position on behalf of the District that it "couldn't"

bargain about insurance even though this conduct allegedly occurred within the one year prior to the filing of the complaint. Furthermore, Ennis' letter of February 19, 1975 does not mention any claim that the negotiations regarding insurance were somehow deferred to March 1975. For these reasons, and others detailed below, the examiner is unable to accept as credible the testimony of Ennis and Thayer to the effect that the District took the position in bargaining that it "couldn't" bargain about insurance and the testimony of Ennis that the REA "accepted" such a position.

The history of this litigation demonstrates that the REA had no reluctance to file prohibited practice charges, and in fact, filed several prohibited practice charges at that time. No reference was made to this alleged violation in those charges or in the motion for enforcement of the Commission's order in Case XVIII filed at that time. In addition, the record indicates that the District bargained about insurance both before and after Peterson allegedly took such a position in bargaining. 80/ On September 10, 1974, the REA acted inconsistently with its claimed "acceptance" of the District's position when it dropped only a portion of its health insurance demands. Later, at the Sienna Center, the REA dropped the balance of its insurance demands and agreed to continue the existing language. The only reasonable inference that can be drawn from this conduct is that it was done in exchange for the District's willingness to continue the health insurance guarantee and to agree to the other provisions of the agreement reached. Had the intent been to defer negotiations on health insurance, the parties would have agreed to defer bargaining on that subject as they did on a number of other subjects.

Even if it is assumed that Peterson stated words to the effect that the District "couldn't" bargain about insurance in August of 1974, the examiner is satisfied that the REA clearly and unmistakably waived its right to demand bargaining about insurance by its conduct thereafter. If the REA was willing to "accept" this position in bargaining, why did it not propose that its proposed changes in the insurance program become effective in March 1975? Even if the parties were discussing a one-year agreement, such a delayed implementation was clearly possible. 81/ Instead, the REA agreed to drop all of its proposals on health insurance and entered into a two-year agreement which continued the existing provision on health insurance and did so with the knowledge that in the past the District had always taken the position that under such language it would consult but not bargain with the REA before renewing the insurance policies.

Finally, the District's decision to apply a $50,000 credit which it apparently received from one of the insurance carriers to the July 1975 premium would appear to be inseparable from the District's undertaking to pay the "full cost" of the existing health insurance program. If such a

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80/ Part of the problem in this regard would appear to stem from Ennis' misunderstanding of the duty to bargain. His testimony indicates that it was his belief that the District did not "bargain" when it offered to continue the language guaranteeing continuation of a fully paid insurance program.

81/ The District also points out that the insurance agreements provide that they can be modified or terminated by the District on thirty days' notice. However, there is no proof in the record here that the REA was aware of this fact prior to Peterson's letter to Ennis dated February 24, 1975.

decision was one about which the District was obligated to bargain, then it would also be logical to conclude that the REA was obligated to bargain about increases or possible surcharges in the premiums charged by the carriers. Such a conclusion is inconsistent with the terms of the agreement. The District was obligated to continue to pay the full cost of the program and that obligation was met at all times relevant herein.

(13) Non-Compliance with Arbitration Award (Ables Grievance)

In paragraph fifteen of its complaint, the REA alleges that "throughout the 1974-1975 school year" the District "has failed and refused to comply with the provisions of a final and binding arbitration award (Ables Grievance) issued and effective during said year." In paragraph nineteen of the complaint, the REA alleges that by such conduct, and the other conduct alleged in the complaint, the District has "failed and refused to negotiate in good faith with the REA in violation of §111.70, Wis. Stats., and has otherwise restrained and interfered with employes in the exercise of rights guaranteed by §111.70, Wis. Stats." Taken together, these two paragraphs can fairly be read to allege violations of §111.70(3)(a)1 and 4 of the MERA; they do not allege a violation of §111.70(3)(a)5 of the MERA.

(a) Background

During the term of the 1972-1974 collective bargaining agreement, Robert Ables filed a grievance alleging that he was paid the wrong rate of pay for attending a program on drug education which was held on Saturday, December 8, 1973. The District had paid Ables and the six other new sixth grade teachers who attended the program at the rate of .375 percent of their annual salary, the contractual rate provided in Article XII, Section 8, for curriculum preparation and paid to teachers who had attended similar programs in the past. It was the contention of the grievance that the teachers in question should have been paid the equivalent of their rate of pay for one day of employment, calculated by reference to the number of contracted days of employment in the 1973-1974 school year (1/189th or approximately .5291 percent of their annual salary.) The grievance was not resolved in the lower steps of the grievance procedure and was submitted to arbitration before Arbitrator Edward E. Hales. Hales heard the matter on November 21, 1974 and, after submission of briefs, issued his award on January 8, 1975. Hales sustained the grievance and his award read in relevant part as follows:

> "2. The drug-education program held on December 8, 1973 was an 'in-service training program' and not 'curriculum preparation'.
>
> "3. The School District violated the negotiated salary schedule contained in the 1972-74 Professional Agreement, by not paying the grievant and other new sixth-grade teachers at their regular daily rate for participating in the drug-education program on December 8, 1973.
>
> "4. The School District shall pay the grievant, and other new sixth-grade teachers who participated in the drug-education program on December 8, 1973, at their regular daily rate, based on annual salary and number of contract days."

The minutes of the regular meeting of the board held on January 13, 1975 reflect that a letter was received from the REA regarding the award of Arbitrator Hales, and that the letter was referred to the superintendent "who will take immediate steps to implement action." Thereafter, Ables

and the other teachers who attended the December 8, 1973 drug education workshop were compensated in accordance with paragraph four of the award.

The complaint herein was filed on May 14, 1975 and sent to the District on June 3, 1975. Insofar as the record is concerned, the filing of the instant complaint constitutes the first claim, since the board's action of January 13, 1975, that the District had not complied with the award of Arbitrator Hales. On June 19, 1975, Ennis wrote Nelson a letter which read in relevant part as follows:

> "Payment of Individuals Attending
> 1974-75 Drug Education Workshop
>
> "Per the Arbitration Award in the Grievance of the Association vs. Unified (Robert A. Ables grievance), we believe that you have a responsibility to pay the ten individual teachers that participated in the workshop this year and that you do so in the same manner as you were instructed in the award of the Arbitrator. We believe that even though the workshop was changed in its format, that the award has effect and impact from the decision forward.
>
> "We request Association notification that you will pay the participants within the next ten calendar days. In the event that the District believes that it has grounds to ignore the decision in the arbitration, we request that you forward those grounds to this office in written form within the next five days and establish a date for a Level III grievance hearing on this matter with the Board's Personnel Committee."

The record does not disclose on what date or dates the individuals in question attended the drug education workshop held during the 1974-1975 school year. Therefore, it is not possible to determine whether they attended the workshop before or after the arbitrator issued his award. Furthermore, no evidence was introduced regarding the content of the programs held in either year. The record does establish that the 1974-1975 workshop was not an all-day workshop and was not held on a Saturday. In his letter to Nelson, Ennis acknowledges that the "format" of the workshop was changed. He testified that it was "ordered in-service" 82/ that it was held for two hours after school and that it offered the "same material." Peterson testified that the workshop that was held was "entirely different" and was "distinguishable" from the grievance presented to Arbitrator Hales which dealt with the question of whether the December 8, 1974 workshop was an extra day of in-service or a day of curriculum preparation.

Ennis apparently received no reply to his letter of June 19, 1975, and, on June 30, 1975, sent Nelson a second letter which read in relevant part as follows:

82/ In his testimony Ennis characterized the changes in the drug education workshop held in 1974-1975 as a "unilateral change" in working conditions. The District objected and moved to strike this testimony which was allowed to stand with the understanding that unless the claim was covered by the existing pleadings it would not be considered except as background. Upon review of the record, the REA's contention that this claim is covered by the charge with regard to the board's allegedly mandating in-service training, is without merit. As noted above under the discussion of that charge the District's action with regard to in-service related to in-service programs dealing with the desegregation program and not drug education.

"On 19 June 1975, the attached letter was sent to you, and a reply was requested. Since this office has not received a reply of any type, we are led to no other conclusion than to believe that the District has no intention of paying the individuals involved.

"We therefore grieve the actions of the Unified School District and your actions as the superintendent of schools for the non-payment of the individuals that were in attendance at this year's Drug Education Workshop and request that you consider this a Level II complaint under the grievance procedures. We request that the order for payment be made by you and that a copy of that order be transmitted to this office within the timelines [sic] of the grievance procedure for Level II or that you formally deny this request so that the Board of Education may act on this matter.

"For the purpose of this grievance, James J. Ennis, 701 Grand Avenue, is the official association representative, and all communication shall be directed to him."

Finally, on September 18, 1975, Ennis wrote Nelson a letter which read as follows:

"On 30 June 1975 this Association transmitted to your office a grievance entitled 'Drug Education Workshop Payment'. We have received no reply; therefore, we will move to Level III."

On the same day Ennis wrote a letter to board member Cathleen Capwell, chairperson of the District's Personnel Committee, which read as follows:

"The Racine Education Association requests a Level III grievance hearing on the grievance entitled 'Drug Education Workshop Payment'."

In his testimony on October 29, 1975, Peterson acknowledged that a "grievance" 83/had been filed with regard to the REA's claim that the District had not properly compensated the teachers who attended the drug education workshop in 1974-1975 and noted that he and Ennis had forgotten to discuss this grievance the last time they met at Level Three. As of the close of the hearing herein, this grievance was still pending.

(b) Discussion

In alleging that the District has failed and refused to comply with the award in question "throughout the 1974-1975 school year" the REA would appear to be alleging that the District was obligated to comply with the award even before it was issued, which it obviously was not required to do. The evidence establishes that the District did comply with the award of Arbitrator Hales shortly after it was issued on January 6, 1975.

Based on the evidence presented at the hearing, it is apparently

two-hour drug education workshop held sometime during the 1974-1975 school year in the "same manner" as employes who were paid pursuant to the award. The evidence discloses that there are several significant differences between the two programs. The December 8, 1973 program lasted all day and was held on a Saturday. The arbitrator, in effect, found that this extended the employes' contract of employment by one day. The 1974-1975 workshop lasted two hours and was held after school.

There is no evidence as to the actual content of the two programs and there is a factual dispute as to whether the two programs were also distinguishable in this regard. Under these circumstances it cannot be said that the District is failing and refusing to comply with the award. The disputes over the significance of the differences in the scheduling of the 1974-1975 workshop and the alleged differences in the content of the 1974-1975 workshop must be resolved in light of the provisions of the agreement before it can be said that the District is obligated to compensate these employes in the same manner as the employes who attended the December 8, 1973 program. 84/ The agreed-to mechanism for resolving such disputes is the grievance and arbitration procedure and, as of the close of the hearing herein, there was a grievance pending in this regard.

(14) Non-Compliance with Arbitration Decision (Dobke-Breckley Grievance)

In paragraph sixteen of its complaint, the REA alleges that the District "has failed and refused to comply with a final and binding arbitration decision (Dobke-Breck[ley] Grievance) which issued and was effective as of January 14, 1975." This allegation, read in conjunction with paragraph nineteen of the complaint, constitutes an allegation that the District has, by such conduct, and other conduct alleged, refused to negotiate in good faith and has interfered with employes' rights in violation of §111.70(3)(a)1 and 4 of the MERA. It does not allege a violation of §111.70(3)(a)5 of the MERA.

(a) Background

The "decision" referred to in this charge was actually a settlement agreement of a grievance involving two teachers named Dobke and Breckley, entered into on January 14, 1975. The record does not disclose the exact nature of the grievance. However, the settlement agreement, which was entered into immediately prior to a hearing scheduled before Arbitrator Howard S. Bellman, provided as follows:

1. The REA agreed not to discuss the grievance in the public media or in its "Insyte" publication but would remain free to discuss the grievance with its membership;

2. The District agreed to define the department chairman's inability to reprimand teachers;

84/ Compare those cases where the commission has held that it will not require arbitration of subsequent grievances where there are no such factual distinctions. Wisconsin Telephone Co. (4771) 2/59; Wisconsin Gas Co. (81180-C and 81180-E) 3/68; Handcraft Co., Inc. (10300-A, B) 7/71; Wisconsin Public Service Corp. (11954-D) 5/74 and Dept. of Administration (13539-C, D) 3/76. Because there is no finding that the District refused to implement the award, it is unnecessary to consider whether the failure to allege a violation of §111.70(3)(a)5, Stats. is fatal to this charge.

3. The District agreed to expunge the personnel files "at all levels";

4. The District agreed that the superintendent would issue a memorandum to principals defining the obligation to protect the integrity of the grievance procedure and verifying or emphasizing that no one would be reprised against for participating in the grievance procedure;

5. Dobke was to be assigned to Case High School effective at the beginning of the second semester of the 1974-1975 school year;

6. The principal at Horlick High School was to reissue a memorandum dated October 11, 1973, under a new date deleting the sentence "Lesson plans are to be given to department chairmen" and substituting therefor the sentence "Lesson plans will be available in a place known to the department chairman and to the principal"; and

7. The settlement agreement was to be final and binding in "much the same manner as if a decision had been necessary by the arbitrator."

On January 15, 1975, a transcript of the proceeding held on January 14, 1975 which contained the terms of the settlement agreement was prepared by the court reporter and sent to the parties. Thereafter, and before the start of the second semester, Dobke was transferred to Case High School. In addition, all of the other requirements of the settlement agreement have also been carried out. However, the memorandum on the grievance procedure, which was to be issued by the superintendent, was not issued until August 29, 1975.

On April 2, 1975, Ennis sent a letter to Nelson wherein he complained about the delay in the District's compliance with the agreement that the superintendent would issue a memorandum on the grievance procedure, which read in relevant part as follows:

"On January 14, 1975, during the arbitration of the Dobke-Breckley grievance, your representative agreed to do the following:

Mr. Peterson: At all levels.

'As to both Dobke and Breckley, the superintendnet will issue a memorandum to principals defining the obligation to protect the integrity of the grievance procedure and verifying or emphasizing that none will be repreised [sic] against for participating in the grievance procedure.

A copy of the memorandum will be sent to the Education Association with a covering letter.'

"I believe 75 days to wait for the accomplishment of this arbitrated settlement is just another purposeful stall and non-compliance with 'good faith' procedures and just another stall on the part of the administrator of this district. You now have become an identifiable part of this stall and, in fact, as chief administrative office responsible.

"My patience has run out with this tactic on your part and you may rest assured that it will no longer be tolerated by myself or this Association.

"You have had 75 days, I now offer you 48 hours to fully accomplish your sworn commitment.

"I further suggest that during this time you re-think the posture and directions you have established for your agents and yourself, and if you are ready to change your attitude, please indicate so to me personally. If not, I will no longer feel compelled to follow a one sided set of rules."

Thereafter Peterson drafted a nine-page (double space) memorandum for Nelson's signature which was directed to all principals and supervisors and described various problems with the grievance procedure and contained a number of recommendations with regard to the handling of grievances. The first two and one-half pages of this memorandum dealt with the subject of reprisals for utilizing the grievance procedure and read as follows:

"I'd like to share some thoughts with you about the handling of grievances. I've talked with Sam Castagna, Deputy Superintendent, and Thatcher Peterson, Coordinator of Employee Services, about different aspects of grievance handling in an attempt to reduce the amount of time spent in getting to the issue being grieved. We've pooled our thoughts on this.

"1. No Retaliation for participating in the Grievance Procedure.

a. We must recognize that many employees are somewhat insecure about filing a grievance, much less about sitting down and talking about something they think constitutes grounds for a grievance.

b. This is a fact of life. It creates the possibility that any action, especially adverse, that a principal takes toward a grieving teacher will be perceived by the teacher as retaliation. From the principal's point of view, whatever action he takes can be unrelated to the fact the teacher filed a grievance. The teacher can see the same action as being caused by his filing the grievance.

c. The point behind this is to make us all aware that heightened perceptions often exist on the part of a teacher who files a grievance. Therefore, be aware that if, for example, you find fault with a teacher on the day after he files a grievance, he might think he's being retaliated against.

d. In some ideal sense, if we were all-knowing and could measur motive, we would apply the 'but for' test to determine whether an adverse action was related to the grievance by cause and effect or by correlation. 'What's the but for test?', I can hear you say to yourself. In the example above, the 'but for' test goes like this: But for the teacher filing a grievance yesterday, would I have found fault with him today? A NO answer would say you are discriminating against the teacher because he filed a grievance.

e. Now, a couple of things. First, we're not saying that principals are or have been retaliating against teachers. Secondly, we're not encouraging principals to turn a blind eye toward a teacher because he filed a grievance. Instead,

we want to point out a problem in perceptions that you sh
be aware of.

f. We open this memorandum with a discussion of retaliation
order to clear the air. Given the insecurities that peop
often feel, this is the place to start. Therefore:

1) The Professional Agreement, Article VII, section 12, says:

> It is understood that teachers filing grievance
> do so in good faith and that no reprisals will
> taken against any participants in the grievance
> procedure.

2) Under no circumstances are principals to retaliate against any teacher as a result of his participation in the grievance procedure or to use his participati in the grievance procedure as a basis for discrimina either for or against him.

3) In other words, the fact a teacher has filed a grievance must have no effect on any other interaction between principal and teacher."

Peterson provided Ennis with a draft copy of this memorandum on or about April 15, 1975 for the purpose of obtaining his suggestions with regard to modifications. Thereafter, Ennis sent Peterson a response which Peterson interpreted to mean that Ennis believed that the proposed memorandum did not comply with the intent of the settlement agreement. Ennis' response, which included his "candid" and apparently unrestrained criticism of a number of a things unrelated to the memorandum on reprisals was not introduced into evidence. Ennis never forwarded any suggested modifications in the proposed memorandum on reprisals.

There is no evidence of any further communication between the REA and the District with regard to this memorandum prior to the filing of the complaint herein on May 14, 1975. Sometime during the summer, Peterson wrote Ennis to ask if he had anything he wished to add to the draft memorandum. When Peterson received no reply, the superintendent issued a new memorandum, which in Peterson's opinion complied with the requirements of the settlement agreement, at the beginning of the 1975-1976 school year.

Peterson transmitted a copy of that memorandum to Ennis by cover letter dated August 29, 1975. The memorandum read in relevant part as follows:

> "The collective bargaining agreement between the school district an
> the REA contains a grievance procedure. The purpose of the
> grievance procedure is to provide a vehicle by which differences in
> the interpretation and application of the collective bargaining
> that from time to time differences are bound to arise.

grievance procedure. Article VII, Section 12 of the collective bargaining agreement says, 'It is understood that teachers filing grievances do so in good faith and that no reprisals will be taken against any participants in the grievance procedure.'

"Practically, a problem of an alleged reprisal is likely to occur where, for example, a teacher files a grievance on Day 1, and on Day 2 a principal or administrator complains to the teacher about something he did on Day 2. Analytically, the question is whether the principal's complaint on Day 2 was caused by the teacher's filing a grievance on Day 1. To the extent that a principal acted because of the filing of a grievance, then that would be a reprisal against the teacher, and wrong.

"If the principal acted only because of the event on Day 2, and would be complaining regardless of whether a grievance was filed, then the principal is not reprising against the teacher.

"The relationship is one of causation versus correlation, and since people see the world through their own eyes, this is a problem area that all of us should be sensitive to."

With regard to the REA's claim of non-compliance, Ennis, who signed the complaint, testified that in his opinion, the District's non-compliance consisted of the failure of the board to officially act on the settlement agreement as it had acted on the award in the Ables grievance. As evidence of such failure he testified that he was unable to find any action by the board's Personnel Committee "approving" the transfer of Dobke to Case High School or the transfer of another teacher who replaced Dobke at Starbuck Junior High School. With regard to the requirement that the superintendent send out a memorandum on reprisals, Ennis acknowledged that the District complied with that requirement but not until August 29, 1975.

(b) Discussion

The provisions of the settlement agreement provided that it was to be considered as final and binding in "much the same manner as if a decision had been necessary by the Arbitrator." Consequently, and in view of the fact that paragraph sixteen of the complaint specifically refers to the "Dobke-Breckley" grievance, this charge would not appear to be prejudicially misleading by reason of its inaccurate characterization of the settlement agreement as an "arbitration decision."

According to Ennis, the District's failure to comply with the settlement consisted primarily of the failure of the board to take official action with regard to its implementation. Inasmuch as all of the terms of the settlement agreement were carried out, such failure would appear to be of no consequence, even if it were required. However, a careful reading of the transcript where the terms of the settlement agreement were discussed, discloses that there was no such requirement. 85/

85/ The question of whether Peterson was required, pursuant to his duties as the District's representative at the hearing, to seek the subsequent approval of the board for the terms of the settlement agreement is a different question. However, in view of the fact that the District complied with the terms of the settlement agreement, the REA would appear to have no standing to raise that issue.

The only serious question presented by this charge is whether the considerable delay in the issuance of the memorandum on reprisals by the superintendent was the result of a bad faith failure and refusal to comply as alleged. The evidence convinces the undersigned that the delay in question was the result of the initial inaction on the part of Peterson and subsequent inaction on the part of Ennis rather than an intentional withholding on the part of the District's agents.

Peterson, by his own admission, had to be "prodded" or reminded of the requirement before he took action to draft the memo for the superintendent's signature. The memo in question was lengthy and contained material with regard to other aspects of the grievance procedure. However, the portion dealing with reprisals clearly complied with the intent of the settlement agreement. There was no requirement that Peterson ask Ennis for his input on the content of the memorandum. However, the fact that Peterson did seek such input belies any claim that he was acting in bad faith. Ennis' "response" to that request effectively placed the proposed memorandum in a state of limbo. Thereafter, the balance of the record establishes that both Peterson and Ennis were diverted by the negotiations on the hours of work and other matters.

The complaint herein, where the REA first charged the District with a failure to comply with the terms of the settlement agreement of the Dobke-Breckley grievance, was not mailed to the District until June 3, 1975. Attempted compliance with this notification requirement during the summer months would have been ineffectual. At the end of the summer, and after Peterson had again contacted Ennis and received no response, the superintendent issued a new memorandum which was limited to the subject of reprisals and unquestionably complied with the requirements of the settlement agreement. The timing of the issuance of this memorandum (the beginning of the new school year) was likely to make it effective for its intended purpose and constitutes further evidence that the delay was not in bad faith.

(15) Non-Compliance with Arbitration Award (North Park Elementary School Grievance)

In paragraph seventeen of its complaint, the REA alleges that "throughout the 1974-1975 school year" the District has "failed and refused to comply with the provisions of a final and binding arbitration award (North Park Elementary School grievance) issued and effective during said year." This allegation, read in conjunction with paragraph nineteen of the complaint, constitutes an allegation that the District has, by such conduct, refused to negotiate in good faith and has interfered with employes' rights in violation of §111.70(3)(a)1 and 4 of the MERA. It does not allege a violation of §111.70(3)(a)5 of the MERA.

(a) Background

On March 5, 1975 Arbitrator Reynolds C. Seitz issued an arbitration award wherein he found that the District had violated Article VIII, Sections 2(c) and (d) of the 1972-1974 collective bargaining agreement when, on September 24, 1973, the principal at the North Park Elementary School announced a change in the school schedule. The schedule was changed from 7:55 a.m. to 2:25 p.m., five days a week to 8:15 a.m. to 3:15 p.m. four days a week with teachers remaining in the building until 3:30 p.m. on the day of early dismissal of students. Article VIII, Section 2(c) and (d) of the 1972-1974 collective bargaining agreement read as follows:

"c. Elementary school principals working with their teaching staff shall have the option of organizing their school day in an attempt to incorporate some flexibility which could provide time for preparation and planning as long as this can be done without decreasing instructional time.

"d. The principal working with the teaching staff shall determine the time during which elementary school teachers shall have 100 minutes of planning time per week."

In reaching the conclusion that the District violated the above provisions, the arbitrator had the following to say with regard to his rationale:

"The evidence convinces me that the principal did a great deal of working with his staff which can be commended. He worked with the staff to arrive at a decision that team teaching was a very desirable approach to instruction. He worked with his staff in an endeavor to get returned to them the planning time they enjoyed in 1970-72 but lost in 1972-73. He worked with his staff with the goal in mind of getting them 100 minutes of planning time per week. The principal did such conscientious and zealous work along the lines just indicated that I have no difficulty at all in believing him when he testified that he was utterly surprised when he learned after he promulgated an administratively approved schedule that would give North Park teachers 100 minutes of planning time that a grievance had been filed protesting the schedule. I have a great amount of understanding of the position in which the principal found himself when central administration officers called him from a negotiating session with the school bus carrier to announce that the 100 minutes of planning time would be available if a particular bus related schedule was accepted.

"But my appreciation of the good things the principal did and my understanding of certain of his reactions does not mean that he complied with the 'working with the staff' dictates of Sections 2 (c) and (d). The evidence is quite clear that at no time did he set [sic] down with his staff to get their reaction to a <u>particular schedule</u> which would incorporate 100 minutes of planning time when it became known that because of time of busing problems the schedule would have to be different than that used in the 1970-72 period.

"I recognize that a plea might be made that if the principal had sat down with his staff <u>he</u> might in the end have determined that the instant schedule was the most reasonable one that <u>he</u> felt could be devised. In this respect, I do think that Section 2 (c) and (d) does not put power in the hands of the teachers to block planning time completely if the schedule is not exactly to their liking. Consequently, I do think that <u>within limits</u> a principal can promulgate a schedule which could be upheld even though the majority of teachers would not vote for it. Certainly one limit on such authority would be that the schedule would not require teachers to work a longer day that was normal in the district. And another limit would be that planning time would have to be set for some time within the normal school day. I emphatically reject the argument that planning time could be tacked on at the end of a normal school day. It is inconceivable that at the time of negotiations the parties could have had any such intent. Indeed, the record is clear that the teacher effort to get planning time was one of the major factors in a strike which preceded the current contract.

"The examples that I have given of limitations which I find the Agreement has imposed upon the principal in respect to promulgating a schedule for planning time if his 'working with the staff' does not produce agreement should not be broadened to subject the District to an arbitrator's decision as to whether the schedule he announced (in the absence of securing the agreement of the teachers) was in the opinion of the arbitrator the wisest and best schedule. In such a situation, the role of the arbitrator is restricted to a determination as to whether the principal ignored limits on his power of the type just previously delineated or whether his 'working with the staff' was an obvious sham or whether the schedule promulgated was utterly arbitrary and capricious.

"Certainly in this case we have no way of knowing what the outcome may have been if the principal had sat down with the teachers to discuss the specifics of schedule making which would provide 100 minutes of planning time and not extend the working time past the normal school day.

"Another argument on behalf of the Board requires reaction. Reference was made to the fact that the schedule would need to be such as to not decrease instructional time (per Section 2(c)). In any schedule making this does need consideration, but I disagree that it requires focusing exclusively upon a comparison with the instructional time available at North Park school in a preceding year. The contract is one which bears upon the whole district. I hold that the reference to 'without decreasing instructional time' made in Section 2(c) must realistically mean that planning time cannot cut into the instructional time which the District recognizes as the minimum requirement. There was considerable argument that the School Board had never established such minimums. If this is so I feel that a realistic implementation of Sections 2(c) and (d) requires such action.

"Having concluded that Article VIII, Sections 2(c) and (d) was violated because the principal ignored the 'working with the teaching staff' provision it remains for me to address myself to a remedy.

"I reject the Association plea that the teachers go back to the schedule of the previous year and the first week in the fall term of 1973-74. I think some consideration must be given to the public desires in the matter. There was evidence parents wanted planning time. To take it away at this time would cause resentment. Indeed, I would think that reflection upon the matter would convince the teachers that such a move would put them in a bad light. Indeed, serious questions could arise as to whether a request for planning time was really made in the interest of making better instruction available for children.

"I have given deep consideration to the Association plea that there be a money award fashioned by working out a proportion which would pay for the claimed hour and forty minutes which teachers are being required to work as a result of the schedule change. I reject taking such action. I do so primarily because it appears that certain elementary teachers in other schools in Racine are working just as many hours as are North Park teachers under their current schedule. Furthermore, the Board made a very good point when it pointed out that if comparison is made with the 1970-72 period when North Park teachers last had planning time the increase made by the present schedule is about 40 minutes per week and not 140.

"Consequently, with such a view of the fact, I think the best interest of education and the teachers in general will be served by the Award to be set forth in the next section."

The award which followed read in relevant part as follows:

"Article VIII, Sections 2(c) and (d) of the Labor Agreement was violated by the schedule promulgated on September 24, 1973. For reasons set forth above I do not order an immediate discontinuance of the schedule or make any back pay type of award.

"On the assumption an existing contract contains the same provisions as gave raise to the current controversy, I order the principal to take steps to work with his staff relative to a schedule which includes planning time which will go into effect at the opening of the term for the 1975-76 year. Very reluctantly and only because I think the situation calls for it as a remedy, I retain jurisdiction to hear the matter if the Association by the opening of the coming fall term feels that the Board is not realistically complying with the dictate of Article VIII, Sections 2(c) and (d).

"The parties are reminded that if the unfortunate situation arises where the impartial arbitrator is called upon to resume jurisdiction, his interpretation of the responsibility of the principal under Article VIII, Sections 2(c) and (d) will be delineated in the Discussion and Opinion section."

Ennis testifed that the District's non-compliance with this award consisted of the board's failure to take official action implementing the award. The REA introduced no evidence which would support a finding that the principal at North Park Elementary School failed to comply with the arbitrator's directive, nor did the REA introduce any evidence that it was necessary to invoke the retained jurisdiction of the arbitrator or that the District failed to comply with any subsequent rulings of the arbitrator.

Castagna testified that after the award was issued, he discussed the award in a meeting of elementary school principals. At that meeting he advised the principals that, although the arbitrator commended the principal at North Park for his past efforts of working with the staff in developing school schedules, he found a violation because the principal at North Park failed to "work with the staff" in the fall prior to developing the particular schedule in question. He therefore advised the elementary principals that they should be careful to go back to the staff and discuss any proposed school schedules each year with their staff.

(b) Discussion

It is clear that the claim that the District failed and refused to comply with this award "throughout the 1974-1975 school year" is overbroad. Since the award was not issued until March 5, 1975 it would not have been possible for the District to fail or refuse to comply with its terms "throughout the 1974-1975 school year."

The award is quite explicit in its requirements as to compliance. The principal was directed to take steps to work with his staff relative to a schedule which includes planning time which was to go into effect for the opening of the term for the 1975-1976 school year. The arbitrator retained jurisdiction for the purpose of ensuring compliance with the intent of his award consistent with his interpretation of the

principal's obligations as delineated in his rationale. There was no requirement that the board take any formal action. Although he was not required to do so, Castagna did take steps to ensure that other principals were aware of their obligations under the provisions in question.

Because of the absence of any evidence to support a finding that the District has failed and refused to comply with this award, it is unnecessary to decide whether the commission ought to assert its jurisdiction to enforce the terms of the award or whether it would be appropriate under the circumstances to defer to the retained jurisdiction of the arbitrator. For this same reason, it is unnecessary to determine whether the failure of the REA to allege a violation of §111.70(3)(a)5, Stats., is fatal to this charge.

(16) Rejection and Refusal to Consider Grievances

In paragraph fourteen of its complaint, the REA alleges that, since April, 1975 the "Administration and School Board" have "rejected and refused to consider grievances" filed by the REA.

(a) Background

Tentative agreement on the grievance procedure to be included in the 1974-1976 collective bargaining agreement, which read essentially the same as the grievance procedure which was contained in the 1972-1974 collective bargaining agreement, was reached on August 9, 1974.

Grievances are defined as claims which allege that one or more of the provisions of the agreement or established District policy have been incorrectly interpreted or applied (provided such claim is based upon an event or condition that affects wages, hours or working conditions). Grievances may be considered at four levels unless they are resolved at an earlier level. Grievances at Level One are considered by the grievant's principal or supervisor. If no satisfactory decision is rendered within ten school days after the teacher presents a grievance in writing at Level One, the teacher may, within five school days, file the grievance with the association's representative. Within five school days after receipt, the association's representative is to refer the grievance to the superintendent or his designee (Peterson) at Level Two. Peterson is to meet with the teacher and association representative within ten school days thereafter. If no satisfactory decision is rendered within fifteen school days after the first meeting with the teacher, the teacher may, within five school days, file the grievance with the association's designee. Within five school days after receipt, the association's designee may refer the grievance to the board or its designated subcommittee (Personnel Committee) at Level Three. The Personnel Committee is to meet with the teacher and association representatives within ten school days thereafter. If no satisfactory decision is rendered within ten school days of the first meeting with the Personnel Committee the teacher may, within five school days, request the association's designee to appeal the grievance to arbitration. If the association believes that the grievance has merit, it may appeal the grievance to arbitration at Level Four by notifying the board in writing of its intent to do so.

By practice under this procedure, the parties have allowed grievances to remain formally unanswered at Levels Two and Three and the REA has retained and exercised the right to appeal grievances to the next level of the procedure in any case where there is no formal decision or the decision ultimately received is considered unsatisfactory. This practice preceded the negotiations in 1974 which resulted in the tentative agreement reached on August 8, 1974, to continue the existing

grievance procedure unchanged. The REA made no proposal in its comprehensive proposal of May 28, 1974, or during the negotiations to change the procedure to modify or eliminate this practice.

Beginning on September 3, 1974, and continuing through April of 1975, a number of grievances (approximately twenty-four) were filed by teachers and association representatives. Some of these grievances alleged unilateral changes in working conditions rather than violations of an existing collective bargaining agreement or existing board policies. Others alleged violations of the agreement or the provisions of the MERA or both. A number of these grievances are "hours of work" grievances in the sense that they are directly related to the board's introduction of the fixed-variable schedule in the junior high schools and its adoption of the school schedule in the elementary schools (which were the subject of the agreement to maintain the status quo pending negotiations of the "hours of work"). For this reason, there was some discussion of these grievances during the negotiations on the "hours of work" discussed below.

On March 4, 1975 the board's Personnel Committee met to consider a number of these grievances. 86/ The Committee's report to the board on March 10, 1975 reflects that the grievances considered centered on the following topics:

"1. Johnson Elementary School

a. Exceeding the recommended class size

"2. Janes School

a. Length of work day
b. Length of teaching time
c. Length of lunch time
d. Removal of the librarian from the student-teacher ratio
e. Loss of teacher aide services
f. Loss of planning time

"3. Fratt School

a. The use of the instructional secretary for administrative tasks rather than instructional tasks

b. Extension of the school day for special education teachers forced to wait for the bus"

The Personnel Committee met again on March 7, 1975 to consider additional grievances. 87/ The report of that meeting reflects that the following grievances were discussed:

86/ A memo from Ennis dated February 19, 1975, reflects that there had been a delay in the Level Three meetings on some of these grievances due to his unavailability. Ennis was "locked up" in unrelated negotiations being held at the Clayton House in Racine for some time. The minutes of the Negotiating Committee's report of February 13, 1975 also reflect that Ennis had been unavailable for bargaining for this same reason for a number of weeks.

87/ A meeting for March 6, 1975 was cancelled to enable the REA and District negotiating committees to meet on the "hours of work" negotiations on that date.

"1. Gifford Jr. High School

a. Class sizes larger than those recommended in the labor agreement. It was also stated that reasonable efforts to alleviate alleged grievances were not described in detail in writing.

b. Student enrollments larger than can be accommodated by the available equipment in laboratory situations - industrial arts, science, etc.

c. Too large a number of exceptional education students mainstreamed in regular classes.

d. Unilateral change in schedule.

"2. Jerstad-Agerholdm Jr. High School

a. Lunch hour causes a division in a class period. It was also claimed that the response to the grievance in level one did not describe the steps taken to alleviate the alleged problem.
b. Inadequate laboratory classroom facilities.
c. Same as 1b above.
d. More teaching assignments per day than specified in the labor agreement for the junior high school level.
e. Reduction in instructional time for students in those classes assigned to the variable portion of the day.
f. Lunch time is at inappropriate times during the day.
g. Teachers required to serve in non-contracted responsibilities without additional compensation.

"3. Horlick High School

a. More teaching assignments per day than specified in the labor agreements for the senior high school day.

"4. Mitchell Jr. High School

a. Inadequate teaching facilities in terms of acoustical treatment.
b. Loss of 30-minute duty free lunch.
c. Teachers required to be in building 45 minutes before school begins, rather than 15 minutes before as called for in the labor agreement."

The report of the March 7, 1975 meeting indicates that the Personnel Committee was scheduled to meet again at later dates in March 1975 but neither the reports nor minutes of those meetings were introduced into evidence so it is not possible to determine whether the committee discussed grievances or other matters at those meetings. According to Ennis, at one of these meetings in March, and at later meetings of the board, the chairperson of the Personnel Committee, Lois Hammes, expressed her opinion that Ables, who had filed a number of the grievances in question, was taking up too much of the committee's time.

On April 14, 1975, the date of the board's regular meeting that month, Ennis gave the following letter to Berthelsen and the other members of the board:

"Attached are copies of seventeen (17) letters signed by W. Thatcher Peterson. Sixteen of them state:

'The Personnel Committee has asked me to express the following Level III responses to this grievance.'

"The seventeenth letter renders a decision but with no stated authority. A careful review of the Personnel Committee Minutes of both 11 and 25 March 1975 shows no such authority nor do they reflect any specific decisions. (see attachment)

"Your agenda for tonight's meeting calls for board action under Item 10, page 2, on the Personnel Committee Report. Further, the adopted grievance procedure calls for you to make a decision 'within 10 school-days after receiving the written grievance'. That time is well past, and the Association has not granted a written waiver of the timeliness at Level III. Therefore, it is your obligation, by contract, to make the Level III decisions on each and every grievance presented to the Board of Education. (To be very clear, you have the obligations to make twenty-four separate decisions.)

"The Board is well aware that it has been agreed that the grievance procedure is the 'sole' remedy available to the Association. We believe that each and every grievance deserves a full and public statement of all the facts on both sides and that you deserve to have before you the recommendation of the Personnel Committee on each and every grievance. We then deserve a roll-call vote on each and every grievance.

"To ask nine board members to make a decision based on no information is unfair and is an irresponsible act by nine-elected public officials especially when we were compelled at Level I, II and III to present such information. To not demand that you have complete, detailed information and to not act on 14 April 1975, is a further clear and distinct violation of a very fundamental right of the Association and a 'slap in the face' to every employee who trusts your word and bond when they entered the procedure.

"You, the Board, have clearly lost three arbitrations out of three hearings since 1 January 1975. This fact alone should indicate to any reasonable board or persons, the massiveness of judgmental errors on the part of your administrators and those charged with the responsibility to advise you and to carry out your policy. If your purpose has been to make the dollar cost of fairness heavy on the Association, that purpose has been well served, but this just further abuses the purpose and intent of the grievance procedure, and, without a doubt, is a further 'bad faith' gesture based on poor advice from your managers.

"Board members have had substantial support from the media of this community and especially from the Journal Times for their actions and judgments. Again, there has been distortion and bad information given to the Journal Times and, of course, the Journal Times has accepted this as fact. But even the Journal must realize (in this instance, and we believe in many others) the callous and blatant disregard for even the procedural rights of the Association and its individual members. As recently as 7 April 1975, Board Members Stanton and Berthelsen made some very aggressive and irresponsible statements when another part of the Contract that had been clearly violated was pointed out during the April 7 Committee of the Whole meeting. This was a very good show for the media but very detrimental to the working relationship between the Association and the Unified School District.

"Now, we present twenty-four (24) separate and distinct violations to the Board--not as a power play-- and not to act outside of the interests of the teachers--but rather against appeal to the Board to live up to their commitments to the contract and to ensure fair, equitable treatment to the Association and its members.

"THEREFORE, WE REQUEST THAT YOU DEMAND A FULL AND COMPLETE PRESENTATION BY THE PERSONNEL COMMITTEE OR ITS AGENTS AT THIS MEETING; that after this presentation, you carefully consider each and every grievance and act on them before the close of the meeting; and, on each and every grievance, make a decision by public roll-call vote of the entire board.

"And, further, if questions or statements of the Association are needed, we stand ready to respond. Please be further advised that the Association will speak for itself in all matters, and if reference is to our action or positions, we will demand to exercise our right of presentation."

The minutes of the April 14, 1975 board meeting were not introduced into evidence so there is no record of what action, if any, the board took with regard to Ennis' letter or any additional reports that may have been made by the Personnel Committee that evening. 88/

On April 23, 1975 Ennis sent Peterson a letter with regard to the grievances in question which read in relevant part as follows:

"Twenty-four grievances were presented at Level III by the Racine Education Association. You or Mrs. Hammes have failed to give us responses to eight of those grievances. We intend to arbitrate the issues in all of the grievances that are not settled.

"You have no reason to stall or delay our ability to apply for aribtration by withholding pieces of written material necessary before we can accept or determine to arbitrate. Procrastination of this type is unfair and unethical on your part. Please transmit the materials immediately."

According to Peterson it was difficult for the parties to meet at Level Three during this period of time due to the "hours of work" negotiations. Furthermore, as noted above, many of these grievances related directly to the "hours of work" negotiations and it was the District's position that those grievances which did so relate should be dropped as part of the "hours of work" negotiations. Although the Personnel Committee had considered all pending grievances, the REA had not yet received formal Level Three responses to all of the grievances when Ennis wrote the following letter to Nelson dated June 18, 1975:

"Per the adopted grievance procedure between the Association and the Board of Directors (Level IV, b), we are notifying the Board of the appeal to arbitration of the grievances that follow. You will note, in several instances, that these grievances have not been acted upon by the Board committees charged with that responsibility per the Agreement. We consider these actions as denials

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88/ The reports the Personnel Committee made to the board on March 10, 1975 at its regular meeting that month were simply "received." As noted above, the board's Personnel Committee was the designated subcommittee of the board to consider and to respond to grievances at Level Three.

of the grievances; therefore, we are provided with the right to exercise our rights to arbitration.

"The Racine Education Association has deemed the following grievances as meritorious and are appealing for arbitration:

Class size	- Linda Robers, Johnson School
Work day	- Robert Ables, Janes School
Teaching time	- Robert Ables, Janes School
Lunch time	- Robert Ables, Janes School
Loss of Teacher aide service	- Robert Ables, Janes School
Planning time	- Robert Ables, Janes School
Use of instructional secretary	- Pat Heberling, Fratt School
Extension of school day	- Marlene Bohlman, Fratt School Bruce Eldridge, Fratt School
Class size	- John Spaeth, Gifford Jr. High
Excessive station load	- Sharon Thompson, Gifford Jr. High
Number of Special Ed students	- Elmon Leggett, Gifford Jr. High
Lunch hour	- Carolyn Gedemer, Jerstad Jr. High
Facilities	- JoAnne Kronberg, Jerstad Jr. High
Student load in lab classes	- Thomas Kaiser, Jerstad Jr. High
Variable teacher load	- Thomas Kaiser, Jerstad Jr. High
Extra class	- Dennis Tesolowski, Horlick High
Non-contract duties	- Edward Hill, Jerstad Jr. High
Cost of living	- Class Action
Re-assignment	- Sue Johnston, Gilmore Jr. High
Properly equip facilities	- Diane Katt, Mitchell Jr. High
Track assistances	- Robert Ware, Mitchell Jr. High
Removal of Librarian from ratio	- Robert Ables, Janes School
Loss of 30-minute lunch	- Julia Nelson, Mitchell Jr. High
Jr. High reporting time	- Norah Barrett, Mitchell Jr. High
Jr. High preparation periods	- Carl Lassiter, Gifford Jr. High

"It should be further noted that those grievances, at the present time, have been forwarded to arbitration. It is not a complete listing of those that we may wish to consider for arbitration. We will notify the Board of Education in writing of further requests for arbitration."

Thereafter, arrangements were made for the selection of arbitrators to hear the grievances in question and, at the time of the close of the hearing, the parties were proceeding to arbitration on these grievances. The record does not establish whether any of these grievances were thereafter settled or dropped or whether they resulted in arbitration awards being issued.

As of September 1975, the Personnel Committee had established a practice of scheduling a meeting on the third Monday each month for the purpose of considering any grievances pending at Level Three.

(b) Discussion

This charge relates to the actions of the "administration and School Board" in dealing with grievances since April 1975. The evidence discloses that there were a large number of grievances (approximately twenty-four) that had been processed to Level Three as of April 1975. Most, if not all of those grievances, were in fact considered by the board's Personnel Committee at meetings in March 1975. The Personnel Committee was the designated sub-committee of the board for the purpose of considering grievances at Level Three. In his letter dated April 14, 1975, Ennis complained that Peterson had drafted the committee's Level Three responses to seventeen of these grievances. However, this practice is clearly consistent with the

practices of the Personnel Committee as described by Peterson. The statements of the Personnel Committee's chairperson to the effect that Ables, who was President of the REA and had filed six of the twenty-four grievances considered in March, was taking up too much of the committee's time, standing alone, does not prove the committee was acting in bad faith in considering the grievances.

In his letter to the board on April 14, 1975, Ennis took the position that the board was obligated to "make a decision" on each of the twenty-four grievances which had been pending at Level Three for ten or more days. Furthermore, it was the REA's position, as stated by Ennis, that the board should hear a "full and public statement of all of the facts on both sides" along with recommendations from its Personnel Committee and then conduct a roll call vote on each and every grievance. As noted above, the evidence does not disclose what action, if any, the board took with regard to this letter. However, it is clear that the board had no obligation to consider the grievances since it had delegated that responsibility to its Personnel Committee pursuant to Level Three, paragraph b of the grievance procedure. 89/

Assuming that the board refused the request contained in Ennis' letter, there would appear to be no basis for finding a violation on its part. This is so because any claim by the REA that the board violated its obligations to bargain in good faith with regard to pending grievances by refusing to consider them is premised on a misconstruction of the collective bargaining agreement and clearly without merit.

Thereafter, on April 23, 1975, Ennis demanded formal responses to eight of the twenty-four grievances he contended were then at Level Three and had not yet been responded to. Apparently, the REA still had not received Level Three responses to all Level Three grievances when the REA appealed twenty-five grievances to arbitration. 90/

The question remains of whether this failure to issue formal written responses to some grievances at Level Three constituted a bad faith rejection and refusal to consider grievances on the part of the "administration and School Board" as alleged. It is the REA's position that the failure of the District's agents to respond to grievances with an analysis of why the grievance was being denied, forces the REA into a position where it must arbitrate grievances and constitutes a bad faith effort to undermine the grievance procedure. It is the District's position that under the agreed-to procedure, it is not required to give formal answers with analysis as demanded by Ennis and that the District is free to simply deny grievances or let the REA move a grievance to the next step. The District points out that this has

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89/ "Level Three

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b. Within five (5) School days after receiving the written grievance, the Association may refer it to the Board or a designated sub-committee of Board members (Hereinafter) in this article where the title Board appears, sub-committee may be substituted therefor) if the Association determines that the grievance is meritorious."

90/ All but three of these twenty-five grievances were referred to in the Personnel Committee's reports to the board at its March 10, 1975 meeting. Two of the twenty-four grievances referred to in those reports, were not appealed to arbitration at that time.

been the practice under the procedure and argues that, in view of the large number of grievances and the "political" nature of some, it should be free to simply deny grievances. To a large extent the resolution of this issue turns on the proper interpretation and application of the provisions of the grievance procedure.

While it is possible to construe the provisions contained in Level Three, paragraph a, and Level Four, paragraph a, as requiring that a formal "decision" be rendered within fifteen days after Peterson meets with the teacher or within ten days after the Personnel Committee meets with the teacher, such a construction is not compelling. The provisions both state that the grievance "may" be taken to the next step "if no unsatisfactory decision has been rendered" within the time provided. It is not at all uncommon for parties to a collective bargaining agreement to allow grievances to accumulate at the upper levels of the procedure rather than force grievances into the next step of the procedure which ultimately results in arbitration. This is the construction the parties have placed on the provisions here by their practices thereunder. Furthermore, the District would appear to be correct that the agreement does not require that "decisions" contain any rationale.

If Peterson and the Personnel Committee were to issue "decisions" within the time limits provided in every case, the REA would be forced to either arbitrate a grievance or drop it within the time provided. By allowing some grievances to remain at Levels Two and Three without forcing the REA to make such a choice, the District is arguably reducing rather than increasing the cost of the procedure. 91/

Finally, there is no evidence that would support a finding that the District exercised its rights under the negotiated procedure in a way that was intended to undermine the grievance procedure as contended by Ennis. Some of the "hours of work" grievances involved interpretations of the agreement which arguably conflicted with the REA's agreement to maintain the status quo pending negotiations of the "hours of work" issues. Many alleged violations of the MERA and were arguably not grievable under the agreement to that extent. A few did not reference any provision of the agreement which had been violated. Under these circumstances, and in the absence of any evidence as to which grievances were not responded to or why, it cannot be said that the REA has proven, by a clear and satisfactory preponderance of the evidence, that the board's contactually sanctioned failure to issue formal responses to some grievances constituted bad faith administration of the agreement.

(17) Refusal to Bargain in Good Faith Concerning Unresolved Issues in 1974 Negotiations

In paragraph eighteen of the complaint, which is dated May 13, 1975, the REA alleges that in October 1974, the REA and District entered into an interim agreement to end a work stoppage on the basis of certain agreements including the agreement to negotiate in good faith concerning unresolved issues, 92/ and that at all times since

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91/ This fact is no doubt responsible for the prevalence of such practice under negotiated grievance procedures, even where the language of the procedure would appear to require action.

92/ The original wording of this charge contains a grammatical error, however, the intent of the charge would appear to be as stated herein.

October 1974, the District has failed and refused to negotiate in good faith concerning such issues. A subsequent amendment to the complaint alleges that the District unilaterally adopted a collective bargaining agreement dealing with these issues on June 4, 1974, in the absence of an agreement or impasse. It is undisputed that no agreement was reached on all issues open for further negotiations; however, the District contends there was an impasse before it acted on June 4, 1975. Consequently, the discussion of this charge is limited to the conduct of the District's agents prior to the alleged impasse and action of June 4, 1975.

(a) Background

During the negotiations held in September 1974 at the Sienna Center in Racine, the parties reached tentative agreement on the terms of a collective bargaining agreement for the 1974-1975 and 1975-1976 school years. Such agreement was reached on the afternoon of Sunday, September 22, 1974. Thereafter, when the parties attempted to put some of the terms of said agreement into writing, it became clear that there was a misunderstanding, or lack of agreement on a number of issues. After further negotiations most of these disputes were resolved on September 24, 1974. However, as noted above, the parties did not attempt to resolve the issues presented by the lack of agreement on the school calendars for 1974-1975 and 1975-1976. With regard to that problem, the REA advised its membership that the calendar for 1974-1975 would contain "186 days" (actually 185.5) and the superintendent advised the board that he would engage in further negotiations on the calendars to be included in the agreement. The membership of the REA and the board ratified the agreement reached and its terms were thereafter implemented.

The terms of the September 24, 1974 agreement can be summarized as follows:

1. The work stoppage which began in September 1974, when the District closed the schools because of the REA's partial strike activities, would cease and the schools would be reopened using the status quo established when schools were initially opened in September, 1974 as the basis for the reopening. The board agreed not to recriminate or retaliate against any teacher for their participation in the partial strike activities on August 29 and 30 and September 3 and 4, 1974, and the REA agreed that its members would not recriminate or retaliate against the board, its members, other employes or their respective children.

2. The REA agreed to withdraw all legal proceedings then pending before Examiner Greco. (Cases XXIV and XXVII, discussed above), and have them dismissed with prejudice and to withdraw two grievances arising out of the dispute over the opening dates for school. The District agreed to dismiss its appeal of the commission's order in Case XVIII with prejudice.

3. The provisions of the 1972-1974 agreement were to form the basis for the new agreement for the 1974-1975 and 1975-1976 school years subject to certain agreed-to modifications and subject to further modification as required by the agreement that the parties would continue to negotiate concerning certain issues.

4. The parties agreed in writing 93/ to establish a study committee to study the "hours of work" problems that arose primarily as a result of the changes in the school day in the elementary schools and the introduction of the fixed-variable schedule in the junior high schools and to bargain the result. It was understood that this would result in some addition to or modification of the language contained in the 1972-1974 agreement, primarily in Article VIII, but there was no agreement as to which sections were affected.

5. The parties verbally agreed to continue to bargain with regard to wages, hours and working conditions for school psychologists and changes in the compensation for coaches and teachers of drivers education.

1. Bargaining on School Calendar Issues

There was no explicit verbal or written agreement that the parties would continue to bargain about issues remaining with regard to the school calendars for 1974-1975 and 1975-1976. However, the evidence discloses that both parties were aware of the lack of agreement on the calendars prior to the respective ratification votes and that they recognized that there was a duty to bargain and did in fact bargain about the remaining calendar issues thereafter.

As noted above under the discussion of the charge that the board adopted a policy of mandating in-service training, Nelson and Ennis attempted to agree that the day before Thanksgiving would be a full day of classes, which agreement was rejected by the REA's Executive Committee. In addition, Nelson and Ennis did reach agreement with regard to the number of days in the 1974-1975 calendar and their use. 94/ Thereafter, the District, in effect, followed the arrangement of days contained in the 1974-1975 calendar which had been proposed by Thayer and Brings at the Sienna Center. Ennis and Nelson were not able to agree to include a day in the 1974-1975 calendar for the in-service program previously identified as Institute Day, but did agree that there would be in-service training in the elementary schools with regard to the desegregation program. Finally, with regard to the 1975-1976 calendar, the REA did offer to accept the board's proposal to add a third in-service day in place of Institute Day at the beginning of the 1975-1976 school calendar in exchange for a concession from the

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93/ "The parties shall each appoint three representatives to study the hours of work for teachers in all schools and all problems related thereto. The report of this committee shall be made to the REA and the Board no later than 30 November, 1974. Following the completion of the report, the parties agree to bargain the result."

94/ That understanding was reflected in a memo to the REA membership from Ennis dated October 31, 1974 which read as follows:

"RE: THE FINAL CALENDAR CLARIFICATION

"In view of the apparent confusion surrounding this year's WEA convention days, we feel we must clarify the intent of the negotiations team with respect to these days. At the ratification meeting we stated that this year's calendar contained 186 days----180 contract days, 2 records days, 2 in-service days prior to the opening of school, and 2 convention days. We also mentioned that you have complete freedom of choice regarding

District on other issues in the negotiations, but no agreement was ever reached in that regard. There were no issues with regard to the calendar remaining other than the inclusion of the third in-service day at the beginning of the 1975-1976 school year at the time that the board implemented its final offer in June 1975.

2. Bargaining on School Psychologists and Compensation Issues

In late October the parties bargained with regard to wages, hours and conditions of employment for school psychologists and the compensation for coaches and teachers of drivers education. On October 30, 1974, the REA made a comprehensive proposal with regard to school psychologists. Although this proposal contained numerous items, one of its major features was the REA's demand that a salary schedule be created for school psychologists. The parties met for the purposes of discussing these issues on various dates in November 1974, and when negotiations resumed later in the Winter and Spring of 1975. Agreement on compensation for teachers of drivers education for the Summer of 1974 was reached on April 9, 1975. Agreement on the terms of employment for school psychologists and the 1975 compensation ratio for teachers of drivers education was ultimately reached on May 20, 1975. Final agreement was never reached on the compensation for coaches.

On the question of the appropriate compensation for coaches, the parties agreed to establish an informal committee to conduct a survey of coaching duties with a view to establishing a "pecking order." In establishing a pecking order, the survey committee attempted to rate the relative difficulty of the various coaching positions in accordance with a number of variables such as length of season, number of contests, number of students, risk of injury and public pressure. The District ultimately made a proposal which was based on this pecking order which was tentatively agreed to by the REA's negotiating team in December. However, on December 9, 1974, Ennis advised the District that the coaches had rejected this agreement and indicated that they would accept the proposal if it were made subject to the cost-of-living provision contained in the agreement, a concept which had not been previously discussed. The District indicated it would not agree to the cost-of-living proposal and this issue lay dormant until the negotiations resumed in 1975.

94/ (Continued)

the use of the convention days. What we meant by this is that no one can plan that time for you nor can anyone require that you attend any particular function during those two days. Each teacher is expected to make his/her own professional decision as to how those days can best be spent. It is also our understanding that no one will have to provide proof of attendance at any particular function during those two days. We must emphasize, however, that the convention days <u>are</u> calendar days, and it is our hope that these days will be used to benefit each and every teacher in the district."

"EXECUTIVE DIRECTOR'S NOTE:

"The above statement has been cleared and concurred to as a joint understanding by the Superintendent of Schools and the REA. If your building administrator continues to distort or misrepresent the calendar negotiation, suggest he/she call Central Office."

On April 9, 1975, the REA made a proposal with regard to coaches which included a number of new items of a non-monetary nature, including: (1) the issuance of coaching contracts; (2) the posting of vacant coaching positions; and (3) a provision that coaches could only be removed with due process and just cause. Thereafter, probably on May 20, 1975, the District made a proposal based on the pecking order previously established by the survey committee which increased the proposed compensation for three or four positions. This proposal, as modified slightly in writing during its presentation, was the proposal ultimately adopted by the board in June 1975. It did change the pecking order relationship between the head football coaches at the junior and senior high schools, because, according to Peterson, the pecking order established by the survey committee resulted in the head football coaches at the junior high schools receiving more compensation per week than the head football coaches at the senior high schools.

3. Study Committee on the Hours of Work

The hours of work negotiations, likewise, did not result in final agreement being reached before the board took action to adopt its proposals in June 1975. According to the record, the first discussion of issues related to hours of work occurred in late November. In order to avert a partial strike scheduled by the REA to take place on December 2, 1974, the parties agreed to meet during the Thanksgiving recess to discuss certain disputes which had arisen in the assignment of lunchroom duties to teachers in the various schools. This problem related primarily to the assignment of certain work to teachers which the REA contended should be performed by A.R.A. Services, Inc., an outside contractor providing food service in some of the District's schools. However, it was also arguably related to the hours of work negotiations because the District had re-established a lunch program in the junior high schools when it abandoned the double shift and established the fixed-variable schedule.

On Friday, November 29, 1974, Nelson, Peterson, Castagna and Fritchen met with Ennis, Schwartz, Ables and Thayer to discuss these problems and tentative agreement was reached wherein the District agreed to take certain actions to avert the scheduled strike. As part of that agreement a separate committee was established "to review all present and past issues relating to the lunch program" and "develop problem-solving approaches." The record does not disclose what further problems, if any, arose with regard to the assignment of lunchroom duties. In the subsequent negotiations on the hours of work held in the Spring of 1975, the parties did discuss problems associated with the scheduling of a thirty-minute duty-free lunch period within the school day.

On December 2, 1974 the hours of work study committee, established by the September 24, 1974 agreement, met for the first time. Members of that committee representing the District were Peterson, Coles and Fergeson. Members of the study committee representing the REA were Ennis, Ables and Thayer. During this initial meeting the members discussed, inter alia, questions regarding the scheduling of one hundred minutes of planning time in the elementary schools, early dismissal or late start for elementary schools, the new junior high starting times, the District's proposed forty-hour work week, the fixed-variable schedule in the junior high schools, the standardized elementary day, the elementary and junior high student-teacher staffing ratio, the splitting of classes for lunch in the junior highs, comparison of starting and ending times in the 1973-1974 and 1974-1975 school years, the time schedule in the junior high schools and a pilot program for night school.

The committee met again in December, the last meeting being held on December 19, 1974. On that date the REA was supplied with a number of documents pursuant to its request. 95/ As noted above under the discussion of the charges involving the adoption of the junior high work day policy and the policy on the elementary hours, REA representatives had previously seen a number of these documents and the REA was aware of the effect the board's actions had on the hours of work at the start of the 1974-1975 school year. Upon reviewing these documents, the REA claimed "surprise" at learning of the contents of some. 96/ The REA then took the position that the agreement to maintain the status quo pending the negotiation of the hours of work issues referred to the status quo at the end of the 1973-1974 school year, except as to the starting and ending times. When questioned by Peterson, Ennis admitted that this interpretation of status quo meant that the District should have returned to the double shift arrangement in the junior highs and abandoned the fixed-variable schedule when the schools reopened. At the hearing Ennis also admitted that it was "very, very possible" that "some teachers were aware" of the changes in the elementary schools.

For the reasons set out above under the discussion of those actions and on the record as a whole, the undersigned concludes that the REA's claim of surprise at learning of the effect of the District's actions with regard to the elementary hours and fixed-variable schedule and its allegation that there was a misunderstanding of the meaning of the agreement on status quo was a bargaining tactic designed to terminate the work of the study committee rather than a genuine expression of surprise or misunderstanding.

On and after December 19, 1974, the REA did not participate further in the study committee and no committee report ever was issued. The REA representatives thereafter reported to the REA's representative assembly that there was a misunderstanding as to the intent of the agreement to maintain the status quo and that the study committee process had "broken down" when the REA representatives discovered that the changes which took effect in September 1974 would form the basis of the District's bargaining proposals. According to Ennis, he also advised the representative assembly that since the draft collective bargaining agreement had not yet been prepared it was his recommendation that the REA enter into the "bargaining phase" with regard to the hours of work.

4. Preparation of Initial Draft of Agreement and Identification of New Issues in Dispute

On December 23, 1974, Peterson hand-delivered a draft copy of the 1974-1976 collective bargaining agreement to Ennis. The proposed draft was transmitted by a hand-written memo which identified nineteen areas where the provisions of the 1972-1974 agreement had been changed pursuant to the agreements which Peterson believed had been reached during the negotiations or where the provisions of the 1972-1974 agreement were still subject to further negotiations. Shortly there-

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95/ At the hearing these documents were introduced in the form of a packet of papers identified as REA's Exhibit No. 6. However, the testimony indicates that some of the papers in REA's Exhibit No. 6 may not have been in the packet delivered on that date.

96/ Ennis testified at length with regard to this claim of surprise. See generally Transcript, Vol. 9 at pp. 45-68. However see also his testimony at Vol. 11, pp. 71-72, 77 and 95-96.

after, Ennis identified five minor changes in provisions which were disputed by the REA. Specifically Ennis indicated that the REA had not agreed to: (1) change Article VIII, Section 6a, 2, to state that monthly subject area meetings could be called by "directors of instruction" as opposed to "consultants." 97/ (2) delete reference to the position of high school activities director from the extra-duty compensation schedule; (3) delete the language in Article XXI, Section 8 dealing with the use of time and facilities in junior high schools on double shifts; (4) delete the language in Article XXI, Section 12 dealing with non-recriminaton pledges for the strike which occurred in the 1972 negotiations; and (5) change the expiration date from August 25 to August 19. The memo and draft reflected that there was no "tentative agreement" on the following provisions of the 1974-1976 agreement which were subject to further negotiations: (1) Article VIII, Section 2 a, c and d; (2) school calendars for 1974-1975 and 1975-1976; and (3) the extra compensation schedule for coaches.

According to Peterson, the District had been advised by Judge Gordon Myse, who was functioning as a mediator during the negotiations at the Sienna Center, that the REA had agreed to the five minor changes to which the REA objected in the December 23, 1974 draft. It was Ennis' position at that time that no such agreement had been reached.

5. Resumption of Negotiations on Hours of Work and Other Unresolved Issues

Between December 19, 1974 and January 8, 1975, the negotiations on issues reserved for further negotiations were dormant. On that date Ennis wrote the board a letter wherein he complained about the time that had elapsed between the September 24, 1974 settlement and the resolution of the remaining issues in negotiations, particularly the salary issues for psychologists and the compensation for coaches and teachers of drivers education. The letter requested that the board members get directly involved in the negotiating process. The minutes of the board's meeting on January 10, 1975 indicate that the letter was instead referred to the board's Negotiating Committee. The record does not reflect what immediate action the Negotiating Committee took, if any, after receiving the letter in question. However, the record does establish that Ennis was unavailable for several weeks during this period of time because he was participating in negotiations between another union and the City of Racine and, for a period of time, had been "locked up" or enjoined from leaving those negotiations by a court order. The report of the Negotiating Committee meeting held on February 13, 1975 reflects the following action was taken:

> "Your Committee directed the Coordinator of Employee Services to express its thanks to the Racine Education Association for stating its concerns about the number of unsettled contract items, and express the further hope that now that Mr. Ennis is back in circulation after his participation on Local 67's bargaining team over these past several weeks, that thise [sic] issues can be resolved before too long."

In the meantime Peterson had made a new proposal on January 20, 1975 with regard to the school psychologists and the parties met to

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97/ Directors of Instruction formerly occupying positions as consultants were no longer deemed to be members of the bargaining unit as a result of the agreement to dismiss the complaint in Case XXIV which complained about their removal from the bargaining unit. This dispute was therefore over the question of whether Directors of Instruction should be among those administrators who could call for such meetings.

discuss that proposal on January 22, 1975. At the meeting on January 22, 1975, the REA made a counter-proposal. On January 23, 1975 the District made a new proposal with regard to psychologists.

On February 7, 1975 Peterson sent Ennis a lengthy letter wherein he reviewed the status of the hours of work study committee and set out the problems that had been identified by the study committee and needed to be resolved from the District's point of view. On February 20, 1975, the REA and District representatives met with Mediator Herman Torosian for the purpose of discussing said issues. This was the first such meeting since December 19, 1974. On the following day, Peterson wrote Ennis a letter wherein he complained that the REA had not yet identified the problems it believed needed to be dealt with in the hours of work negotiations; noted that the REA had requested copies of board policies dealing with elementary and junior high schedules which, in Peterson's opinion, it already had; indicated that copies of said policies would be sent; asked that the REA prepare a list of the problems that it saw as being related to the hours of work negotiations and that the REA agree to meet again for the purpose of discussing those problems; and indicated the District's willingness to bargain about those aspects of board policy relating to the hours of work issues which were subject to the duty to bargain.

On February 25, 1975 Ennis responded to Peterson's letter of February 21, 1975 with a letter that read as follows:

> "I have received your reply of 21 February 1975. I compliment you for the first (very small) movement in the last eleven months which indicate some intent to arrive at settlement.
>
> "As you are well aware, we have started to implement the very expensive and time-consuming process of legally clarifying and resolving our differences. 98/ At this point in time, we will not change our direction in regard to the legal way, but if you do really desire to 'continue those negotiations', I am ready and willing to explore methods of returning to the table. Please be aware that I will never again recommend to the REA of the dropping of legal steps until, or unless, there is a major change in the historic relationship.
>
> "In conclusion let me restate, if you want to get this job done, we are still ready to get it done--but, we expect movement as it relates to the process of collective bargaining."

On February 26, 1975 Peterson responded to Ennis' letter of February 25 as follows:

> "I appreciate the slight compliment you paid in your letter of 25 February 1975 indicating we had made a 'very small' movement which showed some intent to reach a settlement on the items left open from our contract negotiations. I regret I cannot at this time return it.
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> "As we see it, the Association habitually frustrates the process of settlement. It is almost as if the Association feels it

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98/ The record does not establish whether in fact Peterson was so aware. As noted above, the letter initiating the REA's effort to enforce the commission's order in Case XVIII was not sent to the commission until February 25, 1975. A copy was sent to the District by the commission on March 3, 1975.

must create an atmosphere of fear, frustration, and mistrust in order for it to function. We get the feeling that the positions the Association takes at our meetings are defined strictly for their propaganda value--that the Association uses the Impossible Demand technique: knowing the School District cannot accept them, the Association makes impossible demands; then, through its internal propaganda machine, it attacks the District for holding up the settlement.

"From our point of view, our meeting last Thursday is a perfect example of this. Before the meeting, we had defined for the REA the problems we saw with respect to the hours of work issue. We had asked the Association to do the same, without success. At the beginning of the meeting last Thursday, we again asked for a statement of the problem so that we would know the scope of bargaining. The Association refused to do this until the end of the day, when you, verbally, recited some problems and issues.

"Then the Association took the position that it could not define problems with respect to hours of work until it had School Board policies covering elementary and junior high school schedules. That struck us as a red herring, since earlier in the day we had looked at the very policy statements you said you needed. As I recall, we had given them to you a couple of months ago. But, I sent over another copy with my letter of 21 February.

"Instead of getting a definite statement of the issues the Association believes need bargaining, we got a threat: if the parties did not meet the next day, Friday, the Association would enter into extensive litigation, alleging a refusal to bargain. Our response was that, instead of Friday, we were willing to meet the next Monday in order to have a meaningful session. The answer was that that was not good enough, it had to be Friday or else! How are we to interpret this? What good reason demanded another meeting on Friday instead of Monday? We heard none. Indeed, we didn't hear any reasons at all.

"We measure an intention to reach a settlement by behavior that points in that direction. From that point of view, one indication of such an intention is the willingness of the Association to commit to a statement of the issues. We have not seen that. Our position, then, is this:

1. As a result of the collective bargaining last Fall, the parties agreed to jointly study the issue of hours of work and problems related thereto and to collectively bargain the result.

2. The School District intends to live up to its end of the bargain and collectively bargain with respect to that issue.

3. We believe the Association at this point is not serious about resolving issues related to hours of work.

4. I will ask Mr. Herman Torosian, the mediator, to arrange a meeting so we can get on with completing the contract negotiations.

"In conclusion, we are interested in finishing up the negotiations. We are in the process of preparing collective bargaining positions, although it is difficult to do when we remain uncertain about the scope of the bargaining and the potential issues."

On March 3, 1975 Peterson sent Ennis two copies of another draft of the 1974-1976 agreement. In his cover letter Peterson indicated his belief that it represented the agreement reached with the exception of those provisions which were subject to further negotiations. This draft agreement was nearly identical to the December 23, 1974 draft agreement 99/ and included the five minor changes that Ennis had identified as not having been agreed to at the Sienna Center. Peterson indicated that if Ennis had any questions with regard to the draft he should let Peterson know. On March 4, 1975 Ennis responded by letter indicating that a negotiating meeting had been scheduled for March 6, 1975 and that if Peterson wanted to raise the question of signing the agreement at that meeting such a request would "be appropriate." Ennis did not mention the five disputed items in his letter.

On March 6, 1975 the parties met for the purpose of negotiating with regard to the hours of work in the presence of Torosian. At the outset of that meeting the District made a proposal with regard to resolving the hours of work issues. Specifically, it proposed to delete Section 2a, c, and d and the second sentence of Section 3a, of Article VIII and substitute the following language for Section 2a:

"2.a. Unless a different regular teaching day for teachers in any of the schools is established by the Board through a change in policy, the regular teaching day for teachers shall commence at 8:00 a.m. and end at 4:30 p.m. Within such period of time:

1. Elementary school teachers shall have at least 100 minutes of team or unit planning time, at a time determined by the principal working with the team or unit.

2. Secondary teachers will teach a maximum of five class periods a day.

3. Teachers shall perform other assignments made by their principal or other supervisor."

Later during the meeting the REA made a proposal with regard to the hours of work negotiations which read as follows:

"R.E.A. PROPOSED SETTLEMENT OF THE ELEMENTARY SCHOOL WORK ISSUE

"The District shall establish the following conditions as they relate to hours of work for the MBUs working at grades K-6 level.

1. The minimum number of instructional minutes per week shall be 1500 contract minutes.

2. The maximum number of instructional minutes per week shall not exceed 1625 contact minutes.

3. The determination of the number of instructional minutes within the range of 1500 to 1625 shall be as provided in the Contract language, Article VIII, Section 2c, d, or a, through addendum bargaining as established by the Case High Addendum.

99/ The draft contained circles around language in Article VIII that was subject to further negotiations. Although a circle appeared around Article VIII, Section 3a, it was not identified as a provision on which there was no "tentative agreement."

4. In all cases, contact times shall be consistent for all teachers in the school at levels K, 1 thru [sic] 3, 4 thru [sic] 6.

5. When the number of instructional minutes exceed 1625 minutes for students each MBU shall be provided individual planning and preparation time during the instructional day equal to the number of minutes in excess of 1625 minutes but not to exceed 1725 minutes.

Any variance by any elementary building and/or unit of that building from these contract conditions shall have the expressed written approval of the Racine Education Association through its executive director and the Unified School District through its superintendent of schools.

"REA PROPOSED SETTLEMENT OF JUNIOR HIGH SCHOOL WORK DAY

The District shall establish the following conditions as they relate to hours of work for the MBUs working at grades 7, 8, 9 (junior high).

1. The minimum number of instructional minutes per week shall be 1125 contact minutes (5 x 45 minute periods).

2. The maximum number of instructional minutes per week shall not exceed 1375 contact minutes (5 x 55 minute periods).

3. Each and every MBU at the junior-high level shall have an individual preparation period equal to the length of a regular period each day of the school week.

4. Lunch periods for MBUs shall be established so that no instructional block is interrupted by the teacher's lunch-period.

5. Standards 1 through 5 are understood by the parties to mean the traditional school day divided in six equal instructional blocks.

6. The determination of the number of instructional minutes within the range of 45 minutes to 55 minutes shall be established for the individual school for the 1975-76 school year by the principal working with the staff to determine the period lengths between 45 and 55 minutes.

In the event that individual school staff and administrators may desire to vary from these established schedules, and teaching arrangements may be established so long as they are jointly developed and consumated [sic] in the same manner as the Case High Addendum, and that prior to implementation, they have the written approval of the Racine Education Association through its executive director and the district through its superintendent of schools.

"NOTE: Because this proposal is only for the 1975-76 school year, and because of the consistant [sic] denial by the District to enter negotiations of this issue as early as February 1974, and, further, since the length of time since the onset of the 1974-75 school year, the following conditions shall prevail in action for the 1974-75 school year.

1. Each and every MBU at the junior high level shall be compensated for the 8 minutes of duty-free lunch denied them by the unilateral action of the District and its Board per the following formula:

180 days x 8 minutes x 11 cents per minute=$ 79.20 semester
$158.40 year

Payment for the first semester shall be made to all junior high MBUs within ten days of this agreement and payment for the second semester shall be made on the last work day of the 1974-75 school year.

2. The superintendent of schools shall immediately issue to all junior high administrators and MBUs the following statement under his signature:

> All junior high teachers are expected to be in their respective rooms or assigned places at least fifteen minutes before the time for the tardy signal. Teachers are expected to be present and performing their teaching duties during the times that pupils are required to be there according to the hours of school as presently established by the Board. Teachers shall be available for a period of at least fifteen minutes after regular.....

3. A thorough and rapid review of teacher load will be undertaken and completed within 15 days of this agreement. In all cases, within 30 days of this agreement, steps will be completed to return these loads to the 1973-74 individual teacher level.

In those cases where the load reduction is called for, the Association reserves the right to choose the method of reduction, i.e., teaching aides, additional classroom teacher, compensation for selected teachers with an overload. The Association shall determine and notify the District in no more than five work days or no later than the 20th day."

During the meeting on March 6, 1975 and later on the following day, Peterson analyzed the REA's proposal and identified a number of objections from the District's point of view. The parties met again on March 11, 1975 and discussed the District's objections to the REA's proposal. During said meeting the REA outlined a new proposal on the blackboard which was later reduced to writing by Peterson. That proposal would have eliminated Section 2a, c, and d, the last two sentences of Section 3a, Section 4 (dealing with meetings outside the regular school day) and Section 6a and b (dealing with the scheduling of meetings). The following language would have been substituted for the deleted language:

"2(a) The daily teaching load for all teachers shall be a maximum of five hours twenty minutes of student-contact time. Contact time is defined herein as any time a teacher is assigned to direct the learning or supervise the behavior of students.

"(b) During the school day there may be one break of up to one full hour or two breaks, neither to exceed more than thirty minutes. These breaks shall be considered non-duty time.

"(c) All MBU's shall receive thirty min. duty-free lunch.

"(d) Teachers may be required to attend no more than one meeting per month, contiguous with the termination of the student day, called by administrative staff. This meeting shall be no more than two hours in duration."

The parties met again on March 18, 1975 for the purpose of discussing the issues in the hours of work negotiations. On March 25, 1975 Peterson wrote Ennis offering to meet again on March 27, 1975 to negotiate with regard to the hours of work issues. Peterson expressed the opinion that the District had a much better idea of the REA's concerns with regard to the hours of work negotiations as a result of the meeting on March 18, 1975, and stated that in his opinion the negotiations could be completed at the next meeting. On the following day, Ennis wrote Peterson wherein he indicated that the REA's position was that the REA would only meet when the mediator was present and when the District lived up to its "commitment" to give the REA proposals prior to scheduled meetings. According to Ennis the District had promised to give the REA a proposal on March 20, 1975 and had failed to do so.

There were apparently no meetings between March 18, 1975 and April 9, 1975. On that date the District made two proposals on the hours of work. Pursuant to the REA's request that the District draft language outlining its forty-hour week proposal for the REA to take to its membership, Peterson drafted a proposal setting out the specific language that the District would be willing to include in the collective bargaining agreement to implement its "40-hour week" concept. It read in relevant part as follows:

> "Teachers are expected to be in their respective rooms or assigned places for a period of at least eight hours each day, excluding teacher's lunch period, at a time to be determined by the teacher's principal or other supervisor; in addition, teachers also will spend time outside of the above period in order to prepare for class, complete reports, meet with students and/or parents, attend open house, PTA meetings, ceremonies, extra-curricular activities, committee or other meetings, deal with emergency situations, and so forth."

In addition, the District later made an "alternative" proposal with regard to hours of work, making certain modifications in existing language.

After discussing the District's initial forty-hour week proposal, the parties discussed compensation for teachers of drivers education and coaches and a salary schedule for school psychologists. After exchanging a number of proposals on pay for teachers of drivers education, the REA made a new proposal with regard to coaches' pay which included a number of new items, discussed above, and noted that it was insisting that any settlement for the psychologists include a salary schedule. No agreement was reached on drivers education, coaches pay or the salary schedule for psychologists at this meeting.

Between April 9, 1975 and May 8, 1975 no formal negotiations meetings took place. However, during this period Peterson and Ennis entered into informal discussions of the remaining issues in an effort to see if there was any middle ground that might be acceptable to their respective bargaining teams. On May 8, 1975 Peterson called Ennis and described certain concessions the District might be willing to make in order to settle all remaining issues. It covered the

issues remaining with regard to drivers education and coaches' pay, a salary schedule for school psychologists, language covering hours of work, school calendar issues, inclusion of the words "directors of instruction," and contained a proposed administrative procedure for dealing with the large number of transfers brought about by the desegregation program. The latter proposal was the result of discussions held between Ennis, Fritchen and Nelson. It also included a provision calling for "settlement of outstanding grievances." During these discussions Peterson had indicated his desire that the REA drop all "hours of work" grievances as part of any settlement of the hours of work negotiations and Ennis had indicated that it was his belief that dropping of those grievances could be included in the settlement.

The parties met again on May 12, 1975 and discussed the proposed solution to the remaining issues and the proposed transfer procedure which had been previously discussed by Peterson and Ennis informally. During this meeting the District made a proposal which would have modified the language contained in Section 6a of Article VIII, which the REA had proposed to eliminate in its proposal on March 11, 1975. No binding agreements were reached at this meeting. On May 14, 1975 Peterson wrote Ennis and suggested another meeting on May 16, 1975. On that date the parties met again with Mediator Torosian present and discussed a number of REA objections to the proposed solutions to the remaining issues and other issues discussed on May 12, 1975.

On May 20, 1975 the parties met again. At the outset of this meeting Peterson presented the REA with a third draft of the 1974-1976 collective bargaining agreement for the REA's consideration. That draft, like the December 23, 1974 draft and the March 3, 1975 draft proposed to delete the position of high school activities director from the extra duty compensation schedule; delete Section 8 of Article XXI dealing with the use of time and facilities in the junior high schools on double shifts; and delete the language in Section 12 of Article XXI dealing with non-recrimination pledges for the strike which occurred in 1972. It was different from those drafts in the following respects: (1) it reflected that the District had proposed that Section 6 of Article VIII (which included the disputed reference to directors of instruction) be replaced with its proposal presented on May 12, 1975; (2) it proposed to utilize the expiration date contained in the 1972-1974 collective bargaining agreement (August 25) rather than the date of August 19, to which the REA had previously objected; and (3) like the March 3, 1975 draft (but unlike the December 23, 1974 draft) it reflected that Section 3 of Article VIII was also affected by existing proposals with regard to the hours of work negotiations.

The District and REA made proposals and counter-proposals during this meeting dealing with various sections of Article VIII including Sections 1c, 1d, 2a, 2c, 2d, 3a, 4, and 6. Although the parties had previously discussed the impact of the District's ratio policy on the hours of work, this represented the first time they had made proposals and counter-proposals with regard to the language contained in 1c referring to that policy or the language in 1d dealing with the use of aides.

During this meeting on May 20, 1975, the parties reached agreement on a salary schedule for school psychologists and on compensation for teachers of drivers education for the Summer of 1975. The parties met again on May 21, 1975. During that meeting the REA walked out of the negotiations while Peterson was presenting a proposal. Discussion of this meeting and the final round of meetings held in late May and early June is set out below under the charge that the District unilaterally adopted a collective bargaining agreement in the absence of an impasse on June 4, 1975.

(b) Discussion

In its brief the REA makes no distinction between this charge, which was filed in mid-May 1975 before the District had taken any action with regard to the alleged impasse which occurred in late May and early June 1975, and its later claim that the District violated its duty to bargain by taking such action. There is no claim in the REA's written argument that the District engaged in surface bargaining or refused to meet at reasonable times and places during this period. Furthermore, an analysis of the evidence discloses that the District did engage in negotiations in a good faith effort to reach agreement and did not engage in conduct which evidenced a desire to avoid its obligation to bargain in good faith.

The District implemented the terms of the agreement reached on September 24, 1974 and attempted to abide by its terms. It paid the compensation called for by that agreement, including the provisions calling for cost-of-living adjustments. Although there was no explicit agreement that the parties would bargain about the school calendars, it was clear that such a bargaining obligation arose since both parties were aware that there was no agreement on the school calendars when the agreement was ratified. While the REA did bargain about the calendars, it ultimately made only one minor concession with regard to the 1974-1975 school calendar. 100/ The District, in effect, followed the REA's proposed 1974-1975 calendar for the entire 1974-1975 school year. The record does not disclose what differences, if any, existed between the parties' proposed calendars for the 1975-1976 school year, other than the question of whether there should be a third in-service day. Whatever differences there were, the parties were in agreement on the content of the 1974-1976 calendar with that one exception, as of June 4, 1975.

The District, likewise, bargained with regard to the wages, hours and conditions of employment for school psychologists. While there were a number of issues in those negotiations, the central issue was the question of whether the District would agree to establish a salary schedule for school psychologists, and it ultimately agreed to do so. It likewise made proposals with regard to drivers education which were ultimately accepted by the REA. On the question of extra duty compensation, the District reached an agreement with the REA that satisfied its negotiating team and was understandably reluctant to agree to add the cost-of-living provision which had not been previously discussed. The REA's later addition of new non-monetary demands for coaches was contrary to the agreement concerning the issues that were reserved for further negotiations and the District was clearly justified in resisting those demands. The one change in the "pecking order" proposed by the District would not appear to be improperly motivated in view of the reason given for such change and the District's willingness to increase some of the other compensation figures in an effort to reach agreement.

The District's efforts to follow through on the agreement to establish a study committee on the hours of work and report the results were frustrated by the REA's actions. The stalemate that resulted from the REA's refusal to participate further in that effort was not broken when Peterson sent Ennis the lengthy memo dated February 7, 1975, wherein he outlined the hours of work issues from the District's point of view. A meeting was arranged on the basis of that memo but the REA still did not identify the problems that needed to be resolved

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100/ The one concession made related to the agreement reached between Nelson and Ennis on in-service training.

as part of the hours of work negotiations from the REA's point of view. It was only when Peterson wrote Ennis the letter dated February 21, 1975, wherein he indicated a willingness to enter into negotiations rather than insist on compliance with the intent of the agreement on the study committee, that the stalemate was broken. Thereafter, the District met and bargained concerning the issues related to the hours of work negotiations.

The REA made its first proposal regarding the hours of work issues on March 6, 1975. Thereafter, both parties negotiated in an effort to reach agreement. Substantial progress was made during early March but the momentum ceased when on March 26, 1975, the REA refused to meet on March 27, 1975 based on its position that it would only meet when the mediator was present and because the District had allegedly not lived up to a commitment to provide the REA with a proposal on March 20, 1975. 101/

On April 9, 1975 the District made two proposals regarding the hours of work issues and bargained about other issues as well. 102/ No substantial progress was made on the hours of work negotiations and the next meeting was not scheduled until May 12, 1975. Both Peterson and Ennis evidenced a desire to reach agreement and break this apparent deadlock 103/ by their conduct thereafter. However, when the parties met on May 16, 1975, the REA identified a number of objections to the proposed solution to the remaining issues outlined on May 12, 1975. While some progress was made on other issues, the hours of work negotiations broke off again on May 21, 1975, when the REA walked out. In spite of this evidence of an apparent impasse, Peterson wrote the REA in an effort to cause the negotiations to resume and negotiations did resume in late May before reaching an impasse as discussed more fully below.

Finally, throughout this period the District sought to reduce the terms of the agreement reached to a written and signed document. A total of three drafts were prepared by Peterson and tendered to the REA for comments or signature. Neither was forthcoming. The REA did advise Peterson of its belief that five minor items identified by Ennis had not been agreed to because of the apparent failure of Judge Myse to obtain the REA's approval at the Sienna Center. While none of those items would appear to be significant enough to give either party the right to rescind the agreement, and neither attempted to do so the discovery of those discrepancies gave rise to a duty on the REA's part to discuss those items in an effort to achieve a written document that both parties could sign. It never did so. 104/

101/ The record does not establish whether there was in fact such a commitment and if there was, the reason for this alleged failure.

102/ It was during this meeting that the parties entered into a tentative agreement on drivers education for 1974 and the REA made its new, non-monetary demands on behalf of the coaches.

103/ There is reason to believe that an impasse in the negotiations existed at this time. However, a finding in that regard is not essential.

104/ At the hearing Ennis testified that he advised Peterson in early January that the REA would agree to all of these items with the exception of the substitution of the words "directors of instruction" for the word "consultant" in Section 6a 2 of Article VIII. For the reasons discussed below, the undersigned concludes that the District was justified in assuming that the REA continued to dispute these items up through June 4, 1975.

Similarly, the REA never responded to Peterson's effort to identify which sections of Article VIII or other articles of the agreement were subject to further negotiations pursuant to the hours of work negotiations. Once those negotiations began, both parties made proposals and counter-proposals regarding a number of those sections without objection. 105/ It was only after the negotiations broke down and the District implemented its last proposal in bargaining that the REA objected to the relationship of certain of those sections to the hours of work negotiations. This problem is discussed more fully below.

Based on the above and foregoing, and the other evidence of record, it cannot be said that the District failed and refused to negotiate with the REA concerning the unresolved issues in bargaining as alleged.

(18) Unilateral Adoption of Collective Bargaining Agreement

In paragraph one of the proposed amendment to the complaint, which was filed on June 19, 1975 and granted at the outset of the hearing on July 9, 1975, the REA alleges that on or about June 4, 1975, the District unilaterally adopted an entire contract covering all teachers in the bargaining unit at a time when no agreement had been reached concerning the terms of said agreement and no impasse in negotiations had been reached. As noted in the District's brief, no allegation is made herein that the agreement which was allegedly adopted included any items which were not open for negotiations or that it did not include every item in the District's final offer. Notwithstanding such lack of pleading, the REA's brief appears to rely on the testimony of Ennis to that effect rather than its claim in the complaint and at the hearing that there was no impasse in the negotiations.

(a) Background

There was an impasse in negotiations when the board acted on June 4, 1975, to implement its proposals on the remaining issues in negotiations. As the discussion above indicates, there was a breakdown in the negotiations on the remaining issues in dispute which occurred in late May 1975. This breakdown is perhaps most dramatically exemplified by the REA's walkout from the negotiations meeting held on May 21, 1975.

By the end of the meeting on May 20, 1975, tentative agreement had been reached on pay for drivers education and a salary schedule for school psychologists. There was still no agreement on coaches' salaries or the hours of work issues. The parties met again on May 21, 1975, to discuss those issues. At one point during this meeting Thayer had implied that the District "better do something for the junior highs" or else the negotiations would break down. Later, as Peterson was attempting to explain a counterproposal which was apparently unacceptable to the REA, the REA's negotiating team left the negotiations.

105/ The only objection about the bargainability of a proposal raised was the one raised by the District in reference to the REA's effort to bargain about transfer language which was clearly unrelated to the hours of work negotiations and governed by the terms of the September 24, 1974 agreement.

On May 21, 1975 Peterson sent the principals a memorandum advising them of the breakdown and stating his belief that the REA was attempting to prolong negotiations. On May 24, 1975 Peterson hand-delivered a letter to Ennis indicating his belief that an impasse existed and stating that it was his intention to recommend to the board that it implement the District's position as it existed at the time that the REA walked out. Attached to the letter was a copy of the District's latest proposal and another copy of the May 20, 1975 draft of the collective bargaining agreement. That letter read in relevant part as follows:

> "At approximately 3:40 p.m. on Wednesday, 21 May 1975, the Racine Education Association negotiating team walked out of our bargaining session as I was making a counter-proposal. In fact, I did not have the opportunity to complete it. As you were leaving, I told you that your leaving indicated to us that we had reached an impasse in these contract negotiations. That continues to be our belief.
>
> "I wish to give you notice that we intend to recommend to the Board of Education that the School District implement most of its position that existed at the time you walked out of the contract negotiations. A copy of the position that will be recommended for implementation is attached.
>
> "The School Board will meet at 8:00 p.m. on Wednesday, 28 May 1975, to receive this recommendation. It will then resolve into a Committee-of-the-Whole meeting to give the Association the opportunity to speak on this proposed change of policy. Since the Association will be the only speaker, the Association will be given 30 minutes in order to present its views to the Board. Immediately following the Committee-of-the-Whole, the Board will meet to act upon the recommendation of the Committee-of-the-Whole. If the Board adopts the recommendation, it will become effective on 30 May 1975, for the balance of the 1974-75 school year and for the 1975-76 school year, including summer school.
>
> "In the event, however, that you wish to collectively bargain further with respect to the issues between us, we would be happy to continue the bargaining in an attempt to reach a settlement. I do wish to emphasize that we believe an impasse in these negotiations exists. But we also wish to give you the opportunity to engage in further collective bargaining with respect to our position. We will be available to meet next Tuesday, 27 May 1975, from 3:30 - 10:30 p.m. and otherwise at reasonable times."

Thereafter the REA agreed to meet on Tuesday, May 27, 1975 and the parties met with Torosian present from 4:00 p.m. on that date until 8:00 a.m. on the following day. They exchanged proposals during this meeting wherein each side made some minor changes in its position on the remaining issues. At one point during this meeting Ennis mentioned his belief that they may be reaching an impasse and there was a discussion of impasse at that time. However, the District made no claim that there was an impasse. At the conclusion of this meeting, the board's Negotiating committee agreed that it would notify the board that its meeting should be postponed to Friday, May 30, 1975 and the REA agreed to cancel a membership meeting it had scheduled for that evening. They further agreed to return to the bargaining table at 2:00 p.m. Thereafter, the REA notified its membership that the negotiating committee would recommend a delay in the board meeting until Friday, May 30; that the membership meeting scheduled for that evening was cancelled; and that the parties had agreed to meet again at 2:00 p.m. that day.

The parties met from approximately 2:00 p.m. to 5:00 p.m. on May 28 and agreed to adjourn until Friday, May 30. Before adjourning, Peterson asked Ennis if he would agree to discuss any discrepancies in the latest draft of the agreement and Ennis indicated his belief that such discussion should be held at the end of the negotiations. That evening, the Negotiating Committee reported to the board and the board postponed its scheduled meeting indefinitely pending a further report from the negotiating committee. The committee's report that evening read in relevant part as follows:

> "Your Committee believes that the representatives of the Racine Education Association (REA) continue to be reluctant both to meet and to engage in meaningful collective bargaining.
>
> "The parties met today from 10:30 a.m. - 5:30 p.m. The School District modified its position and sought a counterproposal from the REA. The REA representatives said that they had room to make a counterproposal but they did not have time to prepare one this afternoon. We asked them to continue bargaining this evening and said the Committee would make no recommendation with respect to the question of implementing our position so as not to interfere with continued bargaining this evening. The REA refused to meet this evening.
>
> "At this point the bargaining is not an [sic] impasse. Potentially, this is a good sign since it might indicate that the Racine Education Association is finally interested in reaching a settlement. The REA committed itself to make a complete counterproposal at the next bargaining session.
>
> "Your Committee recommends that the special board meeting be recessed to the call of the president."

During the meeting on May 30, 1975, the District provided the REA with copies of its latest proposals in the issues related to the hours of work and all other issues reserved for further negotiations as well as a copy of the latest draft of the proposed administrative transfer procedure for desegregation purposes. The District's proposals on the issues related to the hours of work would have, inter alia, changed the wording of Sections 1c, 2a, 3a, and 6 and eliminated Sections 2c and 2d in Article VIII and added a new section 11 to Article XXI dealing with the fixed-variable schedule. It also contained two proposed statements of policy dealing with the faculty-pupil ratio and hours of work to be adopted by the board but not included in the agreement.

At the conclusion of the meeting on May 30 there was a discussion about another negotiations meeting, possibly on Thursday, June 5, 1975. Instead, the parties agreed to meet on Monday evening, June 2, 1975, subject to confirmation by the mediator. They did meet on Monday evening at approximately 7:00 p.m. Over the weekend the REA prepared a counter-proposal on the remaining issues in negotiations which was accompanied by a three-page "preface." In addition, its negotiating team prepared certain alternative positions for possible use during the negotiations meeting scheduled for June 2.

At the beginning of the meeting, which was held jointly with Mediator Torosian present, the REA read its "preface" which consisted primarily of an accusation that the board and its negotiators had not lived up to the terms of the settlement agreement reached in September 1974, and had refused to bargain in good faith on the remaining issues. Of particular significance was a claim that the December 23, 1974 draft of the agreement contained "deletions, revisions and additions that in no manner

or form reflected the understanding or settlements at the table or during the process of bargaining." The proposal itself contained a number of items described by Peterson as "regressive" in that they were new and placed the parties further apart in their negotiations. The items in question would have:

1. included the starting and ending times which had been established for the 1974-1975 school year in the agreement;

2. established as part of the agreement an elementary student-teacher ratio of 25 to 1;

3. included the board's proposed policy on staffing under the student-teacher ratio in the agreement;

4. provided that there would be a guarantee of "at least" one hundred minutes of planning time, whereas before the REA proposal had been a guarantee of one hundred minutes of planning time; and

5. as later clarified, proposed that the board's administrative procedure on transfer for desegregation purposes be included in the agreement.

Thereafter the parties split into separate caucus groups while the mediator attempted to achieve an agreement through a proposal of his own, known as a "package flier." The package flier would have dealt with all of the remaining issues under discussion based primarily on language contained in the board's latest proposal. According to Thayer, the REA at that time had numerous objections to the District's proposal on the handling of hours of work, class size and special transfer procedures. On the other hand, Ennis testified that the REA was prepared to accept the District's proposals of May 30, 1975 if the District would put the transfer procedure in the agreement and drop its demand that the REA drop its hours of work grievances. He admitted that the REA failed to make any further concessions even though the District repeatedly asked it to do so because the REA felt that the District should have made further concessions first.

From the District's point of view, it was willing to agree to many of the items suggested by Torosian in his package flier but not all of them. Based on discussions with the mediator, 106/ the District's team formed the opinion that there were at least two items that would have to be included in Torosian's package flier to make it acceptable to the REA, both of which were unacceptable to the District. After several hours of unsuccessful efforts on Torosian's part to adjust his package flier in a way that was acceptable to both parties, Torosian brought the parties back together for a joint session.

The joint session took place at approximately 1:30 a.m. on June 3, 1975. Both Thayer and Peterson relied on notes taken by members of their bargaining team when testifying as to what was said at this meeting. According to Thayer, Peterson said that the REA's latest proposal did not induce the District to change anything in its offer of May 30, 1975 and that it was his belief that there was an impasse

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106/ The REA's objection to disclosure of statements made by the mediator in response to Peterson's inquiry of what the mediator thought the REA had to have to settle was sustained. Thereafter, the District offered to prove that the mediator said that the REA would insist on one hundred minutes of planning time and placement of the administrative procedure on transfers in the agreement.

to which Ennis replied "then go impasse." Peterson then asked if Ennis had any proposals or modification in proposals that he desired to make to which Ennis replied "where have you varied in fourteen months?" Thayer stated that Ennis may have said words to the effect, "If you make a move, we will make a move," but such statement is not reflected in the notes. Peterson's final comment was "Then we are at impasse."

According to Peterson, he stated that the mediator had floated ideas but they did not seem to go and asked Ennis if he had any new proposals to make to which Ennis replied "We don't know where to go." Peterson then stated it was his belief that there was an impasse to which Ennis responded "Don't play games, you don't have an impasse, do what Melli 107/ told you to do." Peterson responded to the effect, "Nobody tells us what to do." After another verbal exchange Peterson again inquired if the REA had any new proposals. Ennis did not respond and instead asked his bargaining team if they wanted substitute teachers to teach for them on the following day. After the discussion about substitutes was concluded, the two bargaining teams proceeded to leave. There was no discussion about any future meeting and Ennis' final comment, according to the District's notes, was to the effect "We will keep in touch."

The board's Negotiating Committee met with the board in a special session held on Wednesday, June 4, 1975 at approximately 5:30 p.m. The Negotiating Committee filed the following report:

> "Your Committee has been unable to reach a tentative agreement with the Racine Education Association (REA) with respect to the items left over from last fall's contract negotiations.
>
> "Last fall, as part of its strategy in negotiations, the REA initiated an extensive work slowdown that resulted in the closing of schools from September 5 to September 24, 1975. The negotiations last fall concluded with a 36 hour marathon bargaining session. The agreement reached then broke down when the parties discovered they did not have the same understanding. The REA initiated a sit-in in the administrative offices on Monday, September 23rd, but early the next morning the parties resolved the differences in their understandings.
>
> "The parties ran out of time during these negotiations to resolve compensation questions for school psychologists, coaches, summer drivers education teachers, the school calendar and the difficult problem of defining the teacher's workday. Representatives of the REA and the School District have met since last fall in attempting to reach an agreement on these issues.
>
> "The pace of negotiations has been intensive during the last several weeks. Your Committee has met frequently during the past several weeks in particular--both with the REA and by itself--to assess, evaluate, and re-evaluate our position.
>
> "At this time your Committee believes that the negotiations are at an impasse.

107/ There are numerous references in the record to the effect that Ennis and other REA representatives believed that the law firm retained to represent the District in this proceeding began making all of the collective bargaining decisions thereafter.

"Your Committee believes that the best interests of the School District will be served if the teachers and the community have a degree of certainly [sic] about the items the parties have been unable to resolve. Schools need to make plans for the 1975-76 school year. The community also will be particularly interested in knowing about the school calendar so plans can be made around it.

"For your information, attached is a statement of the School District's position with respect to the five major items:

1. School Psychologists
2. Drivers Education
3. Coaches
4. School Calendar
5. The Hours of Work Issue
   a. Contract Language
   b. Board policy to clarify the working of the Board's existing ratio policy.

"As a practical matter, this position will not result in any major changes in the schools, with two exceptions:

> First, junior high school teachers in schools operating under the Fixed-Variable schedule will no longer be required to report to school at least 45 minutes before the tardy bell for students. That time is being reduced by 15 minutes, so junior high school teachers report 30 minutes before the tardy bell. Notice that the language covers both a Fixed-Variable schedule and a traditional.
>
> Second, for the 1975-76 school year, unitized and team-teaching elementary schools may start late one day a week next year--at no decrease in student instructional time--in order to permit time for unit or team planning.

"The other major change deals with elementary school individual preparation time. Instead of limiting elementary teachers to a flat 100 minutes per week, as the old language called for, it guarantees a minimum of 60 minutes per week but, significantly, it puts no limit on the maximum amount, as did the previous language. This is more in accord with the practice presently occurring in elementary schools.

"Your Committee recommends that:

1. the attached Resolution be put into effect as Board policy on June 9, 1975, for the balance of the 1974-75 school year and for the 1975-76 school year, including summer school.

2. the Board adopt the attached proposals A and B as Board policies in order to explain existing policies in more detail.
   (a) Board Policy on Class Size Under the Teacher-Student Ratio Policy.
   (b) Board Policy Defining Procedures Relating to Hours of Work.

3. the motions be referred to a special Committee-of-the-Whole meeting, and

4. the Board resolve into a special Committee-of-the-Whole for the purpose of giving the REA an opportunity to address the Board, that the rules be suspended to allow the REA to speak for 30 minutes, and that the Board reconvene to hear and act upon the Committee-of-the-Whole's report."

Thereafter, pursuant to the third and fourth recommendations of its Negotiating Committee, the board adjourned into a Committee of the Whole. Ennis spoke with regard to the REA's position on the proposed action. He stated, among other things, that the REA's negotiating team was present and desired to bargain with the board then and there; that it was the REA's desire that the entire board get involved in the bargaining process because it was their belief that the board did not know what was going on in negotiations; and that there was not an impasse in the negotiations. In addition, Ennis asked that the board agree to meet on Thursday, June 5, 1975 at 3:30 p.m. with the press and "community" allowed to observe.

The board, acting as a Committee of the Whole, then agreed to recommend adoption of the first two recommendations of its Negotiating Committee. The board then reconvened into special session and voted to approve the first two recommendations of the Negotiating Committee. The resolution which was adopted pursuant to the first recommendation of the Negotiating Committee consisted of the May 20, 1975 draft of the 1974-1976 collective bargaining agreement with the following changes: (1) it incorporated the District's May 30, 1975 proposal on the issues related to hours of work which changed the wording of Sections 1c, 2a, 3a and 6 and eliminated Sections 2c and d of Article VIII and added a new Section 11 to Article XXI; (2) it included a copy of the calendar which was actually followed during the 1974-1975 school year and a copy of the District's latest calendar proposal (with a third day of in-service at the beginning of the year) for the 1975-1976 school year; (3) it included the District's latest proposal for coaches' salaries; and (4) it included the compensation provisions for teachers of drivers education and the salary schedule for school psychologists which the parties had agreed to on May 20, 1975. The policies which were adopted pursuant to the second recommendation consisted of the latest draft of the proposed policies on hours of work and faculty-pupil ratio presented to the REA on May 30, 1975.

(b) Discussion

The evidence establishes that during May and June 1975, both the REA and District were consciously aware that the question of the existence of an impasse in bargaining was an important question in terms of its impact on the District's desire to resolve the remaining issues in bargaining before implementing its desegregation program in the fall and its impact on the outcome of the instant litigation. For this reason, even though the evidence would seem to clearly establish the existence of an impasse, the conduct of both parties should be scrutinized carefully for possible evidence of posturing.

Scrutiny of that evidence convinces the undersigned that the REA may well have attempted to "bait" the District into precipitously declaring an impasse by some of its statements at the table and otherwise while at the same time attempting to establish a record of having been denied the opportunity to present further proposals which might have prevented an impasse. On the other hand, that same evidence discloses that the District attempted to avoid making a premature claim

of impasse by its letter of May 24, 1975 and its actions on May 27, 28 and 30, 1975. During the meeting on June 2, 1975, the District cooperated with the mediator in an effort to avoid a breakdown in the negotiations and gave the REA numerous opportunities to make the concessions it now claims were available on that occasion. For these reasons, the undersigned is convinced that a genuine impasse in bargaining existed on June 3, 1974 and thereafter.

The only serious question raised by this charge is the claim made by the REA at the hearing and in its brief that the offer implemented by the District made changes in the agreement which were outside the scope of the agreement reached on September 24, 1974 and the claim made by Ennis at the hearing that the District did not implement its entire offer.

The District objects to any consideration of these claims on the basis that they fall outside the scope of the charge. There would appear to be considerable merit to this argument in view of the examiner's initial liberality in allowing amendments to the charges and the numerous admonitions made thereafter to the effect that alleged violations not contained within the pleadings would not be considered. However, because this claim relates to a central issue in this proceeding, and in order to avoid the need to reconsider these claims at a later date if their exclusion were deemed error, the undersigned has considered them.

1. Claim that changes were outside the scope of subjects open for further negotiations

Basically, this claim is to the effect that the District acted improperly by implementing its offer of May 30, 1975 on the hours of work negotiations which required changes in the wording of Sections 1c, 3a and 6 and eliminated Sections 2c and 2d of Article VIII and added a new Section 11 to Article XXI, because said offer exceeded the scope of the subjects which were open for further negotiations. It is the REA's claim that any such unilateral action was necessarily limited to possible changes in Sections 2a, 2c, and 2d which were initially identified as being in issue in Peterson's December 23, 1974 draft of the agreement, notwithstanding the fact that the REA never agreed to that draft or any later draft and the fact that both parties made proposals and counter-proposals regarding all of these sections as part of the negotiations on the hours of work issues.

Fundamental to this claim is the testimony of Ennis to the effect that he had advised Peterson in early January that the proposed draft of the agreement given him on December 23, 1974 was acceptable to the REA with the exception of the use of the words "directors of instruction" in place of the word "consultant" in Section 6a2 of Article VIII. Peterson denied that Ennis had so advised him, and analysis of the other testimony and evidence of record convinces the undersigned that Ennis' testimony is not to be credited or is in error. 108/ After the first week in January, certain members of the board put pressure on Peterson to obtain a signed agreement which pressure is reflected in the minutes of the board's meetings. Peterson thereafter prepared two more drafts of the agreement and the response received to that effort

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108/ It is possible that Ennis may have advised Peterson that he personally had no other objections and that he would seek to convince his bargaining team. This interpretation would be consistent with Ennis' other testimony and his dealings with Nelson and Castagna in August of 1974 and his dealings with Peterson in April and May of 1975.

would seem to belie any claim that the December 23, 1974 draft had been accepted by the REA in January 1975. Finally, it should be noted that in the three-page preface read at the outset of the meeting on June 2, 1975, the REA claimed that the December 23, 1974 draft did not reflect the agreement reached at the table.

The evidence discloses that during the negotiations on the issues related to hours of work, both parties discussed and made proposals which would require modification or elimination of numerous sections contained in Article VIII, including all of those which were affected by the District's offer of May 30, 1975, which was implemented on June 4, 1975. No objection was raised by either party to any of the proposals made by the other on the basis of the claim that said proposals fell outside the scope of the agreement, and an analysis of the various offers of both parties discloses that the changes involved all had an impact on the hours of work negotiations.

2. Claim that the District did not implement its entire offer

At the hearing, Ennis pointed out that the board did not adopt the proposed administrative procedure on transfers as part of its action taken on June 4, 1975. This fact was not mentioned in the REA's written argument but is considered herein for the reasons mentioned above. It is rejected for essentially three reasons.

First of all, the proposed procedure was not related to the issues that were open for further negotiations. Secondly, by the District's own proposal, this procedure was not to be included in the agreement, or even referred to therein. Finally, in the absence of an agreement with the REA to follow this procedure, the District was contractually bound to follow the agreed-to procedure contained in the agreement.

By adopting the first two recommendations of its Negotiating Committed on June 4, 1975, the District in effect implemented its last proposals in bargaining on all of the issues that were open for further negotiations or otherwise unsettled. Because of the existence of the impasse, and in view of its reasons for doing so, the District was justified in unilaterally implementing its last proposal in bargaining which had previously been rejected by the REA's representatives in bargaining. 109/

(19) Refusal to Meet

In paragraph two of its amendment to the complaint the REA alleges that, despite requests by the REA that it do so, 110/ the District has cancelled tentative negotiations and failed and refused to engage in any negotiations since June 4, 1975.

109/ Almeida Bus Lines, Inc. 33 Fed. 2d 729, 56 LRRM 2548 (CA 1 1964); Eddies Chop Shop 165 NLRB 861, 65 LRRM 1408 (1967); Taft Broadcasting Co. 163 NLRB 475, 64 LRRM 1386 (1967); American Laundry Machinery Co. 107 NLRB 1574, 33 LRRM 1457 (1954). Cf. Winter Jt. School Dist. (14482-B, C) 3/77, 4/77. See also, NLRB v. Katz 369 U.S. 736, 50 LRRM 2177 (1962).

110/ The reference to requests that it "do so" apparently relates to engaging in negotiations and not to the alleged cancellation of tentative negotiations.

(a) Background

The record discloses that the District did not cancel any tentative meetings. The testimony of Thayer that she believed that there was a discussion at the end of the meeting which began on June 2, 1975 with regard to the possibility of meeting again on Thursday or Friday would appear to be in error. 111/ The evidence of what transpired at the end of that meeting, including Thayer's other testimony, indicates that the conversation did not take place at that time. The meeting ended with the understanding that the Distrct's bargaining team believed that there was an impasse and that its Negotiating Committee would thereafter recommend that the board implement its latest proposals in bargaining. It would have been totally inconsistent with the flavor of that meeting and the District's position on the question of impasse, to have had such a discussion at that time. Furthermore, no such discussion is reflected in the notes kept by either bargaining team.

On the other hand, the record does indicate that there was a discussion about possible future meeting dates which took place at the end of the meeting on May 30, 1975. The District's notes reflect that Ennis and Peterson at first discussed the possibility of meeting again on Thursday, June 5, 1975. They then discussed the possibility of meeting sooner, possibly that evening. Ennis indicated his belief that such a meeting would not be feasible and Torosian then suggested that the parties meet on Monday, June 2, 1975. It was agreed that they would do so, subject to a confirming phone call from Torosian.

It is entirely possible that, based on this conversation, Ennis made a note in his calendar to hold open the possibility of a meeting on Thursday. 112/ However, the record will not support a finding that there was a meeting tentatively scheduled which was later cancelled.

The only evidence that the REA ever sought a negotiations meeting after June 4, 1975 consists of: (1) Ennis' request, made at the June 4, 1975 board meeting, that the entire board agree to meet then or on June 5, 1975 in a public bargaining session; (2) a casual conversation which took place between Ennis and board member Langdon on July 7 or July 14, 1975; and (3) a letter to Nelson dated July 21, 1975. The request to bargain which was made on June 4, 1975 is described above.

On July 1, 1975, Marilyn Langdon was elected chairperson of the board's Negotiating Committee. Shortly thereafter, either on the evening of the next Committee of the Whole meeting or the next board meeting, which were held on July 7, 1975 and July 14, 1975 respectively, she had a conversation with Ennis during a break in the board's proceedings, around 9:00 p.m. Ennis approached Langdon and said words to the effect, "Now that you are chairperson of the Negotiating Committee, let's get together and negotiate." Langdon responded, "Fine, talk to Thatcher Peterson." According to Langdon, Ennis reacted negatively, shrugged his shoulders and said he would prefer to meet with the committee. Langdon then said "Go talk to Thatch."

111/ Ennis also testified that it was his "belief" that a meeting had been scheduled for Friday or at least the parties had agreed to keep their calendars open.

112/ A negotiations update sent out to all REA members on June 2, 1975 stated that "the Association will negotiate with the Board on Monday night, June 2, and if another meeting is needed we'll meet on Thursday, June 5." (Emphasis added).

On July 17, 1975, Nelson wrote Ennis a letter with regard to some proposed changes in policy and noted that the District was complying with Section 7 and new Section 8 of Article III with regard to implementing policies, and that Castagna was his designated representative for that purpose. On July 21, 1975, Ennis replied as follows:

> "Your letter, although factually correct, is inappropriate and irrelevant to the present state of the contract between us (there is no contract).
>
> "Yes, we have agreed during the life of the contract to a method of communication, but it is our opinion and position that unless or until there is a signed agreement, it is impossible to exercise that clause.
>
> "I have respect for both yours and Mr. Castagna's integrity, but this letter is not the normal, straightforward approach that either of you are capabale of. In fact, I view it as very devious.
>
> "I again request of you, as chief administrative official of the school district, the establishment of a mutually acceptable negotiation date. I further request that we return to the straight-forward methods of dealing that we have had in the last two years."

Although the letter indicated that copies had been sent to Castagna, school board members and two local newspapers, no copy was sent to Peterson.

The testimony of Peterson is unrebutted to the effect that, as of October 29, 1975, no one on behalf of the REA, including Mediator Torosian, had contacted him indicating a desire on the REA's part to resume negotiations. Furthermore, there is no evidence in the record that the position of either party had changed since the June 4, 1975 board action, which would break the impasse which then existed.

(b) Discussion

Since the record will not support a finding that the District cancelled any negotiations meetings as alleged, no further consideration need be given that aspect of this charge. The remaining portion of this charge relates to the District's alleged failure and refusal to respond to requests for negotiations since June 4, 1975.

There is no evidence on the record presented that the REA ever made a request to bargain about the issues left open for negotiations under the terms of the September 24, 1974 agreement, after June 4, 1975, which was not implicitly premised on the inclusion of board members or the exclusion of Peterson or both. 113/ On June 4, 1975, Ennis sought to bargain with the board and asked to bargain with the board on the following day. In early July 1975, he contacted board member Langdon in an effort to set up a negotiations meeting with the board's Negotiating Committee. Finally, on July 21, 1975 he included in a letter to the superintendent on another subject, a request that

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113/ See the discussion below with regard to the REA's efforts during 1974 to compel board members to bargain directly with its negotiating team.

the superintendent set up a mutually acceptable negotiations date. Even assuming that this comment related to the issues left open for further negotiations rather than the subject matter of the letter, no copy was sent to Peterson and there was no indication that the REA desired to make some change in its position which might break the impasse in negotiations.

As late as October 29, 1975, the next to the last day of hearing herein, the REA had still not made a proper request that Peterson return to the bargaining table to discuss the issues at impasse. For this reason, this charge is dismissed as being unsupported by the facts. It is therefore unnecessary to determine whether the District would have been justified in refusing to meet due to the existence of the impasse in negotiations.

(20) Adoption of New Policy (Unspecified)

In paragraph three of its proposed amendment to the complaint, which was granted on July 9, 1975, the REA alleges that, on June 9, 1975, a sub-committee of the board recommended and, on June 12, 1975, the board adopted, a policy which materially and substantially changed the hours and conditions of employment of all teachers in the collective bargaining unit while failing and refusing to negotiate with the REA concerning such changes. It should be noted that not only does this charge fail to specify the policy which was allegedly adopted, it also alleges that the policy affected the wages, hours and working conditions of all teachers in the collective bargaining unit. However, the evidence presented at the hearing leaves no doubt that the policy in question dealt with the abandonment of the fixed-variable schedule and affected the junior high schools only.

(a) Background

The resolution adopted on June 4, 1975, implemented the board's proposed language relating to the hours of work negotiations. With regard to the junior high schools, that language contemplated, but did not require, that some or all of the junior high schools would be operated on a fixed-variable schedule. At that time the junior high schools were all operating on the fixed-variable schedule adopted and implemented prior to the beginning of the 1974-1975 school year. In its report to the board on June 4, 1975, the Negotiating Committee stated its belief that the adoption of the language in question would not cause any major changes in the junior high schools other than a reduction in the number of minutes of reporting time prior to classes in the junior high schools.

Ennis testified that it was his understanding that the board adopted a fixed-variable schedule on June 4, 1975, which was a minor modification in the schedule that existed during the 1974-1975 school year. While this testimony inaccurately characterizes the action of the board with regard to the fixed-variable schedule in general, it appears to be correct that the only direct change in the existing schedule that resulted from the board's action was a reduction in the number of minutes of reporting time in the junior high schools.

The effective date for the implementation of the board's action was Monday, June 9, 1975. According to Ennis, administrators in the junior high schools were in some cases unable, and in other cases unwilling, to implement the new provisions. No administrator or junior high teacher was called to testify in this regard and the only example of such alleged non-compliance given by Ennis related to student supervision schedules. According to Ennis, it was his understanding that certain teachers who were either on a fixed or a variable schedule (he did not recall which) who previously had performed lunch room supervision, were no longer required to perform such supervision.

On the evening of June 9, 1975, the board held its regular monthly meeting. During the new business portion of that meeting a motion was made to change the organization of the junior high schools back to the traditional six-period day that existed prior to the double shift, beginning with the 1975-1976 school year. It was then moved that said motion be referred to a Committee of the Whole meeting to be held in the near future, which motion carried. Finally, it was moved, and unanimously passed, that the effectiveness of the junior high fixed-variable schedule should be studied and that the superintendent should report the results of the study to the board no later than December of 1975.

On June 12, 1975, the board met as a Committee of the Whole wherein it discussed the proposed night school program. At that time it also considered making the following recommendation to the board:

> "The junior high schools be organized in a traditional six-period day corresponding to the original organizational pattern existing before the double shift beginning with the 1975-1976 school year."

During the course of the meeting, REA representatives and a number of junior high school teachers were given the opportunity to present their views to the board. Ennis, speaking on behalf of the REA, opposed adoption of the traditional schedule and recommended that each junior high staff be permitted to establish its own schedule. In addition, fifteen junior high teachers, five of whom identified themselves as REA officials, spoke in favor of retention of the fixed-variable schedule or giving the REA subcouncil or staff in each junior high school the option of retaining the fixed-variable schedule. The board, sitting as a Committee of the Whole, agreed to make the proposed recommendation to the board, and thereafter convening in special session, the board adopted the recommendations of its Committee of the Whole.

There is no evidence to indicate that the board offered to bargain with regard to the proposal to return to the traditional day in the junior highs prior to adopting said recommendation. By its terms, the recommendation called for implementation of the proposal in the Fall of 1975 and there is nothing in the record to indicate that it was not so implemented.

(b) Discussion

This charge, as distinguished from the charge discussed below that the District failed and refused to bargain concerning the impact of the decision to return to the traditional schedule in the junior highs, presupposes that the District was obligated to bargain about the decision. As noted above, the examiner concludes that under the law, the District was not obligated to bargain about said decision. 114/ The only obligation the District had prior to taking the action in question was to meet its contractual obligations under Sections 7 and 8 of Article VIII and, although that question is not properly here for decision, it appears that the District did so.

(21) Refusal to Bargain Impact

In paragraph four of its proposed amendment to the complaint, which was granted on July 9, 1975, the REA alleges that "at all times since June 12, 1975" the District has "failed and refused to negotiate

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114/ Supra, note 41.

concerning the impact of the foregoing material and substantial changes it unilaterally made in hours, terms and conditions of the teacher work day." (Emphasis supplied). Read in conjunction with paragraph three of the amendment, this charge appears to relate to the board's action in adopting the traditional school day in the junior high schools. This interpretation is confirmed by the REA's brief which relies on Ennis' testimony to the effect that the District did not offer to negotiate about the proposed return to the traditional class schedule in the junior highs prior to the implementation of that change. Furthermore, any other interpretation would be unnecessarily duplicative of the charge contained in paragraph two of the amended complaint.

(a) Background

There is no evidence that the District ever offered to negotiate with regard to the impact of the decision to return to the traditional class schedule in the junior high schools on the wages, hours and working conditions in the junior high schools after June 12, 1975. On the other hand, the provisions dealing with the hours of work contained in the board's resolution of June 4, 1975 applied to all teachers in the District's schools, including the junior high schools, regardless of whether they were operating on a fixed-variable or traditional school schedule. There is no evidence that the REA ever sought to identify or bargain about any alleged impact of the decision which was not covered by that resolution. Furthermore, as noted above, the REA never made a proper request for the purpose of resuming negotiations on any of the issues relating to the hours of work in the junior high schools after June 4, 1975.

(b) Discussion

The board's action in adopting a traditional class schedule in the junior highs was an action relating to a non-mandatory subject of bargaining. The only obligation that the District had was to bargain the impact of that decision to the extent that there was no existing agreement on the impact or no waiver of the duty to bargain under Sections 7 and 8 of Article VIII of the agreement.

The REA was aware of the District's proposal to return to the traditional day in the junior high schools prior to the adoption of the resolution on June 12, 1975. Furthermore, it was given the opportunity to present its views to the board consistent with the provisions of Section 7 of Article VIII, and it did so at the meeting of the Committee of the Whole on June 12, 1975. By the terms of the recommendation adopted, the change was not scheduled to be implemented until the Fall of 1975. Instead of identifying any aspects of this change which it believed were not covered by the terms of the agreement or governed by the provisions of Sections 7 and 8 of Article VIII, the REA amended its complaint to allege that the District had violated its duty to bargain by failing and refusing to bargain about the impact of the decision. Simultaneously, the REA has failed to make any proper request of the District's labor negotiator for the purpose of scheduling further negotiation meetings. Under these circumstances it cannot be said that the District has failed and refused to bargain with the REA.

D. Complaint in Case XXXI

In its complaint in Case XXXI, the District alleges that "between on or about August 19, 1974 and on or about August 27, 1974 [the REA] refused to meet for the purpose of collective bargaining respecting the terms and conditions of employment of employes of [the District]

which [the REA represents] with the duly authorized representative of [the District]."

(1) Background

The evidence discloses that the District's "duly authorized representative" is W. Thatcher Peterson, Coordinator of Employee Services. Peterson has been employed by the District for a number of years to represent the District in its negotiations with the various unions representing its employes, including the REA.

Sometime in January 1974, the REA's Welfare Committee developed an internal statement of policy regarding the upcoming negotiations which contained the following item, relevant to this charge:

> "A. We will only negotiate with that person (or persons) who has final settlement authority on each item."

On March 5, 1974 Marie Thayer, chairperson of the REA's negotiating team, sent a letter to Gilbert Berthelsen, chairman of the board's Negotiating Committee a letter requesting a meeting with the Negotiating Committee for the purpose of discussing "ground rules and methods of information gathering and exchange." A copy of that letter was sent to Lowell McNeill, president of the board, but not to Peterson. It read in relevant part as follows:

> "The Negotiating Team of the Racine Education Association is prepared and requests a meeting with your committee to begin the process of negotiations. We suggest the appropriate topics for this meeting be a discussion of general rules and methods of information gathering and exchange. [Emphasis in original].
>
> "We, the Racine Education Association negotiating committee, are prepared to meet on Thursday, March 7 or an acceptable date thereafter. For the purposes of meeting arrangements, please contact the REA Executive Director, James Ennis."

Peterson apparently responded to this request to meet with the board's Negotiating Committee by letter dated March 13, 1974, wherein he advised Thayer that the Negotiating Committee was scheduled to meet on March 20, 1974 to consider the request and Thayer apparently contacted Berthelsen again on March 14, 1974 regarding the request to meet. Peterson's response and Thayer's second communication to Berthelsen are reflected in a letter from Berthelsen to Thayer dated March 15, 1974 which read in relevant part as follows:

> "As Mr. Thatcher Peterson, Coordinator of Employee Services, told you in a letter dated March 13, 1974, the Negotiating Committee meeting on Wednesday, March 20, to consider the REA's first request for a meeting with the Committee. The REA is not invited to this meeting.
>
> "The Negotiations Committee has not considered the REA's first request yet. It is therefore difficult to respond to the second request of March 14, except to ask that you give us time to meet on your requests. Before responding to the REA's request for a meeting. The Committee will have to consider the request.
>
> "I am sorry I cannot give you a more definitive response at this time. However, the School Board and its sub-

committees are part of a deliberative body. Like the Board, the committees can make decisions only when the members come together for a meeting. Members of any committee also serve on other committees and all of us Board members have other commitments. As a result, we are unable to meet as quickly or as often as a private organization like the REA can.

"I do wish to reinforce the idea that you let us know what kind of ground rules you are thinking of. Having a copy of them at our next meeting would help the committee in its deliberations.

"Finally, could you also please send Mr. Thatcher Peterson a carbon copy of any communication to me or to the Negotiating Committee that in any way relates to negotiations? It would be a helpful courtesy."

On March 20, 1974 the Negotiating Committee met and agreed to authorize Peterson "to enter into tentative agreements on behalf of the Committee" and further agreed that "such tentative agreements are not binding upon the School Board, but are subject to ratification by the Board." On March 21, 1974 Berthelsen wrote Thayer a letter which read as follows:

"In response to your letter of March 14, 1974, I wish to advise you that the Negotiating Committee has authorized the Coordinator of Employee Services, Mr. Thatcher Peterson, to enter into tentative agreements on behalf of the Committee. Such tentative agreements will not be binding upon the School Board but are subject to ratification by the Board. Mr. Peterson will act as our spokesman in contract negotiations.

"We would appreciate it if you would address all communications about negotiation matters to him, with carbon copies to us.

"A definition of terms seems appropriate. As far as we are concerned, a tentative agreement exists only when the spokesmen from both the Racine Education Association (REA) and the School District sign and date the item agreed to. All tentative agreements on individual items, in turn, are subject to a tentative agreement on a complete package that ultimately will be subject to ratification by the School Board (and the REA membership) before it becomes binding upon the parties.

"We are anxious to get on with the negotiations and would like to see them completed before school is out in June. The REA has indicated its desire to negotiate a changed agreement. Therefore, we would like to know what changes the REA desires. We would appreciate your sending us your proposal for a new Professional Agreement so we can evaluate it. Within three weeks after receiving the REA's proposal, the School District will be in a position to make a counterproposal.

"You asked for a meeting with this Committee to begin talking about procedures and other things. As we said above, Mr. Thatcher Peterson is authorized to act on our behalf, he is willing to meet with you, and I would suggest you contact him and make arrangements."

This action of the Negotiating Committee was reported to the board and was approved by the board at its regular meeting on April 15, 1974.

The first meeting to discuss the REA's proposed ground rules was held on March 25, 1974. The REA's negotiating team met on that date with Peterson and Fritchen. Thereafter, the parties met on four occasions in April where they discussed the REA's proposed ground rules. On April 29, 1974 the REA submitted a list of twelve proposed ground rules which included the following two, relevant herein:

> "1. The Assoc. agrees to address all communications about negotiations matters to T. Peterson and with carbon copies to the Board Negotiating Team.
>
> "2. We agree to the definition of tentative agreement found in Bertelsen's [sic] letter of Mr. 21."

No agreement was ever reached on these proposed ground rules or on the procedure outlined in Berthelsen's letter of March 21, 1974. Even so, a number of the provisions of those two documents were followed in practice thereafter. On May 7, 1974, the REA submitted its proposal on substantive issues and Peterson submitted the District's counter-proposal on May 28, 1974. In his proposal, Peterson made specific reference to Berthelsen's letter of March 21, 1974, and his authority to enter into tentative agreements.

Negotiations proceeded thereafter between the parties' respective bargaining teams until mid-August, 1974. No member of the board or its Negotiating Committee regularly attended any of these meetings. 115/ However, the Negotiating Committee did hold meetings from time to time with Peterson and others wherein they discussed the progress of the negotiations. On August 9, 1974 Peterson signed a number of tentative agreements on behalf of the board. The parties met several times thereafter. At the end of the meeting on August 16, 1974 the REA asked that the board's Negotiating Committee come to the next meeting. It was thereafter agreed that the next meeting would be held on Monday, March 19, 1974, but there was no agreement that the board's Negotiating Committee would be present.

On August 19, 1974 the parties met at Geise Elementary School during the evening hours. Mediator Torosian was present. In addition, some teachers and representatives of the PTA and media were also present. During this meeting the REA representatives took the position that they would not meet with the District's negotiator unless members of the board were also present. The testimony and notes of this meeting kept by the REA 116/ and the District indicate that the REA's position was not premised on an unwillingness to meet with Peterson but was premised on a desire to have members of the board present. The District's position, as expressed by Peterson, was not that board members would not come to negotiations meetings but that they would not come with so many issues still on the table. During this meeting

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115/ Ennis testified that he did recall that board member McNeill was present at some meetings in August.

116/ The REA notes indicate that the date was August 20, 1974. However, earlier REA notes and the testimony indicate that it was August 19, 1974.

Peterson expressed a desire to meet again on Wednesday, August 21, 1974, but would not promise that any board members would be in attendance. The REA representatives indicated that they would not meet unless board members were in attendance.

Ennis testified that the position taken at this meeting represented the official position of the REA which had been established during a meeting held at the Racine Motor Inn over a two and one-half day period. After considerable discussion of the status of negotiations, the REA's Welfare Committee directed its Negotiating Committee to take this position. According to Ennis, in order for the REA's Negotiating Committee to reverse its position, it would have been necessary to again consult with the Welfare Committee. 117/

No official bargaining sessions were held between August 19, 1974 and August 27, 1974. On August 22, 1974 an informal meeting took place between Peterson, Ennis and Schwartz wherein they discussed the "minimums for settlement" that would probably be acceptable to the REA and another union (Local 152) represented by Schwartz. This discussion did not lead to a settlement of the outstanding issues and, on August 25, 1974, the 1972-1974 collective bargaining agreement expired.

As noted above under the discussion of the REA's charge that the District unilaterally established the opening dates for schools, the District had been unable to obtain the REA's agreement on opening dates for schools. The orientation pamphlet dated August 12, 1974 had indicated that schools would open for returning staff on the customary date of Monday, August 26, 1974 (one week before Labor Day) and the REA's proposal was that schools should open for returning staff on Thursday, August 29, 1974. After trying unsuccessfully to obtain the REA's agreement on an opening date, Nelson wrote a letter, dated August 21, 1974, which indicated that schools would open for returning staff on Thursday, August 29, 1974, the date proposed by the REA.

As the opening date for returning staff drew near, the District acceded to the REA's demand and agreed that board members would enter the negotiations at that time. Peterson called Torosian and advised him of the decision and Torosian arranged for a meeting with the REA on Tuesday, August 27, 1974. Members of the board's Negotiating Committee attended the negotiations that evening and on various other occasions thereafter.

(2) Discussion

The above described facts disclose that the REA began the 1974 negotiations with an effort to by-pass the District's labor negotiator and deal directly with the board. 118/ The policy adopted by the REA's Welfare Committee in January 1974, if pursued, would have required that the REA meet only with the board itself. The initial communications were directed to the board and its Negotiating Committee and copies of that correspondence were not sent to Peterson. In her

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117/ The record does not establish the dates on which this meeting took place. It would appear that this meeting occurred in close proximity to August 19, 1974 and was not the earlier meeting held in January 1974 where the Welfare Committee developed its statement of policy, set out above, where it indicated that it would only negotiate with "that person or (persons) who has final settlement authority."

118/ There can be little doubt that the REA was aware of Peterson's role as the District's labor negotiator since he had functioned in that capacity for the last several contracts.

letter of March 5, 1974 and subsequent contact on March 14, 1974, Thayer sought a meeting with the board's Negotiating Committee for the purpose of discussing matters that normally would be discussed with the District's labor negotiator.

Notwithstanding the fact that the REA sought from the beginning to deal directly with the board in the 1974 negotiations, it did not initially insist that negotiations be carried on directly with the board. On March 20, 1974 the board's Negotiating Committee met and agreed that Peterson would have the authority to enter into tentative agreements on its behalf subject to ratification by the board. The REA apparently accepted this definition of Peterson's authority notwithstanding the fact that he did not, and could not legally, have the "final authority" called for in the resolution of its Welfare Committee. After receipt of Berthelsen's letter, the REA met with Peterson on several occasions for the purpose of discussing its ground rules and demands for information. On April 29, 1974 it proposed to address all communications about negotiations to Peterson with copies to the board's negotiating team and offered to accept Berthelsen's definition of "tentative agreements" set out in his letter of March 21, 1974. Finally, even though no formal agreement was ever reached on "ground rules" for negotiations, the REA in general followed its proposed ground rules and accepted the District's position on tentative agreements until mid-August 1974.

On August 16, 1974, the REA again sought to get board members directly involved in the negotiations. The REA notes of the meeting on August 16, 1974 reflect that a request was made at the conclusion of that meeting that board members be present at the next meeting. This request was neither accepted nor rejected by Peterson.

On August 19, 1974, the REA's position changed from that of a request to that of a demand. On that occasion, it indicated it would not thereafter meet unless board members were present. Peterson offered to meet on August 21, 1974, but again would not make a commitment that board members would be present. 119/ No regular negotiating meeting 120/ was thereafter held until the District acceded to the REA's demand. From this it is clear that the REA conditioned further negotiations on the District's willingness to change the composition of its bargaining team. As noted by Ennis in his testimony, the change sought was not the elimination of Peterson as such but the addition of board members, at least those who were on the board's Negotiating Committee to the board's negotiating team.

The selection of representatives or the composition of either party's bargaining team is a permissive subject of bargaining about which the parties may voluntarily agree to bargain. However, absent unusual circumstances, such as an actual conflict of interest or gross misconduct, it is a prohibited practice for either party to refuse to

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119/ Peterson's reluctance was apparently based on an unwillingness to ask board members to attend negotiations when so many issues were still on the table and not on an unwillingness to ask board members to attend negotiations at a later time.

120/ The informal discussion held on August 22, 1974 is the only arguable exception. However, neither party had the right to treat the results of that discussion as even tentatively binding on the other and consequently this is not deemed to have been a negotiating meeting.

meet with the other party's duly authorized representative or representatives. 121/

There is no evidence of any circumstances present here that might have justified the refusal to meet with Peterson. Peterson was the District's duly authorized labor negotiator and had the authority to enter into tentative agreements on its behalf. In fact, Ennis conceded that the refusal to meet with Peterson was not based on a claim that Peterson should be excluded from the negotiations. Instead it was based on a desire to force board members to come to the bargaining table.

The provisions of the MERA contemplate that municipal employers may choose to engage the services of a labor negotiator to represent them. (§111.70(5), Stats.) Under the provisions of §111.70(3)(b)3, Stats., it is a prohibited practice to refuse to bargain collectively with the duly authorized officer or agent of the municipal employer. By refusing to meet with Peterson unless and until he agreed that board members would be present, the REA refused to bargain collectively and committed a prohibited practice within the meaning of §111.70(3)(b)3, Stats. Accordingly, the undersigned has entered an appropriate remedial order directing the REA to cease and desist from engaging in the activity found violative of the MERA.

Dated at Madison, Wisconsin this 4th day of April, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

121/ Teamsters Local 70 (Kockos Bros.) 183 NLRB 1330, 74 LRRM 1401, affd. 459 F2d 694, 80 LRRM 2464 (1972).