

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Respondent.

No. 21264-B

6. On August 17, 1983, there occurred a departmental meeting of the Transit System where it was orally announced and explained that bus drivers would be required to sweep out their buses at the end of their shifts. A written notice to that effect was subsequently posted.

7. Effective August 24, 1983, bus drivers were required to sweep out their buses at the end of their shifts.

8. Prior to August 24, 1983, full-time bus drivers were not required to sweep out their buses at the end of their shifts; the record is inadequate to determine whether or not part-time bus drivers swept out their buses at the end of their shifts prior to August 24, 1983.

9. There was no separate notice to the Union of the newly imposed sweeping duty.

10. The Union has never made a demand to negotiate over the assignment of sweeping duties.

11. The assignment of sweeping duties has resulted in a four minute increase in the average length of the work day. Prior to assignment of sweeping duties, full-time drivers left work after 6:30 p.m., their scheduled time of departure, 13 percent of the time. Subsequent to the assignment of sweeping duties, full-time drivers left work after 6:30 p.m., 24 percent of the time. There is no additional compensation provided for the additional time worked.

Based upon the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. General Drivers, Dairy Employees and Helpers Local Union No. 579 is a labor organization within the meaning of Sec. 111.70(1)(j), Stats.

2. The City of Janesville is a municipal employer within the meaning of Sec. 111.70(1)(a), Stats.

3. Sweeping duties assigned to bus drivers is a mandatory subject of bargaining within the meaning of Sec. 111.70(1)(d), Stats.

4. The City of Janesville has not refused to bargain within the meaning of Sec. 111.70(3)(a)4, Stats., because no demand to bargain over sweeping duties has ever been made.

On the basis of the foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

That the complaint is dismissed. 1/

Dated at Madison, Wisconsin this 10th day of September, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By William C. Houlihan
William C. Houlihan, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition (Footnote 1 continued on Page 3)

1/ (Continued)

with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

Complainant Union contends that the City violated Sec. 111.70(3)4, Stats., when it unilaterally altered the work assignment of bus drivers by requiring that they sweep out buses. According to the Complainant, sweeping is not fairly within the scope of a bus driver's job and thus constitutes a mandatory subject of bargaining. Furthermore, the added duties extended the workday, cut into checkout period and thereby affected employees' hours of work. The Union cites Milwaukee Sewerage Commission, Dec. No. 17302, 1979; City of Wauwatosa, Dec. No. 15917 (1977); and City of Milwaukee, Dec. No. 16602-A (1979) as authority for the proposition that the Union is entitled to notice prior to the assignment of new duties.

Respondent City contends that the sweeping of buses is fairly within the scope of a bus driver's duties and is therefore not bargainable. The City also cites City of Wauwatosa and City of Milwaukee, supra, in support of its contention that duties which fall fairly within the scope of responsibilities applicable to the job involved are not bargainable. The City argues that the sweeping assignment is a minor demand upon the driver in terms of both effort and time.

DISCUSSION

There is a factual dispute as to whether or not part-time bus drivers were required to sweep out their buses prior to August, 1983. It is unnecessary to resolve the dispute because the record is clear that full-time bus drivers have never been required to sweep out their buses prior to August, 1983. For this group the task is a new one, imposing both a new duty and additional time. Furthermore, the record shows that C.E.T.A. funded high school students did the bulk of the bus sweeping until funds ran out effective July 31, 1983 and the students were no longer employed. It is clear that the City has directed the bus drivers to take on the sweeping responsibilities created by the departure of the C.E.T.A. students.

The initial question to be addressed is whether or not added sweeping duty is bargainable. Sec. 111.70(1)(d), Stats., defines collective bargaining as

. . . the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employees, to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment with the intention of reaching an agreement, . . . the employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employees . . .

When interpreting Sec. 111.70(1)(d), Stats., the Wisconsin Supreme Court has concluded that collective bargaining is required with regard to matters "primarily," "fundamentally," "basically" or "essentially" related to wages, hours or conditions of employment. The Court also concluded that the statute required bargaining as to the impact of policy affecting the "wages, hours and conditions of employment." The Court has found that bargaining is not required with regard to the "management and direction" of the enterprise. Beloit Education Association v. WERC, 73 Wis.2d 43 (1976), Unified School District No. 1 of Racine County v. WERC, 81 Wis.2d 89 (1977) and City of Brookfield v. WERC, 87 Wis.2d 819 (1979).

The application of this standard has caused the Commission to conclude that the assignment of duties can be a mandatory or non-mandatory subject of bargaining. If a particular duty is fairly within the scope of responsibilities applicable to the kind of work performed by the employees involved, an employer may unilaterally impose such assignment and it will be a non-mandatory subject of

bargaining. If a duty is not fairly within that scope, the decision to assign that duty is a mandatory subject of bargaining. 2/ The Commission reasoned that municipal employers should not be required to negotiate over the kind and level of services to be provided the community but, on the other hand, employees may reasonably expect to be assigned only those duties which are generally consistent with the overall nature of their work.

This reasoning has been applied in two cases somewhat analogous to this situation. In Oak Creek - Franklin Jt. City School District No. 1, Dec. No. 11827-D (9/74), the Commission concluded the following:

Typing and duplicating duties performed by teachers in carrying out their classroom responsibilities constitute a portion of their work load. We conclude that the nature of such work load has a minimal effect on educational policy, and, therefore, the matter of whether teachers should perform typing and duplicating duties is subject to mandatory bargaining.

In similar fashion, the Commission analyzed firefighter's desire to be relieved of switchboard duty. In City of Wauwatosa, Dec. No. 13109-A (6/75) the Commission concluded as follows:

Thus, the firefighters here perform duties which are supplemental to and supportive of their firefighting duties, just as the teachers in Oak Creek performed occasional clerical functions which were supplemental to and supportive of their teaching duties. Further, in both instances, the performance of the particular duty in issue is a matter which does not relate to either the management or the basic policy direction of the particular municipal employer. Accordingly, in such circumstances, and pursuant to our decision in Oak Creek, the Commission concludes, based upon the facts here presented, that Petitioner's request to remove the switchboard duties from bargaining unit personnel constitutes a mandatory subject of bargaining.

The analysis of job duties vis-a-vis basic policy concerns of the Employer has continued to be applied to date. The Commission has recently analyzed the following proposal:

Teachers shall not be required to perform the clerical tasks of typing and/or duplicating/reproducing classroom or other instructional materials.

with the following result:

Applying the holdings of Oak Creek, supra, and City of Wauwatosa, supra, to the instant case, we conclude that the Association's proposal is a mandatory subject of bargaining. The record establishes that while teachers do on occasion perform the duties referenced in the Association's proposal, such duties are at most, "supplemental to and supportive of" their teaching duties and responsibilities. However, it should be noted that the proposal, as written applies only to "classroom or other instructional materials". Hence, we do not view this case as presenting an issue as to mandatory nature of proposal which focused upon other potential typing responsibilities. We further conclude that the performance of the clerical duties covered by this proposal is not an issue which relates in any significant way to either the management or the basic policy direction of the School District. The fact that the Association's proposal, if agreed to by the District or if awarded by a mediator-arbitrator, might necessitate the expenditure of additional District resources to have the duties referenced in the

2/ City of Wauwatosa, Dec. No. 15917 (11/77).

proposal performed by other employees, is irrelevant to our determination herein and goes to the merits of the proposal. Obviously, a contrary conclusion would render permissive all proposals which have an economic impact, including proposals specifying wage rates, salary schedules, ect. 3/

Applying the foregoing case law I believe the assignment of sweeping duties is a mandatory subject of bargaining. The bus drivers are hired to drive buses pursuant to the mission of the Transit Authority, which is to provide bus service to the community. If the drivers were to refuse to drive their buses it would have an immediate and obvious impact upon the municipal employer's policy to provide bus service. The same cannot be said of their reluctance to sweep out the buses. Just as typing, duplicating, and performing clerical duties are supplemental and supportive of teaching, and switchboard duty is supplemental to and supportive of firefighting, so is sweeping a bus supplemental to the primary responsibility of driving. There is no management or policy direction involved.

The Union argues that it was entitled to notice of the duty assignment. The management of the Authority announced the change to its assembled work force at a meeting conducted on August 17, 1983. That announcement was confirmed by written notice. Under the circumstances, I believe the Union was put on notice of change. All of its members, including its officers, were put on actual notice.

No demand to bargain was ever made. It is understandable that there was no demand between August 17 and August 24. Complainant was not formally certified until August 24. 4/ However, in October or November, the parties entered into negotiations for a successor agreement. There was no demand to bargain over the assignment of sweeping duties during contract negotiations. 5/

I believe the Union has waived its right to bargain over the added sweeping duties for the period in question. As of August 17, all members of the unit were on actual notice of the added sweeping assignment. 6/ To the extent the Union desired to bargain over the assignment it was incumbent upon the Union to make such a demand. The City's duty to bargain does not arise until such time as a demand to bargain has been made. 7/

Absent a demand to bargain, the City has no obligation to do so and there is therefore no underlying basis to find a refusal to bargain. 8/ The Union argues that it was handed a fait accompli over which no meaningful bargaining was possible. I do not agree. There are situations where decisions are made and implemented under circumstances which render meaningful collective bargaining impossible. For instance, a school board employer which immediately schedules and requires teachers to work a make up day on a previously unscheduled day, leaves little for bargaining. 9/ If there is no time to bargain between the decision and implementation and nothing left to bargain once the teachers have worked the day,

3/ School District No. 5, Franklin, Dec. No. 21846 (7/84).

4/ See New Richmond Joint School District No. 1, Dec. No. 15172-A,B (7/77, 5/78).

5/ Note, this complaint was filed on September 20, 1983.

6/ City of Jefferson, Dec. No. 15482, (Davis, 8/77); Drummond Integrated School District, Dec. No. 15909-A, (Davis 3/78); Barron County, Dec. No. 19883-A, (McGilligan, 6/83).

7/ New Richmond Jt. School District, Dec. No. 15172-A, (Schoenfeld, 7/77); City of Jefferson, supra; Drummond School District; supra.

8/ City of Appleton, Dec. No. 18451-A, (Davis, 8/81); Racine Unified School District, Dec. No. 18810-A, (Shaw, 7/82).

9/ Joint School District No. 5, City of Fennimore, Dec. No. 11865-A, (Fleischli, 7/74).

the Union is indeed confronted by a fait accompli. Similarly, an employer which advises a Union that he has irrevocably committed himself to subcontracting out the jobs of bargaining unit employees and simultaneously does so, presents the Union with a fait accompli, at least in regard to potential bargaining over the decision to subcontract. There is nothing left to bargain. 10/

That is not the case here. It is true that unit members were required to sweep coincidentally with the certification of the Complainant as exclusive bargaining agent. However, the sweeping assignment is an ongoing one which can begin and end at any time. It is different in kind from the type of decision noted above which, when implemented left nothing to negotiate. Here the Union remains free to negotiate whether or not unit members will perform the sweeping task, and if so under what circumstances. The ongoing nature of the assignment makes this possible. The fact that the notice was provided as an assignment of work rather than an invitation to bargain is of no consequence in that it has no influence or impact on the rights and responsibilities of the parties.

Dated at Madison, Wisconsin this 10th day of September, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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10/ Walworth County, Dec. No. 15429-A, 15430-A, (Gratz, 12/78).