STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MENOMINEE NON-TEACHERS ASSOCIATION, Complainant, vs. MENOMINEE INDIAN SCHOOL DISTRICT, Respondent.	:	Case 20 No. 38139 MP-1924 Decision No. 24401-A

Appearances:

Mr. Stephen Pieroni, Staff Counsel, Wisconsin Education Association Council, 101 West Beltline Highway, P.O. Box 8003, Madison, WI 53708, appeared on behalf of the Association.

Mr. John Tomasich, District Administrator, Menominee Indian School District, P.O. Box 399, Keshena, WI 54135, appeared on behalf of the District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-named Complainant having, on January 23, 1987, filed a complaint with the Wisconsin Employment Relations Commission, wherein it alleged that the above-named Respondent has committed a prohibited practice within the meaning of the Municipal Employment Relations Act; and the Commission, on April 13, 1987 having appointed William C. Houlihan, a member of its staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5) Stats.; the parties having waived hearing and stipulated to a factual record consisting of the pleadings and four exhibits, summarized by a September 10, 1987 letter; post-hearing briefs were received by July 28, 1987; the Examiner having considered the evidence and arguments and being fully advised in the premises makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1.

(a) At all times material herein, the Association is and has been a labor organization within the meaning of Section 111.70(1)(j), Stats. The Association's address is: c/o Don A. Marcell, Box 1318 Lulu Lake Drive, Shawano, Wisconsin 54166.

(b) At all times material herein, Respondent is and has been a municipal employer within the meaning of Section 111.70(1)(a), Stats. Respondent's address is: Menominee Indian School District, P.O. Box 399, Keshena, Wisconsin 54135. At all times material herein, Mr. John Tomasich occupied the position of Superintendent of Schools, and is and has been an agent of Respondent.

2.

At all times material herein, the Association is and has been the exclusive bargaining representative of all regular full-time and part-time custodians, food service employees, secretaries, bookkeepers, receptionists, counselor assistants, detention room monitors, hall supervisors, printers and aides; excluding non-teaching supervisors, superintendent's secretary, non-degree teachers, business manager, head bookkeeper, and payroll clerk. There are approximately 54 employes in this bargaining unit.

3.

At times material herein, Respondent and the Association have maintained and enforced a collective bargaining agreement which governs wages, hours and conditions of employment of the employes in the bargaining unit described in paragraph 2. The most recent collective bargaining agreement had a duration of July 1, 1984 through June 30, 1986.

4.

On or about January 27, 1986, the School Board, without notifying the Association, decided to terminate a long-standing practice of giving employes a grace period when they punched their timecard in the time clock in the morning and at the end of the day without losing pay for the quarter hour. The Board adopted a new procedure whereby every member of the bargaining unit is obligated to punch a timecard in a time clock; if an employe punches his or her timecard one minute or more late, he or she is not paid for the next fifteen minutes. Likewise, if an employee punches his/her timecard one minute or more before the end of the designated workday, he or she loses pay for the last fifteen minutes of the workday. There is a time clock in each building in the School District.

5.

The following minutes of the School Board meeting of January 27, 1986 constitutes the record of the decision made with respect to time clocks:

> OTHER BUSINESS
>
> Mr. Klumb forwarded a question from the bookkeepers for a clarification for the new timeclock system used in the three school buildings. The bookkeepers asked if they should continue giving employees a grace period when they punched in in the morning and when they punched out at the end of their work day. That is, can employees punch in several minutes late and punch out several minutes early without losing credit for that fifteen minute time period? The second question from the bookkeepers was related to having employees punch out and then punch back in during their noon break. Mr. Klumb pointed out that if employees did not punch out and then punch in during their noon break, the automatic timeclocks would calculate that amount of time as work time and employees would receive overtime. The Board agreed by a consensus that employees should not receive any grace period when they punch in nor when they punch out. That is, if employees punch in one minute or more late, they will not be paid for the next fifteen minutes. Also, if employees punch out one minute or more before the end of their work time, they will lose the last fifteen minutes of the paid time. The Board also agreed, by consensus, that Roger should notify all employees as soon as possible of the change in procedure and have the new time keeping system go into effect as soon as possible.

6.

On January 30, 1986 Mr. Don Marcell, as a representative of the Association, sent a written request to Mr. John Tomasich, Superintendent, requesting that the District bargain with the Association over the new time clock policy. On February 4, 1986, Mr. Tomasich replied, in writing, to Mr. Marcell's request by stating that the Board of Education had no legal obligation to bargain with the Association over the new time clock policy.

7.

Since the institution of the new time clock policy, numerous bargaining unit employees have been docked pay whereas under the previous policy the employees would not have been docked pay.

8.

At all times material herein, Respondent has refused to rescind its unilateral change in wages, hours and working conditions and to bargain in good faith with the Association concerning the new time clock policy and to repay wages to employees who have had their pay unilaterally docked from their paychecks. Respondent continues to refuse to rescind its actions or to bargain in good faith with the Association, despite repeated demands by the Association.

9.

The following provisions are found in the July 1, 1984 - June 30, 1986 collective bargaining agreement between the parties:

. . .

ARTICLE II

Mangement Rights

The Board possesses the sole right to operate the school system and all management rights repose to it. These rights include, but are not limited to the following:

A. To relieve employees from their duties because of lack of work or any other legitimate reasons;

B. To maintain efficiency of school system operations;

C. To take whatever action is necessary to comply with State or Federal law;

D. To introduce new or improved methods or facilities;

E. To determine the kinds and amounts of services to be performed as pertains to school system operations; and the number and kind of classifications to perform such services;

F. To determine the methods, means and personnel by which school system operations are to be conducted.

G. To establish work rules and schedules of work;

H. To hire, promote, transfer, schedule and assign employees in positions within the school system;

I. To change existing methods or facilities;

J. To contract out for goods or services;

. . .

ARTICLE VIII
Work Schedules

A. WORK DAY: Except as noted below, the normal work day for regular full-time employees shall consist of eight (8) consecutive hours, excluding an unpaid lunch period of one-half (1/2) hour.

B. WORK WEEK: Except as noted below, the normal work week for regular full-time employees shall consist of forty (40) hours.

C. Full-time 12 Month Employees:

Custodians
Bookkeepers

High School Principal's Secretary
Printer
High School Guidance Secretary

D. Full-time School Year Employees:

Aides:
General
Hall Supervisors
Detention Room Monitors
Cooks

E. Ten Month Employees:

Elementary Secretaries
High School Receptionist

F. 188 Day Employees:

Counselor Assistants
Non-Degree Teachers
Certified Aides

G. Overtime: Time and one-half (1-1/2) the employee's rate of pay shall be paid for all hours worked in excess of forty (40) hours per week.

H. Holidays: The employees rate of pay shall be paid for holidays. If it is necessary for an employee to work on a holiday, the employee shall be paid twice (2) the regular hourly pay.

. . .

10.

The following provisions are contained in the 1986-1987 collective bargaining agreement between the parties:

ARTICLE II
Mangement Rights

The Board possesses the sole right to operate the school system and all mangement rights repose to it. These rights include, but are not limited to the following:

A. To relieve employees from their duties because of lack of work or any other legitimate reasons;

B. To maintain efficiency of school system operations;

C. To take whatever action is necessary to comply with State or Federal law;

D. To introduce new or improved methods or facilities;

E. To determine the kinds and amount of services to be performed as pertains to school system operations; and the number and kind of classifications to perform such services;

F. To determine the methods, means and personnel by which school system operations are to be conducted;

G. To establish work rules and schedules of work;

H. To hire, promote, transfer, schedule and assign employees in positions within the school system;

I. To change existing methods or facilities;

J. To contract out for goods or services.

. . .

ARTICLE XIX
Entire Memorandum of Agreement

A. If an article of the Agreement should be held invalid by any tribunal of competent jurisdiction, or if compliance with or form (sic) of any article should be restricted by such tribunal pending determination as to its validity, the remainder of the Agreement shall not be affected thereby and shall remain in full force and effect for the remainder of its term.

In the event that any Article is held invalid or enforcement, or compliance with, has been restrained as set forth above, the parties hereto shall enter into collective bargaining negotiations upon receipt of written notice requesting negotiations by either the Board or the Association, for the purpose of arriving at a mutually satisfactory replacement for such Article. Such negotiations shall be limited solely to the Article involved.

B. This Agreement constitutes the entire Agreement between the parties and no verbal statement shall supercede any of its provisions. Any amendment hereby shall not be binding upon either party unless executed in writing by the parties hereto. The parties further acknowledge, that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals arrived at by the parties after the exercise of that right and opportunity are set forth in the Agreement. Waiver of any future breach of this Agreement by either party shall not constitute a waiver of any future breach of this Agreement. Nothing in this provision, however, shall prevent modification of this Agreement at any time by mutual consent of this (sic) parties.

C. Term: Except as otherwise herein provided, this Agreement will become effective when ratified and shall remain in full force effective through June 30, 1987, and shall renew itself for additional one (1) year periods therafter unless either party pursuant to this article desires to alter or amend this Agreement at the end of the above stated period.

D. Bargaining Procedure:

Step 1: Five (5) months prior to the expiration of this contract, the Association shall present its bargaining requests in writing to the Board.

Step 2: The Board and Association will establish ground rules for negotiations and set a date to exchange proposals no later than thirty (30) days after the regular board meeting in February.

Step 3: Negotiations will commence at a mutually agreeable date.

Signed and effective this 24th day of June, 19 87

FOR THE DISTRICT: FOR THE UNION:

John Tomasich, Supt. /s/ Don A. Marcell /s/

Eugene Wayka /s/	Connie Chevalier /s/
Duane Waukau /s/	Jonathan J. Coutor /s/

In light of the foregoing Findings of Fact, the Examiner makes and issues the following Conclusions of Law

CONCLUSIONS OF LAW

1.

The Menominee Non-Teachers Association is a labor organization within the meaning of Sec. 111.70(1)(h), Wis. Stats.

2.

The Menominee Indian School District is a Municipal Employer within the meaning of Sec. 111.70(1)(j), Wis. Stats.

3.

That by changing its time clock policy and refusing to bargain with the Association upon timely request the District has violated its duty to bargain within the meaning of Section 111.70(3)(a)4 and derivatively, of Sec. 111.70(3)(a)1, Stats.

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

ORDER 1/

IT IS HEREBY ORDERED that the Menominee Indian School District, its officers and agents, shall immediately:

1. Cease and desist from making unilateral changes in mandatory subjects of bargaining without bargaining with the collective bargaining agent.

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 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.

2. Taking the following affirmative action which the Examiner finds will effectuate the purposes of the Act:

(a) Make employes whole for the loss they have incurred as a result of the District's prohibited practice by reimbursing them for wages lost, with interest, 2/ as a result of the altered time clock policy - restoring the grace period, and rescinding all discipline issued pursuant to the altered policy.

(b) Notify all of its employes by posting, in conspicuous places in its place of business where employes are employed, copies of the notice attached hereto and marked "Appendix A." That notice shall be signed by the District Administrator and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by other material.

(c) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of the Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 23rd day of November, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By William C. Houlihan
William C. Houlihan, Examiner

2/ The applicable interest rate is 12 percent per Sec. 814.04(4) Stats.

"APPENDIX A"

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Wisconsin Municipal Employment Relations Act, we hereby notify our employes that:

WE WILL NOT eliminate the grace period for punching in and out without fulfilling our duty to bargain over said change with the exclusive bargaining representative, Menominee Non Teachers Association.

WE WILL reimburse employes for wages lost as a result of the altered time clock policy and will rescind all discipline issued pursuant to said policy.

WE WILL NOT change any matters primarily related to wages, hours, and conditions of employment without fulfilling our duty to bargain with the exclusive bargaining representative, Menominee Non Teachers Association.

Menominee Indian School District

By _____
Roger Klumb, Superintendent

Dated this _____ day of _____, 1987.

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

It is the view of the Complainant that the District has violated Sections 111.70(3)(a)(1) and (4) Stats., by unilaterally changing a mandatory subject of bargaining. Complainant, citing City of Beloit, 74 Wis. 2d 43 (1976), contends that the Employer has a duty to bargain in good faith before changing employes wages, hours or conditions of employment. Failure to do so is alleged to violate Sec. 111.70(3)(a)(4), c.f. City of Wisconsin Dells (Dec. No. 11646, 1973). Installation of a time clock is alleged to be mandatory and bargainable (Village of Sturtevant, Dec. No. 19543-A, 2/83). Complainant cites NLRB law for the same premise.

Complainant contends that by implementing a new time clock policy the District has altered its method of compensating employes by unilaterally terminating the grace period for arrival at and departure from work. As a consequence of the change, employes have lost money they otherwise would have been paid.

Complainant contends that nothing in the Management Rights clause relieves the District of its obligation to bargain. Complainant argues that blanket waivers of bargaining rights must be clear and unmistakable. No such waiver exists.

It is the view of the Respondent that there has been a clear and unmistakable waiver of the right to bargain over the grace period under the terms of the 1984-86 and 1986-87 agreements. Notice was given on January 30, 1986. Article XIX confirms that the written contract constitutes the entire agreement of the parties. Article II preserves all rights to the District not restricted by the terms of the contract. Under the terms of the management rights clause the Board retains control over matters which could be, but are not, in the agreement as well as matters outside the realm of collective bargaining.

The contract is silent on grace time. Nothing bars the District from enforcing the time schedule. Taken together, the District contends that the matter is thus controlled by the Management Rights clause. The District points to Nicolet Jt. Union High School (Dec. No. 12073-C, 10/25) and Village of Greendale (Dec. 13830-A, 13888-A, 3/77) as instances of sustained waiver.

The District believes it retains the unilateral discretion to determine the method by which employes work hours are kept. The District contends that the time clock has not changed the procedure of punching in and out. The only change is that the time clock will automatically deduct 15 minutes if an employe punches in late. The Respondent regards this is a reasonable disciplinary rule for tardiness once the employes were put on notice.

DISCUSSION

The parties to this proceeding do not dispute the general proposition that the installation of a time clock is generally a mandatory subject of bargaining. Complainant has correctly cited the Commission's Village of Sturtevant (Dec. No. 19543-A, 1973) case for this premise. In Sturtevant an Examiner found, and the Commission adopted pro forma, that the installation of a time clock and the implementation of disciplinary policy relating to its use are mandatory subjects of bargaining.

What is really at issue in this proceeding is whether or not the Complainant has waived the right to bargain by virtue of the terms of the contract. The type of waiver claimed by the District is a sort of blanket waiver of otherwise mandatory subjects not addressed by the Agreement. Such waivers are disfavored under the statute and construed narrowly by the Wisconsin Employment Relations Commission. Waivers will not be found absent clear and unambiguous evidence that they were the intended result. The Commission's interpretive policy has been set forth as follows:

> Blanket waivers of the duty to bargain, such as that contained in the foregoing language, generally have been construed restrictively in refusal to bargain cases, and waiver has been found only where an examination into the background shows that the union clearly and unmistakenly waived its interest in the matter. The reason for not giving blanket waivers an expansive construction, as though these were mere contract interpretation cases, it that the origin of the duty to bargain is statutory, not contractual. Further, the backdrop to this legislation "recognizes that there are 3 major interests involved: that of the public" as well as that of employers and employes. Moreover, the legislature has found as a fact that collective bargaining is an essential ingredient for labor peace. Consequently, in view of the public interest and the statutory nature of the duty to bargain, the rule has evolved that waiver of the duty to bargain can be found only on evidence which is clear and unmistakable. (Internal footnotes omitted) 3/

The Commission further explained that such waivers would be given effect only when bargaining history or other circumstances indicated clear intent to waive bargaining. That view has been subsequently reaffirmed in Deerfield Community School District 4/ and State of Wisconsin. 5/

It is that standard against which the arguments and claims put forward by these parties must be measured.

From the record it appears that the installation of the new time clock system had three substantive impacts. The first was that the District had implemented a more accurate system of recording arrival and departure times of employes. The time keeping system has become more precise and more formalized. The second consequence of this system was in the payment for time not worked. Prior to the installation there was a "grace" period in effect at the beginning and end of the workday. Employees were evidently not subject to lost wages if they arrived slightly late or left slightly early. That grace period has been eliminated. The third consequence is that not only has the "grace" period been eliminated, but employes are now subject to a loss of pay for time actually worked through administration of the new time clock policy. An employe who punches in two minutes late, or leaves two minutes early, is subject to the loss of 15 minutes pay. This latter consequence is either a revision of the pay plan or a form of automatic discipline for tardiness.

The Board points to Article II, Management Rights, in support of its retained authority to install the time clocks. The Board's rights in Article II, and elsewhere in the agreement must be read in the context of the general and ongoing obligation of the District to bargain over mandatory subjects, including the installation and administration of a time clock. Taken together, paragraphs D. and I. appear to permit the District to change "existing methods" in favor of "new methods" in the operation of the school system. The language at least arguably permits the installation of a new time clock system as a new method of monitoring and keeping track of employes hours of work. Whether this language satisfies the Commission's waiver test, set forth above, is immaterial in light of the circumstances of this case.

Assuming, arguendo, that the District had the right to install a new time clock system that does not end the analysis. The "grace" period has been eliminated which has as a consequence the conversion of paid time into unpaid time. This is a substantive change which goes beyond simply keeping track of employes hours. The minutes of the January 27 School Board meeting indicate that it was a conscious decision. Additionally, the policy of the District is to dock an employe in 15 minutes increments for tardiness of less than 15 minutes. This policy operates to convert paid working time into unpaid time.

3/ State of Wisconsin, Dec. No. 13017-D, WERC, 5/77.

4/ Dec. No. 17503, WERC 12/79, aff'd Cir. Ct. ____. 1/81.

5/ Dec. No. 19341, WERC 1/82.

Nothing in the record suggests that the Union has waived its right to bargain over these matters. Article II is far too general to constitute a clear and unmistakable waiver. None of the enumerated rights even touch upon the paid/unpaid nature of the time involved. It is the District's burden to point to something specific, and that has not been done here. There is no bargaining history in the record nor any circumstances indicating a Union intent to waive its right to bargain over these matters. To the contrary, the Union made a timely demand to bargain, which was rejected.

The District points to Article XIX, Entire Memorandum of Agreement in support of its claim. That document is dated and effective as of June 24, 1987. Nothing in the record suggests that this language existed in January, 1986 when the incidents giving rise to this complaint arose. Assuming, arguendo, that the Article was in effect in January, 1986, it lacks the explicit waiver provision required by the Wisconsin Employment Relations Commission case law. Paragraph B does contain a zipper clause which might be construed to limit the weight given extrinsic evidence in the construction of provisions within the agreement. The paragraph requires that amendments be in writing to be binding. It further acknowledges that both parties had the unlimited right to make proposals and executed this contract following the exercise of those rights. Critically, however, there is nothing in this clause that says that the parties waive their respective right to bargain over matters which arise during the term of this agreement. This critical substantive omission is precisely what the District claims as its right. Such a right cannot be implied from the foregoing sentence, but must be clearly and unmistakeably set forth if it is to be given effect. The next sentence talks about waiver of a breach of the agreement. This sentence is unapplicable inasmuch as this case involves alleged waiver of the duty to bargain and not a breach of the labor agreement.

Article XIX does not support the position taken by the District.

The District cites Nicolet Jt. Union High School and Village of Greendale as instances of sustained waiver. Neither are applicable. In Nicolet waiver was found to have been created by the following language:

> . . . Agreement contains the entire Agreement between the parties and supercedes all previous agreements, policies and contracts and disposes of all issues subject to negotiation, whether present or not . . . (emphasis added)
>
> . . . there will be no re-opening of negotiations for the period of this Agreement . . . (emphasis added)

The contractual language present in Greendale was:

> The Village and the Union for the life of this Agreement each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated or signed this Agreement. . . (emphasis added)

The very specific waiver language, which formed the basis for the decisions in Nicolet and Greendale is conspicuously absent from this agreement.

There has no waiver by the Association of its right to bargain over the administration and impact of the installation of the new time clock system. By unilaterally installing the time clock, terminating the grace period, and altering the method of payment, the District has refused to bargain with the Association in violation of Section 111.70(3)(a)4 Wis. Stats., and derivatively Sec. 111.70(3)(a)1, Wis. Stats.

REMEDY

The District is ordered to cease and desist from refusing to bargain with the Association with respect to the impact of the new time clock system. The District is further directed to restore the status quo ante by restoring the grace period

which previously existed, by rescinding any discipline issued under the time clock policy change and by restoring any wages lost, with interest calculated at the statutory rate. Additionally the District is directed to post the enclosed notice for a period of 30 days and is directed to advise the Commission of actions taken to comply with this Order.

Dated at Madison, Wisconsin this 23rd day of November, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By William C Houlihan
William C. Houlihan, Examiner