STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AFSCME, LOCAL UNION 2236, AFL-CIO, Complainant, vs. CHIPPEWA COUNTY, Respondent.	Case 136 No. 41165 MP-2145 Decision No. 24521-B

Appearances:

Lawton & Cates, S.C., Attorneys at Law, by Mr. Bruce F. Ehlke, 214 West Mifflin Street, Madison, Wisconsin 53703, appearing on behalf of AFSCME, Local Union 2236, AFL-CIO.

Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Stephen L. Weld and Mr. Joel L. Aberg, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Chippewa County.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Wisconsin Employment Relations Commission having, on May 28, 1987, issued Findings of Fact, Conclusion of Law and Order in the above-entitled matter wherein the Commission dismissed the Union's Sec. 111.70(3)(a)4, Stats., refusal to bargain complaint because the Commission concluded that Chippewa County's decision to sell its Health Care Center primarily related to the formulation and management of public policy and thus was a matter as to which the County did not have a duty to bargain with the Union; and the Union having sought judicial review of the Commission's decision; and Chippewa County Circuit Court Judge Gregory A. Peterson having, on August 1, 1988, issued a Judgement which remanded the matter to the Commission for further consideration and set aside the Commission's Findings of Fact, Conclusion of Law and Order; and following said remand, the Commission having solicited additional written argument from the parties, the last of which was received on November 16, 1988; and the Commission having considered the evidence and arguments of the parties and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That AFSCME Local 2236, AFL-CIO, hereinafter referred to as the Union, is a labor organization which functions as the exclusive bargaining representative of certain employes of Chippewa County employed at the Chippewa County Health Care Center; that Christel Jorgensen is the Union's Area Representative and Phyllis Wolslegel is President of Local 2236 and they have acted on behalf of the Union; and that the Union maintains its offices at 914 West MacArthur Avenue, Eau Claire, Wisconsin 54701.

2. That Chippewa County, hereinafter referred to as the County, is a municipal employer maintaining its offices at the Chippewa County Courthouse, 711 N. Bridge Street, Chippewa Falls, Wisconsin 54729; and that prior to 1986, the County owned and operated the Chippewa County Health Care Center which consisted of three buildings, the Golden Age Home, Wissota Lakeside and a laundry.

3. That the Union and the County had been parties to successive collective bargaining agreements covering the Chippewa County Health Care Center employes, including a 1983-85 agreement which by its terms was in effect from January 1, 1983 through December 31, 1985.

4. That in July, 1985, the Union and the County began negotiations for a successor agreement to that expiring on December 31, 1985; that at the first or second negotiation session, the County informed the Union that the Health Care Center had a substantial operational deficit and that the Union had to make

concessions, otherwise the Health Care Center would be sold or leased; that the County was projecting an operating deficit in excess of 1.1 million dollars for 1985; that the Union proposed certain concessions in bargaining and in return sought job security by proposing that the County not sell or lease the Health Care Center; that on October 16, 1985, the County and the Union reached a tentative agreement which provided for a 20% wage and fringe reduction for employes and an agreement that the County would continue to operate the Health Care Center until January 1, 1987 and would not seek potential buyers or lessors until on or after October 1, 1986; that the tentative agreement was presented to employes on November 4 and 5, 1985; that the membership rejected the tentative agreement on November 6, 1985, apparently on a misunderstanding of the job security provisions; and that thereafter no concessionary bargaining took place.

5. That in July 1985, the County Board's Chairman appointed a seven member Committee to act as a Special Health Care Committee; that on September 27, 1985, the Special Health Care Committee issued a report on the Health Care Center wherein it concluded that a sale or lease of the Health Care Center was feasible; that on September 30, 1985, the County Board passed three resolutions, 63-85, 64-85 and 65-85 related to reducing the operating deficit at the Health Care Center and to seeking concessions in negotiations with the Health Care Center employes; and that on October 8, 1985, the County Board passed resolution 77-85 which authorized the Special Health Care Committee to investigate and negotiate specific proposals for the lease or sale of the Health Care Center.

6. That on November 8, 1985, the Union filed a petition for mediation/arbitration; that the County and the Union met in negotiations thereafter and participated in the mediation/arbitration investigation in an attempt to reach agreement; that such efforts were unsuccessful and final offers were submitted on April 22, 1986; that in its final offer, the Union proposed a "no sale/no lease" clause be included in the successor agreement; and that the County objected to said clause as being permissive and filed a declaratory ruling.

7. That in late 1985 and early 1986, the County sent letters to nursing homes and hospitals in the Chippewa Falls area seeking proposals to lease the Health Care Center; that in February, 1986, the County decided to sell rather than lease its Health Care Center and informed nursing homes and hospitals of that fact; that after receiving certain proposals, the County adopted Resolution 11-86 on March 11, 1986, whereby it approved the sale by land contract of its Health Care Center to Dennis Heyde, the operator of the Eagleton Nursing Home in Bloomer, Wisconsin; and that the land contract was signed on May 15, 1986 and the County gave physical possession of the Health Care Center to Heyde on June 1, 1986, and the County's employes were laid off.

8. That 92% of the Health Care Center's revenue came from medical assistance reimbursement payments; that Heyde structured his offer to purchase based on continuation of said assistance payments; that the land contract runs for a period of forty years in accordance with the offer proposed by Heyde; that the land contract does not contain any convenants or restrictions with respect to the acceptance of residents or any requirement that the same or similar services be continued in operation; and that the residents of the center prior to the sale to Heyde were not displaced but continued as residents after said sale.

9. That the County's sale of the Chippewa County Health Care Center to Dennis Heyde related primarily to the formulation and management of public policy and only secondarily related to wages, hours and conditions of employment.

Upon the basis fo the above and foregoing Findings of Fact, the Commission makes the following

CONCLUSION OF LAW

That as the County's sale of its Health Care Center is primarily related to the formulation and management of public policy and only secondarily related to wages, hours and conditions of employment, the decision to sell is a permissive subject of bargaining within the meaning of Sec. 111.70(1)(a), Stats., and thus the County did not have a duty to bargain over same with the Union, and therefore did not violate Secs. 111.70(3)(a)4 and 1, Stats.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

ORDER 1/

IT IS ORDERED, that the complaint filed herein be, and the same hereby is, dismissed in its entirety.

Given under our hands and seal at the City of Madison, Wisconsin this 11th day of January, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By S H Schoenfeld
S. H. Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties

(Footnote 1/ continued on Page 4)

1/ continued

desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

CHIPPEWA COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

By way of background, we initially think it appropriate to set forth the positions taken by the parties in the initial proceedings for the Commission as well as our response thereto.

BACKGROUND

In its complaint, the Union alleged that the County committed prohibited practices by its sale of the Chippewa County Health Care Center without bargaining to agreement with the Union. The County answered by asserting that the sale was a permissive subject of bargaining and it had no obligation to bargain the decision to sell and it did not commit any prohibited practices.

UNION'S POSITION

The Union contends that the sale of the Health Care Center is a mandatory subject of bargaining because it does not represent a substantial choice among alternative social or political goals. It submits that if the County decided to eliminate the Health Care Center altogether and to sell the building and grounds to be used for other purposes, such a sale would not be a mandatory subject of bargaining because this would involve a reduction in services to residents of the County. It asserts that where there is a continuation of substantially the same service, although in a different mode or by different means, the service has not been reduced and the decision would be primarily related to wages, hours and conditions of employment. The Union points out that in the private sector an employer has an absolute right to go out of business as the employer has the right to give up the benefit of the enterprise and make a fundamental change in the use of capital, however, an employer must bargain the subcontracting of work performed by its employes where that work goes into maintaining an on-going enterprise. The Union submits that there is a difference between the private and public sectors and this difference has been recognized by the Commission and the Wisconsin Supreme Court in the formulation of the "primary relationship" test, i.e. when a decision involves a substantial choice among alternative social or political goals, the decision is not a mandatory subject of bargaining, but where the decision is essentially concerned with wages, hours and conditions of employment, it is a mandatory subject of bargaining.

The Union claims that the County's sale of the Health Care Center does not represent "a substantial choice among alternative social or political goals" and the decision is a mandatory subject of bargaining. It maintains that the County intended that the Health Care Center would continue to provide the same service as it did in the past to County residents. It supports its contention by noting that only health care providers were given notice of the sale and that the sale was by a 40 year land contract to a purchaser who was selected because he could finance the sale only through continuing receipt of medical assistance income, thereby insuring the same services as had been provided by the County. It points out that the location is the same, the residents are the same and the services provided are the same. The only thing that changed was the management of the Center was transferred to a private operator. It argues that the only choice made by the County is the cost savings by the reduction of its employes' wages to the private nursing home industry level. It asserts

that the County has not given up the benefit of the Health Care Center operation and has not reduced services. The Union contends that the arrangement in this case is essentially a subcontracting arrangement and thus a mandatory subject of bargaining.

The Union alleges that the County failed and refused to bargain with the Union on the decision to sell the Health Care Center and thus made a unilateral change in a mandatory subject of bargaining in violation of Secs. 111.70(3)(a)4, and 1, Stats.

COUNTY'S POSITION

The County contends that its decision to sell the Health Care Center was a permissive subject of bargaining and therefore that the County's implementation of the decision was not a prohibited practice.

It submits that the County did in fact sell the Health Care Center. It points out that the evidence establishes an outright sale with no restrictions, conditions or reservations for County involvement in, or control over, any operation conducted by the purchaser of the Health Care Center. It asserts that the County is merely a lien holder and has no propriety interest in the Center.

The County refers to private sector law that an employer is not required to bargain a decision to terminate its business. It submits that while neither the Wisconsin Supreme Court nor the Commission has decided the issue of the decision to sell as a mandatory or permissive subject of bargaining, it asserts that the sale is comparable to economically motivated layoffs by a municipality which is a permissive subject of bargaining.

The County maintains that because the sale was a permissive subject of bargaining, it could unilaterally implement the decision to sell. It notes that it did in fact negotiate with the Union regarding alternatives to the sale and reached a tentative agreement with the Union which was rejected, apparently on a misunderstanding of the terms of the tentative agreement on the part of the Union. The County requests that the complaint be dismissed in its entirety.

DISCUSSION

The parties are in agreement on the legal standards applicable to the instant matter. In 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 Wisconsin Supreme Court formulated the definition of mandatory and permissive subjects of bargaining under Sec. 111.70(1)(a), Stats. A decision of a public employer is a mandatory subject of bargaining if it is primarily related to wages, hours and condtions of employment and is a permissive subject of bargaining if it is primarily related to the formulation or management of public policy. In Unified School District No. 1 of Racine County v. WERC, 81 Wis. 2d 89 (1977), the Court held that the District's decision to subcontract its food service program did not affect its policies and functions but merely substituted private employes for its public employes and the decision was a mandatory subject of bargaining as it primarily related to wages, hours and conditions of employment of employes. In City of Brookfield v. WERC, 87 Wis. 2d 819 (1979), the Court held that the City's decision to lay off employes resulting from budgetary constraints was primarily related to the formulation of public

policy and was a permissive subject of bargaining. The issue presented to us is whether the County's decision to sell the Chippewa County Health Care Center is a permissive or a mandatory subject of bargaining.

The Union admits that if the County had closed down the Health Care Center altogether or decided to raze it or sell the buildings and grounds to a third party for uses other than a health care center, such a decision would be permissive because the level of services would have changed and the rationale in Brookfield would apply. The gist of the Union's argument is that here the level of services to citizens of the County has not changed and will not change because the manner in which the County sought prospective purchasers and structured the sale agreement virtually guaranteed that the purchaser will continue to provide essentially the same services.

With respect to the Union argument regarding the structure of the sales agreement, we see little significance in the fact that the County entered into a land contract. It could have just as easily given a deed and obtained a 40 year mortgage on the same terms. What is significant is that the land contract contains no requirement that the purchaser continue to operate the facility as a health care center or to keep the same or similar residents in the event that the purchaser continues to operate the facility to provide health care. There are no conditions or reservations for the County to have any further involvement in the purchaser's operation of the health care center. The land contract was a straight sale of the Health Care Center with no further involvement of the County in its future operation. Essentially, the County has gotten out of the business of being a health care provider.

With respect to the selection of the purchaser, it seems logical that anyone wishing to sell a certain type of business would advertise that fact to those most likely to be interested and serious purchasers. Contacting those already in that trade would be efficient and most likely to lead to serious offers as well as attract the best price. The fact that a purchaser's willingness to continue to operate the facility as a health care center might appeal to the County and thus be a significant factor in the selection of a purchaser does not constitute a requirement that the purchaser continue to operate a health care center or render the sale a de facto subcontracting arrangement.

The Union contends that no public policy choices are implicated here because after the sale the services to citizens were the same as before but are merely provided by a different entity. We are of the opinion that this argument expands the concept of level of government services beyond that expressed in Brookfield or Racine. Brookfield and Racine involved the level of services provided by or through the municipal employer rather than the more generic question of whether services will be provided to citizens by any entity. Here the concern is the level of County health care services and not the level of health care services available to County residents from any source. The County decided to reduce its health care services and got out of the health care services business entirely. As the Court stated in Brookfield, the decision to reduce the level of services provided by a municipal employer is a policy decision which is left to the elected body of the community citizenry to determine. We think that the decision to sell the Health Care Center was just such a policy decision. The County Board, as elected representatives of the citizens of the County, can

unilaterally determine the level of services that the County will provide. Thus, we conclude under the facts presented in this case that the decision to sell the Health Care Center was a permissive subject of bargaining. Inasmuch as the decision to sell was permissive, the County did not violate Secs. 111.70(1)(a)4 and 1, Stats. For the foregoing reasons, we have dismissed the complaint in its entirety.

Judge Peterson's Judgement remanding this case to us was premised upon the following comments made by the Judge on July 8, 1988 from the bench:

> In my opinion the Commission made an error of law in not applying the primary relation test. I agree with the petitioner's argument that the Commission has elevated the gotten out of the business standard to actually attest in and of itself to establish what, I believe it was the petitioners who argued, to establish a per se rule. I think that is made most clear by what the Commission did in the Manitowoc County case where it showed in the way it applied the Chippewa County decision that it had in essence developed a new test which in many ways supplanted the requirements that the Wisconsin Supreme Court and the Court of Appeals have made clear that the Commission must follow, namely, the balancing test in order to arrive at an appropriate decision about the primary relation.
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> The Commission's decision here is woefully inadequate I think in that it fails to fully identify and develop the various interests involved. It clearly fails to develop how those interests are affected. And it completely fails to balance those interests in deciding the primary relation decision. Its new test is really almost a mechanistic, artificial test that if applied in this case future cases would completely abrogate any kind of reasonable responsibilities or any kind of balancing responsibilities.
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> It would make the Commission nothing more than an automation so that in any case where a municipality has decided to eliminate particular services that in and of itself would establish a permissive subject of bargaining. I don't think that is what the Wisconsin Supreme Court or the Court of Appeals has ever said or ever indicated in any of the decisions cited by the gentlemen in the cases that have been submitted.
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> The Commission even if it looks at the factor of a municipality getting out of a particular business is still required to identify and balance the interests involved for the governmental unit as well as for the employees. As I said earlier, I think the Commission here almost completely failed in its responsibility to do that and for that reason made an error of law and should be reversed.
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> . . .
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> I think it's more appropriate with the Commission with its expertise and its resources to first undergo that balancing act and I'm going to order that the case be remanded for the Commission to apply the balancing test as required by the appellate decisions in this state.

Following the remand, we solicited additional argument from the parties asking them "...to identify as specifically as possible the applicable competing interests and the weight said interest should be given in the application of the balancing test." Understandably, the parties, when accepting this invitation, essentially refined and to some extent repeated the argument they had previously submitted to the Commission.

DISCUSSION:

Judge Peterson's August 1, 1988 Judgement set aside our May 28, 1987 Findings of Fact, Conclusion of Law and Order because, in the Judge's view, our decision failed to demonstrate that we had applied the "primarily related" test to the County's sale of the Health Care Center. While we reach the same result in this decision as was reached in May, 1987, it is our hope that this decision will state the rationale for our result in a manner more consistent with the Judge's view of our obligations.

The Union correctly argues that the employe interests which we must consider when applying the "primarily related" test are substantial. Indeed, the employe interests in maintaining job security and in protecting bargained wages, hours and conditions of employment represent the most basic and thus the strongest of employe interets. However, where we part company with the Union's view of this case is in the identification of the employer interest which is to be balanced against the employe interests.

The Union would have us conclude that the only employer interest is the reduction of labor costs. The Union would have us conclude that because the County hoped that the purchaser would maintain the same services the County had provided and because the purchaser thus far apparently has provided the same services, the County did not make a public policy choice when it sold the Health Care Center. The Union would have us conclude that, in essence, this sale is analytically no different than the subcontracting that occurred in Racine and that the same result should therefore be reached. However, the Union's proposed conclusions recited above are all premised upon the Union's belief that "the fact that the contract does not require the private operator to continue to operate the Health Care Center, or to provide any particular level of services, also is neither here, nor there." We disagree with that belief. In our view, the absence of any legally enforceable requirement that the purchaser provide any health care services establishes that the County made a basic policy choice among "alternative social or political goals" when it sold the Health Care Center. The County concluded through the sale that it would no longer provide such health care services. In our view, the decision of a municipal employer to cease to provide such a service clearly implicates powerful fundamental employer interests.

Given the foregoing, this case presents us with the difficult task of balancing competing employe and employer interests in a factual context in which the strength of those interests could not be greater. The Union asks us to look to Racine for the appropriate result while the County believes Brookfield is more persuasive. Our examination of those two cases satisfies us that when ultimate employe and employer interests compete as they do in this case, the balance is to be struck in the employer's favor.

If this were a subcontracting case, as Racine was, then the competing interests we must balance would be different and our result would track that reached by the Court in Racine. However, this is not a subcontracting case. Unlike Racine, there is no contract obligating the purchaser to provide services to the employer. Indeed, as noted earlier, the purchaser did not assume any legal obligation to provide the services at all. That choice remains the purchasers. The choice the County made was to cease providing the service. In Racine, the employer was continuing to provide the service and had only chosen to pay a subcontractor to provide same.

In the final analysis, we believe the Court's Brookfield decision warrants the result we have reached herein. In Brookfield, the employe job security interests impacted by layoffs were as strong as those implicated herein. Nonetheless, the Court, in a broadly worded decision, concluded:

> We hold that economically motivated layoffs of public employees resulting from budgetary restraints is a matter primarily related to the exercise of municipal powers and responsibilities and the integrity of the political processes of municipal government. The citizens of a community have a vital interest in the continued fiscally responsible operation of its municipal services. Thus, it is imperative that we strike a balance between public employees' bargaining rights and protecting the public health and safety of our citizens within the framework of the political and legislative process.

. . .

> Ch. 62, Stats., requires that the city of Brookfield and other municipalities possess the power to decide when a layoff is necessary in order to secure the policy objectives of the community's citizenry as spoken through the actions of its duly elected representatives. The residents of Brookfield through their elected representatives on the city council requested city budget reductions. Unquestionably, fewer firefighters will reduce the level and quality of services provided, but this is a policy decision by a community favoring a lower municipal tax base. Ch. 62 does not expressly prohibit the topic of economically motivated layoffs from becoming a permissive subject of collective bargaining, but the decision to discuss the topic at a bargaining table is a choice to be made by the electorate as expressed through its designated representatives and department heads. 87 Wis.2d at 830-832.

As the Court was in Brookfield, we are confronted with the economically motivated layoff of public employes due to budgetary restraints; as the Court was in Brookfield, we are confronted with elected representatives of the citizenry who have concluded that a level of service provided by the employer is to be reduced or, more accurately in this case, eliminated. As the Court did in Brookfield, we conclude that the balancing between employe and employer interests in such circumstances yields a conclusion that a municipal employer's economically motivated service choice decision is primarily related to the formulation and managment of public policy even when it produces the loss of jobs for public employes. While the Union correctly notes that Brookfield did involve the exercise of a city's powers under Chapter 62, we see nothing in the Court's decision or in its subsequent duty to bargain decisions which persuades us that the Court would have reached a different result had a county been the employer therein.

Therefore, we have concluded that as the County was not obligated to bargain with the Union over the sale decision, the County did not violate Sec. 111.70(3)(a)4, Stats.

Dated at Madison, Wisconsin this 11th day of January, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
S. H. Schoenfeld, Chairman

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Herman Torosian, Commissioner

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A. Henry Hempe, Commissioner