

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of :
  
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WISCONSIN COUNCIL 40, AFSCME, AFL-CIO :
  
: Case 13
  
Involving Certain Employes of : No. 46190 ME-529
  
: Decision No. 24604-C
  
WISCONSIN DELLS SCHOOL DISTRICT :
  
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Appearances:

- Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53719.
- Mr. Steven Holzhausen, Membership Consultant, Wisconsin Association of School Boards, Inc., 2005 Highland Avenue, Eau Claire, Wisconsin 54701.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER CLARIFYING BARGAINING UNIT

Wisconsin Council 40, AFSCME, AFL-CIO, having, on August 29, 1991, filed a petition requesting the Wisconsin Employment Relations Commission to clarify an existing certified bargaining unit of certain employes of the School District of Wisconsin Dells to determine whether all substitute bus drivers should be included in said unit. Hearing was held in Wisconsin Dells, Wisconsin on January 9 and March 31, 1992. A stenographic transcript was made and received on April 14, 1992. The parties, after receiving a postponement, completed their briefing schedule on June 1, 1992. The Commission, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. The School District of Wisconsin Dells, herein the District, is a municipal employer and has its offices at 811 County Highway H, Wisconsin Dells, Wisconsin 53965.
2. Wisconsin Council 40, AFSCME, AFL-CIO, herein the Union, is a labor organization and has its offices at 5 Odana Court, Madison, Wisconsin 53719.
3. On August 12, 1987, following an election conducted by the Wisconsin Employment Relations Commission, the Commission certified the Union as the exclusive bargaining representative of certain District employes in the following bargaining unit:

All regular full-time and regular part-time employes of the School District of Wisconsin Dells, excluding supervisory, managerial, confidential, and professional

employees.

The position of substitute bus driver existed at the time the election was held and the unit was certified. None of the substitute bus drivers at the time were included on the stipulated list of eligible voters in the election which led to the Union's certification.

4. In bargaining over the initial collective bargaining agreement, the Union proposed the following recognition language, which the District rejected:

Article 1 - Recognition

1.01 The Employer hereby recognizes the Union as the sole and exclusive bargaining agent for all regular full-time and all regular part-time employees of the Wisconsin Dells School District, excluding managerial employees, professional employees, supervisory employees, confidential employees, seasonal employees, and employees who work fifteen (15) hours per week or less during either the school year or the calendar year, for the purpose of collective bargaining on matters concerning wages, hours, and conditions of employment, as certified by the Wisconsin Employment Relations Commission under date of August, 1987, Decision No. 2464-A.

5. The initial agreement between the parties contained the following provisions:

Article 1 - Recognition

1.01 The Board hereby recognizes the Union as the exclusive collective bargaining agent of all employees of the School District of Wisconsin Dells, consisting of all regular full-time and regular part-time employees, but excluding supervisory employees, confidential employees, managerial employees, and professional employees, as certified by the Wisconsin Employment Relations Commission on the 12th of August, 1987, Decision No. 2464-B.

Article 8 - Employee Definitions

8.01 Regular Full-Time Employee: A regular full-time employee is hereby defined as an employee who works nine (9) or more months per year at six (6) or more hours per day.

8.02 Regular Part-Time Employees: A regular part-time employee is hereby defined as an employee who works nine (9) months at less than six (6) hours per day.

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Appendix B - Bus Driver Salary Schedule

Additional Provisions

12. Any driver who transfers from a regular route to substitute status and then returns to a regular route, will retain all seniority earned while on a regular route, however, no additional seniority shall be earned by the employee while on substitute status.

The most recent agreement contains no changes in these contract provisions.

6. Substitute bus drivers have never been included in the bargaining unit set forth in Finding of Fact 3.

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

CONCLUSION OF LAW

1. The District and the Union have agreed to exclude the substitute bus drivers from the bargaining unit represented by the Union and it is appropriate for the Commission to honor that agreement.

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

ORDER 1/

1. The substitute bus drivers shall continue to be excluded from the bargaining unit set forth in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin this 16th day of October, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By \_\_\_\_\_  
A. Henry Hempe, Chairperson

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Herman Torosian, Commissioner

(See footnote 1/ on pages 4 and 5)

- 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 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.

(Footnote 1/ continued on page 5)

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(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.

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(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.

WISCONSIN DELLS SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSION OF LAW AND ORDER  
CLARIFYING BARGAINING UNIT

POSITIONS OF THE PARTIES

District

It is the position of the District that the substitute bus drivers should not be included in the bargaining unit for three reasons. The first and most important reason is that the parties agreed to exclude substitute bus drivers from the bargaining unit in 1987. Noting that the Commission has a longstanding policy where it will not allow a party to such an agreement to pursue alteration of the bargaining units scope through a unit clarification petition with four limited exceptions, the District contends that the Union has not met any of the exceptions.

The second reason for denying the requested clarification is related to the first reason. The parties have agreed, the District asserts, through collective bargaining, on a definition of regular full-time and regular part-time employes. The substitute bus drivers under normal circumstances do not meet this definition and therefore should be excluded.

Finally, the District maintains that the substitute bus drivers do not have a community of interest with the regular drivers.

With respect to the first argument, the District relies upon the Stipulation for Election letter submitted during the original election case along with an agreed-upon list of employes eligible to vote in the 1987 election. A comparison of this list to a list of the substitute drivers establishes that none of the 1987-88 substitute bus drivers appeared on the stipulated voter eligibility list. This, on its face, the District contends, is a clear and convincing evidence that the substitute bus drivers were never included in the original, mutually agreed-upon bargaining unit.

Bargaining history, the District avers, also supports this contention because the Union's initial proposed recognition clause that employes working 15 or less hours per week were to be excluded was rejected and substituted with language mirroring the stipulation for election and certification. Pointing to the seniority language in the agreement which refers to drivers who go from regular to substitute status and the effect on their seniority, the District submits that the only conclusion to be reached is that substitute drivers are and were never part of the bargaining unit. The District also notes that the Union agreed to a successor contract to the initial agreement without ever mentioning the issue of substitute bus drivers at the bargaining table.

In response to anticipated Union arguments that there has been a change in circumstances which materially affects the disputed positions bargaining

unit status, the District stresses that circumstances involving the employment of substitute bus drivers have not changed since the time the appropriate bargaining unit was determined. Moreover, the heavy reliance upon substitute drivers in more recent years was a result of extended medical leaves taken by the District's regular drivers and difficulties in hiring regular full-time drivers that could not be anticipated. While readily admitting that there has been increased utilization of substitutes over the past two years, the District maintains that there is nothing to indicate that this situation is permanent.

The District disputes any contentions on the Union's part that the substitute bus drivers are regular, part-time employes. It believes that times when substitutes drive every day during a particular period are more the exception than the rule. The District also argues that substitute bus drivers do not meet the contractual definition of regular part-time employes.

While conceding that substitute bus drivers meet most of the criteria for possessing a community of interest with the regular bus drivers, the District alleges that there are a number of important differences. Substitutes are available only when it suits their personal schedules. The majority of substitutes have other employment. They may place a greater value on flexibility. Finally, because of their small number, they may not be able to effect economic decisions of the bargaining unit as a whole.

For all of these reasons, the District requests that the petition be dismissed.

#### Union

The Union concedes that the Commission will consider the merits of the petitions to clarify bargaining units only under certain circumstances. Citing Manitowoc County 2/, the Union acknowledges that where the parties have agreed to include or exclude certain positions from a bargaining unit, the Commission will honor such agreements and will not allow a party to the agreement to pursue alteration of the bargaining unit's scope through a unit clarification petition except under very limited circumstances.

The Union argues that there is no record evidence to prove that there was ever any agreement by the parties to exclude the substitute drivers. The Union maintains that there is nothing in the record to indicate whether substitute drivers did or did not vote in the election nor is there any evidence to indicate that there was any discussion at the time of the election that substitute drivers were not to be part of the bargaining unit.

According to the Union, the burden of proof that an agreement to exclude the substitute drivers exists is on the District and the Commission cannot infer an agreement to exclude the substitutes in the absence of one shred of evidence of such an agreement. Citing other Commission cases on this point,

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2/ Manitowoc County, Dec. No. 7116-C (WERC, 11/91).

the Union stresses that such agreements to exclude must be express and specifically applicable to the disputed positions. It claims that no testimony was presented to establish that the bargaining unit status of the substitute drivers was ever discussed by the parties and that they were excluded.

Pointing to the contract language defining regular full-time and regular part-time employes, the Union claims that substitute drivers plainly fall within the "Regular Part-Time Employee" definition contained in the agreement.

In evaluating the bargaining history evidence introduced by the District, the Union maintains that had the parties ultimately agreed to the Union proposal to exclude employes working 15 hours per week or less, the District's objections to the instant petition would be meritorious. Such was not the case, the Union submits. Because there is no evidence that the parties voluntarily excluded the substitute drivers from the bargaining unit when it was defined, Manitowoc cannot serve as a barrier to consideration of the merits of the petition.

Any review of the standards which the Commission applies to discern whether a community of interest exists between the substitute drivers and the existing bargaining unit must end in the conclusion that said substitutes clearly share a community of interest with the regular bus drivers. The substitutes perform the same duties under the same supervision for the same rate of pay. They do not, the Union admits, receive the same fringe benefits.

Regular drivers are hired from the substitutes who prove capable. Moreover, some regular drivers have opted to return to substitute status.

While conceding that the substitutes are on-call, the Union stresses that they are neither temporary nor casual employes. Accordingly, the Union requests that the substitute bus drivers be included in the current bargaining unit.

#### DISCUSSION

Both parties correctly cite the line of Commission cases which has held that where the parties have agreed to include or exclude certain positions from a collective bargaining unit, the Commission will honor that agreement and will not allow a party to the agreement to pursue alteration of the bargaining unit's scope through a unit clarification petition unless:

- 1.The position(s) in dispute did not exist at the time of the agreement; or
- 2.The position(s) in dispute were voluntarily included or excluded from the unit because the parties agreed that the position(s) were or were not supervisory, confidential, managerial or executive (the so-called "statutory exemptions"); or
- 3.The position(s) in dispute have been impacted by changed



circumstances which materially affect their unit status, or

4. The existing unit is repugnant to the Act. 3/

When determining whether an agreement to include or exclude positions from a unit exists, we examine all relevant evidence including any agreement by the parties to a bargaining unit description, any agreement by the parties to the eligibility list utilized in the election; the historical inclusion or exclusion of the position from the unit, and pertinent bargaining proposals or contract provisions. Thus, an agreement to include or exclude positions need not be explicitly stated by the parties and can be established by circumstantial evidence. However, unless we satisfied that the agreement was clearly understood by all parties, we will not honor same 4/ and will proceed to meet our statutory obligations under Sec. 111.70(4)(d)2.a., Stats. to determine "the appropriate bargaining unit for the purpose of collective bargaining."

Here, the exclusion of the substitute bus drivers from the voting eligibility list, the exclusion of the substitute bus drivers from the unit since its inception in 1987, and provision Appendix B-12 from the parties' contract combine to persuade us that the parties clearly intend to exclude substitute drivers from the unit. Thus, we will honor that agreement and dismiss the unit clarification petition.

Dated at Madison, Wisconsin this 16th day of October, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By \_\_\_\_\_

A. Henry Hempe, Chairperson

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Herman Torosian, Commissioner

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William K. Strycker, Commissioner

3/ Manitowoc County, supra. Edgerton School District, Dec. No. 18856-A (WERC, 5/90); City of Sheboygan, Dec. No. 7378-A (WERC, 5/89); see generally City of Cudahy, Dec. No. 12997 (WERC, 9/74); Milwaukee Board of School Directors, Dec. No. 16405-C (WERC, 1/76); West Allis - West Milwaukee Schools, Dec. No. 16405 (WERC, 1/89).

4/ DePere School District, Dec. No. 25712-A (WERC, 10/90).

