STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS, Complainant, vs. SCHOOL DISTRICT OF TURTLE LAKE, Respondent.	Case 29 No. 38623 MP-1956 Decision No. 24686-A

Appearances:

Mr. Michael Burke, Executive Director, Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin 54868, appearing on behalf of the Complainant.

Mulcahy & Wherry, S.C., by Mr. Joel Aberg, 21 South Barstow, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Northwest United Educators having, on April 2, 1987, filed a complaint with the Wisconsin Employment Relations Commission alleging that Turtle Lake School District had committed prohibited practices by violating Sec. 111.70(3)(a)4 and 5 Stats. when the Turtle Lake School District unilaterally implemented a school calendar; and the Commission having, on July 17, 1987, appointed Edmond J. Bielarczyk, Jr., a member of the Commission's staff, to act as Examiner, and to make and issue Findings of Fact, Conclusions of Law and Order; and a hearing in the matter having been scheduled for August 11, 1987 and rescheduled and held on September 9, 1987 in Turtle Lake, Wisconsin; and a stenographic transcript of the proceedings having been prepared and received by the Examiner on October 2, 1987; and the Examiner having received post-hearing arguments and reply briefs by December 17, 1987; and the Examiner having considered the evidence and arguments makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Northwest United Educators, hereinafter referred to as the Complainant, is a labor organization which maintains its offices at 16 West John Street, Rice Lake, Wisconsin.

2. That Turtle Lake School District, hereinafter referred to as the District, is a municipal employer which maintains its offices at Route 1, Turtle Lake, Wisconsin.

3. That the Complainant and Respondent have been signatories to a series of collective bargaining agreements since the 1979-1980 school year; that commencing with the 1978-1980 collective bargaining agreement and up to and including the 1983-1984 collective bargaining agreement the Monday, Tuesday, and Wednesday preceding Thanksgiving were not scheduled work days; that commencing with the 1980-1981 collective bargaining agreement the following pertinent language was included and maintained unchanged in the parties successor collective bargaining agreements up to and including the parties 1986-1987 collective bargaining agreements:

. . .

IV. SCHOOL CALENDAR

A. In a school year, there shall be 180 student contact days, 2 holidays and 5 parent teacher conference and/or inservice days for a total contract period of 187 days.

. . .

D. Negotiations for any succeeding year's school calendar shall commence on or before February 1st of the preceding school year. The school calendar shall annually be proposed by the Administration and referred to NUE prior to January 15 for review and counter-proposal. In the event the parties, bargaining in good faith with an intent to reach agreement, cannot reach agreement on a school calendar by the end of the preceding school year, it is understood that the Board shall have the right to establish the calendar for the first quarter of the succeeding school year. Nothing herein shall be construed as granting to the Board the right to unilaterally alter the total number of contracted days nor the allocation of the contracted days as between parent-teacher conference/inservice days and student contact days.

. . .

and, that the 1986-1987 collective bargaining agreement does not provide for final and binding arbitration of grievances.

4. That during calendar year 1984 the Respondent, in accord with Article IV, School Calendar, paragraph D., submitted to the Complainant a proposed calendar for the 1984-1985 school year; that said proposal included the Monday, Tuesday and Wednesday prior to Thanksgiving as scheduled work days; that as of June 12, 1984 the parties had not reached agreement on a school calendar and the Respondent, in accord with Article IV, School Calendar, paragraph D., established a calendar for the first nine (9) weeks (or first quarter) of the 1984-1985 school year; that the end of their 1984-1985 first quarter was October 30, 1984; that as of October 22, 1984 the parties had not reached agreement on the 1984-1985 collective bargaining agreement; that on October 22, 1984 the Respondent was aware that employes represented by the Complainant had voted twenty seven (27) to thirteen (13) to have the Monday, Tuesday and Wednesday preceding Thanksgiving scheduled as work days; that on October 22, 1984 the Respondent unilaterally implemented a school calendar for the remainder of the 1984-1985 school year; that the Complainant did not initiate any action disputing the Respondent's actions in unilaterally implementing a school calendar for the remainder of the 1984-1985 school year; and, that on January 7, 1985 the parties reached agreement on the 1984-1985 collective bargaining agreement.

5. That in January, 1985 the Respondent, in accord with said Article IV, submitted a school calendar proposal to the Complainant; that as of June 24, 1985 the parties had not agreed upon a calendar for the 1985-1986 school year; that on June 24, 1985 the Respondent adopted and implemented a school calendar for the first quarter of the 1985-1986 school year; that the first quarter of said 1985-1986 school year ended on October 31, 1985; that on October 28, 1985 the Respondent unilaterally implemented a school calendar for the remainder of the 1985-1986 school year; that said calendar did not schedule the Monday, Tuesday and Wednesday prior to Thanksgiving as workdays; that the Complainant did not initiate any action disputing Respondent's actions in unilaterally implementing a school calendar for the remainder of the 1985-1986 school year; that the parties were deadlocked in negotiations over a 1985-1986 collective bargaining agreement and ultimately submitted final offers and proceeded to mediation/arbitration over the 1985-1986 collective bargaining agreement; that on October 13, 1986 Arbitrator John J. Flagler issued an arbitration award selecting the Complainant's final offer to be included in the 1985-1986 collective bargaining agreement 1/; that school calendar was not an issue in dispute in said final offers; that on October 27, 1986 the Complainant ratified the 1985-1986 collective bargaining agreement; that on November 3, 1986 the Respondent ratified the 1985-1986 collective bargaining agreement; that the 1985-1986 school calendar was as follows:

See Appendix A attached.

1/ Turtle Lake School District, Dec. No. 23275-A, (Flagler, 10/86).

6. That during January, 1986, the Respondent submitted to the Complainant a school calendar proposal for the 1986-1987 school year; that said proposal scheduled the Monday, Tuesday and Wednesday prior to Thanksgiving as work days; that as of June 23, 1986 the parties had not agreed upon a calendar for the 1986-1987 school year; that on June 23, 1986 the Respondent implemented a calendar for the first quarter of the 1986-1987 school year; that said first quarter ended on October 30, 1986; that on October 27, 1986 the Respondent unilaterally implemented a school calendar for the remainder of the 1986-1987 school year; that said calendar scheduled the Monday, Tuesday and Wednesday prior to Thanksgiving as workdays; that on November 4, 1986 the Complainant and Respondent met and agreed upon all items to be included in the 1986-1987 collective bargaining agreement except for school calendar; that the school calendar unilaterally implemented by the Respondent maintained the same number of inservice days, student contact days and contract days; and that the 1986-1987 school calendar was as follows:

See Appendix B Attached

7. That on April 2, 1987 the Complainant filed the instant complaint alleging the Respondent's actions in unilaterally implementing a school calendar for the 1986-1987 school year, which scheduled the Monday, Tuesday and Wednesday prior to Thanksgiving as workdays violated Sec. 111.70(3)(a)4, Stats.; that at the hearing in the instant matter the Complainant amended its complaint to allege that Respondent's actions also violated Sec. 111.70(3)(a)5; that the Complainant asserts that the maintenance of the status quo during the hiatus following the expiration of the collective bargaining agreement required the Respondent to not schedule the Monday, Tuesday and Wednesday prior to Thanksgiving as work days; that the Respondent had no basis of necessity when it unilaterally scheduled said work days; that the Complainant did not waive its right to object to the Respondent's actions; and, that the Respondent by unilaterally establishing the calendar for the entire 1986-1987 school year violated Article IV, School Calendar, Section D of the collective bargaining agreement.

8. That the Respondent contends that it acted appropriately out of necessity and pursuant to the expired collective bargaining agreements status quo when it established the last three quarters of the 1986-1987 school year; that the Respondent contends the 1984-1985 collective bargaining is the contractual status quo as no other succeeding collective bargaining agreement was in place when the Respondent was required to enact a calendar on October 27, 1986; that as the Complainant failed to apply for final and binding arbitration, the Complainant waived its right to complain about the 1986-1987 calendar; and, that as the collective bargaining agreement is silent concerning prohibiting the Respondent from setting the remainder of the calendar if there is no agreement the Respondent did not violate said Article IV or any other provision of the cofllective bargaining agreement.

9. That on June 23, 1986 when Respondent unilaterally implemented a school calendar for the first quarter of the 1986-1987 school year the Respondent had bargained in good faith and said action was in accord with Article IV, Section D of the parties' collective bargaining agreement.

10. That the Respondent does not dispute that it was necessary for the Complainant to establish a school calendar for the remainder of the 1986-1987 school year; that Respondent's original proposal on school calendar for the 1986-1987 school year scheduled August 18, 1986 as the first date of the 1986-1987 school year; that the first quarter calendar adopted by the Respondent on June 23, 1986 established August 25, 1986 as the first date of the 1986-1987 school year; that on November 4, 1986 Respondent's District Administrator Douglas Hendrickson informed the Complainant's contract negotiations team that Complainant's calendar proposal was unacceptable because to do so would require setting back the clock on the start of the 1986-1987 school year; and that there is no evidence the Complainant ever modified its original proposal concerning school calendar.

11. That at the November 4, 1986 negotiations meeting Complainant's bargaining representative Steven Eickman informed the Respondent that the Complainant would not seek interest arbitration as a procedure for resolving the disputed calendar issue; that Hendrickson testified at the hearing in the instant matter that as of November 4, 1986 it would have been possible to agree to not schedule the Monday, Tuesday and Wednesday prior to Thanksgiving as workdays; that after November 4, 1986 the Complainant did not seek any meetings with the

Respondent to discuss school calendar; and, that the Complainant did not seek to use any procedures under Sec. 111.70 Stats. to resolve the school calendar issue.

12. That Article IV, Section D of the 1985-1986 collective bargaining agreement grants the Respondent the unilateral right to establish the school calendar for the first quarter of the succeeding school year; that Article IV, Section D of the 1985-1986 collective bargaining agreement specifically mandates that the Respondent maintain the one hundred and eight-seven (187) contract days when it establishes the first quarter of a succeeding school year's calendar; that Article IV, Section D is silent concerning the maintenance of Thanksgiving vacation days; and, that the calendar unilaterally implemented by the Respondent maintained one hundred and eighty-seven (187) contract days.

13. That the Respondent on October 27, 1986 had a business necessity for unilaterally estblishing a school calendar for the remainder of the 1986-1987 school year; that the Respondent had in the past shared a teacher with the School District of Cumberland and there were a total of twenty-seven (27) different days in their respective school calendars; that at the commencement of the 1986-1987 school year Respondent shared three (3) teachers with the School District of Clayton and Clear Lake; that at the commencement of the 1986-1987 school year the Respondent shared students in shared educational programs with the School Districts of Rice Lake, Cumberland, Barron, Prairie Farm, Cameron and Chetek; that all of said eight (8) school districts scheduled school on the Monday, Tuesday and Wednesday prior to Thanksgiving day in calendar year 1986; and, that the Respondent had a valid business reason for scheduling school on the Monday, Tuesday and Wednesday prior to Thanksgiving day in calendar year 1986.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and renders the following

CONCLUSIONS OF LAW

1. That on October 13, 1986 when Arbitrator John J. Flagler issued an interest arbitration award selecting Complainant's final offer, the 1985-1986 collective bargaining agreement came into existence.

2. That the 1985-1986 collective bargaining agreement between the Complainant and the Respondent does not provide for final and binding arbitration of grievances.

3. That the status quo which existed between the parties upon expiration of the 1985-1986 collective bargaining included a school calendar of one hundred and eighty-seven (187) contract days; and, that the status quo which existed between the parties upon expiration of the 1985-1986 collective bargaining did not include a five (5) day, Monday through Friday, Thanksgiving vacation.

4. That when Respondent unilaterally implemented a school calendar for the remainder of the 1986-1987 school year which did not contain a five (5) day, Monday through Friday, Thanksgiving vacation Respondent did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)4 or 5, Stats.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and renders the following

ORDER 2/

That the instant complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 15th day of February, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Edmond J. Bielarczyk, Jr.
Edmond J. Bielarczyk, Jr., Examiner

(See Footnote 2 on Page 5)

2/ 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.

SCHOOL DISTRICT OF TURTLE LAKE
Turtle Lake, Wisconsin 54889
1985-86 Calendar

Adopted 1st 9 weeks
6-24-85

Adopted balance of year
10-28-85

APPENDIX A

1985

	M	T	W	T	F	
Aug.						
	(26)	(27)	28	29	30	3
Sept.	/2/	3	4	5	6	7
	9	10	11	12	13	12
	16	17	18	19	20	17
	23	24	25	26	27	22
	30					23
Oct.		1	2	3	4	27
	7	8	9	10	(11)	31
	14	15	16	17	18	36
	21	22	23	24	25	41
	28	29	30	31*		45
Nov.					1	46
	4	5	6°	7	8	51
	11	12	13	14	15 =	56
	18	19	20	21	22	60
	X	X	X	X	X	
Dec.	2	3	4	5	6	65
	9	10	11	12	13	70
	16	17	18	19	20	75
	X	X	X	X	X	

1986

	M	T	W	T	F	
Jan.	X	X	X	2	3	77
	6	7	8	9	10	82
	13	14	15	16	17	87
	20	21	22*	23	24	90
	(27)	28	29	30	31	6
Feb.	3	4	5	6	7	11
	10	11	12	13	14	16
	17	18	19	20	X	20
	24	25	26	27	28	25
March	3	4	5	6	7	30
	10	11	12	13	14	35
	17	18	19	20	21	40
	24	25	26*	X	X	43
	X					
April		X	2	3°	4	46
	7	8	9	10	11	51
	14	15	16	17	18	56
	21	22	23	24	25	61
	28	29	30			64
May				1	2	66
	5	6	7	8	9	71
	12	13	14	15	16	76
	19	20	21	22	23	81
	/26/	27	28	29	30°	85
June	2	3	4	5	6*	90

Aug. 26-27	Inservice
Aug. 28	Students begin
Sept. 2	Labor Day
Oct. 11	Inservice
Oct. 31	End of first quarter
Nov. 6	Report cards due office-1 P.M.
Nov. 15	P-T Conference
Nov. 25-Dec. 1	Thanksgiving Vacation
Dec. 20	Last day before Christmas Vac.
Jan. 2	First day after Christmas Vac.
Jan. 22	End of first semester
Jan. 27	Report cards due office-8:30 A.M.
Jan. 27	Inservice
Feb. 21	Recess
March 26	End of third quarter
April 3	Report cards due office-8:30 A.M.

1st snow make up day	April 1
2nd snow make up day	March 27
3rd snow make up day	March 31

March 26	Last day before Spring Vac.
April 2	First day after Spring Vac.
June 1	Commencement-2:00 P.M.
June 6	End of second semester

*End of nine weeks & semester
() In Service
= Parent Teacher Conference
// Legal Holiday
o Report cards due in office
X No School

Days actually taught	180
Inservice	4
P-T Conference	1
Legal Holiday	2
	187

Additional make up days if needed designated by Board

SCHOOL DISTRICT OF TURTLE LAKE
Turtle Lake, Wisconsin 54889

1986-87 Calendar

Proposed 1-13-86
Adopted 1st qtr. 6-23-86
Adopted Balance of Yr. 10-27-86

APPENDIX B

1986	M	T	W	T	F	
ug	(25)	(26)	27	28	29	3
Sept.	/1/	2	3	4	5	7
	8	9	10	11	12	12
	15	16	17	18	19	17
	22	23	24	25	26	22
	29	30				24
Oct.			1	2	3	27
	6	7	8	9	(10)	31
	13	14	15	16	17	36
	20	21	22	23	24	41
	27	28	29	30*	31	46
Nov.	3	4°	5	6	7	51
	10	11	12	13	14=	55
	17	18	19	20	21	60
	24	25	26	X	X	63
Dec.	1	2	3	4	5	68
	8	9	10	11	12	73
	15	16	17	18	19	78
	22	23	X	X	X	80

1987	M	T	W	T	F	
Jan.	5	6	7	8	9	85
	12	13	14	15	16*	90
	19	20	21°	22	23	5
	26	27	28	29	30	10
Feb.	2	3	4	5	6	15
	9	10	11	12	13	20
	(16)	17	18	19	20	24
	23	24	25	26	27	29
March	2	3	4	5	6	34
	9	10	11	12	13	39
	16	17	18	19	20	44
	23*	24	25	26	27	49
	30	31				51
April			1	2	3	54
	6	7	8	9	10	59
	13	14	15	X	X	62
	X	21	22	23	24	66
	27	28	29	30		70
May					1	71
	4	5	6	7	8	76
	11	12	13	14	15	81
	18	19	20	21	22	86
	/25/	26	27	28	29	90

Aug 25 - 26	Inservice
Aug. 27	Students begin
Sept. 1	Labor Day
Oct. 10	Inservice
Oct. 30	End of first quarter
Nov. 4	Report cards due office-4 P.M.
Nov. 14	P-T Conference
Nov. 27-28	Thanksgiving Vacation
Dec 23	Last day before Christmas Vac.
Jan 5	First day after Christmas Vac.
Jan 16	End of first semester
Jan 21	Report cards due office-8:30 A.M.
Feb. 16	Inservice
March 23	End of third quarter
March 27	Report cards due office-8:30 A.M.

April 15	Last day before Spring Vac.
April 21	First day after Spring Vac.
May 24	Commencement-2:00 P.M.
May 29	End of second semester

1st snow make up day	April 16
2nd snow make up day	April 20
3rd snow make up day	June 1

*End of nine weeks & semester
( ) In Service
= Parent Teacher Conference
/ / Legal Holiday
° Report cards due in office
X No School

Days actually taught	180
Inservice	4
P-T Conference	1
Legal Holiday	2
	187

Additional make up days if needed designated by Board

TURTLE LAKE SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

BACKGROUND

The Complainant filed the instant complaint on April 2, 1987. Therein the Complainant alleged that the Respondent's actions of unilaterally implementing a school calendar on October 27, 1986 for the remainder of the 1986-1987 school year, which scheduled the Monday, Tuesday and Wednesday prior to Thanksgiving as workdays violated Sec. 111.70(3)(a), Stats. The first quarter or first nine (9) weeks of the school year had been unilaterally established by the Respondent on June 23, 1986. The Complainant does not contend that the establishing of the school's calendar's first quarter was a prohibited practice. At the hearing in the instant complaint the Complainant amended its complaint to allege that Respondent's action also violated the parties' collective bargaining agreement. The Respondent did not dispute and the record demonstrates that the parties do not have a grievance procedure which culminates in final and binding arbitration of grievances. Where final and binding arbitration of grievances is not provided for in a collective bargaining agreement, the Commission will exercise its jurisdiction under Sec. 111.70(3)(a)5 Stats., and determine the grievance on its merits. 3/ The record demonstrates that a grievance was never filed by the Complainant alleging the Respondent's actions violated the collective bargaining agreement. However, the Respondent did not raise a procedural defense and both parties presented testimony, evidence and arguments concerning whether the Respondent breached the collective bargaining agreement. Both parties have acknowledged that school calendar is a mandatory subject of bargaining.

POSITION OF THE COMPLAINANT

The Complainant points out that the Commission has previously established that an employer must, pending the discharge of its duty to bargain, maintain the status quo on the terms of the expired agreement which govern mandatory subjects of bargaining. 4/ The Complainant argues that the Respondent was therefore required to maintain the status quo with respect to school calendar during the hiatus period. The Complainant submits that when the Respondent determined to schedule school on the Monday, Tuesday and Wednesday proceeding Thanksgiving the Respondent failed to maintain the status quo.

In support of its position the Respondent points to School District of Plum City. 5/ The Respondent asserts that maintenance of status quo is dependent upon the continuation of the wages, hours and conditions of employment which existed in the parties' 1985-1986 collective bargaining agreement. Therein, school was not scheduled during Thanksgiving week. Here the Respondent points out, since the 1979-1980 school year only once has school been held on the Monday, Tuesday and Wednesday preceeding Thanksgiving. The Respondent argues that the single exception occurred during the 1984-1985 school year, was based upon the teaching staff's vote in favor of such a schedule and was agreeable to the Complainant because the parties mutually agreed to return to no school during Thanksgiving week during the 1985-1986 school year. Here, the Complainant asserts that the 1985-1986 collective bargaining agreement establishes the status quo as being no school during Thanksgiving week.

3/ Turtle Lake School District, Dec. No. 24687-A (Bielarczyk, 12/87), Superior Board of Education, Dec. No. 11206-A (WERC, 10/72); Melrose-Mindoro Jt. School District No. 1, Dec. No. 11627 (WERC, 2/73).

4/ Greenfield School District No. 6, Dec. No. 14026-B, (WERC, 11/77).

5/ Decision No. 22264-B, (WERC, 6/87).

The Complainant points to the Commission's decision in City of Brookfield 6/ and argues the Respondent's unilateral change in a mandatory subject of bargaining constituted a per se refusal to bargain. The Complainant also asserts that there is no valid reason why the Respondent unilaterally implemented a calendar in a manner which was not consistent with the 1985-1986 school calendar. Here, the Complainant points out that Respondent's District Administrator acknowledged in his testimony that it could have been possible to have no school during Thanksgiving week and extend the school year into June 1987. 7/ The Complainant argues that because it was possible for the Respondent to maintain the status quo, the Respondent's unilateral change cannot be maintained on the basis of necessity.

The Complainant also asserts that it did not waive its right to object to the Respondent's action. Here, the Respondent asserts that prior to the instant matter there has always been agreement between the parties on the Thanksgiving week issue.

The Complainant also asserts that the Respondent violated Article IV, Section D., when it unilaterally implemented a school calendar for the remainder of the school year because there is no language which authorizes the Respondent to set the calendar for the remainder of the school year.

In its reply brief the Complainant asserts that even though the 1985-1986 collective bargaining agreement was not ratified until after the implementation of the 1986-1987 school calendar the Respondent's contention that the 1984-1985 collective bargaining agreement establishes the status quo ignores the fact that 1985-1986 calendar had been implemented and adhered to by the parties at the time of the 1986-1987 hiatus period. The Complainant also acknowledges that while it was necessary for the Respondent to implement a school calendar, it was not necessary for the Respondent to implement a calendar inconsistent with the 1985-1986 school calendar.

Respondent's Position

The Respondent acknowledes that school calendar is a mandatory subject of bargaining. However, the Respondent also points out it is not required to agree or concede to the Complainant's proposal concerning calendar days. The Respondent argues that the Complainant contends that since the Respondent failed to accede to the Complainant's demands on the calendar and because the Respondent was forced by necessity to set the remainder of the school year when no agreement could be reached, the Respondent has violated the status quo by unilaterally implementing Respondent's calendar days schedule. Here, the Respondent points out that historically when the Respondent and Complainant have been unable to agree on a calendar days schedule the Respondent has set the schedule. However, the Respondent asserts it has always met, conferred and bargained with the Complainant prior to doing so. The Respondent also argues that when the Respondent set the calendar for the first quarter of the 1986-1987 school year, the last expired collective bargaining agreement was the 1984-1985 agreement. The Respondent points to Article IV, Section A of said agreement and asserts it had not violated this provision nor has the Complainant alleged it has violated this provision. Here, the Respondent asserts that the 1984-1985 agreement is controlling because when the Respondent set the remainder of the calendar on October 27, 1986, the contractual status quo was still emanating from the 1984-1985 agreement since no other succeeding agreement was in place until November 3, 1986.

The Respondent argues that on November 4, 1986 the parties reached agreement on the 1986-1987 collective bargaining agreement. While there was discussion on calendar on this date, the Respondent contends it was a minor point. The Respondent asserts that there was agreement on the 1986-1987 agreement even though there was no resolution of the calendar days schedule. The Respondent reasserts that it followed the 1984-1985 status quo and that its obligation to bargain calendar days as set forth in the 1984-1985 collective bargaining agreement was adhered to in all respects. The Respondent also argues that the Complainant could

---

6/ Decision No. 19822-C (WERC 11/84).

7/ Tr. p. 67.

have availed itself to final and binding arbitration on this issue but threw this opportunity away and settled the 1986-1987 collective bargaining agreement.

The Respondent also argues that it did not adopt any part of the 1986-1987 calendar in a vacuum or for arbitrary or capricious reasons. The Respondent claims that because of shared teachers and students with other school districts who had scheduled school on the Monday, Tuesday and Wednesday preceding Thanksgiving it was important for the Respondent to do so also. The Respondent also asserts it was necessary and imperative to set a work schedule so that the business of the school could be conducted.

In its reply brief the Respondent argues that the Complainant is incorrect that the 1985-1986 collective bargaining agreement establishes the status quo. The Respondent claims that its actions did not constitute a per se refusal to bargain in good faith. The Respondent points out that the Complainant acknowledged that the Respondent properly set the calendar for the first quarter of the 1986-1987 school year and that school calendar remained an issue afterwards. However, the Respondent points out that the Complainant's position that it was "possible" for the Respondent to set Thanksgiving week as a week off from work ignores the fact that Complainant's position was still that an additional week be added to the calendar at the beginning of the school year, which was no longer possible. The Respondent also asserts that the Complainant waived its right to arbitrate the calendar issue and now seeks to rebargain the calendar by the filing of the instant complaint. The Respondent contends that even if the conclusion is that the Respondent violated the status quo, the Respondent was reasonably justified by the necessity of scheduling work days and by the Complainant's failure to arbitrate the calendar issue. The Respondent also asserts that the Complainant's contention that Respondent violated the collective bargaining agreement is nonsensical since its suggests that after the first quarter of the school year the Respondent has no authority to schedule any work days.

DISCUSSION

1. Status Quo

Both parties acknowledge that an employer must, pending the discharge of its duty to bargain, maintain the status quo on terms of the expired agreement which govern mandatory subjects of bargaining. The determination of what constitutes the status quo is generally based upon the terms and conditions of employment contained in the expired collective bargaining agreement. 8/ The Respondent asserts that the 1984-1985 collective bargaining agreement is the controlling expired agreement because, at the time it made its decision on the school calendar for the remainder of the 1986-1987 school year, there was no other expired collective bargaining agreement in existence. However, the record demonstrates that during the negotiations over the 1985-1986 agreement, calendar was not an issue. Further, that the arbitration decision on the 1985-1986 collective bargaining agreement was issued on October 13, 1986. The Respondent's District Administrator acknowledged that the Respondent had received a copy of the arbitration award in mid-October, 1986. 9/ Section 111.70(4)(c)6. d., Stats., clearly provides in interest arbitration that the decision of the arbitrator " . . . shall be incorporated into a written collective bargaining agreement." Issuance of the interest arbitration award does not end the matter, the parties must still sign and execute an agreement which includes the items in dispute as well as the items which were agreed to in negotiations. However, even if one of the parties were to fail to sign and execute the collective bargaining agreement, an action violative of Sec. 111.70(3)(a)4, Stats., there would still be an active agreement between the parties because the interest arbitrator has issued the award. 10/ To conclude otherwise would make a mockery of the finality provided for in the interest arbitration statutory scheme. Therefore, based upon these

---

8/ City of Brookfield, Dec. No. 19822-B (WERC, Rubin, 2/84); aff'd Dec. No. 19822-C (WERC, 11/84).

9/ Transcript, p. 58.

10/ Sheboygan County (Sheriff's Department), Dec. No. 15380-A (Greco 11/77).

facts, the Examiner finds that the 1985-1986 collective bargaining agreement is the agreement which must be first examined to determine the status quo.

Having found that the 1985-1986 collective bargaining agreement is applicable in determining the status quo a careful review of that agreement establishes the following: First, Article IV, Section D of the 1985-1986 agreement provides that there shall be one hundred and eighty (180) student contact days, two (2) holidays and five (5) parent teacher and/or inservice days for a total of one hundred and eighty-seven (187) days in a school year. There is no dispute that the school calendar enacted by the Respondent conformed with this provision. This provision is silent concerning any specific breaks or vacations in the school calendar.

Second, Article IV, Section D, provides that in the event, after good faith negotiations, the parties are unable to agree on the succeeding year's school calendar the Respondent has the right to set the first quarter of the calendar for the succeeding year. This provision also provides that the Respondent does not have the right to unilaterally alter the total number of contractual days as provided for in Article IV, Section A. This provision is also silent concerning any specific breaks or vacations in the School calendar.

Third, the calendar attached to the 1985-1986 collective bargaining agreement (see Appendix A) stated the following: "Nov. 25 - Dec. 1 Thanksgiving vacation." It can be inferred from this calendar that no school was scheduled during Thanksgiving week, 1985 and that Thanksgiving vacation consisted of five (5) work days.

Under Complainant's theory, the format of the 1985-1986 school calendar attached to the collective bargaining agreement constituted the status quo. Thus, the format of the previous year's calendar would have to be maintained during any hiatus period including the same number of breaks or vacation days as well as the ending of the school year; i.e. five (5) work days for Thanksgiving, eight (8) work days for Christmas vacation, four (4) work days for Spring vacation and school ends on the Friday of the first week of June. Herein, had the Respondent scheduled three (3) work days during Thanksgiving week, the school calendar would of concluded on a Wednesday or the middle of the first week of June. Under the Complainant's theory had school not concluded on a Friday during the first week of June, given that last year's school calendar concluded on a Friday during the first week of June, the status quo would of been violated because the same format was not maintained. However, as noted above, the Respondent has the right to establish in effect the first day of school and the only specific mandate attached to this right is the maintenance of the one-hundred and eighty-seven (187) contract days. Absent specific language that the Respondent must also maintain specific vacation periods, the Examiner has concluded that the number of contract days is the status quo rather than the duration and length of any specific vacation periods.

The Examiner finds the parties bargaining history supports this conclusion. The record demonstrates that during 1984 the Respondent unilaterally implemented a school calendar which scheduled work on the days in question (Monday, Tuesday and Wednesday prior to Thanksgiving). While the record demonstrates that the Respondent was aware that the employes represented by the Complainant had voted in favor of scheduling school during Thanksgiving week, there is no evidence the Complainant informed the Respondent it was in agreement with the implementation of such a change or that the Complainant took any action to dispute the Respondent's 1984 action. Nor, is there any evidence that the parties reduced to writing an agreement that future calendars would contain a one week Thanksgiving vacation or an agreement whereby the Complainant acknowledged it would accept the change and not challenge it in exchange for an agreement that future calendars would contain a five (5) work days Thanksgiving vacation. Thus, the Examiner finds bargaining history supports this conclusion.

Herein, even if the Examiner were to conclude that the status quo was a one week Thanksgiving vacation the Respondent has raised a valid necessity defense.

As noted above the Complainant has acknowledged that Respondent had a business necessity for scheduling school for the remainder of the 1986-1987 school year. The Complainant disputes that the Respondent had a business necessity for scheduling school during Thanksgiving week because it would of been possible for the Respondent to do otherwise. In support of its position the Respondent points to Hendrickson's testimony where he acknowledged that it would of been possible on November 4, 1986 to agree on school calendar that did not schedule school

during Thanksgiving week. 11/ While it may have been possible for the parties on November 4, 1986 or thereafter to agree on a school calendar which did not schedule school during Thanksgiving week, speculation that Respondent could of taken other actions is insufficient to overcome Respondent's necessity defense. The record demonstrates that the Respondent shared both teachers and students with other school districts. These school districts had scheduled school on the Monday, Tuesday and Wednesday prior to Thanksgiving. 12/ The Complainant did not dispute these facts. Thus, the Respondent had a valid business reason for scheduling school on the disputed days. To conclude that the Respondent had a business necessity to schedule school and then to conclude that the Respondent should not take into account valid business reasons on what days work should be scheduled would be to ignore the basic premise on the need for the Respondent to conduct business. Herein, the Respondent had to put in place a school calendar. In determining what days work shall be scheduled, i.e. student contact days, the Respondent was aware that in educational programs whereby it shared students and/or teachers with other school districts, the other school districts had scheduled school on the dates in question. In view of the reasonable nature of the Respondent's decision given the fact the Respondent because of necessity had to schedule work and the lack of any evidence that the Respondent had not scheduled school in the past even though it may have shared students with other school districts, the Examiner concludes that the Respondent had a valid business necessity for scheduling school on the Monday, Tuesday and Wednesday prior to Thanksgiving.

Therefore, based upon the above and foregoing, the Examiner concludes the Respondent did not violate Sec. 111.70(3)(a)4 and has dismissed this portion of the complaint. In view of the foregoing the Examiner finds it unnecessary to discuss Respondent's other defenses to this charge. 13/

BREACH OF CONTRACT

The Complainant has also alleged that the Respondent's actions violated the parties 1985-1986 collective bargaining agreement. As the Respondent has pointed out, Article IV, School Calendar, Section D, permits the Respondent to unilaterally establish the calendar for the first quarter of a succeeding school year. This provision also requires the Respondent to maintain the same number (one hundred and eighty-seven) of contract days. This provision is silent concerning the number of vacation days during Thanksgiving week and the collective bargaining agreement is silent concerning what is to occur should there be no agreement on school calendar at the end of the first quarter. The record demonstrates that the calendar implemented by the Respondent contained one hundred and eighty-seven (187) contract days of which one hundred and eighty (180) were student contact days, two (2) were holidays, and five (5) were parent teacher and/or inservice days. Based upon the above the Examiner concludes the Respondent did not violate the 1985-1986 collective bargaining agreement when it enacted a school calendar for the 1986-1987 school year.

Having found that Respondent's actions did not breach the 1985-1986 collective bargaining agreement, the Examiner concludes Respondent's actions did not violate Sec. 111.70(3)(a)5, Stats., and has dismissed this portion of the complaint.

Dated at Madison, Wisconsin this 15th day of February, 1988.

By Edmond J. Bielarczyk, Jr., Examiner

11/ Transcript, p. 67.

12/ Findings of Fact No. 9.

13/ It should be noted that the Complainant took no action after November 4, 1986 to break the impasse on the calendar issue and did not file the instant complaint until almost five (5) months later. Also noted is the fact that the Complainant informed the Respondent on November 4, 1986 that the Complainant would not seek interest-arbitration to resolve the dispute.