STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of WAUSAU AREA TRANSIT SYSTEM Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and LOCAL DIVISION NO. 1168, AMALGAMATED TRANSIT UNION, AFL-CIO	Case 4 No. 40062 DR(M)-442 Decision No. 25563

Appearances:

Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Dean R. Dietrich, First Wisconsin Plaza, P.O. Box 1004, Wausau, Wisconsin 54402-1004, on behalf of the Employer.

Jacobs, Burns, Sugarman & Orlove, Attorneys at Law, by Mr. Joseph M. Burns, 210 North Wells Street, Suite 1900, Chicago, Illinois 60606-1364, on behalf of the Union.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

Wausau Area Transit System having on January 22, 1988 filed a petition with the Wisconsin Employment Relations Commission pursuant to Sec. 111.70(4)(b), Stats., seeking a declaratory ruling as to whether it has a duty to bargain with the Local Division No. 1168, Amalgamated Transit Union, AFL-CIO over certain matters; and Local 1168 having on February 23, 1988 filed its response to said petition; and the parties having on May 4, 1988 submitted a Statement of Facts in lieu of a hearing; and the parties having filed written argument, the last of which was received on June 3, 1988; and the Commission, having considered the record and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That the Wausau Area Transit System, herein the Employer, is a municipal employer providing bus transportation services to the citizens of the City of Wausau and surrounding communities, and has its principal offices at 420 Plumer Street, Wausau, Wisconsin 54401.

2. That Local Division No. 1168, Amalgamated Transit Union, AFL-CIO, herein the Union, is a labor organization functioning as the collective bargaining representative of certain full-time and part-time bus drivers, mechanics and workers employed by the Employer, and has its principal offices at 1602 Burek Avenue, Wausau, Wisconsin 54401.

3. That during bargaining between the Union and the Employer as to a successor to their 1985-1987 collective bargaining agreement, a dispute arose as to whether the following portion of the Union's proposed final offer was a mandatory subjct of bargaining:

> (b) Part-time employees shall not perform work in excess of 30 hours in any week.
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> (c) Part-time employees may be assigned to work trippers. Part-time employees may also be used to fill runs in emergencies when no full-time operator is available for work, or in cases where a full-time operator requests time off and the run cannot be filled without the use of overtime.

4. That the disputed portion of the Union's offer set forth in Finding of Fact 3 primarily relates to wages, hours and conditions of employment.

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

CONCLUSION OF LAW

That the disputed portion of the Union's offer set forth in Finding of Fact 3 is a mandatory subject of bargaining within the meaning of Sec. 111.70(1)(a), Stats.

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

DECLARATORY RULING 1/

That the Wausau Area Transit System has a duty to bargain within the meaning of Secs. 111.70(3)(a)4 and (1)(a), Stats., with Local Division No. 1168, Amalgamated Transit Union, AFL-CIO over the proposal set forth in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin this 7th day of July, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen 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.

(Footnote 1/ continued on page 3)

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.

(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.

WAUSAU AREA TRANSIT SYSTEM

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

BACKGROUND

It is useful to set forth the general legal framework within which the issue herein must be resolved. In Beloit Education Association v. WERC, 73 Wis.2d 43 (1976), Unified School District No. 1 of Racine County v. WERC, 81 Wis.2d 898 (1977) and City of Brookfield v. WERC, 87 Wis.2d 819 (1979), the Court set forth the definition of mandatory and permissive subjects of bargaining under Sec. 111.70(1)(d), Stats., as matters which primarily relate to "wages, hours, and conditions of employment" or to the "formulation or management of public policy," respectively. The Court also concluded that the impact of the formulation or management of public policy upon wages, hours and conditions of employment is a mandatory subject of bargaining.

As the Court noted in West Bend Education Association v. WERC, 121 Wis.2d 1 (1984),

> As applied on a case-by-case basis, this primarily related standard is a balancing test which recognizes that the municipal employer, the employees, and the public have significant interests at stake and that their competing interests should be weighed to determine whether a proposed subject for bargaining should be characterized as mandatory. If the employees' legitimate interest in wages, hours, and conditions of employment outweighs the employer's concerns about the restriction on managerial prerogatives or public policy, the proposal is a mandatory subject of bargaining. In contrast, where the management and direction of the school system or the formulation of public policy predominates, the matter is not a mandatory subject of bargaining.

In lieu of a hearing, the parties submitted the following Statement of Facts which was drafted by the Employer and then supplemented by the Union.

STATEMENT OF FACTS

> The Wausau Area Transit System, ("WATS") or ("System"), is a municipal bus operation providing bus transportation services for citizens of the City of Wausau and surrounding communities including the City of Rothschild and Schofield. WATS employs 17 full-time bus drivers and 6-8 part-time bus drivers depending upon availability of employees to serve as part-time drivers.
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> The System maintains ten (10) regular runs staffed by full-time bus drivers, some of which are straight eight (8) hour runs and others which are split runs. The System also provides six (6) rotating runs where six (6) full-time drivers rotate a day off based upon alternating schedules. These rotating runs are selected by an Extra Board Rotation where employees pick runs by preference based on seniority. The least senior full-time employee is used to substitute for regular runs and fill-in runs. Part-time employees are used

B. Six (6) busses that leave at 6:15 a.m. and return at 8:15 a.m., then depart again at 2:15 p.m. to 7:00 p.m.;

C. Two (2) busses that provide service to Schofield and Rothschild leaving at 6:00 a.m. to 10:00 a.m. and 6:30 a.m. to 8:30 a.m., then leaving again at 3:20 p.m. to 6:30 p.m. and 3:50 p.m. to 7:00 p.m.;

D. One (1) bus that provides an express route to downtown Wausau running two (2) hours in the morning and two (2) hours in the afternoon;

E. Four (4) busses which run express routes to the west side of Wausau running two (2) hours in the morning and two (2) hours in the afternoon.

Part-time employees are used by the system to run various pieces of routes such as the express routes to the west side of Wausau during peak times and also to run special noon hour runs to cover peak load demands. Part-time employees are also used to fill-in on regular scheduled runs when full-time employees are unable to make scheduled runs either due to sick leave, vacation, or other reasons. Also, WATS, at various times, alters the work schedule by adding additional hours for service demands and part-time employees are used to cover additional temporary route assignments. Full-time employees are also called upon to work overtime hours when necessary to cover for employees off on sick leave or vacation or to fill out runs that are not staffed.

Routes are generally selected through a run pick process whereby the more senior employees are allowed to pick either regular scheduled runs or extra runs as established by the Manager which include pieces of various routes as noted in the above summary. Part-time employees are then used to fill in where necessary to ensure proper staffing of all runs. Part-time employees are also used for contract runs when a contracting party pay for special transportation service from WATS.

Attached as Exhibit "A" is a copy of the route schedules and run picks for full-time employees in the Wausau Area Transit System.

SUPPLEMENTAL STATEMENT OF FACTS ON BEHALF OF ATU LOCAL 1168

In response to the City's proposed, supplemental statement of facts, the Local submits the following clarifications and observations:

1. The number of part-time drivers fluctuates during the year depending on the employer's determination as to the available work. During summer months, there is little, if any, part-time work.

2. Part-time employees are assigned to work "regular" or scheduled runs on routes known as "mainline" runs.

3. Special "noon hour runs" (City's statement, p. 2) and other trippers are sometimes assigned to full-time operators, including those who work the "extra board".

4. During the past 2 years, part-time operators have worked more than 30 hours per week.

5. During the past 2 years, part-time operators have worked more than 40 hours per week.

6. Full-time operators have received less than 8 hours per day or 40 hours of work during the same day or week that part-timers have worked. (e.g. payroll period for February 22 - March 7, 1987).

POSITIONS OF THE PARTIES

The Employer

The Employer asserts that the Union's proposal has a substantial public policy impact because the proposal's limitation on Employer use of part-time employes restricts and limits the level and type of services which can be provided to citizens. The Employer contends that the proposal does not address the "impact" of Employer decisions as to assignments and hours of work on employe wages, hours and conditions of employment. Therefore, the Employer argues that application of the "primary relationship" test to this proposal yields a conclusion that the proposal is a permissive subject of bargaining.

The Employer analogizes the disputed proposal to "minimum manning" proposals found permissive by the Court in Brookfield, supra, and by the Commission in Manitowoc County, Dec. No. 18995 (WERC, 9/81) as well as to the permissive nature of bargaining over class size.

The Employer further contends that the proposal is permissive because of its relationship to public policy decisions regarding the method and means by which the Employer will staff the operation of bus service. The Employer argues that decisions as to the type of work and the quantity of work be assigned to a class of employes are management decisions which need not be bargained. The Employer asserts that the thrust of this proposal goes beyond the Union's legitimate concern over the assignment of work to full-time employes in preference in part-time employes. While the language of the proposal identifying preferences for the use of full-time and part-time employes may well parallel "seniority layoff" language considered mandatory by the Commission and the Court, the Employer asserts that the first sentence of Section 2 of the proposal is permissive because it establishes a limitation on the type of work which can be assigned part-time employes.

The Employer contends that the Union argument which asserts that the proposal is mandatory because similar language exists in other transit contract should be dismissed as irrelevant to the issue at hand.

Given the foregoing, the Employer asks that the proposal be found to be a permissive subject of bargaining.

The Union

The Union contends that the disputed proposal is a mandatory subject of bargaining because it primarily relates to full and part-time employes' wages, hours and conditions of employment. The Union characterizes its proposal as an effort to protect the right of full-time employes to secure sufficient hours of work to make a living and to protect part-time employes from having to work excessive hours. Under the proposal, the Union submits that the Employer determines what level of service is to be provided, how many runs of various types are necessary, how many full and part-time employes to hire, and when the runs should occur. All that the Union seeks to bargain over is who will perform the work the employer determines is available. The Union therefore rejects Employer arguments that the proposal is akin to a "manning proposal" or restricts service level choices, or interferes with other public policy choices. The Union contends that the Employer's arguments simply camouflage the Employer's real interest which is to continue to save money by using lower paid part-time employes at the expense of full-time employes.

Citing Green County, Dec. No. 20056, (WERC, 11/82) the Union argues that there would be little doubt that a proposal which would guarantee full-time employes a 40 hour workweek would be mandatory. Here, the Union argues that it has proposed a more flexible, less costly alternative which focuses on the part-timers' hours of work. The Union asserts that its flexibility ought not convert a

a mandatory proposal into a permissive one. The Union also notes that if more significant issues such as the right to subcontract have been found mandatory in Racine, supra, it is difficult to conclude that a proposal which merely gives full-time operators the first opportunity to work a full day is a "public policy" choice which warrants a permissive finding herein. The Union argues that the Commission has consistently found proposals relating to similar issues to be mandatory.

As the Union believes that the relationship of the proposal to employe hours and conditions of employment dominates any intrusion into policy formulation, it asks that the Commission find the proposal to be a mandatory subject of bargaining.

DISCUSSION

When balancing the respective interests upon which this proposal impacts, we note that the Employer has characterized its concerns and interests both in terms of public policy impact and intrusion into managerial prerogatives. We are persuaded by the Union arguments that no substantial public policy considerations are implicated by this proposal. This proposal is not a "manning" proposal. The proposal leaves the Employer free to make all service level choices. 2/ Thus, the primary impact upon the Employer which is relevant for our purposes herein relates to assessing the proposal's intrusion into managerial prerogatives as to how the Employer will staff busses once it decides whether and when there is a need for a bus run. In this regard, it is apparent that the Employer correctly argues that this proposal would reduce the existing level of managerial flexibility as to whether any specific run will be driven by a full or part-time employe. 3/

As to the proposal's relationship to and impact upon employe wages, hours and conditions of employment, the Union correctly identifies the essential nature of that impact as being the desire of full-time employes to receive hours of work they find sufficient to meet their needs and of part-time employes to obtain some restriction upon the degree to which the Employer can compel them to work. When seeking these goals within the context of the existing run structure, the proposal also impacts upon employe hours and conditions of employment to the extent that it seeks to largely but not totally restrict the availability of presumably more desirable work assignments to full-time employes.

When balancing the respective interests of the parties which are impacted by the proposal, we conclude that the employe interests predominate. Employe interests in the number of hours worked and the work assignment received are at the very core of interests employes seek to protect through the collective bargaining process. Thus, proposals establishing hours of work and the right to job assignment preference based seniority or other factors have been found mandatory despite their intrusion into management prerogatives. 4/ Here, we find

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2/ We do not view issues of how many hours a part-time employe can be required to work or whether a full or part-time driver is driving a bus as "public policy" choices which should be resolved through the political processes in a public forum. To the extent that the Union speculates that the Employer's real objection to this proposal is that it may be more costly for the Employer to operate under this proposal than the existing contract, we agree with the Union that matters of cost are irrelevant to our determination. Indeed, as we have repeatedly noted in prior decisions, any analysis which included cost would ultimately lead to conclusions that even certain wage proposals are permissive because the cost is too high.

3/ We do not believe the proposal constitutes a "limitation by exclusion" of the types of specific job duties which may be assigned to part-time employes. If it did, we would find the proposal permissive to that extent if it prevented the Employer from assigning employes duties which are "fairly within the scope of" a bus driver's job. See, Milwaukee Sewerage Commission, Dec. No. 17302 (WERC, 9/79).

4/ Beloit, supra; Racine Unified School District, Dec. No. 20653-A,C (WERC, 1/84) aff'd No. 85-0158 (CtApp, 1986); School District of Janesville, Dec. No. 21466 (WERC, 3/84).

those same core employe interests to be impacted upon by the Union's proposal and conclude that, on balance, the employe interests outweigh the Employer interest in maintaining existing managerial flexibility. Thus, we find the proposal to be a mandatory subject of bargaining.

Dated at Madison, Wisconsin this 7th day of July, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner