

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS,	:	
	:	
Complainant,	:	
	:	Case 17
vs.	:	No. 43275 MP-2299
	:	Decision No. 26339-B
FREDERIC SCHOOL DISTRICT,	:	
	:	
Respondent.	:	
	:	

Appearances:

Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Joel L. Aberg, 715 S. Barstow, Suite 111, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the Respondent.

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

FINDINGS OF FACT
CONCLUSIONS OF LAW AND ORDER

Northwest United Educators having, on November 3, 1989, filed a prohibited practice complaint with the Wisconsin Employment Relations Commission alleging that Frederic School District had committed prohibited practices within the meaning of Sec. 111.70(3)(a)4 and 5, when it unilaterally changed the assignment of extra-curricular bus trips; that on March 5, 1990 the Commission appointed Stuart Levitan, a member of its staff, to act as Examiner and to conduct the hearing on said complaint; and to make and issue Findings of Fact, Conclusions of Law and Order; that hearing on the matter was held in Frederic, Wisconsin on April 3, 1990; that a stenographic transcript of the proceedings was prepared and received by Examiner Levitan on April 18, 1990; that post-hearing arguments were received by Examiner Levitan by June 27, 1990; that because of the unavailability of Examiner Levitan, the Order Appointing Examiner Levitan was vacated by the Commission on July 2, 1990 and Edmond J. Bielarczyk, Jr., a member of the Commission's staff, was substituted as the Examiner to make and issue Findings of Fact, Conclusions of Law and Order; that on July 5, 1990, Examiner Bielarczyk received the Frederic School District's reply brief; and the Examiner having considered the evidence and arguments of the parties and being fully advised in the premises, 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 maintaining its offices at 16 West John Street, Rice Lake, Wisconsin; and, that the Complainant is the exclusive bargaining representative of certain employes of Frederic School District in a bargaining unit consisting of all regular full-time and regular part-time non-certified employes, excluding the Financial Secretary, the Assistant Financial Secretary, all supervisory, managerial, temporary, confidential and casual employes and all other employes of the Frederic School District.

2. That at all times material hereto the Complainant and the Respondent have been parties to a series of collective bargaining agreements; that the most recent collective bargaining was effective from July 1, 1989 to June 30, 1990; that said agreement did not contain a provision which provided for final and binding arbitration of grievances; and, that said agreement contained the following provisions pertinent hereto:

. . .

ARTICLE V - EMPLOYEE RIGHTS AND PRIVILEGES

- A. No employee shall be disciplined, reprimanded, reduced in rank or compensation without just cause.

. . .

ARTICLE VII - COMPENSATION AND BENEFITS

- A. Salary Schedule: The schedule for all non-instructional staff except bus drivers is attached as Appendix A. The bus driver schedule is Appendix B.

. . .

ARTICLE IX - BOARD RIGHTS

- A. Management retains all rights of possession, care, control and management and retains the right to exercise these functions during the term of the collective bargaining agreement except to the extent that such functions and rights are restricted by the express terms of this agreement. These rights include, but are not limited by enumeration to, the following rights:

1. To direct all operations of the school system.

. . .

6. To maintain efficiency of school system operation.

. . . (sic)

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

. . .

APPENDIX B - 1989-90 BUS DRIVER SCHEDULE

. . .

4. Trips requested by the school which will necessitate a driver to be away from his regular run will be considered an administrative request. As such, the substitute driver will be paid by the school

. . .

4. That prior to August 22, 1989, and since as early as 1964, the Respondent had requested or asked regular bus route drivers to take extra-duty trips before offering said work to non-bargaining unit members, including extra-duty trips which would conflict with a regular bus route driver's regular route; that when a regular bus route driver accepted an extra-duty trip which conflicted with a regular bus route driver's regular route the Respondent hired a non-bargaining unit member, hereinafter referred to as substitute driver, to perform the regular bus driver's regular route; that when the regular bus driver accepted an extra-duty trip which conflicted with the regular bus driver's regular route the regular bus driver received a hourly wage rate in addition to their regular salary; that regular bus route drivers could decline any request to drive an extra-duty trip without suffering any disciplinary action; that prior to August 22, 1989 regular bus route driver's performed almost all extra-duty trips which conflicted with regular bus routes; and, that the Respondent routinely maintains a list of three (3) to four (4) substitute drivers.

5. That on August 22, 1989, the Respondent's Transportation Supervisor, Tom Twining issued the following memo to Bus Drivers:

As per Board of Education direction trips scheduled during regular route times will not be driven by our regular route drivers.

6. That at the hearing Twining testified that student discipline problems were on the rise when substitute drivers performed the Respondent's

regular bus routes; that transportation operations have run more efficiently since the change because regular bus route drivers, by virtue of greater experience, know the regular routes and provide service that the less experienced substitute drivers may not be able to match; that extra-duty trips are less demanding as the trips are more purpose directed, involved point-to-point driving and include chaperons, instructors and coaches; and that by using the substitute drivers there is a cost savings to the Respondent as it does not have to pay for regular routes twice, once to the regular driver and once to the substitute driver.

7. That the Complainant contends that the Respondent's actions violate the collective bargaining agreement between the parties and that the Respondent's actions were a unilateral change in a mandatory subject of bargaining; the Complainant argues the regular bus drivers suffered a reduction of compensation and that Article V, Section A prohibited such actions unless the Respondent had just cause; Complainant asserts that there was no just cause for Respondent's actions; the Complainant also argues the Respondent's claim that its actions are consistent with Appendix B, Section 4, fails because the Respondent never raised the issue of changing how extra-duty trips were assigned during negotiations; the Complainant also argues a review of the parties past practice is necessary in order to interpret Appendix B, Section 4 because the language of this provision is ambiguous; the Complainant contends the past practice was consistent, unequivocal and mutually understood; the Complainant argues said past practice was long-standing and involved a mandatory subject of bargaining and asserts the Respondent had a duty to bargain in good faith prior to any change in the practice; and, the Complainant argues that the August 22, 1989 memo was issued during the term of the collective bargaining agreement and that the Respondent never notified the Complainant of its intent to terminate the past practice at the expiration of the previous contract.

8. That the Respondent contends Appendix B, Section 4, cannot be interpreted as a bar to the Respondent's actions; that Respondent argues that Article IX allows the Respondent to direct all operations of the school system, to maintain efficiency and to determine the methods, means and personnel by which operations shall be conducted; that the Respondent argues it has already bargained for and reserved the express right and management discretion which the Complainant is challenging; that Complainant's claim of reduced compensation is not supported by the record as salaries of regular bus drivers and hourly rates have not been reduced and fewer request to work does not equate to a reduction in compensation; and that the Respondent contends its actions were based upon efficiency, student discipline and economics and Respondent thus had good reason to act as it did.

9. That Article IX, Section A, paragraphs 1, 6 and 10, are management rights and functions which are restricted by express terms and functions of the parties' collective bargaining agreement; that Appendix B, Section A, would be rendered meaningless by Respondent's actions as Respondent's actions would result in a regular bus driver never being away from the regular run; that Appendix B, Section A, is silent concerning how extra-duty trips are assigned to regular bus drivers; that the parties have a consistent, unequivocal and mutually understood practice concerning the assignment of extra-duty trips; that in negotiations which culminated in the current collective bargaining agreement the Respondent did not raise or place the Complainant on notice that the Respondent intended to discontinue the practice concerning the assignment of extra-duty trips; and, that the Complainant had the expectation that the parties' interpretation of Appendix B, Section A would continue during 1989-1990 collective bargaining agreement.

Based upon the above Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That the language of the parties' collective bargaining agreement concerning the assignment of extra-duty trips is ambiguous; that the parties have had a practice established since at least 1964; that all extra-duty trips, including extra-duty trips which conflict with regular bus drivers regular routes, shall be offered to regular bus drivers before being offered to substitute drivers; and, that the Respondent's actions of discontinuing to offer to regular bus drivers extra-duty trips which conflict with regular bus routes would render Appendix B, Section A meaningless.

2. That the decision of the Respondent to unilaterally discontinue and then to discontinue the practice of offering to regular bus drivers extra-duty trips which conflict with regular bus routes violates Appendix B, Section A of the parties' collective bargaining agreement in violation of Sec. 111.70(3)(a)(5), Stats., and derivatively, Sec. 111.70(3)(a)1, Stats.

3. That the decision of the Respondent to unilaterally discontinue and then to discontinue the practice of offering to regular bus drivers extra-duty trips which conflict with regular bus drivers regular routes did not constitute a refusal to bargain collectively with the Complainant in violation of Sec. 111.70(3)(a)4, Stats.

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

ORDER 1/

1. Those portions of the complaint alleging violation of Sec. 111.70(3)(a)4 are hereby dismissed.

2. The Respondent, its officers and agents, shall immediately cease and desist from violating the collective bargaining agreement and the Municipal Employment Relations Act by unilaterally discontinuing the practice of offering extra-duty trips which conflict with regular routes of certain of its employees represented by the Complainant.

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

3. The Respondent, its officers and agents, shall immediately take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act.

- (a) Immediately reinstate the practice of offering to regular bus drivers extra-duty trips which conflict with regular trips.
- (b) Make whole all of those employes represented by the Complainant affected by the unilateral discontinuation of the practice of offering to regular bus drivers extra-duty trips which conflict with regular trips by paying those employes wages they would have earned, retroactive to August 22, 1989, plus interest at the rate of twelve percent (12%) per year ^{2/} on those wages from the dates they were incurred to the date they are refunded.
- (c) Cause the attached notice set forth in Appendix "A" to be signed by an authorized agent of the Respondent and posted in conspicuous places where notices to employes represented by Complainant are usually posted for a period of not less than thirty (30) calendar days, taking responsible steps to ensure that said notice is not altered, defaced or covered by other material.
- (d) Notify the Wisconsin Employment Relations Commission within twenty (20) days of the date of this decision what steps it has taken to comply with this Order.

Dated at Madison, Wisconsin this 1st day of October, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Edmond J. Bielarczyk, Jr., Examiner

2/ The applicable interest rate set forth in Sec. 814.04(4), Stats., at the time this complaint was filed twelve percent (12%) per year.

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

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

1. WE WILL immediately reinstate the practice of offering to regular bus drivers extra-duty trips which conflict with regular routes and reimburse employes for wages they would have earned, with interest, retroactive to August 22, 1989.
2. WE WILL NOT commit unlawful unilateral changes in the offering of extra-duty trips to employes in the bargaining unit represented Northwest United Educators.
3. WE WILL NOT in any other or related manner interfere with the rights of our employes, pursuant to the provisions of the Municipal Employment Relations Act.

Dated this ----- day of -----, 1990.

Frederic School District

By _____

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

FREDERIC SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

The Complainant asserts that the Respondent has committed prohibited practices within the meaning of Sec. 111.70(3)(a)4 and 5, Stats., by its actions of unilaterally altering the method by which extra-duty trips were assigned to regular bus drivers. The Respondent, while acknowledging it had taken some of the alleged actions, denied it had committed prohibited practices.

COMPLAINANT'S POSITION

The Complainant argues that the Respondent's actions on August 22, 1989 of ceasing to offer to employes represented by the Complainant extra-duty trips which conflict with regular bus routes was a violation of the parties' collective bargaining agreement and a unilateral change in a mandatory subject of bargaining. The Complainant points out that regular bus drivers suffered a reduction in compensation as a direct result of the Respondent's actions. The Complainant argues that Article V, Section A requires the Respondent to have just cause to reduce an employe's compensation. The Complainant asserts the Respondent did not have just cause to reduce the employe's compensation.

The Complainant further points out that the practice of how extra-duty assignments were made has been established since 1964. The Complainant asserts the Respondent did not raise or request a change in this practice during the negotiations which culminated into the 1989-1990 collective bargaining agreement. The Complainant argues that Complainant cannot assert its actions are consistent with Appendix B, Section 4 because the Complainant never raised the issue of changing the parties practice on the assignment of extra-duty trips during negotiations.

The Complainant also contends a review of the parties' practice is necessary in order to interpret Appendix B, Section 4. The Complainant argues the language of this provision is ambiguous as it does not define how "request" are made to regular bus drivers. The Complainant asserts the practice of how request were made was consistent, unequivocal and mutually understood. The Complainant argues that as this practice was long-standing and involved a mandatory subject of bargaining, the Respondent had a duty to bargain in good faith prior to any change in the practice. The Complainant asserts the Respondent never notified the Complainant of its intent to change the practice when the previous contract expired.

The Complainant seeks as relief a restoration of the status quo, a make whole remedy for all bargaining unit members who suffered an economic loss, and other such relief as the Commission may deem appropriate.

RESPONDENT'S POSITION

The Respondent contends it did not commit any prohibited practices. The Respondent argues it has bargained for and obtained the express right and management discretion which the Complainant is challenging. The Respondent points out Article IX of the parties' collective bargaining agreement allows the Respondent to direct all operations of the school system, to maintain efficiency, and to determine the methods, personnel and means by which operations shall be directed. The Respondent claims that Appendix B, Section 4 cannot be interpreted as a bar to the Respondent's actions. The Respondent points out that no employe suffered a reduction in salary or hourly rates. The Respondent claims a reduction in request to perform extra-duty cannot be equated to a reduction in compensation. The Respondent further asserts that it had good reason to act as it did. These reasons being efficiency, dealing with student discipline and economics.

BREACH OF CONTRACT

The record herein demonstrates that on August 22, 1989 the Respondent notified its regular bus drivers that it would no longer offer them extra-duty trips which conflicted with their regular bus routes. The Examiner finds such an action clearly renders Appendix B, Section 4 meaningless. This provision requires the Respondent to pay for the substitute driver if a bus driver performs an extra-duty trip which conflicts with the driver's regular bus route. The Respondent's actions clearly would negate the necessity of this provision as the regular driver would not be requested by the Respondent to be away from his regular run. The intent of this language is evident. The Respondent will make such requests, and, when such requests are made, the Respondent will pay for the substitute. The Examiner finds that the unilateral action of the Respondent to cease all requests which would necessitate regular drivers from being away from their regular runs is a violation of this provision.

The Examiner also finds the Respondent's defense that Article IX enumerates functions and rights which permit it to unilaterally cease requesting regular drivers to take extra trips which conflict with their regular runs to be without merit. Article IX, paragraph A, also provides that function and rights of management are limited by the express terms of the agreement. The Examiner concludes that the Respondent cannot exercise the rights identified in Article IX to render meaningless another provision of the agreement.

The Examiner also finds merit in the Complainant's claim that a review of the parties' past practice is necessary in order to interpret Appendix B, Section 4. The collective bargaining agreement is silent concerning the interpretation of the term "administrative request". While the Respondent has argued that the interpretation of this term should be limited to, in essence, a standard dictionary interpretation, the record demonstrates that the parties

have a long-standing practice defining how requests are made. This practice, as the Complainant asserts, was consistent, unequivocal, and mutually understood. Regular bus drivers were offered by the Respondent all extra-duty trips irregardless of whether the trip conflicted with the regular bus driver's regular route prior to offering extra-duty trips to substitute drivers. The Respondent did not dispute that this practice has been in existence since 1964. The Examiner therefore concludes the practice is binding on the Respondent.

The undersigned notes here that there are some circumstances under which the Respondent could rely on a business necessity defense to deny the offering of an extra-duty trip to a regular bus drivers. The Respondent has argued that a reason for its actions was to deal with student discipline problems. Under certain circumstances the Respondent could decline to offer to a regular bus driver an extra-duty trip because there were currently student discipline problems on the driver's regular route. However, the Respondent would also have to demonstrate that the substitute drivers were incapable of handling the student discipline problem. In view of the language of Appendix B, Section 4 and the parties' long-standing practice, such actions by the Respondent would have to be on a case-by-case approach. The Respondent's actions herein cease the offering of extra-duty trips even when there is not a discipline problem on the driver's regular route. Such action clearly violates the meaning and intent of Appendix B, Section 4 and the parties' practice. The Examiner also notes here that there was no evidence presented that on August 22, 1989 there were student discipline problems on all of the regular routes of the regular bus drivers. Thus, while the Respondent could have a business necessity for a particular action in declining to ask a particular driver to take an extra-duty trip, there is no evidence to support the Respondent's actions in the instant matter.

The Examiner has also found no merit in the Respondent's argument that it had good economical reasons for initiating the change. The Respondent clearly knew prior to entering the 1989-1990 agreement with the Complainant what the costs of Appendix B, Section 4 were. Having knowledge of what those costs were and having agreed to continue the language of Appendix B, Section 4 the Respondent is bound by the agreement to continue offering extra-duty trips that conflict with regular routes to regular bus drivers.

Based upon the above and foregoing, the Examiner has concluded the Respondent's actions constituted a violation of Sec. 111.70(3)(a)5, and a derivative violation of Sec. 111.70(3)(a)1. The Examiner has therefore ordered the appropriate remedy and ordered the Respondent to reinstate the offering of extra-duty trips which conflict with regular routes to regular bus drivers. With the Respondent's acknowledgement that its actions were not disciplinary in nature and having found a violation of Appendix B, Section 4, the Examiner has not reviewed the Complainant's claim that Article V, Section A was violated.

DUTY TO BARGAIN

The Examiner has found no evidence to conclude that the Respondent violated Sec. 111.70(3)(a)4. At most, the record herein demonstrates the Respondent had the erroneous belief that Article XI permitted the Respondent the latitude to undertake the actions of August 22, 1989. Therefore the Examiner has dismissed this portion of the complaint.

Dated at Madison, Wisconsin this 1st day of October, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Edmond J. Bielarczyk, Jr., Examiner