STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 1310/ED MCGEORGE, PRESIDENT, Complainant,

vs.

CITY OF EAU CLAIRE, Respondent.

Case 233
No. 55519
MP-3333

Decision No. 29346-C

Appearances:

Davis, Birnbaum, Marcou, Seymour & Colgan, by **Attorney James G. Birnbaum,** and **Attorney Carla J. Hughey,** 300 North Second Street, Suite 300, P.O. Box 1297, LaCrosse, Wisconsin 54602-1297, appearing on behalf of Local 1310/Ed McGeorge, President.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Stephen L. Weld,** and **Attorney Christopher R. Bloom,** 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the City of Eau Claire.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On September 2, 1997, Amalgamated Transit Union, Local 1310 and its President Ed McGeorge filed a complaint with the Wisconsin Employment Relations Commission alleging that the City of Eau Claire had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3, 4 and 5, Stats., by changing existing limitations on the number of hours part-time employees can work, modifying agreed upon work schedules, and failing to bargain over the impact of the modified schedules.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

By agreement of the parties, the complaint was held in abeyance pending their efforts to reach agreement on a successor to their 1995-1997 contract. By March 1998, those settlement efforts had proved unsuccessful and the complaint was assigned to Examiner Lionel Crowley for the scheduling of hearing.

On April 21, 1998, the City filed an answer denying that it had committed any prohibited practices.

On May 6, 1998, the City filed a petition for declaratory ruling with the Commission seeking a determination among other matters as to whether it was obligated to bargain with Local 1310 over subjects related to the issues in the complaint. During the pendency of the declaratory ruling, the parties agreed to postpone further proceedings on the complaint.

On February 8, 1999, the Commission issued a decision in the declaratory ruling proceeding. The parties again agreed to hold further processing of the complaint in abeyance pending their ongoing efforts to reach agreement on a successor to their 1995-1997 contract.

On May 8, 2000, the Commission issued an order resolving a dispute between the parties as to the content of their respective final offers before an interest arbitrator appointed by the Commission to issue a final and binding interest arbitration award as to the terms of the successor to the 1995-1997 contract.

By letter dated August 8, 2000, the City asked that the complaint proceed to hearing.

Hearing was held in Eau Claire, Wisconsin on October 4, 2000 by Examiner Crowley. The parties thereafter filed written argument, the last of which was received December 19, 2000. Shortly thereafter, Examiner Crowley retired.

The matter was then held in abeyance pending the effort of the interest arbitrator to mediate a settlement of the complaint along with the terms of a successor agreement. The parties were successful in reaching a voluntary agreement on a successor to their 1995-1997 agreement. However, that voluntary agreement did not resolve the issues raised in the complaint.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. The City of Eau Claire, herein the City, is a municipal employer having its principal offices in Eau Claire, Wisconsin. At all times material herein, the City provided bus transit services to its citizens.

2. Amalgamated Transit Union, Local 1310, herein the Union, is a labor organization that serves as the exclusive collective bargaining representative of certain full-time and part-time bus drivers, mechanics, servicemen and shop personnel employed by the City to provide bus transit services.

3. The July 1, 1995-June 30, 1997 collective bargaining agreement between the City and the Union provided in pertinent part as follows:

Article 6 – Management Rights

Section 1. The Amalgamated agrees that the right to employ in accordance with the provisions of this agreement, promote, discipline and discharge employees, and the management of the property are reserved by and shall be vested in the City, and in connection therewith the City shall have the right to exercise discipline in the interest of good service and the proper conduct of its business; however, the City recognizes the right of its employees to bargain collectively on employer-employee matters that may arise from time to time.

. . .

Section 5. The City shall be able to employ four part-time operators on a regular basis. These employees may be assigned to work up to 20 hours per week. However, they may work beyond 20 hours when no full-time drivers want time off without pay and the run cannot be filled without the use of overtime. Part-time operators will not be assigned work when full-time operators have not been scheduled for at least 40 hours in a week unless otherwise provided for in the contract. No full-time operators shall be laid off while any part-time operator is still retained on the transit system payroll except when a full-time operator has refused the offer of management to be placed in a part-time position. The past procedure of drafting is still an available option.

. . .

Section 6. The City shall have the right to employ one (1) part-time shop employee. This shop employee will not be scheduled to work in excess of sixteen (16) hours per week unless, because of illness, vacation, or other absence, a full-time shop employee is not at work. No full-time shop employee shall be laid off when a part-time shop employee is still retained on the Transit Division payroll.

. . .

Article 7 – Working Conditions

Section 1. The present set-up of working conditions and hours shall continue during the life of this agreement, unless further changed by mutual agreement, subject, however, to changes by the terms of this agreement, and further subject to adjustment in scheduled hours per week.

. . .

Article 8 – Working Hours

Section 1. The regular hours of employment for General Bus Mechanics are to be 40 hours per week. Scheduling of employees in this classification shall be done so as to allow one General Bus Mechanic to be on duty on Saturdays without the use of overtime. The regular hours of employment for garage employees not classified as general bus mechanics shall be 44 hours per week except for Combination Service Personnel hired after June 30, 1983 will be regularly scheduled for 40 hours of employment per week. They will also be inserted into the normal Saturday rotation without the use of overtime unless work requirements dictate the need for such overtime.

4. By letter dated June 17, 1997, the City advised the Union as follows:

This is to advise that the portion of Article 6, Section 5, which limits the number of part time operators (four) and that part of Article 6, Section 6, which limits the number of part time shop employees (one) are permissive subjects of bargaining. The size and makeup of the workforce, i.e., full or part time employees, is a managerial prerogative. Accordingly, this is to advise you that the word "four" in Article 6, Section 5, and the word "one" in the first sentence of Article 6, Section 6, will evaporate from the collective bargaining agreement on June 30, 1997, the expiration date of this contract. The wages, benefits, hours and working conditions of part time operators and shop employees are mandatory subjects of bargaining. Accordingly, the remainder of those subsections are not affected by this notice.

By letter dated June 30, 1997, the Union responded to the City as follows:

This is to inform you that your position of evaporating parts of Article 6, Section 5, (which limits the number of part-time employees) is unacceptable to Local 1310. We (Local 1310) disagree with you. Any unilateral action of this kind will force us (Local 1310) to file a prohibitive (sic) practice against the City with WERC.

Beginning on or about July 1, 1997, and continuing at all times material herein, the City employed part-time bus drivers and part-time shop employees in excess of the respective 80 hours per week and 16 hours per week restrictions contained in the expired 1995-1997 contract.

In CITY OF EAU CLAIRE, DEC. NO. 29546 (WERC, 2/99) and CITY OF EAU CLAIRE, DEC. NO. 29675-B (WERC, 5/00), the Wisconsin Employment Relations Commission held that the respective 80 hours per week and 16 hours per week restrictions contained in the expired 1995-1997 contract were mandatory subjects of bargaining.

5. In May and June of 1990, the Union filed six grievances with the City protesting changes in work schedules in the City Shop and use of part-time employees when full-time employees are on lay off status or are available to perform overtime work.

On July 30, 1990, the Union and the City entered into the following agreement to settle the six grievances:

. . .

> After several meetings, management has agreed to adopt the following schedule for mechanics and combination servicemen:
>
> WEEK 1
>
> | | | | | | | |
> |---|---|---|---|---|---|---|
> | Mechanic | OFF | 7-3 | 7-3 | 7-3 | 7-3 | 7-3 |
> | Mechanic | 1-9 | 1-9 | 1-9 | 1-9 | 1-9 | OFF |
> | Serviceman | 5-1 | 5-1 | 5-1 | 5-1 | 5-1 | 12:30-8:30 |
> | Serviceman | 1-9 | 1-9 | 1-9 | 1-9 | 1-9 | OFF |
>
> WEEK 2
>
> | | | | | | | |
> |---|---|---|---|---|---|---|
> | Mechanic | 7-3 | 7-3 | 7-3 | 7-3 | 7-3 | OFF |
> | Mechanic | OFF | 1-9 | 1-9 | 1-9 | 1-9 | 7-3 |
> | Serviceman | 5-1 | 5-1 | 5-1 | 5-1 | 5-1 | OFF |
> | Serviceman | 1-9 | 1-9 | 1-9 | 1-9 | OFF | 12:30-8:30 |
>
> In addition, it is agreed that the part-time shop employee can work his/her contractual hours at any time assigned by management. Any hours in addition to the contractual hours must be offered to full-time personnel before assigning the part-time employee.
>
> The union agrees all attached grievances are withdrawn and will no longer be pursued.

. . .

5. By letter dated August 15, 1997, the City advised the Union as follows:

> This letter is to inform you that, pursuant to Article 6, Section 1; Article 7, Section 1; and Article 8, Section 1, of the Agreement between the City of Eau Claire and the Amalgamated Transit Union Local 1310, the City will be adjusting the work schedules of the evening maintenance shift effective August 25, 1997.
>
> The hours for the evening mechanic and combination serviceman will be adjusted from 1:00 p.m. – 9:00 p.m. to 4:00 p.m. – midnight. In accord with Article 7, Section 1, there will be no reduction in hours, simply a schedule adjustment. The introduction of evening service hours forces the City to adjust the hours of this shift. The additional service hours requires (sic) the realignment of this shift to coincide with the later arrival of buses and will, therefore, result in more efficient and effective maintenance of City equipment. It should be noted that the early shift will remain the same.

On or about August 15, 1997, the City implemented the change in work schedule.

The City and the Union bargained over the impact on employee wages, hours and conditions of employment of the change in work schedule for the evening mechanic and the combination serviceman.

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

CONCLUSIONS OF LAW

1. By employing part-time bus drivers and part-time shop employees in excess of 80 hours per week and 16 hours per week, respectively, the City of Eau Claire violated its duty to bargain obligation to maintain the status quo as to all matters primarily related to wages, hours and conditions of employment following expiration of the 1995-1997 agreement. Therefore, the City of Eau Claire thereby committed prohibited practices within the meaning of Sec. 111.70(3)(a)4, Stats., and derivatively Sec. 111.70(3)(a)1, Stats.

2. When implementing changes in work schedules on August 25, 1997, the City of Eau Claire violated its duty to bargain obligation to maintain the status quo as to all matters primarily related to wages, hours and conditions of employment following the expiration of the 1995-1997 agreement. Therefore, the City of Eau Claire thereby committed prohibited practices within the meaning of Sec. 111.70(3)(a)4, Stats., and derivatively Sec. 111.70(3)(a)1, Stats.

3. When implementing changes in work schedules on August 25, 1997, the City of Eau Claire did not violate a collective bargaining agreement and did not refuse to bargain over the impact of the new work schedules on employee wages, hours and conditions of employment. Therefore, the City of Eau Claire did not thereby commit prohibited practices within the meaning of Secs. 111.70 (3)(a)1, 4 or 5, Stats.

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

ORDER

1. The complaint allegations referenced in Conclusion of Law 3 are dismissed.

2. The City of Eau Claire, its officers and agents, shall immediately:

   a. Cease and desist from failing to maintain the status quo as to wages, hours and conditions of employment during the hiatus between collective bargaining agreements with Amalgamated Transit Union, Local 1310.

   b. Take the following affirmative action that will effectuate the purposes and policies of the Municipal Employment Relations Act.

      1. Make employees represented by Amalgamated Transit Union, Local 1310 whole with interest at the Sec. 814.04(4), Stats., rate of 12% per annum in effect when the complaint was filed 1/ for any losses in wages and benefits incurred during the contract hiatus when the City of Eau Claire: (a) employed part-time bus drivers and part-time shop employees for totals of more than 80 hours per week and 16 hours per week, respectively, in circumstances other than those allowed by Article 6, Sections 5 and 6 of the expired 1995-1997 agreement; and (b) changed the work schedule for shop employees, contrary to the terms of the July 30, 1990 settlement agreement.

1/ See WILMOT UNION HIGH SCHOOL DISTRICT, DEC. NO. 18820-B (WERC, 12/83), CITING ANDERSON V. LIRC, 111 WIS.2D, 345, 258-259 (1983); MADISON TEACHERS INC. V. WERC, 115 WIS.2D, 623 (CT.APP. 1983)

2. Notify all City of Eau Claire employees represented by Amalgamated Transit Union, Local 1310, of the Commission's Order by posting copies of the Notice attached hereto for sixty days in conspicuous places where such employees work. This Notice shall be signed by an authorized representative of the City of Eau Claire.

3. Within 20 days of the date of this Order, notify the Wisconsin Employment Relations Commission and Amalgamated Transit Union, Local 1310 of the action taken to comply with this Order.

Given under our hands and seal at the City of Madison, Wisconsin, this 17th day of December, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steven R. Sorenson /s/
Steven R. Sorenson, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

**NOTICE TO ALL CITY OF EAU CLAIRE EMPLOYEES
REPRESENTED BY AMALGAMATED TRANSIT UNION, LOCAL 1310**

Pursuant to the Order of the Wisconsin Employment Relations Commission issued on December 17, 2002, we hereby notify you that:

> We will cease and desist from failing to maintain the status quo as to wages, hours and conditions of employment during periods of time when no contract is in effect between the City of Eau Claire and Amalgamated Transit Union, Local 1310.
>
> We will make employees represented by Local 1310 whole with interest for any losses in wages and benefits caused by the City's improper use of part-time drivers and shop employees and by the change in shop employees' work schedule.

City of Eau Claire

_____ _____
By Date

THIS NOTICE WILL BE POSTED FOR SIXTY DAYS. THIS NOTICE SHALL NOT BE ALTERED, DEFACED, OR COVERED IN ANY WAY.

Eau Claire School District

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

Complainant Local 1310

Complainant Local 1310 asserts Respondent City of Eau Claire committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 1, Stats., by: (1) employing part-time employees in excess of the number of hours per week limitation allowable under the expired contract and (2) changing the work schedule of shop employees and failing to bargain over the impact of the change on employee wages, hours and conditions of employment. Complainant also contends that the change in work schedule violated a grievance settlement agreement and that Respondent City therefore also committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats.

As to the alleged violation of Secs. 111.70(3)(a)4 and 1, Stats., related to the number of hours worked by part-time employees, Complainant argues that the Commission has already specifically held that a limitation on the number of part-time hours was contained in the expired 1995-1997 contract and therefore is part of the status quo the Respondent City was obligated to maintain during the contract hiatus. Thus, Complainant asserts it is clear that Respondent was obligated to honor that limitation during the contract hiatus that followed the expiration of the 1995-1997 contract.

As to the alleged violation of Secs. 111.70(3)(a)4 and 1, Stats., related to the August 25, 1997 change in the schedule of shop employees, Complainant alleges that the schedule change altered the status quo Respondent was obligated to maintain. Complainant asserts the status quo was established by a July 30, 1990 grievance settlement agreement and argues that the 1995-1997 contract does not give Respondent the right to make the schedule change. Complainant further alleges that Respondent City committed an additional violation of Sec. 111.70(3)(a)4, Stats., by failing to bargain with Complainant over the impact of the schedule change on employee wages, hours and conditions of employment.

As to the alleged violation of Sec. 111.70(3)(a)5, Stats., Complainant contends the Respondent acted contrary to a July 30, 1990 settlement agreement when it implemented the August 25, 1997 work schedule change and thereby violated a collective bargaining agreement.

The complaint alleged that Respondent City had violated Sec. 111.70(3)(a)3, Stats., but that allegation was not pursued at hearing or in post-hearing argument and is deemed to have been abandoned.

Respondent City of Eau Claire

The Respondent City denies that it committed any prohibited practices by its conduct.

As to the alleged violation of Secs. 111.70(3)(a)4 and 1, Stats., related to use of part-time employees, the City asserts that it honored the status quo during the contract hiatus by limiting the hours each part-time employee worked to no more than 20 hours per week or 16 hours per week, respectively. The Respondent City rejects the Complainant's contention that the status quo limited overall use of part-time employees to 80 hours per week and 16 hours per week, respectively.

Regarding the alleged violations of Secs. 111.70(3)(a)4, 5 and 1, Stats., related to the change in hours for the mechanic and combination serviceman, the Respondent City contends that the status quo established by the expired 1995-1997 contract gave the City the right to change hours. Should the Commission conclude otherwise, the City argues that the "necessity" exception to the obligation to maintain the status quo was present here due to the City's need to service buses under a new operational schedule. The City further asserts that it did bargain with Complainant over the impact of the change in hours on wages, hours and conditions of employment. Citing the passage of time and change in circumstances, the City alleges that it was no longer obligated to honor the 1990 grievance settlement agreement.

DISCUSSION

We begin with a consideration of the Complainant's contentions that the Respondent City violated its duty to bargain with Complainant by failing to maintain the status quo as to use of part-time employees and as to shop employees' work schedules during the hiatus that followed the expiration of the 1995-1997 contract.

Before examining the specific disagreement between the parties, it is useful to state the general legal framework within which these allegations will be resolved.

It is well settled that during a contract hiatus, absent a valid defense, 2/ a municipal employer violates its duty to bargain (and thus commits a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats.) if it takes unilateral action as to a mandatory subject of bargaining in a manner inconsistent with its rights under the status quo. ST. CROIX FALLS SCHOOL DIST. V. WERC, 186 WIS.2D 671 (CT.APP. 1994); JEFFERSON COUNTY V. WERC, 187 WIS. 2D 647 (CT.APP. 1994); MAYVILLE SCHOOL DISTRICT V. WERC, 192 WIS. 2D 379 (CT APP. 1995); RACINE EDUCATION ASSOCIATION V. WERC, 214 WIS.2D 352 (CT. APP. 1997). Such unilateral action is tantamount to an outright refusal to bargain about a mandatory subject of bargaining because it undercuts the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84); GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84); SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85). In addition, such unilateral action evidences a disregard for the role and status of the majority

representative that is inherently inconsistent with good faith bargaining. SCHOOL DISTRICT OF WISCONSIN RAPIDS, SUPRA.

2/ "Necessity" and responding to illegal conduct are available defenses. CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84); RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 23904-B (WERC, 9/87).

The status quo does not freeze wages, hours and conditions of employment as they existed when the contract expired but instead is a dynamic concept that allows for change so long as the change is consistent with the rights and privileges the parties possessed when the contract expired. VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96); MAYVILLE SCHOOL DISTRICT, SUPRA; ST. CROIX FALLS SCHOOL DIST., SUPRA. As we stated in VILLAGE OF SAUKVILLE:

> The status quo doctrine does no more than continue the allocation of rights and opportunities reflected by the terms of the terms of the expired contract while the parties bargain a successor agreement. . . . The dynamic status quo allows parties to exercise rights which they have acquired through the collective bargaining process.

When determining what the status quo is in the context of a contract hiatus status, we consider the relevant language from the expired bargaining agreement as historically applied or as clarified by bargaining history, if any. CITY OF BROOKFIELD, SUPRA; SCHOOL DISTRICT OF WISCONSIN RAPIDS, SUPRA.

We now turn to the specific disputes between the parties.

The Increased Use of Part-time Employees

The pertinent portions of the 1995-1997 contract state:

> **Article 6 – Management Rights**
>
> . . .
>
> Section 5. The City shall be able to employ four part-time operators on a regular basis. These employees may be assigned to work up to 20 hours per week. However, they may work beyond 20 hours when no full-time driver is available for work; or in cases where drivers want time off without pay and the run cannot be filled without the use of overtime.
>
> . . .

> Section 6. The City shall have the right to employ one (1) part-time shop employee. This shop employee will not be scheduled to work in excess of sixteen (16) hours per week unless, because of illness, vacation, or other absence, a full-time shop employee is not at work.
>
> . . .

Here, the parties agree that the issue of how many hours part-time employees can work is a mandatory subject of bargaining. The parties also agree that the status quo the City was obligated to maintain as to this issue is defined by the language of the expired 1995-1997 contract as impacted by CITY OF EAU CLAIRE, DEC. NO. 29546 (WERC, 2/99) and CITY OF EAU CLAIRE, DEC. NO. 29675-B (WERC, 5/00). The parties disagree over whether the status quo contains an overall limitation on the number of hours part-time employees can work each week. We turn to a resolution of that disagreement.

In CITY OF EAU CLAIRE, DEC. NO. 29675-B (WERC, 5/00), we stated:

> The City contends that our declaratory ruling had the effect of deleting the words "four" and "one(1)" from the "status quo" from which the parties are now bargaining a successor contract. Local 1310 disagrees and argues that the words "four" and "one(1)" continue to be part of the "status quo" but only for the purposes of establishing a limitation on the overall number of hours that part-time employes can work – a limitation which the Commission ruled was the mandatory portion of the disputed sentences. Local 1310 concedes that as a consequence of our declaratory ruling, the City can hire as many part-time employes as it wishes.
>
> As evidenced by the above-quoted portion of our declaratory ruling decision, we ruled that the two disputed sentences were: (1) permissive subjects of bargaining to the extent they limited the number of part-time employees the City could hire; and (2) mandatory subjects of bargaining to the extent they were "part of a mathematical equation by which an overall limitation on the allowable number of part-time employee hours can be calculated. . . ." Given the foregoing, the "status quo" **from which the parties are bargaining their next contract** is that the City can hire as many part-time employees as it wishes but can only assign a total of up to 80 hours of work per week to the "part-time operators" it chooses to hire and can only schedule "part-time shop" employees a total of 16 hours per week. Both parties are free to propose a continuation of this "status quo" in the next contract or a modification thereof. How they chose to express their intent to maintain or alter the "status quo" is a matter for each party to decide. (emphasis added)

Citing the above-emphasized portion of our decision, the City argues that although the status quo **for the purposes of bargaining a new contract** limits the total number of hours part-time employees can work, the status quo the City was obligated to maintain **during the contract hiatus** contained no such overall limitation. The City asserts that because the restriction on the number of part-time employees was found to be a permissive subject of bargaining, the status quo the City was obligated to maintain during the hiatus between contracts allowed the City to hire as many part-time employees as it wished but allowed each part-time employee to work no more than 20 hours (drivers) or 16 hours (shop employees) per week. The City contends that because the expired 1995-1997 contract does not explicitly state the 80 hour and 16 hour limitations, the limitations do not exist for the purposes of a contract hiatus status quo. We disagree.

There is no distinction in the law (or in our CITY OF EAU CLAIRE decisions) between the status quo during a contract hiatus and the status quo from which the parties bargain a successor agreement. They are one and the same. The obligation to maintain the status quo is part of the employer's duty to bargain in good faith. MAYVILLE SCHOOL DIST. V. WERC, SUPRA; JEFFERSON COUNTY V. WERC, SUPRA. The City has not provided any persuasive policy basis grounded in the duty to bargain for creation of the two types of status quo the City claims are present here.

When reaching this conclusion, we reject the City argument that there should be a status quo distinction between matters that the parties **implicitly** agree upon (part of the status quo for the purposes of bargaining the next contract but not part of the status quo that must be maintained during a contract hiatus) as opposed to matters as to which they **explicitly** agree (part of the status quo for the purposes of bargaining the next contract and part of the status quo that must be maintained during a contract hiatus). There is no distinction between implicit and explicit agreements. There is either an agreement or there is not.

The 1995-1997 contract contained three agreements that are relevant here to the use of part-time employees. First, the contract contained an agreement that the City could employ four part-time operators and one part-time shop employee. Second, the contract contained an agreement that each part-time operator could work up to 20 hours per week and the part-time shop employee could work up to 16 hours per week. Third, by virtue of the combination of the number of allowable part-time employees and the number of hours each part-time employee could work, the contract contained an agreement on an overall limitation on the total number of hours that part-time employees could work each week. In CITY OF EAU CLAIRE, DEC. NO. 29546 (WERC, 2/99), we concluded that the first agreement (the limit on the number of part-time employees) was a permissive subject of bargaining. Therefore, that agreement is not part of the status quo the City must maintain during a contract hiatus. However, we also therein concluded that the limitation on the number of hours part-time employees could work was a mandatory subject of bargaining. By virtue of that conclusion, the second and third agreements were part of the status quo the City was obligated to maintain.

When reaching this conclusion, we reject Respondent City's assertion that RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 28859-B (WERC, 3/98) is supportive of the City's position here. Contrary to the City, we did not conclude in RACINE that where mandatory and permissive subjects of bargaining are intertwined, changes in mandatory subjects of bargaining are allowed. Rather, we concluded in RACINE that the status quo included the right of the employer to modify what was at least arguably a mandatory subject of bargaining.

Given all of the foregoing, to the extent the hours of the part-time employees exceeded the 80 hour (drivers) and 16 hour (shop employees) limitations during the contract hiatus where the circumstances identified in Article 6, Sections 5 and 6 were not present, 3/ the City breached its obligation to maintain the status quo and committed prohibited practices within the meaning of Sec. 111.70(3)(a)4, Stats., and a derivative violation of Sec. 111.70(3)(a)1, Stats.

3/ As specified in Article 6, Sections 5 and 6 of the expired contract, the status quo does include circumstances in which the City can use part-time employees in excess of the 80 hour and 16 hour maximums.

Section 5 states that the maximum for part-time drivers can be exceeded ". . . when no full-time driver is available for work; or in cases where drivers want time off without pay and the run cannot be filled without the use of overtime."

Section 6 provides that the maximum for shop employees can be exceeded where ". . . because of illness, vacation or other absence, a full-time shop employee is not at work."

Change in Shop Employee Hours

Both parties again agree that the hours issue presented here is a mandatory subject of bargaining and thus the focus of the dispute is on defining the status quo. Respondent City argues that the status quo is defined by the terms of the expired 1995-1997 contract and that said contract gave it the right to determine/change the hours of the shop employees. Complainant cites a 1990 grievance settlement agreement as establishing the status quo and, in any event, disputes the City claim that the 1995-1997 contract allowed for changes in shop employee hours. We begin with a consideration of the terms of the 1995-1997 contract.

As reflected in Finding of Fact 6, the City relies on Article 6, Section 1; Article 7, Section 1; and Article 8, Section 1 when arguing that the expired 1995-1997 contract gave it the right to change the hours of the shop employees. Those contractual provisions provide as follows:

Article 6 – Management Rights

Section 1. the Amalgamated agrees that the right to employ in accordance with the provisions of this agreement, promote, discipline and discharge employees, and the management of the property are reserved by and shall be vested in the City, and in connection therewith the City shall have the right to exercise discipline in the interest of good service and the proper conduct of its business; however, the City recognizes the right of its employees to bargain collectively on employer-employee matters that may arise from time to time.

. . .

Article 7 – Working Conditions

Section 1. The present set-up of working conditions and hours shall continue during the life of this agreement, unless further changed by mutual agreement, subject, however, to changes by the terms of this agreement, and further subject to adjustment in scheduled hours per week.

. . .

Article 8 – Working Hours

Section 1. The regular hours of employment for General Bus Mechanics are to be 40 hours per week. Scheduling of employees in this classification shall be done so as to allow one General Bus Mechanic to be on duty on Saturdays without the use of overtime. The regular hours of employment for garage employees not classified as general bus mechanics shall be 44 hours per week except for Combination Service Personnel hired after June 30, 1983 will be regularly scheduled for 40 hours of employment per week. They will also be inserted into the normal Saturday rotation without the use of overtime unless work requirements dictate the need for such overtime.

The Complainant persuasively argues that Article 6, Section 1 does not shed much light on the question of whether the City has the right to change shop employee hours.

As to Article 7, Section 1, Complainant points to the "unless further changed by mutual agreement" language as denying the City the right to change hours. However, Section 1 continues on to provide "subject, however, to changes by the terms of this agreement, and further subject to adjustment in scheduled hours of work per week." Use of the word "subject" following "mutual agreement" indicates that the language that follows "subject"

should be viewed as expressing rights not "subject" to "mutual agreement." Thus, we find the phrase "subject to adjustment in scheduled hours of work per week" is supportive of the City's position that it has the right to change work schedules.

Article 8, Section 1 is the contract provision that deals specifically with the hours of the shop employees. Complainant argues that because this portion of the contract only specifies the number of hours employees will work and with the interrelationship between Saturday work and overtime, Article 8, Section 1 is not relevant to the question of whether the City has the right to change scheduled hours. We disagree. Article 8, Section 1 directly references "Scheduling" of "General Bus Mechanics" and to how "Combination Service Personnel" "will be regularly scheduled for 40 hours of employment per week." When read as a whole, we think it clear that the language of Article 8, Section 1 acknowledges the City's the right to schedule the work of shop employees so long as the number of hours per week and the Saturday limitations are honored.

Given the foregoing, if the City is correct that it is the expired 1995-1997 contract that defines the status quo, we would conclude that the status quo allowed the City to change the hours of shop employees in August 1997. However, as noted earlier herein, the Complainant argues that the 1990 grievance settlement agreement must also be considered when determining the status quo for shop employees' hours. We turn to a consideration of the impact of the 1990 grievance settlement agreement on the status quo.

As we held in MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 24287-A (WERC, 3/89) where, as here, parties enter into an agreement of unspecified duration that resolves a dispute arising under their overall contract, that agreement has a duration co-extensive with the overall contract and is subject to renewal, amendment or elimination each time the parties bargain the terms of their successor overall contract. Here, there is no evidence that the parties ever amended or eliminated the settlement agreement. Thus, although first reached in 1990, we conclude the settlement agreement in question was renewed each time the parties bargained their overall contract and remained in effect during the term of the 1995-1997 contract.

Respondent City generally acknowledges the ongoing potential impact of the 1990 settlement agreement on the parties' dispute. However, citing several grievance arbitration awards, the City argues that if the underlying circumstances change substantially from those in effect when the settlement agreement was reached, the agreement need not be honored. The City contends the addition of evening routes is a substantial change in circumstances.

We do not find this City argument persuasive. Circumstances often change during the term of an agreement. If the parties had intended that the settlement agreement was subject to termination due to changed circumstances, they presumably would have so stated. They did not.

Given all of the foregoing, we are confronted with the question of how the status quo should be defined where the terms of the overall 1995-1997 contract gave the City the right to schedule shop employees but the terms of a settlement agreement specified what the schedule will be. Applying the maxim of contract interpretation that the specific should govern over the general, we conclude that the specific settlement agreement overrides the more general contract and establishes the terms of the status quo.

The City next argues that its alteration of the status quo as to shop employee hours should be excused under the "necessity" defense. The Complainant responds by pointing out that even under the 1990 settlement agreement, the City was able to staff the night shop hours with employees so long as they paid overtime for hours worked outside the scope of the 1990 schedule. Thus, the Complainant argues that the City's "necessity" was not the ability to get necessary work performed but rather was only the ability to get the work done without paying overtime.

We find the Complainant's arguments persuasive. As both parties acknowledge, we have previously concluded that the opportunity to obtain operational cost savings cannot be equated with "necessity." VILLAGE OF SAUKVILLE, SUPRA; RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 23904-B (WERC, 9/87). Here, the Respondent City was simply trying to avoid overtime costs. Thus, we conclude a valid necessity defense is not present here.

Alleged Violation of Section 111.70(3)(a)5, Stats.

Section 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer to violate a collective bargaining agreement. The Complainant argues that because the 1990 settlement agreement is a "collective bargaining agreement," the Respondent City also violated Sec. 111.70(3)(a)5, Stats., when it established shop employees' hours that conflicted with those in the settlement agreement.

As noted earlier herein, the duration of the 1990 settlement agreement paralleled that of the 1995-1997 agreement. The Respondent City's action came after the 1995-1997 contract had expired. Thus, the 1990 settlement agreement had also expired as a "collective bargaining agreement" when the City acted. Given that expiration, no violation of Sec. 111.70(3)(a)5, Stats., was committed by the Respondent City.

Alleged "Impact Bargaining" Violation of Section 111.70 (3)(a)4, Stats.

Complainant contends that Respondent City was obligated to but did not bargain with Complainant over the impact of the illegal change in shop employee hours on matters such as employee wages. However, the record establishes that the parties did in fact bargain over impact issues. Therefore, we dismiss this allegation.

Remedy

Complainant presented an exhibit at hearing detailing its view of the monetary remedy that is appropriate should it prevail. Respondent correctly argues that this exhibit cannot be presumed to be accurate because, for instance, there are circumstances identified in Article 6, Sections 5 and 6 when part-time employees can appropriately be used beyond the hour limitations we find present as part of the status quo. Respondent goes on to argue that the inaccuracy of the exhibit should mean that no backpay should be granted. We reject this argument. It is appropriate that affected employees be made whole for losses suffered as a consequence of the Respondent's illegal conduct. However, we acknowledge that it may be difficult to verify what those losses were. Further, as also argued by Respondent, it is conceivable that the result produced by the interest arbitration process (in this instance the parties' voluntary settlement of their successor contract) has some relevance to the level of monetary remedy that is appropriate.

It is our hope that the parties will reach a voluntary agreement on the loss of wages and benefits caused by Respondent's illegal conduct. If such an agreement does not occur, then supplemental hearing will be needed as to remedy.

Dated at Madison, Wisconsin, this 17th day of December, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steven R. Sorenson /s/
Steven R. Sorenson, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

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