

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of

**CITY OF EAU CLAIRE**

Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b),  
Wis. Stats., Involving a Dispute Between Said Petitioner and

**AMALGAMATED TRANSIT UNION, LOCAL 1310**

Case 234  
No. 56479  
DR(M)-592

**Decision No. 29546**

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Appearances:

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Stephen L. Weld**, 4330 Golf Terrace, Suite 205, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appeared on behalf of the City of Eau Claire.

Davis, Birnbaum, Marcou, Seymour & Colgan, by **Attorney James G. Birnbaum**, 300 North Second Street, Suite 300, P.O. Box 1297, LaCrosse, Wisconsin 54602-1297, appeared on behalf of the Amalgamated Transit Union, Local 1310.

**FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND DECLARATORY RULING**

On May 6, 1998, the City of Eau Claire filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling as to the City's duty to bargain with the Amalgamated Transit Union, Local 1310, over certain matters.

The parties stipulated to the facts and filed written argument, the last of which was received November 16, 1998.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

No. 29546

### **FINDINGS OF FACT**

1. The City of Eau Claire, herein the City, is a municipal employer having its principal offices in Eau Claire, Wisconsin. The City provides bus service to its citizens.

2. Amalgamated Transit Union, Local 1310, herein the Union, is a labor organization functioning as the exclusive collective bargaining representative of certain bus drivers and mechanics employed by the City.

3. Prior to May, 1974, bus service in Eau Claire, Wisconsin was provided by the Eau Claire Transportation Company whose employees were represented for the purposes of collective bargaining by the Union. In May, 1974, the City purchased the Eau Claire Transportation Company using federal funds. As a condition of using the funds, the City and the Union became parties to a 13(c) Agreement under the Urban Mass Transportation Act of 1964. The 13(c) Agreement provides, in pertinent part:

(2) All rights, privileges, and benefits (including pension rights and benefits) of employees covered by this agreement (including employees having already retired) under existing collective bargaining agreements or otherwise, or under any revision or renewal thereof, shall be preserved and continued; provided, however, that such rights, privileges and benefits not previously vested may be modified collective bargaining and agreement by the operator of the transit system and the Union to substitute rights, privileges and benefits of equal or greater economic value.

4. The 1995-1997 bargaining agreement between the City and the Union contains the following provisions:

#### **Article 2 – Union Security and Rights**

. . .

Section 6. All practices now in effect, affecting members, unless changed by the terms of this agreement, shall remain in effect unless changed by mutual agreement. (emphasis added).

. . .

#### **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. 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. (emphasis added).

During reductions in service, a full-time operator may be offered a part-time position. When a full-time driver is transferred to a part-time position, he/she will retain benefits previously accrued. He/she will be offered a one-time opportunity to be paid accrued vacation benefits at the existing rate of pay or to use vacation as a part-time employee in accordance with contract provisions and at the part-time pay rate.

Part-time operators will receive benefits on a prorated basis (based on a 20 hour work week), excepting sick leave which will not be allowed part-time operators.

Section 6. The City shall have the right to employ one (1) part-time shop employee. The 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 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. (emphasis added)

. . .

## **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.

The City asserts that the underlined portions of these provisions are permissive subjects of bargaining.

5. The disputed contract provisions set forth in Finding of Fact 4 primarily relate to wages, hours and conditions of employment (in part) and primarily related to managerial prerogatives and public policy determinations (in part).

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

### **CONCLUSIONS OF LAW**

1. The parties' 13(c) Agreement does not mandate that the City of Eau Claire bargain with Amalgamated Transit Union over permissive subjects of bargaining.

2. The disputed contract provisions set forth in Finding of Fact 4 are mandatory subjects of bargaining (in part) and permissive subjects of bargaining (in part) within the meaning of Sec. 111.70(1)(a), Stats.

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

### **DECLARATORY RULING**

1. To the extent the disputed contract provisions set forth in Finding of Fact 4 are mandatory subjects of bargaining, the City of Eau Claire has a duty to bargain within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats. with Amalgamated Transit Union, Local 1310 over said provisions.

2. To the extent the disputed contract provisions set forth in Finding of Fact 4 are permissive subjects of bargaining, the City of Eau Claire has no duty to bargain within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats. with Amalgamated Transit Union, Local 1310 over said provisions.

Given under our hands and seal at the City of Madison, Wisconsin this 8th day of February, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

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James R. Meier, Chairperson

A. Henry Hempe /s/

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A. Henry Hempe, Commissioner

Paul A. Hahn /s/

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Paul A. Hahn, Commissioner

**CITY OF EAU CLAIRE**

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND DECLARATORY RULING**

**Impact of the 13(c) Agreement**

The parties disagree as to the impact of the following 13(c) Agreement language on this litigation:

(2) All rights, privileges, and benefits (including pension rights and benefits) of employees covered by this agreement (including employees having already retired) under existing collective bargaining agreements or otherwise, or under any revision or renewal thereof, shall be preserved and continued; provided, however, that such rights, privileges and benefits not previously vested may be modified collective bargaining and agreement by the operator of the transit system and the Union to substitute rights, privileges and benefits of equal or greater economic value.

The Union contends the 13(c) Agreement mandates that the disputed contract provisions be treated as mandatory subjects of bargaining without regard to the provisions' status under Wisconsin law. The Union asserts that the disputed provisions are "rights, privileges, and benefits" under the 13(c) Agreement which can only be modified through collective bargaining – not through declaratory ruling litigation. To find the provisions to be permissive subjects of bargaining subject to unilateral removal would be violative of the "substitution" right of the 13(c) Agreement which requires receipt of "rights, privileges and benefits of equal or greater economic value" if existing "rights, privileges and benefits" are modified.

The Union concedes that the 13(c) Agreement does not guarantee the continued presence of existing contract provisions in the successor contract. However, the Union alleges that the 13(c) Agreement requires that any modification result from the collective bargaining process. The Union contends that *LOCAL DIVISION 519, AMALGAMATED TRANSIT UNION, AFL-CIO v. LACROSSE MUNICIPAL TRANSIT UTILITY*, 445 F. Supp. 798 (W.D. Wis., 1978), *UNITED TRANSPORTATION UNION v. BROCK*, 815 F.2d 1562 (D.C. Cir. 1987), and *AMALGAMATED TRANSIT UNION v. DONOVAN*, 767 F.2d 939 (D.C. Cir. 1985) all support the proposition that 13(c) agreements protect the process of collective bargaining.

Thus, the Union argues by virtue of the 13(c) Agreement, the City and Union have agreed to consider all portions of their contract as mandatory subjects of bargaining and the City has, in effect, waived its right to challenge the status of the disputed provisions through the declaratory ruling process.

The City contends that the 13(c) Agreement does not protect permissive subjects of bargaining. It argues that collective bargaining under the National Labor Relations Act (NLRA), like collective bargaining under the Municipal Employment Relations Act (MERA), distinguishes between mandatory and permissive subjects of bargaining and that an employer need not bargain over permissive subjects of bargaining under either Act. The City submits that it is adhering to the 13(c) Agreement by bargaining over mandatory subjects of bargaining. However, the City asserts that from a review of LACROSSE, supra, DONAVAN, supra, and BROCK, supra, it is apparent that protection of the collective bargaining process under a 13(c) Agreement does not protect permissive subjects of bargaining.

We find the City's view of the 13(c) Agreement to be more persuasive than the Union's. While the Union argues it only seeks to protect the collective bargaining process, we find the Union to be seeking more rights than it had when it was bargaining with the Eau Claire Transportation Company under the NLRA. As asserted by the City, under the NLRA, the Union did not have the right to bargain over permissive subjects of bargaining. From our review of LACROSSE, DONAVAN and BROCK, it is apparent that 13(c) Agreements protect existing bargaining rights but do not create additional rights. Thus, because the Union herein seeks a right it did not have under the NLRA – the right to bargain over permissive subjects of bargaining – we reject the Union's position.

Language from the DONAVAN decision directly supports the result we reach. At page 954, the Court makes clear that the purpose of 13(c) Agreements is to maintain rights as they existed under the NLRA when it states:

. . . Act 1506 mandates that the parties bargain in the same manner and to the same extent as if (the Authority's employees) were the employees of any privately owned transportation system. . .

The Court also states at page 954 that:

We hold that while section 13(c) does not entitle transit workers to any particular form of binding arbitration, it does require some process that avoids unilateral control by an employer over mandatory subjects of bargaining. (emphasis added).

Given all of the foregoing, we find the 13(c) Agreement does not protect permissive subjects of bargaining and does not deprive the City of its rights under MERA to seek a determination as to whether permissive subjects are present in the 1995-1997 agreement. We proceed to determine whether the disputed contract provisions are mandatory or permissive subjects of bargaining.

**Article 2, Section 6 and Article 7, Section 1**

Article 2, Section 6 provides, in disputed part:

All practices now in effect, affecting members, unless changed by the terms of this agreement, shall remain in effect unless changed by mutual agreement.

Article 7, Section 1 provides, in disputed part:

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.

The City argues that because these two “maintenance of standards” clauses are not limited to mandatory subjects of bargaining, the clauses require maintenance of matters which are permissive subjects of bargaining and thus are themselves permissive to that same extent. The City cites Commission decisions in RUSK COUNTY, DEC. NO. 18593 (WERC, 4/81), GREEN COUNTY, DEC. NO. 20056 (WERC, 11/82) and CITY OF WAUKESHA, DEC. NO. 17830 (WERC, 5/80), in support of its position.

The Union contends that the scope of the two maintenance of standards clauses is limited to the mandatory subjects of bargaining of union security and rights, hours and working conditions. Therefore, the Union alleges the disputed provisions are mandatory subjects of bargaining.

We have held that where a maintenance of standards clause is explicitly limited to mandatory subjects of bargaining, it is a mandatory subject of bargaining (GREEN COUNTY, CITY OF WAUKESHA) and that absent such an explicit limitation, the clause is to that extent permissive (RUSK COUNTY). Our holdings reflect the reality that “practices” or “working conditions” can reasonably be interpreted to include matters which are permissive subjects of bargaining. For instance, a teacher’s “working conditions” could reasonably be interpreted to include the number of students taught. However, class size is a permissive subject of bargaining. BELOIT EDUCATION ASSOCIATION V. WERC, 73 Wis. 2D 43 (1976).



As presently written, the language of Article 2, Section 6 and Article 7, Section 1 is sufficiently broad to encompass “practices” or “working conditions” which are permissive subjects of bargaining. Thus, under RUSK, GREEN COUNTY, and CITY OF WAUKESHA, the disputed language is to that extent permissive. If modified to explicitly state that their scope is limited to protection of matters which are mandatory subjects of bargaining, the provisions themselves become mandatory subjects of bargaining in their entirety. We believe our result to be consistent with the result that would be reached under the NLRA.

**Article 6, Sections 5-6**

The disputed language in Article 6, Section 5 states:

The City shall be able to employ four part-time operators on a regular basis.

The disputed language in Article 6, Section 6 provides:

The City shall have the right to employ one (1) part-time shop employee.

The City claims that these provisions are permissive subjects of bargaining because they limit management’s prerogative to hire part-time employees and therefore impact on the “execution of public policy prerogatives” as to how much, where and when bus service should be provided.

Contrary to the Union, the City asserts the contract provisions do not establish the number of hours per week part-time employees may work or give full-time employees priority on job assignments. Instead, the provisions simply limit the number of part-time employees that can be hired, which, in turn, negatively impacts on the City’s ability to meet the bus service level choices it has made.

Unlike the proposal at issue in WAUSAU AREA TRANSPORTATION SYSTEM, DEC. NO. 25563 (WERC, 7/88), these contract provisions preclude the City from deciding how many part-time employees to hire. Therefore, the City argues that these provisions are simply “manning” proposals which, unlike the proposed at issue in WAUSAU, are therefore permissive subjects of bargaining.

The Union contends that when read in context, the disputed language does no more than establish the number of hours per week part-time employees may work. Thus, the Union contends the provisions are equivalent to the disputed language in WAUSAU which was found to be a mandatory subject of bargaining.

The Union alleges that the disputed provisions do not prohibit the City from making the public policy choices of providing evening bus service or expanding bus service into different geographic areas. Like any contract provision, the disputed language simply modifies the City's otherwise unfettered prerogatives but remains a mandatory subject of bargaining.

Both parties correctly cite our prior holding in WAUSAU as an important component in the resolution of this dispute. In WAUSAU, the disputed proposal stated:

- (b) Part-time employees shall not perform work in excess of 30 hours in any week.
- (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.

We held:

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 employee.

As to the proposal's relationship to and impact upon employee wages, hours and conditions of employment, the Union correctly identifies the essential nature of their impact as being the desire of full-time employees to receive hours of work they find sufficient to meet their needs and of part-time employees 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 employee 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 employees.

When balancing the respective interests of the parties which are impacted by the proposal, we conclude that the employee interests predominate. Employee interests in the number of hours worked and the work assignment received are at the very core of interests employees seek to protect through the collective bargaining process. Thus, proposals establishing hours of work and the right to job assignment preference based on seniority or other factors have been found mandatory despite their intrusion into management prerogatives. 4/ Here, we find those same core employee interests to be impacted upon the Union's proposal and conclude that, on balance, the employee interests outweigh the Employer interest in maintaining existing managerial flexibility. Thus, we find the proposal to be a mandatory subject of bargaining.

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2/ We do not view issues of how many hours a part-time employee 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 employees. If it did, we would find the proposal permissive to that extent if it prevented the Employer from assigning employees 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).

As reflected in WAUSAU, the question before us as to these proposals is whether the intrusion into managerial flexibility outweighs the impact on employee wages, hours and conditions of employment. As correctly argued by the Union, and as was true in WAUSAU, there are no substantial public policy considerations present here. The City is free to provide whatever bus service it wishes, wherever it wishes, and whenever it wishes.

The City views WAUSAU as holding that restrictions on the overall number of hours part-time employees can work are mandatory subjects of bargaining so long as the employer remains free to hire as many part-time employees as it wishes. The Union, in effect, concurs with the City's view of WAUSAU by arguing that when viewed in context, the disputed language is no more than a different manner of stating a WAUSAU restriction on the total number of hours part-time employees can work.

Clearly, the Union is correct that when the limitation on the number of part-time employees is combined with the limits on the usage of each part-time employee, a WAUSAU limitation on the overall usage of part-time employees is created. Consistent with WAUSAU, the disputed language is mandatory at least as to the extent it is a component in an overall limitation on use of part-time employees.

However, the Union's protests to the contrary, it is clear the disputed language goes beyond WAUSAU. In addition to serving as part of a mathematical equation by which an overall limitation on the allowable number of part-time employee hours can be calculated, the existing contract provisions prohibit the hiring of more than the specified number of part-time employees. Is this additional intrusion into management prerogatives sufficient to warrant a conclusion that the disputed language is to that extent a permissive subject of bargaining?

We conclude this question should be answered in the affirmative. While the Union has a right to bargain WAUSAU-type protections and limitations on the overall use of part-time employees (see also CITY OF RIVER FALLS, DEC. NO. 28384 (WERC, 5/95), we conclude that as to determinations of how many employees to hire, management interests in determining organizational structure predominate over employee interests. See SHAWANO COUNTY, DEC. NO. 28250-B (WERC, 2/97). We believe our result to be consistent with the result that would be reached under the NLRA.

Given the foregoing, as was true for the maintenance of standards provisions, the disputed portions of Article 6, Sections 5-6 are mandatory in part and permissive in part.

Dated at the City of Madison, Wisconsin this 8<sup>th</sup> day of February, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

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James R. Meier, Chairperson

A. Henry Hempe /s/

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A. Henry Hempe, Commissioner

Paul A. Hahn /s/

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Paul A. Hahn, Commissioner

