STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATION ASSOCIATION, Complainant,

vs.

RACINE UNIFIED SCHOOL DISTRICT and BOARD OF EDUCATION OF THE RACINE UNIFIED SCHOOL DISTRICT, Respondents.

Case 187
No. 57636
MP-3528

Decision No. 29659-B

Appearances:

Kelly & Petranech, by **Attorney Brett C. Petranech,** 122 East Olin Avenue, Suite 195, Madison, Wisconsin 53713, appearing on behalf of the Racine Education Association.

Melli, Walker, Pease & Ruhly, S.C., by **Attorney Jack D. Walker,** Ten East Doty, Suite 900, P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of the Racine Unified School District and the Board of Education of the Racine Unified School District.

ORDER AFFIRMING AND MODIFYING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND AFFIRMING EXAMINER'S ORDER

On December 13, 1999, Examiner Lionel L. Crowley issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that Respondent Racine Unified School District had not violated its duty to bargain with Complainant Racine Education Association and thus had not violated Secs. 111.70(3)(a) 4 or 1, Stats. Therefore, he dismissed the complaint.

Complainant timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received February 14, 2000.

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

ORDER

A. Examiner's Findings of Fact 1-7 are affirmed.

B. Examiner Finding of Fact 8 is affirmed as modified to delete the following sentence:

The parties reached impasse at that meeting.

C. Examiner Findings of Fact 9-10 are affirmed.

D. Examiner Conclusion of Law 1 is affirmed.

E. Examiner Conclusion of Law 2 is affirmed as modified below:

2. By implementing its inservice proposal, the District did not violate its duty to bargain with the Association and thus did not violate Secs. 111.70(3)(a)4 or 1, Stats.

F. Examiner's Order is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 17th day of April, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

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

I concur in part and dissent in part.

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

Racine Unified School District

MEMORANDUM ACCOMPANYING ORDER AFFIRMING AND MODIFYING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND AFFIRMING EXAMINER'S ORDER

To a large extent, the parties disagree not over what happened but over the legal consequences of their conduct. A review of that conduct is a useful place to begin our consideration of the Complainant's petition for review.

The Respondent had some inservice issues that it wanted to bargain with Complainant during the term of the parties' July 1, 1997-June 30, 1999 contract. The Respondent sought bargaining over these inservice issues in November 1998 and January 1999. The Complainant agreed to bargain over the inservice issues and the parties subsequently had two bargaining sessions -- one in February 1999 and one in March 1999.

By letter dated March 19, 1999, Respondent provided Complainant with a written inservice proposal dated March 17, 1999, that Respondent felt reflected a conceptual agreement the parties had reached on inservice issues during their two bargaining sessions. The March 17 proposal stated:

> Racine Unified School District
> Proposal
> March 17, 1999
>
> Mandatory Staff Development (Inservice)
>
> Mandatory inservice meetings after regular school hours must be attended by all persons directed to attend unless excused for just cause by their principal or supervisor.
>
> Mandatory inservice meetings may be held after regular school hours on Thursdays or on Saturdays. No teacher will be required to attend more than three (3) Saturday inservice meetings.
>
> Bargaining group members attending these inservice meetings (excluding inservice on early release days, Institute Day and special education inservice designated as Section 10.5 meetings) will be paid a stipend of $80.00 for attending a Saturday inservice meeting and $40.00 for attending an after-school inservice meeting. Saturday meetings will be approximately four (4) hours long and after-school inservice meetings will be approximately two (2) hours long. Student Assistance sponsored workshops that are held on Saturdays may be up to seven (7) hours long, including lunch, and the stipend for attending this length of meeting shall be $100.00.

> Bargaining group members who are required to be presenters at these meetings will be paid the same as Institute Day Inservice Presenters as specified in Section 18 of the collective bargaining agreement. This will be in addition to their stipend as an inservice attendee.
>
> After-school and Saturday inservice meetings will not be held between May 15th and the end of the school year. These meetings will also not be held between the start of the school year and September 15th. This applies to teachers assigned to teach during the regular school year.
>
> Student Assistance sponsored workshops may be held during summer months for periods not to exceed three (3) days. A stipend of $100.00 per seven (7) hour day will be paid in such case. Excuses for not being able to attend a summer workshop will be liberally considered.

Complainant did not respond to Respondent's written proposal. By letter dated April 19, 1999, Respondent advised Complainant that it interpreted Complainant's silence as indicating that an agreement did not exist and asking for Complainant's substantive position on inservice issues. Complainant made no written response to the April 19 letter but ultimately verbally advised Respondent that Complainant would not reach agreement on any inservice issues except as part of an overall settlement of a 1999-2001 contract. At the time of this conversation, the parties had not yet exchanged initial proposals for a successor agreement.

The parties met on June 8, 1999 and exchanged their initial proposals for a 1999-2001 contract. Respondent's initial proposal contained the same inservice language as had been proposed to Complainant March 19 except the first and last sentences of the March 17 proposal were deleted. During the June 8, 1999 meeting, neither side raised any issue regarding the status of the separate inservice bargaining that had occurred in February and March.

By letter dated June 10, 1999, Respondent advised Complainant that it believed the parties had reached an impasse in their inservice negotiations and therefore was implementing its inservice proposal. The inservice proposal contained in the June 10 letter was the same as the inservice proposal contained in Respondent's initial proposal for the 1999-2001 contract.

On June 16, 1999, Complainant filed the instant complaint.

THE EXAMINER'S DECISION

The Examiner considered the foregoing conduct and concluded that an impasse occurred when Complainant terminated the mid-contract inservice bargaining by advising Respondent that it was unwilling to reach any inservice agreements except in the context of a settlement of the 1999-2001 contract the parties had not yet begun to bargain. The Examiner

further concluded that because an impasse existed, Respondent could proceed to implement its March 17 inservice proposal. The Examiner acknowledged that there was a difference between the March 17 proposal and the June 10 implementation notice provided to Complainant. However, because he determined (1) there was no evidence that Respondent had not in fact implemented the March 17 proposal and (2) the difference reflected an inadvertent error by Respondent, the Examiner concluded that the difference was of no legal consequence if corrected. He directed Respondent to make the correction and dismissed the complaint.

POSITIONS OF THE PARTIES ON REVIEW

Complainant

Complainant contends the Examiner erred when he concluded that an impasse had been reached, and that Respondent thus did not violate its duty to bargain with Complainant when Respondent implemented an inservice proposal during the term of a contract.

Complainant argues that the Examiner wrongly viewed Respondent's action as implementation of a March 17, 1999 inservice proposal that followed some inservice bargaining. Complainant alleges that the proposal actually implemented on or about June 10, 1999 was first made on June 8, 1999 and was never bargained. Because there never was any bargaining over the June 8 proposal, Complainant contends there could be no impasse and thus that Respondent's action was illegal. Once the new proposal was made in June 1999, Complainant asserts that the March 17 proposal and any alleged impasse over it became irrelevant. Complainant argues that Respondent's new June proposal in effect waived whatever right Respondent may have previously had to implement following the alleged impasse over the March 17 proposal.

To the extent the Examiner accepted Respondent's claim that it intended to implement the March 17 proposal and that language from the March 17 proposal was omitted by mistake from the June 10 implementation letter, Complainant argues that the record does not support the claim of mistake.

Even assuming the Examiner correctly concluded that it was the March 17 proposal that was implemented, Complainant contends that the Examiner nonetheless erred because the parties were not at impasse as to inservice issues. Complainant asserts the Examiner failed to appropriately consider the parties' long term and short term bargaining history on inservice issues, the Complainant's June 8 inservice proposal, the District's lack of good faith, the importance of inservice as an issue, and the parties' contemporaneous understanding at the time the District declared an impasse. Complainant argues that the Examiner incorrectly concluded that the inservice proposals contained in the parties' June 8 package proposals had nothing to do with the question of whether impasse existed as to the parties' mid-term inservice bargaining. Complainant asserts that Respondent's conduct gave it no reason to believe that Respondent did not share Complainant's interest in bargaining inservice issues as part of the overall negotiations for a new contract.

Complainant contends that neither fair labor policy nor existing Commission precedent support a conclusion that an impasse is per se created when one party desires to bargain over an issue as part of a package and the other desires single issue bargaining. Because it was willing to continue to bargain over inservice issues and the parties exchanged inservice proposals on June 8, Complainant argues that no impasse existed and the Respondent's implementation therefore violated Sec. 111.70(3)(a) 4 and 1, Stats.

Respondent

Respondent argues the Examiner correctly resolved the issues before him and should be affirmed. Respondent contends the Complainant either fails or refuses to recognize the difference between bargaining during the term of a contract and bargaining over a new contract.

Respondent asserts it is well settled that municipal employers in Wisconsin can make mid-term changes in mandatory subjects of bargaining as long as a bargaining impasse has been reached. Respondent alleges the Examiner correctly concluded that the parties had reached impasse in their mid-term negotiations and thus that the Respondent could implement its inservice proposal.

Respondent asks that the Examiner be affirmed.

DISCUSSION

The parties come at this dispute from fundamentally different perspectives.

From Complainant's perspective, it engaged in mid-term bargaining over inservice issues which it was entitled to and did unilaterally terminate and which then evolved through Complainant's insistence and Respondent's acquiescence into bargaining on inservice as part of an overall effort to reach agreement on a 1999-2001 contract. From Respondent's perspective, the mid-term inservice bargaining was a matter which it was entitled to and did pursue to agreement or impasse and which is unaffected by the exchange of proposals for the 1999-2001 contract.

These two differing perspectives present two basic questions that need to be resolved as part of our analysis. First, did Complainant have a right to unilaterally terminate the mid-term bargaining process or did Respondent have the right to pursue the mid-term bargaining to agreement or impasse? Second, even if Complainant had no right to terminate the mid-term bargaining, did Respondent's conduct between April 19 and June 10 nonetheless waive its right to pursue the mid-term bargaining inservice issues to agreement or impasse?

When answering these two questions, we begin by acknowledging that the parties' duty to bargain during the term of a contract is limited to (1) mandatory subjects of bargaining which (2) are not already covered by the contract or as to which the right to bargain has not been waived through bargaining history or specific contract language. CITY OF MADISON, DEC. NO. 27757-B (WERC, 10/94); SCHOOL DISTRICT OF CADOTT, DEC. NO. 27775-C (WERC, 6/94); AFF'D CADOTT EDUCATION ASS'N V. WERC, 147 WIS.2D 46 (CTAPP 1995). Thus, if Complainant believed the inservice issues were not mandatory subjects of bargaining or were already covered by the 1997-1999 contract or were matters as to which Respondent had waived its right to bargain, Complainant would have been entitled to refuse Respondent's mid-term request for bargaining. Here, Complainant has not argued that it had no duty to bargain with Respondent over inservice issues during the term of the contract. Complainant makes no contention that the inservice issues are permissive subjects of bargaining, or that the issues were already covered by the contract, or that Respondent had waived an otherwise existent right to bargain mid-term.

Under these circumstances and based on the existing record, we conclude that Complainant was obligated to bargain with Respondent over the inservice issues presented by Respondent. Once Complainant began the collective bargaining process, it was obligated to honor its duty under Secs. 111.70(1)(a) and 111.70(3)(b)3, Stats., to continue to meet with the "intention of reaching an agreement." Complainant violated this obligation when it unilaterally terminated bargaining with its statement that it had no intention of reaching any agreement as part of the mid-term bargaining process. Given all of the foregoing, we think it apparent that Complainant had no legal right to terminate the bargaining process.

Did Complainant's illegal termination of bargaining create an impasse which allowed implementation -- as argued by Respondent and found by the Examiner? We think not. In our view, an analysis of whether an impasse exists is best restricted to consideration of the traditional factors of bargaining history, the good faith of the parties, the length of the negotiations, the importance of the issue or issues and the contemporaneous understanding of the parties as to the state of the negotiations. CITY OF EAU CLAIRE, DEC. NO. 22795-B (WERC, 3/86). We think the better approach is to conclude that where, as here, the union has engaged in illegal conduct that prevents the parties from reaching agreement or impasse, an employer is entitled to implement.

Such an approach draws support from existing Commission precedent. 1/ In CITY OF BROOKFIELD DEC. NO. 19822-C (WERC, 11/84) and GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84) we noted that a union's unlawful abusive delay in the interest arbitration process may allow the employer to implement **even where the dispute will ultimately be resolved through interest arbitration**. **Here**, because this is a mid-term bargain, **interest arbitration was not available to resolve the inservice dispute**. DANE COUNTY, DEC. NO. 7400 (WERC, 11/79) AFF'D DANE CO. CIRCT. CASE NO. 80-CV-0097 (6/80); EAU CLAIRE AREA VTAE DISTRICT, DEC. NO. 23944-C (WERC, 11/87). Thus, absent the ability to implement, an employer has no option available to it to seek resolution. Therefore, a union such as Complainant that illegally refuses to bargain further over a mid-term issue has

engaged in conduct more damaging to the statutory rights of the parties than would be the case where interest arbitration was available.

1/ Existing precedent under the National Labor Relations Act also supports this approach. See SERRAMONTE OLDSMOBILE V. NLRB, 86 F.3D 227 (1996).

In our view, Complainant's refusal to bargain further on a mid-term basis clearly prevented the parties from reaching agreement or impasse. Thus, we conclude that although the parties had not reached an impasse in their mid-term negotiations on inservice and Complainant's illegal conduct did not create an impasse, said illegal conduct nonetheless entitled the Respondent to implement.

Complainant argues that whatever right to implement Respondent may have acquired was subsequently waived by virtue of Respondent's willingness to bargain over inservice as part of the 1999-2001 contract negotiations. We do not agree. The bargaining over the 1999-2001 contract is separate and distinct from the mid-term bargaining over inservice issues. SEE GENERALLY EAU CLAIRE VTAE DISTRICT, SUPRA. Mid-term bargaining and implementation under the 1997-1999 contract do not remove the parties' need/obligation to bargain over the same issues for the period of time covered by the 1999-2001 contract. Thus, by making an initial proposal for the 1999-2001 contract which included an inservice proposal, Respondent was doing no more than acknowledging its obligation/interest in reaching an agreement on inservice issues (among others) for the period of July 1, 1999-June 30, 2001. The fact that the Respondent's initial inservice proposal in the context of the 1999-2001 bargain would closely resemble the Respondent's last proposal from the inservice mid-term bargain is unremarkable. One would expect that Respondent would propose essentially the same language it found acceptable during the mid-term bargain and ultimately implemented. Thus, we conclude that Respondent's conduct following Complainant's refusal to bargain and prior to the June 10 implementation does not establish that Respondent had waived its right to implement.

There remains the fact that Respondent's June 10 notice of implementation did not include the first and last sentences of its March 17 proposal. These missing sentences addressed how employe requests to be excused from mandatory inservice during the regular school year and in the summer would be judged. 2/

2/ The sentences stated:

Mandatory inservice meetings after regular school hours must be attended by all persons directed to attend unless excused for just cause by their principal or supervisor.

and

Excuses for not being able to attend a summer workshop will be liberally considered.

Where an employer is allowed to implement, it must implement in a manner consistent with the position/proposal it took at the bargaining table. EAU CLAIRE AREA VTAE DISTRICT, SUPRA; CITY OF APPLETON, DEC. NO. 18171 (PIERONI, 10/80), AFF'D DEC. NO. 18171-A (WERC, 1/82); GREEN COUNTY, DEC. NO. 20030-D (MCCORMICK, 10/83), AFF'D BY OPERATION OF LAW, DEC. NO. 20030-E (WERC, 10/83). Respondent presented testimony that the omission of the two sentences was a mistake. As noted by the Examiner, there is no evidence in the record that the Respondent's implementation was in fact inconsistent with the March 17 proposal. Under these circumstances, we are persuaded that the Respondent implemented in a manner consistent with its March 17 proposal.

Given all of the foregoing, we have affirmed the Examiner's conclusion that Respondent's implementation did not violate its duty to bargain with Complainant as well as the Examiner's resultant order that the complaint is dismissed. 3/

3/ On review, Complainant did not take issue with the Examiner's resolution of Title I issues in Conclusion of Law 1 and we hereby affirm his dismissal of that complaint allegation as well.

Commissioner Hempe criticizes us for deciding the case on a refusal to bargain theory not argued by the parties. His criticism is unwarranted.

This case turns on the consequences of the Association's admitted refusal to bargain further with the District over mid-term inservice issues. Thus, the refusal to bargain is a critical and known component of this litigation. Particularly where, as here, use of the refusal to bargain as part of an impasse analysis plows new ground under the Municipal Employment Relations Act and is contrary to long standing existing private sector labor law precedent (set forth most recently in the previously cited D.C. Court of Appeals SERRAMONTE OLDSMOBILE decision), we think our analysis is both prudent and appropriate.

Dated at Madison, Wisconsin this 17th day of April, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

Paul A. Hahn
Paul A. Hahn, Commissioner

Racine School District

DISSENT AND CONCURRENCE

In contrast to the position of the majority, I would affirm the examiner's findings of fact and conclusions of law in their entirety.

The majority asserts that the parties come at this dispute from fundamentally different perspectives. But the record does not support this contention. Instead, the record reflects that the parties have a shared perspective of the legal issue presented herein – a perspective that under all of the facts seems to me more accurately focused than the view adopted by the majority.

For the majority provides a solution for a problem that neither party identified, addressed or argued. Contrary to the view of the Racine Unified School District (RUSD) and the examiner, the majority concludes there was no *bargaining impasse* as the District sought to bargain a mid-term issue. Instead, it discovers that the Racine Education Association (REA) was guilty of "illegally" terminating the bargaining, which then serves as the majority's basis for allowing unilateral implementation by the District of its last bargaining proposal. Not only was this problem not alluded to by either side, the District specifically affirmed several times that the REA was within its *legal* rights to bargain to impasse, 1/ (but must then accept the consequences of that impasse).

1/ E.g., District's Initial Brief to Examiner (DIBE) at p. 6: "While this may be a party's right, exercising that right creates an impasse." DIBE at p. 14: "Either party in bargaining may insist on a package proposal, and may also insist on an individual proposal." DIBE at p. 18 (Footnote 4): "While the REA has a right to take such a bargaining position, the position itself creates the impasse." DIBE at p. 21: "The District does not claim Mr. Ennis has to agree to anything, and the District agrees Mr. Ennis could, for the sake of argument, condition his agreement on one thing on agreement on other things, even where some of the issues are successor contract issues, and some are not." District's Brief to Commission (DBC) at p.12: "However the real risk a union runs in such a situation is not a finding of bad faith bargaining, but rather implementation upon impasse being reached."

Moreover, contrary to the assertion of the majority, at no time has the REA's perspective included a claim or acknowledgement that it unilaterally terminated bargaining over the mid-term issue. Instead, REA briefs to the Commission have consistently maintained " . . . that the District's initial proposal was unacceptable to the REA and that the REA wanted to continue negotiating," 2/ and "(i)n the end there is no factual basis for concluding an impasse existed between these parties on June 10, 1999. 3/

2/ REA's Initial Appeal Brief at p. 30, reasserted on p. 34: "First, and most obviously, Ennis' reply on its face indicated the REA's desire to continue bargaining the issue."

3/ REA's Initial Appeal Brief at p. 35.

Finally, to make its finding of illegal termination of bargaining, the majority must necessarily ignore the counter proposal the REA did make to the District, the gist of which proposed that the mid-term issue continue to be negotiated, but in the context of a successor labor agreement. There can be little doubt that the REA's counter proposal was legal. Its flaw was that it introduced a new issue (successor agreement) over which the District was not required to bargain at that point.

The majority professes to draw support from *dicta* from prior Commission cases, citing CITY OF BROOKFIELD 4/ and GREEN COUNTY. 5/ The instant matter, however, marks the first time the Commission has actually invoked its prior *dicta* of "illegal abusive delay" as a basis for allowing an employer to implement a mid-term bargaining proposal. Certainly, that *dicta* give little hint of the stretch to which the majority subjects it in this matter – a stretch that either makes new law or trivializes the past *dicta* beyond recognition.

4/ DEC. NO. 19822-C (WERC, 11/84).

5/ DEC. NO. 20308-B (WERC, 11/84).

In determining that an employer was not entitled to implement a bargaining proposal that is subject to interest arbitration, we observed in GREEN COUNTY, SUPRA: "An *extreme case* of *unlawful abusive delay of the statutory resolution process* may be another exception (to the doctrines of waiver or necessity)." Emphasis supplied. Neither waiver nor necessity was at issue herein. In the CITY OF BROOKFIELD case, SUPRA, the Commission found that "(i)n an *extreme case*, *unlawful abusive delay of the statutory process* . . . might be sufficient to render lawful a unilateral change previously proposed. Emphasis supplied.

The facts of this case are not particularly *extreme* – certainly not for the parties involved herein, but even for less bellicose protagonists. The action – or inaction – of the REA amounts to little more than a failed bargaining ploy. The tactic was not without known risk to the REA. Before negotiations on the mid-term issue even commenced REA Executive Director James Ennis recognized the existence of a potential danger of implementation by the District. (Tr. 104)

Neither do the facts admit of *illegal abusive delay* of any statutory process, including bargaining. In the first place, unlike the provisions of Ch. 111.70, Stats., governing interest arbitration for initial or successor labor agreements, the Legislature has not designed any specific *process* for the resolution of *mid-term* issues. Second, even if it had, there is no evidence herein of *illegal abusive* conduct by the REA. Even the District appears to agree, correctly so in my view. 6/ Bargaining tactics implemented in pursuit of a bargaining goal may well lead to an unintended *impasse* as I (and the examiner) conclude occurred herein, but do not necessarily constitute an *illegal abusive* delay or termination of the bargaining process.

6/ See Note 1, supra. In its Reply Brief to the Examiner, the District argued that "the bottom line in this case is confined to the REA's attempt to mousetrap the District by stalling so that it could run a test case to stop all mid-term implementations with the argument that the onset of bargaining for a successor agreement gives the REA a new found veto over changes the public school deems necessary." At the end of the same brief, the District briefly returned to this line of argument, stating that "(h)ere, REA did indeed insist on delay. Delay, not the substance of the proposals, was the only issue the REA has ever specifically insisted on." P. 11. But the "delay" alleged by the District was cited only as an additional reason to justify a finding of impasse, and was never claimed to have been illegal and abusive.

From a pragmatic standpoint, inasmuch as the examiner, the majority and I all agree as to remedy, debate over whether that result should be justified by those actions of the REA that a Commission majority now finds illegal or, instead, a finding of bargaining impasse may seem pointless to some. Perhaps so. On the other hand, inasmuch as there is no effective counterweight available to municipal employes in mid-term issue cases where the employer opts to unilaterally implement except for Commission review, fairness to each party demands that we not employ a "shifting goalpost" standard. The parties are entitled to rely on prior expressions of the law as reflected in our cases. New expressions or expanded applications of existing law (particularly *dicta*), unless rationally supported by pellucid policy necessity, run the risk of being deemed arbitrary or capricious. Thus, in my view, the basis for the result that we all agree should be reached herein should not have wandered beyond the issue identified by the parties.

The issue herein identified and argued by each party is simply whether or not the parties were at impasse in their bargaining on a mid-term issue. The examiner found they were. Inasmuch as the Legislature has not provided any statutory impasse resolution procedure applicable to mid-term issues, 7/ the examiner concluded the employer could lawfully implement its last proposal.

7/ AREA VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT ONE, EAU CLAIRE, DEC. NO. 23994-C (WERC, 11/87); CITY OF EAU CLAIRE, DEC. NO. 22795-B (WERC, 3/86); GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84); DANE COUNTY, DEC. NO. 17400 (WERC, 11/79); RACINE SCHOOL DISTRICT, DEC. NO. 14722-A (WERC, 8/78).

I agree.

A mid-term issue consists of a mandatory subject of bargaining that arises during the term of an existing labor agreement, but is not covered by the terms and conditions of such agreement. There is no dispute between the parties that the issue the District sought to bargain in the instant matter was a "mid-term" issue.

But the parties disagree as to whether they were at impasse on the mid-term issue. The National Labor Relations Board has offered a useful definition of "impasse:" "A genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position." HI-WAY BILLBOARDS, INC., 206 NLRB 22, 84 LRRM 1161, 1162 (1973). Additional guidance may be taken from ERC 32.09(2) as it provides, in relevant part, a standard for Commission staff in determining whether or not parties to a labor dispute are "deadlocked:"

> ". . . The commission or its agent may not close the investigation (of whether the parties are deadlocked) until the commission or its agent is satisfied that *neither party, having knowledge of the content of the final offer of the other party, would amend any proposal contained in its final offer . . .*" (Emphasis supplied).

Ultimately, whether an impasse exists must be determined in the context of the facts in a particular case, as they existed at a particular point of time. 8/ Thus, "(w)hether a bargaining dispute exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations, are all relevant factors to be considered in deciding whether an impasse in bargaining exists." TAFT BROADCASTING CO., 163 NLRB 475, 64 LRRM 1386, 1388 (1967), quoted with approval in CITY OF EAU CLAIRE, SUPRA. 9/

8/ CITY OF EAU CLAIRE, DEC. NO. 22795-B (WERC, 3/86).

9/ I recognize that in the case of a mid-term impasse, the employer, not a third party neutral, is making a unilateral declaration of impasse. While the employer might be tempted to make a self-serving call in this regard, it proceeds at its peril in that its determination is subject to a review of the WERC (or the court).

The facts of this case are spread through two transcript volumes of testimony and 54 exhibits. I list some evidentiary highlights.

The bargaining issue facing the parties involved inservice training. Specifically, the District perceived a need to provide student assistance training workshops for its teaching professionals outside the school day that it apparently wished to commence in March of the current school year.

In a letter dated November 16, 1998 to REA Executive Director Jim Ennis, the District enclosed an inservice pay proposal for After-School Mandatory Inservice Presenters and Voluntary Inservice Presenter (after school, evenings, Saturdays). The REA made no response.

In a letter dated January 13, 1999 District Director of Employee Relations Frank Johnson explained, "Normally we would wait and propose and discuss this rate of pay during the time we bargain the entire agreement but because scheduling must take place in March, we are unable to wait." (Ex. 5)

Specifically, Johnson's letter proposed 1) that workshop attendance be voluntary, 2) that the workshops take place on Saturdays or other non-school days, and 3) a pay schedule for teachers in attendance. Johnson further indicated that the District planned to implement its proposed pay for the workshops unless the REA and the District agreed to something other than the amounts proposed.

By letter dated January 19, 1999 to Johnson, (Ex. 16) REA Attorney Robert Kelly denied the existence of any emergency sufficient to create a need for immediate unilateral action by the District as to rate of workshop pay. Kelly added that the REA would resist ". . . in an appropriate forum any attempt by the District to unilaterally implement the program you outlined in your January 13th letter."

By letter dated January 28, 1999 to Kelly, Johnson noted Kelly's letter of January 19th did not respond to the District's bargaining proposal as to workshop pay. Johnson affirmed the District's willingness ". . . to meet and bargain over this voluntary inservice," but added, ". . . based on our past experience we are not willing to put the program on hold until the Association decides if and when it is willing to bargain about this." Johnson closed with a request for any REA proposal on the issue as well as whether the REA was willing to meet prior to the program's implementation date in March.

By letter dated (and FAXed) January 28, 1999, (Ex. 18) Kelly affirmed the REA's willingness ". . . to bargain over the voluntary inservice," noted the absence of any requirement that that the REA submit a counterproposal prior to the commencement of bargaining, and suggested several alternate bargaining dates.

Following an additional exchange of letters, (Exs. 19, 20 & 21) the parties agreed to meet at the REA office on February 18 at 2:00 p.m. to bargain concerning the Student Assistance Program.

The parties met on February 18 and once more on March 11. Eight days after the March 11 meeting, Johnson mailed to Ennis a written proposal dated March 17, 1999, entitled "Mandatory Staff Development (Inservice)." (Ex. 6) The proposal dealt generally with inservice meetings, and included a provision that allowed student assistance workshops to be held during the summer months. According to its transmittal letter dated March 19, 1999, the proposal consisted ". . . of proposed contract language covering inservice and presenter stipends for after school and Saturday inservice meetings." In his letter Johnson asserted, "(t)his is pretty much what we discussed at the REA offices on March 11, 1999." Johnson added a request that Ennis advise Johnson whether the proposal "would do the job" and if not, to tell Johnson what Ennis believed would work.

Ennis neither agreed with nor responded to the proposal. At hearing, Ennis explained his inaction was based on his belief that the proposal was inconsistent with the terms of the then existing labor contract, and further noted that ". . . the whole tenor of moving from something that was voluntary to mandatory from after school to weekends is different than was discussed or heard." (Tr. 28) Consequently, Ennis said, "We gave up and did not respond." (Tr. 29) Under cross-examination, Ennis elaborated that he instructed Attorney Kelly to respond to Johnson's March 19 letter, (Tr. 89) and that Kelly's ultimate response was to file the complaint that initiated this case.

By letter dated April 19, 1999, Johnson again wrote Ennis. (Ex. 47) Johnson reminded Ennis of the District's staff development proposal attached to Johnson's letter of March 19, indicated that Ennis had not responded, and asked Ennis to delineate the REA's position on the issue. Johnson asked to be advised if Ennis wanted to meet again.

Johnson never received a written response to his April 19 inquiry. However, at hearing Johnson recalled a face-to-face meeting with Ennis on other matters sometime after April 19 at which Ennis advised him that it was Ennis' intention not to agree to anything *until an entire successor labor contract was resolved.* (Tr. 321)

On June 8, 1999 the parties opened their collective bargaining for a successor agreement. In that context, the District proposed, *inter alia*, a somewhat modified inservice and student assistance program workshop proposal.

By letter dated June 10, 1999 over signature of Employee Relations Director Frank Johnson the District announced it was implementing what amounted to its March 17 inservice/student assistance program workshop proposals.

On this record I conclude with the examiner that the parties were at impasse. The District recognized a need pertaining to student assistance workshops not covered in its collective bargaining agreement with the REA. It expressed its concern to the Association, specifically noting its wish to resolve the issue by March 1999. Following an exchange of correspondence culminating in an agreement to meet on the issue, the parties in fact met on two occasions, one in February 1999, the other in March. In April, the District wrote to the

REA inquiring as to its position. The REA did not respond in writing, but informally advised the District that it did not intend to agree to any inservice proposal relating to student assistance workshops except in conjunction with reaching an entire successor agreement to the then existing labor contract. Based on this communication, the District concluded it was at impasse, i.e., deadlocked, and proceeded to unilaterally implement its last proposal on the mid-term inservice issue.

The District's conclusion was a reasonable one. Viewed in retrospect it also appears to have been correct. Each side was aware of the final offer of the other. Neither side was inclined to amend its position. Whether measured against the formal standard of ERC 32.09(2) or a more informal common sense, the parties were deadlocked.

Moreover, the parties have a bargaining history that includes lengthy hiatus periods. The District was not unreasonable in concluding that linking its mid-term issue to negotiations on an entire successor agreement would probably not be concluded by the end of the then current school year. This, of course, would be too late to be of any assistance to the District in implementing its student assistance workshops during the current school year.

Thus, when REA Executive Director Ennis advised RUSD Human Relations Director Johnson that the REA would agree to nothing *except* in the context of negotiating an entire successor labor agreement, Ennis clearly stamped negotiations on the mid-term inservice issue with the word "deadlocked." For the District was under no duty to negotiate issues outside the mid-term issue it had raised. "Package bargaining" may well be the normal bargaining practice for these parties as they negotiate successor labor agreements where bargaining impasses are resolved by interest arbitration, but does not oblige the parties to operate in similar fashion as to mid-term issues that may emerge.

The fact that the parties had negotiated the issue on only two previous occasions is immaterial. Length of negotiations is only one of several factors to be considered in determining whether an impasse exists. 10/

10/ See TAFT BROADCASTING COMPANY, SUPRA, cited with approval in CITY OF EAU CLAIRE, SUPRA. See also CITY OF APPLETON, DEC. NO. 18171 (PIERONI, 10/80), AFF'D DEC. NO. 18171-A (WERC, 1/82), in which the examiner found an impasse had been reached after only three negotiating sessions and one telephone conference.

REA claims of implementation by ambush seem disingenuous in view of the District's letter dated January 13, 1999 in which it expressly noted its intent to implement its mid-term

proposals if agreement was not reached. Moreover, as previously noted, at hearing the REA Executive Director expressly acknowledged his early concern that the District would seek to unilaterally implement its inservice proposal, (Tr. 104) and his later opinion that unilateral implementation was in fact the District's intention. (Tr. 105) That the District actually did so following the obvious deadlock between the parties could have thus hardly been a surprise to the REA.

Arguably, District implementation contained elements of clumsiness and poor timing. For instance, the District was uncertain whether it sent a letter dated May 26, 1999 (Ex. 54) to Ennis in which the District announced its intention to implement its previously proposed pay for teachers attending student assistance workshops. The June 10 letter of implementation that the District did send failed to mirror with exactitude the District's last proposal. Finally, based in part on District uncertainty as to whether it mailed its letter dated May 26, 1999, the District was not able to establish that it had implemented its mid-term issue proposal *before* embarking on negotiations for a successor agreement on June 8.

As to the last point the REA argues that whatever right to implement the District may have acquired was thus waived by virtue of the District's willingness to bargain over inservice as part of the 1999-2001 contract negotiations. I do not agree.

As the majority agrees, the bargaining over the 1999-2001 contract is a matter separate and distinct from the mid-term bargaining over inservice issues. See EAU CLAIRE VTAE DISTRICT, SUPRA. In this instance, mid-term bargaining and implementation under the 1997-99 contract did not remove the parties' need and obligation to bargain on the same issue for the successor agreement. Moreover, a mid-term bargaining impasse, itself, merely represents a hiatus in negotiations. HI-WAY BILLBOARDS, INC., SUPRA.

Thus, by making an initial proposal for the 1999-2001 contract that included an inservice proposal, the District was doing no more than acknowledging its duty to bargain the impact of the issue in the successor agreement. The fact that this proposal closely resembled the District's soon-to-be implemented mid-term proposal is both unremarkable and predictable. Accordingly, although better practice would have been for the District to announce its implementation of its mid-term issue proposal *prior* to commencing negotiations for a successor agreement that included the identical issue, I conclude that the District's failure to do so in this instance does not create any District waiver of its right to implement.

There remains the fact that the District's June 10 notice of implementation did not exactly replicate its proposal of March 17. Specifically, the District failed to include the first and last sentences of its March 17 proposal. These missing sentences address how employe requests to be excused from mandatory inservice during the regular school year and in the summer would be evaluated. 10/

10/ The sentences stated:

> ***Mandatory inservice meetings after regular school hours must be attended by all persons directed to attend unless excused for just cause by their principal or supervisor.***
>
> ***And***
>
> ***Excuses for not being able to attend a summer workshop will be liberally considered.***

Where an employer is allowed to implement, it must do so in a manner consistent with its last stated bargaining position. EAU CLAIRE AREA VTAE DISTRICT, SUPRA; CITY OF APPLETON, DEC. NO. 18171 (PIERONI, 10/80) AFF'D DEC. NO. 18171-A (WERC, 1/82); GREEN COUNTY, DEC. NO. 20030-D (MCCORMICK, 10/83) AFF'D BY OPERATION OF LAW, DEC. NO. 20030-E (WERC, 10/83).

In the instant matter, the District presented testimony that the omission of the two sentences in question was inadvertent. As noted by the Examiner, there is no evidence in the record that the District's implementation was in fact inconsistent with its March 17 written proposal to the Association. Under these circumstances neither the majority nor I am persuaded that the District illegally implemented its March 17 proposal. In the words of the examiner, "no harm, no foul."

Given all of the foregoing, I would thus affirm the findings, conclusions and result reached by the examiner. Specifically, I dissent from the majority's conclusion that the REA was guilty of illegal termination of the bargaining process, but concur with the majority's conclusion that the District's implementation of its March 17 proposal did not violate its duty to bargain the mid-term issue with the Association. Accordingly, I join the majority in ordering the complaint of the REA be dismissed.

Dated at Madison, Wisconsin this 17th day of April, 2000.

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

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