STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

LOCAL 1310, AMALGAMATED TRANSIT UNION

To Initiate Arbitration Between Said Petitioner and

THE CITY OF EAU CLAIRE AND THE EAU CLAIRE TRANSIT AUTHORITY

Case 232
No. 55325
INT/ARB-8186

Decision No. 29675-B

Appearances:

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

Weld, Riley, Prenn & Ricci, by **Attorney Stephen L. Weld,** 4330 Golf Terrace, #205, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the City of Eau Claire and the Eau Claire Transit Authority.

ORDER

On August 27, 1997, Amalgamated Transit Union Local Division 1310 filed a petition for interest arbitration with the Wisconsin Employment Relations Commission pursuant to Sec. 111.70(4)(cm)6, Stats., regarding the efforts of Local 1310 and the City of Eau Claire to reach agreement on a successor to a 1995-1997 contract. Pursuant to the petition, the parties met with Commission Investigator Paul Hahn who attempted to mediate a settlement of the contract dispute.

During the parties' collective bargaining, a dispute arose as to the duty to bargain over certain matters and the City filed a petition for declaratory ruling with the Commission to resolve the dispute. On February 8, 1999, the Commission issued Findings of Fact, Conclusions of Law and Declaratory Ruling.

Following issuance of the Commission's decision, the parties returned to the bargaining table but were unable to reach agreement on a new contract. After further mediation efforts proved unsuccessful, Investigator Hahn recommended to the Commission that an order directing the parties to interest arbitration be issued. On July 28, 1999, the Commission issued Findings of Fact, Conclusions of Law, Certification of Results of Investigation and Order Requiring Arbitration. The parties thereafter selected Rose Marie Baron as their interest arbitrator and the Commission then issued an Order appointing Ms. Baron as the arbitrator to issue a final and binding award pursuant to Sec. 111.70(4)(cm)6 and 7, Stats.

Thereafter, a dispute arose between the parties as to the content of their respective final offers. Following efforts by Investigator Hahn to informally resolve this dispute, the parties submitted written argument on the matter, the last of which was received March 22, 2000.

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

ORDER

1. The investigation of the interest arbitration petition is reopened. If the parties are unable to reach agreement on a new contract, they are ordered to file new final offers and a stipulation of agreed upon matters.

2. The Findings of Fact, Conclusions of Law, Certification of Results of Investigation and Order Requiring Arbitration issued July 28, 1999 is set aside.

3. The Order Appointing Arbitrator issued August 12, 1999 is set aside.

Given under our hands and seal at the City of Madison, Wisconsin this 8th day of May, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

Commissioner Paul A. Hahn did not participate.

City of Eau Claire

MEMORANDUM ACCOMPANYING ORDER

From our review of the file and the parties' written argument, it is apparent that there is sufficient confusion as to the content of the parties' respective final offers/stipulation of agreed upon matters to warrant reopening the investigation of the interest arbitration petition. With the assistance of Investigator Hahn, the parties are directed to begin anew the process of filing their respective final offers and a stipulation of agreed upon matters for ultimate submission to arbitration, if necessary.

However, from our review of the file and the parties' written argument, it is also apparent that the parties will be unable to successfully complete the final offer process unless we resolve their dispute over the impact of our February 1999 declaratory ruling decision. Thus, we proceed to consider that matter.

The parties' 1995-1997 contract contained the following provisions:

> 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).
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> 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)

In the declaratory ruling proceeding, the City asserted that it had no duty to bargain with Local 1310 over the first sentences of Section 5 and Section 6, respectively. We ruled as follows:

> **Article 6, Sections 5-6**
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> The disputed language in Article 6, Section 5 states:
>
> The City shall be able to employ four part-time operators on a regular basis.
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> The disputed language in Article 6, Section 6 provides:
>
> The City shall have the right to employ one (1) part-time shop employee.
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> The City claims that these provisions are permissive subjects of bargaining because they limit management's prerogative to hire part-time employes and therefore impact on the "execution of public policy prerogatives" as to how much, where and when bus service should be provided.
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> Contrary to the Union, the City asserts the contract provisions do not establish the number of hours per week part-time employes may work or give full-time employes priority on job assignments. Instead, the provisions simply limit the number of part-time employes that can be hired, which, in turn, negatively impacts on the City's ability to meet the bus service level choices it has made.
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> 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 employes to hire. Therefore, the City argues that these provisions are simply "manning" proposals which, unlike the proposed (sic) 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 employes 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 employe.

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

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

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

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

4/ BELOIT, SUPRA; RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 20653-A, C (WERC, 1/84) AFF'D NO. 85-0158 (CTAPP, 1986); SCHOOL DISTRICT OF JANESVILLE, DEC. NO. 21466 (WERC, 3/84).

As reflected in WAUSAU, the question before us as to these proposals is whether the intrusion into managerial flexibility outweighs the impact on employe 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 employes can work are mandatory subjects of bargaining so long as the employer remains free to hire as many part-time employes 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 employes can work.

Clearly, the Union is correct that when the limitation on the number of part-time employes is combined with the limits on the usage of each part-time employe, a WAUSAU limitation on the overall usage of part-time employes 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 employes.

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 employe hours

> can be calculated, the existing contract provisions prohibit the hiring of more than the specified number of part-time employes. 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?
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> 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 employes (SEE ALSO CITY OF RIVER FALLS, DEC. NO. 28384 (WERC, 5/95), we conclude that as to determinations of how many employes to hire, management interests in determining organizational structure predominate over employe 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.
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> 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.

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 employes 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 employe 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 employes 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" employes 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.

Given all of the foregoing, we return this matter to Investigator Hahn for further mediation/collection of new final offers on any and all matters on which the parties cannot reach agreement for inclusion in the successor to the 1995-1997 contract. Because we have reopened the investigation into the interest arbitration petition, we have also set aside our Findings of Fact, Conclusions of Law, Certification of Results of Investigation and Order Requiring Arbitration and our Order Appointing Arbitrator. If arbitration is needed the parties are entitled to a new panel of arbitrators or can agree that Arbitrator Baron should so serve.

Dated at Madison, Wisconsin this 8th day of May, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

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