STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GILMAN SUPPORT STAFF LOCAL #4311, WFT, AFL-CIO, Complainant,

vs.

GILMAN SCHOOL DISTRICT, Respondent.

Case 32
No. 60909
MP-3798

Decision No. 30442-A

Appearances:

Ms. Patricia Underwood, Staff Representative, Wisconsin Federation of Teachers, AFL-CIO, 811 9th Street West, Altoona, Wisconsin, appearing on behalf of the Complainant.

Weld, Riley, Prenn & Ricci, S.C. by **Attorney Thomas B. Rusbolt**, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Gilman Support Staff, Local #4311, WFT, AFT, AFL-CIO, filed a complaint with the Wisconsin Employment Relations Commission on February 18, 2002, alleging that the School District of Gilman had committed a prohibited practice in violation of Sec. 111.70(3)(a)1 and 4, Stats., when it changed working conditions of an employee without bargaining the changes with the Complainant. The Respondent filed an Answer on March 4, 2002, denying that it had violated Sec. 111.70(3)(a)1 and 4, Wis. Stats., and alleged an affirmative defense. The Commission issued an order on September 25, 2001, authorizing Examiner Lauri A. Millot to make and issue findings of fact, conclusions of law and order as provided in Sec. 111.07(5), Stats.

Hearing on the Complaint was held on September 24, 2002, at Gilman, Wisconsin. A stenographic transcript of the proceedings was made and received by October 25, 2002. The parties submitted initial briefs and reply briefs, the last of which were received by December 16, 2002, whereupon the record was closed.

The Examiner, having considered the evidence and arguments of Counsel, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Gilman Support Staff Local #4311, WFT, AFT, AFL-CIO, (hereinafter Union or Complainant) is a labor organization and at all times material herein has been the exclusive bargaining representative

> . . . of all full-time and part-time employees except teaching, counseling, psychological, managerial, supervisory, confidential, substitute, and temporary (defined as working less than (60) consecutive work days) employees.

The Union's principal office is located at 811 Ninth Street West, Altoona, Wisconsin, 54720.

2. Gilman School District, (hereinafter District or Respondent) is a municipal employer and maintains its principal office at 325 North Fifth Avenue, Gilman, Wisconsin 53547.

3. The parties' 2000-2001 Agreement expired on June 30, 2001, and the parties were unable to reach agreement on a successor agreement until May 20, 2002.

The 2000-2001 collective bargaining agreement contained, in pertinent part, the following provisions:

D. Management Rights

. . .

1. To direct all operations of the School District.

. . .

5. To maintain efficiency of School District operations.

. . .

7. To introduce new or improved methods or facilities.
8. To change existing methods or facilities.

. . .

> 10. To determine the methods, means, and personnel by which School District operations are to be conducted.
>
> . . .
>
> District recognizes that the inclusion of the above provisions does not alter its duty to bargain the impact of decisions affecting wages, hours, or conditions of employment pursuant to these provisions.
>
> . . .
>
> Q. Savings Clause, Closure, and Re-opener
>
> If any part of this agreement is declared invalid by any person, tribunal, or agency having legal authority to do so, the rest of this agreement shall remain in effect and the invalid part shall be renegotiated immediately. This agreement, reached as a result of collective bargaining, represents the full and complete agreement between the parties, and supersedes all previous agreements between the parties. Any supplemental amendments to this agreement or past practices shall not be binding upon either party unless executed in writing by the parties hereto. . . .

4. Mike Leech, bargaining unit part-time school bus driver, was hired by the District in March, 1999, following two interviews with District Administrator Tom Fuhrmann. During both of Leech's interviews he inquired as to whether he would be allowed to drive the school bus to and from his residence between scheduled routes and at the end of the workday. Fuhrmann told Leech that Leech would be allowed to drive the school bus back and forth from Leech's home to the school, during the day and evening. Leech's inquiry was prompted by his knowledge that one of his predecessors had been allowed to use the District's school bus to travel from her home to the school building.

Fuhrmann recommended Leech for hire to the Board of Education and informed the Board that Leech would be taking the school bus to his residence between his bus routes and at the end of the work day. The Board hired Leech.

At the time of his hire, Leech lived seven miles from the school building, the geographic location of which, in comparison to the school, is not contained in the record. Leech's current residence is located six miles north of Gilman. Upon leaving the school building, Leech travels two miles east to the Highway 73 intersection and then travels north four miles to reach his home.

5. LeAnne Trawicki was one of Leech's predecessors in the part-time school bus driver position. For a portion of her employment she lived northwest of Gilman. During Trawicki's employment as a driver, when her route began or ended near her home, she drove

the District owned bus to her home at night and in between routes during the day. When her route did not begin or end near her home, she would drive her personal vehicle to school, pick up the bus, drive her routes and return to her home at the end of the day in her personal vehicle.

6. Katherine Piwoni preceded Trawicki in the bus driver position and for "many, many years" kept the District owned school bus at her home. Wendy Rady was another school bus driver who kept the District owned school bus at her home. The dates of employment for Piwoni and Rady are not established in the record.

7. During the school years 1999-2000 and 2000-2001, Leech drove the school bus to and from his home in between school bus routes and at the end of the of his work day. An incident arose during school year 1999-2000 that resulted in a notation in Leech's evaluation "Mike must separate his driving time from his leisure time in transporting family. He has improved in this area since we talked about this." Leech had been granted permission by Fuhrmann to pick up his own children after their sporting events with the District school bus on his way home rather than take the school bus to his home, pick up his personal vehicle and return to pick up his children provided it did not put extra miles on the school bus. This notation was the result of a complaint from a sporting coach who alleged that Leech was using the school bus for personal use. Leech was not disciplined for this complaint.

8. In August, 2001, prior to the beginning of the 2001-2002 school year, Leech was informed by Josie Steinbach, District Transportation Coordinator that he would no longer be able to drive the school bus to and from his residence between his routes and at the end of the work day. The decision was prompted by a recommendation from District Administrator Drew Johnson to the Board of Education that they eliminate the practice because it was "costing the [District] money" and thus not financially beneficial.

9. Leech's work routine for the 2000-2001 school year began at 6:50 a.m. when he left his home and traveled south using his personal vehicle seven miles to the school building where he conducted a safety check on his school bus and began his morning class route at 7:15 a.m. by driving south to Lublin. Leech picked up a handicapped student in Lublin, and returned to school by 8:00 a.m. Leech then traveled by personal vehicle seven miles back to his home.

Leech returned by personal vehicle seven miles to the school building at 10:00 a.m. and began a second route by traveling east to Perkinstown, passing his residence, picking up his afternoon class students, and returning to the school building at 12:15 where he dropped off the afternoon class and picked up the morning class. Leech then transported the a.m. class to their destinations which concluded on County Highway F in the Lublin area, returned to the school building by 1:25 p.m. and then traveled seven miles to his residence by personal vehicle. Perkinstown is located east of the school building and east of Leech's home; the school building is midway between the Perkinstown and Leech's home.

At 3:05 p.m. Leech left the school building and transported the handicapped student to Lublin and return to the school building by 3:40 p.m. He would then travel via personal vehicle to his home until his next route was scheduled to begin.

Leech's final route of the day was to transport the students that participate in sports to their homes after practice. This route began at the school building at 5:30 p.m. and concluded at 6:15 p.m. Although this route did not occur on all school days, there were not very many days when Leech did not drive this route. The stops for this route were dependent upon the students that utilized the transportation service and encompassed all geographic locations in the district.

Leech's routes in 2001-2002 in comparison to the 2000-2001 routes were more complicated, took longer, but were in the same geographic areas as the prior year.

Leech traveled 45 miles per day with his personal vehicle to and from his residence to the school building between routes and at the beginning and end of his work day totaling approximately 8,000 personal miles driven for school year 2001-2002.

10. Two additional bus routes were added to Leech's work schedule for the 2002-2003 school year. The first route begins at 8:00 a.m. when Leech picks up a handicapped boy in Lublin and brings him to school and later takes the same boy and two additional children home between 3:15 p.m. and 3:30 p.m. with stops in Jump River, Perkinstown and Lublin. Leech drives the handicap vehicle for these two routes.

11. After learning that Leech would no longer be able to drive the school bus to and from his home in between his routes and at the end of his work day, the Union communicated to Johnson, both verbally and in writing in a letter dated September 13, 2001, which read as follows:

. . .

> This letter will serve as a follow-up to our recent telephone conversation during which we discussed the changed instituted by the District Board to discontinue allowing the bus driver to drive the bus to-and-from his home between his route times. This results in approximately sixty (60) miles per day of driving for the bus driver to-and-from his home between his route times.
>
> As you indicated, the Board did not want that practice to continue. That may be within the District's rights; however, the bus driver has been allowed to drive the school bus to-and-from his home between his route times, and at the beginning and end of the workday, since the start of his employment with the District. The Union views this as a change in conditions and is requesting to bargain the impact of that change.

> The Union proposes that the bus driver begin and end his route from the school each day, but that he be allowed to drive the school bus to-and-from his home between his route times.
>
> I appreciate your consideration of this request and look forward to hearing from you following the District Board meeting next week.
>
> . . .

The District responded in writing on September 18, 2001, stating that it did not "agree with your [the Federation's] assessment of the contract language. The School District of Gilman does not feel this is a change in working conditions covered by contract. Therefore, Mike [Leech] will continue to not drive the district-owned bus home."

On September 26, 2001, the Union filed a grievance on behalf of member Leech. The grievance alleged that the District violated the rights of Leech by unilaterally changing a condition of his employment and refusing to bargain the impact of the change pursuant to Section D of the management rights clause of the parties' agreement.

Johnson met with Union representatives on October 10, 2001, as part of the grievance procedure. Johnson was not agreeable to the Union's request that Leech's use of the District vehicle be re-instituted. No impact bargaining regarding the District's decision took place at the meeting.

District Administrator Johnson denied the Union's grievance on November 1, 2001, on the basis that there was "no contractual or other written document requiring the district to allow an employee to drive a district-owned vehicle home at night or between shifts" and based on the savings clause contained in the collective bargaining agreement which "makes it clear that unwritten past practices are not binding by either the district or the support staff union." Johnson further indicated that "the practice of driving the district-owned vehicle home at night or between shifts is not binding on the district and we have the right to eliminate the practice. Finally, the district has met its duty to bargain with the union by meeting with them regarding the decision to change this practice." Johnson met with Union representatives on October 10, 2001 prior to the November 1, 2001 correspondence. Johnson was not agreeable at that meeting to the Union's request that Leech's use of the District vehicle be re-instituted.

Following appeal by the Federation to the Board of Education, the Board denied the grievance on November 19, 2001.

12. The Union filed a complaint with the WERC on February 18, 2002, alleging that the District violated Sec. 111.70(3)(a)1 and 4, Stats., when it unilaterally, without notice to the Union and without bargaining with the Union, made unilateral changes to the mandatory working conditions of driver Leech.

13. The record does not establish when the parties exchanged initial proposals in preparation for negotiating the 2001-2002 collective bargaining agreement. The District and the Union met on October 10, 2001; October 30, 2001 and March 13, 2002, for the purpose of negotiating the 2001-2002 collective bargaining agreement. Leech was a member of the Complainant bargaining team. At no time during negotiations did the Complainant raise the issue of the District's decision to no longer allow Leech to drive the bus to and from is residence between scheduled routes and at the end of the work day.

On April 30, 2002, WERC Investigator Stephen G. Bohrer assisted the Respondent and Complainant in reaching a voluntary settlement for the 2001-2002 labor agreement. In advance of the meeting, the parties' had agreed that should there be time available at the conclusion of the meeting with the Investigator, they would request the Investigator's assistance in pursuing settlement of the Leech grievance. At approximately 11:00 p.m., after reaching tentative agreement, the Complainant requested that Investigator Bohrer initiate such a grievance settlement discussion with the Respondent Board of Education; however, the parties did not pursue settlement discussions of the Leech grievance on April 30, 2002.

14. The District's decision to discontinue the practice of allowing bus driver Leech the use of a District-owned vehicle to travel to and from school between bus routes and at the end of the work day primarily relates to wages, hours and conditions of employment and is a mandatory subject of bargaining. The impact of the District's decision to end the aforesaid practice primarily relates to the wages of the affected employee.

15. The District's communication to Leech in August, 2001, that he was no longer allowed to use the District-owned vehicle to travel to and from the school between bus routes and at the end of the work day was a valid repudiation of the past practice of allowing Leech use of the vehicle for commuting purposes.

16. The District did not fail to maintain the *status quo* when it terminated the practice in August, 2001, of allowing bus driver Leech use of the District vehicle to travel to and from school between bus routes and at the end of the work day.

17. The Union demanded to bargain over the decision to terminate Leech's use of the District vehicle, demanded to bargain the impact of the District's decision and made an impact bargaining proposal regarding Leech's use of the District-owned vehicle. The District responded in the negative to the Union's demand to bargain the decision to terminate Leech' use of the District-owned vehicle. The District did not respond to the Union's demand to bargain the impact of District's decision or the Union's impact bargaining proposal.

18. The Union's failure to introduce any bargaining proposals during negotiations for the 2001-2002 collective bargaining agreement that addressed the impact of the District's termination of the practice of allowing bus driver Leech use of the District owned vehicle to travel to and from school between bus routes and at the end of the day constituted waiver by inaction.

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

CONCLUSIONS OF LAW

1. Complainant is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.

2. Respondent is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats.

3. Use of a District-owned vehicle for commuting to and from a bus driver's residence and the school building work site in between bus routes and at the end of the work day is a mandatory subject of bargaining.

4. By terminating the practice in August of 2001 of allowing bus driver Leech to drive the District-owned school bus to and from his residence in between his scheduled bus routes and at the end of his work day, the Gilman School District did not violate its obligation to maintain the *status quo* as to all matters primarily related to wages, hours and conditions of employment following the expiration of the 2000-2001 agreement. Therefore, the Gilman School District did not violate Sec. 111.70(3)(a)4, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats.

5. The impact of the decision of the Gilman School District to no longer allow bus driver Leech to drive the District-owned school bus to and from his residence in between his scheduled bus routes and at the end of the work day was a mandatory subject of bargaining over which the Gilman School District was required to bargain with the Gilman Support Staff Local #4311, WFT, AFL-CIO. As a result of the Union's waiver of the District's obligation to bargain the impact of said decision, the Gilman School District, its officers and agents, have not refused to bargain in violation of Sec. 111.70(3)(a)4, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER

The Gilman Support Staff Local #4311, WFT, AFT, AFL-CIO complaint of prohibited practice is dismissed in its entirety.

Dated at Wausau, Wisconsin this 14th day of April, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lauri A. Millot /s/
Lauri A. Millot, Examiner

GILMAN SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITION OF THE PARTIES

The Complainant

The District committed a prohibited practice by unilaterally changing the conditions of employment for school bus driver Leech. Leech was afforded permission by former Superintendent Furhmann upon hire to use the District owned school bus to travel from his residence to work during the school day in between bus runs and at the beginning and end of his work day. Leech followed this practice every day for three years until August, 2001, when he was informed by newly hired Superintendent Johnson that he was no longer allowed to use the school bus as his means of transportation before, during and after the school day. The District never informed Leech that this was not a permanent condition of employment. Leech's use of the school bus was a well-established, long-standing arrangement known to both Superintendents and the school board members and thus one that could not be unilaterally changed.

Complainant attempted unsuccessfully to discuss the unilateral changes imposed on Leech and to bargain the impact of those changes with the District. In addition to requesting to meet with the District prior to filing a grievance, a settlement offer was made to the District in September, 2001, although no response was received. The District denied the grievance at all steps and it refused to meet with the Union on the issue. It was further unwilling to try to resolve the issue on April 30, 2002, with the assistance of an outside party. As a result of the expiration of the collective bargaining agreement on June 30, 2001, a prohibited practice complaint was filed.

The use of the school bus is a benefit of compensation to Leech. Leech has driven his personal vehicle in excess of 7,000 miles as a result of the District's unilateral action. Although the District believes that it was a "benefit to the District" for Leech to use the school bus, taking it home between and after his routes it was economically beneficial to Leech and thus a mandatory subject of bargaining.

In response to the District's assertion that the Union is trying to obtain a change in the Employer-Employee relationship through the grievance procedure and subsequent prohibited practice complaint rather than at the bargaining table, the Complainant denies that it is attempting to do so. Rather, the District forced the Union's hand in this case as a result of its refusal throughout the entire process to meet or discuss this issue.

For all of the above reasons, the Complainant respectfully requests that the Respondent be directed to reinstate the *status quo ante* and make Leech whole for any losses suffered as a result of the Respondent District's unilateral actions.

The Respondent

Inherent in the management rights clause of the parties' collective bargaining agreement is the right to determine where to store and how to use the buses of the School District. Leech's taking home of the mini-bus was a management decision made in the best interest of the District. When bus routes changed for school year 2001-2002 and a major construction project was completed, the District determined that it was no longer as efficient to allow Leech to take the bus to his residence. As a result, the District's action was grounded in, and authorized by, the language of the parties' agreement.

Use of the bus was not a benefit to Leech. At best it was a gratuity and certainly not a "major condition of employment." Gratuities and non-major conditions of employment may be unilaterally discontinued, even if they are established past practices. WAUSAUKEE SCHOOL DISTRICT, CASE 33, NO. 50583 MA-8310 (GALLAGHER, 11/23/94). In this instance, due to the change in Leech's route and the completion of the major construction project, the District had the contractual and changed circumstances right to terminate its practice. Further, assuming that the use of the school bus was a practice, it was repudiated during the contract hiatus since the District put the Union on notice that it intended to terminate the practice.

Leech's use of the mini-bus did not constitute a past practice. First, the savings clause of the collective bargaining agreement negates unwritten past practices from agreements between the parties. Next, Leech's use of the bus was not unequivocal because the Board of Education allowed it only when it served the District's purposes and it was not clearly enunciated since there was not any discussion of its permanency. Further, it did not exist for a reasonable period of time since it only occurred for two years. Given this, it does not meet the requirements to establish a binding past practice.

For the foregoing reasons, the Respondent District requests that the Complaint be dismissed.

DISCUSSION

The Complainant Union alleges that the Respondent District violated its duty to bargain with the Complainant by failing to maintain the status quo as to the working conditions of school bus driver Leech during the hiatus that followed the expiration of the 2000-2001 contract.

The Commission has held that, absent a valid defense, a unilateral change in the *status quo* wages, hours or conditions of employment during a contract hiatus is a *per se* violation of Sec. 111.70(3)(a)4, Stats. SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85). A municipal employer who violates Sec. 111.70(3)(a)4, Stats., derivatively interferes with the Sec. 111.70(2), Stats., rights of bargaining unit employees in violation of Sec. 111.70(3)(a)1, Stats. GREEN COUNTY DEC. NO. 20308-B (WERC, 11/84). Waiver and

necessity have been recognized to be valid defenses to a charge of unilateral implementation in violation of Sec. 111.70(3)(a)4, Stats. RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 23904-B (WERC, 9/87).

The employer's *status quo* obligation only applies to matters which primarily relate to employee wages, hours and conditions of employment. MAYVILLE SCHOOL DISTRICT, DEC. NO. 25144-D (WERC, 5/92). Unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining and evidence a disregard for the role and the status of the majority representative, which disregard is inherently inconsistent with good faith bargaining. SCHOOL DISTRICT OF WISCONSIN RAPIDS, SUPRA. 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. V. WERC, 186 Wis.2d 671 (CT. APP. 1994). As the Commission 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 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.

In defining the *status quo* during a contract hiatus, the Commission has held that it will consider relevant language from the expired contract as historically applied or as clarified by bargaining history, if any. ID. at 11.

The District's unilateral decision to terminate Leech's use of the District vehicle occurred during August, 2001. The parties' 2000-2001 collective bargaining agreement had expired on June 30, 2001, and the parties had not begun to negotiate the successor 2001-2002 collective bargaining agreement which was not ratified until May 20, 2002. Thus, during August, 2001, the parties' labor agreement was not in hiatus and the District was obligated to maintain the *status quo* on mandatory subjects of bargaining.

The Complainant asserts that the use of the school bus was a mandatory subject of bargaining in that it was a benefit of employment provided to Leech. The District does not address whether Leech's use of the District vehicle is a mandatory subject of bargaining, rather it argues that it was a benefit to the District for Leech to utilize the school bus and that its management rights clause allows it to determine where to store and how to use its buses. The Examiner concludes that Leech's use of the District owned school bus is analogous to use of a vehicle which was found to be a mandatory subject of bargaining in FORD MOTOR CREDIT CO. V. ADODT, 29 WIS.2D 441 (1966) cited in DODGELAND EDUCATION ASSOCIATION V. WERC, 250 WIS.2D 357, 388, 639 N.W.2D (2002). The benefit was both a form of compensation and a condition of employment and as such would fall within the meaning of wages, hours and conditions of employment as that term is used in Sec. 111.70(1)(a), Stats.

Having found that use of the District school bus is a mandatory subject of bargaining, the issue thus becomes whether the District's unilateral decision violated its obligation to maintain the *status quo*. The first consideration to be addressed in defining the *status quo* is the language of the expired agreement and there is no specific language in the 2000-2001 agreement granting Leech use of the District vehicle for commuting purposes yet there is broad management rights delineated in Section B. Unable to point to a specific right contained in the agreement, recognizing the broad management rights afforded the District and together with the recognition that the *status quo* doctrine which focuses "not on the nature of the changes made by the employer, but on whether those changes are among previously bargained rights" RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 28859-A (MCLAUGHLIN, 8/97) at p. 10 AFF'D RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 28859-B, (WERC, 3/5/98), the Examiner finds that the District acted within its contractual authority when it changed the benefit granted to Leech. The dynamic *status quo* doctrine allows parties to exercise rights which they have acquired through the collective bargaining process. Here, the Union had not acquired through the process of collective bargaining for the school bus driver to use the school bus to commute during and after the work day. As no such right was acquired, the *status quo* is the existing bargained management rights clause of the labor agreement which provides the District with the right to take the action that it did.

Moving to the second consideration in determining the *status quo*, the record is void of any bargaining history or a pattern of conduct during contract hiatus and in such absence the Examiner must rely solely on the language of the expired labor agreement.

The Union asserts that Leech's use of the District vehicle was an existing past practice and that as a result, the District did not have the authority to unilaterally terminate it. This argument is not persuasive. The explicit language of the Article Q of parties' expired agreement provides that "past practices shall not be binding upon either party unless executed in writing" and thus to elevate a past practice to a contractual right which must be maintained during a contract hiatus is in clear contradiction to the intent of the parties.

Next, as the District asserts, the practice of allowing Leech the use of the District vehicle was repudiated in August of 2001. The question of whether an employer can end a practice and begin to rely on the clear language of the labor agreement for the purposes of the *status quo* analysis was addressed in OUTAGAMIE COUNTY, DEC. NO. 27861-B (WERC, 8/94). The Commission found in the affirmative stating

> Where a party has previously bargained a clear right, it is consistent with the dynamic nature of the status quo to conclude said party is entitled to exercise that right during a contract hiatus and repudiate a contrary practice. ID. at 11.

Thus when the District informed the Union that Leech was no longer able to use the District vehicle it was repudiating the unwritten practice of allowing Leech to do so and exercising its right contained in the management rights language in Section D of the labor agreement.

The Examiner is satisfied that the District's decision to terminate driver Leech's use of the District owned school bus to travel to and from his residence and the school building between his scheduled routes and at the end of his work day did not violate the dynamic status quo doctrine. Accordingly, the Examiner has concluded that the District did not violate its MERA duty to bargain pursuant to Sec. 111.70(3)(a)4, Stats., and derivatively Sec. 111.70(3)(a)1, Stats.

Having found that the District's decision to terminate Leech's use of the District vehicle for commuting purposes did not violate the *status quo* and thus there was no obligation on the District's part to bargain its decision prior to implementation, the question becomes whether the District failed to bargain the impact of its decision in violation of Secs. 111.70(3)(a)4 or 1, Stats. It is well established that a municipal employer has the statutory duty "to bargain with respect to policies primarily, relating to "management and direction of the governmental unit . . . insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of . . . municipal employees (emphasis added)." MADISON TEACHERS INC., 218 WIS.2D 75, 80, 580 N.W.2D (CT. APP. 1998). Waiver by inaction has been recognized as a valid defense to alleged refusals to bargain, except where either the unilateral change amounts to a *fait accompli* or the circumstance otherwise indicate that the request to bargain would have been a futile gesture. CITY OF KAUKAUNA (FIRE DEPT), DEC. NO. 27027-A (NIELSEN, 8/92) The Examiner concludes that such a waiver by inaction occurred in this case. The Union demanded to bargain the impact of the District decision and presented an impact proposal in the context of the grievance procedure during September, 2001. The District did not respond to the proposal. Between October, 2001, and May, 2002, the District and Union met on four occasions for the purpose of reaching agreement on the successor contract, but at no time did the Union make any additional proposals addressing the impact of the District's decision on Leech. Had it been the desire of the Union to bargain regarding the impact of the District's decision, it was during this time period where it could most effectively have pursued bargaining and the District would not have been able to ignore its proposals as a result of the impasse resolution procedures of Sec. 111.70(4)(cm), Stats. It is concluded from the record that the Union waived bargaining the impact of the District's decision.

In sum, the Examiner has concluded that the District has not violated any of the provisions of MERA and, therefore, the complaint is dismissed.

Dated at Wausau, Wisconsin this 14th day of April, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lauri A. Millot /s/
Lauri A. Millot, Examiner

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