STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

INTERURBAN TRANSIT PARTNERSHIP,
Public Employer-Respondent,

-and- Case No. C06 E-099

AMALGAMATED TRANSIT UNION, LOCAL 836,
Labor-Organization-Charging Party.
_____/

APPEARANCES:

Miller Johnson, by Craig A. Mutch, Esq., for Respondent

Law Offices of Mark H. Cousens, by John E. Eaton, Esq., for Charging Party

DECISION AND ORDER

On April 27, 2007, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts as its order the order recommended by the Administrative Law Judge.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

INTERURBAN TRANSIT PARTNERSHIP,
Public Employer-Respondent,

Case No. C06 E-099

-and-

AMALGAMATED TRANSIT UNION, LOCAL 836,
Labor-Organization-Charging Party.
_____/

APPEARANCES:

Miller Johnson, by Craig A. Mutch, Esq., for Respondent

Law Offices of Mark H. Cousens, by John E. Eaton, Esq., for Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, this case was heard at Lansing, Michigan, on September 6, 2006, before Administrative Law Judge Julia C. Stern for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on November 20, 2006, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Amalgamated Transit Union, Local 836, filed this charge against the Interurban Transit Partnership, a public transit authority, on May 1, 2006. Charging Party represents a bargaining unit of full and regular part-time nonsupervisory employees of Respondent. It alleges that on or about March 23, 2006, Respondent violated Section 10(1)(e) of PERA by refusing to bargain with Charging Party over a new attendance policy for part-time drivers. Charging Party also alleges that Respondent's implementation of the new policy effective April 3, 2006 constituted an unlawful mid-term modification of the parties' collective bargaining agreement.

Findings of Fact:

Work Rules and Management Rights

Charging Party has represented employees of Respondent and its predecessors for more than twenty years. Charging Party's bargaining unit currently consists of maintenance employees, full-time drivers, and part-time drivers who drive regular routes. The parties' current collective bargaining agreement covers the term 2005-2008. Article III of the contract, entitled "Management Rights," reads as follows:

> The management of the Authority's operations and the direction of the working forces shall be retained by the authority, to be exercised in its sole discretion except for any rights specifically and explicitly restricted in this agreement. The Authority has the right to determine the types and amount of service to be provided, including the making of schedules, frequency of service, and the amount of time allowed on individual runs; to modify, adopt, install, operate and maintain existing, new or improved equipment or methods of operation; to hire, promote, discharge for cause and maintain discipline and efficiency, subject to any limitation of this agreement. The authority also has the right to make and enforce reasonable and uniform work rules. [Emphasis added]

In March 1986, one of Respondent's predecessors, the Grand Rapids City Coach Lines, promulgated a set of comprehensive work rules governing employee conduct. These rules, described on their face as an update to rules in a previous employee handbook, had separate rules for drivers and for maintenance employees. The rules included a four-page progressive disciplinary policy for drivers. The disciplinary policy set out the penalties for thirty-two separate offenses. The rules also included a separate absenteeism policy for drivers. Under this policy, drivers could be disciplined after twelve "occurrences" – an unexecused absence, tardiness, or leaving early without permission – within twelve months. A driver with sixteen "occurrences" within twelve months could be discharged. Except for the absenteeism policy contained in the 1986 rules, the work rules were still in effect for drivers on the date of the hearing in November 2006. Between 1986 and 2006, Respondent and its predecessors promulgated additional rules for drivers dealing with drug and alcohol testing and with cell phone use.

As discussed below, the current collective bargaining agreement includes a detailed attendance policy for full-time drivers that superseded the absenteeism policy contained in the rules. It also contains a provision applicable to all drivers that covers a driver's obligation to call in when absent or when returning from leave. These are the only provisions in the current contract that address driver misconduct or discipline.

Driver Attendance Policies and Contract Provisions

Until 2002, collective bargaining agreements between Charging Party and Respondent's predecessors contained a tardiness policy, Article VII, Section 5 (Section 7.05). Under this provision, drivers incurred "misses" for failing to report for their assignments on time. In general, the penalty for a "miss" was loss of a day's pay; the tardy driver's assignment was given to another

driver. However, drivers who were more than two hours late or failed to call in within this time period lost additional pay. The contract also stated that an operator with five "misses" within thirty scheduled workdays could be discharged. Drivers were also subject to the absenteeism policy contained in the 1986 work rules that provided for discipline after twelve "occurrences" within a twelve-month period. In addition, Section 7.06, entitled "Contacting dispatch," stated that operators who were not available for a work assignment because of illness were required to call the dispatcher thirty minutes before their report time, and that operators on the sick list who wished to return to work had to notify the dispatcher the day before their return. Section 7.06 did not set out the penalty for failing to call in on time.

When the work rules referred to above were promulgated in 1986, the Grand Rapids City Coach Lines did not employ part-time drivers. Part-time drivers were first hired by another predecessor, the Grand Rapids Area Transit Authority (GRATA), in 1992. At this time, only some of the part-time drivers had regularly scheduled runs. Most of the part-time drivers were "extra operators," who filled in for regular drivers when they were absent and drove other runs that were posted on the "extra board." The extra operators worked on-call and could refuse assignments.

After GRATA began hiring part-time drivers in 1992, separate articles covering "extra operators" and "part-time operators" were added to the contract. Article XIX set out the terms and conditions of employment for part-time drivers with regularly scheduled routes. It limited the number of part-time operators Respondent could employ, and the number of hours they could work. It described how their seniority would be calculated, and set out their fringe benefits, which included vacation and holiday pay but not sick or personal leave. Article XIX, Section 8 (Section 19.08) was entitled "Governing Work Rules:"

> Part-time operators will be covered under those sections of this Agreement that pertain to grievances/arbitration, Union membership, probationary periods and seniority. They will also be governed by the rules/regulations affecting full-time operators referenced in Sections 6.06, 6.07, 6.08. 6.12, and 7.06.

Sections 6.06, 6.07 and 6.08 cover pay for pre-trip inspections and relief time and "show-up" pay. Section 6.12 covers breaks and lunch periods. As discussed above, Section 7.06 of the contract deals with a driver's obligation to call the dispatcher to report his absence or to return to work after an absence.

GRATA and Charging Party agreed that the tardiness provision in the contract, Section 7.05, would not apply to part-time drivers. Part-time drivers with regularly assigned runs were technically subject to the absenteeism policy contained in the work rules. However, according to the testimony of Juanita Merritt, a part-time driver in 1992 and now Charging Party's president, the rules as applied to part-time drivers with regular runs in 1992 combined aspects of the tardiness policy in Section 7.05 and aspects of the absenteeism policy contained in the work rules. Merritt testified that if part-time drivers were late for their scheduled shifts, but reported or called in within two hours, their only penalty was the loss of that day's pay. The driver might not suffer even this penalty if Respondent needed him or her to drive another route. If a part-time driver was more than two hours late, or failed to call in at least thirty minutes before the start of his or her shift, the driver automatically received an unexecused absence. According to Merritt, the dispatcher, at his

discretion, could give a part-time driver who called in on time a "layoff" or "granted day." In that case, the driver's absence would be excused. Merritt testified that if drivers had a certain number of unexecused absences within a year, they received a reprimand. She was not sure how many unexecused absences a driver could accumulate before being subject to discipline. It was not clear from Merritt's testimony whether a part-time driver was ever discharged for accumulating too many unexcused absences.

During negotiations for the parties' 2002-2005 collective bargaining agreement, Respondent proposed, and Charging Party agreed, to replace the tardiness policy in Section 7.05 and the absenteeism policy in the rules with a new, comprehensive attendance policy for full-time drivers. Under the new Section 7.05, drivers accumulate points for absences not covered by personal leave, for tardiness, and for failing to report their absences at least thirty minutes before the start of their assignments. Section 7.05 contains a progressive discipline system based on the accumulation of a certain number of points within a continuous 12-month period. At eight points, drivers can receive discipline up to a two-day suspension. At ten points, drivers can be discharged. The parties agreed that the new Section 7.05 would not apply to part-time drivers. Insofar as the record discloses, there was no other discussion at the bargaining table about attendance policies for part-time drivers.

In about 2004, Respondent stopped employing "extra operators" and assigned all its part-time drivers to regularly scheduled runs. According to Chris Leighty, who became Respondent's transportation manager in about December of 2003, the March 1986 absenteeism policy did not work well to ensure that part-time drivers with regularly scheduled runs showed up for their assignments. In Leighty's view, since part-time drivers worked fewer hours than full-time drivers they did not accumulate enough "occurrences" within twelve months for the 1986 policy to deter poor attendance. In any case, Leighty testified that the March 1986 absenteeism policy was not applied to discipline part-time drivers after 2004. The only testimony regarding attendance rules applicable to part-time drivers between 2004 and 2006 came from an employee who worked as a part-time driver during this period. She testified if she wanted a day off, she had to request permission in advance from the dispatcher. To her knowledge, there was no limit on the number of absences that could be excused. She testified that on several occasions between 2004 and 2006 she called in to report that she would be absent less than thirty minutes before the start of her shift, but did not receive any penalty for calling in late. She also testified that she was once late for her shift. She was sent home and not paid for that day but suffered no other penalty. The driver was not aware that there were any attendance rules beyond the ones to which she testified, and did not know what the penalty, if any, might have been for an unexecused absence.

During negotiations for their 2005-208 contract, the parties agreed to minor changes in Section 7.05. The parties did not discuss making Section 7.05 applicable to part-time drivers, and insofar as the record discloses, did not discuss part-time driver attendance. The parties concluded negotiations for this contract in November 2005 and executed it in December 2005.

Leighty testified that, as the new transportation manager, he was too busy to address the issue of part-time drivers' attendance during the period the parties were negotiating their 2006-2008 collective bargaining agreement. In early 2006, however, Leighty decided to design a more effective attendance policy for part-time drivers. Around March 1, Leighty gave Merritt a draft of an attendance policy for part-time bus operators. The policy read as follows:

Part-time Days and Time Off

Part-time Bus Operators will be allowed to be absent without penalty from a scheduled work assignment only during use of pre-approved Vacation time, Part-time Guaranteed Days off, or Part-time Leave Request. Part-time guaranteed days off requests will be limited to 3 per calendar year. The department manager must approve part-time leave requests in advance. Part time guaranteed days off will run on a calendar year and be prorated for anyone starting employment after January.

Absence from a Scheduled Work Assignment

Any absence from a scheduled work assignment on the day of the scheduled assignment without use of guaranteed day off time will result in the accumulation of attendance points.

Part-time Attendance Point Schedule

Calling in less than 30 minutes prior to a scheduled work assignment = 1 point

Late for a scheduled work assignment or missing 2 hours or less of a scheduled work assignment =1 point

Missing more than 2 hours of a scheduled work assignment = 2 points (unless no additional work is offered = 1 point)

Point totals are cumulative and multiple occurrences will carry multiple points with a maximum one-day total of 2 points. Part-time attendance points will be cumulative for a rolling, continuous 12-month period. Part-time Bus Operators who receive attendance points will be addressed as follows:

1-3 points – written warning

4 points – written warning and counseling session with transportation manager and human resources representative.

5 points – discipline up to and including discharge at the discretion of the Authority.

Merritt asked Leighty if this document was a proposal for the next contract negotiations. Leighty said no, that they were planning to implement this policy for the part-time drivers. On March 7, Merritt gave Leighty a letter stating that the proposed attendance policy modified the attendance policy the parties had negotiated, since Respondent had never proposed an attendance policy that would pertain to part-timers. Merritt's letter said that any modification to the attendance policy would have to be made during negotiations for the next contact. Leighty replied by letter dated March 8. Leighty maintained that the establishment of an attendance policy for part-time bus operators was not a modification to the current collective bargaining agreement, since the contract

had no language covering the attendance of part-time drivers. Leighty also said that Respondent was entitled to issue the policy because Article III gave it the right to make reasonable work rules.

After Merritt received this letter, she went to see Respondent's director, Brian Pouget. During their discussion, Pouget told Merritt that Respondent would accept Charging Party's input, but that it would not agree to bargain over the policy. On March 14, 2006, Merritt sent Pouget a letter demanding to bargain. Pouget replied on March 17, reiterating Respondent's argument that Article III gave it the right to implement the new policy. On March 30, Respondent distributed the attendance policy to its part-time drivers. The policy was effective April 3, 2006. Between April 3, 2006 and September 6, 2006, the date of the hearing in this case, four part-time drivers had received points pursuant to the policy and one had been discharged.

Discussion and Conclusions of Law:

Midterm Modification of the Contract

When a party negotiates a contract provision that "fixes the parties' rights" with respect to a mandatory subject of bargaining, it satisfies its obligation under PERA to bargain over that subject for the term of that agreement. *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 318 (1996). Once agreement is reached, both parties have a right to rely on the language of the agreement as the statement of their obligations on a topic "covered by" the agreement. A midterm modification of the contract by either party, without the consent of the other, violates that party's duty to bargain in good faith. *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n*, 458 Mich 540, 565 (1998). *St Clair Intermediate Sch Dist; Allied Chemical & Alkali Workers of America v Pittsburgh Plate Glass*, 404 US 157, 183 (1971).

Charging Party argues that Respondent's promulgation of attendance rules for part-time drivers in April 2006 constituted an unlawful unilateral midterm modification of the parties' collective bargaining agreement. It asserts that Section 7.05 represented the parties' complete agreement on attendance, and that Respondent could not modify the parties' express agreement during the contract term. It also asserts that the parties had a mutually accepted past practice that the only penalty part-time drivers would receive for absences or tardiness would be the forfeiture of their pay for that shift. It argues that this past practice had become a term of the collective bargaining agreement and could not be modified without the Union's agreement during the contract term.

In *St Clair Intermediate Sch Dist*, the actions of the respondent union's insurance subsidiary altered an express term of the parties' collective bargaining agreement. Here, however, Section 7.05 of the 2005-2008 contract did not apply to the part-time drivers, and the contract was simply silent on most of the issues addressed by the April 2006 rules.1 As noted above, Charging Party argues that Respondent's policy was not to discipline part-time drivers for absences or tardiness, and

1 Section 7.06 requires part-time drivers to call in at least thirty minutes before the start of their shift to report an absence, but does not specify the penalty for failing to do so. The April 2006 attendance rules add a penalty for failing to comply with this rule.

that this policy was incorporated into the contract as a past practice. However, the record does not support Charging Party's claim. Charging Party president Merritt testified that in 1992 part-time drivers could be reprimanded for excessive unexcused absences, even though she was not sure how many unexcused absences a driver could accumulate before being disciplined. Similarly, the witness who was a part-time driver between 2004 and 2006 knew that she had to call in to report an absence, and that her absence had to be excused, even though she was not sure what the penalties for repeated violations of these rules might be. In *Gogebic Cmty College Michigan Ed Support Personnel Ass'n v Gogebic Cmty College*, 246 Mich App 342, 352 355 (2001), the Court of Appeals held that in determining whether a party's actions constitute an unlawful midterm modification of the contract, unambiguous contract language controls "unless [there is a] past practice so widely acknowledged and mutually accepted that it creates an amendment to the contract," citing *Port Huron* at 329. In this case, the contract was mostly silent on the topics addressed by the April 2006 rules, and Charging Party failed to show that there was an established practice with respect to these issues. I conclude that the April 2006 attendance rules did not constitute a midterm modification of the parties' 2005-2008 contract.

Unilateral Change and "Covered by the Contract"

Charging Party also argues that even if the April 2006 rules did not constitute a modification of the contract, Respondent had a duty to bargain before implementing them. Respondent does not dispute that attendance rules constitute a mandatory subject of bargaining. It asserts, however, that it had no obligation to bargain over these rules because its right to promulgate them was "covered by" Article III of the collective bargaining agreement. As discussed in *Port Huron*, at 309, when a matter is "covered by" the contract, the dispute does not involve statutory right and the details and enforceability of the contract provision are generally left to the parties' grievance arbitration procedure. In the alternative, Respondent argues that Charging Party waived its right to bargain over the attendance rules by the language of Article III and by past practice.

In *Port Huron*, at 319, the Court discussed at length the difference in collective bargaining law between the situation in which a subject is "covered by" a collective bargaining agreement and the situation where a union has waived its right to bargain over that subject. Quoting Judge Harry T. Edwards in *Dep't of Navy v Federal Labor Relations Authority*, 962 F2d 48 (DC Cir, 1992), the Court explained the difference as follows:

> A waiver occurs when a union knowingly and voluntarily *relinquishes* its right to bargain about a matter; but where the matter is covered by the collective bargaining agreement, the union *has exercised* its bargaining right and the question of waiver is irrelevant.
>
> * * * * * *
>
> Indeed, the difference between the two concepts goes to the structural heart of labor law. When parties bargain about a subject and memorialize the results of their negotiation in a collective bargaining agreement, they create a set of enforceable rules - a new code of conduct for themselves – on that subject. Because of the fundamental policy of freedom of contract, the parties are generally free to agree to

> whatever specific rules they like, and in most circumstances it is beyond the competence of the Authority, the National Labor Relations Board or the courts to interfere with the parties' choice.... On the other hand, when a union *waives* its right to bargain about a particular matter, it surrenders the opportunity to create a set of contractual rules that bind the employer, and instead cedes full discretion to the employer on that matter. For that reason, the courts require "clear and unmistakable" evidence of waiver and have tended to construe waivers narrowly. [Emphasis in original] *Dep't of Navy,* 962 F2d at 57.

In support of its argument that the Commission should find its implementation of attendance rules for part-time drivers to be "covered by" Article III of the contract in this case, Respondent relies on a later decision by Judge Edwards, *NLRB v US Postal Service*, 8 F3d 832 (DC Cir, 1993), criticizing the refusal of the National Labor Relations Board (NLRB) to apply a "covered by" analysis to management rights' language. In *US Postal Service*, the NLRB had found that the union had not waived its right to bargain over the post office's decision to cut post office service hours, a decision that resulted in a small cut in hours for contingent part-time employees, by language in the management right's clause that gave the employer the right to "transfer and assign employees," "determine the methods, means and personnel by which [its] operations are to be conducted, " and "maintain the efficiency of the operations entrusted to it." The NLRB had concluded that the contract did not contain a "clear and unambiguous waiver" of the union's right to bargain because the language of the contract, on its face and as interpreted by arbitrators, did not specifically refer to the type of action taken by the employer. Judge Edwards, writing for the Court, criticized the NLRB's approach as a "crabbed reading of the 'waiver/covered by' distinction." The Court held that the despite the fact that the management rights language did not specifically mention service hours reductions, it "surely" permitted the employer to rearrange its employees' work schedules, which, according to the Court, was the only significant effect of the reduction in service hours.

Management rights clauses in collective bargaining agreements generally set out the matters that are left to the employers' discretion and over which they have no obligation to bargain during the contract term. The matters covered may include both mandatory subjects of bargaining and permissive subjects that are within the scope of the employers' inherent managerial prerogative. Since the Supreme Court's decision in *Port Huron,* the Commission has not directly addressed the question of whether it should determine whether the management rights clause "covers" the subject at issue, or whether it should apply the more restrictive "clear and explicit waiver" test. In *Pontiac Sch Dist,* 2002 MERC Lab Op 20, the Commission held that the employer did not have to bargain over the assignment of new duties to bargaining unit employees because changes in the daily work assignments of employees are within an employer's inherent managerial prerogative. Both the Commission and the administrative law judge also held, in the alternative, that the proper forum for the dispute was the grievance procedure since the disputed issue was "covered by" the language in the management rights clause that gave the employer the right to manage and direct its work force, including "assignments." An administrative law judge also applied a "covered by" analysis to management rights language in *City of Pontiac (Police Dep't),* 1997 MERC Lab Op 201 (no exceptions). On the other hand, in two other decisions issued after *Port Huron, Interurban Transit Partnership,* 17 MPER 40 (2004), and *Ingham* Co, 2001 MERC Lab Op 97, the Commission concluded that the employer violated its duty to bargain in good faith because management rights language in the contract did not constitute a "clear, explicit and unmistakable waiver" of the union's

right to bargain. See also *Royal Oak Twp,* 2001 MERC Lab Op 117 (no exceptions) and *Wayne Co,* 1999 MERC Lab Op 99 (no exceptions).

In many cases, of course, the Commission will find that management rights language that "covers" a subject also clearly waives the union's right to bargain. However, this may not always be simply an academic distinction, especially since an arbitrator, and not the Commission, ultimately determines the parties' rights when a matter is "covered by" the contract. As the Court noted in *Port Huron,* a waiver of the right to bargain occurs when a union has ceded to the employer its right to make contractual rules on a particular subject. Judge Edwards notwithstanding, I believe that under *Port Huron,* the "clear and explicit waiver" test should be applied to management rights language that purports to give the employer the right to act unilaterally on matters that would otherwise be subject to the duty to bargain. I conclude, therefore, that it would be inappropriate to dismiss this charge on the basis that the dispute is "covered by" Article III of the contract.

Waiver by Contract or Practice

The Commission and Courts have consistently held that a waiver of bargaining rights under PERA must be "clear, unmistakable and explicit." *Amalgamated Transit Union v SEMTA,* 437 Mich 441 (1991); *Southfield Police Officers Ass'n v Southfield,* 162 Mich App 729 (1987); *Lansing Fire Fighters v Lansing,* 133 Mich App 56 (1984). See also *Metropolitan Edison Co. v NLRB,* 460 US 693,708 (1983).2 In *City of Rochester,* 1982 MERC Lab Op 324, the Commission held that management rights language that gave the employer the right to "establish and require employees to observe the City's rules and regulations" did not, standing alone, waive the union's right to bargain over any change in terms and conditions of employment issued as a "rule." The Commission stated, at 330, "Waiver questions are usually decided by looking at both the contractual language and the parties' conduct to determine whether an intent to waive the right to bargain over the specific subject matter in dispute can be discerned." In general, the Commission has not found a waiver of the right to bargain over a change in terms and conditions of employment solely from contract language giving an employer the right to promulgate rules.

In *Oakland Co Road Comm,* 1983 MERC Lab Op 1, the Commission held that management rights language giving the employer "the right to establish and update work rules and to establish penalties for violation of such rules," did not waive the union's right to bargain over a new absenteeism policy. In *City of Ecorse,* 1998 MERC Lab Op 306, the Commission adopted its administrative law judge's finding that contract language giving the employer the right to "make reasonable rules and regulations not in conflict with the agreement which are for the purpose of efficiency, safety and discipline," did not, standing alone, give the employer the right to unilaterally promulgate new work rules. More recently, in *Clinton-Ingham Cmty Health Dept,* 19 MPER 1 (2005) (no exceptions), a Commission administrative law judge held that management rights language providing that the employer could "amend, supplement or add to its official departmental

2 Waivers can occur in any of three ways: by express provision in the collective bargaining agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two. *Brad Snodgrass, Inc,* 338 NLRB 917, 926 (2003); *United Technologies Corp,* 274 NLRB 504, 507 (1985).

rules and regulations," did not constitute a waiver of the union's right to bargain over substantial changes in break time policies, a new no-solicitation policy, and a new list of "unacceptable behaviors" that might lead to discipline. Cf *City of Saginaw*, 1990 MERC Lab Op 755 (no exceptions), holding that management rights language giving the employer the right to adopt, revise and enforce rules, coupled with a statement in an existing employee manual that "employees may not wear improper footwear," constituted a waiver of the union's right to bargain over a new footwear rule. Respondent cites *Holland Pub Schs*, 1989 MERC Lab Op 346, in which the Commission held that a contract provision stating, "The District may adopt rules and regulations not in conflict with the terms of this agreement governing the professional conduct of teachers," waived the union's right to bargain over a rule governing smoking on school property. *Holland*, however, appear to be an anomaly.

As set out above, the Commission's approach to waiver has been to look at both the contract language and the parties' conduct to determine whether the union intended to waive its right to bargain over the particular subject matter. Here, the record indicates that parties' practice since at least 1986 has been to exclude disciplinary issues from the contract and permit these matters to be governed by rules promulgated by Respondent. Consistent with this practice, Article III allows Charging Party to grieve work rules on the basis that they are not "reasonable" or "uniform." Attendance rules for drivers, however, have been a partial exception to the practice. Prior to 2002, the contract contained a tardiness policy, Section 7.05, and a "call in" policy, Section 7.06. Full-time drivers were subject to both these policies as well as the absenteeism policy set out in the 1986 rules. In 2002, Respondent proposed, and the parties agreed to include in the contract, a comprehensive attendance policy for full-time drivers that covered absenteeism, tardiness, and the failure to call in and which superceded the absenteeism policy in the rules. As discussed above, although part-time drivers were covered by Section 7.06 of the contract, there does not appear to have been a clearly articulated attendance policy of any type for part-time drivers prior to 2006. This may have been because, until 2004, a large number of the part-time drivers were "extra operators" who worked on-call and for whom a comprehensive attendance policy was not necessary. After 2004, as transportation manager Leighty testified, Respondent needed such a policy because it needed to ensure that part-time drivers showed up, and showed up on time, for their assigned routes. However, as the record indicates, the parties never discussed attendance rules for part-time drivers, either as part of or outside contract negotiations, before Respondent announced in 2006 that it was promulgating a comprehensive attendance policy for part-time drivers and refused to bargain over this policy. I find no evidence from which to conclude that Charging Party knowingly and voluntarily relinquished to Respondent its right to bargain over a comprehensive attendance policy for part-time drivers. I conclude, therefore, that Charging Party did not waive its right to bargain over the April 2006 attendance policy.

In sum, I conclude that Respondent's April 2006 attendance policy did not constitute an unlawful midterm modification of the parties' 2005-2008 collective bargaining agreement. However, I find that Charging Party did not waive its right to bargain over this policy, and that, therefore, Respondent violated its duty to bargain under Section 10(1)(e) of PERA by unilaterally promulgating these rules and by refusing Charging Party's demand to bargain. In accord with these findings, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

Respondent Interurban Transit Partnership, its officers and agents, are hereby ordered to:

1. Cease and desist from altering terms and conditions of employment for employees represented by the Amalgamated Transit Union, Local 836 without bargaining with that labor organization.

2. Take the following affirmative action to effectuate the purposes of the Act;

   a. On demand, bargain with the above labor organization over attendance policies applicable to part-time drivers;

   b. Pending satisfaction of its obligation to bargain, rescind the attendance policy promulgated in April 2006;

   c. Rescind all discipline issued to employees pursuant to the April 2006 attendance policy and reinstate any employee discharged pursuant to this policy;

   d. Make employees whole for any monetary losses suffered as a result of discipline issued pursuant to the April 2006 policy, including interest, computed quarterly, at the statutory rate of five (5) percent per annum;

   e. Post the attached notice to employees in conspicuous places on the Respondent's premises, including all places where notices to employees are customarily posted, for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE **INTERBURBAN TRANSIT PARTNERSHIP** TO HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT (PERA). PURSUANT TO THE TERMS OF THE COMMISSION'S ORDER,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT alter terms and conditions of employment for employees represented by the Amalgamated Transit Union, Local 836, without bargaining with that labor organization.

WE WILL, on demand, bargain with the above labor organization over attendance policies applicable to part-time drivers.

WE WILL, pending satisfaction of its obligation to bargain, rescind the attendance policy for part-time drivers promulgated in April 2006.

WE WILL rescind all discipline issued to employees pursuant to the April 2006 attendance policy and reinstate any employee discharged pursuant to this policy.

WE WILL make employees whole for any monetary losses suffered as a result of discipline issued pursuant to the April 2006 attendance policy, including interest, computed quarterly, at the statutory rate of five (5) percent per annum.

As a public employer under the PERA, we are obligated to bargain in good faith with representatives selected by the majority of our employees with respect to rates of pay, wages, hour of employment or other conditions of employment. All of our employees are free to form, join or assist in labor organizations and to engage in lawful concerted activity through representatives of their own choice for the purpose of collective bargaining or other mutual aid and protection.

INTERURBAN TRANSIT PARTNERSHIP

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510.