

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 FLAMBEAU SCHOOL DISTRICT : Case 28  
 : No. 43160  
 and : MA-5909  
 :  
 NORTHWEST UNITED EDUCATORS :  
 :  
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Appearances:

Weld, Riley, Prenn & Ricci, S.C., Ms. Kathryn J. Prenn, Attorneys at Law,  
 715 South Barstow, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030,  
 appearing on behalf of the School District.  
Mr. Kenneth Berg, Representative, Northwest United Educators, 16 West  
 John Street, Rice Lake, Wisconsin 54868, appearing on behalf of  
 Northwest United Educators.

ARBITRATION AWARD

Flambeau School District, hereinafter the District, and Northwest United Educators, hereinafter the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration the undersigned was appointed to arbitrate a dispute over the assignment of a class. The parties also agreed to have the undersigned render a decision based upon exhibits and written arguments submitted. Arguments and reply arguments were submitted to the undersigned by November 26, 1990. Full consideration has been given to the evidence and arguments presented in rendering this Award.

ISSUE

The undersigned frames the issue as follows:

Did the District violate the collective bargaining agreement when it failed to offer to the Grievant an assignment to monitor a class offered through TI-IN?

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE II - SCHOOL BOARD'S MANAGEMENT RIGHTS

- A. The School Board, unless otherwise herein provided, hereby retains and reserves unto itself all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and Constitution of the State of Wisconsin, and of the United States, including but without limiting the generality of the foregoing, the right:
  - 1. To the executive management and administrative control of the school system and its properties and facilities.
  - 2. To hire all employees and, subject to the provisions of law, to determine the qualifications and the conditions of their continued employment.
  
- B. The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this agreement and Wisconsin Statutes 111.70 and then only to the extent that such specific and express terms hereof are in conformance with the Constitution and laws of the United States.

ARTICLE IV - CONDITIONS OF EMPLOYMENT

A. The basic schedule is for a 186-day contract with a normal high school teaching load of six classes, study hall supervision and a preparation period; or seven classes and a preparation period. Teachers who are assigned seven classes and a preparation period shall be compensated at the rate of \$500 per semester. Elementary teachers shall average one preparation period per day each week.

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F. During the 186-day contract period, all teachers will be on duty from 8:00 a.m. to 3:35 p.m. All teachers are to have thirty (30) minutes duty-free lunch period by state law, but have agreed to a shorter day in lieu of the duty-free lunch period. Extended contracts will be based on an eight (8) hour day and a forty (40) hour week, as a duty-free lunch period is available. One (1) hour preparation period for a full day, a fractional preparation period in proportion to a fractional part of a day for extended contract teachers performing actual classroom instruction. Teachers tardy or absent without leave from contract or assigned duties may have their salaries reduced proportionately.

Commencing with the 1988-89 school year, during the 186-day contract period, teachers shall be on duty from 8:00 a.m. to 3:50 p.m., excluding a 30 minute duty-free lunch period, except that on Fridays and days immediately preceding holidays or vacation, teachers may leave work five (5) minutes after the end of the student day.

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ARTICLE XI - GRIEVANCE PROCEDURE

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B. For the purpose of this agreement, a grievance is defined as any dispute involving the interpretation or application of any provision of this agreement.

C. Whenever a grievance shall arise the following procedure shall be followed:

. . .

Step #3

If the aggrieved person is not satisfied with the disposition of the grievance at Step #2, he must notify the Superintendent in writing within ten (10) calendar days after receiving an answer from the Superintendent that his grievance will be sub-mitted to arbitration. Within ten (10) calendar days after such written notice of submission to arbitration, the aggrieved party shall file a request with the Wisconsin Employment Relations Commission to appoint a member of its staff to act as arbitrator. The function of the arbitrator shall be to determine whether or not the rights of the teacher have been violated by the District contrary to express provision of this agreement. The arbitrator shall have no authority to add to, subtract from, or modify the Agreement in any way. The arbitrator shall have no authority to impose liability upon the District arising out of facts occurring before the effective date of this Agreement. The decision of an arbitrator within the scope of his authority shall be final and binding upon the District, the Northwest United Educators and the NUE-Flambeau bargaining unit.

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ARTICLE XII - LAYOFF CLAUSE

- A. If the teaching staff is decreased, the School Board will lay off teachers in the inverse order of appointment of such teachers, by department or elementary grades, and subject to the qualifications needed. If vacancies occur, teachers laid off shall be reinstated to fill the vacancies and within a two (2) year period from the beginning of the school year for which they were laid off. The Board agrees that no new or substitute appointments will be made while there are laid off teachers available who are qualified to fill the vacancies. Qualifications will be based on state certification and experience in the subject and grade level.

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BACKGROUND

Amongst its various educational programs the District offers distant learning programs, referred to by the parties as TI-IN. These distant learning programs generally involve students taking a class through instructional television. The TI-IN Network is an instructional television service which the District contracted with to expand course offerings at the high school level. Course offerings contracted for include French, Marine Science, Astronomy, Spanish and Psychology. The District does not employ any teachers who are certified by the Wisconsin Department of Public Instruction to teach these subjects. With the exception of science courses which have science labs the District is not required to have a certified teacher supervise or monitor students who are taking TI-IN courses. Except for Science Labs all instruction for TI-IN courses are provided by the TI-IN instructor over the television. The District is required to have an adult supervise and monitor all students who are taking a TI-IN course.

During the 1989-1990 school year a TI-IN French class was offered by the District. This course was broadcast "live" on the TI-IN Network from 7:30 a.m. to 8:20 a.m. One (1) student enrolled in the class during the first semester and two (2) students enrolled in the class during the second semester (the 1989-1990 school year consisted of two (2) semesters). A teacher aide, Nancy Toman, was assigned by the District to monitor the students taking the French class.

At the commencement of the 1988-1989 school year Sue Coggins, hereinafter referred to as the Grievant, was reduced from full-time to 7/8's time. In September 1989 the Grievant became aware TI-IN classes were being monitored by other teachers and that, in one instance, the teacher was paid extra for the extra class in accordance with Article IV, A of the collective bargaining agreement and in another instance, the assignment was part of the teachers' regular teaching load. In October 1989 the Grievant filed the instant grievance and it was processed to arbitration in accordance with the parties collective bargaining agreement.

During the 1989-1990 school year the District assigned three (3) teachers; Ross, Groothousen and Lee, to TI-IN courses. Ross had initially been issued a full-time teaching contract for the 1989-1990 school year. By School Board policy courses are not offered if less than eight (8) students enroll. By mid-summer, and after the time frame which the District may lay-off teachers, one of Ross' courses dwindled to two (2) students. The course was cancelled and Ross was assigned distance learning supervision duties. The distant learning courses supervised by Groothousen contained lab activities which required a certified teacher. Groothousen did receive additional compensation for teaching a seventh course. Lee, the District's Librarian supervised two (2) TI-IN courses because the television monitor was in the Library and Lee was in the area anyway. Lee did not receive additional compensation.

UNION'S ARGUMENT

The Union contends the TI-IN French class assigned to an Aide who is not certified to teach is the type of assignment that had it been offered to the Grievant would have allowed the District to treat the Grievant the same as both Ross and Groothousen were treated. The Union also argues that when the District assigned TI-IN courses to Ross and Groothousen it is acknowledging

that these types of courses are bargaining unit work.

The Union also argues that the District made changes in course assignments to accommodate Ross. The Union asserts the Grievant was available during the first and fourth class periods and should have been given one or two TI-IN assignments to fill out her teaching load, particularly in view of the fact that the Grievant is more senior than Ross and in view of the fact TI-IN programs are recorded and can be used at any time.

The Union also argues that it never gave the District a free hand to do anything the District wanted regarding the Distant Learning Program. The Union points out that even though a tentative agreement had been reached in September 1989, regarding Distance Learning during negotiations for the 1989-1990 collective bargaining agreement, when the Union heard an Aide was handling a TI-IN class the tentative agreement fell apart as the Union believed the District's actions circumvented the tentative agreement.

The Union would have the undersigned sustain the grievance and order the District to make the Grievant whole.

#### DISTRICT'S POSITION

The District contends its actions did not violate the collective bargaining agreement. The District argues an assignment to supervise distant learning students is not a "vacancy" within the meaning of Article XII of the collective bargaining agreement. The District points out that this is not the first time the Grievant has attempted to secure full employment and points to Flambeau School District, WERC Case 24, No. 42064, MA-5551 (4/11/90). Therein, the District argues, the arbitrator held that study hall assignments are not within the scope of the layoff clause. The District contends the arbitrator's decision is dispositive in this case as there is no requirement, with the exception of the science classes, that a certified teacher serve as a supervisor of the students who are taking a distance learning course. Further, and contrary to the claims put forth by the Union, the District argues the assignments of Ross, Lee and Groothousen to supervise distance learning programs was not made to provide full-time employment.

The District also argues the decision to assign an Aide to supervise students taking courses over instructional television was within its management rights. The District points to Article II in support of its position. The District also asserts it has made extensive use of Aides to supervise students and argues the Union is attempting to interfere with basic educational policy choices in the domain of the District. The District argues the Union is asking the arbitrator to compel the District to remove supervisory duties from a member of the support staff even though, as in study halls, no certification is required for such duties. Such a conclusion, the District contends, would require the arbitrator to add language to the parties' collective bargaining agreement, an action clearly beyond the scope of the arbitrator's authority. The District also asserts the Union's position would require the District to hire two (2) teachers for the same course, one who turns on the television monitor and the one doing the teaching.

The District also asserts past practice supports its position. The District argues that Toman's work is no different from work performed by other Aides who supervise study halls, serve as resource persons for students using the library, and work with Special Education, Chapter I and kindergarten students.

The District also argues any bargaining history regarding a tentative agreement concerning distance learning is not relevant. The District points the tentative agreement was dropped because there was "no meeting of the minds" on the issues. Further, even though the distance learning program was in place the parties voluntarily resolved the 1989-91 collective bargaining agreement without any provision referencing the program.

The District would have the undersigned deny the grievance.

#### UNION'S REPLY BRIEF

The Union contends the instant matter is not similar to the arbitrator decision concerning study halls and argues to extend that interpretation to classes for which students will receive credit is not even logical. The Union also contends the District's assertion it can hire whoever it wants circumvents the question of bargaining unit work. The Union also asserts it is not attempting to interfere with the offering of television courses but rather proposing that it should be accomplished under the rights of recall for a teacher with a partially reduced contract. The Union further argues that the District's argument on past practice does not deal with the major issue that the TI-IN classes have been used to provide for a full and an extended teaching contract.

## DISTRICT'S REPLY BRIEF

The District points out that Groothousen had a normal teaching load pursuant to the terms of the collective bargaining agreement, Article IV, A, seven (7) classes and a preparation period. Further, that the District had a choice with Ross. Pay him for doing nothing or pay him for doing something. As a result, Ross was assigned to supervise a TI-IN class. The Grievant had been reduced in the 1988-89 school year, a full year before the District offered TI-IN classes.

## DISCUSSION

The instant matter involves several distinct issues concerning the parties distance learning program. The program has two distinct parts. Science courses must have a certified teacher in any subject area. No other TI-IN courses require a certified teacher.

For those TI-IN courses which do not require a certified teacher, this matter is similar to the study hall grievance cited by the District. Therein the arbitrator held that within Article XII, A, vacancies are limited to assignments for which there is a requirement of State certification. The undersigned concurs with this interpretation. Thus, as a laid-off employe does not have a reinstatement right to study hall because certification is not required, a laid-off employe does not have a reinstatement right to be assigned to a TI-IN course which does not require a certified teacher. The District's assignment of Ross, Lee and Toman to perform supervision duties of students taking TI-IN courses did not violate the Grievant's reinstatement rights. The undersigned also finds that the bargaining unit work sought by the Union in the instant matter is limited by the necessity of certification in a subject area.

If the District creates a new assignment which does not require certification, a laid-off employe does not have reinstatement rights to the assignment absent a practice which would demonstrate the duties are exclusively in the purview of the Union. Herein, the District employs many non-bargaining unit employes, some of whom, have duties which require the supervision of students. The undersigned therefore cannot conclude the supervision of students taking a TI-IN course which does not require a teacher who has certification is the Union's exclusive bargaining work.

Turning to the question concerning TI-IN programs which require a certified teacher the undersigned again concurs with the conclusion reached by the arbitrator in the study hall grievance. Therein the arbitrator also held ". . . there is no 'reinstatement' right to 'bump' into the work assignment of another bargaining unit employe." The arbitrator also concluded Article VII, A, limited reinstatement to work which would have been performed by a new or substitute employe. Herein, Groothousen had a normal teaching assignment as defined by Article IV, A. He was neither a new or substitute employe. While no specific certification was required for the science TI-IN classes Groothousen supervised, the Grievant had no reinstatement rights to perform this assignment.

While the undersigned is aware of the Union's concern that distance learning courses could provide full-employment for laid-off employes, to grant the remedy the Union seeks would clearly add to the language of the parties agreement. Article XII, A clearly limits reinstatement rights to assignments which would otherwise be performed by new or substitute employes. This Article further limits such rights to vacancies based upon certification and experience in the subject or grade level. To find that a laid-off employe could bump into distance learning programs which do not require certification or into distant learning programs which require certification but are being performed by another bargaining unit employe who is neither a new employe or a substitute would change the limitations placed upon reinstatement by Article XII, A. Clearly, the undersigned has no authority to modify the parties agreement and thus cannot alter the limitations placed upon reinstatement by the parties agreement.

Based upon the above and foregoing, and the arguments and exhibits presented by the parties, the undersigned finds that the District did not violate the collective bargaining agreement when it failed to offer a TI-IN course assignment to the Grievant. The undersigned has not addressed the hours issue or bargaining history issue raised by the parties. In view of the foregoing, both are deemed irrelevant by the undersigned. The grievance is denied.

## AWARD

The District did not violate the collective bargaining agreement when it failed to offer the Grievant a TI-IN course assignment.

Dated at Madison, Wisconsin this 7th day of March, 1991.

By Edmond J. Bielarczyk, Jr., Arbitrator