BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
NORTHWEST UNITED EDUCATORS	Case 29 No. 46249 MA-6918
and	
BLOOMER SCHOOL DISTRICT	

Appearances:
Mr. Alan D. Manson, Executive Director, Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin 54868, on behalf of the Union.
Mr. Stephen L. Weld, Weld, Riley, Prenn and Ricci, S.C., Attorneys at Law, 715 South Barstow, Suite 111, Eau Claire, Wisconsin 54702-1030, on behalf of the District.

ARBITRATION AWARD

Northwest United Educators ("the Association") and Bloomer School District ("the District") are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. On September 25, 1991, the Association made a request, in which the District concurred, for the Wisconsin Employment Relations Commission to designate a member of its staff to serve as impartial arbitrator to hear and decide a grievance involving the application and interpretation of the terms of the agreement relating to categories of employes and lay-offs. The Commission designated Stuart Levitan, a member of its staff, to serve as impartial arbitrator. Hearing in the matter was held in Bloomer, Wisconsin on December 19, 1991; it was not transcribed. Initial briefs were received from the District and Association on April 15 and 17, 1992, respectively. Reply briefs were provided by the Association and District on April 30 and May 6, 1992, respectively, at which time the record was closed.

ISSUE:

Did the District violate Article IX of the collective bargaining agreement when it laid off the Grievant on May 3, 1991? If so, what is the remedy?

RELEVANT CONTRACTUAL LANGUAGE:

II. RELEVANT CONTRACT PROVISIONS

ARTICLE I - RECOGNITION

The Bloomer Board of Education recognizes NUE as the exclusive and sole bargaining representative for all regular full-time and regular part-time educational support employees . . .

ARTICLE II - MANAGEMENT RIGHTS

While it is agreed that NUE has the exclusive right to negotiate for associate staff as provided by law on questions of wages, hours, and working conditions, it is also expressly recognized and hereby agreed that:

A.The Board retains and reserves the right to direct the working forces, including the

right to establish and/or eliminate positions, to hire and rehire, evaluate, promote, suspend, non-renew and discharge employees, including. . . to determine the size of the work force and to lay off employees.

B. The Board retains and reserves the right to determine the services, supplies and equipment necessary to continue its operation and to determine all methods and means to distributing the above and establishing standards of operation, the means, methods and processes of carrying on the work, including automation or subcontracting thereof or changes therein.

C. The Board retains and reserves unto itself all powers, rights, authority, and responsibilities to manage and operate the District. The exercise of such power, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules and regulations and practices in furtherance thereof, shall be limited only by the specific and express terms of this Agreement and by the laws of the State of Wisconsin and of the United States of America. The foregoing statement of the functions of the Board shall not be considered to exclude other functions of the Board not heretofore set forth; the Board retaining all functions and rights to act not specifically covered by this Agreement.

ARTICLE IV - FAIR SHARE

B. The District agrees that effective thirty (30) days after the date of initial employment, it will deduct from the monthly earnings of all employees in the collective bargaining unit their fair share of the cost of representation by NUE as provided in ss. 111.79(1)(h), Wis. Stat., and as certified to the District by NUE or the NUE dues if authorized by the employee, and pay the said amount to the Treasurer of NUE on or before the end of the month following the month in which such deduction was made. Changes in the amount of dues to be deducted shall be certified by NUE thirty (30) days before the effective date of change.

ARTICLE VII - LAYOFF/SENIORITY

F. Layoffs shall occur only on September 1; no advance notice is required.

G. Recall: Rehiring of employees who have been laid off shall be in order of seniority within classification providing the recalled employees are qualified to perform the available work. Laid-off employees shall retain seniority rights for a period of two (2) calendar years from the date of layoff. The notice of recall for any employee who has been laid off shall be sent by certified mail to the last known address of the employee. Employees on layoff shall forward any change of address to the District.

ARTICLE VIII - VACANCIES AND TRANSFERS

A. Posting: When the District determines that a vacancy should be filled or a new position created within the bargaining unit, the District agrees to post the notice of such vacancy in all three (3) school buildings for at least five (5) working days before the announcement is made or posted outside the District's buildings.

. . .

C. Within the Same Department: The selection of any applicant to fill a job vacancy within the same department shall be made on the basis of seniority, provided the employee is equally qualified as compared with other applicants in terms of relative ability, experience and training.

ARTICLE IX - TEMPORARY EMPLOYEES

An employee who is substituting for an employee who is on leave shall not be considered a member of the bargaining unit until he/she has been employed twenty (20) consecutive working days in that position. After twenty (20) consecutive working days in the same position, the employee shall become a member of the bargaining unit, but shall be excluded from the provisions of the layoff clause contained in the collective bargaining agreement.

ARTICLE X - PROBATION/DISCIPLINE

. . .Upon completion of the probationary period, the employee shall be granted seniority rights from the employee's date of hire, and shall not be disciplined, reduced in rank or compensation, or discharged without just cause.

BACKGROUND

The grievant worked most of the 1989-90 and 1990-91 school years as a temporary custodian in the employ of the District. This grievance concerns the involuntary cessation of his employment on May 3, 1991.

During the 1989-90 period, the grievant's employment was related to a medical leave taken by Darrell Pagenkopf. Pagenkopf, a 44-hour-per-week custodian, was replaced by regular, full-time employe Ken Hinke, whose 40-hour-per-week position was then filled by the grievant. In October, 1990, Pagenkopf returned for approximately five or six weeks, at which time Hinke reverted to

his prior 40-hour post, and the grievant was laid off. No grievance was filed in relation to these personnel transactions.

Pagenkopf's return to work, however, lasted only this five to six-week period, and he again took a medical leave of absence. Again, Hinke assumed Pagenkopf's schedule and the grievant again assumed Hinke's post.

On or about February 5, 1991, District Administrator Gerald L. Smith sent Pagenkopf the following letter:

Darrell Pagenkopf
R.R. # 2, Box 138A
Bloomer, WI 54724

Dear Darrell:

> After reviewing your medical condition with you for the past seventeen months and the various leaves of absences you have had, I now find that I must ask for your return to work on a full-time basis soon. The Board of Education has allowed you a one year full-time leave of absence for medical reasons and then accommodated you with a return to work schedule on a seven hour per day basis last fall. This accommodation was with the anticipation that this shortened work schedule would allow you to acclimate yourself to the job and then in the near future return to work full-time.

It is my understanding, based on our conversations, that your medical condition will not allow your return to work on a full-time basis and that you are doubtful that you can work even part-time in your current medical condition. The school district needs a full-time custodian.

If you cannot return to work by February 25, 1991, I will have to fill the position with another worker. You can resign or we can sever your employment at that time with the understanding that, if your medical condition changes in the near future, the Board of Education will offer you one of the part-time cleaner positions when vacant, if you are physically able to perform the tasks of the position. Upon successful performance of that job, you will be given an opportunity to post into a vacant full-time position assuming again you have the physical ability to perform the tasks of that position. You indicated in our conversations that you may be interested in a part-time position if there is an opening.

If I, or the other district personnel, can be of any assistance to you in resolving this difficult situation, please let me know. I trust you understand the need of the district to fill the position as much as the district understands the very difficult medical situation you are confronted with daily.

Sincerely,

Gerald L. Smith /s/
Gerald L. Smith
District Administrator

c.c. Al Manson, Ken Hinke

On or about February 25, 1991, Pagenkopf terminated his employment with the District. On or about March 21, 1991, the District posted a position availability for the 44-hour-per-week position, with an application deadline of March 28, 1991. Hinke and the grievant both applied for the position. Hinke received the 44-hour-per-week position, and the grievant continued in the 40-hour capacity. The District, however, never posted the 40-hour position; the Association never grieved this non-action.

For the two-week pay periods ending January 11, January 25, February 8, April 19, and May 3, 1991, the grievant worked 40 hours per week. In the remaining pay periods in which he worked in 1991, the grievant worked 78.5 hours, 77.5 hours. 85.25 hours, 80.5 hours and 72 hours, for a total of 793.75 hours over 20 weeks. For all pay periods he worked in 1991, and all but one in 1990, the grievant had deductions for the union taken from his paycheck.

On April 22, 1991, the Board, by a vote of 6-1, adopted a motion directing the District Administrator "to implement a plan of revision of custodial staff with reduction of temporary employees on a trial basis." As was made clear in a separate memorandum prepared by the district administration, the Board understood that this revision would include the layoff of the grievant.

On April 26, 1991, the District publicized the following notice:

TEMPORARY CLEANERS NEEDED
SCHOOL DISTRICT OF BLOOMER

> The School District of Bloomer needs three (3) temporary cleaners, for the month of May, 1991. Positions to start May 6, 1991, and terminate May 31, 1991. Hours are variable by position from 11:30 am to 9:00 pm. Salary as per collective bargaining agreement. Contact: Gerald L. Smith District Administrator at 568-2800 for application or stop at the District office in the Senior High.

Also on April 26, 1991, NUE Executive Director Al Manson wrote to Administrator Smith, informing him that the Association believed that Article VII - Part F prevented the District from laying off the grievant at any time other than September 1.

On April 29, 1991, Administrator Smith sent to the grievant the following letter:

> This is to notify you that the temporary position you occupy will terminate on May 3rd, 1991. The provision for the termination is in accordance with Article IX Temporary Employees of the collective bargaining agreement and if we can be of any assistance to you during the transition period feel free to contact me.

The positions referenced in the April 26 notice were not posted in the three school buildings. The grievant did not apply for any of these positions.

By letter of May 3, 1991, Manson lodged with Smith a written grievance

over this matter, which was thereafter processed to arbitration.

On June 28, 1991, Manson proposed to Smith an agreement to resolve this matter. Among other features, Manson's proposal included setting certain staffing levels, a redefinition of temporary employes, and the withdrawal of the instant grievance. The Board did not accept this proposal.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Association asserts and avers as follows:

As noted by payroll records showing deductions for union dues, the grievant became a member of the bargaining unit no later than January 5, 1990. He later became a regular, non-probationary, full-time employe as of May 3, 1991. His layoff in May, 1991, was in violation of the collective bargaining agreement.

Due to the ongoing medical leave of absence of custodian Darrell Pagenkopf, a 44-hour-per-week employe, custodian Ken Hinke, a 40-hour-per-week employe, assumed Pagenkopf's schedule and the grievant replaced Hinke. The grievant thus worked continuously as a 40-hour-per-week custodian, except for a period in October, 1990. Pagenkopf was terminated on or about February 25, 1991, after which time the grievant worked 50 further regular workdays (until May 3) as a 40-hour, regular full-time custodian.

As the grievant was a regular, non-probationary full-time employe, it was improper for the District to attempt to exclude him from the provisions of the layoff clause by claiming he was a temporary employe. In the alternative, if it is found that the grievant is not covered by the contractual provisions of the layoff clause, he is still entitled to just cause protection from the District's total reduction in his compensation.

Temporary employes are defined as employes who are substituting for another employe on leave; but as of February 25, 1991, when Pagenkopf was terminated, the grievant was no longer substituting for anyone. Having thus become a regular, full-time employe, the grievant is entitled to the contractual protections against layoff at a time other than September 1.

In addition to the contractual provisions relating to layoffs, the grievant, as a bargaining unit member, is also protected against reductions in rank or compensation for other than just cause. As the employer chose to create new positions performing substantially similar duties, it cannot claim fiscal necessity or lack of need as just cause for the total elimination of the grievant's rank and compensation.

The appropriate remedy for the District's violation is an order reinstating the grievant to the 40-hour-per-week custodian position and making him whole for any losses suffered as a result of his improper termination/layoff on May 3, 1991.

In support of its position that the grievance should be denied, the District asserts and avers as follows:

The grievant was a temporary employe, and was therefore excluded from coverage of the layoff provision. The grievant, substituting for Pagenkopf during two extended periods of leave, never deviated from his temporary status, and could therefore be laid off at any time and without recall rights -- as happened in late 1990, when Pagenkopf returned for a five-six week period.

The contractual language reflects a bargaining table compromise regarding the rights of employes (both substituting and substituted for) and the employer. It was designed to meet just such a situation as is now at issue; its careful balance should not be disrupted through a grievance arbitration. Its language and import are clear and unambiguous.

The relevant language explicitly states that an employe who is substituting for another employe who is on leave is not entitled to protection from layoff. Mr. Pagenkopf was on leave; the grievant substituted for him. The language of Article IX applies -- the grievant was an employe substituting for another employe who was on leave, and thus was not covered by the layoff clause. Even though the grievant became a member of the bargaining unit after twenty (20) consecutive days as a custodian, he could be laid off at any time.

A temporary employe is one whose employment lasts only a limited time. There is no evidence that the grievant was ever offered anything other than limited term employment. Further, the grievant acted in accordance with this understanding. When Pagenkopf returned to work in the fall of 1990, the grievant was laid off on a date other than September 1; he did not file a grievance. When he was rehired, it was on the same basis as before -- as a substitute for Pagenkopf. For the grievant to have become a regular employe, the position would have had to have been posted and the grievant formally hired, pursuant to Article VIII, Paragraph A. The District only posted the one elementary custodial position, into which a more senior custodian transferred. The District never posted the second position, and never hired the grievant as anything other than a temporary employe.

The District has the management right to determine whether or not to fill a vacancy. Here, it has acted reasonably and within its contractual rights in re-evaluating its staffing needs and eliminating the second full-time custodian position. Nothing in the contract requires that a vacant position must be filled; pursuant to its broad management rights, the District has the right to fill vacancies or not. Nothing requires that a job be posted if the District decides to leave it vacant. Given the reasonable and responsible desire by the District to control costs, the District acted within its authority in not filling the second full-time

custodian position.

Nor is the District in violation of the just cause standard for termination; the completion of the temporary task for which the grievant was hired constitutes just cause for his termination. Commission precedent, upheld on judicial review, is cited in support of the proposition that the duration of the grievant's employment was limited to the time when Pagenkopf returned to work or to the time when the District decided not to fill the permanent vacancy.

The fact that union dues were collected does not make the grievant a regular employe. It only demonstrates that the District was complying with the contractual provision for dues deduction for unit members, including temporary employes.

Any union argument that the District violated the contract by failing to post the temporary part-time cleaning position filled after the April board meeting also fails, in that such contention is untimely and countered by the District's Article II management rights, which authorize the District to hire temporary employes without a posting.

Finally, it is clear the Union is using this grievance as a bargaining tool during negotiations; the record establishes that the Union was willing to drop this grievance in exchange for certain provisions it sought during collective bargaining.

In summary, the grievant was a temporary employe who was not entitled to the provisions of the layoff clause; the Union presented no evidence that the District ever promised or hired the grievant for a regular, full-time position. The grievant was properly laid off when the District decided against filling the second elementary school custodial position. Accordingly, the grievance should be dismissed in its entirety.

In reply, the Association posits further as follows:

The grievant was not a temporary employe as defined in Article IX, in that he was not substituting for an employe on leave. After Pagenkopf's termination on February 25, and until May 3, the grievant worked 40 hours per week and paid regular union dues as a non-probationary member of the bargaining unit. He did so without substituting for anyone who was on leave.

The Association agrees that the District has the right to fill or leave vacant a position; but once it fills a vacancy, the District must comply with the contractual terms. Once the District chose to retain the grievant after its termination of Pagenkopf, it was restricted from altering the custodial staffing until either a vacancy arose due to a legitimate termination or until the contractually specified September 1 date for layoffs.

It is well-settled that words in contracts are there for a

purpose. The phrase "who is on leave," in defining a temporary employe, is in the contract for a purpose, as is the September 1 layoff date. The grievant was not substituting for another employe on leave, and thus was within the parameters of the September 1 date for layoffs.

It is agreed that the District need not retain two employes after a leave ends and there is only work for one. It is also agreed that the District could have terminated both Pagenkopf and the grievant at the same time. But the failure of an employe to return from leave, followed by the formal termination of that employe, and then the continuation of the temporary substitute well beyond the date of termination, does not allow the District to ignore the September 1 date. The exclusion of temporary employes from the layoff clause is to allow the District to have no more employes after a leave of absence than before; it is not to allow the District to reduce the staff at a time other than September 1.

The Commission precedent cited by the District actually supports the Association, in that it stands for the proposition that the temporary nature of the grievant's employment ended with the termination of Pagenkopf. Further, the hiring of new custodial personnel after the termination of the grievant shows there was a continued need for this work to be performed.

It is the action of the District which determines whether a position is temporary or regular. Here, the grievant, a member of the bargaining unit, was treated as of February 25 as a regular employe covered by the layoff clause of the contract. The District should not have laid him off, nor have reduced his compensation completely, and should be ordered to reinstate him and make him whole for his damages.

In its reply, the District posits further as follows:

There simply is no contractual basis for the Union's proposition that the grievant's status changed from temporary to regular upon the termination of Pagenkopf. When Pagenkopf retired in February, 1991, the District had the right to determine whether to fill that position, fill a modified position, or to reduce its work force. It chose to post and fill the 44-hour position at the elementary school but to not post and fill the 40 hour position. Only if the 40 hour position had been posted and filled would the grievant have become a regular employe. But the District chose to reduce its work force by hiring a temporary part-time cleaner. This action was consistent with the District's management rights to determine the size and nature of the workforce.

DISCUSSION

Resolution of this grievance requires a determination of whether the grievant was a temporary employe. If so, the District acted within its authority in laying him off in May, 1991. If not, the District's action was

contrary to the contract.

The District is correct in contending that the general definition of "temporary" is "for a limited time." The parties' relationship, however, is not governed by general definitions, but by the specific terms of the collective bargaining agreement. And that agreement defines a temporary employe as one "who is substituting for an employe who is on leave...." 1/

In its brief, the District contends that Pagenkopf was on leave, and the grievant substituted for him. Thus, it asserts, because "the grievant was an employe substituting for another employe who was on leave," the provisions of Article IX -- and the exclusion of the grievant from the provisions of the layoff clause -- apply.

Regarding the first phase of Pagenkopf's illness (during most of the 1989-90, and the start of the 1990-91 school year, up to late 1990), this analysis applied. Indeed, when Pagenkopf returned in the fall of 1990, the district laid the grievant off, apparently without challenge by the grievant or union.

This analysis is not correct, however, as regards the second phase of Pagenkopf's illness, following his brief (five or six weeks) return to work in the fall of 1990. For as of February 25, 1991, Pagenkopf was not on leave. At the request -- almost the direction -- of the District, Pagenkopf resigned. Thus, one of the central conditions of a temporary employe -- the substitution for another employe who is on leave -- was, as of February 25, no longer present.

The District notes the policy and practicality reflected in the exclusion of temporary employes from the provision of the layoff language, which it says would be undermined if the district were required to hire (i.e., retain) a temporary employe "even though the regular employee returns to work or the school district makes a determination not to fill a vacancy." However, as noted above, that is not the situation here present, for the regular employe -- Pagenkopf -- did not return to work, but rather terminated.

Prior to Pagenkopf's illness, there were two regular employes on active duty (Pagenkopf and Hinke); during Pagenkopf's illness, there was one regular employe on active duty (Hinke), one regular employe on leave, and one temporary employe (the grievant); after Pagenkopf's termination, under the Association's theory, there would still only be two regular employes on active duty, Hinke and the grievant. Thus, even under the Association's theory, the District would have the same number of regular full-time employes as prior to this whole chain of events, thereby establishing that no extra, unanticipated expense or other harm befell the district. The policy inherent in the exclusion of temporary employes from the provisions of the layoff clause is not undermined by the retention of the grievant under these circumstances.

The District argues that it has the management right to determine the size of the work force, and is under no obligation to fill all, or even any,

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1/ Technically, the collective bargaining agreement does not "define" temporary employes, but rather describes their relationship to various provisions of the contract. That is, the contract does not read: "A temporary employe is an employe who is substituting for an employe who is on leave. A temporary employe shall not be considered to be a member of the bargaining unit until he/she has been employed twenty consecutive days in that position." Rather, the contract reads as cited above. The parties agree, however, that the language used is tantamount to a definition, in that it is mutually understood to mean that a temporary employe is one who is substituting for an employe who is on leave.

vacancies that may arise. Again, the District is correct -- it has that right, and is under no such obligation. But that right, and that freedom, are not unlimited. In Article II, the Board explicitly retains and reserves the rights to establish and/or eliminate positions, to hire and rehire, and discharge employes. These rights, however, are general provisions, and prevail only in the absence of specific provisions to the contrary. That is, the District has the right to eliminate positions -- but it may only do so in conformity with the specific contractual terms on layoffs, seniority, and so on.

Article VII states that, "(l)ayoffs, in whole or in part, shall be accomplished by the District deciding to eliminate or reduce a position." There can be no dispute but that what the District has done here (or, at least, has sought to do) is to eliminate the position of 40-hour custodian. The District's right to determine the size of the workforce is constrained by the contractual provision on layoffs. And its right to determine whether to fill vacancies is constrained when a position has, in fact, already been filled.

The District argues that the grievant could have become a regular employe only through a formal process of posting and appointment; as the second custodial position was never posted, it contends, the grievant could never have been appointed.

Indeed, after the posting period closed on March 28, and Hinke was formally placed in the 44-hour position formerly held by Pagenkopf, the District did not post the 40-hour job. Instead, the grievant, who had been filling in on Hinke's 40-hour post since Pagenkopf's second leave several months prior, thereupon continued in that capacity, working approximately 50 eight-hour days between Pagenkopf's termination on February 25 and his own termination on May 3. During that period, he was an employe -- but what kind of employe?

The collective bargaining agreement is not very specific in defining categories of employes. Besides the indirect definition of temporary employes, the only other reference is the recognition clause's application to "all regular full-time and regular part-time educational support employees...."

I do regard the process by which the grievant assumed the 40-hour position previously held by Hinke, and the fact that the Association never grieved this process, as weak links in the Association's case. That they are weak links, however, do not make them fatal flaws.

The grievant clearly was not appointed to the position, but essentially grew into it. As a general rule, permanent, regular employes should assume their positions by appointment, rather than evolution. However, all employes must be of one category or another. The absence of an employe on leave precludes the grievant from being a temporary employe. The only other categories referenced in the contract are regular full-time, regular part-time and probationary. The employe has not contended that the grievant was probationary. The grievant's work schedule of 40 hours per week is a full-time schedule. The grievant was thus a regular, full-time employe.

Moreover, the non-posting of the position was not an Association action or decision, but was rather an aspect under the complete control of the District. Whether or not the Association might or might not have had a meritorious grievance over this non-posting in the period February 25 to May 3 is an interesting question, but it is not the question before me. What is before me is assessing whether the District should now benefit from its decision to avoid posting the position of 40-hour custodian, which it filled for two months before terminating the grievant. I find that it should not.

The District contends it had the management right to determine whether to fill the 40-hour position, modify it, or leave the position vacant. The

District, in general, does, and did, have that right -- but in exercising that right, it had the obligation to act within a reasonable time-frame, namely in conjunction with the Pagenkopf termination. That is, I believe it would have been within the District's authority to abolish the 40-hour position, providing it did so at or about the same time as Pagenkopf's termination. But the District waited two months before it decided to replace the 40-hour custodian with part-time cleaners. At some point there is a reliance factor which begins to apply, under which the employe can rely that his or her position does in fact exist, and is secure, at least until September 1. I am not sure as to exactly what date the parties crossed that reliance threshold -- but I am sure that it was crossed prior to the District's actions of April 22.

The District cites Northwest United Educators v. WERC, Dec. No. 24259-C (1/91) as supporting its contention that the grievant's position was temporary, and its duration limited to the time when the District decided not to fill the permanent vacancy. In that case, however, there was specific contract language defining a temporary teacher as one "employed for a limited specific period of time to fill a temporary need...." (emphasis added). This clear difference in the pertinent contract language distinguishes these two cases dramatically, and makes the earlier cased not on point in this proceeding.

Nor can the District claim, as it does, that "completion of the temporary task for which the grievant was hired constitutes just cause for termination of his employment." The grievant was not hired for a temporary task that he completed; rather, he occupied a position (full-time custodian) which was abolished and essentially re-created as three part-time cleaner positions.

Noting past settlement offers made by the Union, the District also challenges the validity of this grievance by claiming the grievance is being used by the Union as a bargaining tool in contract negotiations. In certain egregious circumstances, the motives for the way a grievance if filed and responded to may have some relevances. Here, I find the issue of why the Union brought the issue, and what it was willing to accept in exchange for dropping the grievance, to be irrelevant to a consideration of the merits of the matter.

In its brief, the District raised two issues in a preemptory manner -- that dues were deducted for the grievant, and that the new part-time cleaning positions were not posted. The Association raised neither of these matters in its brief, but responded to the union dues argument in its reply.

The collective bargaining agreement provides that temporary employes become members of the bargaining unit -- except for purposes of the layoff provisions -- after twenty consecutive working days in their position. The grievant had dues deducted as early as February, 1990, a time when both parties agree he was a temporary employe. The deductions continued up to his termination. In making these deductions, the District was acting in accordance with the contract. These deductions have no bearing, and provide no guidance, on whether the grievant was a regular or temporary employe.

The District raises an objection as to timeliness of any Association argument challenging the District's failure to post the part-time cleaning positions filled after the April Board meeting. The Union has not raised such a challenge. I need not address an issue that has not been joined, and which is beyond the issue presented to me for resolution.

Remedy

Having determined that the grievant was improperly laid off, I turn now to the question of remedy. As remedy, the Union seeks an order reinstating the grievant to the 40-hour-per-week custodian position, plus back pay for losses suffered due to the improper termination.

As noted above, it is the District's prerogative -- within certain limits -- to determine the size of the work force. My determination that the District acted beyond the contract in laying the grievant off on a date other than September 1 does not mean that I have determined that the District could not lay the grievant off at all -- just that it took this action in an untimely manner. An order of reinstatement is not in accordance with the essence of this contract.

The grievant is, however, entitled to be made whole for lost wages and other benefits which he lost due to his improper termination. The Union shall prepare a calculation showing its fiscal analysis on this point, which the District shall review and respond to. In order to resolve any disputes arising over the calculation of this make-whole order, I shall retain jurisdiction until jointly relieved by the parties.

Accordingly, on the basis of the evidence and the arguments of the parties, I issue the following

AWARD

1. The District shall make the grievant whole for wages and other benefits lost between his termination on May 3, 1991 and September 1, 1991.

2. I shall retain jurisdiction until jointly relieved by the parties.

Dated at Madison, Wisconsin this 8th day of June, 1992.

By Stuart Levitan /s/
Stuart Levitan, Arbitrator

sdl/gjc
STUART'S