BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between MUSKEGO-NORWAY SCHOOL DISTRICT and MUSKEGO AREA PUBLIC EMPLOYEES UNION LOCAL 2414, AFSCME, AFL-CIO (CUSTODIAL/MAINTENANCE EMPLOYEES)	Grievances 9102 and 9103 Non-posting and assignments of second shift custodial work Case 47 No. 46780 MA-7065

Appearances:

Mr. Robert Duffy, Quarles & Brady, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Milwaukee, WI 53202-4497, appearing on behalf of the District.

Mr. John Maglio, AFSCME Council 40 Staff Representative, PO Box 624, Racine, WI 53401-0624, appearing on behalf of the Union.

ARBITRATION AWARD

The parties jointly requested that the Wisconsin Employment Relations Commission designate the undersigned Arbitrator to hear and determine a dispute concerning the above-noted grievances under the grievance arbitration provisions of their 1991-93 collective bargaining agreement (herein Agreement). The Commission issued the requested designation on February 5, 1992.

The parties presented their evidence and arguments to the Arbitrator at a hearing held at the District office in Muskego, Wisconsin, on March 12, 1992. The hearing was transcribed. Briefing was completed on May 28, 1992, marking the close of the record.

STIPULATED ISSUES

At the hearing, the parties authorized the Arbitrator to decide the following issues:

> 1. Did the District violate the Agreement by assigning employes Brown, Underdale, Bieniewski and Schickowski to second shift work in the same classification and building in which they were working in August of 1991, and/or by failing to post the second shift custodial work assigned to those employes?

2. If either or both are so, what shall the remedy be?

PORTIONS OF THE AGREEMENT

ARTICLE II. MANAGEMENT RIGHTS

2.01 RIGHTS: Unless otherwise herein provided, the management of the work and the direction of the working forces . . . is vested in the Employer.

. . .

ARTICLE IX. SENIORITY

9.01 DEFINITION: It shall be the policy of the Employer to recognize seniority. The date an employee is employed or reemployed in a regular full-time or regular part-time position shall become his seniority date. The seniority date shall be used in all computations that involve length of service in other articles of this Agreement. Seniority shall be applied on a bargaining unit-wide basis.

9.02 APPLICATION: Seniority shall apply as provided in related sections of this Agreement.

. . .

ARTICLE X. PROMOTIONS AND TRANSFERS

10.01 VACANCIES: Whenever any vacancy occurs due to the retirement or termination of the incumbent employee, the creation of a new position or for whatever reason, the job vacancy shall be made known to all employees through job posting.

10.02 POSTING PROCEDURE: Job vacancies shall be posted on bulletin boards in convenient locations in each department for at least five (5) work days in overlapping weeks.

10.03 POSTED INFORMATION: The job posting shall set forth the job title, work location, schedule of hours, rate of pay and a brief description of the job requirements and the qualifications desired.

10.04 APPLICATION: Any employee interested in such vacancy

shall sign the job posting.

10.05 SELECTION: When vacant or newly created positions become available, first consideration shall be given to present employees within the bargaining unit. Such consideration shall be based upon seniority, prior work performance, and relevant experience, in that order. In cases where prior work performance and relevant experience are substantially equal, seniority shall prevail. The Board is not limited to considering present employees when filling new or vacant positions.

10.06 PROBATIONARY PERIOD: An employee moving into a position generating a higher rate of pay will be on probationary status for sixty (60) days for that position only.

ARTICLE XI. LAY-OFF AND RECALL

11.01 LAY-OFF PROCEDURE: Should a reduction in personnel become necessary, the following procedure shall be utilized:

11.011 NON-UNIT EMPLOYEES All temporary, seasonal, student and probationary employees shall be laid off before any bargaining unit employees are laid off.

11.012 UNIT EMPLOYEES: In the event that it becomes necessary to lay off bargaining unit employees, the employee with the least seniority, irrespective of building assignment, shall be the first person laid off, provided, however, that the remaining employees are capable of performing the work that remains.

11.02 RECALL PROCEDURE: The last person laid off shall be the first person reemployed, provided that such employee is available for work and desires to return.

11.03 UNIT-WIDE SENIORITY: The lay-off and recall procedures specified in this article shall be made on the basis of bargaining unit-wide seniority.

11.04 NOTICE OF LAY-OFF: The employer agrees to provide written notification to employees who are to be laid off at least three (3) calendar days prior to the effective date of the layoff, or in the case of an emergency, to provide as much prior notice as is

possible. In the event that the Employer knows that a layoff will occur in advance of the three (3) day notice period mentioned above, such information shall be provided to employes as far in advance of the effective date of the layoff as possible.

ARTICLE XII. HOURS OF WORK

12.01 WORK DAY: The normal work day for regular full- time employees shall consist of eight (8) consecutive hours, excluding a one-half (1/2) hour lunch period.

12.02 WORK WEEK: The normal work week for regular full-time employees shall consist of five (5) consecutively scheduled normal work days, Monday through Friday. The third shift beginning on Sunday night will be considered in conformity with this Section.

12.03 SHIFTS: Each employee shall have a regular schedule of hours. During the term of this Agreement the shifts shall be as follows:

12.031 First Shift: Eight (8) consecutive hours scheduled between 6:00 a.m. and 5:00 p.m.

12.032 Second Shift: Eight (8) consecutive hours scheduled between 2:00 p.m. and 1:00 a.m.

12.033 Third Shift: Eight (8) consecutive hours scheduled between 10:00 p.m. and 9:00 a.m.

The starting times of individual employees may vary within the shifts outlined above and shall be determined in accordance with the variations in the school hours among the several administrative units.

12.034 Swing Shift

During the term of this contract there will be one swing shift position. In the event the needs of the district would warrant an additional swing shift position, the Board and Union would have to mutually agree to such an addition.

The employee filling this position will be classified a Custodian I.

The swing shift custodian would work eight consecutive hours. The Building and Grounds Supervisor would determine what school or schools the swing shift employee would be working and the time the shift would start.

. . .

12.06 CHANGES IN STARTING TIMES: The regular starting times of employees may vary in special situations, providing that such change shall be in effect for at least one (1) week. Employees shall be given as much advance notice as possible prior to such change in hours and shall return to their regular schedule of hours as soon as possible.

ARTICLE XV. WAGES

. . .

15.02 SHIFT DIFFERENTIALS: Employees working on the second shift shall be paid a shift premium in the amount of twenty (20) cents per hour. Employees working on the third shift shall be paid a shift premium in the amount of twenty-five (25) cents per hour.

15.021 SHIFTS DEFINED: Shifts will be scheduled in accordance with Section 12.03. For the purposes of this Article, any shift beginning at or after 10:00 P.M. will be considered a third shift.

15.022 APPLICATION: During those times of the year when all employees work on the first shift, the shift differential shall not apply.

15.023 Employees who work beyond 5:00 P.M. shall receive second shift differential for all work past 5:00 P.M.

BACKGROUND

The District provides public education in grades K-12. The Union represents the District's non-supervisory full-time and regular part-time maintenance and custodial employes.

At all material times, there have been twenty employes in the bargaining unit -- one Maintenance Worker, four Head Custodian IIs and 15 Custodian Is --- all of whom are employed on a 12 months per year basis. At least two Custodian Is have worked in each of the District's six school buildings, with four at the High School and three at the Bay Lane Middle School.

Because the duties of Custodian Is include taking care of building housekeeping, cleanliness and sanitation, as well as light maintenance such as light bulb changes, ceiling tile and the like, some of that work can more efficiently be performed at those times when the buildings are not occupied, i.e., outside of the hours of normal school activities, which are approximately 7:00 AM to 4:00 PM weekdays. Accordingly, since at least 1980 some of the Custodian I work has been regularly scheduled to be performed on a first shift (defined at least in recent years as eight consecutive hours falling within the 6:00 AM to 5:00 PM range), and some has been performed on the second and/or third shifts (defined at least in recent years as eight consecutive hours between 2:00 PM to 1:00 AM and 10:00 PM to 9:00 AM, respectively.)

While, as noted below, the range of circumstances in which Custodial unit positions have historically been posted in the District is disputed, it is undisputed that when postings have been put up regarding available Custodian I positions, the postings have identified the shift and/or the schedule of hours associated with the posted position. Before the parties agreed in November of 1989 to amend Article XII of their July, 1989-June, 1991 agreement to permit one swing-shift Custodian I position, their agreement had provided that each employe shall have a regular schedule of hours falling entirely within one of the three shifts defined in Article XII. The nature of the regular schedules of hours that Custodian Is have historically worked is not clear from the record, so it cannot be determined to what extent Custodian Is regular schedules of hours may have deviated from the confines of those defined shifts. However, the evidence does show that from at least 1986 (i.e., before the swing-shift amendment) until August of 1991, Grievant Schickowski had a regular schedule of hours of work (11:30 AM to 8:00 PM) that overlapped the first and second shifts. It also shows that at least in 1980, Grievant Brown and perhaps other employes had a regular schedule of hours which consisted of the second shift from the beginning of the school year in fall to December 1, the third shift from December 1 to April 1 (apparently for snow removal purposes), and the second shift from April 1 until the end of the school year in spring. In addition, by all accounts, regardless of the individual Custodian Is' regular schedules of hours at other times of the year, the District has always required Custodian Is to work on the first shift during the annual Christmas, summer and spring vacations when school is not in session, apparently to create a larger work crew to get the work done.

The changes in the bargaining unit employes' regular hours of work giving rise to the grievances were imposed in late August of 1991. Gary Rosploch, the District's Supervisor of Buildings and Grounds determined that problems the District was experiencing with obtaining and maintaining sanitation and cleanliness in the District High School and Middle School buildings could be effectively addressed only by having more Custodian I work performed at times when those buildings were not occupied. As of that time, aside from school break periods when they all worked on first shift, two of the six Custodian Is at the High School had a regular schedule of

hours on the second shift and four had a regular schedule of hours falling within the first shift. Those on the first shift at the High School and their bargaining unit seniority dates were Robert Wendland (12-6-71), Grievant Robert Brown (11-1-78), Frank Bieniewski (10-27-80) and Leonard Underdale (2-25-82). At the Middle School, Mark Buelow (11-17-80) had a regular schedule on the first shift and, as noted above, Carl Schickowski (4-6-84) worked a regular schedule of 11:30 AM to 8:00 PM so that it overlapped the first and second shifts. The third Middle School Custodian I, Joseph Gehling (3-15-82) worked a regular schedule on the second shift.

Rosploch reviewed the collective bargaining agreement and conferred with various individuals including then-Union Staff Representative David White and a former administrator of the District, John Egan. Egan had administered custodial unit personnel functions prior to the District's August, 1990 creation of a half-time Personnel Director position and hiring of then-teacher Jean Henneberry to perform those functions. White took the position that the District was free to create new Custodian I positions on the later shifts, but that it must not take away any of the first shift hours the present Custodian Is were working. Egan told Rosploch that the District had historically changed the shifts on which employes had been working by means of unilateral reassignments without posting. Rosploch sought but was unable to find written documentation to that effect, however. Rosploch concluded that the Agreement did not prescribe the method by which he should implement the needed changes in hours, so he decided that if it became necessary to impose hours changes he would do so by inverse order of bargaining unit seniority among the Custodian Is working first shift hours within each of the two buildings involved. The record establishes that comparisons of bargaining unit seniority limited to those within a building is the method utilized for determining the order in which custodial unit employes pick vacation and in selecting employes to be required to cover for absentees.

Rosploch ultimately decided to reschedule three Custodian Is at the High School from first shift to either the second or third shift at the employe's option. He called a meeting of the High School Custodians, explained the problems the District was experiencing and the decision he had reached about how to address them, and asked if there were any volunteers among the first shift Custodians I to change to the second or third shift. There were no volunteers. Rosploch then decided to change the shifts of the three High School Custodian Is with the least bargaining unit seniority from first shift to either second or third shift at the affected employes' options. He sent Brown, Bieniewski and Underdale letters to the effect that they were being assigned hours of work from 3:00 PM to 11:30 PM or to the third shift if the employe preferred. Rosploch also notified Schickowski that he was being assigned hours of work from 2:30 PM to 11:00 PM.

As a result, the employes experiencing the disputed changes were those with the least bargaining unit seniority as compared with the other Custodian Is regularly scheduled to work first shift hours within their respective buildings. However, Buelow, a Middle School Custodian I less senior than three of the four Grievants remained on first shift at the Middle School. As a result of the changes, each of the Grievants has been scheduled to work on the second or third shift (at the employe's option) except for periods of time when they substituted during the temporary absence

of a first shift employe and except for the Christmas, spring and summer recess periods when all custodial employes have been required to work first shift hours.

The Union filed two grievances, both dated August 26, 1991. Grievance #9102 asserted that the District had placed day shift employees on the second shift without having looked into all possibilities, thereby affecting four Custodian Is with considerable service to the District. It cited Agreement Sections 12.03, 12.06 and 10.03 and further asserted that all affected employes signed a posting which classified them as day shift employes such that their schedule is between 6:00 AM and 5:00 PM, and that employes whose starting times are changed are supposed to be returned to their regular hours as soon as possible. By way of remedy, the grievance requested that the District put the affected employees "back to regular starting times on first shift."

Grievance #9103 asserted "positions were changed with no postings be[ing] put up." It alleged Agreement violations as follows: "Any & all articles incl. 12.06, 10.01, 10.02, 10.03, 10.04, 10.05 -- new positions were created and none were posted for employees to consider." By way of relief it requested, "All new positions will be posted at all times by Management."

Both grievances remained unresolved following processing through the pre-arbitral grievance procedure steps, and the arbitration proceedings described above followed.

At the arbitration hearing, Brown testified that he had secured his first shift Custodian I position at the High School by responding to a posting identifying it both as a first shift position and as one located at the High School. Brown testified that it was his understanding that each of the other three Grievants had secured the positions they held as of August of 1991 in the same manner. Brown further testified that it was his recollection that whenever the regular schedule of hours of a position was changed from one shift to another the position had been posted, whether an employe had vacated the position involved or not. By way of example, Brown asserted that Buelow had been working a first shift job at the high school; the shift of the position was changed to evening hours and posted even though the position remained at the same building. Joe Gehling bid for the job and was selected, creating a vacancy at Tess Corners Elementary which was then, in turn, posted and for which Buelow bid and was selected. Brown stated that he sought posting documents from the District's administrative secretary concerning various personnel transactions but was told that they could not be located and may no longer exist in the District's records.

District Personnel Director Henneberry testified that the District had not, until she assumed her current position in August of 1990, systematically retained copies of custodial unit posting notices. Specifically, she stated that she was unable to find any such posting notices before 1989, and only a very few for 1989 and 1990. She asserted that from her review of all of the District's personnel records, and in preparation for this grievance, she is not aware of any time that the District has posted a situation where it takes an existing individual and reassigns them to a different shift within the same building. She also admitted, however, that she had no documentation to support the conclusion that custodial unit employes' hours have historically been changed from one shift to another without a posting. (Tr. 122.) She did find a March 18, 1981 memorandum

summarizing items covered in a meeting that included supervision and custodial unit employe Orv Graebel, which included an item which read,

> Mr. Graebel's work shift has been re-established as 6:00 AM to 2:30 PM. Any work required of Mr. Graebel outside of those perimeters will be compensated at time and a half. There shall be no compensatory time provided under any circumstances.

Henneberry admitted, however, that any change in hours referred to in that memorandum could have been from one schedule to another within the same defined shift. In that regard, Henneberry also acknowledged that the Union had not, at least since August of 1990, disputed the right of the District to change the starting time of a custodial position so long the new hours remained within the same contractually-defined shift.

POSITION OF THE UNION

Agreement Sec. 10.03 requires job postings to specify the schedule of hours and/or shift of the position. Thus each of the four employes named in ISSUE 1 would have signed a posting for the position he held before the disputed actions occurred in August of 1991. The District unilaterally implemented an indefinite (i.e., permanent) change in the regular shift of these four employes.

If the District did not eliminate the four positions involved, then it is required by Secs. 10.03 and 12.06 to return the employes to their regular schedule of hours as soon as possible.

If the District did eliminate the four positions involved, then it has technically laid off the four employes involved without applying District wide-seniority regardless of building assignment and without posting the positions that have been newly created on a different shift. As a result, the District allowed a less senior Custodian I, Mark Buelow, to continue working on the first shift while involuntarily imposing second or third shift hours on other more senior employes. In that context, the District's actions violated Agreement Secs. 9.01, 9.02, 10.01, 10.02, 10.03, 10.04, 10.05, and 11.012.

The District has not presented evidence to support its contention that the parties' past practice has been that shift changes within a building were not posted. The evidence concerning establishment of Orv Graebel's hours in 1981 is inconclusive, since it could have constituted a change of starting time within a bid shift rather than a change from one contractually established shift to another. Union witness Brown testified that each time there was a change in an employe's shift hours, that job was posted, regardless of the building location(s) involved. Brown recalled an example in which employee Buelow had been working a first shift job at the high school; the shift of the position was changed to evening hours and posted even though the position remained at the same building. Joe Gehling bid for the job and was selected, creating a vacancy at Tess Corners Elementary which was then, in turn, posted and for which Buelow bid and was selected. The sole

longstanding and mutually recognized exception has been that all employes work first shift during Christmas, Spring and summer breaks; however once school is in regular session, the affected employes are returned to their posted shifts. While seniority among the employes within a building has been determinative of vacation selection priorities, that practice does not authorize the District to limit seniority protections of shift preferences to seniority among those within a particular building as it has done in this case.

For the foregoing reasons, the Arbitrator should require the District to return all incumbent employes to their bid shift. If the Arbitrator concludes that Agreement authorizes the District to eliminate the four positions held by the four employes named in ISSUE 1 in August of 1991, then the District should be required to post those newly-created positions and to treat the employes whose positions were eliminated as they would be if they were laid off, allowing them to invoke their seniority rights to displace less senior employes in their classification so as to receive available hours of work in accordance with their bargaining unit seniority on a District-wide rather than building-wide basis .

POSITION OF THE DISTRICT

The District acted within rights reserved to it in the Agreement both in deciding to reschedule some of its Custodian I work from to the second and third shift, and in reassigning the four least senior Custodian Is in each building to perform that work on other than the first shift.

Section 2.01 reserves to the District the right to manage and direct the working forces. Absent specific restrictions on those rights elsewhere in the Agreement, the right to schedule work remains with the District. For example, absent a specific contractual limitation, it was held that management had the right to reassign day shift workers to rotating shifts in the same job classification to save overtime costs on the grounds that the employes were not performing different jobs as a result of the reassignment. Citing, Georgia-Pacific Corp., 77 LA 1156, 1159 (Mewhinney, 1989)

In the instant case, nothing elsewhere in the Agreement limits the District's right to efficiently manage the operations of the District to insure that the District's buildings will be in a clean and sanitary condition for the students, faculty, staff and visitors who use them. The District's disputed actions in this case were in response to serious problems in those regards. Management's actions solved those problems in a manner that met all of the applicable contractual requirements: the Sec. 12.01 requirement that shifts consist of eight consecutive hours excluding a half hour lunch; the Sec. 12.03 requirement that each employe except the swing-shift position have a regular schedule of hours on one of the three shifts; and the Sec. 12.034 proviso that the starting time for the eight consecutive hour swing-shift, on which Schickowski was working in August of 1991, shall be determined by the Buildings and Grounds Supervisor. Section 12.06 is not applicable herein because it relates only to special situations meaning short-term, intermittent changes of hours, not long term reassignments. Even if Sec. 12.06 were applicable, the District

met its requirements by making starting time changes effective for more than one week, by giving the affected employes advance notice, by having legitimate operational reasons not to return them to the first shift, and by carefully looking into other options and discussing them with the affected first shift High School employes before imposing the disputed reassignments.

Accordingly, the Arbitrator must reject the Union's demand in Grievance 9102. That demand, for the District return the four reassigned custodians to the shifts on which they had been working prior to the instant reassignments, would prevent the District from redirecting the work of its current employes to meet the changing needs of the District, and it would require the District to return to the same unacceptable conditions that existed before the reassignments were made.

The Agreement also did not require the District to post at the time it reassigned the Custodians' hours, because the reassignment of hours did not create any vacancies under the Agreement. Established arbitral principles recognize that the mere reassignment of hours does not constitute a layoff triggering agreement seniority provisions. Rather, a layoff occurs only where there is a termination, severance or separation of employment. Citing, Oscar Meyer & Co., Inc., 75 LA 555, 550 (Eischen, 1980) and O'Neal Steel, Inc., 66 LA 118, 125 (Grooms, 1985). Here the reassigned Custodians experienced no reduction in work, no separation in any form and no break in their employment. There was no reduction in personnel and not even a reduction in hours of work of any employe. Hence, no layoff occurred. Rather the affected custodians were merely assigned to different hours of work. There were no vacancies to fill on the second shift which would require posting and selection with consideration of seniority. The four reassigned custodians remained in the same buildings and in the same job classification. The second and third shift positions they held after the reassignments were, by any standard, the same positions they held on the first shift.

Even if there were any ambiguity in the applicable Agreement language, the parties' past practice confirms that the District was not required to post the instant reassignments of hours. The records shows that in those cases where the District has changed an individual custodian's hours but the custodian has remained in the same building, the District has not posted such reassignments. This has occurred at least six times each year when the District has routinely reassigned custodians to and from the first shift for the summer, Christmas and spring recesses. It has also occurred sporadically, as demonstrated in the March 18, 1989 reassignment of Orv Graebel to work a 6:00 AM to 2:20 PM shift. In addition, Grievant Brown admitted that he held a position in 1980 that in addition to those changes involved working second shift from the beginning of the School year to December 2, third shift from December 1 to April 1 for snow removal and second shift April 1 to the end of the school session, without a posting associated with each of those changes. District Personnel Director Jean Henneberry testified that she was unaware of any time when the District posted a job where an existing individual was reassigned to a different shift within the same building. The Union presented no evidence to show that any such postings occurred. In contrast, the evidence shows that in four separate instances where actual vacancies arose by reason of, for example, the retirement of an incumbent custodian, a notice was

posted. The fact that the Union has never objected to the District's non-application of the posting to intra-building reassignments to different hours has created a binding past practice which the Union cannot now be permitted to disavow. Limiting the seniority comparisons to employes within each building, rather than looking outside the buildings for a District-wide comparison was the same practice which the District has used to cover the work during a custodian's absence for vacation; it was a fair method of selection; and it avoided the administrative nightmare that the Union's relief request would impose on the District for no good reason.

Because the Union's demand in Grievance 9103 would require that positions be posted even when there is no vacancy involved, that demand, which is not supported by the Agreement and which is inconsistent with the parties' past practice, must be denied.

DISCUSSION

Analysis as to Grievants Brown, Underdale and Bieniewski

Answering ISSUE 1 requires reading various parts of the Agreement as a whole to determine the existence and scope of the District's rights to reschedule work, to change positions from one shift to another without posting, and to select employes for involuntary changes in hours and shifts by bargaining unit seniority within building rather than unit-wide.

The Agreement and evidence make it clear that the District acted within its rights when it decided to have less of its custodial work performed on the first shift and more performed on the second or third shift. Agreement Sec. 2.01 reserves to the District "the management of the work and the direction of the working forces," "Unless otherwise provided" elsewhere in the Agreement. As the District argues, that reservation includes the right to reschedule the hours at which work is performed except to the extent the Agreement otherwise provides. Putting aside the issues (discussed below) about posting and the order in which employes could be required to work on a different shift, the Arbitrator finds nothing in the Agreement that would preclude the District from rescheduling work from one of the shifts defined in the Agreement Art. 12.03 to another. The evidence overwhelmingly demonstrates that the District did not exercise its rights in that regard in an arbitrary, capricious or bad faith manner. The pre-change allocations of work hours among Custodian Is during periods when school was in session was causing operational cleanliness problems which the District had a right to address by rescheduling work from the first to the second or third shifts. Thus, the Agreement did not require the District to hire additional personnel in order to have more of its Custodial I work performed on the second or third shifts.

The Agreement does, however, place numerous limitations on the District's Sec. 2.01 rights as regards the hours at which particular Custodian Is can be required to perform the work available in that classification. As the District has recognized, it needs to conform its scheduling of employe hours to the normal work day and work week defined in Secs. 12.01 and 12.02. It also needs to conform its scheduling to the Secs. 12.03 requirements that "Each employee shall

have a regular schedule of hours" and the Sec. 15.021 requirement that "Shifts will be scheduled in accordance with Section 12.03." Section 12.03 states that starting times of individual employes may vary within the confines of the first, second and third shifts defined in Sec. 12.031-12.033 "in accordance with variations in the school hours among the several administrative units." Section 12.034 authorizes the District to determine what time the swing-shift would start, and it seems clear that the resultant shift need not fall within the confines of only one of the three shifts defined in Secs. 12.031-12.033 from the inherent nature of a "swing" shift. Section 12.06 authorizes the District to make temporary changes in employes' regular starting times in "special situations" of at least one week's duration with as much advance notice as possible. The language of Sec. 12.06 does not clearly indicate whether the changes in starting times must remain within the confines of the shifts elsewhere defined in Sec. 12.03, but that issue need not be addressed here because the instant hours changes were of indefinite rather than temporary duration making Sec. 12.06 inapplicable.

Article X also contains a reference to employes' schedules of hours. Section 10.03 provides that one of the attributes of a vacant position that must be included on a posting is the schedule of hours involved. By its title, Article X deals with both "Promotions and Transfers." Section 10.01 provides that "Whenever any vacancy occurs due to the retirement or termination of the incumbent employee, the creation of a new position or for whatever reason, the job vacancy shall be known to all employees through job posting." The "or for whatever reason" in Sec. 10.01 language suggests that the parties intended the scope of applicability of the posting language to be broadly rather than narrowly interpreted. In Section 10.05, the method for selection of individuals for promotion or transfer to a posted position is specified, authorizing the District to consider outside applicants but requiring that seniority prevail where prior work performance and relevant experience are substantially equal.

Reading the foregoing provisions together with Sec. 2.01, the Arbitrator would be inclined to interpret the Agreement as follows: that the District has the right to establish the regular schedule of hours of each position (within the confines of Secs. 12.01, 12.02 and 12.03) when it posts that position; that the District may alter the starting time of the incumbent of such a position within the contractually defined shift (first, second, third or swing) within which the incumbent's regular schedule of hours falls, without posting the position with a modified schedule of hours; but that the District may not change an incumbent's hours so that they fall into a different contractually-defined shift without reposting.

The Arbitrator is inclined toward that interpretation based on the language of the Agreement for the following reasons. The Sec. 10.05 requirement that the District include the "schedule of hours" of posted positions for transfer selections based in part on seniority would be rendered meaningless if the District were deemed authorized by Sec. 12.03 to radically alter the schedule of hours of the position immediately after an employe bid and was selected for the position pursuant to an Art. X posting. Similarly, if the parties intended that the District could reassign employes to a different shift at any time without posting and in whatever order the District

might choose, Sec. 12.06 would also be rendered meaningless if it authorizes changes in starting time outside of the contractually-defined shifts. In addition, the language of Secs. 12.03 and 12.034 bearing on non-temporary changes in hours of work all relate to variations in employes' "starting times," not to changes in the shift within which the employes' regular schedule of hours falls. Conversely, neither Sec. 12.03 nor 12.034 expressly states that the District may only determine or vary starting times when it specifies a schedule of hours in an Art. X posting.

The past practice evidence does not mandate a different interpretation than the one posited by the Arbitrator, above. The District's undisputed failure to systematically retain copies of postings from prior August of 1990 has prevented direct corroboration/refutation of Brown's and Henneberry's respective conclusory claims that the District did or did not post changes in shift as regards the same classification and within the same building in the past. Had the District retained such postings, the Arbitrator would be in a far better position to evaluate Brown's claim that the District posted a third shift High School Custodian I position when it informed Buelow that his first shift position in that building was being eliminated. While that incident would have been potentially meaningful, and while the District did not directly refute Brown's testimony concerning it, it would not, alone, constitute proof of a practice of a sufficiently longstanding and uniform nature to bind the parties.

On the other hand, the documentation the District presented is not sufficient to persuasively support Henneberry's general claim regarding postings practice, either. It shows that there were postings in 1990 in response to retirements, but that is not instructive as to the District's obligations when it seeks to change the shift on which work at a given building is to be performed. The Graebel memorandum is of no significance since it could well have involved a change in hours within the same contractually defined shift, rather than a change in Graebel's hours from one shift to another, and since the Union apparently concedes that the District has the right to impose changes of the former variety without posting (tr. 119). The District's April 29, 1980 memorandum to Brown concerning a transfer to the third shift was, according to Brown, pursuant to a posting for a position which was known to those posting as consisting of a period of time on third shift in the winter to facilitate snow removal. The changes from second to third shift and back involved in that situation were therefore not involuntarily imposed on Brown. Moreover, that single example is also insufficient to establish that it has been the District's longstanding and uniform practice not to post positions the regular schedule of hours of which is permanently changed from one shift to another.

The undisputed established practice permitting the District to move all custodial employes to the first shift during Christmas, Spring and summer breaks when school is in session not applicable to the shift changes imposed by the District in August of 1991. It involves temporary periods of time of definite duration, and the District's right to move all employes to the first shift and back to their regular schedule of hours is expressly recognized in Sec. 15.022. The changes at issue in this case were of indefinite duration, they were not limited to periods of time when school was not in session, they did not involve moving all employes to the first shift, and hence the school

recess practice is not applicable to them.

In light of all of the foregoing, the Arbitrator concludes that the District's decision to reschedule High School Custodian I work to the second or third shifts that was being performed on the contractually-defined first shift constituted the creation of newly-created positions within the meaning of Sec. 10.01, requiring posting of the transfer opportunities. The District's failure to post those newly-created positions violated Sec. 10.01. The change in Schickowski's hours is separately discussed below.

As a practical matter, of course, it is quite possible that none of the first shift incumbents would have bid for second/third shift positions at the High School had they been posted, leaving additional questions about the parties' rights and obligations in that event which are addressed below.

In those regards, the District has presented impressive arbitral precedents supporting its contention that a layoff does not occur where there is no separation from employment of some duration. It is the Arbitrator's opinion, however, that the language of the Agreement at issue in this case, read as a whole, does not afford the District the right to decide for itself which of its employes will experience an involuntary change from one contractually-defined shift to another to perform the available work on the various shifts. Nor does the Agreement at issue in this case permit the District to select the employes to experience such involuntary shift-to-shift changes by inverse seniority among a group of employes limited to those within the building affected. Rather, reading the Agreement as a whole, persuades the Arbitrator that the imposition of what amounts to an involuntary transfer of a Custodian I from one contractually-defined shift to another must be implemented in inverse order of bargaining unit seniority among all of those in the affected classification bargaining unit-wide, rather than just on a building by building basis. As noted above, Sec. 10.03 requires that postings specify the regular schedule of hours of the employes involved. The limited number of postings in evidence reveal that the parties have at a minimum implemented that requirement by identifying the shift involved, e.g., District Exhibit 20a. That provision, read together with the Agreement as a whole, makes a position in the same building that is changed to a different contractually-defined shift a different position which requires posting before it is filled. The Agreement in this case also generally provides, in Sec. 9.01 that "It shall be the policy of the District to recognize seniority." Section 9.02 provides that "Seniority shall apply as provided in related sections of this Agreement." The District has pointed to no section of the Agreement providing for a building-by-building application of seniority, whereas the parties have expressly adopted seniority irrespective of building assignment as their mode of seniority application as regards involuntary layoffs in Secs. 11.012, and Sec. 9.01 provides, "Seniority shall be applied on a bargaining unit-wide basis." Thus, whether the District's actions in this case are viewed as a layoff or not, the Arbitrator concludes from the Agreement as a whole that the parties intended the same method of seniority application to apply when an involuntary transfer to a different shift is being imposed.

For those reasons, as between the District's interpretation whereby the District is free to determine whether and to what extent to apply seniority in imposing involuntary transfers to what have been determined above to be newly created positions due a change in the contractually-defined shift involved, and the Union's interpretation in which the District is required to adopt the same mode of application of seniority as the parties have expressly adopted in other related sections of the agreement, the Arbitrator finds the latter interpretation more consistent with the spirit and letter of the various Agreement provisions discussed above read together and of the Agreement read as a whole.

The fact that the parties have limited seniority comparisons to employes within each building for purposes of vacation selection and absentee coverage does not support the extension of such a practice to determinations of what an employe's regular shift will be. For vacation and absentee coverage purposes, seniority comparisons within buildings seem sensible, fair and mutually beneficial, and they apparently have been so viewed by all concerned since there is no evidence that they have been objected to or grieved. Limiting seniority comparisons for the imposition of involuntary shift changes to a building-by-building basis is not fair, inasmuch as it has left Buelow in the apparently widely-preferable first shift while more senior employes have been involuntarily changed from the first to the second shift, and the affected employes have objected and grieved. Moreover, an involuntary change in shift has a potentially much more significant impact on an employe's work and personal lives than do matters of vacation selection or even selection to cover for an absentee.

Accordingly, the Arbitrator concludes that the District also violated the Agreement when it selected the employes to be changed from first shift to work second/third shift at the High School by seniority within each building rather than by seniority bargaining unit-wide.

Analysis as to Grievant Schickowski

The Arbitrator finds that a materially different analysis is applicable to Schickowski's situation than is applicable to the the other three Grievants. Schickowski's regular schedule of hours as of August of 1991 was 11:30 AM to 8:00 PM, though he and the others were at that time working on first shift in accordance with established past practice. District Exhibit 18 clearly shows that Schickowski transferred to a Middle School Custodian I position with hours of 11:30-8:00 PM on December 5, 1986, which was before the parties' agreement to add a swing-shift exception to Sec. 12.03. The parties' letter of understanding regarding the swing shift expressly provided, "It is the intent of the District to employ a new employe for this position and no current employee would have to accept this job unless he signed the posting for such a position." If, as appears to have been the case, Schickowski kept the same work location and schedule of hours from 1986 through August of 1991, that would suggest that he was not the "new employee" to whom the swing-shift language was intended to apply. Brown's testimony that Schickowski was being treated in all respects as a first shift employe despite the overlap of his hours across two shifts would support the same conclusion. However, whether Schickowski is deemed to have been working the Sec. 12.034 swing shift in August of 1991 or not, the Arbitrator finds that the District had the right to impose an involuntary change in his hours to the second shift as it did. For, if he were deemed to be on the swing shift, then Sec. 12.034 authorized the Building and Grounds Supervisor to determine the time his shift would start, and that shift need not straddle two other defined shifts in order to remain within the scope of the swing shift as provided for in Sec. 12.034. If Schickowski were not deemed to have been on the swing shift as of August of 1991, Rosploch's change in his starting time merely brought his hours into conformity with the express requirements of Sec. 12.03 by placing his hours wholly within the second shift, in which the majority of his previous schedule of hours had previously fallen. Because the District was either exercising its rights under Sec. 12.034 or conforming to its obligations under Sec. 12.03 by changing Schickowski's hours as it did, the Arbitrator cannot conclude that the District violated the Agreement either by failing to post a second shift Middle School position or by selecting Schickowski as the Middle School employe whose hours would be involuntarily changed to better meet the District's operational needs.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the undersigned Arbitrator on the STIPULATED ISSUES noted above that:

1. As to Grievant Schickowski, the answers to all parts of ISSUE 1 are "no," and grievances 9102 and 9103 are denied insofar as they relate to him.

2. As to Grievants Brown, Underdale and Bieniewski, the answers to ISSUE 1 are "yes," but only to the following extent:

a. The District did not violate the Agreement by deciding to schedule less of its Custodian I work at the High School on the first shift and more on the second and/or third shifts.

b. The District did violate the Agreement by failing to post (in the manner prescribed in Art. X) what were newly-created positions on the second or third shift because they involved a change to a different contractually-defined shift.

c. The District also did violate the Agreement by selecting the three employes for involuntary changes in shift by inverse order of seniority within each building.

d. The Agreement required, instead, both that the District post the High School positions newly-created on different shifts and that employes subjected to involuntary changes in contractually-defined shift be selected by inverse order of bargaining unit seniority irrespective of building assignment.

2. By way of remedy for the violations noted in 1., above, the District shall immediately restore the employes, Brown, Underdale, Bieniewski to a regular schedule of hours falling within the first shift. Such restorations shall be subject to the right of the District to schedule less of its High School Custodian I work on first shift and more of that work on the second and/or third shifts in the contractually-permissible manner described in 2.d., above.

3. The Arbitrator retains jurisdiction for the sole purpose of resolving disputes, if any, between the parties concerning the interpretation and application of the remedy ordered in 2., above, upon the request of either party received by the Arbitrator within 60 days of the date of this Award.

Dated at Shorewood, Wisconsin
this 13th day of August, 1992 by Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator