BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
NORTHWEST UNITED EDUCATORS	:	Case 28 No. 48564 MA-7641
and	:	
LADYSMITH-HAWKINS SCHOOL DISTRICT	:	

Appearances:

Mr. Alan D. Manson, Executive Director, Northwest United Educators, appearing on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., by Mr. Steven L. Weld, appearing on behalf of the District.

ARBITRATION AWARD

The Employer and Union above are parties to a 1992-95 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested the Wisconsin Employment Relations Commission to appoint an arbitrator to resolve a grievance filed by the Union on behalf of a number of employes laid off and subsequently hired as temporary substitutes at a lower pay rate.

The undersigned was appointed and held a hearing on April 27, 1993 in Ladysmith, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs, and the record was closed on June 7, 1993.

STIPULATED ISSUES:

1. Did the District violate the collective bargaining agreement by refusing to pay laid off employes who worked as substitutes the starting wage rate in the department in which the substitute work was done or the laid off employes' rate of pay if working as a substitute in the department in which the employe was working when laid off?

2. If so, what remedy is appropriate?

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE 2 - RECOGNITION

The Ladysmith-Hawkins Board of Education recognizes NUE as the exclusive and sole bargaining representative for all regular full-time and regular part-time educational support employees, including secretaries, aides, food service, custodial and maintenance employees, and bus drivers, employed by the School District of Ladysmith-Hawkins, but excluding supervisory managerial, professional, confidential, and all other employees.

. . .

ARTICLE 3 - MANAGEMENT RIGHTS

B. This written agreement between NUE and the School Board constitutes the entire agreement between said parties on all matters pertaining to wages, hours, and working conditions. All matters not specifically covered in this written agreement are and shall remain exclusively the prerogative of the School Board for the term of the agreement and NUE waives and gives up any right to negotiate further on wages, hours, and working conditions for the period covered by this agreement.

. . .

ARTICLE 5 - EMPLOYEE RIGHTS

A. Following a six (6) month probationary period, no employee shall be disciplined, reduced in rank or compensation, or discharged without just cause. The probationary period shall be defined as a cumulative total of six months actual employment in the same position.

. . .

ARTICLE 9 - GENERAL PROVISIONS

H. In the event a substitute or temporary employee works more than 20 consecutive workdays in the same position, beginning with the 21st workday he/she shall be considered a bargaining unit member and will subsequently use his/her initial date of work in that position as the

initial employment date for seniority purposes and will be compensated according to the salary schedule (starting on the 21st workday.). The substitute employee, while encouraged to apply for vacant permanent positions, shall not have transfer rights or the right to fill vacancies under Article 11. While Article 5 shall apply, the parties agree that completion of the assignment shall be just cause for separation. The parties agree that Article 12 (Layoff), particularlyrecall rights and/or notice timelines, Article 16 (Vacation and Holidays) shall not apply to substitute employees. . . .

. . .

ARTICLE 12 - LAYOFF

If necessary to decrease the number of employees, the Board may lay off in whole or in part the necessary number within a department (custodial, secretarial, aide, bus driver, food service, and seasonal groundskeeping) but only in inverse order of the employee's appointment as an employee of the District provided the remaining employees are qualified to do the work. Such employees shall be reinstated in inverse order of their being laid off, within departments, when vacancies occur. Such reinstatement shall not result in loss of credit for previous years of service. No new or substitute appointments may be made while those who were laid off are available to fill vacancies. Seniority shall be based on total continuous employment in the District. All layoff notices shall be issued by June 1 for the ensuing year except as follows: 1) teacher aides may be laid off at the start of the second semester provided they are notified by October 20 of such a layoff; 2) seasonal groundskeepers may be laid off with a 30-calendar-day notice. 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 their immediate supervisor.

FACTS:

At the hearing, the parties stipulated to all of the relevant facts, as follows:

1. At the end of the 1991-92 school year nine aides were effectively laid off. Karen Gray, Betty Becker and Ruth Ewer remain laid off and have not worked since in any capacity for the District. July Ohlfs has worked in a series of substitute positions and has been paid $5.00 an hour in each.

2. Joint Exhibit 3 is three pages of Julie Ohlfs' pay records. Page 1 is the total to date for the year. Page 2 is a representative payroll dated September, 1992; page 3 is a representative December, 1992 payroll.

3. Glen Ralston, a Groundskeeper, was laid off from this contractually seasonal position in the Fall of 1992. He has worked since as a substitute Custodian and has been paid the substitute rate, i.e., $5.00 per hour.

4. The substitute rate is set unilaterally by the District and substitutes are not covered by the collective bargaining agreement for the first 20 days of employment.

5. The other five aides who were laid off were:

   a. Ann Blakstad, laid off as an aide, hired to fill a position as a clerical at the high school on August 24, 1992.

   b. Sharon Kaul, recalled as an aide at Ladysmith Elementary after she had worked for periods of time as a substitute aide and clerical at $5.00 per hour. Joint Exhibit 4 shows that she was recalled between September and December, 1992.

   c. Ann Hraban was hired to fill a custodial vacancy in the Fall of 1992.

d. Lisa Strop was recalled to fill two part-time aide positions in the Fall of 1992. Joint Exhibit 5 shows her payroll samples.

e. Kathy Martin was re-hired as an aide in the Fall of 1992, and in addition worked as a substitute custodian, but at the contractual rate. Joint Exhibit 6 shows her sample payroll records.

6. Joint Exhibits 3 through 6 are not intended as complete payroll records. The Union makes no remedy claim for hours for which the employe was paid at other than the $5.00 rate.

7. Ann Blakstad was laid off at the end of the 1990-91 year as an aide. During 1991-92 she was used as a substitute employe both as an aide and as a secretary. She was paid the contractual rate for both kinds of work. This was between August and October, 1991. On October 28, 1991 she was rehired as a part-time regular aide. The work prior to October 28, 1991 was on-call, not regularly scheduled. She did not work any position for 20 consecutive days then.

8. Laid off employes have recall rights under both Joint Exhibit 1 and Joint Exhibit 7.

9. Ruth Ewer's work records are unknown at present.

10. The last sentence in Union Exhibit 5 refers to the fact that an employe substituting for another employe in the employe's own department is paid his or her regular rate, not the starting rate.

11. With respect to the second paragraph of Union Exhibit 4, the District did not examine records extending back before the start of the 1991-92 school year.

The parties also introduced the documents referred to in the factual stipulations above.

THE UNION'S POSITION:

The Union contends that there is a clear and established past practice of paying all bargaining unit employes, who work as substitutes beyond their regular hours, at regular contract rates. Their contract rates were also applied, up to the 1992-93 year, to such employes recalled from layoff to work as substitutes. The Union notes that its exhibit 2 shows that in the Chester Golat instance, in 1989, the District first paid Golat at substitute rates, but then after a grievance was filed agreed that he be paid at the contractual rate, in a situation similar to those at issue here. The Union contends that in 1992-93 the District changed this practice in violation of both the implied meaning of the collective bargaining agreement and its express language. The Union contends that the laid off employes remain members of the bargaining unit, and the layoff clause requires the Employer not to make new or substitute appointments while there are laid off employes available for vacancies, whether those vacancies are temporary substitute vacancies or otherwise. The Union argues that to interpret the clause on the Employer's terms has the effect of abrogating considerable individual job security provisions, as well as allowing such a recalled employe to be discharged without just cause on the contention that that employe was now not a bargaining unit employe. The Union argues that for this and related reasons, it would be a harsh and absurd result to allow the Employer to consider such laid off employes to be independently hireable as substitute employes at the substitute rate. The Union requests that employes who were inappropriately denied contractual wages be made whole for their losses, and that the Arbitrator retain jurisdiction in the event that the amounts require third party assistance in calculation.

THE EMPLOYER'S POSITION:

The Employer contends that while laid off regular employes remain members of the bargaining unit for purposes of recall rights into bargaining unit positions, substitute positions are not included in the bargaining unit apart from having first right of refusal of such work, the laid off regular employes do not attain bargaining unit status by accepting such offers of work. The District argues that the 1989 memorandum of former Administrator Bobbe was limited to circumstances in which a working bargaining unit member substituted for another position, in which they would then obtain the starting rate for that position for those hours. The District distinguishes this practice from the instant case, in which the employes involved were completely laid off. The District notes that after 20 days in the same position, a substitute employe is automatically elevated to bargaining unit status and this work is not at issue.

The District contends that these employes were not called in to "fill a position" in the sense of being hired for regular work. They were called on for temporary and substitute work, and are not covered by the master agreement or entitled to the contractual wage rate. The District cites several cases distinguishing temporary employes from other employes for purposes of pay. The District also contends that it has the right to set the pay rate for substitute employes, under both general conceptions of management rights and under the management rights clause here specifically.

Finally, the District argues that the Union has not met its burden of proving that a past practice exists supporting the payment of the contractual rate to a recalled employe. The District argues that the one proven case, involving Ann Blakstad, in 1991, is of the "one swallow does not make a summer" level of value, and that the Chester Golat incident does not show a clear result. In this connection the District also points to the settlement agreement reached in that instance, which states that the agreement will have no precedential value.

The District requests that the grievance be denied.

DISCUSSION:

I find it unnecessary to address some of the more creative arguments advanced in this matter, because I find Article 12 to be clear on its face. In particular, I cannot interpret the sentence "No new or substitute appointments may be made while those who were laid off are available to fill vacancies" on the Employer's terms. This language explicitly denies the Employer the opportunity to make a substitute appointment while there is a laid off employe available. Clearly, the laid off employes in this instance were available. The obvious intent of this language is to ensure that if there is work to be done, the employes with recall rights (if qualified) will be recalled to do the work, rather than allowing the work to be handled through a secondary and cheaper labor source. There is simply no way to explain away the fact that the Employer "made" a substitute appointment while laid off employes were available, rather than recalling those employes. Therefore, I conclude that this specific language -- even in the absence of any consideration of general principles, which might anyway result in interpreting common layoff language in the Union's favor under these facts -- requires a finding that the District violated the contract.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the District violated the collective bargaining agreement by refusing to pay laid off employes who worked as

substitutes the starting wage rate in the department in which the substitute work was done, or the laid off employe's rate of pay if working as a substitute in the department in which the employe was working when laid off.

2. That as remedy, the Employer shall, forthwith upon receipt of a copy of this Award, make said employes whole for losses suffered as a result of said violation.

3. That the undersigned reserves jurisdiction for at least sixty days from the date below, in the event of a dispute concerning the application of this Award.

Dated at Madison, Wisconsin this 13th day of August, 1993.

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator