

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 NEW LISBON SCHOOL DISTRICT : Case 27  
 : No. 49687  
 and : MA-8029  
 :  
 NEW LISBON SUPPORT STAFF (NLSS) :  
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Appearances:

Mr. Robert Butler, Esq., Wisconsin Association of School Boards, Inc.,  
 on behalf of the District.  
Mr. Gerald Roethel, Executive Director, Coulee Region United Educators,  
 and Mr. Thomas C. Bina, Executive Director, Coulee Region United

Educator

ARBITRATION AWARD

According to the terms of the 1991-93 collective bargaining agreement between New Lisbon School District (hereafter District) and New Lisbon Support Staff (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them relating to the reduction of employee Evelyn Young's hours. The undersigned was designated arbitrator. Hearing was held on November 9, 1993 at New Lisbon, Wisconsin. No stenographic transcript of the proceedings was made. The parties submitted their briefs and reply briefs herein by December 17, 1993.

Issues:

The parties stipulated to the issues to be determined in this case as follows:

Did the School District violate Article III Section A of the collective bargaining agreement when it reduced Ms. Young from her position?

If so, what is the appropriate remedy?

Relevant Contract Language:

ARTICLE III

LAYOFF CLAUSE

A. Seniority rights shall prevail for employees under this Agreement. Seniority shall be determined by length of service in respect to the employee's classification status. In the event of a layoff, those employees with the least number of years of seniority shall be laid off first, provided those employees retained are fully qualified as determined by the administrative staff. There will be no bumping between classifications except that an individual with seniority in another classification will be able to bump back into that classification if the transfer has occurred within the last three years. In recalling,

those employees having the greatest classification seniority shall be called back first. Employees on layoff will be recalled to positions outside of their classification if the administration determines the employee is qualified. Notice of layoff will be at least thirty (30) days before the beginning of the layoff. Classification will be defined as aide, bus driver, cook, custodian, bus mechanic, and secretary.

Background:

The initial support staff collective bargaining agreement, covering 1989-91, was the first agreement following the Local Union's affiliation with Coulee Region United Educators. That agreement contained the following "Layoff" language at Article III:

A. Seniority rights shall prevail for employees under this agreement. Seniority shall be determined by length of service in respect to the employee's classification status. In the event of a layoff, those employees with the least number of years of seniority shall be laid off first, provided those employees retained are fully qualified as determined by the administrative staff. There will be no bumping between positions or classifications. In re-employing, those employees having the greatest classification seniority shall be called back first, provided they are qualified to do the available work.

Union Representative Roethel, who represented the Local Union at negotiations for the 1989-91 agreement, stated that the existing contract provision regarding layoffs was discussed and the parties agreed to expand the time frames. Roethel also stated that during bargaining, the parties discussed the use of the word "qualified" in Article III, Section A. The Union asked what the District's intent was in using the term "qualified" and the District, through its bargaining representative David Friedman, stated that this was meant to be an objective standard, to allow the District some discretion to require that employees meet State safety and other requirements such as licensing. The District also assured the Union that the evaluation of performance would not enter into the determination of qualifications under Article III, Section A, but that seniority and licensing would be relevant.

Roethel further stated that during negotiations for the 1991-93 agreement, the parties added references to job classifications to Article III, Section A, but that there was no discussion of the bus aide position and the Board did not raise a concern that that position was not specifically listed in the contract at Article III, Section A.

Facts:

In 1989, the District created the bus aide position. There are no job descriptions for the positions of Teachers aide or Bus aide/monitor in effect at the District.

Evelyn Young, the Grievant, has been employed as a bus driver by the District since 1979. Since at least 1992-93 Young was also assigned to work two hours per week as a bus aide/monitor. Young is the only District employe who has occupied the bus aide position since its creation. As a bus aide, during the 1992-93 school year, Young's duties were to ride the bus between New Lisbon and Mauston and insure the safety and monitor the behavior of 13 District special education students who were then attending classes at the Mauston School District. (Three parochial school children, residing in New Lisbon, also rode this bus to attend schools of their choice in Mauston). Young stated that during her employment with the District, she never applied for the bus aide position or any classroom aide position and that she was never assigned to work as a classroom aide at the District. Young also indicated that she was not assigned to instruct special education students while on the bus as bus aide and that she did not instruct these students unless they asked her to assist them with their homework on occasion.

Young stated that prior to her employment with the District, she had been employed for eight years by the Mauston School District. In that position, Young stated that she never worked as a classroom aide. Rather, she worked as a playground, study hall and lunch room aide and as an aide in study halls for special education students. 1/ For the 1993-94 school year, the District did not hire any new aide employes.

Some time during July, 1993, Ms. Young was notified that the District no longer intended to run the bus for special education students to Mauston and that therefore it had no need for her services as a bus aide. The District's decision was based upon the fact that the majority of the District's special education students would be taught in the District's own programs beginning in 1993-94; and that the District had decided that the bus driver could handle the few remaining special education students and the parochial students who had to be bussed to Mauston for 1993-94. District Administrator Derrickson also stated

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1/ The District was unaware of Young's former duties at Mauston until she testified at the instant hearing.

that he did not believe Young was qualified to bump into a classroom aide position as she lacked both the classroom aide experience and training therefor. 2/

The effective job description for the District's Special Education Aide position reads as follows:

The special education program aide works under the direction of the special education teacher to carry out activities that may include the following:

- 1) Activities related to the instructional program such as reviewing study assignments with the students or other such activities to reinforce the instructional program.
- 2) Assisting the special education teacher in preparation, distribution, collection of materials.
- 3) Assisting individual students in following directions of the teacher.
- 4) Assisting in feeding, toileting, dressing, and movement of students who are not able to carry out these tasks alone or who are developing self-help skills.
- 5) Assisting in maintaining behavior control.
- 6) Monitoring the students' activities in and out of the classroom under the direction of the special education teacher.

Evaluation of the special education program aide will be conducted periodically during the year by the supervising special education teacher and/or designated evaluator.

Positions of the Parties:

The Union contended that the District must prove the meaning of the words "fully qualified," as printed in the agreement, in order to show that the language of Article III Section A is clear and unambiguous. The Union asserted that its evidence regarding bargaining history demonstrates that the disputed language was intended to have a non-subjective meaning. The Union further observed that if the disputed language were clear, a grievance would not have been filed regarding the proper interpretation of Article III, A.

The Union urged that newly hired District Administrator Derrickson should not be allowed to exercise his discretion in reducing employes in a manner

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2/ At some point either before or after she received notice of her reduction in hours due to the elimination of her bus aide position, Ms. Young applied for a teacher aide license from the Department of Public Instruction. At the time of the instant hearing, Young had not yet received the license although the Department of Public Instruction had cashed her check for the license.

which goes beyond the parties' understandings in bargaining -- that only license and certification are relevant considerations in determining the meaning of the phrase "fully qualified." The Union further argued that the District Administrator did not have any reasonable basis for his position that Ms. Young was unqualified to fill a special education aide (SEA) position and that virtually anyone could perform the SEA job, given the District's SEA job description. Thus, the Union urged that the District reduced Ms. Young out of mere convenience. The Union contended that if the District's acts were extended into layoffs generally, such an approach would grant the District greater discretion than the contract provides and allow it to eliminate the major role seniority was intended to play in layoffs.

The Union further asserted that the District, by reducing Ms. Young, has effectively taken the position that it can reduce whomever it chooses. The Union noted that Young had been an aide at Mauston Schools prior to her employment with the District. The Union observed that Ms. Young is senior to at least three aides, that she "is certified as a special education aide" that, as such, she falls into the contract's aide classification and that equity should dictate that Young be given two hours special education aide work to replace the two hours of bus aide work she lost due to the District's actions. The Union argued that the District should be required to live up to oral assurances it made during bargaining regarding the meaning of the phrase in dispute in this case. The Union therefore urged that the District be ordered to pay Young backpay for the two hours' pay per day pay Ms. Young has lost in 1993-94 and to place Young in an aide position for two hours per day.

District:

The District urged that because the language of Article III, A, is clear and unambiguous, the clear meaning of the words must be enforced, especially where as here, no evidence of custom or past practice was submitted. In this regard, the District noted that in an Article III layoff situation, seniority prevails only if the senior employees to be retained are fully qualified to perform the remaining work, as determined by the administrative staff. In Ms. Young's case, she was the only (and therefore least senior) bus aide whose position was eliminated for the 1992-93 school year. In addition, the District contended, Ms. Young was not qualified to perform classroom aide work because she lacked training and experience.

The District further asserted that the Union's evidence regarding bargaining history is not only inadmissible but also illogical. In regard to the latter point, the District observed if the parties had meant to require only licensing or certification to trigger seniority layoffs in Article III, they could have and should have used those words in the labor agreement rather than using the words "fully qualified." Furthermore, in regard to the former point, the District argued that evidence of bargaining history and arguments regarding interpretation may not be considered where the contract language in question is clear on its face.

The District pointed to Article II, B (Management Rights) of the contract as further support for its position that it properly reduced Ms. Young's hours when it decided to eliminate the bus aide position. The District quoted the following Article II, B language:

B Without limiting the generality of the foregoing (paragraph A), it is expressly recognized that the Board's operational and managerial responsibility includes:

. . .

-- The creation, combination, modification, or elimination of any support staff position deemed advisable to the Board.

. . .

-- The determination of the size of the working force, the allocation and assignment of work to employees, the determination of policies affecting the selection of employees, and the establishment of quality standards and judgment of employee performance. . . .

The District also urged that its determination to reduce Ms. Young's hours as unqualified was done within its discretion and that the Union failed to prove that that decision was arbitrary, capricious or discriminatory. In fact, the District contended, the District Administrator indicated it was Young's total lack of experience and training as a classroom aide which moved him to reduce Ms. Young as bus aide while retaining other (needed) classroom aides. Therefore, the District sought the dismissal of the grievance in its entirety.

Reply Brief:

Union:

The Union asserted that the District's brief was inaccurate in some respects. The Union noted that according to Young, she had had seven years' experience as an aide in the Mauston School District and she had had many years of bus driver experience with the District, during which she regularly dealt with developmentally disadvantaged students. The Union also noted some other misstatements in the District's brief regarding Ms. Young's employment History and the type of work she had performed in the past.

The Union further contended that its evidence regarding bargaining history stands unrefuted and that the District's definition of "fully qualified," given at the bargaining table, should control over "what appears on paper." The Union claimed that if the District's explanation at bargaining of the disputed words had been otherwise, the "Union would not have allowed those words to remain in the collective bargaining agreement." The Union asserted that the language of Article III, B, could not be read in a vacuum and that its evidence of bargaining history must prevail to show the proper interpretation of Article III, B.

The Union urged that the District failed to prove that it had decided to reduce Ms. Young based upon proper reasons. The Union concluded that ". . . we have a 'competent, experienced bus driver' who performs her duties well, and she is entitled to maintain her two (2) hours of aide work."

Discussion:

It is a generally accepted principle of grievance arbitration that where the language of a collective bargaining agreement is clear on its face, extrinsic evidence may not be considered unless that evidence supports the clear meaning of the language. Extrinsic evidence, by definition, is evidence found outside the four corners of the agreement, such as evidence relating to custom or past practice and bargaining history.

In this case, the Union has offered evidence that District bargaining

representative David Friedman made certain assurances to the Union during initial bargaining over Article III. The undisputed evidence offered indicated that Friedman assured the Union that the words "fully qualified as determined by the administrative staff," would allow the administration to exercise only very limited discretion -- that the administration would only consider whether an employe had the licensure or certification necessary to hold the job in question in determining if the employe was "fully qualified."

The difficulty with this evidence lies in the fact that the language of Article III, A, not only fails to support such an interpretation, the clear language of Article III, on its face, belies such an interpretation or application. In these circumstances, although the Union certainly received these assurances, which were undisputedly made by Friedman, the Union had no right to rely upon them.

In this regard, I note that the words "fully qualified" imply a subjective not objective analysis of an employe and they clearly would allow for a broader determination than simply whether the employe possesses a required license or certification. In addition, the use of the word "fully" underscores the breadth of the subjective analysis the District may engage in under this section. Also, the phrase, "as determined by the administrative staff," indicates that the administrative staff has the discretion to decide if the individual is fully qualified. In these circumstances and in the absence of any express limitations on the administration's discretion or any reference to licensure or certification in Article III, A, the Union's assertions that the parties specifically agreed otherwise just simply cannot be affirmed.

Furthermore, the language specifically refers to classification seniority, it restricts bumping between classifications and it lists classifications as aide, bus driver, etc. It is undisputed that Ms. Young was hired as a bus driver in 1979. Young served as the District's only bus aide/monitor from 1989 until that position was eliminated in 1993. She never applied for the bus aide position or any other aide position in the District, and no job description for bus aide exists. As bus aide, Young did not instruct students in a classroom or other setting. Rather, her main duties were to monitor the students' behavior on the bus to assure their safe transport to and from Mauston for classes. Thus, the overwhelming evidence demonstrates that Young was hired as a bus driver, and that she was continuously employed and classified as a bus driver employe (not as an aide) when her bus aide job was eliminated.

Because Article III, A, prohibits bumping between classifications (except in circumstances not present here), the issue becomes whether by using Young as a bus aide for two hours per day from 1989 to 1993, the District intended to give Ms. Young bumping rights into a classroom aide position. In my view, the answer to this question must be no. I note in this regard that Article III, A, does not refer to the possibility of dual seniority for bumping purposes except where an employe was transferred from one classification to another within a three year period. Young was at all times relevant here chiefly employed by the District as a bus driver; she was never "transferred" to the bus aide position in the ordinary sense of the word. Furthermore, I note that the parties never specifically discussed the bus aide position during their discussions which led to the inclusion (into the 1991-93 agreement) of the list of classifications in Article III, A.

The Union asserted that the District lacked a reasonable basis upon which to eliminate Ms. Young's bus aide position. I disagree. The District showed that it no longer needed the bus aide position and it decided, based upon undisputed business necessity, to eliminate the position. The Union failed to

prove there were any arbitrary, capricious or discriminatory reasons for this decision. The fact that the District refused to allow Ms. Young, a bus driver, to bump into a classroom aide position based upon her bus aide experience was also reasonable based upon Article III, A, and the circumstances of this case. 3/ I also disagree with the Union's assertions that the District will be able to reduce any employe it chooses if its decision to reduce Ms. Young is allowed to stand. In my view, were the Union's interpretation of Article III, A, to prevail, the District's clear right, on the face of the language, to determine whether employes are "fully qualified" would be entirely destroyed. 4/

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3/ I note that the Union failed to prove that Ms. Young actually possessed a proper SEA license from D.P.I. at the time the District eliminated her bus aide job and she requested to bump a classroom aide for two hours per day.

4/ I realize that this is a bitter pill for the Union to swallow in the face of the oral assurances to the contrary given by the District in prior collective bargaining negotiations. But this is why parties in labor relations write down their agreements as best they can and do not operate or rely upon oral assurances and a "trust-me" attitude.



Based upon the relevant evidence and argument I issue the following

AWARD

The District did not violate Article III, Section A of the collective bargaining agreement when it reduced Ms. Young from her position.

The grievance is therefore denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 12th day of January, 1994.

By Sharon A. Gallagher /s/  
Sharon A. Gallagher, Arbitrator