BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GENERAL TEAMSTERS UNION, LOCAL 662, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO,

and

SCHOOL DISTRICT OF NEW RICHMOND

Case 32
No. 49272
MA-7882

Appearances:

Ms. Marianne Goldstein Robbins, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin 53212, appearing on behalf of General Teamsters Union, Local 662, affiliated with the International Brotherhood of Teamsters, AFL-CIO, referred to below as the Union.

Mr. James M. Ward, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 715 South Barstow, Suite 111, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the School District of New Richmond, referred to below as the Employer or as the District.

ARBITRATION AWARD

The Union and the District are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in grievances filed on behalf of two bargaining units, one covering secretarial and bookkeeping personnel (the clerical unit) and the other covering maintenance and custodial personnel (the custodial unit). The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on August 12, 1993, in New Richmond, Wisconsin. The hearing was not transcribed, and the parties filed briefs and reply briefs by October 21, 1993.

ISSUES

The parties did not stipulate the issues for decision. I have determined the record poses the following issues:

> Are the present grievances arbitrable?
>
> Did the District violate any of the applicable collective bargaining agreements covering the clerical and custodial employees when it commenced and pursued litigation against the employees in these units to collect sums of money to reimburse the District for payments to the WRS to cover participation of those employees in the system from January 1, 1986 through March 31, 1989?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

The 1989-91 Clerical Agreement

ARTICLE 18 - RETIREMENT

Effective April 1, 1989, all eligible employees shall participate in the Wisconsin Retirement System. Commencing April 1, 1989, the Employer shall pay the employee's contribution up to six percent (6%).

The 1991-93 Clerical Agreement

ARTICLE 8

GRIEVANCE PROCEDURE

A. Purpose. The purpose of this procedure is to provide an orderly method of resolving differences arising during the term of this Agreement. A determined effort shall be made to settle any such differences through the use of the Grievance Procedure, and there shall be no suspension of work or interference with the operations during the terms of the Agreement.

B. Definition. For the purpose of this Agreement, a grievance is defined as any complaint regarding the interpretation or application of a specific provision of this Agreement.

. . .

ARTICLE 10

INSURANCE

. . .

4. a. The Employer shall contribute for a Tax Sheltered Annuity (TSA) plan of the employee's choice

. . .

ARTICLE 18

RETIREMENT

Commencing July 1, 1991, the Employer shall pay 6.1% of the employee's contribution. Effective January 1, 1992, the Employer shall pay up to 6.2% of the employee's contribution.

The 1989-92 Custodial Agreement

ARTICLE 30 WISCONSIN RETIREMENT SYSTEM

Effective April 1, 1989, all eligible employees shall participate in the Wisconsin Retirement System. Commencing April 1, 1989, the Employer shall pay the employee's contribution, up to six (6%) percent.

The 1992-95 Custodial Agreement

ARTICLE 6

MAINTENANCE OF STANDARDS

Section 1. The Employer agrees that all conditions of employment in his individual operation relating to wages, hours of work, overtime differentials and general working conditions shall be maintained at not less than the highest standards in effect at the time of the signing of this Agreement, and the conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement . . .

Section 2. Extra Contract Agreements. The Employer agrees not to enter into any agreement or contract with his employees, individually or collectively, which in any way conflicts with the terms and provisions of this Agreement. Any such agreement shall be null and void.

. . .

ARTICLE 7

GRIEVANCE PROCEDURE AND ARBITRATION

Section 1. All grievances which arise by employees and/or their representatives, or the Employer, shall be processed in the following manner and sequence except that Employer or Union Representative grievances shall

proceed immediately to the Fourth (4th) Step. A grievance shall mean a dispute concerning the interpretation or application of this contract.

. . .

ARTICLE 28

RETIREMENT

All employees covered by this Agreement shall retire in accordance with State or Federal Law.

ARTICLE 29

PENSION

Effective July 1, 1989, and throughout the term of this Agreement, the Employer shall contribute to the Central States, Southeast and Southwest Areas Pension Fund the sum of . . .

ARTICLE 30

WISCONSIN RETIREMENT SYSTEM

Effective April 1, 1989, all eligible employees shall participate in the Wisconsin Retirement System. The Employer shall pay the employee's contribution, up to 6.2%.

BACKGROUND

This matter is based on a written submission agreement, executed by the parties on May 13, 1993, which reads thus:

. . .

WHEREAS, the District and the Union are parties to two collective bargaining agreements, one of which expires by its terms on June 30, 1993, and covers clerical personnel, and the second of which expires by its terms on June 30, 1995, and covers custodial and maintenance personnel; and

WHEREAS, each of the above referenced collective bargaining agreements contains a grievance procedure culminating in final and binding arbitration before an arbitrator appointed from among the staff members of the Wisconsin Employment Relations Commission . . . and

WHEREAS, by means of civil litigation against all affected members of each bargaining unit, the District is seeking reimbursement from these bargaining unit members of certain retroactive contributions to the Wisconsin Retirement System which the District contends were made on their behalf pursuant to a directive from the Wisconsin Department of Employee Trust Funds; and

WHEREAS, the Union has filed grievances under each of the above-referenced collective bargaining agreements alleging contractual violations on the part of the District in pursuing this civil litigation; and

WHEREAS, the District initially refused to process either grievance through the grievance procedure, as contractually established, contending in each case that the grievance was not arbitrable thereunder; and

WHEREAS, the Union has brought suit against the District to compel arbitration of these grievances; and

WHEREAS, the parties desire to provisionally resolve their dispute over the issue of arbitrability pursuant to the guidelines enunciated by the Wisconsin Supreme Court in Joint School District No. 10, City of Jefferson v. Jefferson Education Association, 78 Wis.2d 94 (1977).

NOW, THEREFORE, the parties do hereby agree as follows:

1. The two grievances in question shall be submitted to the jurisdiction of an arbitrator duly appointed by the Commission to serve in that capacity.

2. Both grievances shall be assigned to the same arbitrator, notwithstanding the existence of separate collective bargaining agreements covering separate bargaining units.

3. The arbitrator so appointed shall be authorized to preliminarily decide the threshold issue of arbitrability, subject to de novo judicial review of the arbitrability issue as provided in Jefferson, supra.

4. Aside from the arbitrability issue, the arbitrator so assigned shall be authorized to issue a final and binding decision on the merits of the two grievances in accordance with the terms of the respective collective bargaining agreements, applying usual and customary principles of contract interpretation in a grievance arbitration context.

5. Beyond de novo judicial review of the arbitrability issue, nothing herein shall be construed to prohibit either party from petitioning a court of record to vacate a subsequently rendered arbitration award on the merits under the applicable standards for review of final and binding labor arbitration decisions established by Wisconsin statutory and case law.

. . .

The parties also executed a stipulation of facts, dated August 12, 1993, which reads thus:

. . .

1. By resolution (the "Resolution) dated September 16, 1985, the District elected to participate in the Wisconsin Retirement System ("WRS") with respect to its educational support personnel ("ESP") (all eligible employees other than teachers and administrators, who already participated). Participation was to become effective January 1, 1986. Thereafter, the School District provided WRS coverage for teacher aides and food service employees but not for clerical and custodial employees.

2. The exclusion of clerical and custodial personnel from participation in the WRS is contrary to Sec. 40.22, Wis. Stats., which, inter alia, requires inclusion of all employees working over 600 hours per year in every ESP category in order for any one or more ESP categories to be so included.

3. As of the January 1, 1986, effective date of the Resolution, the District's custodial personnel were in a bargaining unit represented by the Union, with their wages, hours and working conditions governed under the terms of a collective bargaining agreement covering the period of time from July 1, 1983, through June 30, 1986. Neither that collective bargaining agreement nor its successor, which covered the period of time from July 1, 1986, through June 30, 1989, referred to WRS participation.

4. As of the January 1, 1986, effective date of the Resolution, the District's clerical personnel were not part of any collective bargaining unit. The West Central Education Association ("WCEA") was subsequently recognized as the collective bargaining representative for a bargaining unit consisting of clerical employees, and negotiated a first collective bargaining agreement covering the period of time from July 1, 1987, through June 30, 1989. That collective bargaining agreement similarly did not refer to WRS participation.

5. Upon being apprised by the Wisconsin Department of Employee Trust Funds ("DETF") in early 1989 that otherwise qualified employees in the clerical and custodial categories were improperly excluded from WRS participation, the District unilaterally commenced payment of both the employee and employer share of WRS contributions on their behalf, effective April 1, 1989.

6. On May 22, 1989, the parties reached tentative agreement on a successor collective bargaining agreement for the custodial bargaining unit to cover the period from July 1, 1989, through June 30, 1992. The terms of tentative settlement, ultimately ratified by both parties, called for WRS participation, pursuant to Article 30 . . . coupled with a wage freeze during the first year of the contract term, and $.20

per hour across-the-board wage increases during each of the second and third years thereof.

7. By virtue of a November 12, 1990, interest arbitration award in which Arbitrator William W. Petrie selected the final offer of the District, the successor collective bargaining agreement for the clerical bargaining unit for the period from July 1, 1989, through June 30, 1991, similarly provided for WRS participation pursuant to Article 18 . . . coupled with a wage freeze during the first year of the contract term, and a 2.5% across-the-board wage increase during the second year thereof.

8. Following the issuance of this arbitration award, the Union, via a representation election conducted by the Commission, replaced the WCEA as collective bargaining representative for the clerical unit, effective May 17, 1991.

9. Notwithstanding the commencement of WRS contributions on behalf of qualified employees in both the clerical and custodial bargaining units as aforesaid, the District continued to communicate with the DETF in hopes of eliminating, or at the very least reducing, any obligation to make retroactive WRS contributions, plus interest and penalties, for the period from January 1, 1986 through April 1, 1989.

10. After the collective bargaining representative for each of the affected bargaining units declined to take a position on the District's request for a waiver of retroactive contributions for the period from June 1, 1986, through April 1, 1989, and after the District otherwise concluded that it would be futile to appeal the DETF's initial determination of retroactive contribution liability, the District, in July, 1990, tendered payment in full of the total amount, inclusive of interest computed by DETF as due and owing.

11. On October 24, 1990, Legal Counsel for the District informed representatives of the custodial and clerical units of the District's intention to send letters to employees notifying them of the District's intent to collect monies from them relating to the aforesaid retroactive WRS contributions. The Union sent back a letter in protest maintaining that any collection would violate the existing collective bargaining agreement for the custodial unit. Legal Counsel for the WCEA, as the bargaining agent for the clerical unit at that time, similarly responded with a letter contending that there was no legal basis for collecting anything from those employees.

12. By separate letter dated January 2, 1991, to each affected employee in the clerical and custodial bargaining units, the District notified employes that it intended to collect from each, his/her employee share of the retroactive WRS contribution in the amount specified in each such letter.

13. Thereafter, the Union filed a grievance on January 17, 1991, on behalf of the affected employees in the custodial unit. In response, on January 31, 1991, the District informed the Union it would not deduct money from employees' payroll checks and would be reviewing and assessing all options. Given that the District determined not to deduct monies from employees checks, the earlier grievance has no bearing on this case.

14. On July 2, 1992, the District sought recourse in the form of civil litigation against the affected employees seeking to collect the amounts allegedly due and owing. The Union filed timely grievances, maintaining as it always has, that any such collection activity violated the pertinent terms of the collective bargaining agreements for each of the two units.

. . .

The parties, at hearing, supplemented the submission agreement and stipulation of facts with further evidence. Thomas Kleppe, the District's Superintendent, noted that the District would informally discuss wages and conditions of employment with its unrepresented Aides and Food Service employes. In August of 1985, the Board proposed to each group that the District would contribute the employer's share of participation in the WRS effective January 1, 1986, and the employee's share of participation in the

fund effective at the start of the 1986-87 school year. Neither group, under this proposal, would receive a wage increase for the 1985-86 or the 1986-87 school year. The Board, by a unanimous vote, adopted a resolution on September 16, 1985, to include its Aides and Food Service employes in the WRS. The Department of Employe Trust Funds (DETF) acknowledged the Board's resolution in a confirming letter dated October 9, 1985, which noted that "Any employe who meets the eligibility requirements will be covered for retirement purposes beginning January 1, 1986."

The Board's then incumbent Business Manager and Board handled these informal negotiations, and believed employe participation in the WRS was voluntary. As noted above, District custodial personnel were represented by the Union, and covered by a labor agreement in effect from July 1, 1983, through June 30, 1986. Article 29 of that agreement required the District to make payments to "the Central States, Southeast and Southwest Areas Pension Fund." As noted above, the clerical unit's first contract was in effect from July 1, 1987, through June 30, 1989. Article 10 of that agreement requires a Board contribution to "a tax sheltered annuity (TSA) plan of the employee's choice."

In January of 1989, the District upgraded the position of Dee Quinn. Kleppe confirmed this in a letter to her which reads thus:

> This is to officially notify you that at their January 16, 1989 meeting the Board of Education approved the recommendation to upgrade your position to secretary . . . You will receive all the prorated benefits of a secretary and eligible to join the union. The only question is the retirement plan which you are now under . . . It is our understanding you have the right to continue your state retirement program, which would reduce your salary by 12% . . .

Bernadine Frey has been employed by the District since August of 1979, serving as a Secretary since December of 1983. She was a member of the negotiating team which bargained the first WCEA contract. Frey had never been offered the option of participating in the WRS, and contacted DETF to determine if she was eligible to participate. Frey testified she did not contact DETF as a WCEA representative, but "did it on my own." She learned from DETF representatives that employe participation in the WRS was mandatory with the Board's application for entrance into the WRS. By February of 1989, she and Dennis Hurtis, an active Union member, had seen to it that the District submit the relevant information to DETF to place all District employes into the WRS.

David Dahl was, in 1989, the Union's Secretary Treasurer-Business Agent, and served as the spokesman for the custodial unit. He and Kleppe had a phone conversation on April 6, 1989, concerning the status of WRS participation. Dahl summarized the conversation in a letter to Kleppe thus:

> Tom pursuant to our phone conversation on this date, this will confirm our understanding regarding the Wisconsin Retirement Fund issue.
>
> The Employer agrees to pay the full amount due the W.R.F. pending the outcome of our upcoming negotiations. Depending on those negotiations, Local 662 recognizes April 1, 1989 as the base date contributions were required. If the Union has any future obligation, determined again by our negotiation for payment of any part of the W.R.F., the April 1, 1989 date is viewed as the starting point for which payments began.
>
> If you have any question please advise.

Kleppe did not respond to the letter, and the District withheld WRS contributions effective April 1, 1989.

On May 5, 1989, the Union submitted the following proposal for a successor to the labor agreement which expired on June 30, 1989:

> RETIREMENT
>
> First year, Employer contribute employee's share of Wisconsin Retirement Fund.
>
> Second year, Leadman $.35 per hour increase
Maintenance $.30 per hour increase
Custodians $.25 per hour increase
>
> Third year, Leadman $.35 per hour increase
Maintenance $.30 per hour increase
Custodians $.25 per hour increase
>
> All other terms and conditions of Agreement remain unchanged during term . . .

The District responded on May 10, 1989, with this proposal:

> 1. Except as provided in the settlement offer, the terms and conditions of the 1986-89 contract shall become the terms and conditions of the 1989-92 contract.
> 2. ARTICLE 29 - PENSION
>
>   First Paragraph: Delete "There shall be no other pension fund under this Agreement for operations under this Agreement."
>
>   Add a NEW paragraph to read as follows:

Effective April 1, 1989, all eligible employees shall participate in the Wisconsin Retirement System. From April 1, 1989 through June 30, 1990, the employee's contribution shall be paid entirely by the employee. Effective July 1, 1990, the Employer shall pay the employee's contribution, up to three percent (3%). Effective July 1, 1991, the Employer shall pay the employee's contribution up to six percent (6%).

3. EXHIBIT A - WAGES AND CLASSIFICATIONS

1989-90: No change

Effective	Classification	Increase
Effective July 1, 1990:	Leadman	$.35 per hour increase
	Maintenance	$.30 per hour increase
	Custodians	$.25 per hour increase
Effective July 1, 1991:	Leadman	$.35 per hour increase
	Maintenance	$.30 per hour increase
	Custodians	$.25 per hour increase

4. The Union shall execute a Letter of Agreement indicating that the Union and its membership will neither contest nor support the District's effort to seek an exemption from the Wisconsin Retirement System for any and all liability for retroactive WRS contributions for the custodians.

The parties met and discussed these proposals. During the course of those discussions, the District sought the Union's assurance that it would remain neutral in the District's then-ongoing dispute with DETF regarding employer/employe contributions for the period from January 1, 1986, through March 31, 1989. Dahl verbally assured the District that the Union would remain neutral in that dispute, and further stated that the Union would oppose any attempt by the District to compel payment from employes for that period. Kathryn Prenn served as the District's spokesperson in these negotiations, and informed the Union that if the District was unsuccessful in securing a waiver of the retroactive contributions, it might seek to collect those contributions from employes.

On May 22, 1989, the Union and the District reached tentative agreement on a successor labor agreement. Prenn summarized the tentative agreement thus:

1. Except as provided in this Tentative Settlement, the terms and conditions of the 1986-89 contract shall become the terms and conditions of the 1989-92 contract.

2. ARTICLE 29 - PENSION

   First Paragraph: Delete "There shall be no other pension fund under this Agreement for operations under this Agreement."

   Add a NEW paragraph to read as follows:

   > Effective April 1, 1989, all eligible employees shall participate in the Wisconsin Retirement System. Commencing April 1, 1989, the Employer shall pay the employee's contribution, up to six percent (6%).

3. EXHIBIT A - WAGES AND CLASSIFICATIONS

   1989-90: No change

Effective July 1, 1990:	Leadman	$.20 per hour increase
	Maintenance	$.20 per hour increase
	Custodians	$.20 per hour increase
Effective July 1, 1991:	Leadman	$.20 per hour increase
	Maintenance	$.20 per hour increase
	Custodians	$.20 per hour increase

By June 19, 1989, both parties had ratified the agreement.

The WCEA and the District were unable to reach agreement for a successor to the 1987-89 labor agreement, and submitted their dispute to interest arbitration. The parties agreed on a wage freeze for the 1989-90 school year, but differed on the wage increase for the 1990-91 school year. Neither party addressed retroactive contributions to the WRS, and both parties addressed only the cost impact of the April, May and June, 1989, contributions on their final offers.

Throughout this period of time, the District and DETF discussed the pre-1989 WRS contributions. In October of 1989, DETF billed the District $174,304.58 for unpaid contributions. The District continued its appeal to DETF for a waiver of the unpaid contributions. On May 29, 1990, the Chief Counsel for DETF formally rejected the District's appeal. On June 5, 1990, DETF billed the District $217,052.51 for those contributions. The District approached both Union and WCEA representatives on its ongoing problem with DETF. Dahl responded, for the Union, in a letter to Kleppe dated July 23, 1990, which reads thus:

> Tom, this will advise that after the "brainstorming" session on July 17, 1990 in the Board office I spoke with the Custodial unit regarding the requests advanced by Board Attorney Prenn.
>
> Those requests specifically asked that unit employees join the School Board in an appeal to the W.R.S. requesting a waiver of W.R.S. payments due on behalf of Custodial employees for the period of January 1, 1986 through April 1, 1989 and/or requesting an alternative payment schedule for monies due the W.R.S.
>
> The consensus of the group was unanimous to extent that we decline to participate in the appeal procedure.

WCEA representative Jeffrey Roy responded, for the WCEA, in a letter to Kleppe dated July 24, 1990, which reads thus:

> This is to advise you that the WCEA-New Richmond Secretarial Unit is not interested in joining the School Board in an appeal to the WRS requesting a waiver of payment due on behalf of the secretarial employees for the period of January 1, 1986, through April 1, 1989, nor is the WCEA-New Richmond Secretarial Unit interested in an alternative payment schedule due the WRS.

. . .

Discussions on the precise amount owed by the District to DETF continued, but the District made payment to DETF in July of 1990.

In a letter to WCEA and Union representatives dated October 24, 1990, Prenn stated that:

> Enclosed is a copy of the draft of a letter which the District intends to issue in the near future to each employee who is subject to the back payments for WRS contributions. Prior to doing so, however, the Board wishes to provide each of the affected bargaining units the opportunity to negotiate a voluntary settlement of the matter on a bargaining unit basis. Just as the parties negotiated the WRS contribution obligations from August 1, 1989, forward, the Board believes there may be options for collectively negotiating the issue of the retroactive payments.
>
> Based on this belief, the Board will forestall sending the notices to the affected employees until November 30, 1990, with the hope that within the next 30 days the bargaining units will present the District with specific proposals for a unit-wide negotiated settlement.
>
> . . .

Dahl responded to this letter in a letter dated November 1, 1990, which reads thus:

> . . .
>
> When the School District took action to include certain employees in the W.R.S. system in 1986, this Local Union was never approached regarding the Custodians inclusion in that program. As we both know, the State ultimately ruled the Custodians were to be included.
>
> Our 1989 negotiations resulted in the employee's share of the W.R.S. contribution to be paid by the Employer.
>
> As a result of the Employer's unilateral action in 1986, and our negotiated settlement of the current Agreement, it is this Local Union's position that Custodial employees are under no obligation to contribute monies to the W.R.S. program, at any time, unless otherwise negotiated.
>
> Any attempt to collect monies from the Custodial group retroactively or otherwise will be viewed as a violation of our Collective Bargaining Agreement and we will take whatever action we deem appropriate.

The WCEA responded in a letter dated November 9, 1990, from its Staff Counsel. That letter reads thus:

. . .

> The WCEA-Secretarial unit does not believe that the District is entitled to charge the employees for back payments for WRS contributions. We believe the District made a unilateral mistake for which there is no legal basis to charge the employees for that error.
>
> We have two suggestions. First, the District can seek recovery from its error and omissions insurance carrier. Second, if the District believes it is legally entitled to money in the possession of the employees, it can sue for money damages in a Court of law. We believe it is appropriate to resolve this dispute through the judicial system, if necessary.
>
> For your information, I have advised Mr. Roy that the District may attempt to cost the WRS payments against the employees wage package in the next round of bargaining. I understand that the parties will re-open the contract this spring. This might be considered a third alternative. Our position is that the District should not be allowed to cost WRS payments against the employees' package because it was not bargained. The employees had no choice. Nonetheless, we are prepared to let an interest arbitrator settle this dispute in the context of the next bargain.

. . .

The District, in January of 1991, issued a letter to employes advising them that it was considering collecting from them the amount paid by the District for the employe's share of WRS contributions for the period from January 1 through March 31, 1989. The Union formally protested the letter and filed a grievance. The District responded in a letter to Dahl dated January 31, 1991, in which the District's Business Manager, Mark Christianson, stated:

> Although the District made an effort to resolve the issue of the retroactive WRS payments voluntarily, that effort failed. While the District would have preferred to resolve the matter voluntarily, it now appears that a voluntary resolution will not be forthcoming.
>
> During the coming weeks, the District will be reviewing and assessing all lawful options available to it for recouping the payments, including seeking relief through the courts. Please be assured that the District has not and will not unilaterally implement any payroll deductions for the retroactive payments.

In May of 1991, the District again advised the Union that it was considering "its available legal options for collecting these monies," and made a formal offer to settle the matter. The Union declined the offer and stated its position that "any resort to litigation" would be "frivolous."

As noted above, the District did commence a civil action. The Union filed grievances on behalf of both units on July 15, 1992. The grievance for the custodial unit reads thus:

> The Employer violated Articles 6, 7, 28, 29, and all other relevant contract provisions of the current and predecessor agreements when it commenced an action to collect money allegedly for pension contributions from current and former employees of this bargaining unit.
>
> The Union requests that the Employer cease and desist from its action and make employees and union whole for all losses, fees and costs incurred in defending against the Employer's action.

The grievance for the clerical unit is identical except that it cites the following provisions: "Articles 8, 10, 18 . . ."

The parties negotiated labor agreements covering the clerical unit for July 1, 1991 through June 30, 1993, and for July 1, 1993, through June 30, 1994. The parties also negotiated a labor agreement covering the custodial unit for July 1, 1992, through June 30, 1995. None of these agreements specifically address WRS payments for the period from January 1, 1986, through March 31, 1989. During the negotiations for these agreements, neither party proposed contract language to specifically address this point.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The Union's Initial Brief

After a review of the facts and the issues, the Union contends that the grievances are arbitrable. The Union asserts that the District has "not provided any justification or explanation for its initial position that the present dispute is not arbitrable." The Union then argues that both federal and Wisconsin "case law has long recognized that arbitration is a favored means of labor dispute resolution." Both federal and state law interpret arbitration clauses broadly, the Union contends, to apply this policy in favor of arbitration. Since "the Union has cited a number of contract clauses which the Employer has violated," and since "the grievances address interpretation and application of the parties' labor agreement" the Union concludes that the grievances are arbitrable.

Turning to the merits of the grievances, the Union argues that the District's collection litigation violated the applicable labor agreements. More specifically, the Union argues that "arbitrators have recognized a distinction between clerical mistakes for which recoupment is available and mistakes of law, for which no right of recoupment is recognized." The record demonstrates, according to the Union, that "there can be no doubt that the error which causes the Employer to seek recoupment is a mistake of law, not a mistake of fact or a clerical error."

The Union then contends that the relevant labor agreements "preclude any claim of recoupment by the School District for monies allegedly owed for WRS contributions between January 1, 1986 and March 31, 1989." More specifically, the Union asserts that any recoupment "essentially reduces employees' wages below that established by a series of labor agreements." The Union also contends that this reduction is apparent whether the recoupment is viewed as retroactive or prospective. Beyond this, the Union contends that any District recoupment would unilaterally alter the agreed upon wage and benefit package in violation of Article 6, Sections 1 and 2. While noting that the clerical contract does not include "the same specific provisions", the Union argues that "it is well established that an employer cannot alter the contractually provided wage/fringe package by unilateral implementation of a resolution such as that passed by the School Board . . ."

Noting that "(t)he language negotiated to address the custodial and clerical units' participation is the WRS is found in Article 30 of the custodial contract and Article 18 of the clerical agreement," the Union concludes that neither article "makes (any) provision or suggestion of recoupment." The Union contends, beyond this, that neither article is subject to interpretation or reform. If there is ambiguity in the language, the Union contends that any ambiguity must be construed against the District as the party who proposed it. Nor is either article subject to reformation since, according to the Union, there has been no mutual mistake. Evidence of bargaining history confirms these conclusions, according to the Union. Any recoupment must, the Union contends, be negotiated.

The Union's final major line of argument is that the remedy it seeks is appropriate. A cease and desist order is appropriate, the Union contends, because "the violating party's conduct in this case . . . is ongoing." An award of attorney fees and costs is also appropriate, the Union contends, because "the Employer has sought an extra contractual remedy when the issue of wages and fringe benefits is necessarily governed by the parties' labor agreement," thus causing the "Union to incur costs above and beyond those incurred in arbitration."

The District's Initial Brief

After a review of the facts and the issues posed, the District notes that Article 18 of the clerical contract and Article 30 of the custodial-maintenance contract "contain identical language on the subject of WRS participation." Noting that "neither collective bargaining agreement changed significantly thereafter" on this point, the District asserts that "the clauses relating to WRS neither expressly obligate the District to make contributions prior to (April 1, 1989) . . . nor do they expressly exonerate the District from that obligation." Since it has honored its obligation since April 1, 1989, the District concludes that "any contributions made prior to that date must be viewed as non-contractual." Those contributions are, the District contends, "nothing more than a matter of compliance with applicable law under Chapter 40 of the Wisconsin Statutes." Contending that it "would have been under exactly the same obligation to make retroactive contributions even if these were unrepresented employees," the District concludes that any issues posed on this record are essentially "a legal question to be resolved in civil litigation rather than grievance arbitration."

Evidence of bargaining history confirms this conclusion, according to the District. Dahl's and Kleppe's phone conversation and Dahl's written summary of that conversation are, the District contends, ambiguous at best concerning payment for employe contributions to the WRS before April 1, 1989. Across the

table discussions demonstrate only that the District and the Union did not agree on this point, the District concludes. That the WCEA and the District each costed WRS contributions for three months of 1989 demonstrates, the District contends, that neither party knew when or if the District would have to pay employe contributions for their pre-April, 1989, coverage in the WRS. This reflects, the District concludes, that the parties had no mutual understanding regarding such contributions, other than a mutual recognition that the point remained open. Beyond this, the District urges that "(a)n analogy to elementary principles of contract law" demonstrates that there has been no bargained agreement that the District would not seek recoupment. As the District puts it: "any purported release of bargaining unit employees from liability to reimburse the District for retroactive WRS contributions must fail for lack of consideration . . . the District is under no contractual obligation in this regard because the employees gave nothing in return."

Beyond this, the District argues that bargaining subsequent to 1989 has failed to produce agreement on whether the District can recoup its payment of the employes' contribution. Noting that an attempt was made by the District to open the contracts in 1990 to address this point, and that there has been at least one agreement reached with each unit since that time, the District concludes that "the parties have still refrained from undertaking the seemingly monumental task of trying to resolve this issue at the bargaining table." Because the point remains to be addressed in bargaining, the District concludes there is no factual basis on which to found a contractual violation. To find such a violation would be, the District asserts, less contract interpretation than contract creation. The District summarizes the point thus:

> In order for this grievance to be sustained, there should be at least some tenable basis for the postulate that had the parties truly chosen to address the issue of reimbursement in negotiations, there is some likelihood that they would have reached essentially the same end result the Union is requesting from the Arbitrator. That is most certainly not the case here.

The District notes that exercising appropriate restraint "would merely relegate the parties to resolve this issue at the bargaining table, where it properly belongs."

The District concludes that its recoupment action "is premised on noncontractual theories of liability." The District concludes its right to pursue such litigation "is beyond the scope of any collective bargaining agreement for either of these two bargaining units." It follows, the District concludes, that the grievance must be denied.

The Union's Reply Brief

The Union notes that the District's statement of facts confirms its assertion that this "case involves impermissible recoupment for a mistake of law in violation of the parties' agreement." Beyond this, the Union contends the District reads the second sentence of Articles 18 and 30 in a fashion which renders the first sentence of that clause and other agreement provisions meaningless. The Union asserts established rules of interpretation preclude this result. The Union contends that to give meaning to each sentence, the first must be read to establish a date by which "the Employer was to pay the entire contribution amount." It follows, the Union argues, that "if participation occurred at a prior date, because of the District's unilateral mistake, the District is liable for the full contribution then too."

To read the second sentence as the District does would, according to the Union, unilaterally and impermissibly read bargained agreement provisions out of existence. The Union concludes: "The implicit and explicit provisions of the two agreements establish the initial date for participation in the WRS as well as a complete wage benefit package which were violated by the District's recoupment action."

The Union then challenges the District's view of bargaining history. That bargaining established no more than that the Union refused to acknowledge that any employe payment for contributions to the WRS before April 1, 1989, could be unilaterally made. Beyond this, the Union challenges the District's view of the conduct of the prior bargaining representative for the clerical staff. That view unpersuasively assumes that this is, or was, a case in which a labor organization sought to bargain a new benefit. Any costs traceable to the unbargained for benefit must, the Union insists, be imposed by collective bargaining, if at all. Noting that the "District acknowledges, in passing, that it has failed to address the issue in subsequent rounds of negotiations," the Union concludes that "it is disingenuous for the District to characterize a threat to come after employees for as much as . . . $6,000.00 each as an 'invitation' to negotiate a 'voluntary settlement.'" The Union concludes that the District's failure to bring the point to collective bargaining cannot be condoned in arbitration or by civil litigation.

The Union concludes that the grievance must be sustained, and that a cease and desist order be issued, together with "make whole" relief for both the Union and the affected employes.

The District's Reply Brief

The District challenges the Union's assertion that "recoupment is (not) available to rectify . . . mistakes of law." Even assuming the validity of the Union's citation of arbitral precedent, the District contends that this line of argument "is more properly raised in the pending civil litigation than here." Beyond this, the District specifically challenges the applicability of the arbitration cases cited by the Union. Noting that the employers in those cases, "(u)nlike the District . . . all utilized the self-help remedy of a payroll deduction to recoup the contested overpayments to their employees," the District concludes that each case is inapposite here. In this case the District has, it contends, properly chosen "the more orderly judicial process whereby the affected employees will be afforded their full panoply of procedural and substantive rights." The District concludes that the Union's authority misses the fundamental point posed here --"the retroactive WRS contributions it made on behalf of these employees is really a question of law beyond . . . the scope of either collective bargaining agreement." The District also denies that the payment of the employe share of WRS contributions can be characterized as a cost of doing business for which an employe cannot be held liable.

The District challenges the Union's "curious" argument that "the District violated either collective bargaining agreement by including clerical personnel and custodial/maintenance personnel in the WRS prior to April 1, 1989". Noting that it did not "voluntarily" make the retroactive payments, and that it promptly negotiated for employe contributions on a prospective basis, the District contends that it acted unilaterally only after it became evident it had no alternative.

More specifically, the District denies Article 6 can "properly be applied in this setting." Noting it promptly notified the Union it would seek reimbursement as soon as it learned it could not avoid the retroactive

payments, the District concludes "there was no 'standard' to be maintained."

The District also denies that Articles 18 and 30 should be construed against it. Neither provision is, the District contends, ambiguous, and neither applies to periods before April 1, 1989.

The District asserts that its "retroactive WRS contribution obligation is statutory in its origin, and exists entirely independent of any contractual obligation on its part." The District concludes that "its right to seek reimbursement via civil litigation" must also be viewed as an "independent statutory obligation unless that right somehow has been restricted contractually." Since, according to the District, no such restriction exists here, "the Arbitrator should permit the District to proceed with the pending civil litigation."

DISCUSSION

The issues adopted above are drawn from the Union's brief. The differences between the parties' statements of the issue are minimal, and do not

warrant specific discussion. The submission agreement requires a determination on the arbitrability of the grievances, and "aside from the arbitrability issue" authorizes the issuance of a decision on the merits of the two grievances.

The submission agreement sets Joint School District No. 10, City of Jefferson v. Jefferson Education Association, 78 Wis.2d 94 (1977), as the authority governing the arbitrability determination. The Jefferson court thus noted its adoption of the teachings of the Steelworkers Trilogy regarding "the court's limited function" in determining the arbitrability of disputes:

> The court's function is limited to a determination whether there is a construction of the arbitration clause that would cover the grievance on its face and whether any other provision of the contract specifically excludes it. 1/

The Jefferson court held that unless it could be said "with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," 2/ the grievance must be found arbitrable.

Application of the two elements to Jefferson requires the resolution of two prefatory points. The first is the isolation of the conduct alleged to violate the contract. Each grievance questions the District's commencement of "an action to collect money allegedly for pension contributions from current and former employees of this bargaining unit." The second is the isolation of the contract governing the complained of conduct. The grievance states the conduct is governed by "the current and predecessor agreements." The District started its civil action in July of 1992. This act is the source of the grievances and falls within the term of the 1991-93 clerical agreement and within the term of the 1992-95 custodial agreement. The arbitrability determination is rooted in those agreements.

The second Jefferson element can be dealt with summarily. Neither agreement addresses the impact of the commencement of a legal action. There is, then, no "other provision of the contract" which "specifically excludes" the grievances from arbitration.

The first Jefferson element is thus the focus of the arbitrability issue. Because it can be said, with positive assurance, that there is no construction of the arbitration clause that would cover the grievance on its face, the grievances are not arbitrable.

Each agreement defines a grievance broadly. The custodial agreement is somewhat broader, defining a grievance as "a dispute concerning the interpretation or application of this Contract." The clerical agreement defines a grievance as a "complaint regarding the interpretation or application of a specific provision of this Agreement." Each focuses grievances on agreement provisions. The clerical agreement is a less persuasive vehicle than the custodial agreement for an argument that benefit provisions read as a whole preclude any recoupment, but this point is, on these facts, technical.

1/ Ibid., at 111.

2/ Ibid., at 113.

The difficulty with each grievance, under Jefferson, is that the issues posed are legal, not contractual. Under neither agreement can an "interpretation or application" of agreement provisions bring the challenged conduct within the contract. The civil action asserts the District's right to collect is based in Chapter 40, Stats., or in the equitable/common law doctrine of unjust enrichment. The Union contends, regarding each unit, that specific contract provisions or a web of contract provisions read as a whole would be violated if any recoupment is made. Because accepting this argument will not support the conclusion the Union seeks, the grievances must be seen to raise legal claims.

The legislature has provided for the enforceability of agreements to arbitrate. 3/ The enforcement mechanism is either judicial or administrative. 4/ Even if the administrative is used, the enforcement mechanism is ultimately judicial. 5/ Thus, assuming my adoption of the Union's position, the enforcement of that conclusion would be left to the court. Even assuming that the determination of a violation of the contract is initially mine to make, with the court's role reduced to reviewing that determination, does not alter this conclusion. The grievances do not question whether recoupment would violate the contract. Rather, the grievances seek a determination that the initiation of a recoupment action violates the contract. This does not pose a question regarding any of the contract provisions cited in the grievance. Such questions would concern the scope of arbitral authority over the contract. The question posed by the grievances concern the scope of the court's authority to hear an action.

The issues posed by my acceptance of the Union's position can be phrased thus:

> If a collection action against the individual employes violates the terms of the labor agreements covering them, is such a violation sufficient to defeat any District rights under Chapter 40, Stats.?
>
> If the labor agreement denies the District the right to collect any employe's contribution to the WRS for the

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3/ See Sec. 111.70(4)(c)2, Stats.; Sec. 111.70(4)(cm)4, Stats., and Chapter 788, Stats.

4/ See Chapter 788 regarding judicial enforcement, and Secs. 111.70(3)(a)5 and 111.70(3)(b)4, Stats., regarding administrative enforcement.

5/ See Secs. 227.52 and 227.53, Stats.

> period January 1, 1986, through March 31, 1989, does the employe's receipt of District payment of that contribution constitute unjust enrichment?

Both are issues of law. The matter is analogous to the situation posed by an arbitrator's ruling that a labor agreement unambiguously applies to certain facts. This does not preclude the party losing the arbitration from appealing the arbitrator's conclusion to court. If the court agrees with the arbitrator, even to the point of characterizing the suit as frivolous, the determination is the court's, arising after the initiation of the civil litigation. The preemptory strike sought by the Union here is beyond my authority.

Because acceptance of the Union's reading of the contract does not bring the action challenged by the Union within the scope of my authority under the contract, the grievances cannot, under Jefferson, be considered arbitrable. It can be said, with positive assurance, that no interpretation of the contract provisions cited in this matter would authorize me to determine the legal validity of the District's civil action.

The submission agreement authorizes a decision on the merits of the grievances "(a)side from the arbitrability issue." This seeks a determination beyond the arbitrability issue. The arbitrability determination is procedural. That I am without authority to stop the civil litigation does not mean I am without authority to determine what impact on contract rights a judicial determination permitting the collection action would have.

That neither contract authorizes the collection action is acknowledged by the parties. At no point in either unit's history has the contract granted the District the authority to collect employe WRS contributions for the period from January 1, 1986, through March 31, 1989.

The issue on the merits is, then, whether either labor agreement would be violated if the recoupment is permitted.

There is no contract provision which would, standing alone, be violated if the recoupment is permitted. This is because the parties have specifically and mutually excluded the contributions from January 1, 1986, through March 31, 1989, from their labor agreements. For an agreement right to be violated, the parties must have reached some mutual understanding on the right.

No agreement provision clearly and unambiguously addresses the subject of payment of the employe share of the 1986-1989 WRS contribution preceding April 1, 1989. Each unit has, since April of 1989, been governed by a labor agreement providing specifically for District payment of the employe share. Those provisions (Article 18 for the clerical, Article 30 for the custodial unit) clearly preclude employe payment of the employe share, but are effective April 1, 1989.

The best guides for resolving contractual ambiguity are past practice and bargaining history, since each focuses on the conduct of the parties whose intent is the source and the goal of contract interpretation. In this case, there is no past practice. Evidence of bargaining history underscores that the parties never agreed to apply Articles 18 and 30 to contributions preceding April 1, 1989.

Regarding the custodial unit, Dahl's April 6, 1989, letter can be read to preclude employe payment of WRS contributions preceding April 1. It also, however, can be read to set the date the parties agreed to kick in District contributions, leaving any prior contributions subject to further bargaining

between the District and DETF or the District and the Union. The latter explanation is, unlike the former, consistent with the then-existing context and with the parties' conduct. It was, by April of 1989, clear that the District had entered the WRS with a mistaken assumption regarding the ability of employes to waive participation. It was also clear that the District was attempting to secure a DETF waiver of contributions traceable to this mistake. This point is manifested in the collective bargaining at that time. The District unsuccessfully sought Union assistance in approaching DETF on the point. The Union stated its willingness to stay neutral in the process, and its opposition to any District attempt to recoup the employe share of the pre-April 1, 1989, contributions. This agreement to disagree was solidified by the May 22, 1989, tentative agreement. Nothing was done in that tentative agreement to resolve the difference. Each party thus understood there was no agreement on the contributions. The tentative agreement, and the labor agreement which resulted from it, manifested a mutual desire to skirt the issue.

Similar history surrounds negotiations for an agreement covering the clerical unit. That agreement was reached through interest arbitration. As the parties' briefs in that litigation demonstrate, both parties restricted their negotiations to contributions dating from April 1, 1989. Here too, the parties mutually chose to skirt the issue.

This set the tone for future negotiations. At no point have the parties chosen to address the gap in WRS contributions. The Union has consistently asserted that there is no gap, due to the District's unilateral mistake. This may or may not be the case. The point here is that there is no agreement for an arbitrator to enforce. More significantly, the bargaining history precludes a conclusion that the specific point was unaddressed and thus resolvable through the application of other general agreement provisions which might bear on the point. In this case, the gap is intentional.

The absence of other provisions to cover this gap is most apparent regarding the clerical unit. The grievance points to Articles 8, 10 and 18. Article 18, as noted above, is inapplicable by its terms and its bargaining history. Article 8 provides the right to grieve, but supplies no substantive provision to ground the grievance. Article 10 provides for a District contribution to a TSA, but is inapplicable to the WRS.

For similar reasons, Articles 7, 28 and 29 of the custodial agreement are inapplicable. Article 6, Sections 1 and 2 of that agreement do bear more directly on the points at issue. Neither, however, can be persuasively applied to preclude a recoupment. Article 6, Section 1, maintains "the highest standards in effect at the time of the signing of this agreement". This provision is inapplicable because there was no standard regarding WRS participation prior to the signing of the 1989-92 agreement, and the negotiated standard of Employer payment has been maintained ever since. Nor is Article 6, Section 2, applicable. The District has not yet, and does not now, seek "any agreement . . . . with his employees" on the recoupment. Rather, it seeks to compel it.

The provisions of Article 6 do pose the Union's position that recoupment would improperly lower the negotiated wage and fringe benefit level. The difficulty with this argument is that it is legal and not contractual. The Union argues that Article 6, read with or without other wage and benefit provisions, permits the creation of a WRS benefit beyond the negotiated wage and benefit level of the labor agreement, but precludes the imposition of any cost for it. If, however, the Employer's mistake was legal and thus removed from the bargaining process, the implications of that mistake are similarly legal and thus removed from the bargaining process. The attempt to incorporate

the benefit as a matter of law undercuts the attempt to raise the contract as a shield to the implications of the benefit.

In sum, neither agreement authorizes or precludes a recoupment. The parties have mutually recognized the issue, and have deliberately chosen not to address it in their agreement(s).

Before closing, it is necessary to address the implications of the conclusions stated above. The submission agreement is broad, and calls for the points submitted to be fully addressed. Pushing the discussion beyond the conclusion stated above is arguably dicta, but in this case, the line between dicta and holding is, at best, fine.

Since the parties' agreements covering the clerical and custodial unit do not cover the issue of recoupment, it cannot be said that bargaining on that point has been waived, at least by the Union. 6/ This means that ultimately the issue of recoupment raises statutory issues implicating the District's duty to bargain. Payment of the employe's share of the WRS is a mandatory subject of bargaining. 7/ The District could not impose, unilaterally, costs traceable to this mandatory subject of bargaining without first discharging its duty to bargain. Since bargaining on this point has not been waived by the Union, it is difficult to fathom how the District could effect its recoupment, under either count of the pleadings of the civil action, without raising an irreconcilable conflict with its statutory duty to bargain.

In sum, the grievances pose issues of procedure. I do not believe arbitration is available to resolve the issues posed. This conclusion flows from Jefferson, since the agreements do not call for arbitral determination of legal rights. Even if the grievances are arbitrable, the underlying agreements do not cover the issue posed. Because the lack of coverage is intentional, there is no agreement provision which can be enforced against the possible recoupment. That the agreements do not cover the point raises, however, issues of statutory interpretation regarding the reconciliation of the rights asserted by the District in the litigation against its statutory duty to bargain.

6/ The District "has a duty to bargain collectively with the representative of its employes with respect to mandatory subjects of bargaining during the term of a collective bargaining agreement, except as to those matters which are embodied in the provisions of said agreement, or bargaining on such matters had been clearly and unmistakably waived." Racine Unified School District, Dec. No. 18848-A (WERC, 6/82).

7/ The payment of the employe's share of WRF contributions primarily relates to wages. See, Racine Unified School District, Dec. No. 23904-A (Honeyman, 2/87), aff'd Dec. No. 23904-B (WERC, 9/87); Green County, Dec. No. 21144 (WERC, 11/83); and La Crosse County, Dec. No. 26270 (WERC, 12/89).

The award below addresses only the arbitrability issues. Conclusions beyond that point have been reached in response to the breadth of the submission agreement. Because I am without authority to enforce those conclusions, they are not included in the award.

AWARD

The present grievances are not arbitrable.

Dated at Madison, Wisconsin, this 21st day of January, 1994.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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