BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
BENTON EDUCATION ASSOCIATION	Case 11 No. 49471 MA-7963
and	
BENTON SCHOOL BOARD	

Appearances:

Ms. Joyce Bos, Executive Director, South West Education Association, P. O. Box 722, Platteville, Wisconsin 53818, appearing on behalf of the Benton Education Association, referred to below as the Association.

Ms. Eileen A. Brownlee, Kramer, McNamee & Brownlee, Attorneys at Law, 1038 Lincoln Avenue, P. O. 87, Fennimore, Wisconsin 53809, appearing on behalf of the Benton School Board, referred to below as the Board, or as the District.

ARBITRATION AWARD

The Association and the Board 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 Association requested, and the Board agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in grievances filed on behalf of Suzanne Marx and Jeffrey Droessler. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on October 12, 1993, in Benton, Wisconsin. The hearing was not transcribed, and the parties filed briefs and reply briefs by December 9, 1993.

ISSUES

The parties stipulated the following issues for decision:

> Did the School District violate Article 21 of the collective bargaining agreement by reducing Suzanne Marx from a full-time teacher in the school year 1992-93 to a five-eighths time teacher for the 1993-94 school year while retaining less senior - priority employees by assigning job duties Mrs. Marx is qualified to perform to less senior - priority employees?
>
> Did the School District violate Article 21 of the collective bargaining agreement by reducing Jeffrey Droessler from an 85% teacher in the school year 1992-93 to a five-eighths time teacher for the 1993-94 school year while retaining less senior - priority employees by assigning job duties Mr. Droessler is qualified to perform to less senior - priority employees?

RELEVANT CONTRACT PROVISIONS

MANAGEMENT RIGHTS

Management retains all rights of possession, care, control and management that it has by law and retains the right to exercise these functions under the terms of the collective bargaining agreement except to the precise extent such functions and rights are explicitly, clearly and unequivocally restricted by the express terms of this Agreement. These rights include, but are not limited by enumeration to, the following rights:

. . .

C. To hire, promote, transfer, schedule and assign employees in positions within the school system;

. . .

E. To relieve employees from their duties because of lack of work;

. . .

21. STAFF REDUCTION

A. In the event the Board of Education determines to reduce the number of employee positions (full layoff) or the number of hours in any position (partial layoff) for the forthcoming school year, the provisions set forth in this Article shall apply. Layoffs shall be made for the reason(s) asserted by the Board and not to circumvent the other job security or discipline provisions of this agreement.

B. Layoff Notices and Effective Date of Layoffs

1. Prior to the sending of notice(s) of intent to layoff, the Board shall notify the President of the Association in writing of the position(s) which it has determined to reduce, together with its reason(s) for reduction(s).

. . .

C. Selection for Reduction: When the Board decides to reduce the size of the teaching staff either in the number of full-time positions or by reducing the hours of a full-time teacher, the Board shall layoff teachers based upon the following point system, with the person having the lowest point total being laid off first.

Length of Service to the Benton School District

3 points for each of the first three years
2 points for each of the next three years
1 point for each succeeding year

PLUS Academic Training Points:

BA	0 points	MA	3 points
BA + 12	1 point	MA + 12	4 points
BA + 24	2 points	MA + 24	5 points(max.)

Points earned for academic training during the first semester will be credited for the current school year. Points earned during the second semester will be credited for the ensuing school year.

. . .

D. Bumping: Any Employee who is selected for reduction may elect in writing, within ten (10) days of receipt of a layoff notice, to assume any supervision assignment or a teaching assignment (in the case of full layoff) or portion of an assignment (in the case of partial layoff) of the employee with the lowest number of points who holds an assignment for which the more senior teacher is certified or able to be certified by the contract date. Any employee who is replaced in this fashion may similarly elect to replace another employee in the District as provided above.

E. Refusal of partial layoff: Any employee who is selected for a reduction in hours (partial layoff) and is not able to exercise bumping rights may choose to be fully laid off without loss of seniority or recall rights.

22. LENGTH OF SERVICE

A. For the purposes of this Article, the commencement of an employee's service in the District shall be the first day of employment under his/her initial contract.

An interruption in continuous District employment due to leave of absence, medical leave, maternity leave, child-rearing leave, adoption leave, or layoff shall not cause the loss of prior accumulated Length of Service. No distinction will be made between full and part-time employees in calculating Length of Service.

No later than January 15 of any school year, the Board will produce a Length of Service list. The list will be considered final when there is mutual agreement between the Board and the Association. Such list shall include both active employees and employees on full or partial layoff according to their length of service in the District. This list shall also state the teaching assignments, if any, presently held by such employees, and the area(s) in which each employee is certified.

B. RECALL . . .

An employee on layoff status may refuse recall offers less than their previously held position without loss of rights to the next available position . . .

23. PART-TIME RIGHTS

. . .

D. All part-time empoloyees (sic) shall have all rights and privileges of full-time employees with the exceptions noted above.

BACKGROUND

The Board hired Suzanne Marx in August of 1986. She taught Family and Consumer Education on a full-time basis through the 1992-93 school year. The Board's then-incumbent District Administrator, David Elliot, issued Marx a "PRELIMINARY NOTICE OF CONSIDERING REDUCTION IN TIME OF TEACHER'S CONTRACT" dated February 22, 1993. 1/ The notice stated the contemplated reduction was "from a 100% position to a 62.5% (5/8) position" due to "lack of enrollment in the Family & Consumer Education Program."

1/ References to dates are to 1993, unless otherwise indicated.

The Board hired Jeffrey Droessler in July of 1990. He has taught Health and Physical Education on a part-time basis. He has also served as a Basketball Coach. In the 1992-93 school year, Droessler taught at 85% of a full-time teaching load. Elliot issued Droessler a preliminary notice, dated February 22, similar to that issued Marx. The notice stated the contemplated reduction was "from a 85% position to a 62.5% (5/8) position" due to "lack of enrollment."

On February 23, Elliot issued the following letter to Terry Hanson, the Association's President:

> This brief note is sent on behalf of the Board to satisfy the requirements of Article 21, Section B, (1) of the Teacher Negotiated Agreement. At a special meeting of the Board of Education last evening, the Board passed resolutions to give notice of intent to layoff (partial layoff) in two program areas. Resolutions were passed to reduce the family and consumer education program from 100% to a 5/8 position and to reduce the 85% physical education program to a 5/8 position. The reasons for the reduction of time in these two areas was listed on the resolutions as decreasing enrollment as indicated from the recent course signup for 1993-94 school year.
>
> Please keep in mind that these layoff resolutions are based on projected enrollments and are subject to change as course enrollments are adjusted when courses with very low "signups" are eliminated.
>
> . . .

Elliot, on the same date, also issued the following letter to Hanson:

> It was brought to my attention at the special Board of Education meeting last night that the Board was to have supplied you with a copy of a Length of Service list by the 15th of January. On behalf of the Board, I'm sending a Length of Service list from my office . . .
>
> I am also including a list of the teachers and their certified areas as per the Teacher Negotiated Agreement.

Seven pages of data were attached to this letter.

In separate documents headed "NOTICE OF REDUCTION IN TIME OF A TEACHER'S CONTRACT FOR THE ENSUING YEAR" dated March 24, the Board advised the Grievants that the Board "has determined to reduce the time of your teaching contract . . . to 62.5% of full time for . . . the 1993-94 school year." Each notice stated, as the final paragraph, the following:

> Due to the fact that this is a partial layoff arising out of a reduction in staff, you will be eligible for recall rights as provided in the collective bargaining

agreement.

The Grievants responded in memos dated April 1, each of which acknowledged the March 24 reduction, and then stated the following:

> Although I believe this to be in violation of Article 21., C., the fact remains, the action was passed by a majority vote of the Board. To preserve my bumping rights within the contract, I am submitting this within the ten (10) days of receipt of a layoff notice.
>
> This is to notify you of my intent to exercise my rights for Bumping, as guaranteed, under the negotiated contract between the Benton School Board and the Benton Teacher Association. I will "assume any supervision assignment or a teaching assignment or portion of an assignment of the employee with the lowest number of points who holds an assignment for which the more senior teacher is certified or able to be certified by the contract date."
>
> This notification of intent to bump will not negate any legal action or remedies I may choose to take in the future for the violation of Article 21.,C.

Neither Marx nor Droessler took further action to bump a less senior teacher because the Board had not yet determined a class schedule for the 1993-94 school year. Each assumed such a schedule would be prepared which recognized their bumping rights. In June, the Board adopted a class schedule for the 1993-94 school year. Droessler did not, beyond grieving the Board's action, address the bumping issue with the Board. Marx, however, issued the following letter, dated July 29, to James Sebanc, then Interim District Administrator:

> I am electing to utilize my bumping rights under Article 21, Section D in the following areas:
>
> 1. study hall
> 2. one semester of Consumer Economics.
>
> Both of these assignments are held by a person less senior than me. There are two available study halls, one is held by Linda Gude and the other one by Jim Tiedeman. The Consumer Economics is held by Jim Tiedeman.
>
> These assignments would make me 6/8 time first semester and 7/8 time second semester . . .

Sebanc responded in a letter dated August 3, which reads thus:

. . .

> According to the agreement if you elect to utilize your bumping rights your are required to do so, in writing, within ten (10) days of receipt of your notice of partial layoff. Since your election to utilize your bumping rights was executed in an untimely manner it will be denied.

Sebanc testified that Marx's April 1 letter advised the Board only of her intent to bump. He felt she and Droessler were obligated to advise the Board of which teacher or teachers they chose to bump.

Sebanc was, at the time the Grievants were being considered for a layoff, the Principal of the Board's Junior/Senior High School. He testified that he reported to Elliot and the Board regarding staffing levels. In the spring of 1993, the Board concluded from preliminary enrollment figures that enrollment was declining in the Family and Consumer Education program and in the Physical Education program. The Board determined reductions would have to come from these programs. Marx was selected for layoff because she was the only teacher in the program. Droessler was selected for layoff because he was the least senior of the Board's two Physical Education teachers.

The parties' first labor agreement covered the 1991-92 and 1992-93 school years. The parties met roughly twenty times to reach that agreement, discussing language issues first and then economic issues. The Association's initial proposal on the selection of employes for layoff read thus:

> The Board shall select employees for the reduction in the grade level, department or subject area affected by such reduction(s) in the order of the employee(s)' length of service in the District, beginning with the employee in such level, department or area with the shortest service (least seniority).

The Board's counter proposal on this point read thus:

> In determining which teacher shall be laid off, the Board shall take into account the following factors respectively:
>
> a) academic training and current permanent

certification as determined by the Department of Public Instruction (no emergency or temporary licenses will be considered unless presently employed in the district under such a license,

b) full or part-time teaching status and length of service to the district,

c) years of teaching experience both within and outside of the district

d) ability an performance as a teacher as per documented by the most current evaluation by supervisory personnel.

The Board, in a subsequent counter proposal, stated the following selection procedure:

> (T)he Board shall layoff teachers within each of the following grade-level or departmental classifications:
>
> K-8
> 9-12
>
> Departments include, but are not limited to, art, social studies, science, math, guidance, etc. . . .

The Association initially proposed that notice of layoff follow the timelines of Sec. 118.22, Stats., while the Board initially proposed notice of layoff be given by May 1. The parties were mutually concerned about the effect of reduction in force language given the size of the District. The parties discussed their respective positions at length, particularly the date of notice of layoff. When tentative agreement was reached, the parties did not specifically discuss the impact of not including departmental or grade level considerations in the layoff process.

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

THE PARTIES' POSITIONS

The Association's Initial Brief

After a review of the facts, the Association notes that the "basic issue before the Arbitrator is one of determining whether or not the District violated the negotiated agreement when it reduced the Grievants' number of contract hours for the 1993-94 school year." Article 21, Section C, is, according to the Association, "clear and unambiguous", and thus not subject to interpretation. That section requires, the Association contends, that the teacher with the lowest point total be selected for layoff. Evidence of bargaining history is, the Association argues, irrelevant, but if considered shows only that the Association deliberately excluded departmental considerations from the selection for layoff process.

The Association asserts that a review of the record establishes that the Board violated the contract in "no less than three" ways. First, the Board failed to notify the Association President of the position to be reduced. Second, the Board failed to layoff the teacher having the lowest point total. Third, the Board failed to "produce a Length of Service list by January 15, 1993." With these violations as background, the Association argues that "bumping rights should never have entered into the dispute between the Grievants and the District."

The Association concludes that the grievances should be sustained, and that the Grievants should be awarded "full back pay and re-employment for the 1993-94 contract year at the same percentage of employment they enjoyed for the 1992-93 contract year."

The Board's Initial Brief

The Board argues initially that the Association has failed to meet its burden of proving there has been any violation of Article 21. More specifically, the Board argues that "the Association's interpretation of Article 21 effectively eliminates portions of both Articles 21 and 22." The Board contends that the contract cannot be persuasively read to require it "to proceed straight to the bottom of the seniority list and lay off the person . . . whose name appears there" even if selecting that person does not produce a reduction in the program the Board seeks to reduce. This "ludicrous" result, the Board argues, has no basis in the parties' bargaining history.

The contract is more persuasively read to require it "to lay off or reduce the contract of the person who is at least senior in the area proposed for layoff or reduction," the District contends. Any other conclusion would, the Board argues, render the bumping provisions of the contract meaningless.

The Board's next major line of argument is that bumping must occur at the point of lay off, not when the next year's schedule is made. This interpretation is, according to the District, well supported by Article 21, Section D. Adopting the Association's view of the bumping language would, the District contends, produce an unwieldy and cumbersome procedure . . . and would create uncertainty for an unreasonably long time." The procedure could produce multiple bumps extending well into the next school year, the Board concludes. The District states the appropriate procedure thus:

> (T)he teacher is required to specify the assignments into which he or she will bump within 10 days of

> receipt of the reduction or layoff notice. If this results in another teacher having the right to bump, this again is accomplished within 10 days.

The Board contends that Marx failed to properly follow this procedure by filing only a notice of an intent to bump. When she attempted to make a bump months later, the Board appropriately viewed the request as untimely. The propriety of its determination was, the Board notes, never grieved. Any other conclusion would, the Board concludes, render the recall provisions of Article 22 meaningless.

Noting that the same arguments apply to Droessler, the Board asserts that "one additional factor arises" in his case. That factor is his part-time status. The Board argues that "the plain language" of Article 21 makes it applicable only to full-time teachers. That factor is, the Board concludes, determinative.

Viewing the record as a whole, the Board concludes that the grievances must be dismissed.

The Association's Reply Brief

The Association emphasizes that the parties' bargaining history establishes that the District accepted an Association proposal which eliminated the use of departments for lay off and bumping purposes. Beyond this, the Association challenges the Board's contention that Droessler's part-time status is a meaningful factor. Article 22, Section A, according to the Association, precludes the distinction the Board asserts in its initial brief. Viewing the Board's lay off process, the Association concludes the Board arrogated non-contractual rights to lay off by department and failed to "develop a length-of-service list prior to laying off the Grievants."

Bumping rights should not be in issue, the Association argues, since the Board should have "laid off the person with the lowest points". The Association contends that if Board followed the contract, "new certification in a teaching area would be the only way to utilize the bumping rights in the contract." Because the Board did not select the teachers with the lowest point totals, and because the class schedule had not yet been developed at the time of lay off, the Association argues that the Grievants could only protect their rights by filing an intent to exercise bumping rights and waiting for the schedule to be developed. The Board's view of the contract has been, the Association asserts, consistently selective.

The Association concludes that the grievances must "be sustained and the grievants be restored to their previous level of employment and that any salary the grievants may have accrued paid in full."

The Board's Reply Brief

The Board contends the Association has made two errors of fact. First, the District notes that the agreement "requires that notice be sent to the Association prior to notice being sent to the teachers; not prior to the Board taking action." The Board argues that, contrary to the Association's assertion, the Board did properly notify the Association. The second error involves the Association's characterization of bargaining history. The Board notes that both parties assumed, in bargaining, that the Board would lay off the least senior employe in an affected program and that bumping would assure the teacher with the least points in the program would be laid off.

The Board reasserts that the Association's view of the lay off process nullifies a series of agreement provisions. The Board puts the point thus:

> No explanation is offered regarding the inter-relationship among the reduction procedure, bumping procedure and recall procedure. It is the District's position that no such explanation is offered because there simply is no feasible way it can work other than as was actually done by the District.

The Board's final major line of argument is that one of the cases cited by the Association addressed "notably different contractual language than that which exists in this case" and was "overturned in Grant County Circuit Court on procedural grounds."

The Board concludes "that the grievances should be dismissed."

DISCUSSION

The Association alleges the Board violated the agreement in four different ways. First, the Board failed to timely provide the Association with a seniority list. Second, the Board failed to timely notify the Association President of its intent to layoff Marx and Droessler. Third, the Board selected the wrong employes for reduction. Fourth, the Board failed to honor Marx's and Droessler's request to bump.

The first violation is acknowledged by Elliott's February 23 letter to Hanson, and requires no extended discussion here. Article 22 requires the list no later than "January 15 of any school year."

The Association has not proven its second contention. Section B, 1, of Article 21 requires the Board to "notify the President of the Association in writing of the position(s) which it has determined to reduce, together with its reason(s) for the reduction(s)" prior to sending "notice(s) of intent to layoff." The Association bases the violation on the Board's February 22 Preliminary Notice Of Considering Reduction In Time Of Teacher's Contract. The Board sent this notice to Marx and Droessler, and acted on them at its February 22 meeting. The Board advised Hanson of its intent to reduce the Grievants' contracts on February 23. The Notice of Reduction issued Marx and Droessler is dated March 24, and there is no contention either employe received this notice earlier than February 24. Thus, the allegation has merit only if the preliminary notice is taken to be the notice "prior" to that issued Hanson.

Article 21, Section B, 1, cannot persuasively be read as the Association asserts. The section refers to "notice of intent to layoff", and the February 22 notices were preliminary in form and in substance. Each is labelled a preliminary notice. More significantly, each was preliminary until the Board acted at its February 22 meeting to make its consideration of a reduction a fixed intent to reduce. The language of Article 21, Section B, 1, underscores this by requiring the notice to refer to positions which the Board "has determined to reduce." The use of the past tense is controlling here. The Board had not "determined" to reduce the positions prior to its February 22 meeting. The Board's notice to Hanson was, then, "prior" to the notices to Marx and Droessler. There has been no violation of this section.

The next alleged violation concerns the Board's selection of the Grievants for layoff, and is governed by Article 21, Section C. It is undisputed that the Board retained teachers with lower point totals than Marx and Droessler. The Board contends the point totals became relevant only after it determined which program areas were to be reduced. Marx was the only teacher in the Family and Consumer Education area, and thus the teacher with the lowest point total. Droessler had the lowest point total of the two physical education teachers.

Article 21, Section C, mandates the selection for layoff of the "person having the lowest point total." This supports the Association's interpretation, but cannot be considered to clearly and unambiguously mandate the result the Association seeks. The cited reference is prefaced by a general statement that the "Board decides" the necessary reductions. Section C is silent on the decisional process. It must, however, be read with other agreement provisions. The Management Rights clause, for example, authorizes the Board to "relieve employees from their duties because of lack of work." How this reference can be given meaning if the Board's sole discretion to lay off employes is based on point totals is not clear. If, for example, a teacher was not the employe with the lowest point total, but was certified only to instruct a field in which there was no student interest, it would, under the Association's interpretation, be impossible to select this teacher for layoff even if there was no other field lacking student interest. Nor is it immediately apparent why the parties included Section D of Article 21 if Section C is read as the Association urges. The relationship of Article 21, Section C, to other agreement provisions cannot, then, be considered clear and unambiguous.

The most persuasive 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, however, neither guide is available. There is no evidence of past practice, and evidence of bargaining history is inconclusive.

The Board's dropping of a proposal which used departments as the basis for the selection process is not conclusive proof that the Board accepted the reading of Article 21, Section C, the Association urges here. The Association incorporated departments in its initial proposal. It is not persuasive to view the Association's dropping of this reference as meaningless, while viewing the Board's dropping of its reference to departments as determinative. More significantly, the interpretation of seniority advanced by the Association in these grievances is a more significant limitation on Board discretion than any of the Association proposals which preceded it. The Association urges, then, a broader limitation on Board discretion in arbitration than it proposed in collective bargaining.

With this as background, Article 21, Section C, should be interpreted in a manner which gives effect to related agreement provisions. As alluded to above, the Association's interpretation is irreconcilable to other agreement provisions. Its view of Article 21, Section C, is difficult to square with Section E of Management Rights. Under the Association's view, the Board could act to relieve a teacher of duties due to lack of work only if that teacher also happened to have the lowest point total. In the example noted above, the Board would not be able to relieve any employe due to lack of work even though there was one field with no student interest. Beyond this, the Association's view of Article 21, Section C, renders Article 21, Section D, meaningless. If the Board must, under Section C, select the teacher with the lowest point total for layoff, there is no need for bumping. Nor does reading Section D to specify rights for a teacher who is certifiable, but not yet certified, in an area outside of that subject to the reduction inject meaning into the section. If the teacher with the lowest point total is selected for layoff, widening that teacher's area of certification does not necessarily yield bumping rights.

The Board's interpretation of Article 21, Section C, does not pose these difficulties. By selecting employes in areas subject to declining enrollment, Article 21, Section C, is reconcilable to Section E of Management Rights. Beyond this, Section D of Article 21 acquires meaning. Under the Board's view, the Board first decides which program areas require reduction. Teachers are then permitted to bump to assure that the teacher with the lowest point total is ultimately the teacher laid off. The reference, in Section D, to certification underscores this. Under the Board's view, a teacher's ability to acquire certification beyond the area subject to reduction becomes a potentially crucial consideration.

In sum, Section C of Article 21 did not require the Board to focus only on teacher point totals in selecting Marx and Droessler for layoff. The Board's initial focus on its program needs was not improper. There has been, then, no Board violation of Section C.

Before addressing the issue of bumping, it is necessary to address the Board's contention that Droessler, as a part-time teacher, has no rights under Article 21. The Board contends Section C mandates this result by limiting the decision to reduce to "full-time positions or . . . the hours of a full-time teacher." The reference does support the Board's view. The relationship of this reference to other agreement provisions is not, however, unambiguous. Section A of Article 21, for example, links the decision to reduce to "employee positions" generally or to reducing hours in "any position." Beyond this, Length of Service is a significant factor in the point system established by Section C. Article 22 specifies that no "distinction will be made between full and part-time employees in calculating Length of Service." It is not apparent why the parties would include this reference if Article 21 gave no seniority rights to part-time employes.

Because there is no evidence of past practice or bargaining history on this point, it is necessary to read Article 21, Section C, in a manner which gives effect to related agreement provisions. As alluded to above, the Board's reading of Section C renders the final sentence of the second paragraph of Article 22, Section A, meaningless. Beyond this, it is not clear how, under the Board's interpretation, the following reference in Article 22, Section B is to be interpreted: "An employee on layoff status may refuse recall offers less than their previously held position . . ." The reference to "less than their previously held position" is, at best, problematic under the Board's view. Under that view the reference should read "less than full time." Under the Board's view, if the teacher had less than a full-time position as "their previously held position," there would be no recall rights.

The Association's interpretation does not pose any of these difficulties. It should also be noted that whatever the scope of Article 23, Section D, may be, the Association's view of Article 21, Section C, is reconcilable to it. The Board's is not, for it denies Droessler rights not subject to "the exceptions noted above" in Article 23. The Board's notice itself underscores the problematic nature of denying Droessler rights. The final paragraph of his layoff notice states that he "will be eligible for recall rights as provided in the Collective Bargaining Agreement."

The issue thus becomes the scope of Marx's and Droessler's bumping rights under Article 21, Section D. The Board contends that Marx's and Droessler's April 1 notice of their "intent to exercise my rights for Bumping" is insufficient, and thus any subsequent attempt, including their grievances, must be viewed as untimely. The parties dispute whether bumping rights have to be exercised at the time of the layoff against then existing assignments or at the time of layoff against the next school year's assignments. Resolution of this issue is not, however, necessary to resolve the merits of the grievances.

The Board's refusal to treat the Grievants' April 1 letters as timely notice under Article 21, Section D, violated that section. Practically speaking, the Board's view of the section is onerous, at best, for a laid off teacher. Under the Board's view a laid off teacher, within ten days of the notice of layoff, would have to isolate all supervisory and teaching assignments; determine the point total of the incumbent teacher holding that assignment; and isolate those assignments available for them to bump into. The difficulty of this cannot be ignored, and is highlighted by the Board's inability to supply the Association with a Length of Service list within one month of its due date. Beyond this, it is not apparent, under the Board's view, what the Board would do with the detailed notice of bumping rights it seeks here. Presumably, the Board is not bound by this notice, but would verify that the teacher has accurately defined and applied their bumping rights. What the purpose of the detailed notice is, under the Board's view, not immediately apparent. It would, in any event, be an unusual result to

force the obligation at issue here away from the party with the best access to the underlying data and onto the party with the poorest access to that data.

More significantly, the Board's view is irreconcilable with other agreement provisions. The Board, under Section C of Management Rights, retains the authority to "transfer . . . and assign employees in positions within the school system." To "assume any . . . assignment" under Article 21, Section D, a teacher would have to be assigned by the Board. The April 1 letters constitute a request for such an assignment. If the Board had any doubt on this point, it had only to contact the Association. If the Board wanted the Association's input on the bumping process, it could have sought it. The Board, however, chose to treat the notices as ineffective, without even giving notice that it considered the notices ineffective until Sebanc's August 3 letter to Marx. The Board's view of the required notice unpersuasively shields it from any role in the bumping process when the contract reserves the Board the power to assign which is essential to that process.

The Board's failure to respond to the April 1 letters, coupled with its position that neither Grievant gave timely notice under Article 21, Section D, thus constitutes a wrongful denial of the Grievants' bumping rights. The parties have not litigated what, if any, assignments were available for either Grievant to bump into. This affects the Award noted below, and requires some discussion here.

Rather than mandate further hearing, the Award provides the parties the opportunity to determine what, if any, assignments the Grievants could have bumped into had the Board permitted them to exercise bumping rights. If such bumping opportunities were available, the Award requires the Board to make the Grievants whole for the denial of those opportunities. This interjects a factual uncertainty into the Award. It also interjects a contractual uncertainty, since the parties dispute whether the bumping should have been against the then current teaching and supervisory assignments or against the assignments for the following school year. I believe it is preferable to leave these ambiguities, for the moment, unaddressed. This will permit the parties the opportunity to resolve the bumping dispute consensually. This has the advantage of putting the parties with the most expertise and with the most to gain or to lose in the position of resolving this dispute without outside interference. If the parties are unable to resolve these points consensually, I have retained jurisdiction over the matter and the dispute can be further litigated. The Award thus lacks some finality, but assures that litigation of the bumping issue remains, as it should be, the last, not the first, option.

The Association has not sought specific relief for the Board's failure to timely present it with a Length of Service List. That violation is subsumed in the statement of the Award, but is not further addressed.

AWARD

The School District did violate Article 21 of the collective bargaining agreement by reducing Suzanne Marx from a full-time teacher in the school year 1992-93 to a five-eighths time teacher for the 1993-94 school year, without offering her the opportunity to exercise bumping rights under Article 21, Section D, while retaining less senior - priority employes by assigning job duties Mrs. Marx is qualified to perform to less senior - priority employes.

The School District did violate Article 21 of the collective bargaining agreement by reducing Jeffrey Droessler from an 85% teacher in the school year 1992-93 to a five-eighths time teacher for the 1993-94 school year, without offering him the opportunity to exercise bumping rights under Article 21, Section D, while retaining less senior - priority employes by assigning job duties Mr. Droessler is qualified to perform to less senior - priority employes.

As the remedy appropriate to the Board's violation of Article 21, the Board shall make each Grievant whole for the wages and benefits, if any, each would have earned in the 1993-94 school year had the Board not denied them the opportunity to exercise bumping rights under Article 21, Section D.

To address any uncertainty in the implementation of this Award, I shall retain jurisdiction over this matter for a period of not less than sixty days from the date of issuance of this Award.

Dated at Madison, Wisconsin, this 25th day of February, 1994.

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

RBM/mb
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