BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
SCHOOL DISTRICT OF WAUKESHA EMPLOYEES UNION LOCAL 2485	Case 100 No. 49313 MA-7893
and	
WAUKESHA SCHOOL DISTRICT	

Appearances:
Mr. Laurence S. Rodenstein, Staff Representative, Wisconsin Council 40, on beh
Davis & Kuelthau, S.C., by Mr. Gary M. Ruesch and Ms. Jane M. Knasinki, on beh

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "District", are privy to a collective bargaining agreement providing for binding arbitration. Hearing was held in Waukesha, Wisconsin, on October 27, 1993. The hearing was transcribed and both parties thereafter filed briefs and reply briefs which were received by January 18, 1994.

Based upon the entire record, I issue the following Award.

ISSUES

Since the parties were unable to jointly agree on the issues, I have framed them as follows:

1. Are the grievances arbitrable?

2. If so, did the District violate Articles XXII and XXIII of the contract when it reassigned grievant Allen Jamieson to different custodial positions and, if so, what is the appropriate remedy?

DISCUSSION

Grievant Jamieson, a fifteen (15) year employe, worked on the day shift as the Head Custodian in the Lindholm School. By letter dated October 27, 1992, District Operations Manager Daniel Streeter told him that the position was being eliminated; that he could transfer to any vacant position per his seniority; and that, "The assignment will be made pursuant to Article XXIII of the agreement", which refers to layoff and recall.

By letter dated November 4, 1992, Paul V. Roberts, the District's Executive Director of Human Resources, told Jamieson that:

> This memo is a confirmation that we agree with the union's position that since your position was eliminated at the Lindholm Building, that you have the right to bump the least senior head day custodian within your category, B classification. According to our records, the least senior person is Rick Rageth, who is the head building custodian at Hillcrest.
>
> As indicated by the union, Rick Rageth will be placed in the open second shift position, which is the

> substitute night custodian working out of the service building.
>
> This will become effective on Monday, November 9, 1992.

The Union subsequently responded to the November 4, 1992, letter by stating:

> We agreed to that part that Al has the right to bump. Al chose Hillcrest because that is the school he wanted, not because Rick Rageth was the least seniored head day custodian within the category.
>
> We did not agree that Rick would go to second shift sub.

Jamieson on November 9, 1992, moved to the Hillcrest School as Head Custodian pursuant to the parties' earlier agreement to that effect. In moving Jamieson, the District never posted for the position at the Hillcrest School.

Jamieson on or about December 7, 1992, subsequently transferred to the Horning School where he filled in on the first shift as a substitute for the custodian who normally worked there, but who has been absent for some time. On about August 23, 1993, Jamieson transferred to the Hawthorn School pursuant to his posted request. On or about October 27, 1993, Jamieson transferred to the Bethesda School pursuant to his posted request.

Throughout this time, Jamieson retained his same rate of pay and never suffered any loss of pay or benefits even though some of those positions had lower posted hourly rates than what he earned at the Lindholm School.

The District during this time employed temporary, part-time, and seasonal employes, none of whom were displaced as a result of the events surrounding Jamieson. Furthermore, there was a vacant night shift substitute position for part of this time.

A grievance was filed on November 2, 1992, which claimed that Jamieson had in effect been laid off and that the District had violated Article XXIII of the contract by not first laying off temporary, part-time, and seasonal employes. A second grievance was filed on November 4, 1992, which grieved his initial dislocation from the Lindholm School on the ground that he and "other employes affected" were entitled "to bump any less seniored employee."

By letter dated December 7, 1992, Streeter denied the first grievance by stating that "Since no member of the bargaining unit has been laid off, there is no violation of the contract." By letter dated December 11, 1992, Roberts also denied the grievance on the ground, "Since Al Jamieson was not laid off, the layoff provision does not apply."

By memo dated November 13, 1992, Local 2485 President Mark Mathias informed Roberts:

. . .

> Dear Paul,
>
> As of today Local 2485 demands the School District of Waukesha to layoff all tempory [sic] and part time seasonal employees. By eliminating the day custodian job at Lindholm you have reduced the number of full time staff. We see this as a layoff, job reduction, work shifting or whatever you may choose to call it. It's all the same thing, and [sic] attempt to eliminate full time jobs.

. . .

By letter dated November 17, 1992, Roberts informed Mathias:

. . .

> Dear Mark:
>
> Thank you for your memorandum concerning the posting of the night custodial position. It is my understanding that the decision concerning when and if to fill any positions is a management right, and I am unaware of any restrictions in this area.
>
> Concerning your second communique.....your demand that the School District of Waukesha lay-off all temporary and part-time employees is unfounded. After carefully reviewing the contract, I am not aware of any restrictions of the district's ability to eliminate positions or language concerning the impact of such decisions. The contract language that you refer to under section 23.03 "Temporary and Seasonal Employees: All temporary and seasonal employees shall be laid off prior to a regular full-time employee being laid off" is relative only to lay-offs. Since there were no lay-offs involved, that language does not apply.
>
> The union has had many opportunities to bargain language concerning the impact of any decision to eliminate positions in the past and will have another opportunity to bargain language this spring.

. . .

By letter dated November 20, 1992, Roberts informed Jamieson:

. . .

> Due to the elimination of your full-time custodial position at the Lindholm Building, you received notice that you would be placed in a second shift substitute custodial position. We subsequently met with your union and came up with a compromise agreement which would allow you to bump the least senior head day custodian within your category B classification and that person would be placed in the open second shift substitute custodial position.
>
> Subsequent to that decision, the union indicated that they no longer supported the compromise agreement that we agreed to. As a result you will be returned to the second shift custodial position as originally directed. The effective date of your new assignment is November 30, 1992.

. . .

The parties were unable to resolve this matter, hence leading to the instant proceeding.

In support of the two grievances, the Union primarily argues that the

District's assignments of Jamieson to the Hillcrest School and Horning School violated Article 23 of the contract; that it violated Section 23.03 of the contract dealing with temporary and seasonal employes; and that it also violated Article 22's posting requirement. It thus states that the District twice referred to Jamieson's situation as a layoff; that the parties in the past recognized via settlement of the Gamroth grievance that employes are allowed to bump in those situations; and that Jamieson "possessed the right to choose among less senior employe positions for his new assignment." Disputing the District's claim that the grievances are "moot", the Union seeks a declaration that the District has not followed the contract.

The District, in turn, asserts that the grievances are "moot" and therefore not arbitrable because the Union is not seeking any backpay; because Jamieson is not grieving his present work assignment; because the parties "at all times mutually agreed to the Grievant's employment assignment"; and because the Union is "inappropriately seeking a declaratory ruling for employes whose jobs may in the future be eliminated." 1/ The District also maintains that it properly eliminated the Head Custodian position at Lindholm School because there is nothing in the contract prohibiting it from doing so; that the contract does "not require bumping following the elimination of a position"; and that Jamieson's reassignments did not constitute a layoff.

The first issue to be resolved here is whether the grievances are moot and hence not arbitrable, as the District claims. Since the Union is not asking for any backpay for Jamieson, and since the District tried to accommodate Jamieson by trying to place him where he wanted to be, it is understandable as to why the District believes that there is nothing left to this dispute.

But there is. The parties here are at fundamental odds as to whether the elimination of a position and subsequent reassignment of bargaining unit personnel without any loss of employment represents a layoff which must be accompanied by bumping and eliminating part-time, temporary, or seasonal employes with the Union asserting, and the District denying, that it is. As surely as the sun rises in the east and sets in the west, then, the parties will continue to disagree over this issue if the District in the future ever again eliminates a full-time bargaining unit position and then tries to reassign that employe to another position the way it did so here.

Accordingly, this is precisely the kind of situation which the United States Supreme Court has declared to be "capable of repetition, yet evading review" and therefore not "moot". See Honig v. Doe, 484 U.S. 305, 318 (1988); Murphy v. Hunt, 455 U.S. 478, 482 (1982) 2/ The grievances therefore are arbitrable.

Turning now to the substantive merits of the grievances, Article XXIII of the contract provides:

> 23.01 Layoff Procedure. If a reduction of employee personnel is necessary, the least senior employee shall be the first person laid off, irrespective of building assignment.

1/ In support of this contention, the District cites Inland Container Corporation, 29 LA 861 (Eckhardt, 1957); Practice and Procedure in Labor Arbitration, (2d. Ed. 1983), at 120, by Owen Fairweather.

2/ I find these United States Supreme Court cases more on point than the contrary authority relied upon by the District set forth in n.1, supra.

23.02 Recall Procedure. The last person laid off shall be the first person re-employed, (if available and desires to return).

23.03 Temporary and Seasonal Employees. All temporary and seasonal employees shall be laid off prior to a regular full-time employee being laid off.

The Union is quite right in asserting that the District violated Article XXIII if one presupposes that what happened here is a layoff, as this language by its own terms is entitled "Layoff and Recall".

But this is not a "layoff", at least as that term is commonly understood. For a layoff, by definition, means a separation of employment because of a lack of work. Jamieson, however, never suffered any such separation of employment and neither did any other bargaining unit members. Rather, what happened here was a reassignment from one position to the other. The Union certainly has the right to question how that reassignment was effectuated and whether the District violated the posting requirements of the contract in the way it treated Jamieson and any other affected employes.

In this connection, it certainly is true that the District during this dispute initially stated that Jamieson's situation was covered under Article XXIII. However, Streeter explained that he referred to Article XXIII in his October 27 letter to Jamieson because he had copied the text of a prior letter sent to Brad Gamroth when his position was eliminated in 1989 and that he, Streeter, did not really view Jamieson's situation as a layoff. Moreover, the record elsewhere shows that the District during this time disputed the Union's claim that Jamieson was being laid off, which is why Roberts' November 17 letter to Union President Mathias stated: "Since there were no layoffs involved, that language [i.e., Section 23.03] does not apply."

Furthermore, and contrary to the Union's claim, the record fails to establish that a past practice exists to the effect of treating what happened here as a layoff. For while the District initially indicated in 1989 to then-Union Staff Representative Robert Chybowski that the elimination of a maintenance position would lead to District-wide bumping, that in fact did not happen. Instead, the District only allowed Gamroth, the displaced employe, to transfer to a vacant position and Streeter in an April 11, 1990, letter to Union President Mathias stated: "No employe of the bargaining unit was laid-off, thus 23.01 and 23.02 are not called into effect. . ."

All in all then, the record shows that while there has been some confusion over whether the elimination of a position and subsequent reassignment constitutes a lay-off, the fact remains that there is no clearly-defined past practice regarding this issue. Hence, the word "layoff" in Article XXIII must be given its ordinary meaning - one which refers to the separation of employment. Since that did not happen here, there was no lay-off and there similarly was no need for the District to lay-off part-time, temporary, or seasonal employes under Section 23.03 before eliminating Jamieson's position.

The Union is more on the mark in pointing out that what happened to Jamieson is somewhat like a football receiver who is caught between a layoff "zone" and a transfer "zone". That is true since the contract does not clearly address what is to happen when the District eliminates a slot and then reassigns that displaced incumbent to another slot.

But that does not necessarily mean that such an incumbent has the right to bump any less seniored employe who, in turn, then gets to bump a less seniored employe who, in turn, etc. For bumping is an important contractual right, one which many employers oppose because of its disruptive results and

one which therefore cannot be read into a contract when there is no provision for it. That is why there is no merit to the Union's claim that Jamieson and other affected employes had unlimited bumping rights.

It therefore is difficult to determine what should be done in such circumstances. At a minimum, Jamieson was entitled to bid for any vacant position, and the District in fact offered him that opportunity here. Moreover, since Jamieson worked on the day shift, he was entitled to remain on that day shift since working days is normally a substantial benefit. That means that he was entitled to bump the least senior head day custodian, which is exactly what the District agreed to do here. In the absence of any express contractual bumping language, the displaced head day custodian then could move to a vacant position or displace the least senior head custodian on the night shift if that was possible or displace the least senior employe on the day shift who would then move to the night shift, with no further bumping allowed.

Since the District tried to be fair in the way it handled this difficult problem, and since it tried to accomodate Jamieson's wishes as best it could, I find that the District did not violate any parts of the contract, including the promotion language of Article XXII, when it eliminated Jamieson's slot at the Lindholm School and reassigned him elsewhere.

In light of the above, it is my

AWARD

1. That the grievances are arbitrable.

2. That the District did not violate Articles XXII or XXIII when it reassigned grievant Allen Jamieson to different custodial positions; the grievances are therefore denied.

Dated at Madison, Wisconsin this 4th day of March, 1994.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator