

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 GREEN BAY BOARD OF EDUCATION : Case 148  
 EMPLOYEES UNION, LOCAL 3055, : No. 50013  
 AFSCME, AFL-CIO : MA-8126  
 :  
 and :  
 :  
 GREEN BAY AREA PUBLIC SCHOOL DISTRICT :  
 :  
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Appearances:

Mr. James E. Miller, Staff Representative, Wisconsin Council 40, AFSCME,  
Mr. J.D. McKay, Attorney at Law, on behalf of the Green Bay Area Public

AFL-CIO  
 School

ARBITRATION AWARD

Green Bay Board of Education Employees Union, Local 3055, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the Green Bay Area Public School District, hereinafter the District, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The District subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on January 25, 1994 in Green Bay, Wisconsin. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs in the matter by March 28, 1994. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties were unable to stipulate to a statement of the issues and agreed that the undersigned would frame the issues within the bounds of the parties' statements.

The Union would state the issues as being:

Did the Employer violate the contract when it eliminated the Custodian II/sub positions at both Kennedy and King Elementary Schools and then created a new Custodian II position covering both of these schools. If so, what is the remedy?

The District would state the issue as follows:

Did the Employer violate the Collective Bargaining Agreement when it eliminated two half-time sub positions and combined the two half-time custodian positions into one position, the net effect of which was to reduce the staff through attrition by one full-time equivalency.

CONTRACT PROVISIONS

The following provisions of the parties' 1992-94 Agreement are cited:

**ARTICLE II**

**MANAGEMENT RIGHTS**

The Employer, on its own behalf, hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and the constitutions of the State of Wisconsin, and of the United States, including, but without limiting the generality of the foregoing, the rights:

. . .

4. To establish new jobs and abolish or change existing jobs;
5. To manage the work force and determine the number of employees required;
6. To subcontract where staff vacancies have been created by quit, discharge for cause, retirement or any other reason, but not for or by staff layoff. Subcontracting shall be done by attrition and in accordance with Article XXXIV of this Agreement.

The exercise of management rights in the above shall be done in accordance with the specific terms of this Agreement and shall not be interpreted so as to deny the employee's right of appeal.

The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Employer, the adoption of policies, rules, regulations, and practices in furtherance thereof, and the use of judgment and discretion in connection therewith, shall be limited only by the specific and express terms of this Agreement and Wisconsin Statutes, Section 111.70, and then only to the extent such specific and express terms are in conformance with the Constitution and laws of the State of Wisconsin and the Constitution and laws of the United States.

. . .

**ARTICLE IV**

**PRACTICES**

All existing practices pertaining to hours, working conditions, rules and regulations not specifically mentioned in this Agreement shall continue in force as at present until they are adjusted by mutual agreement between the Employer and the Union. The Employer further agrees to maintain all existing benefits not contained in this Agreement.

. . .

**ARTICLE VII**

**SENIORITY**

The Employer agrees to the seniority principle.

Seniority shall be established for each employee and shall consist of total calendar time elapsed since the date of h/er regular employment. Seniority rights terminate upon discharge or quitting.

Seniority shall be established separately in the craft union.

In the event of lack of work or lack of funds, employees shall be laid off in inverse order to the length of service; and the last employee laid off shall be the first to be called back from such layoff provided the employee's qualifications meet the needs of the Employer.

In the event of layoffs, the remaining jobs will be realigned by a seniority bumping procedure with such procedure occurring at a full meeting between the Employer and the Union at a time agreed upon prior to the effective date of layoff.

Regular employees shall not be subject to layoff until all temporary and probationary employees in the Maintenance Unit are first laid off.

If a layoff under consideration is to be a reduction-in-force layoff, the Employer shall give the Union ten (10) days' notice.

No employee hired prior to July 1, 1992, shall be laid off due to the sub-contracting provisions contained in this Agreement.

If any employee fails to return to h/er job within seventy-two (72) hours after being recalled, h/er employment shall be terminated. Notice of such recall and/or terms of employment shall be furnished to the Union.

. . .

BACKGROUND

The District maintains and operates a number of school buildings and employs maintenance employees for the upkeep of these buildings. The Union is the exclusive collective bargaining representative of those maintenance employees.

The Grievants, Mike Berceau and Art Brodhagen, have been employed by the District as Custodians.

At the end of the 1991-92 school year, Brodhagen posted into a Custodian 2 NS/Sub position at Kennedy Elementary School. The position consisted of working five hours at Kennedy and subbing the remaining three hours where needed elsewhere in the District. The posting for the position read, in relevant part, as follows:

NOTICE OF JOB POSTING TO ALL MAINTENANCE EMPLOYEES

DATE: April 23, 1992

BULLETIN: #991

POSITION: Custodian 2 NS/Sub

LOCATION: Kennedy School

PAY LEVEL: 2  
(New employees on probation 90% of above pay level)

HOURS OF WORK: 3:15 p.m. to 11:15 p.m.  
40 hours per week

NOTE: This position will be split between home school and any other school that is in need of substitute help. The exact number of hours in each will be assigned by the Manager of Custodial Services. The first part of the work shift will not necessarily be at the home school.

Applications for the above position will be accepted at my office until Tuesday, May 5, 1992.

Responsibilities include routine manual and semi-skilled work in the performance of a variety of custodial and maintenance tasks essential to maintain the school buildings and grounds in a clean and orderly condition. It may be necessary for the employee in this position to open up the building and be available to assist in setting up for after school activities. The Custodian 2 also performs building and equipment repair, routine tasks to ensure building security and other related work as required. (Call Nancie at 448-2155 for a detailed job description.)

Work is performed under the direction of the Manager of Custodial Services and is reviewed through inspection and observation of the cleanliness and order of the areas to which the employee is assigned.

. . .

In July of 1992, the District posted a similar position at the Martin Luther King, Jr. Elementary School. The posting read, in relevant part, as follows:

NOTICE OF JOB POSTING TO ALL MAINTENANCE EMPLOYEES

DATE: July 1, 1992

BULLETIN: #1006

POSITION: Custodian 2 NS

LOCATION: Martin Luther King, Jr. Elementary School/Substitute

PAY LEVEL: 2  
(New employees on probation 90% of above pay level)

HOURS OF WORK: 3:15 p.m. to 11:15 p.m.  
40 hours per week

NOTE: This position will be split between home school and any other school that is in need of substitute help. The exact number of hours in each will be assigned by the Manager of Custodial Services. The first part of the work shift will not necessarily be at the home school.

Applications for the above position will be accepted at my office until Friday, July 10, 1992.

. . .

The remainder of the posting listing the responsibilities, tasks, etc., were essentially identical to the posting for the Custodian 2 NS/Sub posting at Kennedy. Berceau posted into the Custodian 2/NS Sub position at King Elementary. During the 1992-93 school year Brodhagen worked in the Custodian 2 NS/Sub position at Kennedy and Berceau began working in the Custodian 2/NS Sub position at King effective October 12, 1992. Brodhagen worked five hours per shift at Kennedy and subbed where needed elsewhere in the District the remaining three hours of his shift. Berceau worked four hours per shift at King and subbed elsewhere the remaining four hours of his shift.

June 7, 1993, the District's Board of Education acted upon a number of recommendations it had requested regarding reorganizing and reducing support staff. One of the recommendations was "To discontinue one Custodian II Night Shift/Substitute position at either Kennedy or King Elementary School." By letter of June 20, 1993, Lori Gmack, the District's Supervisor of Human Resources, notified the Union's President, Al Rymer, that the Board had eliminated eight positions, including "(1) Custodian 2 NS/Sub (King)".

Gmack sent Rymer the following letter of July 12, 1993, which read, in relevant part, as follows:

Dear Al:

As I advised you in my June 20, 1993, letter, the Board of Education eliminated eight (8) positions in the maintenance unit at its June 7, 1993 meeting.

Currently there are incumbents in four (4) of the eliminated positions. As a result, it is necessary to schedule a meeting to allow the incumbents to either bump or post by seniority into another position for which they qualify.

Please let me know a convenient date to hold the meeting. If you have any questions or feel there are any unresolved issues, please contact me prior to the bumping meeting.

Gmack notified Berceau in July of 1993 that his job was being eliminated and asked him whether he would want to go to Eisenhower or West from his position at King. Berceau worked at King throughout the summer and on the first day of school of the 1993-94 school year he was assigned to East on a temporary basis. Also on the first day of school Brodhagen's assignment was changed to four hours at Kennedy and four hours at King.

On September 28, 1993, Gmack sent Rymer the following letter:

Dear Al,

This memo is to advise you that the District will be abolishing one (1) Custodian II/Sub position at Kennedy and creating one (1) Custodian II position at Kennedy/King effective immediately.

If you have any questions, please contact me.

Sincerely,

Lori J. Gmack /s/  
Lori J. Gmack  
Supervisor of Human Resources

On September 29, 1993, a meeting was held where the employees whose jobs were eliminated exercised their bumping rights. As a result of that meeting, effective October 1, 1993, Berceau bumped into the position of Custodian II on the second shift for six hours at Danz school and two hours as a sub, and Brodhagen bumped into a Custodian II, second shift position for Eisenhower Elementary working six hours at that school and two hours as a sub. The Custodian II second shift position split between Kennedy and King, with four hours at each, was then posted, bid on, and filled by another employee.

Two grievances were filed, one by Berceau and one by Patrick Doherty on behalf of Berceau and Brodhagen, alleging that the District's actions had violated the parties' Agreement. The parties attempted to resolve the matter, but were unsuccessful, and proceeded to arbitrate their dispute before the undersigned.

#### POSITIONS OF THE PARTIES

##### Union

The Union asserts that the parties' respective statements of the issue indicates the difference in how they perceive the District's actions in this case. The Union contends that the previous jobs of Custodian II/Sub at Kennedy and King schools were not actually eliminated at either school. The work is still being performed at each school, albeit by only one individual at both of

the schools after the restructuring.

The Union characterizes the District's position as being that it somehow only eliminated the substitute portion of these jobs and combined the remaining parts into one position, and that the reduction in staff was accomplished by attrition. The Union asserts that the District uses the term "attrition" in conflicting ways, but does agree that there were no layoffs caused by the decision to eliminate jobs due to a number of positions being left vacant at the end of the 1992-93 school year. Beyond that, "attrition" is not relevant.

In the Agreement attrition is only referred to in the subcontracting provision of Article II - Management Rights and in Article XXXIV - Attrition, which details its application. In this case, regardless of whether attrition was used or actual layoffs occurred, the question of whether the jobs were properly eliminated would still exist.

The Union contends that the Custodian II/Sub positions at Kennedy and King were "intact full-time positions" when they were supposedly eliminated, and that those jobs have continued to be done at those schools. That is unlike what happened to the other positions that were eliminated. Those positions ceased to exist after the bumping meeting and the schools where they had previously existed ended up with one less employe. At Kennedy and King, the hours that were "eliminated", were then replaced by the creation of the new position. Brodhagen in fact continued to work the Kennedy/sub-position until the bumping meeting - albeit the subbing was limited to King. Similarly, until the bumping meeting, Berceau was subbing at East. Thus, although the District claimed to have eliminated the "sub" portion of their jobs, that was not done until the bumping meeting.

The Union asserts that the primary work the Grievants had been performing continued to be done at Kennedy and King. The grievance is over the decision to eliminate only a portion of the jobs and creating a new position to do the same work the Grievants had done at their respective schools. The Custodian II/Sub positions are used to more efficiently handle the cleaning workload at the District's schools and the employes in that position are available to work in whatever school has a vacancy or to be assigned to assist in their primary school. The employes in that position know in advance that is the case. They also know that they did not sign a posting for two separate part-time jobs. The District is claiming the right to eliminate a portion of these Custodian II/Sub positions as if the remaining portion did not exist, however, the Agreement does not permit it to do that. While the District has a right to create or abolish jobs, in this case the job it said was being eliminated was not. The half-day positions at the two schools are still being done in pretty much the same time frame as before. The work was not redistributed among remaining staff; rather, it is now assigned to one person who works half-day shifts at each of the two schools.

In its reply brief, the Union challenges the District's summary dismissal of the alleged violation of Article IV - Practices. The issues in this case pertain to hours and working conditions and, hence, are covered by that provision. The District simply avoids looking at the wording of Article IV. Similarly, the District asserts there was no violation of seniority, since there were no layoffs. Seniority has application beyond layoffs. Here, there was bumping caused by the elimination of jobs. If the jobs in issue were eliminated improperly, then the Grievant's seniority rights were violated. With regard to the District's claim that it can eliminate a position, but must bargain the impact, if any, the Union asserts there is no evidence that any impact bargaining took place. Lastly, as to the District's characterization of Doherty's testimony as supporting the District's position in this case, an examination of that testimony does not lead to such a conclusion.

As a remedy, the Union requests that the District be ordered to return the Grievants to the positions they held during the 1992-93 school year.

## District

The District cites Article II - Management Rights, Subsections 4 and 5, of the Agreement, as allowing the District "to establish new jobs and abolish or change existing jobs" and "to manage the work force and determine the number of employes required." It takes the position that it acted within those rights and that its actions did not violate the Agreement as alleged in the grievances.

The District notes that Berceau's grievance alleges a violation of Article IV - Practices and Article VII - Seniority, of the Agreement. The District contends that there was no testimony offered regarding "practices" and that the case does not involve a question of practices. Article IV is, therefore, not applicable and was not violated. Similarly, no testimony was offered as to any violation of the seniority provisions in Article VII. Since there were no layoffs, there were no violations of Article VII.

Doherty's grievance on behalf of Brodhagen and Berceau alleges violations of Article I - Recognition and Unit Representation, Article II - Management Rights, and Article IV - Practices, of the Agreement. The District asserts that Doherty's testimony regarding the alleged violation of Article I is not consistent with the language of that provision. According to the District, its Board may eliminate a position and must bargain the impact, if any, of that action. Doherty's testimony as to Article II referred to subsection 6 of that provision, but he conceded that subcontracting is not involved in the grievance. Doherty could give no specifics regarding the alleged violation of Article IV and he conceded that the Agreement references certain powers reserved to the Board. He also conceded that the District could do what it did in this case as long as it complied with the terms of the Agreement, and he offered no evidence that the District had not so complied.

In its reply brief, the District disputes the Union's claim that the position of Custodian II/Sub was not eliminated at Kennedy and King. It asserts that a Kennedy/King position now exists and was properly filled pursuant to the Agreement. Two half-time sub positions were eliminated at each school, resulting in the elimination of the equivalent one full-time position. The position each Grievant claims - half-time at the respective school combined with a half-time sub position, no longer exists. The persons who formerly held those positions have moved into other positions per the terms of the Agreement. Under the Union's argument, no portion of a combined job could ever be eliminated, since the remaining portion would constitute the old job under the Union's logic. The District asserts that position makes no sense and is not supported by the evidence or the terms of the Agreement.



## DISCUSSION

Despite the Union's vigorous argument to the contrary, the evidence indicates that the Custodian II/Sub positions at Kennedy and King schools were eliminated by the time of the September 29, 1993 bumping meeting. The position created is the Custodian II Kennedy/King position. While the same amount of work in terms of hours, and the same number of employees performing that work, remains unchanged at those schools, on a District-wide basis the action resulted in the full-time equivalent of one less substitute position. The person in the Kennedy/King position does not work at Kennedy four hours and sub at King for four hours, nor vice-versa. Rather, that person is permanently assigned to work four hours at Kennedy and four hours at King each shift.

Article II - Management Rights, of the parties' Agreement, reserves to the District the following rights:

4. To establish new jobs and abolish or change existing jobs;
5. To manage the work force and determine the number of employees required;

Article II goes on to require that the exercise of those rights "shall be done in accordance with the specific terms of this Agreement. . ." The Union has alleged violations of Articles I, II, IV and VII of the Agreement.

Article I - Recognition and Unit Representation, is what it purports to be, i.e., a recognition clause wherein the District recognizes the Union as the exclusive collective bargaining representative of certain employees for purposes of negotiating on questions of wages, hours and conditions of employment. There has been no showing as to how the District violated that provision by its actions in eliminating the substitute portions of the two positions. 1/

As Article II - Management Rights, Subsection 4, expressly reserves to the District the right to take the action being grieved, a violation of this provision would be dependent upon finding that the right was exercised in a fashion that violated another provision of the Agreement. Article IV - Practices, cited by the Union, cannot be read to require that all existing jobs must remain configured as is, for such an interpretation would render meaningless the rights expressly afforded the District in Article II. It is a principle of contract construction that an interpretation that would tend to render another provision of the contract meaningless should be avoided, as the parties are presumed not to have placed provisions in their agreement that they did not intend to have effect. 2/

With regard to the alleged violation of Article VII, Seniority, the Union has not indicated specifically how that provision was violated beyond arguing that the Grievant's seniority rights were violated if their jobs were improperly eliminated. There does not appear to be any issue regarding following seniority in the bumping that took place at the bumping meeting following the changes, and there also does not appear to be an issue as to how the Custodian II Kennedy/King position was filled. Rather, the Union's case boils down to the question of whether the District had the right to eliminate just the substitute portion of the jobs in question. Since Article II, Subsection 4, of the Agreement expressly reserves to the District the right ". . . To abolish or change existing jobs", that question must be answered in the affirmative.

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1/ Whatever duty the District might have regarding bargaining the impact of the change is a matter of law not placed in issue before this Arbitrator.

2/ Elkouri and Elkouri, How Arbitration Works, 3rd. ed., at p. 308.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievances are denied.

Dated at Madison, Wisconsin this 15th day of June, 1994.

By David E. Shaw /s/  
David E. Shaw, Arbitrator