BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
NORTHWEST UNITED EDUCATORS	:	Case 32 No. 50266 MA-8196
and	:	
BLOOMER SCHOOL DISTRICT	:	

Appearances:
Mr. Alan D. Manson, Executive Director, Northwest United Educators, appear
Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by Mr. Stephen L. Weld, appearing on behalf of the District.

ARBITRATION AWARD

Northwest United Educators, hereinafter referred to as NUE, and Bloomer School District, hereinafter referred to as the District, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The parties jointly requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. A hearing was held in Bloomer, Wisconsin on February 22, 1994. The hearing was not transcribed and the parties filed post-hearing briefs and reply briefs, the last of which were exchanged on May 9, 1994.

BACKGROUND

In the Spring of 1993, the District decided to reduce or eliminate a number of programs for the 1993-94 school year. One area of reduction was the Driver's Education program. In 1992-1993, Gordy Meyer had taught both the classroom portion as well as the behind-the-wheel portion of Driver's Education. The District decided to subcontract out the behind-the-wheel portion of Driver's Education for the 1993-94 school year. On April 27, 1993, Gordy Meyer was notified by the District that he would be laid off 62.5% for the 1993-94 school year. As Meyer had bumping rights, a number of reassignments were made so he retained 100% employment for 1993-94. Certain of these assignments were as follows:

Meyer was assigned the History classes taught in 1992-93 by John Welter, and Meyer remained full-time. John Welter, in turn, was assigned nothing but English classes and he, too, remained full-time. Lynette Emanuel, who taught 100% French in 1992-93, was reduced to 25% French and 50% English, for a total of 75% for 1993-94. Myra Snippen, a Business Education teacher, was reduced from full-time to half-time in 1993-94.

In April or May, 1993, Meyer spoke with Pauline Roll, the District's Superintendent, about subcontracting the behind-the-wheel portion of Driver's Education and informed her that he had spoken with the Department of Public Instruction (DPI), who had informed him that state aids would not be available. Superintendent Roll asked the District's attorney concerning the possible loss in state aids due to the Driver's Education subcontracting, and was advised that there would not be any such loss.

In early September, 1993, the District was advised that state aids would not be available where the classroom portion of Driver's Education and the behind-the-wheel portion were taught simultaneously, if the behind-the-wheel

portion was taught by someone other than a regular District teacher. The rule was that the classroom portion had to be completed first and then the behind-the-wheel instruction may be taken by a student from an outside provider. The District called a special meeting for September 9, 1993, and rescinded its decision to subcontract the behind-the-wheel instruction with a private driving school and decided to post a .4 vacancy for the behind-the-wheel instruction.

NUE requested that Meyer be reassigned to his old job with behind-the-wheel instruction, that Welter be reassigned Meyer's History classes, that Emanuel be assigned Welter's English classes, and Snippen get Meyer's 5th hour study hall. The District denied this request on the grounds that school had already started and that there would be too great a disruption on the student's education. Because neither Emanuel nor Snippen had the certification for Driver's Education, they could not post for the .4 position.

The NUE grieved the District's refusal to reassign Meyer to the behind-the wheel portion of Driver's Education, as well as the subsequent reassignments of Welter, Emanuel and Snippen. The grievance was denied and appealed to the instant arbitration. The parties stipulated that all four teachers were qualified to move to the positions they sought.

ISSUE

The parties stipulated to the following:

> Did the District violate Article II, Part 7; Article IV, Part 1; Article V, Part 2 or Article XIV, Parts 1 and 2, when it refused to reinstate Gordy Meyer to his 1992-93 teaching assignment when a vacancy existed? In addition, did it violate the collective bargaining agreement when it refused to reassign John Welter to the teaching of History classes, or to increase the teaching assignments of Ms. Emanuel and Ms. Snippen? If so, what is the remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE II - RECOGNITION

. . .

3. The Board on its own behalf and on behalf of the electors of the School District, hereby retains and reserves unto itself without limitation, all powers, rights, authority, duties, and responsibilities conferred upon and vested in it by the school code and the laws of the state, the constitution of the state of Wisconsin and/or the United States. Such rights, duties, etc., shall include, by way of illustrations and not by limitation, the right to:

   A. Manage and control its business, its equipment, and its operations and to direct the working forces and affairs of the entire school system within the boundaries of the Bloomer School District.

   B. Continue its rights, policies and practices or assignment and direction of its personnel, determine the number of personnel, and work schedules of all the foregoing.

   C. Direct the working forces, including the right to establish and/or eliminate positions, to hire and rehire, evaluate, promote, suspend, non-renew and discharge employees, including assignments for all programs of an extra-curricular nature, determine the size of the work force and to layoff employees.

   D. Determine the services, supplies and equipment necessary to continue its operation and to determine all methods and means to distributing the above and establishing standards of operation, the means, methods and processes of carrying on the work, including automation or subcontracting thereof or changes therein.

. . .

5. The listing of specific management rights in this Agreement is not intended to be nor shall be restrictive of or a waiver of any rights of management not listed and specifically surrendered herein whether or not such rights have been exercised by the Board in the past.

6. The Board reserves all rights and responsibilities not specifically nullified by this Agreement.

7. The Board agrees that it will not exercise any

of the foregoing rights in such manner as to violate the express provisions of this contract or the statutes or constitution of the State of Wisconsin or the United States.

. . .

ARTICLE IV - ORGANIZATIONAL RIGHTS

1. The provisions of Wisconsin Statute 111.70 will be observed by the Board and NUE.

. . .

ARTICLE V - TEACHER RIGHTS

. . .

2. All rules and regulations governing employee activities and conduct shall be interpreted and applied as uniformly as is reasonably possible throughout the District; provided, however, that the parties recognize that valid differences in rules and regulations on similar issues may exist between the buildings and between grade levels and subject area fields.

. . .

ARTICLE XIV - LAYOFFS

1. When the Board determines that it is necessary to lay off a teacher within an area of certification, in whole or in part, teachers teaching in that area of certification shall be laid off in the inverse order of their initial employment according to the following procedure. The Board may exempt one (1) employee annually from the seniority-based layoff provision. The Board will rely on retiring, resigning, or teachers who volunteer for layoff, to the extent possible to avoid involuntary layoffs.

2. A teacher whose position is eliminated shall either be transferred to a vacant position for which he/she is qualified and certified, or replace the teacher with the lowest seniority anywhere within the school system in the area in which the teacher whose position is eliminated is qualified and certified. The teacher with the lowest seniority would then be laid off except:

. . .

5. Recall shall be in the inverse order of layoff if the laid off teacher is certified to fill the vacancy.

NUE's POSITION

The NUE contends that the District has betrayed the basic principle in

the job security seniority-based layoff article. It submits that the District has twisted the details of Article XIV to improperly frustrate its intent. NUE believes that the District has a contractual obligation to return staff members to their teaching positions which were changed through bumping as a result of a planned elimination of a position, which plan was never put into effect. It insists that the layoffs of Emanuel and Snippen would have been lessened had there been no planned subcontracting of a portion of Driver's Education and when no subcontracting occurred, the District was obligated to restore the employes to their previous positions.

It points out that Meyer was laid off because the District was eliminating a portion of his position but then the District did not eliminate his position and the District had no authority under the layoff clause to transfer him. It further asserts that the District cannot rely on its Management Rights because they are limited by the terms of the contract. It argues that when the District abandoned its plan to eliminate the position, it abandoned the layoff clause as a source of authority to act and must not refuse to take action to diminish or prevent layoffs. It maintains that the layoff language is to minimize layoffs and bumping and the District cannot use the strict terms of the recall language to prevent a laid off teacher the opportunity to reduce that layoff.

NUE refers to the first paragraph of Article XIV which provides that the District will rely on retiring, resigning or volunteers to avoid involuntary layoffs to the extent possible. It claims that the intent of this language obligates the District to make a good faith effort to restore the long-established teaching assignments of veteran teachers.

The NUE asserts that the District violated Articles II-7 and XIV -1 because it wanted to make life difficult for Meyer as evidenced by the District's various communications about the Driver's Education program and the failure to give him credibility with respect to DPI/DOT regulations. It alleges that the District's actions were based in part on an active dislike for Meyer's having engaged in protected activities including successfully grieving his non-renewal.

NUE disagrees with the District's characterization of the reassignments as a "mid-semester" disruption when the reassignment could have been made within two weeks of the start of school. NUE admits that the District has exclusive control over quality education decisions but maintains that this authority cannot be used as a pretext to overcome contractual obligations. NUE contends that the District violated Article V -2 by its unreasonable response to the request of veteran teachers to return to their accustomed assignments in order to diminish involuntary layoffs.

NUE argues that the District violated the spirit and intent of Article XIV. It insists that an integral part of the seniority based layoff system is the recall system and a short hiatus in the behind-the-wheel Driver's Education instruction is not a legitimate basis for the full invocation of the layoff clause. It maintains that once the District decided not to follow through on eliminating the behind-the-wheel portion of Driver's Education, it was obliged not to follow through on the bumps and involuntary transfers as no position was eliminated, so reliance on the layoff clause was not legal. NUE requests that Emanuel and/or Snippen be made whole for the losses suffered as a result of the District's failure to allow Meyer to return to his position after it was decided to not eliminate it. NUE also seeks prospective relief for 1994-95.

DISTRICT'S POSITION

The District contends that the only language applicable to the instant case is the layoff clause, Article XIV and the evidence fails to prove any

violation of Article IV, Part 1, Article II, Part 7 or Article V, Part 2. The District asserts that it has not violated Article XIV and acted within the contract in making its staffing decisions and assignments for the 1993-94 school year.

The District claims that it had sought to eliminate the behind-the-wheel Driver's Education classes from Gordy Meyer's teaching assignment under Article II, paragraph 3(D). It points out that as Meyer was the only Driver's Education teacher, he was the only teacher affected by the subcontracting decision. It notes that under Article XIV, part 2, Meyer could transfer to a vacant position for which he was certified or bump the least senior teacher, and as there were no vacant positions, Meyer bumped and maintained a full-time position with the District.

The District maintains that it did not violate the contract by its decision to rescind the subcontracting and creating a vacant .4 position for Driver's Education. The District strongly denies that it violated the layoff clause by pretending to eliminate a position as an excuse to transfer and lay off employes. It maintains that when school started, it had every intention of subcontracting the behind-the-wheel instruction, a decision it had made in the spring of 1993. It states that it was not until early September that the District learned of the potential problem with its decision to subcontract. It disputes the NUE's assertion that the District knew or should have known that there were potential problems because Meyer had informed Administrator Roll about them. Roll had gotten legal advice to the contrary and had no reason to reconsider the decision until the District received confirmation in September 1993 from DPI and DOT that it could not offer behind-the-wheel and classroom instruction simultaneously unless both instructors were on staff. It notes that the District scheduled a special meeting, and decided to rescind the subcontracting, but to avoid disrupting students, it decided not to reverse the bumping process and to create an in-house position.

The District claims that the decisions regarding staffing and scheduling are policy decisions within the District's Management Rights. It submits that under the listed rights in Article II, the District had the right to assign Meyer and Welter their 1993-94 teaching assignments. The District takes the position that Meyer and Welter had the choice of taking the reduced assignments or to transfer and they took the transfers.

The District insists that there were good and valid reasons not to reassign Meyer and Welter and that was to avoid disruption to students. Even though it was possible to reverse the assignments, this was not the preferred alternative.

The District argues that it was not obligated to reassign Welter so Emanuel would have additional classes. The District believes that nothing in the contract requires it to reassign teaching duties in order to establish a vacancy within a laid-off teacher's certification. According to the District, Emanuel was reduced to .75% and had the right to be recalled to classes for which she is certified (French and English) but unless Welter was reassigned history classes, thereby creating an English vacancy, Emanuel would not be recalled as there was no vacancy.

The District asserts that it is unclear how Snippen could justify any recall. It notes that NUE refers to Meyer's 5th period study hall but layoffs do not apply to study hall assignments and recall requires certification and there is no certification for study hall. The District asserts that it is not obligated to assign Ms. Snippen to study hall assignments. The District requests that the grievance be dismissed in its entirety.

NUE's REPLY

NUE takes exception to the District's assertion that the .40 position was established after the school year began asserting that the position was ever present and not filled by a bargaining unit member until after the school year began.

NUE argues that the District is relying on technicalities such as employes were not certified for the particular vacancy and therefore were not eligible for recall. NUE submits that seniority bumping should have been rescinded and all teachers involved would have returned to their previous assignment and the remedy requested is proper. With respect to technicalities, NUE asserts its own and that is that while the District contemplated "eliminating" the Driver's Education position, it never did so, and thus the position was not eliminated and the "layoff" of Meyer and subsequent bumping was improperly founded and must be rescinded. NUE claims that the District lacks authority under the layoff clause to deny the requested transfers because the original basis of all the layoffs never occurred.

With respect to Snippen's study hall assignment, NUE says that if Meyer was restored to his position in Driver's Education, then someone would be assigned to the study hall and NUE says that this should be Snippen. NUE asserts that because Meyer never was transferred back, the question cannot be answered because the District blocked it by its improper conduct by denying Meyer his requested return to his previous assignment.

DISTRICT'S REPLY

The District submits that, contrary to NUE's assertion, it did subcontract the behind-the-wheel portion of the Driver's Education position but the subcontractor did not do any actual instruction. The District notes that an exchange of letters in June and July, 1993, establishes that NUE knew of the subcontracting and the position had been eliminated.

The District insists that it had no contractual obligation to return staff members to their previous positions when it rescinded the subcontract. The District asserts that nothing in the contract requires it to reassign Meyer and Welter and to increase the FTE of Emanuel and Snippen. The District maintains it had the right to subcontract and it implemented the decision to subcontract by layoff. It claims that it could "manipulate" positions to meet legitimate educational goals and policy as established by the District's Board. It insists that it has followed the letter and intent of the master agreement. It alleges that the intent of the layoff clause is to set out reduction in force procedures and selection criteria and not to avoid involuntary layoffs but to set out a procedure for them and nothing in the agreement requires reassignment of Meyer to his prior behind-the-wheel assignment.

The District claims that even if it did not eliminate the behind-the-wheel position, it retained the right to transfer staff to new teaching positions. According to the District, Article II provides that it has the right to transfer, or reassign employes and if Article XIV is not applicable, then Article II applies. The District takes the position that regardless of Meyer's and Welter's desired assignments, arbitral authority supports the District's right to transfer employes.

The District insists that the assertion of union animus is totally unfounded. It notes that Meyer's grievance on non-renewal was ten years ago, he retained a full-time position and the decision to subcontract was founded in budget restraints. The District reiterates the scenario with respect to the decision to subcontract and its subsequent rescission. The District submits that the grievance must be denied.

DISCUSSION

Article XIV of the parties' collective bargaining agreement provides as follows:

> 1. When the Board determines that it is necessary to lay off a teacher within an area of certification, in whole or in part, teachers teaching in that area of certification shall be laid off in the inverse order of their initial employment according to the following procedure. . .The Board will rely on retiring, resigning, or teachers who volunteer for layoff, to the extent possible to avoid involuntary layoffs.

The evidence establishes that in the spring of 1993 the District properly deemed that it was necessary to reduce Meyer's position for budgetary reasons and the record does not demonstrate that this initial decision was made in bad faith or for any reasons of animus toward Meyer. Thus, the initial decision on layoff and Meyer's reassignment did not violate Article XIV.

The District's decision to rescind its subcontracting on September 9, 1993, however meant that the Board determined that it was not necessary to layoff a teacher within an area of certification and essentially, the decision that it was not necessary meant that Article XIV, paragraph 1, was no longer applicable and Meyer should not have been laid off. Inasmuch as the position was not eliminated, Meyer should not have been transferred and the District's refusal to return him to his position violated Article XIV.

The District has raised a number of defenses such as a disruption of students and teachers however, as classes started on August 25, 1993, there would have only been 11 or 12 class days that had gone by and Meyer was teaching history which he had apparently not done for some time and Welter had been teaching it regularly, so any disruption would not have been as great as the District asserts. Even so, disruptions occur due to illness, death, and other emergencies and students have to cope with these. It should be emphasized that following analysis applies to the facts of the instant case and had the District's rescission occurred, say on January 9, 1994, the student disruption argument would be more persuasive. Additionally, layoff decisions may change or be reversed for the following school year and such would not be a violation of Article XIV.

Article XIV indicates an intent to avoid involuntary layoffs to the extent possible. This intent translates into providing available employment to existing employes rather than hiring new employes when existing employes are on layoff. It is not unusual for School Districts to notify teachers they will be laid off in the spring to allow for flexibility to cover factors that may occur during the summer, such as loss of aids, cost controls, new mandates, etc. If a very senior teacher is laid off and bumps into an area where another teacher is less senior but has substantial seniority and the second teacher's certification does not allow further bumping, that teacher would be laid off. If no contingencies occur during the summer and the first teacher's position is restored and the second laid off teacher is not certified for it, it would be patently unfair to hire a new teacher while the senior teacher is on layoff. Because of the salary schedule, a District may be benefitted financially by hiring a new teacher but the intent of the layoff clause would be violated. If the position is restored, the bumping teacher should return to it so the bumped teacher can be recalled and involuntary layoffs avoided.

Another factor here is that Meyer had told Administrator Roll that the District would lose aids. The District had ample time to check this out before school started and while it found out after classes started, it was the District's mistake and it must be responsible for its mistakes. This is not to say that the District was acting deliberately or intended the result here;

rather, it is concluded that an honest mistake was made and the District, not laid off teachers, should bear the cost of this mistake.

The District claims that it could have reassigned or transferred Meyer and Welter under Article II and such conduct would not violate the contract. The agreement must be read as a whole as to give effect to all of its provisions. Article II of the agreement provides that the District has the right of "assignment and direction of its personnel, determine the number of personnel, and work schedules of all of the foregoing." It has the right to eliminate and establish positions, and by inference, to transfer employes. However, Article II, paragraph 7 provides that the District will not exercise any of the foregoing rights in such manner as to violate the express provisions of the contract. Article XIV provides a method for layoffs and provides a transfer to a vacant position if he/she is qualified and certified. Under the facts of this case, it would appear that the transfer of Meyer, the only Driver's Education teacher, to teach history, then to hire a new person to teach a portion of Driver's Education would not make sense and would be a method to circumvent Article XIV and render it mere surplusage. It is reasonable to assume the parties put Article XIV in the contract to cover the instant case and the language of Article II cannot be used to circumvent or render Article XIV a nullity; thus the District's arguments with respect to the right to transfer are not persuasive.

Under the unique facts of this case, the District violated Article XIV because it decided that no layoff of Driver's Education was necessary for the 1993-94 school year and it is only that school year that is in question with respect to the layoffs. It is concluded that the District violated the agreement when it continued to apply the layoff procedures to Meyer after it determined that no layoff was necessary, thereby violating Article XIV.

The school year is over, so any possible disruption never occurred which apparently was of benefit to the District. Thus, the remedy here is simply monetary. Meyer and Welter were retained full-time although not teaching in the area they should have been but there is no remedy for this except for prospective relief. With respect to Emanuel and Snippen, they continued on layoff while a new teacher was hired and this mistake can be remedied monetarily. Meyer will be returned to his former position in 1994-95, if it still exists, and Welter will likewise return to his former position in 1994-95, if it still exists. Emanuel could have been assigned two of Welter's English classes and that would have made her a full-time teacher. The District is directed to pay her the wages and benefits she would have been paid had she been 100%.

With respect to Snippen, the District has asserted that a study hall assignment is not required to be assigned to her. Arbitrators have held that a District is not obligated to assign study halls from a junior teacher to a senior teacher so that a senior teacher would retain a 100% contract. 1/ This argument is not applicable here. It appears that Meyer was reduced to 62.5% based on 3 periods of behind-the-wheel instruction and that was assigned to a new teacher. If 2 periods or 25% is reassigned monetary-wise to Emanuel, that leaves 1 period for Snippen, or 12.5%. Although the new position was .40 indicating by simple math a 25 - 15% split for Emanuel and Snippen the undersigned is not convinced that it would be more than 12.5%. A more senior employe than Snippen might have received the study hall, but the evidence failed to establish this and the undersigned concludes that Snippen should be compensated an additional 12.5% wages and fringes for 1993-94.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

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1/ School District of Montello, unpublished, (Block, 1982).

AWARD

The District violated the layoff provision of the parties' agreement when it failed to reassign Meyer to Driver's Education when it rescinded its layoff decision on September 9, 1993. Additionally, Welter should have been restored the history classes assigned to Meyer and Emanuel assigned the two English classes assigned to Welter. Snippen should have been assigned the third class period left over. The District shall treat Meyer and Welter as if Meyer taught full-time Driver's Education in 1993-94 and Welter, history and English at 100% for 1993-94. The District shall treat Emanuel as if she were 100% for 1993-94 and grant her backpay and benefits accordingly. Snippen will be treated as having a 62.5% contract for 1993-94 and granted back pay and benefits accordingly.

The undersigned will retain jurisdiction for a period of thirty (30) days for the sole purpose of resolving any disputes with respect to the remedy herein.

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

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

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