BEFORE THE ARBITRATOR

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| In the Matter of the Arbitration<br>of a Dispute Between<br><br>TOMAH AREA SCHOOL NON-TEACHING<br>EMPLOYEES, LOCAL 1947-B, AFSCME,<br>AFL-CIO<br><br>and<br><br>BOARD OF EDUCATION OF THE<br>TOMAH AREA SCHOOL DISTRICT | Case 61<br>No. 52534<br>MA-9015 |

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, on behalf of the Union.
Lathrop & Clark, by Ms. Jill Weber Dean, on behalf of the District.

## ARBITRATION AWARD

The above-entitled parties, herein "Union" and "District", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held on September 29, 1995, in Tomah, Wisconsin. The hearing was transcribed and both parties filed briefs which were received by November 29, 1995.

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. *Did the District violate Article 8, Section 3, B, of the contract when it failed to immediately post within five (5) days the bus driver position formerly held by Earl Kastenschmidt, and, if so, what is the appropriate remedy?*

2. *Whether the District is required to immediately post the position of a successful job applicant or whether, instead, that position need not be posted and filled until the conclusion of that applicant's trial period.*

## DISCUSSION

Former bus driver Earl Kastenschmidt resigned his position on March 3, 1995. 1/ The District then assigned his bus route to a temporary employe who was not covered under the parties' collective bargaining agreement. The District subsequently learned that there was about a nine-mile error in the size of Kastenschmidt's bus route and it reconfigured that route so that it ended up being about 27.5 miles rather than the 38 previously reported. The District on July 21 posted that route by calling it "Earl Kastenschmidt's Route", (Joint Exhibit No. 4), and it was ultimately awarded to substitute bus driver Gaylon Jorgenson who began driving that route in August for the subsequent school year.

Director of Transportation and Maintenance Gary Sartorius testified here that he did not immediately post and fill two earlier bus driver positions which became vacant in December, 1994, because he needed time to evaluate the most efficient way to structure those routes; that these positions were posted in February, 1995; and that no grievance was filed over those situations. He also said that he needed time to study Kastenschmidt's vacated route to determine whether it could be combined with other routes; whether it could become more efficient; and whether some parts of that route could be moved to other routes in the area. He further stated that he regularly reviews all bus routes in this fashion in order to "manage the system as best as we can so that we have an efficient, safe operation". He added that it was unreasonable to conclude any job evaluations within five days of a death or resignation which is why the District sometimes uses temporary employes for a ninety (90) day period, during which time this evaluation process is conducted.

On cross-examination, he said that if vacancies were posted within five days, the evaluation process would have to take place afterwards.

School Superintendent Anthony M. Hinden testified that he previously served as the District's Business Manager; that he then always assumed that "a position did not become a vacancy until we as an employe felt it was a vacancy and that we had time to evaluate positions"; and that in some cases these evaluations took more than 5 days, after which they were posted. He also said that the Union never grieved over the District's policy in the past; that the District's Board of Education never approved Joint Exhibit 4 which is the posted job vacancy for Kastenschmidt's former route; and that Kastenschmidt's former route was one of the routes slated for possible consolidation or combination as a result of the District's purchase of larger 78-person buses.

Robert T. Fasbender, the District's current Business Manager, testified that throughout his tenure he always has assumed that "a vacancy occurs when management determines there's a vacancy"; that there "never" has been a grievance over this practice; and that as a result of

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1/ Unless otherwise stated, all dates hereinafter refer to 1995.

reconfigurating Kastenschmidt's bus route from 38 to 27 miles, it dropped two or more pay categories. He added that if Kastenschmidt's original route were posted at the higher pay grade, a grievance could be filed by his successor complaining that the route subsequently dropped two pay grades. He further testified that job postings for bus routes do not list the actual miles of the routes and admitted that he told the Union on or about March 3 that he would post Kastenschmidt's vacant route as soon as possible, but that he was unable to do so because of the need to reconfigure his route.

Union President John Hableman testified that Fasbender told him on or about March 3 that he would post the route as soon as possible and that Fasbender thereafter never told him why there was a delay in doing so.

The record also shows that the Union in 1989, 1990 and 1991 complained about temporary employes working more than ninety (90) days before their slots were posted and that the Union did not then proceed to arbitration over any claim that those vacant slots had to be filled within five (5) days.

The Union filed the instant grievance on April 6 which charged the District with "Failure to post vacancy when they occur" and which asked as a remedy: "Post vacancy and make successful applicants made whole for any losses sustained."

The Union argues that the grievance should be sustained because Article 8, Section 3, B, states that all vacancies must be posted within five days; because the District in fact did "declare a vacancy when it continued operating the Kastenschmidt bus route"; and because the District must exercise reasonable diligence in evaluating any vacated positions. It asserts that its prior grievances dealt with temporary employes and not filling vacancies and that they thus have no bearing on the issues here; that the phrase "temporary employe" in Article 6 of the contract only refers to other employes who are on leaves of absence; that Kastenschmidt's "vacant bus route was not temporary by definition"; and that waiting three months to post his "vacancy is neither expeditious nor reasonable." As a remedy, the Union requests that the District be ordered to post vacancies no less than five (5) work days after the vacancy has occurred and that Jorgenson, who was eventually awarded the vacancy, be made whole by awarding him backpay.

The District, in turn, contends that the Union has failed to meet its burden of proving that the contract has been violated; that Article 8, Section 3, B, is ambiguous on its face, thus warranting the use of parol evidence such as bargaining history and past practice which support its position; that it has the inherent management right to fill a vacancy under Article 16 of the contract; and that it is free to use temporary employes up to ninety (90) days. The District further contends that it needs time to properly evaluate vacated bus routes; and that various arbitration cases support its position; that the Union has failed to prove that the District "lacked good faith or legitimate reasons for declaring. . .Kastenschmidt's bus route vacant on June 21";
and that the Union's requested make-whole remedy should not be granted.

This case turns upon the application of Article 8, Section 3, B, which provides:

> A. In filling vacancies within a job category, making promotions, or where new jobs are created within a job category in the bargaining unit, those regular employes with the most seniority in the job category shall be given preference in filling vacancies, if qualified and available. If a vacancy is not filled from within a job category, employes from other job categories shall be given preference in filling such vacancy. The most senior applicant who is qualified and available will be selected.
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> B. When a vacancy occurs, or when any job other than a special education aide job is increased in time by doubling the hours per day or by increasing the hours by two hours or more per day, whichever is less, or when any special education aide job is increased in time by three hours or more per day, a notice shall be posted no less than five (5) workdays after the vacancy has occurred. Vacancies shall be posted for five (5) workdays. Employes wanting such posted jobs shall communicate in writing their interest to the person designated in the notice. A copy of the notice shall be provided to the Union. Vacancies occurring between June 1 and September 1 shall be advertised on one occasion in the official school paper. The notice shall include the following statement: "Current employees shall receive preference for this position." The Employer agrees to number job postings.
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> C. Any employee selected to fill a vacancy shall be given at least fifteen (15) workdays to qualify, and this period may be extended by mutual agreement.
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> D. Employees who took a test in relation to a vacancy shall be able to review the test within two (2) weeks of taking the test.
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> **Section 4.** Employees moving from one job category to another shall retain all seniority for purposes of fringe benefits, vacations, and severance pay.

Contrary to the District's claim, this language on its face is clear and unambiguous in stating that vacancies must be filled within (5) five workdays. It is hard to see how any language can be clearer than that.

The only possible basis for concluding otherwise is to accept the District's claim that a "vacancy" arises only after it determines that one exists and that it should be filled. This claim presupposes that the District can act in this fashion under Article 16 of the contract, entitled "Management", which states:

> Except as otherwise provided in this Agreement, nothing herein shall limit the Employer in the exercise of the rights and functions of ownership or management, including but not limited to the right to manage the operations of the Employer and direct the workforce, the right to hire new employes, to assign work, to determine the number and location of its operations, the services required therein, and the quality of such service, including the means and processes of services and the materials used therein. This provision shall not be used to discriminate against any employes.

The District thus points out that it has the inherent right under this language to determine whether a vacancy exists and whether it should be posted and filled.

This is true, but only to a point: that point centers on whether the District wants the work formerly performed to be continued. Thus, if the District wants to totally abolish a bus route -- or the duties of any other position for that matter -- it certainly has the right to do so.

But, that is not what happened here. The District, in fact, continued Kastenschmidt's route since the school children on that route continued to be picked up and dropped off to and from school after his resignation.

True, his route was subsequently changed by deleting about nine miles. Yet, it still remained "Kastenschmidt's Route" since that was the exact title that the District used when it posted his vacated position. (Joint Exhibit No. 4).

The District nevertheless claims that it was justified in waiting so long before declaring that vacancy because it needed time to study and revise it and because it cut that route from about 38 to 27.5 miles. However, there is nothing in the contract which states that the District can delay posting vacancies whenever that happens and the record shows that the District could have posted this vacancy within five (5) days and then studied whether it had to be changed. Indeed, Sartorius testified to that effect.

The District asserts that a past practice supports what it did here. That practice, however, cannot supersede the clear language which is found in Article 8, Section 3, B. Furthermore, it is not at all clear that the Union before the recent past was ever confronted with a situation of where the District refused to post a vacancy because it insisted on using temporary employes for up to ninety (90) days during the school year.

That is why the grievances filed in 1989, 1990 and 1991 are not much help in resolving this dispute since none of them asserted that vacancies had to be posted within five (5) working days. Hence, it is entirely possible that those disputes centered on Article 16 of the contract which limits the use of temporary employes to "school vacation periods" or Article 6 which deals with filling in for employes during a bargaining unit member's leave of absence. It therefore appears that none of them dealt with the precise issue here; i.e., whether the District during the school year can refuse to immediately post a vacancy regarding a vacated bus driver route which is performed by a temporary employe for up to ninety (90) days.

The record further shows that Sartorius, Hinden and Fasbender all testified in substance that the District in the past has filled bus driver routes in the same fashion it did here. However, it again is unclear whether the District's actions in the past were limited to the summer months and the autumn hiatus, which the Union agrees that the District has more flexibility in filling vacancies and adjusting routes.

Absent a clear past practice or ambiguous contract language, the District thereby violated Article 8, Section 3, B, of the contract when it failed to immediately post Earl Kastenschmidt's bus route and when it assigned a temporary employe to fill it.

I therefore find that little weight can be given to the fact that the Union in 1995 did not grieve over the District's failure to immediately post vacancies caused by Rick and Shirley Schwarze. For in order for there to be a binding past practice, it by definition must be "readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties". See, Elkouri and Elkouri, How Arbitration Works, p. 439 (4th Ed., 1985). The prior isolated instances of where the Union did not grieve do not rise to this level.

Furthermore, there is no merit to the District's additional claim that its actions must stand because the Union has failed to prove that it "lacked good faith or legitimate reasons . . ." for not declaring Kastenschmidt's route vacant much earlier. The District's purported good faith, however, is immaterial because the contract itself does not use that standard in determining what the District can or cannot do under Article 8.

The District cites prior cases in support of its contrary position; i.e., School District of Siren, Dec. No. 27764-A (WERC, 1994); In re Philips ECG, 79 LA 123 (Shister, 1982); In re City of Pontiac, 75 LA 1097 (Bowles, 1980).

In Siren, Hearing Examiner Jane B. Buffett ruled that the employer did not violate the contract when it hired two part-time summer employes rather than posting a forty (40) hour per week position for a bargaining unit summer employe. In so ruling, she found that the contract did not restrict bargaining unit work to bargaining unit members and that the contract did not restrict the employer's "use of temporary or casual employees to perform work similar to work performed

by bargaining unit members". Here, by contrast, the contract does limit the use of temporary employes in Articles 6 and 15.

In Philips ECG, supra., Arbitrator Joseph Shister ruled that the employer did not violate the contract when it failed to immediately post and fill a vacant cleaner-oiler job and assigned others to perform those duties on a temporary basis under contract language stating: "All vacancies in the jobs covered by the agreement will be posted by the Company for two days. . ." (Emphasis added). That language therefore differs from Article 8, Section 3, B, which requires jobs to be posted "within five (5) days." (Emphasis added). Furthermore, the prior cleaner oiler was physically and mentally handicapped and he performed his listed job duties for only about 10 hours in his 40-hour a week job and the job itself was subsequently abolished after he retired. Arbitrator Shister found that those circumstances enabled the employer to abolish the job under a cost-cutting move and not fill it. Here, on the other hand, Kastenschmidt's route was never abolished; to the contrary, the District posted his vacant position by calling it "Earl Kastenschmidt's Route", thereby showing that his job continued to exist. The facts here, therefore, are materially different from the ones in Philips ECG, supra..

Ditto for Pontiac, supra. There, Arbitrator George E. Bowles ruled that the employer did not violate the contract when it failed to fill a vacated Executive Assistant Chief slot because - in his words - that "position never appeared in the contract" and because "with a position outside the contract and the bargaining unit, it is for the City to determine first whether there shall be. . ." such a position. Here, on the other hand, the bus driving position clearly is in the bargaining unit and the contract. Hence, the District must comply with all posting requirements regarding that position, unlike the employer in Pontiac, supra.

Turning now to the question of remedy, the Union requests that the District be ordered to post future job vacancies within five work days. I agree that this remedy is appropriate. As a result, the District is hereby required to post vacancies in that fashion whenever the job duties of vacated positions are being performed.

The Union also requests backpay for Jorgenson who was ultimately awarded Kastenschmidt's route in August, 1995. This remedy, too, is appropriate because it is reasonable to assume that he would have been awarded Kastenschmidt's vacant route in March, 1995 had that vacancy then been posted. He therefore should be made whole by paying to him the difference between what he would have earned had he been placed in the bargaining unit at that time and what he in fact earned as a temporary employe between March and August, 1995.

Lastly, the District asserts that if the grievance be sustained, that it be given the right to immediately post the vacated position of a successful job bidder rather than waiting to fill it until after he/she passes a trial period. The District at that point apparently wants the right to terminate the bidder if he/she fails and if his/her vacated slot is filled by someone else. That, of course, is not what the contract provides and there is no evidence that the parties in negotiations ever agreed

to such a draconian and absurd result which in effect penalizes employes who do not qualify for another job. Accordingly, the District is precluded from effectuating that result. Instead, it shall not permanently fill any vacated positions after successful job applicants have passed or failed any trial period.

In light of the above, it is my

## AWARD

1. That the District violated Article 8, Section 3, B, of the contract when it failed to immediately post within five (5) work days the bus driver position formerly held by Earl Kastenschmidt.

2. That as a remedy, it shall take the remedial action noted above by making employe Gaylon Jorgenson whole and by henceforth posting vacancies which need to be filled within five (5) work days.

3. That the District is not required to immediately post the position of a successful job applicant until the conclusion of that applicant's trial period.

4. That to resolve any questions which may arise over application of this Award, I shall retain jurisdiction for at least sixty (60) days.

Dated at Madison, Wisconsin this 18th day of March, 1996.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator