BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

CHEQUAMEGON UNITED TEACHERS

and

WASHBURN SCHOOL DISTRICT

Case 37
No. 53305
MA-9304

Appearances:

Mr. Barry Delaney, Executive Director, Northern Tier UniServ-West, appearing on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., by Ms. Kathryn J. Prenn, appearing on behalf of the District.

ARBITRATION AWARD

The Employer and Union above are parties to a 1994-96 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the recall grievance of Jan Sorenson.

The undersigned was appointed and held a hearing on February 14, 1996 in Washburn, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs and reply briefs, and the record was closed on May 7, 1996.

ISSUES:

The Union proposes the following:

1. Did the District violate the seniority/layoff/recall provisions of the collective bargaining agreement when it created the position of food service director/manager and/or hired Al Munson for such position and assigned him duties relating to cooking, baking, other food preparation, presentation for serving food, serving food and general clean up?

2. If so, what is the appropriate remedy?

The District proposes the following:

1. Did the District violate the collective bargaining agreement when it created and filled a non-union food service director/manager position?

2. If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS:

RECOGNITION

The Board of Education action for said District recognizes the Chequamegon United Teachers as the exclusive and sole bargaining representative for all regular full-time and regular part-time non-certified employees of the School District of Washburn, excluding supervisory, managerial and confidential employees as certified by the W.E.R.C.

MANAGEMENT AND ASSOCIATION RIGHTS

. . .

B. The School Board, on its own behalf, hereby retains and reserves unto itself without limitation all powers, rights, and authority vested in it by applicable laws.

The Board possesses the sole right to operate the school system and all management rights repose in it subject only to the provisions of this contract and applicable laws. These rights include but are not limited to the following:

. . .

3. To hire, promote, transfer, schedule and assign employees in positions with the school systems.

. . .

8. To determine the method, means and personnel by which school system operations are to be conducted.

. . .

10. The Board will not subcontract if such subcontracting results in reduction of time and/or layoffs of any bargaining unit members. This provision shall only apply to employees hired before July 1, 1988.

. . .

SENIORITY/LAYOFF/RECALL

E. Employees placed on layoff status will be recalled in inverse order of layoffs, for up to two (2) years, for any vacancies, provided that they are qualified to perform the work. Laid off employees shall receive a certified letter from the District notifying them of any vacancies that the laid off employees are qualified to fill.

F. No new permanent or regular part-time employees may be hired while qualified employees ar eon layoff status.

. . .

FACTS:

The facts are not substantially disputed. The grievant is a part-time cook who works at the District's elementary school. During the 1992-93 year, the grievant worked two and one-half hours per day. During the summer of 1993, the District encountered financial difficulties and needed to reduce staff in the kitchen. The District announced an intention to reduce each of three cooks by one-half hour per day, and the Union objected on the grounds that the layoff provisions of the collective bargaining agreement required that the least senior cook bear the brunt of the reduction. The District acted accordingly, and reduced the grievant's hours to one hour per day for the 1993-94 school year, as she was least senior.

Sorenson began the 1994-95 year, also, at one hour per day. But long-term illness of the head cook, a bargaining unit position, resulted in the head cook ceasing to work about December, 1994, and the grievant along with other cooks received additional hours. As of the end of the school year, the health status of the head cook was still in doubt, and the grievant was working five and one-half hours per day. Subsequently, the head cook determined that return to work was not possible, and took early retirement. The District then considered whether to replace the head cook, but decided in view of management problems and financial shortfalls in the food service area, together with criticism of the District's past performance in this department by the Department of Public Instruction, that it was better to reconfigure the position as a management

position. The District determined to hire a food service manager/director, and notified the Union of this intention on or about July 19, 1995. The District's letter to the Union included a notice of vacancy for the position which defined it as "food service

director/manager", and did not list the duties of the position. The notice, which was subsequently published in the newspaper of the area, did list the qualifications, in the following terms:

> Minimum two year food service manager degree. Knowledge of the food service area. Ability to supervise the work of others, ability to establish and maintain accurate and complete records.

The Union made no objection to the creation of this position.

Al Munson, a highly experienced retired teacher of food service, applied for and was awarded the food service manager position. Munson did not have an extensive opportunity to discuss food service issues in detail with the District's superintendent, Kenneth Kasinski, until some time after he was hired. In their initial conversation, Kasinski indicated to Munson that he should tell the employes they would have the same hours as they had the previous year, for the time being. On the first day of work for the new school year, the grievant was scheduled to work five and one-half hours and another cook, Irene Zambori, was scheduled to work three and one-half hours. The grievant and Zambori both informed Munson that they would prefer to switch these hours, because it was unfair for Zambori, who was the senior employe of the two, to have fewer hours. Munson agreed, and both employes worked for five and one-half hours on the first day. On the second work day, the grievant worked three and one-half hours and Zambori five and one-half.

But by then Munson had been advised by Kasinski that his interpretation of Kasinski to have the employes work their previous hours was in error. Kasinski had intended Munson to understand that the hours involved were those the employes had prior to the departure of the head cook in about December of 1994. As of the third day, Munson reduced the grievant's hours to one hour per day accordingly (and also reduced Zambori's to three and one-half hours per day, not relevant to this dispute).

There is no dispute that the effective date of the reduction in hours to the grievant's 1993-94 amount of one hour per day was the first day of work of that year, August 30, 1993. The effective date of the reduction to one hour in 1995 was on or about August 27, 1995.

Munson's work schedule is seven hours per day, and he works the same days as the teachers. Within his work day, he sets his own schedule and determines his own duties. It is undisputed, however, that he has done regular work of the same character as the bargaining unit employes in the kitchens of both the high school and the elementary school, and that this has

consumed a significant part of his time. Typically, Munson spends approximately two hours per day at the elementary school working with the cooks over the lunch hour, and uncontradicted testimony also established that he also spends some hours each day performing similar work at the high school. The job description for Munson's position, which the Union did not request at the time of creation of the position and which was not supplied to the Union until the grievance arose, describes the food service director/manager's performance responsibilities in the following terms:

1. Supervises and arranges for the training of kitchen personnel in the safe, proper and efficient use of all kitchen equipment.

2. Takes disciplinary action when appropriate.

3. Interviews, evaluates and recommends for employment of food service employees.

4. Approves leaves of kitchen staff and arranges for substitutes

5. Makes recommendations on the staffing of the districts (sic) food service program.

6. Maintains the highest standards of cleanliness and safety in the kitchen.

7. Develops and submits the budget for the food service program.

8. Prepares all state and local reports as required.

9. Checks food shipments into the school, signing invoices only after each order has been verified.

10. Plans disposition of government commodities as part of the ongoing food service program.

11. Checks all government reimbursements.

12. Approves all bills and purchase orders for accuracy before presenting them to the bookkeeper for payment.

13. Purchases and maintains an inventory of all foods, supplies and equipment based on bid sheet process.

14. Records all food requisitions from the storeroom, and records all meals served, designating with or without milk.

15. Oversees the locking of the storeroom, and the maintaining of a correct monthly inventory.

16. Plans and checks all menus for school lunches.

17. Determines the quantities of each food to be prepared daily and assists with cooking duties as seen fit.

18. Determines the size of serving to meet the necessary requirements with regard to the ages of those served.

19. Supervises the planning and preparation of any special meals required for district sponsored events.

20. Visits all cafeterias as often as possible, checking that high standards of health and safety are maintained, and observing possible improvements in operation.

21. Informs the public, through the local press, of planned lunch menus on a weekly basis.

22. All other duties as assigned.

THE UNION'S POSITION

The Union contends that the grievant's recall rights from her 1993 partial layoff extended through August 29, 1995. The grievant's notice that her work hours would be reduced to one hour per day for 1995-96, the Union argues, occurred within that time frame because she got notice of the reduction on August 25, 1995. The Union notes that it is seeking a remedy that would restore her hours to two and one-half per day, but that the District had in fact increased the grievant's hours to two hours per day on or about September 1, 1995. The Union contends that Al Munson spends a great deal of his work day performing bargaining unit work, noting testimony by Christine Matson that Munson spends four to four and one-half hours each day doing the work of a cook at the high school, and noting Munson's testimony that he works at the elementary building for two hours each day, essentially performing duties associated with cooks. The Union contends that the postings for this position fail to indicate that the position will have duties normally associated with a cook's position such as cooking, baking, other meal preparation, and so forth, and the Union further contends that the job description for the position lists 21 specific duties, none of which "even hints" that the position entails duties normally associated with cooks.

The Union notes that the job description of the former head cook position did list preparation of food as one of its duties.

The Union contends that Munson actually holds two positions, the position of food service director/manager and the position of cook. The Union argues that it could not have known, nor could the cooks have known, that Munson would hold the position of cook, based on the documents available to the Union at the time. The Union argues that the contract does not allow the District to assign cook duties to Al Munson while Jan Sorenson was on reduced hours and while her recall rights were in effect. The Union further argues that Section F of the seniority/layoff/recall language is violated by the District's hiring a new permanent employe (Munson) while Sorenson, who is qualified to do the cook-type duties that Munson is performing, remains on partial layoff.

In its reply brief, the Union notes that it is not contesting the District's creation of the new position or the filling of the position. The Union identifies its concern as being the adding of duties for which Sorenson was qualified to the new "employe" while Sorenson was on partial layoff status with recall rights. In response to the Employer's argument that the contract does not specify whether the "years" referred to in the recall provision are school years, work years or calendar years, the Union argues that there is no reason given in the record as to why the year would be defined as anything other than a calendar year, particularly since employes can be laid off in mid-year. The Union adds that the Drummond case cited by the District is inapposite because the contract language involved is different, and notes that contrary to the Employer's contention that the Union is claiming that the grievant is qualified for the food service director position, the Union makes no such claim. The Union argues that its proposed remedy merely requires the District to assign Sorenson some of the duties which Munson has been performing which are beyond the duties of the supervisory/managerial position. The Union requests a make-whole remedy together with interest on back pay.

The District's Position

The District contends that the food service director's position, as a non-unit position, is not subject to the layoff and recall provisions of the collective bargaining agreement, and that the word "employe" in the recall provision cannot refer to an employe except as that term is understood in the context of a collective bargaining agreement, i.e. a bargaining unit type employe. The District contends that Arbitrator Crowley in a Drummond School District case applied similar language, to the result that work could be transferred to employes of a different bargaining unit, which it argues is an analogous situation. The District notes that the grievant by her own admission is not qualified for the food service director position, and contends that Section F therefore cannot apply, because the grievant was not qualified for the position as it was created.

The District contends that the timing of the reduction in hours should be dated from August 30, 1993 at the latest, and that as of August 30, 1995, the grievant's recall rights had

expired. The District contends that when the grievant was partially reduced in the fall of 1995, because she was no longer picking up substitute hours occasioned by Carlson's medical leave, that substitute work does not count as regular hours of work. The District further notes that the cooks, including the grievant, have generally welcomed Munson's assistance in working in the kitchen.

In its reply brief, the District contends that the Union's contention that Munson is really holding two different positions lacks merit and is without precedent. The District argues that prior arbitration cases have established that an employer is not required to create two part-time positions from one full-time position in order to ensure the continued employment of a more senior employe, and contends that if this is not required within a bargaining unit it could not possibly be required in the case of a non-bargaining unit position. The District argues that the Union has brought the question of Munson's duties and the balance of his work to the wrong forum, and has not claimed in a unit clarification proceeding that Munson should be in the bargaining unit. The District also takes issue with the Union's request for interest as a part of the proposed remedy.

DISCUSSION:

I find that the issue as framed by the District avoids the core of the Union's arguments, and frames the issue as one which the Union has clearly disavowed (at least by the time of its reply brief). The Union's proposed framing of the issue, meanwhile, is broad, and given that the Union has expressly disavowed an argument that the District should not have hired a food service manager, I find it appropriate to frame the first issue as follows:

> 1. Did the District violate the collective bargaining agreement by the food service manager/director's performance of duties related to cooking, baking and food preparation, serving and clean up while the grievant was on layoff status?

I find that the actions relevant to a determination in this case did occur within a period in which the grievant still held recall rights from the 1993 reduction in hours. It is clear that the reduction in hours took effect on August 30, 1993. The date that the action took effect is customarily the date from which a time period of a right to do something about it (whether in the sense of a grievance or in the sense of recall rights) is calculated. And there is no dispute in this record that the grievant's hours were reduced by Munson back to the one hour level before two calendar years had elapsed. At the same time, I can see no reason to read into the collective bargaining agreement's language the phrase "school year" or any other sense than calendar year, for the reasons argued by the Union. Additionally, I note that on page 12 of the collective bargaining agreement the parties did make a distinction in a clause entitled "school year and work day". That clause includes both the phrase "school year" and the term "work year". The implication is that a plain "year" (as used in the recall clause on the preceding page) means a calendar year. I note also that the Union has clarified in its reply brief its claim, so that it is now clear that the Union is not claiming that the grievant had a right to retain those hours of work

which were hers only as a temporary substitute for the head cook while the latter was on extended medical leave.

In analyzing the rights of the parties, I must begin with the observation that the collective bargaining agreement here contains no explicit provision either allowing or disallowing the performance of bargaining unit work by a supervisor. The contract does contain a recognition clause, a wage scale identifying certain kinds of work, and a management rights clause. All three are typical of their kind. Under such circumstances, many arbitrators have found that management is not bound to keep all bargaining-unit-type work within the bargaining unit, but that it does not have a contractual right to remove such work willy-nilly, either. Most of the cases discussing whether an employer, under given circumstances, violates such an agreement by a transfer of work occur in the context of subcontracting, but the principles concerning transfer of work to a different bargaining unit or performance of bargaining-unit-type work by a supervisor are similar. The circumstances governing whether the transfer of work under such ambiguous contracts is permissible or impermissible in any given case are complex, and I have discussed them previously in print; 1/ I will not repeat them here. In essence, I concluded that it is commonly held that the typical recognition clause and wage scale establish a claim to certain work for members of the bargaining unit; that the typical management rights clause establishes a contrasting management claim to flexibility as to how and by whom work will be performed; and that in the absence of more specific language, the tension between these provisions is often resolved on a situation-specific, fact-driven basis. Here, I note that the parties have negotiated one specific provision for subcontracting (item B 10 of the management rights clause), which might control the situation if the disputed work had been given to a subcontractor, but does not encompass the food service director's performance of that work. The only clause which here sheds any additional light on the ambiguity is Section F of the seniority/layoff/recall clause.

Some of the District's arguments have been clarified out of relevance by the Union's attempt to distinguish what it is really arguing for. It is clear from the Union's reply brief that the Union is not pursuing a theory either that the District had no right to fill the food service manager position or that it was required to restrict Munson from performing any bargaining unit work. The ambit of the Union's argument is that the grievant should not be foreclosed from reclaiming the time she lost in 1993 because of Munson's assumption of that work.

It appears from the testimony that if Munson reduced his time spent in bargaining unit work, there would be more work for the grievant. Munson performs work in both kitchens, and there is no reason to believe from this record that the grievant would not logically have more work to do if Munson did less. The fact that other employes prior to Munson have been detailed from the high school over to the elementary school to perform such work adds to this impression.

1/ See Honeyman, C., "In Defense of Ambiguity", Negotiation Journal, January 1987, pages 81-86.

I note that while the District is correct in denying the Union's assertion that none of the documentation of the food service director position "even hints" at bargaining unit work, the reference to "and assists with cooking duties as seen fit" was hardly made conspicuous. It appears as the second half of item 17 in a 21-item list of duties, which would not lead an ordinary reader to anticipate that 80-90 percent of the position's working time will be under that phrase. It also appears to be out of the context of the position's advertisement (the notice actually sent to the Union), which speaks exclusively in supervisory/management terms. This, however, influences, but does not control the outcome here. The District's argument that Section F of the layoff and recall provisions does not prevent the "hiring" of a non-unit employe who turns out to have a heavy component of unit-type work must be evaluated in the light of the ambiguity of the Agreement as a whole with respect to performance of bargaining unit work by supervisors. To read the term "employe" in that clause such as to refer only to a bargaining unit employe, and thus distinguish a supervisor from the meaning of that clause or from its intent entirely, creates an inherently improbable meaning of the Agreement as a whole. The net effect of such a conclusion would be to hold that the District could not replace the head cook with a new head cook without restoring the grievant's hours to her 1993 level prior to calculating the new position's hours, but that those hours could be removed entirely from the bargaining unit and given to a newly created supervisory position. It does not appear to me likely that parties negotiating language such as Section F would intend or expect such a result. I conclude, accordingly, that under the circumstances of this case the ambiguity should be resolved in favor of finding that the grievant had rights to the disputed work time. I must note that for all of the reasons given in the article noted above, this is a highly situation-specific holding, and this decision should not be construed as having broad impact in any other fact situation. I also note that with respect to the Union's request for interest as a part of the remedy, I find this unwarranted, for the reasons stated in the Salem award by Arbitrator Nielsen which the District cited in its brief.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the District violated the collective bargaining agreement by performance of bargaining unit work by the food service director to the extent that such work involved time to which the grievant had recall rights.

2. That the District shall, forthwith upon receipt of a copy of this award, recall the grievant to work at two and one-half hours per day effective August 26, 1995, and make her whole by payment of a sum of money equal to wages and benefits she would have earned but for the reduction below two and one-half hours per day.

3. That I will retain jurisdiction for at least sixty days from the date below, in the event of a dispute concerning the remedy.

Dated at Madison, Wisconsin this 16th day of August, 1996.

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator