

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

FOND DU LAC EDUCATION ASSOCIATION/  
WINNEBAGOLAND UNISERV

and

FOND DU LAC SCHOOL DISTRICT

Case 51  
No. 54386  
MA-9664

Appearances:

Davis & Kuelthau, S.C., 111 East Kilbourn Avenue, Suite 1400, Milwaukee, WI 53202-3101, by Mr. Mark Vetter, Attorney at Law, appearing on behalf of the Fond du Lac School District.

WinnebagoLand UniServ, Post Office Box 1195, Fond du Lac, WI 54936-1195, by Mr. Armin Blaufuss, Executive Director, appearing on behalf of the Fond du Lac Education Association.

ARBITRATION AWARD

The Fond du Lac Education Association (hereinafter referred to as the Association) and the Fond du Lac School District (hereinafter referred to as the District) requested that the Wisconsin Employment Relations Commission designate the undersigned as arbitrator to hear and decide a dispute concerning the employment of Inge Adelmeyer for the 1995-96 school year under a Letter of Temporary Substitute Employment rather than a regular teaching contract. The undersigned was so designated. A hearing was held in Fond du Lac on August 26, 1996, at which time the parties were afforded full opportunity to present such testimony, exhibits, stipulations, other evidence and argument as were relevant to the case. The parties submitted post-hearing briefs on September 3, 1996, whereupon the record was closed. The parties requested that the undersigned issue an expedited Award, setting forth the result of the grievance, with a more fully developed decision to follow at the arbitrator's convenience.

Now, having considered the evidence, the arguments of the parties, the contract language and the record as a whole, the undersigned makes the following Award.

## **I. Stipulations**

At the outset of the hearing, the parties presented an extensive stipulation for inclusion in the record. The narrative portion of the stipulation is set forth below:

### **STIPULATED ISSUE**

Did the Fond du Lac School District violate Article II, C, 2, and/or Article VIII, E, 2 and/or 3, when it employed Inge Adelmeyer under a Letter of Temporary Substitute Employment (LTSE) contract rather than a regular individual teaching contract for the 1995-96 school year?

### **STIPULATED FACTS**

The parties agree to the accuracy and authenticity of the following facts. However, each party reserves the right to question the relevance of the facts.

#### **I. Prior Bargaining and Grievance History**

During the 1981-82 school year, the Fond du Lac Education Association (FEA) raised several bargaining unit work issues with the Fond du Lac School District. On February 8, 1982, an issue arose regarding bargaining unit work assigned to non bargaining unit personnel -- administrators. (See attached Exhibit A.) On February 17, 1982, an issue was raised regarding the bargaining unit status of school social workers and psychologists. (See attached Exhibit B - Paragraph 4.) On April 27, 1982, an issue was raised regarding the assignment of a long-term substitute to a high school library vacancy. The FEA filed a grievance regarding this issue. (See attached Exhibit C.) Subsequently, this grievance was put on hold pending negotiations of the 1982-84 Master Agreement. (See attached Exhibit D.)

The administrator-bargaining unit work issue and the school social worker and psychologist issue were resolved in 1982-84 negotiations. (See attached Exhibit E.) The terminology, "letter of temporary substitute employment (LTSE)," first appeared in the parties' 1982-84 Master Agreement and applied to teachers hired to fill the position of a regular bargaining unit employee on a leave of absence. LTSE employees became bargaining unit employees with

limited rights. (See attached Exhibit E.)

Application of Article II, C, to the bargaining unit status of the substitute assigned to the high school library vacancy remained unresolved and the April 27, 1982 grievance was submitted to arbitration. (See attached Exhibit F.)

Two issues arose during the 1982-83 school year regarding the bargaining unit members on leave of absence. Grievances were filed on January 13, 1983, and February 8, 1983. (See attached Exhibit G.)

Article II, C, was revised during negotiations for the 1984-85 Master Agreement to cover the bargaining unit status of substitutes filling determinate and indeterminate leaves of absence and permanent vacancies occurring during any semester. LTSE's were given to teachers hired to fill the position of a regular bargaining unit member on determinate or indeterminate leaves of absence and to teachers who on a substitute basis filled a permanent vacancy occurring in any semester. Employees on LTSE contracts were bargaining unit members with limited rights. The February 27, 1982, January 13, 1983, and February 8, 1983 grievances were resolved as part of the negotiations for the 1984-85 Master Agreement. (See attached Exhibit H.)

On September 26, 1989, an issue arose when the District created a new position after the school year began and the position was filled with a long-term substitute teacher. A grievance was filed and was resolved during negotiations for the 1989-92 Master Agreement. (See attached Exhibit I.)

## II. Bargaining History for the 1989-92 Collective Bargaining Agreement

On May 2, 1989, the Fond du Lac Education Association (FEA) submitted its initial negotiations proposals for a successor to the 1987-89 Master Agreement to the representatives of the Fond du Lac Board of Education. The document included a proposal which read as follows:

"Article 11, C. Bargaining Unit Work 2, b and c. Clarify use of Letters of Temporary Substitute Employment. (See the attached

Exhibit J.)

The parties discussed the use of Letters of Temporary Substitute Employment during their bargaining session on August 24, 1989. Mr. Elwood H. Bilse, the District's Director of Personnel, clarified that Letters of Temporary Substitute employment (LTSE) are used when position vacancies occur during the school year and the District is unable to engage in a normal recruiting process. If the list of candidates for a vacancy is limited due to the timing of the vacancy and/or the District believes that a more qualified candidate could be found through the normal recruiting process, then a LTSE will be issued. Mr. Bilse indicated that he intended to continue to follow this same practice in the future.

During negotiations for the 1989-92 Master Agreement, FEA negotiators objected to the District's practice of utilizing LTSE contracts. The FEA representatives indicated that they wanted the practice changed but will not be submitting any specific language proposals. However, the FEA may file grievances if it disagrees with the way the District utilizes LTSE contracts. (See the Board of Education summary and minutes of the August 24, 1989, discussions identified as Exhibits K and L, respectively.)

Based upon the foregoing discussions, the FEA proposal was withdrawn on April 24, 1989. (See the attached Exhibit J - Article II, C, 2, b and c.)

Article II, C, was revised in negotiations for the 1989-92 Master Agreement. Reference to vacancies was removed and placed in a new provision Article VIII, E, Reassignment and Transfers. New Article VIII, E, provided where reassignments/transfers occurred as a result of vacancies during the school year that would be disruptive to the school program, the District has the right to fill the temporary vacancy with an employee on an LTSE. (See attached Exhibit M.)

The District and FEA entered into two agreements: one on March 20, 1990, and the other on April 22, 1991, which clarified Article VIII, E. Reassignments and Transfers. (See attached Exhibit N.)

Article II, C, and Article VIII, E, remain unchanged in the 1992-94 Master Agreement and the 1994-97 Master Agreement. (See attached Exhibit O.)

### III. Background Information

During the 1995-96 school year, the District employed fifteen (15) individuals under a LTSE. These individuals fall into three categories.

1. Individuals employed to fill the position of teachers on a leave of absence.
2. An individual employed to fill a position funded for only one year. (The parties have a dispute regarding this issue that is not part of the instant arbitration.)
3. The individual employed to fill the Sabish Junior High choral music position.

### IV. Sabish Junior High Choral Music Position

Al Lemery, the choral music teacher at Goodrich High School, retired at the end of the 1994-95 school year. The position vacancy was posted on May 10, 1995. (See attached Exhibit P.) The applicants for the position included Warren Larson, a teacher at Sabish Junior High School, and Rick Zielinski, a teacher from outside the District. Mr. Larson's application consisted of a request for a voluntary transfer to the position.

On June 7, 1995, Warren Larson interviewed for the position with High School Principal Jon Kaiser and District Director of Fine Arts Jon Gilliland. On July 17, Superintendent of Schools Dr. Michael Homes informed Warren Larson that the administration was recommending his transfer to the high school position to the Board of Education. On July 19, 1995, Warren Larson's position at Sabish Junior High was posted as a vacancy. (See attached Exhibit Q.)

At its July 28, 1995 meeting, the Board of Education approved the employment of Rick Zielinski to a choral music position in the District. He was offered a regular individual teaching contract on August 1, 1995. (See attached Exhibit R.) The FEA filed a grievance on August 1, 1995, contending that the District violated the master agreement when it failed to transfer Warren Larson to the high school choral music position.

The Board of Education was to meet on August 21, 1996, to determine Rick Zielinski's actual assignment. (See attached Exhibit R.), however on August 18, 1995, Mr. Zielinski declined the teaching contract offer. On August 22, 1995, the administration transferred Warren Larson to the high school choral music position. The District offered the Sabish Junior High School choral music position to two individuals who turned the position down. The District employed a substitute teacher in the Sabish choral music position from the beginning of the school year through September 1, 1995, in the position. Inge Adelmeyer, who applied and was interviewed for both the Goodrich High School and the Sabish Junior High choral music position, was offered the position on August 28, 1995, six (6) work days following the start of the school year (August 21, 1995). The District placed Ms. Adelmeyer on a LTSE. (See attached Exhibit S.) She occupied the Sabish Junior High choral music position from September 5, 1995, through the end of the 1995-96 school year.

**II. Contract Language**

**ARTICLE VIII  
PERSONNEL POLICIES**

...

**E. REASSIGNMENT AND TRANSFERS**

...

2. Reassignments. Reassignments will normally be made between March 15 and May 1. It is understood that reassignments may occur at other times during the school year when vacancies arise. Reassignments will occur prior to the posting of vacancies. In the event that the District determines that reassignments occurring as a result of vacancies during the school year would be disruptive to the school program, such positions may be posted and filled as temporary vacancies. The F.E.A. shall be notified of such situations. Teachers who fill temporary vacancies shall be employed by letters of temporary substitute employment pursuant to Article II, C2a. However, if no certified teacher is available, the District may fill the position with a long term substitute for a maximum of up to ten (10) days. Temporary vacancies will be subject to the transfer provision below and will be treated as new positions in the subsequent school year. Teachers assuming those positions will be non-renewed, reassigned, transferred or laid off for

the subsequent school year, whichever is appropriate.

3. Transfer. For the purpose of this section, vacancy shall include full-time or part-time new positions or positions posted. No vacancy shall be filled by a non-bargaining unit member where there is a qualified bargaining unit member who has made application for the position. In the event that the District determines that transfers occurring as a result of vacancies during the school year would be disruptive to the school program, such positions may be posted and filled as temporary vacancies. The F.E.A. shall be notified of such situations. Teachers who fill temporary vacancies shall be employed by letters of temporary substitute employment pursuant to Article II, C2a. However, if no certified teacher is available, the District may fill the position with a long term substitute for a maximum of up to ten (10) days. Temporary vacancies will be treated as new positions in the subsequent school year. Teachers assuming those positions will be non-renewed, reassigned, transferred or laid off for the subsequent school year, whichever is appropriate. Notices of all vacancies will be posted on the official bulletin board in each school with a copy sent to the F.E.A. Vacant positions for the subsequent school year shall not be posted internally before reassignments have been completed (May 1) unless within a building all contracts have been returned and all reassignments completed. During the summer, notice of vacancies will be posted in the central administration offices and sent to the F.E.A.

Vacancy notices shall contain the date of posting, a description of the position, name and location of the school, certification needed for the position, name of the person to which the application is to be returned and the deadline for applying.

## **II. Background**

This case involves the hiring of Inge Adelmeyer as the choral music teacher at Sabish Junior High School. That job became available when the incumbent, Warren Larson, accepted a transfer to the same position at the high school. The high school job was originally posted in May of 1995. Larson applied to transfer to the high school. Also applying for the job was Rick Zielinski, who was not a District employee. Larson was interviewed on June 7th, and on July 17th the Superintendent of Schools told him that the administration would recommend that the School Board approve his transfer. Two days later, the District posted Larson's job at Sabish.

A faction of the School Board felt strongly that Zielinski was the best choice for the job at the high school. When the Board met on July 28th, it voted to offer Zielinski a contract for a choral music position in the District, with the actual assignment to be determined at a meeting on the first day of school, August 21st. At its meeting on the 28th, the Board did not approve the administration's recommendation that Larson be transferred to the high school. The Association then filed a grievance, asserting that the District violated the contract by failing to transfer Larson, who was the senior qualified internal applicant.

On August 14th, the President of the School Board wrote to Zielinski about the controversy surrounding his possible work assignment:

In our conversation of July 27, I advised you that the Fond du Lac Board of Education was scheduled to take formal action on your employment on July 28, 1995. I further advised you that it was my understanding that there appeared to be sufficient support among members of the Board to act on August 21, 1995 to formally appoint you to the choral music teacher position at Goodrich High School, but that I could not guarantee that appointment.

I think it is only fair to tell you that since our July 27, 1995 conversation, two Board members who had initially supported your assignment to the Goodrich position indicated to me that they were reconsidering their position and might vote against that assignment.

I understand that you were advised on July 24 that your assignment to the Goodrich High School choral music position may violate the provisions of the master agreement between the Fond du Lac Education Association (FEA) and the Board of Education. You were also advised that the FEA may grieve the assignment and this act could result in arbitration. In that regard, the arbitrator's decision may result in the assignment of the bargaining unit member to the Goodrich position. I believe that these considerations, among others, have caused Board members to rethink their former positions.

You are already aware that on July 28, 1995, the Board did take formal action to approve your employment as a choral music teacher in the Fond du Lac School District. A contract offer was forwarded to you on August 1, 1995. That offer of employment remains. However, the specific assignment will be wherever the opening occurs. Therefore, if you accept the offer of employment with the District, you may be assigned to Sabish Junior High School



or Goodrich High School, depending on the outcome of the Board's formal action scheduled for vote on August 21, 1995.

If you have any questions regarding this issue, please feel free to contact the Fond du Lac School District Personnel Office...

Zielinski responded by declining any employment with the District. On the 21st, the Board accepted the administration's original recommendation, and Warren Larson was transferred to the high school effective August 22nd. His position at Sabish was filled on a temporary basis by a substitute teacher. The District offered the job to two individuals who both declined, and it then turned to Inge Adelmeyer. Adelmeyer had interviewed for both the high school job and the Sabish posting but had not been seriously considered during the recruiting process because she had only a general background in music and no experience with choral music at the secondary level. On August 28th, Adelmeyer was offered a Letter of Temporary Substitute Employment (LTSE) to fill the Sabish job for the balance of the 1995-96 school year. The LTSE is a device by which the District employs an individual for a specified period of time at the same pay and fringe benefits as other teachers, but without any promise of continued employment. Adelmeyer accepted the job, and started work on September 5th.

The Association filed the instant grievance on October 9th, asserting that the use of an LTSE for the Sabish job violated the contract, and seeking as a remedy the issuance of a regular teaching contract to Adelmeyer. The District responded that the opening occurred after the beginning of the school year, and that the talent pool at that late date was not adequate for hiring a permanent employee. Thus it denied the grievance. The matter was not resolved in further meetings, and was referred to arbitration.

Additional facts, as necessary, will be set forth below.

### **III. Arguments of the Parties**

#### **A. The Position of the Association**

The Association takes the position that the use of LTSE's has been a continuing source of controversy and negotiation between the parties. Since at least 1981, LTSE's have been the subject of grievances and contract negotiations. As a result of their extensive bargaining over many years, the parties have agreed that the use of LTSE's will be permitted in very limited circumstances. Article II of the contract allows their use to cover leaves of absence. That exception is not at issue in this case. Article VIII allows the District to issue LTSE's in order to cover vacancies which occur during the school year -- in this case, on or after August 21, 1995. Those are the only two allowances made in the contract for LTSE's. Thus it is clear from the contract language that the use of LTSE's rather than regular teaching contracts is not permitted where, as here, the vacancy occurred well before the beginning of school.

The District's argument that the LTSE is a necessary tool for filling vacancies late in the summer, when the talent pool is depleted, is not on point. If the District believes that to be the case, it should bargain for a new exception to the general ruling in favor of employing teachers only through regular teaching contracts. It cannot simply assert a need and ignore the collective bargaining agreement. The Association also notes that this claimed problem is overblown, given that teachers on regular contracts must serve a probationary period during which they can be dismissed or non-renewed.

Allowing the District to unilaterally expand the use of LTSE's would seriously undermine the integrity of the bargaining unit and the protections of the contract. Conversely, limiting their use to vacancies occurring during the school year protects the bargaining unit and honors the agreement the parties themselves have bargained. In this regard, the Association stresses that the vacancy at Sabish occurred well before the beginning of the 1995-96 school year. Warren Larson held the job until mid-July, when the administration told him his transfer would be recommended to the School Board. Larson had a clear contractual right to the vacancy, and Board approval should have been nothing more than a formality. In recognition of this, the vacancy at Sabish was posted on July 19th, more than one month before the school year was to begin. This posting was never withdrawn. Due to Board intervention, no formal action was taken on Larson's transfer until August 21st, leading to the current District argument that the vacancy did not exist until after the school year began. The arbitrator must reject this argument. The attempt to deny Larson's transfer was an obvious violation of the contract, and the District cannot be allowed to benefit from the resultant delay. Had the Board followed the contract, there would have been a vacancy in both the technical and the actual sense no later than July 28th. Even under the facts as they unfolded here, the vacancy at the high school was filled, and the vacancy at Sabish was created, for every practical purpose when Zielinski withdrew as a candidate for the high school position on August 18th. A ruling that the Board may evade the issuance of regular teaching contracts if it delays formally filling vacancies until after the first day of school will invite future abuse of the narrow exception that the Association negotiated in good faith. It contravenes the purpose of the contract, and gives the Board something via arbitration that it could not gain in bargaining.

The District clearly violated the contract by issuing an LTSE to Adelmeyer. As a remedy, the Association seeks the issuance of a regular teaching contract to Inge Adelmeyer for 1995-96, and her continued placement under a regular contract to the Sabish position for the 1996-97 school year. There has been no intervening event, such as a layoff, that would have required her removal from Sabish at the end of the 1995-96 school year and she is therefore entitled to remain in that job.

#### B. The Position of the District

The District takes the position that the grievance is without merit and should be denied. While the Association attempted to introduce a great deal of testimony regarding the various

conversations had between the parties about the use of LTSE's before 1989, none of those discussions involved anything remotely similar to this dispute. Only in the 1989 negotiations did the parties discuss the use of LTSE's for vacancies occurring in late summer. That is the relevant starting point for any analysis, and using that as the starting point it is clear that the Association is attempting to gain through arbitration what it never could obtain at the bargaining table. In 1989, the Association brought its initial proposals to the table. Included among these was the request that the parties "clarify" the use of LTSE's. the District's personnel director obliged this request, advising the Association that they were used when vacancies occurred in late summer or during the school year, because the talent pool was not sufficient to find qualified candidates. The Association objected, but the District did not change its position and no change was made in the contract language. Since that time, the District has continued to use LTSE's for vacancies which cannot be adequately filled through the normal recruiting process. This has included those vacancies occurring late in the summer but before the start of school. Having specifically raised the issue in negotiations, and having been advised of the District's practice and its intention to continue that practice, the Association cannot now, seven years later, seek through the arbitrator what it could not accomplish in negotiations.

The well-established past practice of issuing LTSE's where adequate applicants cannot be found is an extension of the Board's reserved right to "hire employees and ... determine their qualifications and the conditions of their continued employment..." The contract recognizes the retention of all management rights which are not specifically and expressly limited by other terms of the contract. The only limitations on the use of LTSE's in the contract deal with leaves of absence (Article II), reassignments and transfers (Article VIII). None of these provisions are at issue in this case. There was no leave of absence involved here, and no reassignment. The transfer of Larson triggered the opening at Sabish, but the contract language on LTSE's in the transfer section speaks to the District's option to deny a transfer to a teacher during the school year in order to avoid disrupting the educational program. In that event, the District has the option of instead using an LTSE to fill the vacancy the teacher was seeking. Here the District granted Larson's transfer request, and there was no other in-house candidate seeking to transfer to the Sabish opening. Thus this portion of the contract does not apply. Given the absence of any relevant contract provision limiting the District's use of LTSE's, and the broad right to determine conditions of continued employment, there can be no contract violation in this case.

Assuming, arguendo, that the transfer provisions of Article VIII do have some bearing on this case, the District was still within its rights when it opted for the use of an LTSE to hire Adelmeyer. Article VIII was understood by both parties to allow the District to use LTSE's to fill vacancies during the school year which are not filled internally. This vacancy did not occur until Larson's transfer was approved on the evening of August 21st. The vacancy was not filled until August 28th, six school days into the school year, and Adelmeyer did not start until ten school days had passed. Thus the hiring of Adelmeyer cannot have violated Article VIII, since it took place in exactly the manner prescribed by that provision.

Finally, even if the arbitrator somehow concluded that the Sabish vacancy occurred before

the beginning of the school year, and that the occurrence of the vacancy as opposed to its filling is the relevant event, the grievance is still without merit. As previously noted, the use of LTSE's in these circumstances is a long-standing and well known practice, and is not limited by any specific, relevant contract provision. The District obviously exercised its rights here in good faith, since Adelmeyer was not an acceptable candidate for long term employment under a regular teaching contract. Thus the District's rights were not exercised in an unreasonable manner, but rather for precisely the reasons that were explained to the Association in the 1989 negotiations. For all of these reasons, the District urges that the grievance be denied.

#### **IV. Discussion**

The permissible uses of letters of temporary substitute employment has been a point of ongoing controversy between the parties for many years. The contract contains three references to situations in which LTSE's clearly may be used. In Article II, the parties agree to the use of teachers on LTSE's for covering leaves of absence. In Article VIII, Section E2, the parties agree to the use of LTSE's for vacancies occurring during the school year where a reassignment of a regular teacher to fill the vacancy would disrupt the school program. Section E3 of that same Article allows the use of LTSE's where a transfer to fill a vacancy occurring during the school year would be disruptive of the school program. 1/ The Association views these three situations as being the only times that an LTSE can be used in preference to a regular teaching contract. The District asserts that the three references in the contract function as narrow limits on an otherwise unfettered right to use LTSE's, and argues that this right has historically been exercised to fill openings late in the recruiting season, without regard to whether school has started.

Before delving into the broad arguments of the parties, the arbitrator must determine whether the employment of Adelmeyer via an LTSE falls within the clear contractual windows for using this form of employment. Article II deals with leaves of absence, and does not apply. The Board is now arguing that Article VIII only applies to those vacancies during the school year where an established teacher might be seeking reassignment or transfer, and that it is essentially an exception to the existing staff's right to bid for transfers and reassignments. Under this line of reasoning, since no incumbent sought the Sabish position, Article VIII is irrelevant and its language limiting LTSE's to "vacancies during the school year" does not apply. This interpretation does some violence to the actual language of the contract, and is contrary to the clear history of negotiations over this Article.

In the 1989-92 contract, the parties rewrote and rearranged the contract provisions

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1/ In general terms, a "reassignment" under this contract is the movement of a teacher within the same building, while a "transfer" is the movement of a teacher in a new building.

regarding the use of LTSE's to temporarily fill permanent vacancies. Prior to that contract, Article II contained a provision headed "Permanent Vacancies" which stated in part:

2. In any semester during which a permanent vacancy occurs the district has the right to fill that permanent vacancy with a substitute teacher for the remainder of that semester. In the event that it chooses to do so it shall notify the F.E.A. in writing.

3. The district shall issue a letter of temporary substitute employment to the person filling the vacancy on the first day of the following semester or within 20 contract days of the existence of the permanent vacancy, whichever is later. It is understood by the parties that the person may not be the same individual who was substituting previously in that position.

This language was removed from Article II, placed in Article VIII and rewritten to separate it out into the present distinct provisions on reassignments and transfers. At the conclusion of the negotiations, the parties executed a letter of intent, drafted by the Board's legal counsel, for future use in interpreting the contract:

During recent negotiations between the Fond du Lac Education Association and Fond du Lac School District Board of Education, the parties reached voluntary agreement on new contract language regarding the voluntary and involuntary assignment and transfer of teachers. During discussions which resulted in that contract language, the parties discussed their intent with respect to certain aspects of the contract language. Rather than include any specific statements of intent in the collective bargaining agreement, the parties agreed to prepare a separate summary covering these items. The following is such summary.

...

It is the intent and desire of the parties that the interpretations in this letter will assist the parties in administering the language in the transfer and reassignment provisions in the collective bargaining agreement.

...

The letter of intent, which was signed by both parties, unambiguously states that Article VIII, Section E applies to all vacancies during the school year which are not filled internally. It does not limit the language to just a narrow subset of these cases. Thus if the Sabish opening was a "vacancy during the school year", Article VIII applies.

The Sabish Junior High School job belonged to Warren Larson. The opening was created

by the transfer of Larson to the high school choral music position. The administration told Larson in July that it would recommend his transfer, and then posted the Sabish job as a vacant position. However, School Board approval is needed for transfers, and at its July 28th meeting the School Board refused to act on the recommendation in favor of Larson, electing instead to pursue Zielinski for the high school job. The contract forbids hiring outside candidates to fill openings sought by qualified internal candidates, and the Board was warned that bypassing Larson would be challenged. In the face of a grievance over the Board's course of action, the political coalition in favor of Zielinski unraveled and he withdrew as a candidate on August 18th. The School Board met on the evening of August 21st and approved Larson's transfer. The 1995-96 school year began on the morning of August 21st.

The vacancy at Sabish could neither actually occur nor formally be filled so long as Larson occupied the job. 2/ He no longer had the job once he transferred to the high school. His transfer did not occur until the evening of August 21st, which was during the school year. Thus, going strictly by the dates of the various events, the Sabish vacancy occurred during the school year, Article VIII applies, and the District had the right to use an LTSE to fill the job for the balance of the year. However, the Association urges that the arbitrator look beyond the simple chronology, and take into account the reasons for the delay in transferring Larson. Specifically, the Association urges that the Board not be allowed the benefit of a delay occasioned by its own bad faith in attempting to circumvent Larson's rights under the transfer provisions of the contract.

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2/ Given the peculiar facts of this case, I do not find the July 19th posting of the Sabish vacancy controlling for purposes of determining when the vacancy occurred. Clearly this posting was done on the reasonable assumption that the Board of Education would accept the administration's view that Larson was qualified for the job and was entitled to the transfer. If, however, the Board had persisted in its refusal to transfer Larson, or if he had changed his mind and withdrawn the transfer request before any Board action, he would have retained his rights to the Sabish job. It would not have been vacant, even though it had already been posted. After July 19th, there remained a genuine question as to whether the vacancy would be created.

From the information in the record, it does appear that the delay in transferring Larson, and the attendant delay in creating the actual vacancy at Sabish, were both the result of a course of action that, if pursued, would have violated the contract. It bears noting that the course of action was not pursued, and the contract was not violated. 3/ If this were a grievance by a teacher seeking to claim the Sabish vacancy, but blocked through the employment of an LTSE teacher, the Association's argument would be very persuasive. In that case, there would be a direct, logical and foreseeable connection between the attempt to deny Larson the high school job and the denial of the second teacher's transfer bid. Likewise, if there were evidence to suggest that the delay was part of a pattern of conduct intended to maximize the use of LTSE's, there would be a substantial argument to be made in favor of using something other than the technical date of the transfer for determining when a vacancy existed. Neither of these is the case here. As things actually played out, the contemplated violation was the frustration of Larson's right to the high school job, not the frustration of any other bargaining unit member's right to the Sabish job. There were no internal candidates for the Sabish choral music position, and the disposition of that job was not the focus of concern leading to the delay. It was at the very most a secondary issue, and to the extent that the School Board acted in bad faith, I find that it was bad faith towards Larson's rights, not those of Adelmeyer or the other members of the Association.

While it is understandable that the Association would wish to have the Board of Education realize the full consequences of having tried to block Larson's transfer, the record is clear as to the date on which the vacancy at Sabish occurred and the contract is clear as to the date after which LTSE's may be employed for vacancies. 4/ The vacancy occurred during the school year. Inasmuch as the delay in transferring Larson was not a ruse to circumvent another

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3/ The significance of this is that I am not called upon to use broad remedial jurisdiction to craft a remedy with respect to the violation of Larson's rights and the ripple effect of such a violation. In that case, the nexus between a clear contract violation and the delay would be fixed and definite. My duty is instead to determine whether the delay itself was a separate and distinct violation with respect to Adelmeyer and/or the Association.

4/ The overall scope of the right to use LTSE's need not be determined in order to resolve this grievance. The relevant portion of the contract language concerns the timing of vacancies, and that is all that this Award is intended to address.

bargaining unit member's rights or to enable the District to use an LTSE for the choral music position at Sabish Junior High School during the 1995-96 school year, I cannot conclude that the District is estopped from asserting the actual date of the vacancy in defense of its actions. I therefore find that the use of a letter of temporary substitute employment to hire Inge Adelmeyer was not a violation of the collective bargaining agreement.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The Fond du Lac School District did not violate Article II, C, 2, and/or Article VIII, E, 2 and/or 3, when it employed Inge Adelmeyer under a Letter of Temporary Substitute Employment (LTSE) contract rather than a regular individual teaching contract for the 1995-96 school year. The grievance is denied.

Dated at Racine, Wisconsin this 20th day of September, 1996.

By Daniel Nielsen /s/  
Daniel Nielsen, Arbitrator