BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CUDAHY SCHOOL DISTRICT

and

MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO and its affiliated LOCAL 742

Case 52
No. 53324
MA-9309

Appearances:
Lindner & Marsack, S.C., Attorneys at Law, by **Mr. Jonathan T. Swain**, 411 East Wisconsin Avenue, Milwaukee, WI 53202, for the District.

Podell, Ugent, Haney & Delery, S.C., Attorneys at Law, by **Mr. Robert Haney**, 611 North Broadway Street, Suite 200, Milwaukee, WI 53202-5004, for the Union.

ARBITRATION AWARD

Pursuant to a request by Milwaukee District Council 48, AFSCME, AFL-CIO and its affiliated Local 742, herein the Union, and the subsequent concurrence by Cudahy School District, herein the District, Raleigh Jones was appointed arbitrator by the Wisconsin Employment Relations Commission on December 12, 1995 pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. Also on December 12, 1995 Raleigh Jones disclosed in writing "that prior to joining the Commission's staff in February, 1982, I was the South Dakota Director of AFSCME." By letter dated December 19, 1995, the Union objected to the assignment of Arbitrator Jones to the above-captioned case based on his prior employment. By letter dated December 28, 1995, Arbitrator Jones withdrew as arbitrator in the case. The undersigned was designated as arbitrator in the case on February 16, 1996. Hearing was scheduled for April 1, 1996, at Cudahy, Wisconsin. At hearing on said date the parties agreed to enter into settlement discussions on the grievance with a mediator from the Commission. Those settlement discussions were ultimately unsuccessful. After several postponements, the hearing was held in Cudahy, Wisconsin, on June 26, 1997. The hearing was transcribed, and the parties completed their briefing schedule on August 29, 1997.

After considering the entire record, I issue the following decision and Award.

ISSUES

The parties were unable to stipulate as to the issues.

The Union frames the issues as follows:

> Did the Employer violate the collective bargaining agreement when it posted the vacant full-time Lincoln and high school position as two part-time cleaning positions? If so, what is the appropriate remedy?

The District frames the issues in the following manner:

> Whether the District violated the existing custodial agreement (Jt. Ex. 2) when it failed to fill a full-time custodial position serving one half time at Lincoln School and one half time at the high school, and stated its intention to hire and/or otherwise post it as a vacancy for two part-time cleaner positions, one at Lincoln School and one at the high school? If yes, what is the appropriate remedy?

Having reviewed the entire record, the Arbitrator finds that the issues as framed by the Union are sufficient to decide the instant case.

FACTUAL BACKGROUND

General Background

The parties have two collective bargaining agreements, one covering part-time cleaners and one covering full-time custodians.

The part-time cleaners were organized and became a recognized bargaining unit in the fall of 1977.

Under the cleaner's contract, the cleaner employes perform only cleaning-related job duties. They do not perform any custodial duties. The custodians perform the same type of cleaning work as the cleaners, but they also perform numerous other duties which are clearly custodial in nature, such as operation of the heating and ventilating system, maintenance of the plumbing and lighting systems, preventative maintenance, and care of the lawn, sports and play areas and parking lots.

As of August of 1995, there were 15 custodial positions and 10 cleaner positions in the District. While the number of employes in these positions has varied over time, what has not changed is that the cleaning duties the custodians perform are equivalent to the cleaning duties assigned to the cleaners.

Facts Leading to the Instant Grievance

In the summer of 1995, a high school custodian retired. The District posted the job. An employe named Dean Czachorski bid on and was awarded the position. At the time, Czachorski was a full-time night custodian working half-time at Lincoln School and half-time at the high school. His work schedule was to work every other night at one of the schools. Therefore, he worked three nights per week at the high school and two nights per week at Lincoln. The following week, he would work three nights at Lincoln and two nights at the high school.

Although Czachorski was classified as a "custodian", approximately 90% of his former duties at both Lincoln School and the high school were "cleaning" duties of the type regularly performed by cleaning employes.

On August 16, 1995, the District posted Czachorski's former custodial position. There were no bidders for this posting. When nobody bid for the "open" custodial position, the District reviewed the duties involved, as well as the work schedule and determined that most of the responsibilities of the position involved "cleaning" work identical to the work of cleaners. Thereafter, a decision was made to fill the one full-time equivalent position with two half-time cleaners and reassign the 10% custodial duties to other custodians. None of the work that the cleaners would be doing in these positions involved purely custodial work. No custodians would have been laid off, terminated, or had shorter hours as a result of this "cleaner" posting.

On September 1, 1995, with the approval of the School Board, the District posted two "cleaner" vacancies; one at Lincoln School and one at the high school. On September 12, 1995, the Union grieved the District's decision to make this posting. The District denied the grievance in a letter to the Union dated September 28, 1995. When the District received the grievance, it stopped the process of filling these two open positions.

Since the fall of 1995, the District has utilized substitute custodians and has not filled either the "cleaner" positions or the "custodial" position in dispute. It is the stated position of the District that if successful in this grievance, it would post and/or hire cleaners to perform work in accordance with the cleaner job description at the Lincoln School and at the high school. It would not fill the vacancy in the custodial ranks left by Czachorski.

Prior Contract Language on the Subject

The 1975-76 and 1977-78 custodial collective bargaining agreements between the parties contained the following:

ARTICLE VII

Jurisdiction

Section 1

No work historically performed or hereafter assigned to members of the bargaining unit shall be subcontracted, transferred, assigned, or conveyed in whole or in part to outside firms or to non-Civil Service personnel, excepting qualified personnel during summer months or Easter and Christmas vacation, Monday through Friday. Only in an emergency situation may any work be offered to anyone outside the bargaining unit.

Should the Board of Education authorize the Kiwanis-Lions to utilize its facilities for the annual charity event, two custodians shall be assigned during setup, activity time, and clean-up. Voluntary help may be allowed to assist the custodians.

The Board shall have the right to hire and utilize temporary, part-time, or substitute help at any time and for any reason so long as no member of the bargaining unit is laid off, discharged, suffers a loss in wages or of the opportunity to perform snow plowing, salting, emergency maintenance or other emergency work traditionally performed by employees of the bargaining unit. Part-time and temporary help shall not work in excess of eight (8) hours per day nor be utilized on work assignments of any nature on Saturday or Sunday.

The Board may request further exceptions to the foregoing as they arise, but these exceptions shall not be granted unless mutually agreed upon. The Union agrees to assign the members of its bargaining unit with authority to bind the Union to such exceptions as they may occur from time to time.

Prior Grievances On The Subject

In August of 1976, the Union filed a grievance regarding a full-time custodial position at the Kosciuszko School, vacated through retirement, which the District decided to replace with a part-time position. The Union felt that the work was work historically performed by full-time people and that the "job should stay under the jurisdiction of our contract, according to the jurisdictional language."

The proposed elimination of the full-time position was not a situation where the work had been eliminated, it was just a matter of changing the hours from a full-time to a part-time position.

Although the grievance was initially denied, the School Board ultimately decided to continue to have a full-time position and that part of the work would be done at the Kosciuszko School, and the remainder of his time would "be used according to the needs

of the school district."

On or about May, 1994, the Union filed a grievance over the elimination of a full-time custodial position. The basis of the grievance was that a custodian went out on a health disability and as the custodians went to different schools, the Cudahy High School field house job was left open. The District divided up the duties of that job with two other custodians on the second shift at the Cudahy High School, and parts of their jobs were given to part-time cleaners "to allow them time to clean in the field house."

The Union grieved the matter because the work was "under our jurisdiction and it's work historically performed by us." The Union objected to parts of the custodial work being "given to part-time cleaners." The Union met with the personnel committee, pointing out the jurisdiction violation in the agreement, and the School Board ultimately upheld the grievance. By letter dated June 14, 1994, District Superintendent John A. Watson wrote that the School Board had "approved the relief sought regarding your grievance of the high school custodian position." Watson added: "The essence of the agreement is that an additional custodian position will be made available at the high school. This is in addition to the present work force."

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE

Management Rights

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 law. These rights include, but are not limited to, the following:

To direct all operations of the school system; to establish reasonable work rules; to hire, promote, transfer, schedule and assign employees in positions with the school system; to suspend, demote, discharge and take other disciplinary action against employees, for just cause; to relieve employees from their duties because of lack of work or any other legitimate reason; to maintain efficiency of school system operations; to take whatever reasonable action is necessary to comply with State or Federal law; to introduce new or improved methods or facilities, or to change existing methods or facilities; to determine the kinds and amounts of services to be performed as pertains to school system operations, and the number and kind of positions and job classifications to

perform such services; to determine the methods, means and personnel by which school system operations are to be conducted; to take whatever action is necessary to carry out the functions of the school system in situations of emergency. These rights shall not be used for the purpose of discriminating against any employee or for the purpose of discrediting or weakening the Union.

ARTICLE VII

Jurisdiction

Section 1

No work historically performed or hereafter assigned to members of the bargaining unit shall be subcontracted, transferred, assigned, or conveyed in whole or in part to outside firms or to non-Civil Service personnel, excepting qualified personnel during summer months or Easter and Christmas vacation, Monday through Friday. Only in an emergency situation may any work be offered to anyone outside the bargaining unit.

The Board shall have the right to hire and utilize temporary, part-time, or substitute help at any time and for any reason so long as all vacant positions are filled or in the process thereof (6 months maximum will be allowed from the date when the position became vacant) and no member of the bargaining unit is laid off, discharged, suffers a loss in wages or of the opportunity to perform snow plowing, salting, emergency maintenance or other emergency work traditionally performed by employees of the bargaining unit. Part-time and temporary help shall not work in excess of eight (8) hours per day nor be utilized on work assignments of any nature on Sundays or Holidays.

Part-time and temporary help may be utilized on Saturdays but shall be limited to eight (8) hours per day to a maximum of forty (40) hours per week and only for painting, grass cutting, tree and bush trimming, cleanup litter and watering.

The Board may request further exceptions to the foregoing as they arise, but these exceptions shall not be granted unless mutually agreed upon. The Union agrees to assign the members of its bargaining unit with authority to bind the Union to such exceptions as they may occur from time to time.

. . .

ARTICLE VIII
Grievance Procedure

. . .

(C) Upon completion of this hearing, the arbitrator shall be requested to render a written decision within thirty (30) working days after the conclusion of testimony and argument to both the Board and the Union, which shall be final and binding upon the parties. In making his/her decision, the arbitrator shall neither add to, detract from nor modify the language of this Agreement.

. . .

Decision of the Arbitrator: The decision of the arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the contract in the area where the alleged breach occurred. The arbitrator shall not modify, add to or delete from the express terms of the Agreement.

. . .

POSITIONS OF THE PARTIES

Union's Position

The Union initially argues that the language of Article VII, Section 1 explicitly restricts the District's right to transfer the work in question out of the bargaining unit. In this regard, the Union points out that the aforesaid contract language states that the District has the "right to hire and utilize . . . part-time . . . help at any time and for any reason so long as all vacant positions are filled or in the process thereof . . . and no member of the bargaining unit is laid off . . . suffers a loss in wages or of the opportunity to perform . . . other emergency work traditionally performed by employees of the bargaining unit. . . ." (Emphasis supplied) The Union maintains that the aforesaid language clearly requires two conditions which must be met to hire and use part-time help. The Union states that the second condition is not at issue.

The Union next argues that a "vacancy" exists, unless the workload of the position diminishes or ceases to exist. Citing SHERWIN WILLIAMS CO., 49 LA 74, 75 (RAY, 1967), the Union admits that where the duties of a position no longer exist, an employer does not need to fill a position. In the instant case, the Union points out that all of the work still exists; therefore, the District has a vacancy which it must fill.

The Union also argues that work assignments do not need to belong exclusively to a bargaining unit in order to be protected citing YOUNGSTOWN HOSPITAL ASSOCIATION, 88 LA 251 (DILONE, 1986)and several other arbitration awards in support thereof. This

is particularly true, the Union claims, where the disputed work is a substantial part of the affected bargaining unit's work. In the instant case, the Union points out that the cleaning work performed by the custodians is a "jugular vein" of the custodials as opposed to a "de minimis incidental task".

The Union further rejects the District's assertion that the Union is taking the position that the issue is one of establishing a mandatory manning level, and cites several examples of situations where it did not grieve the loss of positions where the work was no longer available.

Finally, the Union points out that the present jurisdictional language closely resembles the jurisdictional language which the District, in settling grievances, has

recognized as protecting the full-time custodial positions from disappearing by assigning the custodians' cleaning work to part-time workers and/or cleaners, both before and after the cleaners became a separate bargaining unit within Local 742.

For the above reasons, the Union requests that the grievance should be sustained and that the District should be ordered to fill the vacant custodial position.

District's Position

The District initially points out that "it has long been recognized that management has the right to interclassification transfer of work where the work in question is work performed by both classifications and where no restriction on that right is found in the agreement." The District adds that its right to take the action it did is found in the express language of the management rights clause citing ST. LOUIS POST DISPATCH, 93 LA 548 (HEINSZ, 1989) in support thereof.

The District next argues that the "jurisdiction clause" does not prevent it from posting the two cleaner positions, while the "management rights" clause guarantees its right to do so. In this regard, the District first argues that because the inherent duties of the disputed position were 90% cleaning duties it had the right under the "management rights" clause (Article V) to rescind the aforesaid custodial vacancy and post for two part-time cleaners. The District points out that its intent is to have the two cleaners do work that cleaners currently do under the cleaner's agreement. The District notes that the filling of the two cleaning positions will not result in cleaners doing any custodial work. However, the District points out that it is undisputed that in the past it has reassigned cleaning duties between the custodians and the cleaners without any grievances filed by the Union over same.

Secondly, the District argues in support of the above that the "jurisdictional clause" (Article VII) which the Union relies on herein, does not prevent the District's posting action. In support thereof, the District first maintains that there is nothing in said clause which supports a "minimum manning" argument or a claim that the mix of work between the cleaners and custodians has to remain constant. To the contrary, the District

maintains that the real purpose of said clause is to prevent the District from subcontracting bargaining unit work to outside contractors or non-union employes something which it is not attempting to do here. The District adds that the Union "is simply trying to invoke this clause in an attempt to support an argument for which this clause was not intended to support." The District concludes by noting that in twenty years of negotiations between the parties involving the cleaners the Union has never asked for contract language that would prevent the District from assigning cleaning work back to cleaners.

The District also argues that the past grievance settlements relied upon by the Union are factually distinct and are therefore not relevant to the Union's attempt to have the current grievance sustained and do not constitute a waiver of the District's future rights on the issue citing several arbitration awards in support thereof.

Finally, the District argues that past practice supports its right to reassign the duties

in question at its discretion between the cleaners and custodians and to operate in the most efficient manner possible to protect the taxpayers and children in the District.

Based on all of the above, the District believes that the grievance must be denied. The District also cautions that "in order to sustain the Union's grievance, the Arbitrator would have to add to or modify the language of the contract," something which is beyond the authority of the arbitrator.

DISCUSSION

The District initially argues that management has the right to interclassification transfer of work where the work in question is work performed by both classifications and where no restriction on that right is found in the agreement. The District adds that its right to take the action it did is supported by the express language of the management rights clause, and cites ST LOUIS POST DISPATCH, SUPRA, in support thereof.

The Arbitrator agrees with the District's basic position that arbitrators have held that management has the right to transfer work out of the bargaining unit absent a contract provision to the contrary. However, in the instant case, as discussed below, the language of Article VII, Section 1 explicitly restricts the District's right to transfer the work in question out of the bargaining unit.

Likewise, the Arbitrator rejects the District's reliance on ST. LOUIS POST DISPATCH, SUPRA. In that case, the arbitrator found that the employer properly reassigned the task of stuffing "run of the paper" ads into envelopes from composing room employes to dispatch room employes represented by another union, even though such work had historically been performed by composing room employes. In reaching his conclusion, the arbitrator relied on two material facts, not present in the instant dispute; namely, that a de minimis amount of work was transferred (20 to 30 minutes of bargaining unit work per day), and that the Employer's decision to transfer said work day had a minimal impact on the bargaining unit. (Emphasis added)

The District next argues that the "management rights" clause guarantees its right to post the two cleaner positions, while the "jurisdiction clause" does not prevent it from doing so. In this regard, the District first argues that because the inherent duties of the disputed position were 90% cleaning duties it had the right under the "management rights" clause to rescind the aforesaid custodial vacancy and post for two part-time cleaners. It is true, as pointed out by the District, that the management rights clause does provide that the District has all management rights to operate the school system including the right to . . . assign employees in positions with the school system; to maintain the efficiency of school system operations; to introduce new or improved methods; to determine the kinds and amounts of services to be performed as pertains to school system operations, and the number and kind of position and job classifications to perform such services; and to determine the methods, means and personnel by which school system operations are to be conducted. However, it is also true that unless a contrary intention appears from the agreement, the meaning of the aforesaid general management rights provision may be restricted by more specific contract provisions. The parties did not argue, nor could the

Arbitrator find such a contrary intention herein. To the contrary, the "management rights" clause, Article V, specifically provides that the aforesaid management rights are subject only to the provisions of this contract. (Emphasis added) The Arbitrator, therefore, turns his attention to the language of Article VII, Section 1.

The Union argues that Article VII, Section 1, requires that the District post and fill the vacant custodial position instead of assigned the custodians' cleaning work to part-time cleaners. As pointed out by the Union, the aforesaid contract provision provides that the District has the right to hire and utilize part-time help at any time and for any reason so long as all vacant positions are filled or in the process thereof. . . . (Emphasis supplied) The question before the Arbitrator is whether the aforesaid "jurisdiction clause" requires the District to post and fill the disputed vacant position with a custodian prior to hiring or utilizing any part-time help.

The cases cited by the Union are instructive on this point. In SHERWIN WILLIAMS CO., SUPRA, the arbitrator decided that the employer did not violate the contract giving it the right to determine size of the work force and each classification, and providing that all permanent vacancies be posted and subject to bidding among unit employes when it failed to post a mechanic position for bid after the previous occupant of said position was promoted to foreman. The arbitrator noted that the employer had decided, as was its right under the contract, that there was no need to replace the promoted employe and, therefore, a permanent vacancy did not exist. The arbitrator also noted that the work performed by the mechanic had been reduced substantially by the purchase of new equipment and that the employer's action was supported by past practice.

In reaching the above conclusions, the arbitrator relied on the principals and language from three other cases. From RHEEM MANUFACTURING COMPANY, 46 LA 1029 (BLOCK, 1966), the arbitrator noted that following the retirement of an employe, "the employer was not required to post the job where the work had dwindled to a maximum of three hours per day and had been assigned to other employees. . . ." 1/ (Emphasis

supplied) Similarly, from OHIO VALLEY GAS COMPANY, 39 LA 321 (MAY, 1962), it was noted that an employer "has the unilateral right to eliminate a job for lack of work, and is under no compulsion to post a job vacated by an employee." 2/ (Emphasis supplied) Finally, from VICTOR CHEMICAL WORKS, 22 LA 71 (DWORET, 1953), the arbitrator noted that the relevant contract "provision did not state that a vacated position must be filled whether or not the performance of the job was necessary . . . the employer [had] the right to determine whether an employee was needed." 3/ (Emphasis supplied)

As pointed out by the Union, the one constant in all of the above cases is "that the positions at issue were all positions that went unfilled when the need to perform the duties of the position no longer existed."

In the instant case, the record is undisputed that the work has not "dwindled", and it is not "lacking". The work is still there, and needs to be performed. In addition, the District's action had a significant impact on the bargaining unit. At the time there were only 15 bargaining unit positions. The District's action eliminated almost 10% of the

bargaining unit.

YOUNGSTOWN HOSPITAL ASSOCIATION, 88 LA 251 (DILEONE, 1986) is more directly on point. In that case, the employer assigned a licensed practical nurse's work to non-bargaining unit registered nurse after laying off the LPN in a staff reduction. The employer claimed its action was proper because the duties performed by the non-bargaining unit employee were customarily performed by said employe. The employer added that the duties involving the LPN's and RN's overlapped in substantial form and were performed by both classes of employes at the hospital.

The parties' agreement, like the contract in the instant case, contained a strong work preservation clause. The Union claimed the Employer violated same, citing the following two sections:

1. Article XXI Section 1 states:

> "Work customarily performed by employees within the bargaining unit shall not be performed by supervisors or other personnel not included within the bargaining unit except for the purpose of instruction . . . or in the event of an emergency . . . or where assistance is necessary. . . ."

1. Article XX Section 11 the pertinent part of which states:

> ". . . The hospital, except in case of emergency, will not fill a bargaining unit job with a non-bargaining unit employe . . ." 4/

That the LPN's performed the same duties that were also part of the RN's job description was not important to the arbitrator in reaching his decision that the employer violated the work-preservation clause of the agreement. The Arbitrator noted:

> It may be argued that the hospital was faced with a decrease in patient volume, warranting the reduction in the work force, but however that might be, assignments of work to the proper employees still must be recognized. Duties belonging to bargaining unit employees, and customarily performed by them, cannot be shifted to others on the pretext that there exists overlapping duties between classification. 5/

The Arbitrator added:

> To overlook what the RN did in this case would in effect grant to the hospital the power to destroy the work preservation provision set forth in Article XXI Section 1. 6/

A similar situation was addressed in SHELL CHEMICAL CO. 47 LA 1178 (ROHMAN, 1967). In that case two bargaining units both performed hydrostatic testing work, and the employer decided to shift the work to one bargaining unit. The Company defended its action on the grounds that said work was not peculiar to any craft and had been performed

by both groups over the years.

The arbitrator began by noting that he had upheld the Company's position on numerous occasions where the work performed by another group was incidental or de minimis in nature. However, the arbitrator went on to distinguish those decisions "based on the degree to which the shared work duties comprised the principal duties of members of the affected bargaining units." He added: "In the instant grievance, however, we are confronted with an entirely different situation. Namely, the jugular vein of a craftsman pierced by a primary task as contrasted with a de minimus incidental task." 7/ He also stated that the work in question had always, as a primary task, belonged to the group which claimed it. The arbitrator concluded by finding that the employer had violated the contract by shifting the aforesaid work.

As pointed out by the Union, an examination of the job descriptions for the custodians 8/ and the part-time cleaners 9/ shows that the cleaning performed by the custodians is a "jugular vein" of the custodians as opposed to a "de minimis incidental task". In fact, the only witness for the District, Daniel C. Zillmer, testified that cleaning responsibilities comprised about 90% of the work of the custodial position in dispute here. 10/

Based on the foregoing standards, as well as the specific facts of this case; namely one, the bargaining unit work in question is still being and will be performed, two, said work is not de minimis in nature but instead a substantial part of the custodians' work, three, the disputed work in the past has been performed by a custodian, and four, the District's action in reassigning the work in question had a significant impact on the bargaining unit, the Arbitrator finds that the aforesaid contract language in Article VII, Section 1, requires the District to fill the disputed vacancy with a custodian before additional part-time help can be utilized to perform the custodians' cleaning work.

An interpretation of the above contract language in this manner is supported by the other sections of Article VII, Section 1. Said contract provision provides: "No work historically performed or hereafter assigned to members of the bargaining unit shall be subcontracted, transferred, assigned, or conveyed, in whole or in part . . ., excepting, . . ." (Emphasis added) It also provides that "Only in an emergency situation may any work be offered to anyone outside the bargaining unit." This work preservation clause, in the opinion of the Arbitrator, is very strong, and in its entirety supports the Union's position herein.

Past practice also supports the Union's position herein. In this regard, the Arbitrator notes, contrary to the District's assertion, that past grievance settlements are relevant to the Union's current grievance. The record indicates that the present jurisdictional language relied upon by the Union closely resembles the jurisdictional language which the District, in settling prior grievances, has recognized as protecting the full-time custodian positions from disappearing by assigning the custodians' cleaning work to part-time cleaners, or other part-time help. The District itself, by resolving the aforesaid disputes in the manner indicated, has given the language of Article VII, Section 1 the meaning sought by the Union herein. The fact that the District in the past has reassigned cleaning work in different/other situations does not detract from the relevance of the two

grievances resolved in favor of protecting full-time custodian positions from having their work assigned elsewhere.

In reaching the above conclusions, the Arbitrator rejects the District's allegation that the real issue herein is one of "minimum manning." Contrary to the District's assertion, the Union did not raise, nor is the Arbitrator finding, that the District is required to fill the disputed vacancy with a custodian where the work is no longer available. Nor is the Union arguing or the Arbitrator finding that the District must maintain a set number of custodian positions.

The Arbitrator also rejects the District's allegation that the "real" purpose of the aforesaid contract clause is to prevent subcontracting. The disputed "Jurisdiction" clause is much broader than that, in the opinion of the Arbitrator, and protects full-time custodial positions from disappearing by assigning the custodians' cleaning work to part-time workers/cleaners as claimed by the Union.

Finally, the Arbitrator rejects the District's argument that in order to sustain the Union's grievance, the Arbitrator would have to add to or modify the language of the contract. The language of Article VII, Section 1, the parties' own interpretation of said language in the past and the specific facts of this case provide the basis for the Arbitrator's decision and Award herein.

Based on all of the foregoing, and absent any persuasive evidence or argument to the contrary, the Arbitrator finds that the answer to the issue as framed by the Union is YES, the District violated the collective bargaining agreement when it posted the vacant full-time Lincoln and high school position as two part-time cleaning positions, and it is my

AWARD

That the grievance is sustained, and the District is ordered to fill the vacant custodial position.

Dated at Madison, Wisconsin this 6th day of November, 1997.

Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

ENDNOTES

1/ WILLIAMS, SUPRA, at 75.

2/ Id.

3/ Id.

4/ YOUNGSTOWN HOSPITAL ASSOCIATION, SUPRA, at 252.

5/ SUPRA, at 253.

6/ Id.

7/ SHELL CHEMICAL CO., SUPRA, at 1180.

8/ Jt. Ex. No. 5.

9/ Jt. Ex. No. 4.

10/ Tr. at 71-72.

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