BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NEKOOSA EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION

and

NEKOOSA BOARD OF EDUCATION

Case 49
No. 57479
MA-10647

Appearances:

Mr. Thomas S. Ivey, Jr., Executive Director, Central Wisconsin UniServ Council-Southwest, on behalf of the Union.

Dr. David J. Scarpino, Superintendent of Schools, Nekoosa School District, on behalf of the District.

ARBITRATION AWARD

The Nekoosa Educational Support Personnel Association (herein the Union) and the Nekoosa Board of Education (herein the Board) are parties to a collective bargaining agreement dated June 9, 1998, covering the period July 1, 1997, to June 30, 1999, and providing for binding arbitration of certain disputes between the parties. On April 19, 1999, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration regarding a dispute over the hiring of non-bargaining unit employes to fill temporary substitute positions and requested the appointment of a member of the WERC staff to arbitrate the issue. The undersigned was designated to hear the dispute and a hearing was conducted on December 2, 1999. The proceedings were not transcribed. The parties filed briefs on January 12, 2000, and reply briefs on February 1, 2000.

ISSUE

The parties were unable to stipulate to a statement of the issue, therefore, the arbitrator frames the issue as follows:

> Did the District violate the collective bargaining agreement by employing non-union substitute workers while the Grievant was on partial layoff?
>
> If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE II – 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 Agreement and applicable law.

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

. . .

H. To contract out for goods or services as long as bargaining unit employees are not deprived of their regular normal hours of work or are on layoff;

. . .

ARTICLE IV – CONDITIONS OF EMPLOYMENT

. . .

E. LAYOFF AND RECALL

For the purposes of computing department seniority the following departments are to be utilized: (1) Custodial, (2) Secretarial, (3) Assistant, (4) Food Service, (5) Cleaner.

When the Board determines to layoff employees – full layoff, or reduce the number of hours of employees – partial layoff, the employees with the least amount of seniority in the specific department(s) where the layoff(s) are to occur will be the first to be notified of a possible layoff. Preliminary notice of layoff will be given to the affected employee(s) with a copy to the Union thirty (30) days prior to the anticipated date of lay off.

If the least senior employee in the department has more seniority than another employee in a department where the employee was previously employed, the employee who is least senior in the department being reduced may bump back to the department where the employee was previously employed, and displace any other employee in that department who has less departmental seniority and assume the same hours, wages and conditions of employment of said position.

Employees on layoff shall retain their seniority, accumulated sick leave, and all other employee rights for a period of two (2) calendar years from the date the layoff commenced. The District shall not fill a bargaining unit position with a non-bargaining unit employee while there are employees who are laid off and

who are qualified and willing to perform the work. Employees shall be recalled to work in reverse order of layoff – the most senior qualified employee shall be the first to be recalled. An employee who is unwilling to accept recall will lose to the right to be recalled. The employees shall notify the District of their intent to return within ten (10) work days of receiving a registered notice by the District.

. . .

O. SUBSTITUTE PAY

Cleaner employees, when required to substitute for Maintenance/Custodian employees will be paid at the Maintenance/Custodian Probationary First 90 Days rate for all time worked.

Educational Assistants shall be paid at the Special Education Assistant rate if required to substitute for the Special Education Assistant who is absent from work.

In the event a Cook employee is required to perform work normally performed by a higher-paid Food Service employee for a full normal work day, the employee will be entitled to pay at the higher rate for work performed.

In the event an Assistant employee is required to perform work normally performed by a Secretarial employee for a period of more than five consecutive days, the Assistant employee shall receive pay at the probationary rate for the Secretarial position starting on the sixth consecutive work day in that position. This qualifying time for the additional pay only needs to be met one time each year before the employee receives the additional pay.

P. SUBSTITUTE WORKERS

The supervisor will make a reasonable effort to offer the vacant position to the most senior qualified employee in that department. If none are available in that department, the supervisor will make a reasonable effort to offer the vacant position to the most senior qualified employees that are working less hours than the vacancy. The moves will be limited to the building where the vacancy occurs. Special Education Assistants will be excluded from this paragraph, excepting that Special Education Assistants can move within their own classification.

If an employee signs a “waiver” they will not be offered any vacant positions for that school year, and a copy of this waiver will be provided to the employee’s immediate supervisor.

. . .

BACKGROUND

The District and the Union have been in a collective bargaining relationship for many years. In the 1988-91 agreement, a layoff/recall provision was added which provided, among other things, that the District could not fill bargaining unit positions with non-unit employes while there were bargaining unit members on layoff status. In the 1991-93 agreement, Article IV, Section P, was added, dealing with the process for obtaining substitute workers to fill temporary openings, which emphasized that priority would be given to the most senior qualified bargaining unit employes. In the 1995-97 agreement new language was added to Section P, which limited substitutions within the bargaining unit to the school buildings in which the vacancies occur.

During the 1998-99 school year, the Grievant, Sandra Skerven, was employed as a cook at Humke Elementary School in the Nekoosa School District as a regular part-time school year employe assigned to work six and one-half hours per day. On January 16, 1999, the Grievant and two other employes, Gloria Kruger and Sheryl Baker, were notified that they would be laid off. Effective January 19, 1999, the Grievant's hours were reduced to four per day. In addition to less pay, the reduction made her ineligible for health insurance benefits provided by the District to support staff working an average of six or more hours per day. In order to compensate for the shortfall, the Grievant notified the principals of the elementary school, middle school and high school, as well as the District maintenance supervisor, that she was available to substitute for other absent employes to obtain extra hours. During the term of her partial layoff the Grievant was called to substitute as a cleaner at Humke Elementary on 11 occasions and to substitute in the food service at Alexander Middle School on 2 occasions. For the 1999-2000 school year, the Grievant has been employed at Humke Elementary as a Library Assistant.

During the period of the Grievant's partial layoff, Duane Exner, a maintenance worker for the District, and also Union President, observed a non-union employe doing substitute work as a cleaner at the Middle School. Exner objected to the maintenance supervisor, Edward Robatcek, on the basis that under the contract the District should not be hiring non-union substitutes while there were bargaining unit members on layoff status, whereupon Robatcek immediately sent the worker home. The next day Exner again saw a non-union substitute in the building and when he confronted Robatcek was told to discuss the matter with the Superintendent. The Union then filed the instant grievance. The matter proceeded through the steps of the grievance procedure without resolution and thereupon was submitted for arbitration.

POSITIONS OF THE PARTIES

The Union

This case requires giving proper construction to the interplay between Article IV, Section E and Article IV, Section P of the collective bargaining agreement. Each, standing

alone, appears clear and self-explanatory, but ambiguity is created when, as here, both sections come into play. Section E contains the layoff provisions and Section P covers the procedure for hiring substitute workers to fill temporary positions, but neither addresses the issue of hiring substitutes while bargaining unit members are on layoff, nor is it clear which provision takes precedence under such circumstances. Here, Section E requires that qualified laid off bargaining unit members be offered open bargaining unit positions before they can be filled with non-bargaining unit employes. Section P, on the other hand precludes bargaining unit members from substituting for temporary vacancies in buildings other than the one in which they are assigned. This is an example of "latent ambiguity, where the language appears clear on its face, but becomes unclear when an effort is made to apply it to a situation." Elkouri and Elkouri, How Arbitration Works, 5th Edition, p. 484, (1997), quoting MIDWEST RUBBER RECLAIMING COMPANY, 69 LA 199 (BERNSTEIN, 1977).

The arbitrator may rely on parol evidence, such as past practice, bargaining history and statements made during negotiations, as well as the express language of the contract to determine the intent of the parties. NORTHWEST UNITED EDUCATORS V. HAYWARD COMMUNITY SCHOOL DISTRICT, DEC. NO., 24259-C (WERC 7/20/87). Further, clear intent supercedes clear language when implementation of the clear language creates an ambiguity. CIRCLE STEEL CORP., 85 LA 738 740 (1984).

Bargaining history reveals that the 1997 addition to Section P, restricting substitutions to employes in the same building, was a District proposal, which the Union opposed. The District argued that to allow substitutions between buildings would be too disruptive, and the Union ultimately assented to the proposal, but nothing was discussed about the interplay between Section P and Section E. The District's argument that the layoff and recall provision only refers to permanent positions has no basis in fact and this was never the Union's understanding. In fact, Article IV, Section P of the agreement clearly encompasses temporary openings in its definition of "vacancy," and the District, in its responses to the grievance, acknowledges that laid off employes do have priority in filling temporary vacancies (Jt. Ex. 3 and 6). Further, the District drafted and insisted upon the substitute language in Section P, therefore, to the extent it is ambiguous it should be construed against the District.

Despite what the District's witnesses contended at the hearing, the District's actions and practice reveal that it recognizes the need to reconcile Sections E and P and, in fact, has made an effort to do so. In it's responses to this grievance the District informed the Grievant that, as a laid off employe, she would have top priority as a substitute within her building. Further, in an August 1998 memorandum, the Superintendent specifically referred to the Layoff and Recall provision in directing building principals to give top priority to laid off employe Gloria Kruger to fill any temporary Sub Assistant openings (Jt. Ex. 9). The District now contends that the Union, when it agreed to the Substitute language, understood that it restricted moves to within assigned buildings, but, in fact, the Union never conceded that the language applied to laid off workers, nor did it intend to compromise the lay off protections of the contract. The Union agreed to the change to help avoid the disruption of staff moving around from school to school, which is not a factor where a laid off employe is concerned.

The District's contention that it is bound by the language of the contract in this matter is specious, because it has shown an ability and willingness to move staff from building to building in the past to fill substitute positions. The record reflects that, while on lay off status, Gloria Kruger and Sheryl Baker were used as substitutes at schools other than those to which they were assigned. Further, time records entered into evidence show that non-bargaining unit personnel were used as substitutes from time to time. Board member Fred Taylor testified that in order to get the work done the District is justified in using bargaining unit members as substitutes in other buildings when necessary. The cause of the instant grievance was not the fact that bargaining unit members were being moved around, but the arbitrary fashion in which the District did so, to the Grievant's detriment.

The bargaining history between the District and the Union reveals that a consistent Union goal has been to protect the hours of its members. This is shown in several provisions which limit the District's ability to hire or contract outside the bargaining unit if there are unit members on lay off or if the effect of such would be to reduce the hours of regular full-time or part-time employes, as well as giving priority to laid off unit members when vacancies arise. Section P. and its forerunners, therefore, reflect the Union's desire to protect hours for its members and to assume that the Union would agree to a provision it thought would result in the hiring of non-unit employes to fill positions while unit members were on lay off would be illogical. The District itself agrees that this has been the Union's consistent stance and the District's demonstrated willingness to ignore the building exclusivity language and use laid off unit members in other buildings when necessary indicates that the intent is mutual.

The Substitute Worker clause cannot be considered in a vacuum, as the District suggests. Rather, the contract must be construed as a whole to give effect to all its terms and harmonize competing language. Looked at in this light, it is apparent that the overall intent of the document in the areas of wages and hours is to prefer the more senior employes over the less senior and bargaining unit employes over non-unit employes. Thus, with respect to filling permanent vacancies, the most senior employes would have the first opportunity. Any laid off employes, who would presumably have the least seniority, would eventually be permitted to post into any remaining openings and only then would non-unit personnel be considered for unfilled positions. This is consistent with the Union's interpretation of the Substitute provision and allowing laid off employes to fill at other schools would not cause the disruption the building exclusivity language was intended to avoid.

The District

The issue is whether or not the District violated the collective bargaining agreement when it hired a non-bargaining unit employe as a temporary substitute for a bargaining unit employe. The District did not violate the agreement and, in fact, had the District acted otherwise it would have done so.

The Union cites Article II, Section H, and Article IV, Section E, in support of its position. Both of these sections are inapplicable. Article IV, Section E, addresses the issues of Layoff and Recall, which is irrelevant to the case at hand. The District did not hire someone to fill a vacant position. Rather, it obtained a substitute to fill in for an employe who was temporarily absent. Article II, Section H, is inapplicable for the same reason and would only be appropriate if there were not specific contract language addressing the point in question.

Article IV, Section P of the contract specifically governs the situation before the arbitrator and sets forth a clearly outlined procedure for filling temporary positions. First, the supervisor must make a reasonable effort to offer the position to the most senior qualified bargaining unit member in the department. Next, the a reasonable effort must be made to offer the post to the senior qualified employe working less hours than the vacancy. Bargaining unit members are limited, however, to substituting only within the buildings to which they are assigned, with the exception of Special Education Assistants. Further, employes have the option of signing a waiver which withdraws them from consideration for substitute positions for the school year.

This case involves a substitute position, therefore, the Substitute Worker provision in the contract should control. No other provision of the contract is relevant. The language of the provision is clear and specific and the District followed it, as it was bound to do. The Grievant was assigned to Humke Elementary School and is not a Special Education Assistant. Therefore, she could only be offered substitute assignments that occurred within Humke Elementary. Because this case does not involve hiring a person to fill a new or open permanent position, Article IV, Section E, Layoff and Recall, which the Union has cited, does not apply.

At the hearing, School Board member Wayne Freeman testified that the Substitute Worker language was specifically intended to deal with these situations and, further, that the Layoff and Recall provision was limited to issues of laying off personnel and hiring them back again and had nothing to do with substitute workers. He added that the purpose of the language precluding staff from moving to different buildings was intended to avoid disruptions and pointed out that the only exceptions to this rule were the Special Education Assistants. Union President Duane Exner denied the applicability of Article IV, Section P to this situation, which is an illogical and untenable position. The parties do not have the luxury of picking and choosing which contract provisions they will and will not follow, and the District followed it exactly in this case.

It should also be noted that, unlike previous agreements, the contract containing the language restricting substitutions to within the same buildings did not go to arbitration, but was approved by the Union membership. Exner also admitted that it went to a vote because the bargaining team "deemed the agreement worthy of consideration" and that a majority of the unit members approved it. Exner and other Union witnesses also testified that the appropriate

procedure for an employe unable to come to work is to "contact their supervisor and ask him to get a sub," implicitly agreeing that the Substitute Worker provision is the applicable provision in such cases.

In some instances the District has been forced by necessity to use bargaining unit members to substitute in other buildings. This is due to the fact that the District only has three individuals on its non-bargaining unit substitute list. If a replacement cannot be found using the Substitute Worker criteria, and if there are no non-unit substitutes available, the District has little choice in getting necessary work done, but to use whoever is available. This only occurs, however, when all other options have been tried and have failed.

In summary, this is a case about substitute workers and the District applied the Substitute Worker language scrupulously in the Grievant's case. The arbitrator is bound to interpret and apply the specific terms of the agreement, which the District has cited, and on that basis the grievance should be denied. If the Union does not like the Substitute Worker language the appropriate place to address it is at the bargaining table.

Union Reply

The District concedes that it violates the language of Article IV, Section P, when it admits to using substitutes from other school buildings when necessary. Clearly the provision, as interpreted by the District is unworkable. In fairness, therefore, if the District is going to create exceptions to the rule, it must do so uniformly. There is no reason why other employes should be called to substitute at other buildings and the Grievant not and she should not be singled out. Further, since the District's express reason for wanting the language was to avoid disruption, it should be noted that using laid off workers would involve no disruption and, therefore, would not violate the intent of the provision.

The Union does not, as the District alleges, contend that Article IV, Section P, is ambiguous. Rather, the language does not address the proper response to the situation at hand and, therefore, is unclear to that extent.

The District's argument that the grievance should be denied and the issue addressed at the bargaining table has no merit and is contrary to law. The contract contains a grievance procedure specifically to address disputes between the parties and both the contract and the statute contemplate that disputes will arise over the proper application of "mutually agreed language." It is no argument, therefore, to say that the grievance should be denied merely because the parties mutually agreed to put the disputed language into the contract.

Taking the contract as a whole, there are two apparent provisions, which, while clear individually, become unclear when applied to the present fact situation. The Union maintains that its interpretation gives effect to all the language of the contract and is consistent with past practice in the District. The grievance should, therefore, be upheld.

District Reply

The language of Article IV, Section P, is specific and clear, not ambiguous as the Union contends and the exceptions cited by the Union do not alter its plain meaning. In the case of Gloria Kruger, she was originally assigned as an aide in both the elementary and middle schools. Therefore, the District acted consistent with the substitute language when it used her as a substitute in both buildings. In the other situations, the District was confronted with an emergency in that it was not able to procure substitutes within the given buildings, nor could it find a non-bargaining unit replacement, and it had to use bargaining unit personnel from other buildings to fill needed positions. This was the case with Sheryl Baker and also on the occasion that the Grievant was called to work at the high school.

The District has shown that the language of Article IV, Section P, is neither ambiguous, nor unclear, and that it has applied it strictly except in rare and justifiable instances. This provision, which was approved by the Union, was applied properly here and, because it is the only language directly applicable to substitute workers, should be interpreted strictly by the arbitrator.

The Union's claim of ambiguity is a sham intended to obtain relief through a meritless grievance. The language is clear and the Union's concerns are properly dealt with at the bargaining table, not in arbitration. The grievance should be denied.

DISCUSSION

The record shows that during the 1998-99 school year, the Grievant was employed as a cook at Humke Elementary School, but that between January 19, 1999, and the last week of the school year, her hours were reduced from six and one-half to four hours per day, which qualifies as a partial layoff under the collective bargaining agreement. During that interval, temporary openings would periodically arise at the Middle School and High School, which would be filled by qualified support staff within those buildings, or, failing that, by non-bargaining unit temporary employes. Only in the event that no on-site or temporary substitutes were available would substitute work be offered to staff assigned to other buildings, whether laid off or not.

The substitute worker provision was first added to the contract in the 1991-93 agreement. It stated as follows:

> Q. SUBSTITUTE WORKERS
>
> It is mutually agreed that the District will not assign substitutes or temporary employees to a position that requires more hours than are normally worked by regular employees. A reasonable effort shall be made by the Supervisor to assign this work to the highest seniority employee qualified to perform the work, limited to one move or one classification per building.

This provision recognized the right of qualified regular employes, on the basis of seniority, to first refusal of temporary substitute positions prior to the District hiring temporary substitutes from outside the bargaining unit. This language remained unchanged in the 1993-95 agreement. In theory, the provision was intended to insure that the highest paying jobs with the most hours stayed within the bargaining unit. If a senior employe took a substitute position, that employe's position would become temporarily open for a less senior employe to fill and so on down the line. If, at the end of the substitution process, a low-end position remained temporarily vacant, that position would, if necessary, be offered to a non-unit employe.

In the 1995-97 agreement, the language was modified as follows:

> P. SUBSTITUTE WORKERS
>
> The supervisor will make a reasonable effort to offer the vacant position to the most senior qualified employees that are working less hours than the vacancy. The moves will be limited to the building where the vacancy occurs. Special Education Assistants will be excluded from this paragraph, excepting that Special Education Assistants can move within their own classification.
>
> If an employee signs a "waiver" they will not be offered any vacant positions for that school year.

This language contains two significant changes. First, it limits offering of substitute positions to only those employes assigned to the building in which the opening occurs, with the exception of Special Education Assistants. Second, it permits employes to opt out of consideration for substitute positions by signing an annual waiver. The provision achieved its current form when language was added to the 1997-99 agreement giving first preference to senior employes within the same department as the vacancy.

From the outset it is clear that the Union intended, in the development of this provision, to protect, to the degree possible, the rights of bargaining unit employes over non-bargaining unit employes and to recognize seniority rights in the context of substitute openings. The District, on the other hand, desired an efficient and workable process for making sure temporarily vacant staff positions were covered. As witnesses for both sides testified, the impetus for adding the language restricting moves to assigned buildings to the 1995-97 contract was the District's concern that it's operations would be disrupted if staff members were shuttling from building to building exercising their seniority rights every time a temporary opening arose.

It is axiomatic that parties negotiating a contract can not foresee all contingencies, or draft language in such a way as to cover every situation that might arise. In such a case, it is the arbitrator's lot to attempt to determine from the parties' revealed intent what they would have done. STERLING COLORADO BEEF, 86 LA 866, 871 (SMITH, 1986) From the bargaining

history here, it does not appear that either side considered the implications of the substitute worker language where laid off employes were concerned. There is no record of any bargaining discussions regarding the rights of laid off employes over substitute positions, nor about the possible interplay between the Layoff/Recall and Substitute Worker sections of the contract. Neither does the section, itself, make any reference to the rights of laid off employes, or the lack thereof. This being the case, it is necessary to consider the contract as a whole, as well as any pertinent extrinsic evidence, to determine whether laid off employes should be entitled to different treatment with regard to substitute positions.

Addressing first the Layoff and Recall language of Article IV, Section E, cited by the Union, it is clear that this section is not directly on point. The District argues that this provision is intended to deal with the recall rights of laid off employes to new or vacant permanent positions, rather than substitute positions. I concur. Significantly, the next to last sentence in the section states, "An employee who is unwilling to accept recall will lose the right to be recalled." To argue that a laid off employe has recall rights to temporary substitute positions under this provision would mean that a full-time regular employe on layoff status would be required to accept any substitute position offered, for however short a time, or risk losing the right to be called back to a full-time position. It is unlikely the Union would agree to a provision it understood to have such implications. That having been said, however, the section does point up the importance that the Union places in general on seniority rights and the protection of bargaining unit work.

The District apparently agrees, at least in principle, that, under the guidelines established by Article IV, Section E, substitute work should be offered to laid off bargaining unit members before non-unit employes. In his Step 2 response to the grievance, Superintendent Scarpino stated as follows:

. . .

> Because your grievance pertains to a NESPA person working for (substituting for) another NESPA person who is unable [sic] attend work, I call your attention to the specific sentence contained within Article IV: "The moves will be limited to the building where the vacancy occurs."
>
> When a NESPA vacancy occurs in a building and a NESPA person is on layoff within that particular building, the NESPA person on layoff will be called back to work according to the contractual language. Specifically, Mrs. Skerven will be asked to substitute at Humke Elementary School, when a NESPA person is unable to attend work at Humke Elementary School, because this is where Mrs. Skerven works.

. . .

In this Step 3 response to the grievance, the School Board President, Herbert Carlson, states the District's position as follows:

. . .

> The Board concludes that according to the specific contractual language found in Article IV, P, when a NESPA vacancy occurs in a building and a NESPA person is on layoff within that particular building, the NESPA person on layoff should be the substitute.

. . .

Further, in addressing the substitute rights of Gloria Kruger, a laid off Title I Assistant, the Superintendent, in an August 21, 1998 letter to the Union President, stated as follows:

. . .

> After reading the contractual language (page 6, E. Layoff and Recall) I find that in the event there is a need for a Sub Assistant, Gloria should be called first. The specific language reads:
>
> > The District shall not find a bargaining unit position with a non-bargaining unit employee while there are employees who are laid off and who are qualified and willing to perform the work.
>
> Therefore, if the need arrises [sic] for a Sub Assistant in your building, Gloria Kruger should be contacted first. If Gloria cannot be reached, you may then proceed to your next choice on your list.

. . .

It is also clear from this correspondence, however, that the District interprets Article IV, Section P, as barring laid off employes from substituting in buildings other than where they were assigned at the time of lay off.

Another provision requiring particular attention is Article II, Section H. This provision, part of the Management Rights clause, permits the District to "contract out for goods or services as long as bargaining unit employees are not deprived of their regular normal hours of work *or are on layoff*. (Emphasis added.) This is extremely significant because it underscores the principle that laid off employes should have access to available work before the District can offer it to non-unit employes. In fact, it is at least arguable that temporary substitute work would constitute "services" as that term is used in Article II, Section H, thereby requiring the District to offer substitute hours to laid off employes prior to non-unit

employes, as long as they are qualified to do the work and aren't prohibited for some other reason. This is consistent with the view expressed by the District in the correspondence cited above.

In the District's view the prohibiting factor is the limitation in Article IV, Section P, preventing substitutes from moving from building to building, which it contends is as applicable to laid off employes as it is to those working full time. I am not persuaded that this is so. Bargaining history, as related by the District's witnesses, reveals that the building limitation language was added at the District's instigation to reduce the disruption caused by staff people moving around the District. Essentially, the system of filling substitute positions can have a cascade effect. As a more senior employe moves to fill a substitute position, his or her position is opened for a more junior employe to fill and so on down the line. The District's concern was that, by allowing movement District wide on the basis of seniority, staff people would constantly be moving around, which would be confusing and would negatively affect the District's operations. The Union recognized the District's concern and for that reason agreed to add the language to the contract. The logic underpinning this system breaks down, however, when applied to laid off employes, who would not be leaving one position to fill another.

Also, the District has recognized that necessity sometimes requires less than strict adherence to the Substitute Worker provision. The record reveals that at any one time the District has only three potential non-unit substitutes available to fill temporarily open positions. Occasionally, when the District has exhausted its substitute options among the regular workforce in the particular building and the non-unit substitutes, employes from other buildings have been used as substitutes, in apparent violation of Article IV, Section P. This was testified to by Dan Enerson, Kathleen Smith and Harland Felch, as well as School Board member Roy Taylor. Enerson, Smith and Felch are all members of the bargaining unit and each testified to having been asked to substitute at other buildings when no non-unit substitutes were available. On two occasions, the Grievant was sent to the Middle School as a substitute when no non-unit substitutes were available. According to Taylor, the District's position in such cases is that the necessity of getting the work done and operating the District properly supercedes the restrictions of the contract.

The District having conceded *de facto* that the contract language can be circumvented when dictated by necessity, it is difficult to see the logic behind interpreting and applying it, as the District does here, to the detriment of the laid off employes. Laid off employes would obviously not be moving from building to building to fill temporary positions, so there would be no disruption of District operations. Even partially laid off employes would have, at best, minimal disruptive effect. Because of their relatively low seniority, they would only be offered a position after more senior full-time staff <u>within the building</u> had been offered the work, and there would likely be no more than one move. Further, their partial lay off status would mean there would be fewer hours the District would have to fill with non-unit employes. Given the rationale used by the District to justify the non-mobility policy, it is unreasonable to apply it to laid off employes, when to do so provides marginal benefit at best, but has the effect

of giving preference to non-bargaining unit personnel, a result which contradicts one of the foundational concepts in the contract. Given the bargaining history and past practice of the parties, this cannot have been the intent behind the language.

While the Grievant was on partial lay off, bargaining unit work for which she was apparently qualified was offered to and performed by the following non-unit substitutes: Shane Sorenson – 8 hours regular and .5 hours overtime; Durward McIntire – 310 hours regular and 2 hours overtime; Debbie Ratajczyk – 80.75 hours regular; Tina Gerrettie – 96 hours regular, for a total of 494.75 hours regular and 2.5 hours overtime. Except in instances where there may have been overlap between two or more substitute openings on the same day, and to the extent the available hours did not conflict with the Grievant's regular work schedule, these hours should first have been offered to the Grievant.

Based upon the foregoing and the record as a whole, the undersigned enters the following:

AWARD

By hiring non-bargaining unit substitutes to fill temporary positions while the Grievant was on lay off and available to work the District violated the collective bargaining agreement. Accordingly, for the period between January 19, 1999, and such time as she was reassigned as a full-time Library Assistant, the District is ordered to pay the Grievant, according to the formula set forth in Article IV, Section O, of the contract, for any and all hours of substitute employment within the District, for which she was qualified and available, which were filled by non-unit temporary employes The District is also required to provide the Grievant with any additional benefits, or make any additional contribution to existing benefits, to which the added hours entitle her.

Inasmuch as there was not extensive discussion at the hearing over the character or implementation of the remedy, the undersigned will retain jurisdiction over this matter for a period of six months after the issuance of this award to resolve any disputes that may arise relative to implementing the remedy.

Dated at Eau Claire, Wisconsin this 26th day of April, 2000.

John R. Emery /s/

John R. Emery, Arbitrator

JRE/ans
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