

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**SENECA COUNCIL OF AUXILIARY PERSONNEL/
SOUTH WEST EDUCATION ASSOCIATION**

and

SCHOOL DISTRICT OF SENECA

Case 37
No. 58201
MA-10876

(Bus Driver Grievances)

Appearances:

Mr. Leroy Roberts, Executive Director, South West Education Association, appeared on behalf of the Association.

Mr. Michael Seiser, District Administrator, School District of Seneca, appeared on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and District respectively, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide three bus driver grievances. A hearing, which was not transcribed, was held on January 12, 2000, in Seneca, Wisconsin. Afterwards, the parties filed briefs and reply briefs, whereupon the record was closed on March 10, 2000. Based upon the entire record, the undersigned issues the following Award.

ISSUES

The parties were unable to stipulate to the issues to be decided herein. Having reviewed the record and the arguments in this case, the undersigned finds the following issues appropriate for purposes of deciding this dispute:

First Grievance

Did the District's failure to post the revised bus routes violate Article V of the collective bargaining agreement? If so, what is the appropriate remedy?

Second Grievance

Did the District's failure to assign the revised bus routes by seniority violate Article V of the collective bargaining agreement? If so, what is the appropriate remedy?

Third Grievance

Did the District sexually discriminate against Illene Olson by assigning her Don Noel's old southern bus route? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1999-2002 collective bargaining agreement contains the following pertinent provisions:

ARTICLE III – MANAGEMENT RIGHTS

The Board shall have the sole and exclusive right to determine the number of employees to be employed, the duties of each employee, the nature and place of their work, and all other matters pertaining to management and operation of the District, including but not limited to, the following:

1. To direct the employees, including the right to assign work and overtime;

...

3. To hire, examine, classify, promote, train, transfer, assign, in positions with the school system;
4. To increase, reduce, change, modify or alter the composition in the size of the work force, including the right to relieve employees from their duties because of lack of work and to suspend, demote, discharge, or take other disciplinary action against employees;

...

7. To change or eliminate existing methods, equipment, or facilities and to introduce new or improved methods or facilities;

...

The exercise of the foregoing shall be limited only by the express terms of this agreement.

...

ARTICLE V – SENIORITY

In the event the board determines it is necessary to lay off employees due to the reduction of work, seniority shall be used in the selection of the employee(s) to be laid off so long as the remaining employees are qualified to perform the remaining work. Seniority will be measured from the date of initial employment in the district. Bus Drivers shall comprise a separate category for the purposes of layoff. Seniority for employees having a common date of initial employment will be determined by a drawing of lots by the Board of Education with those affected and union representation present.

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Recall will be by seniority, if said laid off employees are qualified to fill the vacancies. Such re-employment will not result in the loss of credit for the previous active employment in the District. No new or substitute appointments will be made while there are laid off employees available and qualified to fill the vacancies.

...

Seniority is a measure of an employee's continuous service to the District as defined herein, and will be used to determine an employee's right to assignment and to overtime hours for work which the senior employee is qualified to perform. A second refusal to accept an assignment to overtime hours in a given work year shall negate the senior employee's right to overtime hours for that work year.

Seniority will be used in determining the right to transfer to a vacant position, and the right to a job in the event of a reduction in staff. Qualification for a permanent work position shall be determined after orientation and a 60 day trial performance in the permanent work position.

When a bargaining unit position becomes vacant, employees who qualify for the position may apply for transfer. All vacancies will be posted internally for ten (10) days and current employees making application for transfer shall be given preference for the available position.

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FACTS

The District operates a K-12 public school system. The Association represents the District's support staff employees. Bus drivers are included in the support staff bargaining unit. They (the bus drivers) were accreted to the support staff unit in 1997.

The District employs a half dozen bus drivers to transport students to and from school. The routes driven by the drivers are determined by the District's transportation director. Some of the factors which are considered in determining a bus route are student locations, driver residence, efficiency and cost effectiveness. Historically, bus routes have not changed much over the years. As an example, driver Illene Olson drove the same northern bus route for 17 straight years. Additionally, driver assignments to these bus routes have not changed much over the years either. When a driver assignment was changed, though, the District made the decision - not the employee. Thus, drivers have not historically selected their own assignments/routes.

In August, 1999, the District decided to eliminate a bus driver position due to declining student enrollment. The bus driver whose position was eliminated was Don Noel. Prior to his layoff, Noel drove one of the District's southern bus routes.

Following this action, the District decided it was necessary to change several bus routes and driver assignments. The route and assignment changes which the District made are identified below. The record indicates that the route and assignment changes involved herein are the first route and assignment changes which have occurred in the District since the bus drivers were accreted to the support staff unit in 1997.

Prior to the 1999-2000 school year, the District had three northern bus routes which were driven by Jim Boylen, Illene Olson and Charlie Wright. Effective at the start of the 1999-2000 school year, the District consolidated the three northern routes into two routes. Boylen's and Wright's old routes were essentially consolidated into one, and that (combined) route was assigned to Wright. Wright lives on the route he was assigned to drive. Boylen is the District's most senior driver. He was assigned to drive the route previously driven by Olson. The District also reconfigured Noel's old southern route. Prior to being reconfigured that route was about 26 miles long, one way. The record does not indicate whether this southern route became longer or shorter after being reconfigured, but the route is still one of the District's shortest routes in terms of miles. In terms of time, however, this route takes the longest to drive. The District assigned this route to Olson to drive. Olson is the only woman bus driver in the District. She is also the second most senior driver.

Olson did not want to drive the new southern route she was assigned. She considers that route harder and more difficult to drive than her old northern route. Her assessment of that route is shared by many of her fellow drivers. Olson tried to bump less senior drivers for their routes, but the District would not allow it.

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The record indicates that the District has never previously posted bus routes for bidding. None of the bus routes/assignments involved herein were posted.

...

The Association subsequently filed three separate grievances concerning the route and assignment changes referenced above. One grievance alleged that the District violated the collective bargaining agreement by not posting the changed bus routes. Another grievance alleged that the District violated the collective bargaining agreement when it did not utilize seniority in deciding who to transfer to the changed routes. Another grievance alleged that the District sexually discriminated against "the female driver" (i.e. Olson) when it transferred her "to the least desirable bus route." All three grievances were processed through the contractual grievance procedure and ultimately appealed to arbitration.

POSITIONS OF THE PARTIES

Association

The Association contends that the District violated the labor agreement in several respects by its actions herein. It makes the following arguments to support this assertion.

First, the Association sees this case, in part, as a failure to post case. Accordingly, it makes the argument traditionally made in such cases, namely that the Employer was obligated to post a position and that it failed to do so. According to the Association, at least two positions/routes should have been posted. One was the position that was vacated by the layoff of Don Noel (i.e. the southern route to which Olson was assigned), and the other was the new northern route which was created when Boylen's and Wright's old routes were combined. This argument is premised on the notion that a bus route is a "position" within the meaning of Article V, so that the District is contractually obligated to post it for bidding. To support this premise, it relies on the fact that Article V provides that "all vacancies will be posted internally". The Association characterizes this language as specific, mandatory and non-discretionary. Responding to the District's assertion that it has never posted a route before, the Association acknowledges that that is the case, but it nevertheless avers that the District is contractually required to post same.

Second, the Association also sees this case, in part, as an improper work assignment case. In its view, the route assignments which the District made to Boylen and Olson were improper because the District failed to consider seniority in making them. The Association notes in this regard that employees Boylen and Olson are the most senior employees in the bargaining unit. The Association believes that as the senior employees, they were entitled to pick their own routes, rather than have their routes selected for them by management. Thus, the Association maintains that drivers have a contractual right to select their routes based on their seniority. The Association contends that since that did not happen here, the District violated the labor agreement. Responding to the District's assertion that it has not based route assignments on seniority before, the Association notes that previous route assignment changes occurred prior to the bus drivers being accreted to the bargaining unit in 1997. In the Association's view, the District's manner of making assignments prior to 1998 (when the drivers became covered by the support staff labor agreement), is irrelevant and should not be considered by the arbitrator. The Association maintains that the only time period relevant to this case is what happened post 1998, and it avers that there have not been any route or assignment changes since then, so no past practice is applicable herein.

Third, the Association also claims that the District “inequitably applied the contract” when it assigned Olson to Noel’s old southern route. The Association asks rhetorically why Olson was “forced to give up a route she had driven for 17 years” and “singled out to drive the most difficult route”. It answers this rhetorical question by avering that it was because she is the only female bus driver. Thus, the Association alleges that the District sexually discriminated against Olson by assigning her to the southern route. According to the Association, Olson was “singled out for the unsavory duties that the men drivers did not wish to accept or would not accept.”

In order to remedy the District’s contractual breach, the Association asks the arbitrator to “apply arbitral thought and make the Association and Olson whole.” According to the Association, a make whole award in this particular case should include the following elements. First, the District should be required to post all bus routes. Second, the drivers should “be allowed to select the route they prefer.” As the Association sees it, “this process would continue among the remaining drivers and routes until only one route remains and it would be provided to the least senior employe.” Third, the Association asks that Olson be provided with either (unspecified) monetary relief for “driving the worst route” all year, or her old northern route back.

District

The District contends that its actions herein did not violate the labor agreement as claimed by the Association. In the District’s view, its actions were in accordance with same. It makes the following arguments to support this contention.

First, the District disputes the Association’s contention that it violated the contractual posting provision. For the purpose of responding to this contention, the District acknowledges that 1) Article V requires it to post “vacancies” and 2) it did not post any of the route changes or assignments which it made. The District reads the word “vacancies” in Article V to apply to vacant positions, such as bus driver positions. According to the District, a position is separate and distinct from a bus route or assignment. Building on this premise, the District maintains that the posting language in Article V does not apply to bus routes and/or assignments. To buttress this view, the District calls attention to the fact that it has never previously posted a route or allowed drivers to select their own route. As the District sees it, this establishes that Article V has never previously been interpreted by the parties to require the posting of bus routes and assignments. The District therefore submits it did violate the posting provision by not posting the work involved here.

Second, the District disputes the Association's contention that the assignments which it made here were contractually improper. For background purposes, the District notes that it has the right, under the Management Rights clause, to assign work to employees. It further notes that it has previously exercised that right and assigned routes to drivers. According to the District, it has never allowed employees to select their own routes, or used seniority to determine who drove what route. Instead, the District avers that it has always decided who drove which route. The District essentially characterizes this as its past practice. It is against this backdrop that the District maintains it did the same thing here, namely assign routes to drivers after considering a variety of factors. Turning now to the assignments which are the focus of this case, the District acknowledges that its assignment decisions were not popular with the bus drivers, particularly Olson and her husband who is also a driver. Be that as it may, the District asserts that it was not trying to punish Olson when it assigned her to the southern route. The District also avers that it did not select her for that particular assignment because of her gender.

Given the foregoing, the District maintains that no contract violation occurred when it changed the configuration of several bus routes and reassigned those routes to certain employees, including Olson. It therefore asks that the grievances be denied. In the event that the arbitrator rules against the District and finds a contract violation, the District asks that the remedies not be those proposed by the Association. In the District's view, the remedies proposed by the Association will disrupt the entire busing operation, serve little purpose, and cause serious undue confusion to the students who ride the buses.

DISCUSSION

My discussion begins with a review of the following pertinent facts. Prior to the start of the 1999-2000 school year, the District laid off a bus driver (Noel) after it eliminated his position. Following this action, the District made several bus route and driver assignment changes to its northern and southern routes. The changes affecting the northern routes can be summarized thus: the District consolidated three northern routes into two routes. Boylen's and Wright's old routes were essentially consolidated into one, and that (combined) route was assigned to Wright. Boylen was assigned to drive the route previously driven by Olson. The changes affecting the southern routes can be summarized thus: Noel's old route was reconfigured and assigned to Olson.

It is noted at the outset that this case does not involve Noel's layoff. Instead, it involves the route and assignment changes just referenced. Those changes caused great consternation among the bus drivers. The Association subsequently filed three separate grievances concerning these route and assignment changes: one alleged that the District violated the collective bargaining agreement by not posting the changed bus routes; one alleged

that the District violated the collective bargaining agreement when it did not utilize seniority in deciding who to transfer to the changed routes; and one alleged that the District sexually discriminated against Olson when it transferred her to Noel's old southern route. All three grievances will be addressed in the analysis which follows. They will be addressed in the order just listed.

I begin my analysis of this contract dispute by first looking at the event that caused the District to make the above-noted route and assignment changes. That event, of course, was the elimination of Noel's bus driver position. Rhetorically speaking, when the District eliminated that position and laid off Noel, was a vacancy created which the District was obligated to fill? No. The elimination of a position followed by a layoff does not automatically create a new vacancy. When an employe departs, management has the right to decide whether or not the employe's departure creates a vacancy. This prerogative is reserved to the District here by the Management Rights clause (Article III) which explicitly grants the District the right to "alter the composition in the size of the workforce." This clause gives the District the right to determine the amount of work it needs and what level of service or activity can be eliminated. In the absence of a contract provision limiting management's right to fill vacancies (for example, a clear requirement to maintain a certain number of positions in each classification), it is management's right to determine whether a vacancy exists and when it is filled. Nowhere in this labor agreement is there any contractual provision which requires the District to fill every vacancy or maintain a certain number of positions in each classification. The contractual posting provision found in Article V certainly does not guarantee that all vacancies will be filled. On its face, that provision neither contradicts the management rights noted above nor restricts the District from determining how many positions it chooses to fill. If management determines that a vacancy exists within the meaning of Article V which is to be filled, then and only then does the posting procedure found in that article apply. Thus, unless management determines that a vacancy exists, no contractual right which is contingent on the existence of a vacancy may be exercised.

This rationale also applies to the Association's contention that bus routes are positions. It has just been noted that the District determines whether a vacancy exists. The same is true of positions. Thus, the District also determines whether a position exists.

In this case, the District decided that bus routes are not positions so they did not have to be posted. The Association disagrees on both points. In its view, bus routes are positions which have to be posted.

The undersigned could easily accept the Association's premise that bus routes are positions which have to be posted if there was language in the contract specifying same. In this Arbitrator's experience, language specifying that bus routes are positions which have to be

posted is common in school district support staff labor agreements covering bus drivers. However, this particular labor agreement does not contain such language. In contract interpretation cases, arbitrators try to determine and give effect to the mutual intent of the parties. If the parties here had intended that bus routes are positions which have to be posted, they could have easily so stated in Article V. They did not. The language therein does not say either explicitly or implicitly that bus routes are positions which have to be posted. In the absence of such language, Article V cannot be interpreted as saying that bus routes are positions. That being so, I find that bus routes are not positions within the meaning of Article V. It follows from this finding that bus routes do not have to be posted.

Having just found that bus routes are not positions within the meaning of Article V, the question remains what to call them. The undersigned has decided to call them an assignment of duties. What the District did here was assign certain bus routes to certain bus drivers. The posting language does not apply to or cover the assignment of work. Instead, another provision does. That provision is the Management Rights clause (Article III). That clause gives management the right to assign work to employees. The work which the District assigned to the bus drivers in question was traditional bus driver work. That being the case, the assignment was within the bus driver job description.

The Association contends that the work assignments which the District made here were nonetheless contractually improper because they should have been made by seniority and they were not. I find otherwise. The seniority clause (Article V) does not explicitly provide that bus routes will be assigned on the basis of seniority or that employees can pick and choose their bus routes based on their level of seniority. Again, if that had been the parties' mutual intent, they could have included plain language that so specified. They did not. While Article V does say that "seniority. . .will be used to determine an employee's right to assignment", the record indicates that the word "assignment" in this clause has not previously been interpreted by the parties to refer to bus driver assignments. Thus, up to now, bus routes and driver assignments have not been assigned by seniority or based on seniority. If the parties want to change this, and interpret the clause just noted to mean that bus drivers can pick their bus routes and driver assignments based on their seniority, they can certainly agree to do so. The question here, though, is whether the Arbitrator should interpret that clause to mean that bus routes and driver assignments have to be assigned by seniority notwithstanding the fact that Article V has never been interpreted that way before. I decline to do so. If the Association wants the clause just noted in Article V to have that meaning, it has to get it through bargaining with the District. Given the foregoing, it is held that the District was within its contractual rights when it did not base the bus routes and driver assignments in question on seniority.

Finally, attention is turned to the Association's contention that the District sexually discriminated against Olson by assigning her to Noel's old southern route. It is noted at the outset that numerous state and federal laws prohibit employers from making employment decisions based on an employee's gender. Broadly speaking, those laws prohibit sex discrimination. Here, though, the undersigned is not empowered to enforce those laws and remedy statutory violations of same because my authority is limited to interpreting the labor agreement and resolving questions of contractual rights. While some collective bargaining agreements contain provisions which expressly incorporate various discrimination laws into the agreement, a review of the collective bargaining agreement involved here reveals it does not contain such a provision. That being so, there is no contractual provision which expressly gives a reviewing arbitrator a contractual basis (as opposed to a statutory basis) for deciding whether the District's employment decision (i.e. the assignment in question) was gender based. However, assuming for the sake of discussion that a contractual basis does exist for a discrimination claim, the Association still has the burden of proving it. In other words, the Association has to establish that the assignment in question was gender based. It failed to do so. The Association cites just one fact from the record to support its claim that Olson was the victim of sex discrimination, namely the fact that she is the District's only woman bus driver. The undersigned concludes that this one fact, in and of itself, proves nothing. More proof is necessary, and is lacking herein. That being the case, the Association's claim of sex discrimination has not been substantiated.

In light of the above, it is my

AWARD

First Grievance

That the District's failure to post the revised bus routes did not violate Article V of the collective bargaining agreement. That grievance is therefore denied.

Second Grievance

That the District's failure to assign the revised bus routes by seniority did not violate Article V of the collective bargaining agreement. That grievance is therefore denied.

Third Grievance

That the District did not sexually discriminate against Illene Olson by assigning her Don Noel's old southern bus route. That grievance is therefore denied.

Dated at Madison, Wisconsin this 1st day of June, 2000.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

REJ/gjc

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