

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BUSINESS AGENTS' ASSOCIATION

and

TEAMSTERS LOCAL UNION NO. 662

Case 1

No. 63009

A-6093

(Karen Haase Layoff)

Appearances:

Mr. Daniel Alexander, S10000 County Road "Z", Mondovi, Wisconsin 54755, appearing on behalf of the Business Agents Association.

Mr. Scott Soldon, joined on the brief by **Mr. Timothy Hall**, Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., 1555 North RiverCenter Drive, Suite 202, Milwaukee, Wisconsin 53212, appearing on behalf of Teamsters Local Union No. 662.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Business Agents Association (hereinafter referred to as the Association) and Teamsters Local Union No. 662 (hereinafter referred to as either the Local or the Employer) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute over the Local's decision to layoff Karen Haase from her position as a clerical employee in the Local's Stevens Point office. The undersigned was so designated. An arbitration hearing was held on the matter on May 4, 2004, in Eau Claire, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits and other evidence as were relevant to the dispute. The parties submitted written arguments, which were exchanged through the undersigned on July 12, 2004, whereupon the record was closed. A Motion to Reopen the Record was made in October, 2004 and was denied.

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

ISSUE

The Parties were unable to stipulate to an issue, and agreed that the arbitrator should frame the issue in his Award. The Association proposes that the issue be:

Did the Employer violate the collective bargaining agreement by the layoff of the grievant and the assignment of her regular work duties to a non-bargaining unit permanent replacement? If so, what is the appropriate remedy?

The Employer believes the issue to be:

Did the Employer violate the collective bargaining agreement in laying off the grievant and hiring another individual to fill the new position of confidential secretary? If so, what is the remedy?

There is little difference between the two formulations. The issues may be fairly stated as:

1. Did the Employer violate the collective bargaining agreement in laying off the grievant, and in replacing her with a person in the newly created, non-bargaining unit position of confidential secretary?
2. If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

Article 1. Definitions

Section 3. The term "employee(s)", as used herein means all office clerical employees covered by Exhibit "A" coming under the jurisdiction of the Union.

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Article 2. Recognition, Union Shop and Check-Off of Union Dues

Section 1. Recognition. The Employer recognizes and acknowledges that the Union, its agents, representatives, or successors, is the exclusive bargaining agent for those classifications covered by this Agreement and listed in the attached Exhibit "A", including all regular part-time and regular full time

employees within the Union's jurisdiction as defined by the NLRB Certification No. 18-RC-16037.

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Article 10. Maintenance of Standards

The Employer agrees that all conditions of employment relating to wages, benefits, including but not limited to all insurance policies, hours of work, overtime differentials, holidays, pensions, vacations, and general working conditions, shall be maintained at not less than the existing standards in effect on the effective date of this Agreement, but that such conditions of employment shall be improved or modified wherever specific provisions for improvement or modification are made elsewhere in this Agreement.

It is agreed that the provisions of this Article shall not apply to inadvertent or bona fide errors made by the Employer or Union in applying the terms and conditions of this Agreement if such error is corrected within ninety (90) days from the date of error.

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Article 13. Seniority

Section 1. Seniority rights for employees shall prevail in all matters of employment in this Agreement except or unless it is specifically noted in any Article or Section. For determination of seniority rights, the rule shall be that the longest tenured employee in respect to his/her employment with the Employer in the bargaining unit, as defined in Section 2 below, is the senior employee and has seniority over anyone his/her junior who is hired thereafter as defined in Section 2. This shall continue down the list with the above interpretation. Therefore, any place in this Agreement that seniority is mentioned, unless qualified, it shall mean the longest tenured employee of the Employer in respect to length of employment with the Employer in the bargaining unit.

It is also understood that should any employee leave the bargaining unit for any reason other than that which is granted pursuant to the provisions of Article 11, entitled "LEAVE OF ABSENCE", he/she shall lose all seniority accumulated to date.

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Section 6. When layoffs are necessary, those employees with the least seniority shall be laid off first, provided those employees retained are qualified to carry on the operations. When employees are called back to work, those employees having the greatest seniority shall be recalled providing they, together with those on the job, are qualified to carry on the Employer's usual operations.

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Article 21. Workweek

EAU CLAIRE FULL TIME EMPLOYEES (40 hours):

8:00 AM - 5:00 PM with 1 hour unpaid lunch. (Note: The Employer will continue to honor the present schedule for Lisa Kloss, but reserves the right to modify or revert to pure contract hours schedule based on operational necessities).

EAU CLAIRE PART TIME EMPLOYEES (30 hours):

10:30 AM - 5:00 PM with 1/2 hour unpaid lunch. (Note: The Employer will continue to honor the present schedule for Charleen Graff, but reserves the right to modify or revert to pure contract hours schedule based on operational necessities).

STEVENS POINT OFFICE - LEAD CLERICAL POSITION (40 hours):

8:00 AM - 5:00 PM with 1 hour unpaid lunch

STEVENS POINT OFFICE - Assistant Clerical Position (20-30 hours):

(20 hours) 10:00 AM - 2:30 PM with 1/2 hour unpaid lunch (25 hours) 10:00 AM - 3:30 PM with 1/2 hour unpaid lunch (30 hours) 10:00 AM - 4:30 PM with 1/2 hour unpaid lunch

Necessary coverage for vacation/personal day usage, or absences necessitated by illness/injury, or other legitimate cause, will be executed on a straight 8:00 A.M. - 5:00 P.M. basis with 1 hour unpaid lunch.

The foregoing will be subject to review and change based on operational necessity and mutually agreed in writing between the affected employee(s) and the Local 662 Secretary/Treasurer.

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Article 34. Duration and Termination

Section 1. THIS AGREEMENT shall be in full force and effect from JANUARY 1, 2002, TO AND INCLUDING DECEMBER 31, 2004, and shall continue in full force and effect from year to year thereafter unless written notice of desire to cancel or terminate the Agreement is served by either party upon the other at least sixty (60) days prior to date of expiration.

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BACKGROUND

There is no real dispute about the events giving rise to this grievance, but the background of those events is disputed. The Local represents roughly 5,000 workers in west central and north central Wisconsin. Its principal office is in Eau Claire, and it maintains a satellite office in Stevens Point. The clerical employees in those offices are represented by the Association. Prior to the layoff which is in issue in this case, there were two bargaining unit clericals, plus a non-unit bookkeeper and non-unit office manager in Eau Claire, and one bargaining unit clerical in Stevens Point. The Grievant, Karen Haase, was the bargaining unit clerical in the Stevens Point office. She started as a part-time employee in 2000, and went to full-time on January 1, 2002 when the previous full-time clerical left.

From May of 1992 through mid-August of 2003, James Newell was the Secretary-Treasurer, and thus the principal executive officer, of the Local. Newell worked principally from the Eau Claire office. On August 14, 2003, Newell was suspended from office and from membership in the Union, and was replaced by David Reardon, who had been the President of the Local. Reardon worked principally from the Stevens Point office. Reardon was succeeded as President by John Kaiser, who also worked principally from the Stevens Point office.

Kaiser and Reardon initially attempted to work with the existing structure and distribution of work. When Reardon needed clerical work done, he would fax it to Karen Endress, the confidential office manager in Eau Claire, who would fax back the draft, and he would then fax back the changes. After several weeks, he decided this was too cumbersome. Although responsibility for contracts had been redistributed among the various officers and business agents, the great majority of his contracts were still in the Stevens Point area, and he spent about sixty percent of his time there. He had also distributed some of the administrative duties for the Local to Kaiser, who alternated time with him between the two offices. As a result of this, more administrative work was being performed from the Stevens Point office than had previously been the case.

In Fall of 2003, Reardon told the Local's Executive Board he wanted to establish a confidential secretary's position in the Stevens Point office. The Executive Board agreed with his proposal. Reardon, however, felt the Grievant was not qualified for a confidential position, because he doubted her trustworthiness and discretion. His concerns were based on some problems that had been discussed in a meeting in November of 2002 with the Grievant, Kaiser and Bob Russell, a Business Agent working out of the Stevens Point office. The meeting was called at the Grievant's request to discuss problems that Reardon had with her work performance. In the meeting, Reardon raised a number of points he was dissatisfied with:

- An incident in which the Grievant told a steward that Reardon was out to lunch at 2:00 in the afternoon, rather than saying he was in meetings or negotiations, as she had been instructed to do. When they first discussed this incident, the Grievant had denied telling the man Reardon was out to lunch, but when Reardon played a voice mail message from him making reference to Reardon being out to lunch for her, she said she thought it had been all right, since that steward was a personal friend of Reardon's.
- An incident in which he returned to his office and found her playing a voice mail message to him, from an International Vice President, for a trustee of the Local.
- An incident in which she described the President of another Teamsters Local as "a fall down drunk" during a conversation with Bob Russell at a stewards' banquet. When this was first raised with her, the Grievant denied the statement, then left the building for the remainder of the day after Russell told her she had said it to him directly. In the course of this meeting, the Grievant denied the statement.
- An incident in which a member called for John Kaiser, and she told him she would have to wake him up because he was sleeping in the back. The Grievant admitted saying this, but explained that she felt it was okay, since the caller was a friend of Kaiser's.
- An incident in which she told Kaiser that Reardon had left instructions that no one was to call him at home, when he had not issued such instructions. The Grievant denied telling Kaiser this.
- An incident in which a steward reported that the Grievant's husband, a member of one of the Local's bargaining units, said she had told him about warning letters issued to other employees in that bargaining unit. The Grievant denied telling her husband about the letters.
- A comment she had made to Jim Newell that Reardon and others in Stevens Point were trying to keep him in the dark. The grievant denied making the comment.
- A comment she made to steward who was trying to reach Russell that he shouldn't call until 10 or 11 because Russell didn't come in before then, he shouldn't call during lunch because Russell would be gone then, and

he should be sure to call before 2:00 because that's when Russell left for the day. When initially confronted about this, in the presence of the steward, the Grievant said she thought he must have misinterpreted what she said.

The new confidential position was created. Since the available workload did not justify two clerical employees in Stevens Point, the Grievant was placed on layoff. The instant grievance was filed, and was not resolved in the lower steps of the grievance procedure. At the arbitration hearing, in addition to the facts recited above, Lisa Kloss, a Triton Operator in Eau Claire and the President of the Association, testified that she had started with the Local as a confidential employee. As a confidential, she sometimes performed bargaining unit work, but only when directed to by Newell or Karen Endress, the Office Manager. Kloss testified that the new confidential secretary in Stevens Point had called her from time to time with questions about her work, and that those questions were the same type that the Grievant used to pose to her. Charleen Graff, a part-time secretary in Eau Claire, testified that she had done very little work for the Stevens Point office since the Grievant's layoff. Graff testified that Endress had done bargaining unit work in Eau Claire, but only to cover for an absent bargaining unit employee or in an unusual circumstance. Graff recalled an incident in which Endress had sent notices to employers when Business Agent assignments changed. The Association objected, and the work was assigned to her.

Jim Newell testified that he was in on negotiations for the Association's contract and that the Local never sought a management rights clause or any provision allowing subcontracting of unit work. He explained that the Local did not want to be in the position of demanding contract clauses that it resisted as a matter of policy when negotiating on behalf of its members. He estimated that Karen Endress spent 10% of her time on bargaining unit work, basically helping out, and 90% of her time on confidential duties, principally bookkeeping. Newell said that the Local negotiated issues with the Association rather than acting unilaterally, and gave as examples the use of temporary employees to cover absences in the Stevens Point office, the creation of a lead clerical position, and the implementation of HIPAA agreement with the Central States Pension Fund that allowed the Fund to provide insurance information to members.

Dave Reardon testified that the amount of confidential work in Stevens Point increased with his elevation to Secretary-Treasurer, and his membership on Executive Board of Joint Council 39, the policy committee for the National Dairy Conference and the policy committee for the Miscellaneous and Industrial Trades Conference. He expressed the opinion that the confidential position in Eau Claire did not suffice to meet the needs of the new arrangement since constantly faxing drafts back and forth was not workable over the long term. He also noted that he had delegated some of the executive responsibility for running the Local to

Kaiser, and worked out an arrangement with Kaiser whereby the two would alternate time in Eau Claire and time in Stevens Point, with Reardon spending 60% of his time in Stevens Point. Thus there was now always an executive officer in Stevens Point.

Reardon stated that the new confidential employees was cross-trained to cover for Endress when she was gone, and was also assigned his and Kaiser's confidential correspondence. She works with him and Endress when outside auditors come in, is involved in meetings on the Local's investments, handles correspondence with the Local's law firm, and will be responsible for maintaining his files during negotiations with the Association. Previously all of this work was done from the Eau Claire office. Reardon also noted that he travels a great deal, so the secretary in Stevens Point is responsible for transmitting messages to him, including messages about confidential matters. He estimated that 40% of her time was devoted to confidential matters, and observed that the arrangement to have Central States provide insurance information to members rather than having the office staff do this had substantially reduced the amount of bargaining unit clerical time needed in Stevens Point.

Reardon testified that the Grievant is on layoff and has recall rights should a bargaining unit position become open. He also noted, however, that after she was notified of the layoff, the Local became aware of several serious work performance problems. Approximately 2100 documents were lost from the computer system she was responsible for maintaining, owing to the fact the virus protection was not working. The phone book of contacts for the Local was deleted from the computers. She failed to provide notice of reopening for ten expiring contracts, which all clerical staff had been advised was grounds for immediate termination. She failed to provide a list of open projects, even though she had been directed to do so. She also provided wrong information to the wife of a dying member, leading to the widow losing the member's pension. Reardon stated that he would be meeting with the Grievant to discuss these problems after the adjournment of the arbitration hearing.

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

POSITIONS OF THE PARTIES

The Employer

The Employer takes the position that it had ample cause to layoff the Grievant and ample cause not to recall her to the new position of confidential secretary. The decision to eliminate the Grievant's position was prompted in part by her job performance issues, which made the position less than useful to the administration of the Local, and by the Local's need for a more logical and efficient work flow. New Secretary/Treasurer David Reardon made a judgment that the pre-existing system of having all of his work flow through the confidential

secretary in the Eau Claire office was not practical, and that a confidential secretary was also needed in the Stevens Point office. With the addition of such a position, there was no need for the Grievant's position, since the workload did not justify that level of staffing. The Grievant herself was unsuitable for the new confidential position, given her history of disclosing internal matters and gossiping about the officers of the Local and of other Locals.

Following the decision to layoff the Grievant, she more than justified Reardon's concerns by refusing to provide requested updates on pensions, insurance and other pending matters, a list of contracts to be opened, and similar necessary information. Once the Grievant was gone, the Local discovered that the computers the Grievant had been responsible for maintaining had no active virus protections, resulting in contamination by large numbers of worms and viruses. This in turn resulted in the loss of approximately 2,100 documents from the Local's files. The Local also discovered that the phone and address databases had been deleted from the Grievant's computers. Even more serious than the problems in the computer system were the substantive mistakes the Local discovered. Ten contracts had not been reopened, which was one of her most important responsibilities. Wrong contracts were submitted to employers for signature, and members were given wrong insurance information. In one instance this resulted in a widow being denied pension benefits.

The new position is clearly a confidential position, and is conceded to be such by both parties. The incumbent handles financial records, Executive Board, Joint Council and Policy Committee records, correspondence related to personnel and disciplinary actions, files related to negotiations with the Association, and correspondence to and from the Local's law firm. These were not the duties performed by the Grievant.

The Local argues that the Association has failed to point to any contract provision that guarantees the reservation of unit work to the bargaining unit, and has failed to show that clerical work has been the exclusive province of the bargaining unit. Moreover, it is clear that the confidential secretary is confidential in the labor relations sense of the term – she assists persons who formulate, determine and effectuate management policy in the field of labor relations. Her position is therefore excluded from the bargaining unit, and the Grievant's recall rights do not extend to claiming this job. For all of these reasons, the Arbitrator must conclude that the Local acted properly in laying off the Grievant and in hiring the new confidential secretary, and should further conclude that there is no merit to this grievance and that it should be denied in its entirety.

The Association

The Association take the position that the Local violated the contract, and that the Grievant must be recalled and made whole. The Grievant was, at the time of her layoff, the

sole clerical employee in the Stevens Point satellite office. Her duties were the same as those of the other full-time clerical in the bargaining unit, located in Eau Claire. Those duties have now been assigned to a non-unit employee. Granting that the contract is silent as to the transfer of unit work outside of the bargaining unit, the Association notes that there are well recognized, implicit restrictions on such transfers. The right to subcontract cannot be unfettered, as this would leave the bargaining unit open to destruction at the Employer's whim. As a general rule, the exercise of the right to transfer work must be measured against a standard of reasonableness, and the transaction in this case cannot pass muster under that standard.

While the bargaining unit has been generous in allowing *de minimis* performance of unit work by non-unit personnel, this sharing has always been done with the foreknowledge and acquiescence of the unit, and has never resulted in any loss of earnings or job security for the members of the unit. The transfer in this case utterly devastates the unit, as it is reduced from three to two members, and it also inflicts serious economic harm on the Grievant herself. The work being transferred is core work of the unit – basic clerical duties, with a smattering of supposedly confidential duties. While Reardon said that the new confidential in Stevens Point spent 40% to 60% of her time performing confidential duties, he also said he spends 40% of his time in Eau Claire, where another confidential employee is available to him. Given that the basic clerical duties remain to be performed in Stevens Point, and that Reardon already has another full-time confidential available to him, it is implausible that nearly half of the new confidential clerical's time is spent on confidential duties.

It is evident that the Local intends to permanently remove this work from the bargaining unit, thereby reducing it by one third. This dramatic assault is unwarranted. The Local claims that it was caused by personal defects of the Grievant, whom it could not trust with the new position. That misses the point. If the Grievant had defects, those are issues for another time. The issue here is the transfer of work out of the bargaining unit. Even though the Local claims it dramatically reorganized after Reardon took over, the basic work load remained the same. There was no sudden expansion in the amount of confidential clerical work. Even if there had been, the more reasonable route would have been to employ a part-time clerical, as has been done in the past in the Stevens Point office. In short there are no special circumstances that can justify the Local's attack on the bargaining unit.

The Association notes that Jim Newell, the former Secretary-Treasurer, gave unrefuted testimony that the Local never attempted to bargain a management rights clause or work transfer provisions in this contract, since such provisions would have been used against the Local by employers in its efforts to negotiate contract for the membership. Given the lack of such provisions, and the overwhelming evidence that the transfer here was unreasonable, the Association urges the arbitrator to order the restoration of the bargaining unit position in Stevens Point, and the recall of the Grievant to that position.

The Local spent much of its time at hearing disparaging the Grievant's character and performance. As previously noted, the Association believes that her personal attributes are irrelevant to the contract question here. However, it also observes that the criticism is misplaced. Most of the items cited by the Local were originally raised and discussed in a meeting on November 8, 2002. No discipline was imposed at that time. She continued in her job for 11 months after that meeting, and there is no evidence that any of the alleged misconduct was repeated. Even if there had been some sort of performance problems, they clearly were addressed and remedied.

The Local also raised issues occurring after the layoff. These are, of course, completely irrelevant, but they are also largely unfounded. The Local complains that the computers were infected with viruses and worms, but it does not specify when this developed. Since the computers have a permanent internet connection, this may just as easily have developed after the Grievant was laid off as before, since she was no longer there to update the virus protection software. As for the claim that incorrect information was given to a retiree, this complaint is dated a week before the hearing in this case, and a year after the supposed problem occurred. The letter of complaint simply says that wrong information was given, without saying who provided the information or even what the gender of the person providing the wrong information is. This retiree could have spoken with just about anyone. Indeed Reardon testified that it was Eau Claire Office Manager Karen Endress the retiree spoke with. The evidence of after-discovered misconduct is flimsy to the point of non-existence and merely serves to highlight the almost obsessive dislike Reardon had for the Grievant. It is evident that he wanted to be rid of her, knew he could not possibly satisfy a just cause standard, and so resorted to the pretext of a layoff.

This contract is silent as to subcontracting. However, the Arbitrator has previously analyzed these same circumstances and determined that there are implicit limitations on the right to subcontract. Primary among the factors applied has been whether there is a substantial impact on the bargaining unit and/or unit employees. In this case, that factor obviously weighs heavily in the Association's favor. This transfer of work outside the unit has a devastating effect on both the unit and the employee. Balanced against the very flimsy showing of any legitimate need for the subcontract, this consideration should lead the arbitrator to a finding that the Employer violated the contract, and thus the grievance should be sustained.

DISCUSSION

The Association styles this dispute as principally an issue of subcontracting work outside of the unit, while the Employer styles it as a layoff caused by a combination of job performance issues and a work reorganization which rendered the Grievant unqualified.

The contract is silent as to the right to assign work outside of the bargaining unit. It does not contain a traditional management rights clause, nor does it make any reference to work preservation, on the one hand, or a right to subcontract or reassign work, on the other. It does include a strong seniority provision, and a maintenance of standards clause. The question is whether these provisions serve to limit the Local's ability to assign general clerical work to a confidential employee, in addition to the duties that render the employee confidential.

At the outset, I would note that the use of the term "subcontracting" for the work transfer here is misplaced. This is not a subcontract, as that term is commonly used. No outside vendor has been contracted to perform bargaining unit work. Instead this is a work assignment case. In both sets of cases, however, the test in the face of contractual silence is whether the transfer of work was reasonable under all of the circumstances. 1/ This involves a weighing of the impact on the bargaining unit and the employees against the legitimate interests of the employer.

1/ See, ALLIANT FOODSERVICE, A-5715 (Nielsen, 10/11/01) for a discussion of this standard in subcontracting cases; MANITOWOC ENGINEERING, 93 LA 937 (Nielsen, 11/04/89) for the requirement of reasonableness in a case where the assignment is to other employees.

Cutting against the reasonableness of the Local's action in this case are the facts that the bargaining unit is substantially reduced by removing one of three covered positions, that the change seriously affects a unit member by triggering a layoff, and that the work, excluding the purely confidential duties, has been and could have been performed within the unit. The Local asserts that its actions were made reasonable by its need for a confidential employee and the Grievant's work performance problems and general unfitness to perform confidential work. With respect to the last points regarding the Grievant's qualifications or lack thereof, I agree with the Association that this is utterly irrelevant to the instant grievance. If the Grievant was not competent to perform her duties, the answer lies either with retraining or progressive discipline, not transferring her job out of the bargaining unit. If she engaged in some form of misconduct, before or after the layoff notice, the answer again lies in progressive discipline. The question here is the right to remove work from the bargaining unit, not whether the Grievant personally is well suited to perform the work.

The strongest factor in the Local's favor, indeed virtually the only factor in the Local's favor, is its statutory right to exclude from the bargaining unit clerical employees who have confidential duties. While the Association concedes this right, it asserts that it only extends to those duties, and not to any other clerical work. That is not a correct statement of the law as regards confidential employees. Confidential employees customarily perform a mix of

confidential and non-confidential work. Unlike supervisory and managerial exclusions, confidential employees are excluded not because their work is principally different from that performed in the bargaining unit, but because in a portion of that work they have access to the employer's confidential labor relations information. In a small office, it is not generally possible to completely segregate confidential work from non-confidential work, and employers are not generally required to hire part-time employees to precisely allocate the two types of clerical work, so as to maximize the union's scope of representation.

Neither, of course, is an employer allowed to distribute confidential work more broadly than necessary to create more excluded employees than it really needs. The Association points out that, in the past, the Local has functioned with a single confidential employee in the Eau Claire office, and questions how the scope of confidential work could have expanded while the bargaining unit contracted. It also questions whether much of what the Local cites as confidential work truly meets the definition of that term. With respect to this latter point, I agree that many of the duties pointed to by the Local involve sensitive information, which is confidential in the layman's understanding, but has little to do with the Local's labor relations vis-à-vis the Association. However, some it clearly does.

As to the argument that the amount of confidential work should not have increased when the bargaining unit decreased, the Local's response is that confidential work has shifted, with the shift in executive function from Eau Claire to a sharing between the offices. That is a facially plausible argument but, as with the question of whether the confidential duties are or are not *de minimis*, it is not an argument that I can resolve. The arbitrator has jurisdiction to resolve disputes under the contract. Whether the secretary in the Stevens Point office is a confidential employee involves the application and interpretation of the National Labor Relations Act, and is within the jurisdiction of the National Labor Relations Board.

On the record before me, I conclude that if the secretarial position in the Stevens Point office is legitimately a confidential position under the National Labor Relations Act, then the Local acted reasonably when it unilaterally established the position, transferred clerical work previously performed by the Grievant to the new position, and laid off the Grievant, who was the least senior clerical employee. If, on the other hand, the position is not legitimately confidential, the principal justification for transferring this work out of the unit vanishes, in which case the exclusion of the position from the bargaining unit was not reasonable and the layoff of the Grievant violated the collective bargaining agreement.

The arbitrator remands this case to the parties to agree on the confidential nature of the position or to seek a ruling from the National Labor Relations Board. Should the NLRB conclude that the position is legitimately excluded from the unit as confidential, the grievance is denied. Should the NLRB conclude that the position is not legitimately excluded from the

unit as confidential, the grievance is granted, the position will be treated as if it had been part of the bargaining unit from its inception, and the Grievant will be entitled to make whole relief and reinstatement, subject to the normal offsets for such relief.

The parties are directed to advise the arbitrator within 90 days of the issuance of this Award of the status of the case. The arbitrator will retain jurisdiction over this matter pending resolution of the confidential status of the position, and for the purpose of resolving disputes over remedy, if the question of remedy is reached, and the arbitrator is so requested.

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

AWARD

1. If the Local's transfer of duties to a new unilaterally-created confidential secretarial position outside the bargaining unit created a position occupied by a confidential employee within the meaning of the National Labor Relations Act, as amended, then the Local did not thereby violate the Agreement.

2. If the Local's transfer of duties to a new unilaterally-created confidential secretarial position outside the bargaining unit did not create a position occupied by a confidential employee within the meaning of the National Labor Relations Act, as amended, then the Local did thereby violate the Agreement.

3. In that event, the appropriate remedy would be that the Local, its officers and agents, shall, effective upon the issuance of a determination that the Administrative Assistant position is not occupied by a confidential employee within the meaning of the National Labor Relations Act, as amended, immediately: (a) treat the newly-created confidential secretarial position as a bargaining unit position covered by the Agreement; and (b) reimburse the Association for lost dues and fees for the period during which the position was excluded from the bargaining unit; (c) make the Grievant whole for the losses she suffered by reason of the layoff; and (d) reinstate the Grievant to her position. The remedies directed to the Grievant individually are subject to normal offsets. The arbitrator will retain jurisdiction over this matter to resolve disputes over the scope and calculation of the remedy ordered.

4. The parties are directed to advise the arbitrator of the status of this case within 90 days of the date of this Award.

Dated at Racine, Wisconsin, this 18th day of January, 2005.

Daniel J. Nielsen /s/

Daniel J. Nielsen, Arbitrator

DJN/gjc
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