BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

RICE LAKE SCHOOL DISTRICT

and

TEAMSTERS UNION LOCAL 662

Case 69
No. 64611
MA-12950

(Seasonal/Casual Grievance)

Appearances:

Jill M. Hartley, Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., 1555 North RiverCenter Drive, Milwaukee, WI 53212, appearing on behalf of Teamsters Union Local 662.

Stephen L. Weld and Ryan Steffes, Weld, Riley, Prenn & Ricci, SC, 3624 Oakwood Hills Pkwy., Eau Claire, WI 54702, appearing on behalf of the Rice Lake School District.

ARBITRATION AWARD

The Rice Lake School District, hereinafter District or Employer, and Teamsters Union Local 662, hereinafter Union or Teamsters, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the City, requested the Wisconsin Employment Relations Commission to provide a panel of Commissioners or Commission staff from which the parties would select an arbitrator to hear and decide the instant grievance. Commissioner Susan J.M. Bauman was so selected. A hearing was held on June 30, 2005, in Rice Lake, Wisconsin. The hearing was not transcribed. The record was closed on August 4, 2005, upon receipt of all post-hearing written arguments.

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

There are no procedural issues. The parties were unable to agree to a statement of the issue. The Union would frame the issue as:

> Is the School District violating Article VIII, Section 1 of the parties collective bargaining agreement by using seasonal or casual workers to perform bargaining unit work during the school year? If so, what is the appropriate remedy?

The District would frame the issue as:

> Is the School District violating Article VIII, Section 1 of the contract by having seasonal employees work during the School Year? If so, what is the remedy?

The parties agreed that the Undersigned would frame the issue. Based upon the evidence and argument presented, I adopt the District's statement as the issue to be decided.

BACKGROUND and FACTS

The custodial and laundry workers of the Rice Lake Area School District are currently represented for the purposes of collective bargaining by Teamsters General Union, Local 662. Teamsters and the District are parties to a collective bargaining agreement covering the period July 1, 2002 through June 30, 2005, which was signed on August 14, 2003. Article VIII, Section 1 of this agreement states, in pertinent part:

> Any employee hired as a seasonal or casual worker shall not become a seniority employee. The word seasonal, as used herein, is meant to cover situations such as Christmas or summer when school is not in session. The word casual, as used herein, is meant to cover situations such as replacements for absenteeism and vacations.

Although this is the first contract between Teamsters and the District, the same language was contained in the bargaining agreement when these employees were represented by NUE, and perhaps when they were represented by Teamsters previously. The language was continued into the present contract without discussion during bargaining for the 2002 – 2005 agreement.

The parties agree that there is a long standing practice for the District to hire additional help during the summer. There is no dispute that there have been individuals working as seasonal employees, perhaps since as early as 1984. There is disagreement as to whether these individuals mowed lawns prior to the last five (5) years,[1] but there is no dispute that lawn mowing has been performed by seasonal workers since, approximately, 2000. Both Union and District employees testified that seasonal employees have started in the middle of May prior to the end of the school year, and worked into September and October, after school started. The Union has been concerned about this since at least 1999, but acknowledge awareness for a longer period of time. This use of seasonal employees during the summer, but overlapping the school year, has occurred on an annual basis. According to the District, during the 2000-2001 school year, members of the bargaining unit requested that the seasonal employees be utilized to do field marking and other lawn care tasks so that they could devote more time to their primary duties. The District contends that it responded to this request by removing field marking duties from the unit members and hiring seasonal workers for additional time during the school year. Although the Union officials who testified were unaware that the request was made by members of their bargaining unit, they did not dispute that such a request had been made by a union member. More importantly, Union witnesses acknowledged that the field marking was being done by seasonal employees during the school year, without protest by the Union.

Gary Fredrickson acknowledged that he was aware of the use of seasonal employees for limited purposes prior to the start of the summer break and after the start of school as early as 2000. He chose not to file a grievance in an attempt to accommodate the District, and in light of the significant amount of work the custodians had to accomplish. However, when bargaining unit members began to be laid off, or have their hours reduced, there was concern that seasonal employees were being used to replace members of the bargaining unit.

A number of Union witnesses indicated that there had been discussions with the District about the use of seasonal employees before the instant grievance was drafted.[2] These discussions did not produce results, and the employee's prior representative, NUE, would not process a grievance on the issue.

The instant grievance arose during the 2003 – 2004 school year when the District reduced the number of hours worked by a laundry worker. The Union was concerned about the reduction in hours, and Union Steward Tom Smetana drafted a grievance, dated October 20, 2003, in which the relief sought was to "Convert the new Laundry/custodian position to an 8 hr. position." The grievance was not submitted to representatives of the District at that time.

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[1] Although Union witness Frederickson testified that lawn mowing has been done by seasonal employees during the past five years, and that seasonal employees previously were used to assist custodians on other projects while lawn mowing was reserved to bargaining unit members, Mr. Frederickson testified that the Union has no objection to the use of seasonal employees during the summer for lawn mowing.

[2] No specific time frame was provided regarding these discussions.

John Balts became the Union Steward in May or June 2004[3]. At the time, he was unaware of the grievance that Smetana had drafted, or the fact that it had not been presented to management. It was brought to his attention at a meeting in June 2004 with Mike Schmidt, Teamsters Local 662 Business Agent; Gary Frederickson, prior alternate Union Steward; and Patrick Blackaller, Director of Finance and Operations for the District. This meeting occurred after school was out for the year. Thereafter, Balts obtained a copy of the grievance and presented it to Blackaller, sometime in August.

By letter dated September 1, Mike Meyers, Maintenance/Custodial Supervisor responded to Balts regarding the grievance:

> This letter is in response to the grievance received by Mr. Blackaller in August of 2004 dated October 20, 2003 regarding the laundry/custodial hours.
>
> After reviewing the workload for the current laundry position, it does not necessitate or warrant 8 hours per day. For that reason, I am denying the above mentioned grievance.

By letter dated September 10, Business Agent Schmidt advanced the grievance to the next step of the grievance procedure. In this letter, Schmidt memorialized the Union's clarification of the grievance and the remedy sought: ". . . that the Employer cease and desist utilizing casual and seasonal employees under the scope of the Agreement pursuant to Article VIII." The parties discussed ways to resolve the issue so as to best meet the needs of the District and the employees. These attempts were unsuccessful. By letter dated October 19, Blackaller wrote to Balts:

> The district will agree to discontinue the use of seasonal/casual employees when school is in session effective at the end of the day October 15, 2004.
>
> The district has completed is [sic] evaluation of the seasonal/casual grievance and has elected not to dispute the unit's position. Therefore, the unit's grievance is approved.

According to Balts, Meyers brought this letter to him when he was sitting in the custodial closet at Hilltop Middle School. Meyers advised that the District would abide by the contract and that custodians would have to do the mowing, all the work, and there would be no overtime paid. Balts felt threatened by Meyers and advised that this was good, it was about

[3] Unless otherwise specified, all dates hereafter are in 2004.

time; and that the union was going to file for back pay. On November 16, Balts submitted a grievance alleging a violation of Article 8, Sec.1 and requested "Back Pay for the time casual workers worked outside of the Contract Language."

Meyers responded by letter dated December 1:

> On October 19, 2004, the district agreed to comply with the unit's request to eliminate the use of seasonal/casual workers during the school year with the understanding that the issue would be settled. Since the unit has elected to file a grievance requesting back pay for seasonal/casual work, the district is now withdrawing it [sic] original settlement offer dated October 19, 2004, and is also denying the back pay grievance by the unit.

Continued discussions between the Union and the District failed to resolve the issue and the matter proceeded to arbitration. Further facts will be set forth in the Discussion section below.

RELEVANT CONTRACT PROVISIONS

ARTICLE 1I – MANAGEMENT RIGHTS

Section 1: It is recognized that the Board has and will continue to retain the rights and responsibilities to operate and manage the school system of the District and its programs, facilities and properties and the activities of its employees during working hours.

Section 2: Without limiting the generality of the foregoing Section 1, it is expressly recognized that the Board's operational and managerial responsibilities include:

. . .

7. The direction and arrangement of all working forces in the system, including the right to hire employees.

8. The creation, combination, or elimination of any employee position deemed advisable by the Board. Combination shall mean the Board's right to combine part time positions within the District into full time positions and the right to combine full time positions due to diminished workload.

9. The determination of the size of the working force, the allocation of assignment of work to employees, the determination of policies affecting the selection of the employees and the establishment of quality standards and judgment of employee performance.

. . .

ARTICLE VI – GRIEVANCE PROCEDURE

. . .

Step 7:

. . .

The sole function of the arbitrator shall be to determine whether or not the employee's rights have been violated by the District contrary to an express provision of this agreement. The arbitrator shall have no authority to add to, subtract from, or modify this agreement in any way. The arbitrator shall have no authority to impose liability on the District arising out of facts occurring before the effective date or after the termination of this Agreement. Any decision by the arbitrator within the scope of his authority shall be final and binding on the District, the Union and the employee.

ARTICLE VIII – SENIORITY

Section 1 – Seniority Defined: The parties recognize District-wide bargaining unit seniority. District-wide seniority will be based on date of most recent hire with the District and shall apply to fringe benefit eligibility (i.e., sick leave accrual, vacation eligibility and longevity). Bargaining unit seniority shall be based upon date of inclusion within this bargaining unit and shall apply to job security issues, including layoff, recall, promotions and transfers and probationary period.

Employment for purposes of determining seniority shall include all time during which the employee is on active status or paid leave, military service prescribed by law, worker's compensation (up to one year) or by mutual agreement between the Board and the Union. Employees on unpaid leave or layoff status shall not accrue seniority; however, if they return to work, time and service accrued prior to the leave or layoff shall be included in their seniority.

Regular part time employees who work less than 20 hours per week shall not accrue seniority. Regular part time employees who work 20 hours per week or more shall earn seniority on a pro-rata basis. Should two or more employees be

included in the bargaining unit on the same date and hour, then bargaining unit seniority shall be determined by arranging said employees in alphabetical order on the seniority lists starting with the last name and then the first name.

Any employee hired as a seasonal or casual worker shall not become a seniority employee. The word seasonal, as used herein, is meant to cover situations such as Christmas or summer when school is not in session. The word casual, as used herein, is meant to cover situations such as replacements for absenteeism and vacations.

Seniority lists shall be prepared by the District at the start of each school year. The list shall be transmitted to the Teamsters General Union, Local 662 office.

POSITIONS OF THE PARTIES

The Union argues that the clear and unambiguous language of Article VIII, Section 1, prohibits the use of seasonal workers during the school year. Since the language is clear and unambiguous, it must be enforced and the District must be limited in its use of seasonal employees to portions of the year when school is not in session. The past practice of the parties, if established, cannot trump the clear and unambiguous language of the contract.

The Union contends that the Employer has not established a past practice that is clear, unequivocal and agreed to explicitly or implicitly by the parties. The District's case is premised on hearsay, which is not credible evidence upon which a finding of an agreed upon past practice can be found. The limited payroll information provided does not even indicate when school began and ended each year in question, again providing insufficient evidence to establish a past practice.

Finally, the Union argues that the District's use of non-bargaining unit, seasonal employees to perform lawn mowing and other bargaining unit work during the school year violates the entire collective bargaining agreement between the parties. Although there is no subcontracting clause, the recognition clause, the wage clause and seniority clause together establish "an implied covenant of fair dealing between the contracting parties. . . that one of the parties cannot subvert an agreement by conduct seeking to deprive the other party of the bargain that was struck." The use of seasonal employees to perform bargaining unit work during the school year takes work away from the bargaining unit in violation of the contract.

The Employer acknowledges its use of seasonal employees for summer break. It also acknowledges that these employees often start before the school year is over and often work after the school year starts. The District contends that this is an unequivocal, consistent practice accepted by both parties for at least four years and probably as many as 30 years. The District also claims that the language of Article VIII, Section 1 is ambiguous, contending that it

could mean that seasonal employees can only work on days that there is no school or it could mean that employees who are hired for the summer break and are not in the bargaining unit can be utilized prior to the end of the school year and after the start of the subsequent school year. That is, Article VIII defines bargaining unit members and says that employees working predominately outside the school year are not bargaining unit members.

According to the District, the doctrine of laches bars the Union's claim and allows the District to continue the practice until the next contract negotiation. The three elements of this equitable doctrine are satisfied: there was an unreasonable delay in asserting the claim; the party asserting the claim had knowledge of the course of events and acquiesced therein; and the party asserting the defense has been prejudiced by the delay. The District also contends that the Union has waived any right to back wages by its acquiescence to the District's use of seasonal workers outside the contract language.

The District asks that the grievance be denied and that the District be awarded costs and attorney's fees because the Union's claim for back wages was made in bad faith, given the District's complete and unconditional acceptance of the grievance.[4]

DISCUSSION

The Union contends that the language of Article VIII, Section 1 is clear and unambiguous. If the Union is correct that the language is clear and unambiguous, then the District violated the contract over the course of many years by hiring seasonal employees who began to work before school was over in the Spring, or who remained working for the District after school began again in the Fall. The District, by its letter of October 19, 2004 "approved" the seasonal/casual grievance that it received in August 2004 and agreed that it would end the use of such employees when school is in session, effective October 15, 2004. There is no evidence that the District has employed seasonal employees during the school year since that time.

Remedies are limited under the terms of the collective bargaining agreement between the parties: "The arbitrator shall have no authority to impose liability on the District arising out of facts occurring before the effective date or after the termination of this Agreement." Thus, any back pay would be limited to the period July 1, 2002 through June 30, 2005, despite one employee's contention that he should receive back pay for as long as the practice existed.

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[4] There is another issue in this matter: the District seeks attorney's fees for the Union's tardiness due to the Union's error regarding the time the hearing was to commence. The Union points out that there is nothing in the parties' agreement that allows the Arbitrator to award any type of sanction or fine against either party. I agree with the Union that the Arbitrator's authority is limited to that expressed in the collective bargaining agreement, which does not include the ability to sanction the Union for its tardiness at hearing. It was an inadvertent error on the part of the Union. As the copy of the e-mail attached to the Union's brief demonstrates, initially a 10:30 am start time was suggested. As the date for hearing changed, so did the starting time. It is unfortunate that the District may have to incur additional cost for the Union's mistake in this regard, but the undersigned has no power to order payment of the attorney's fees in question.

However, the Union acquiesced to the District's interpretation of the language over a period in excess of five (5) years. Each person who testified for the Union admitted that he was aware that the District employed seasonal employees both before the beginning and after the end of the summer break.[5] The Employer contends that Union members asked that the practice be extended to cover field marking, a contention that Union witnesses acknowledged may have occurred although they were not aware of it at the time. The Union cannot claim that this was a violation of the collective bargaining agreement that they were willing to accept for a period of at least five (5) years and now claim back pay for the alleged violation for that period or longer. That is not to say that, if the language is clear and unambiguous, the Union cannot enforce the contract language. It merely limits any remedy to violation of the terms of the agreement from the time that the Union put the District on notice that such violations will no longer be tolerated. See Elkouri and Elkouri, How Arbitration Works, 6th Ed., p. 560. Although the Employer has argued that the Union waived its right to grieve, the undersigned is of the view that the language, if clear and unambiguous, trumps the practices of the District, that the grievance is timely, and the doctrine of laches does not prevent the bringing of the grievance. It only limits the remedy. The District has expressed its willingness to bargain about this issue and contends that it has been harmed by the Union's delay in raising the issue.[6] I find that if the language is clear and unambiguous, unit employees would be entitled to back pay for hours worked by seasonal employees during the school year commencing in August 2004 when the Union formally submitted its grievance.

However, while I have rejected the District's contention that the Union has waived the right to bring this grievance, the District argues in the alternative that the language in question is not clear and unambiguous and therefore the past practice of the parties should be used to determine the meaning of the language. As argued by the District, the language in question is only intended to define bargaining unit membership, not limit the District's ability to hire employees and assign work, management rights that are retained by the District. Thus, the question of clarity is crucial to resolving this grievance.

The recognition clause, Article I, defines the bargaining unit as "all regular full time and regular part time employees the Board classifies as maintenance, custodial, and laundry room employees, but excluding . . .[standard exclusions]." Article VIII is entitled "Seniority" and Section 1 thereof is entitled "Seniority Defined." The portion of Section 1 relied upon by the Union in support of its grievance is one that excludes seasonal and casual workers from

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[5] Although the Union argues that this practice was not proven by the Employer and that the payroll records submitted do not indicate the dates the school year started and ended, all Union witnesses testimony supports the fact that seasonal employees worked when school was in session. The Union does not claim that this happened for the first time in 2003 or 2004.

[6] It is appropriate that this matter be resolved through bargaining the terms of the successor agreement between the parties, especially in light of the fact that the agreement was set to expire, by its terms, the day following the hearing of the grievance!

seniority rights: "Any employee hired as a seasonal or casual worker shall not become a seniority employee." The remainder of the paragraph defines the words seasonal and casual:

> The word seasonal, as used herein, is meant to cover situations such as Christmas or summer when school is not in session. The word casual, as used herein, is meant to cover situations such as replacements for absenteeism and vacations.

There is nothing explicit in this language to prohibit the District from employing seasonal employees during part of the school year. The phrase "such as Christmas or summer when school is not is session" provides instances when seasonal employees might be employed. The major thrust of the provision appears not to limit the District's ability to utilize seasonal employees but rather to make clear that such seasonal employees will not accrue seniority and the benefits that flow there from, such as those delineated in subsequent subsections of Article VIII.

The Union reads this section as prohibiting the District from employing any persons doing maintenance, custodial and laundry room work other than regular full time and regular part time employees except during the Christmas or summer school breaks. The Union does not address the question of whether, under its interpretation, the District could utilize seasonal employees during spring (Easter) break, or during the Thanksgiving recess. That is, it is unclear to the undersigned whether the Union contends that seasonal employees may only be used when school is not is session, or whether the usage is specifically restricted to Christmas and summer breaks. Regardless, the language is not as clear and unambiguous as the Union contends. "Such as" language is designed to provide examples of appropriate usage. It is traditionally not meant to limit usage. The undersigned, contrary to the Union, finds the language to be ambiguous. It can be read as limiting the use of seasonal employees to periods of time associated with Christmas or summer, but does not exclude their use such that it overlaps with periods of time when school is in session before and after Christmas or summer break. As this differs, significantly from the Union's interpretation of the language, as well as the District's October 19th response to the grievance, the language cannot be clear!

The Union also contends that the use of non-bargaining unit, seasonal employees to perform lawn mowing and other bargaining unit work during the school year violates the entire agreement, regardless of whether Article VIII, Section 1 is clear and unambiguous. Recognizing that the parties' collective bargaining agreement does not contain a subcontracting clause, the Union relies on a series of cases that find an implicit provision banning subcontracting by looking at the recognition clause, the wage clause and seniority provisions. In this matter, subcontracting is not the issue, though the use of seasonal, non-bargaining unit employees to do bargaining unit work, is. The Employer has chosen to utilize seasonal employees to perform certain work during certain times of the year. The language of the

contract clearly permits the use of seasonal and casual employees. There has been no showing that the Employer has transferred work from the bargaining unit in such a manner as to reduce the scope of the unit or to, in any manner, undermine the bargaining unit. Thus, there is no violation of the contract as a whole, as argued by the Union.

Since the language of Article VIII, Section 1 is not clear and unambiguous, standard rules of contract interpretation require that the meaning of language be determined by reviewing the practices of the parties to the contract. Here, it is well established that, at least for the past five years, the District has employed individuals as seasonal employees, and that they have either commenced working prior to the end of the school year or continued working after school started in the fall. The Employer's hearsay evidence to the effect that such practice has existed since 1984 need not be considered, as the Union representatives themselves testified that they were aware of the practice for a considerable period of time. In fact, witnesses testified to this being the case over many years, but that it was only in the past five (5) years that the seasonal employees were mowing, work traditionally done prior to that time by regular employees, sometimes being paid overtime to do so. The Employer presented hearsay testimony that in the recent past some of the high school custodial employees requested that the seasonal employees be utilized to mark fields in order to free up their time to do primary duties. Union representatives acknowledged that seasonal employees were performing this work, but had no knowledge that it came about as a request of individual union members. In any case, this was not discussed and done with the full knowledge and consent of the Union. The Union did, however, acquiesce in the extended use of seasonal employees, particularly as to lawn mowing and field marking.

In order to establish that the use of seasonal employees overlapping the school year is a binding past practice, it must be (1) unequivocal, (2) clearly enunciated and acted upon, and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by the parties. Often, past practice is described as having "clarity, consistency, and acceptability." Another factor often considered is mutuality, an implied mutual agreement. In this case, the parties are in agreement that seasonal employees have been utilized by the District for an extensive period of time. They also agree that in the past five years the seasonal employees have been utilized to perform work (mowing) that was traditionally reserved for bargaining unit members. While there may have been discussions between the parties regarding the use of such seasonal employees, Union witnesses made it quite clear that the prior bargaining representative, NUE, was not willing to file a grievance over the use of seasonal employees. Whether NUE did not perceive the District's utilization of seasonal employees to be a violation of the contract or whether NUE merely acquiesced to the District's usage is unclear and irrelevant. Both parties to the current agreement, that contains the same language as prior agreements, concur that the District consistently hired seasonal employees that overlapped the school year and the Union did not object thereto. Thus, a past practice has been established. There is no contract violation, and no back pay obligation, where the contract language is not clear and unambiguous and there is an established past practice as to its application. The grievance must be denied.

The District not only seeks to have the grievance denied, but also seeks costs and attorney's fees, contending that the Union's claim for back wages was made in bad faith. A review of the history of the grievance reveals that in October 2003, Union Steward Smetana drafted a grievance that on its face appears to be related to the District's use of casual/seasonal employees. This grievance, which was not presented to the Employer until August 2004, reads as follows:

> Causal [sic]/part time employees are working full time 40 hrr.s [sic] of more a week holiday/weekends full time custodian was laid off 11/26/03 when there are casual/part time employees working.
> The custodian/laundry position could have been converted to an 8 hr. position, currently there is or was two part time people doing this open position.
> As of this date there is a person filling in the Laundry/custodial position who has limited physical restrictions and belongs to another union.
> In the past the CUstodial [sic] supervisor has done and is doing exitsting [sic] custodial work...

The relief sought was to "convert the new Laundry/custodian position to an 8 hr. position." The writing of this grievance was apparently prompted by the reduction in hours of a laundry worker. This was the "frosting" after the District had increased its usage of seasonal employees and was now decreasing the hours of regular employees. For whatever reason, the grievance was not presented to the District until August 2004, after a new Union Steward had taken office. After the grievance was denied at the first step of the process, the Business Agent added to the remedy sought: "Employer cease and desist utilizing casual/seasonal employees outside the scope of this agreement (during the school year.)" Discussions between the parties failed to result in a settlement, and by October 19, the District "approved" the grievance and agreed to no longer utilize seasonal/casual employees while school was in session. Subsequently, the Union filed another grievance in which it sought back pay for the time casual/seasonal employees were utilized by the District during the school year. The filing of the second grievance was prompted, in part, by the manner in which the Union steward was advised of the decision regarding the first grievance. After additional discussions between the parties in attempts to resolve this grievance failed, by letter dated December 1, 2004, the District both withdrew its October 19 settlement and denied back pay.

The initial grievance in this matter was inartfully drafted. The Business Agent amended the grievance to expand the remedy and demand that the Employer cease and desist from its utilization of seasonal employees during the course of the school year. At that time, it would have been appropriate to also make the request for back pay that was included in the second grievance. Had this occurred, and the District had offered the October 19 resolution to the grievance, it is entirely likely that the matter would have proceeded to arbitration as it did. Accordingly, although Balts admitted that the second grievance was filed in response to the

manner in which he was advised that the use of seasonal employees would be modified, I cannot make the finding sought by the District that the second grievance was filed in bad faith and will not award fees and costs.[7]

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

The District has not violated the collective bargaining agreement by its use of seasonal employees during the school year, limited to the overlapping of the end of one school year and the beginning of the next.

The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 8th day of September, 2005.

Susan J.M. Bauman /s/
Susan J.M. Bauman, Arbitrator

[7] The authority of the undersigned, as indicated in footnote 4, does not extend to the awarding of fees and costs, even were it found to be appropriate in these circumstances.

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