

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BANGOR SCHOOL DISTRICT

and

**COULEE REGION UNITED EDUCATORS,
BANGOR EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION**Case 23
No. 64710
MA-12981(Rasmussen Grievance)

Appearances:

Mr. Gerald Roethel, Executive Director, Coulee Region United Educators, 2020 Caroline Street, LaCrosse, WI 54603, on behalf of the Association and the Grievant.

Mr. Scott R. Mikesh and Mr. Daniel Mallin, Staff Counsel, Wisconsin Association of School Boards, Inc., Room 500, 122 West Washington Avenue, Madison, WI 53703, on behalf of the District.

ARBITRATION AWARD

According to the terms of the 2003-05 collective bargaining agreement between the captioned parties, the parties jointly selected Arbitrator Sharon A. Gallagher to hear and resolve a dispute between them concerning the Van Driver hours worked by Grievant Diane Rasmussen during the 2003-04 school year. A hearing was originally scheduled for September 20, 2005 but it was cancelled by the District due to witness unavailability. The hearing was then rescheduled and held on December 7, 2005 at Bangor, Wisconsin. No stenographic transcript of the proceedings was made. The parties agreed to submit their initial briefs through the Arbitrator postmarked January 27, 2006 for her exchange. The Arbitrator received the parties' initial briefs by February 1, 2006, which she immediately exchanged. The parties reserved the right to file reply briefs postmarked one week after their receipt of the other party's initial brief. The Arbitrator received the last document on February 15, 2006, whereupon the record was closed.

ISSUES

The parties were unable to agree upon the issues to be determined herein. However, they stipulated that the Arbitrator could frame the issues based upon the relevant evidence and argument as well as the parties' suggested issues. The Association suggested the following issues:

1. Did the District violate the collective bargaining agreement when it reduced Diane Rasmussen's hours?
2. If so, what is the appropriate remedy?

The District suggested the following issues for determination:

3. Did the District's decision to hire an additional Van Driver during the 2003-04 school year result in a layoff of the Grievant for which the District was required to give thirty days' notice?
4. If so, what is the appropriate remedy?

Neither parties' issues fully and accurately describe the dispute between the parties as both contain argument. Therefore, the Undersigned determines that the following issues which fairly describe the instant controversy shall be decided:

5. Did the District's decision to reduce the Grievants' Van Driver hours during the 2003-04 School year amount to a layoff of the Grievant for which the District was required give thirty day's notice? Did the District's subsequent hire of a third Van Driver violate the labor agreement?
6. If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE VII

REDUCTION IN FORCE, POSITIONS & HOURS

- A. In the event the Board determines to reduce the number of positions (full layoff) or the number of hours in any position (partial layoff), the provisions set forth in this Article shall apply. Layoffs shall be made only for the reasons asserted by the Board, and shall not be used to discipline an employee for his or her performance or conduct.
- B. The District will give at least thirty (30) calendar days notice of layoff. The layoff notice shall specify the effective date of layoff. A copy of this notice will be sent to the President of the Association.
- C. **SELECTION FOR REDUCTION**

In the implementation of staff reductions under this Article, individual employees shall be selected for full or partial layoff in accordance with the following steps

Step One – Attrition.

Normal attrition resulting from employees retiring or resigning will be relied upon to the extent that is administratively feasible in implementing layoffs.

Step Two – Selection.

The Board shall select an employee(s) for a reduction in the affected Department in the order of the employees' length of service in the District, with the employee having the shortest length of service being the first selected. If two or more employees have identical length of service, the selection shall be based on relative qualifications. Departments for the purpose of this Article shall be defined as:

- a. Custodial/Maintenance
- b. Bookkeepers and Secretaries
- c. Food Service
- d. Teaching Assistants
- e. Transportation/Bus Drivers and Van Drivers

Seniority. For purposes of this Article, seniority is measured by an employee's date for hire in his or her position with the District. Employees shall be defined as full-time or part-time consistent with Article V Employee Definitions. In calculating seniority the District will annually produce a seniority list and forward that list to the President of the Association. The Association will raise any objections to the proposed seniority list within two weeks of receipt.

Step Three – Reduction in Hours.

Full-time employees who are reduced in hours shall not lose any benefits they have accrued. Benefits are defined as seniority, sick leave, and vacation earned as a full-time employee. Reduced in time employees shall have all the rights and privileges of full-time bargaining unit members under this Agreement except that economic provisions will be prorated to be consistent with the portion of a full-time position held.

Any employee who is reduced in hours (partial layoff) may choose to be fully laid off without loss of any rights or benefits as provided herein.

D. RECALL

1. Laid-off employees shall retain the right to be recalled for a period of fifteen (15) months after the employee's last day of work with the District.
2. If the district has a vacant position available for which a laid-off employee is qualified, the employee shall be notified of such position and offered employment in that position, commencing as of the date specified in the notice. Where more than one employee with recall rights is qualified for the position the most senior employee will be recalled. Where seniority is equal in the particular classification, employees will be recalled in reverse order of layoff. (Last laid off will be the first recalled.)
3. Employees shall be notified of recall by registered mail. The employee shall respond to the recall by the date specified in the notice. It shall be the responsibility of the employee to keep the District advised of his/her current whereabouts. The Board shall simultaneously provide the Association with the copies of any recall notice sent under this section. An employee's failure to respond to the recall notice within ten (10) working days of receipt of the notice will be considered a waiver of that employee's recall rights.

4. Recall rights shall end should an employee refuse recall to a position in the bargaining unit. Casual or substitute work with the District during the recall period shall not extend the recall period.
5. A full-time employee on layoff status may refuse recall offers of part-time, substitute or other temporary employment without loss of rights to the next available full-time position for which the employee is qualified. Full-time employees on layoff status shall not lose rights to a full-time position by virtue of accepting part-time or substitute appointments with the District.
6. No new permanent appointments may be made by the District while there are employees who have been laid off or reduced in hours who are willing, available, and qualified to fill the vacancy.

E. BENEFITS DURING LAYOFF

1. Laid-off employees, who are eligible, may continue group insurance coverage available through the District during the recall period by reimbursing the District for premium costs.
2. Laid-off employees shall suffer no loss of sick leave or other accrued benefits or seniority accrual when rehired. Such leave days and seniority time shall not accrue while an employee is on full layoff status.
3. No employee on full layoff shall be precluded from securing other employment while on layoff status.

ARTICLE XV¹

GENERAL PROVISIONS

- A. A letter of intent of employment will be given to each employee on April 15 of each year.

¹ The 2001-03 agreement did not contain paragraphs two and three of Article XV, Section B as those were first added to the agreement in 2003. Article XV in the 2001-03 agreement contained the following language which was deleted from the 2003-05 agreement:

Transportation employees will be paid a minimum of 4 hours a day and will be allowed to keep the District's buses at their home provided the employee's place of residence is in the Bangor School District or within five (5) miles of the school district's boundary. The Board and the Association agree that if the Board builds or leases a busing garage the buses will be kept at the busing garage or at the employee's residence as designated by the Board.

- B. Bus drivers will be paid two hours each for the first and last runs of each day. Bus drivers and van drivers will be allowed to keep the District's vehicles at their home provided the employee's place of residence is in the Bangor School District or within five (5) miles of the school district's boundary. The Board and the Association agree that if the Board builds or leases a busing garage the buses will be kept at the busing garage or at the employee's residence as designated by the Board.

The kindergarten route will receive two (2) hours' pay. The after-practice route will receive a minimum two (2) hours' pay. The Coulee Christian School route, when added to a regular route, will receive one-half (1/2) hour pay if the total time exceeds two hours. Each summer school route will receive two hours pay for the pick up and the return home. The after-practice route will be rotated every two weeks. The summer school routes will be assigned based on seniority. When the kindergarten route becomes vacant, the position will be filled annually based on seniority.

Van drivers will be paid two hours each for the first and last runs of each day. Runs that occur within the day will be paid for each half-hour to be rounded up. (i.e. 0-30 minutes = 1/2 hour, 31-60 minutes = 1 hour, etc.). If the time between runs is less than one hour, the employee will be paid for this time.

...

- E. All extracurricular trips will be assigned on a rotational basis.

The District will rotate all the extra-curricular trips. The rotation will include all regular drivers who wish to drive extra-curricular trips and one additional substitute bus driver.

The District shall designate the substitute driver that will be included in the rotation at the beginning of the year.

The District may change the designated substitute once during each school year. If all regular drivers and the above-designated driver refuse the extra-curricular trips, the District may assign the trip to other substitute drivers.

...

- K. Bargaining unit members shall be given the first opportunity to substitute for absent employees, receiving the same rate of pay for work performed as the absent employee's rate of pay.

...

- M. Drivers will be paid \$9.30 (2003-2004) and \$9.60 (2004-2005) an hour for all extra-curricular trips. Drivers will be paid a minimum of two (2) hours for each extra-curricular trip or the actual time of the extra-curricular trip whichever is greater. The actual time for the extra-curricular trip begins at pick-up time and ends after the bus is cleaned and fueled.

...

- O. All employees will receive payment for all time actually worked before and/or after their routes. Drivers will be paid \$9.30 (2003-2004) and \$9.60 (2004-2005) an hour for all other non-route driving time spent on such activities as meetings and maintenance. Drivers who gas up their buses as part of their regular route driving duties will be paid their regular route rate. Drivers who attend meetings or perform other work which is coterminous to their regular route driving duties will be paid their regular route rate of pay.

...

BACKGROUND

As of August 1, 2003, the District employed two Van Drivers, Grievant Diane Rasmussen and Rod Nicholai. On February 23, 2004, the District hired Rob Carrie as a Van Driver and on that day the Grievant's Van Driver hours were reduced from approximately 35 hours per week to twenty hours or fewer per week. Carrie was hired because the District's special needs population increased significantly and unexpectedly and the two Van Drivers, Rod Nicholai and Grievant, could not do all of the necessary driving because of the timing of the pick-ups and drop-offs of the children. There were then two or three Van runs to pick-up and drop off children who needed to meet with a Speech Therapist, to attend Early Childhood

Classes at West Salem School District² and to pick-up and drop-off area children attending the Christian Grade School. At this time and for the 2003-04 school year, Nicholai was assigned to transport High School seniors deficient in credits for graduation to and from the Technical College in La Crosse which meant Nicholai was unavailable for any other trips.

Former District Administrator Wyatt stated herein that District van driving time increased in 2003-04 due to the above factors; that although Rasmussen was always willing to take extra trips and she had done so, Wyatt was concerned that Rasmussen's hours would exceed the contractual 1,000 hours per annum maximum; and that in any event, Rasmussen could not physically do all the necessary work because she could not be in two places at once. Wyatt stated that as there is no language in the contract regarding how extra van trips are assigned³, he decided to hire the third van driver in order to cover all the trips that had become necessary by mid-February, 2004.

Wyatt stated that if the District were to drop a sport it would not send a layoff notice to the Bus Driver who drove the bus for those events; that the District would only send a layoff notice to a Bus Driver if the District were consolidating routes and it had to eliminate one full Bus Driver position.⁴ Wyatt stated that during his eleven-year employment with the District no Bus or Van Driver has ever been scheduled for or worked more than 1,000 hours in a year. Wyatt also stated that if a Van Driver works from 8:00 a.m., to 12:01 p.m., the driver receives 4.5 hours' pay. Wyatt stated that when the language of Article XV, Section B, including paragraph 3 was added to the contract, there was no discussion concerning how this provision would work with the contractual layoff provision. Rather, the discussions revolved around what would constitute an extra trip for a Van Driver.⁵

The Grievant and Nicholai were hired at about the same time as Van Drivers so their seniority is approximately the same. The Grievant stated that since her hire, she has been guaranteed at least four hours of van driving each school day; and that her hours have fluctuated during each year and from year to year since her employment at the District.

² Bangor School District does not have a Speech Therapist or Early Childhood Classes. It sends its children to the West Salem School District for these programs.

³ Bus driving is separate from van driving in the District. Extra-curricular trips are assigned every two weeks at a meeting between the Superintendent and the drivers where the drivers select trips they prefer by seniority on a rotation. Bus Drivers can take extra Van Driver trips if they are available; they pick these by seniority as well.

⁴ Bus Drivers must be completely laid off; they are never reduced in time because all regular routes must be driven daily.

⁵ Wyatt was the only witness who testified concerning the bargaining history regarding Article XV herein.

From 2000 through the 2002-03 school year, Rasmussen's individual employment contracts identified her as a "Bus Driver" (2000-01) or "Bus (van) Driver" (2001-2003). Each contract stated "the 'standard' time for the position shall be four hours per day for regular a.m. and p.m. routes." Rasmussen stated that the District normally scheduled her to drive four hours in the morning or four hours in the afternoon and that whenever she did not work four hours in a day she was paid for four hours pursuant to the contract. In 2003-04, Rasmussen's individual contract language read as follows: "The 'standard' time for the position shall be as described in the Master Agreement."

Rasmussen confirmed the accuracy of District Exhibit 36 which read as follows:

Bangor School District

Rasmussen Hours Worked Per Pay Period

00-01	01-02	02-03	03-04		Average of Hours Excluding 2003-2004	2003-2004 +/- Average
13.8	15.9	33.5	15.6		21.0	-5.5
55.2	45.7	40.0	22.9		47.0	-24.1
58.0	44.8	39.5	59.4		47.4	11.9
57.5	48.2	42.5	61.0		49.4	11.6
46.5	38.0	32.0	60.0		38.8	21.2
63.5	50.0	40.5	44.8		51.3	-6.6
52.0	43.0	50.5	56.3		48.5	7.8
63.5	48.5	36.0	49.0		49.3	-0.3
33.8	49.5	41.0	72.0		41.4	30.6
55.8	15.5	9.5	13.0		26.9	-13.9
63.8	53.0	41.0	66.5		52.6	13.9
60.5	51.8	40.2	71.5		50.8	20.7
65.0	45.2	36.2	70.0		48.8	21.2
55.8	50.5	42.5	47.5		49.6	-2.1
45.0	50.0	40.0	40.0		45.0	-5.0
43.0	44.8	22.5	40.0		36.8	3.2
22.5	34.8	40.0	37.0		32.4	4.6
41.2	51.8	32.0	34.5		41.7	-7.2
42.5	50.5	40.0	40.0		44.3	-4.3
27.4	50.5	46.8	40.0		41.5	-1.5
27.4	22.5	43.0	26.0		31.0	-5.0
		38.5				
	Totals				Average	
993.5	904.3	827.7	966.9		895.7	
			Total	Loss or	Gain	-17.3
	Ave.	Hours	Lost	Per	Paycheck	-2.16

In 2000-01, Rasmussen stated that she worked 993 hours; but in 2001-02 she worked about 100 hours less. In 2001, Rasmussen stated she did not receive a layoff notice from the District. Rasmussen stated that in February of 2001, District Administrator Wyatt cut her hours back and told her that she could not go over 1,000 hours. Rasmussen stated she did not have a copy of the Association contract and she did not file a grievance regarding the reduction in her hours. Rasmussen stated that she offered to sign a waiver of health insurance benefits in order to continue to work more hours in 2001. Wyatt responded that he could not do this because other employees would complain.

In 2002-03, Rasmussen stated that her hours decreased again from the 2001-02 level, by about 75 hours. Rasmussen stated she did not receive a layoff notice in 2002-03; that in that year she received four hours of work per day or pay therefor; and that the District never hired a third Van Driver. Because there were no additional children that needed to be driven so she did not see the reduction in her hours in 2002-03 as a layoff, and Rasmussen did not file a grievance in 2002-03.

Rasmussen filed the instant grievance when her hours were reduced in February, 2004, she stated, because the District hired the third Van Driver, Rob Carrie, and Rasmussen felt that her hours had been reduced to give to Carrie. Rasmussen stated that Wyatt explained to her in February, 2004 that he was concerned that her hours not go over the 1,000 hour maximum when Wyatt cut her hours. Rasmussen believed she should have received a thirty-day layoff notice before the District reduced her hours in 2004.

Wyatt stated that teacher aides are employed by the District for various hours unlike Van Drivers who were are always offered and paid four-hour positions when he was superintendent. When teacher aide Mary Spaeth was laid off from full-time to half-time she received a layoff notice at the end of the prior school year.

Current District Administrator Foegen stated that during his tenure, Van Drivers have often driven less than four hours per day but they are always paid for four hours per day. Wyatt and Foegen stated that Rasmussen was never guaranteed more than four hours of work per day, a particular route or certain hours⁶ by her contract or verbally. Foegen stated that when Van Driver Carrie was laid off in 2005, he received a thirty-day layoff notice and he was thereafter laid off (reduced to no hours) from his four hour Van Driver position because the District's need for Van Driving decreased in 2005-06.

⁶ Rasmussen confirmed these statements were true.

POSITIONS OF THE PARTIES

The Association:

The Association argued that arbitral principles require that the specific language of Article VII should control this case rather than the general language of Article II. The Association also noted that Article VII requires that the District choose the least senior employee in the Department for any layoff, and that the District cannot hire and employ another employee while a (more senior) employee is on layoff subject to recall. Therefore, the District was not privileged to partially layoff the Grievant who was not the least senior Transportation employee. In any event, the District could not hire Rob Carrie to work the Grievant's hours while she was on layoff. Even assuming the layoff of the Grievant was appropriate, the District was required to give Rasmussen 30 days notice of her layoff before it could reduce her hours. In this case, the Association urged that the proper course is for the Arbitrator to find that Rasmussen's reduction in hours was a layoff and to order that the District pay Rasmussen for the hours of work she lost due to her having been reduced in hours in violation of the agreement.

The examples of other layoffs, Spaeth and Carrie, demonstrated that the District laid off the least senior employee in those situations and that it gave those employees the proper 30 day advance notice of their layoffs. Yet, the District failed and refused to follow the contract in the Grievant's case. In the Association's view, the District's argument that the individual employment contracts justified its actions regarding the Grievant was misplaced. In this regard, the Association observed that the "standard time" of 4 hours was applicable to Bus Drivers, not to Van Drivers, due to the change in Van Driver pay which was agreed to in the effective labor agreement. In addition, the reference to "school year less than 1000 hours" on Van Driver individual employment contracts is not referred to in the contract and is therefore not binding or enforceable. In any event, Van Drivers often drive more than 30 hours while Bus Drivers never drive more than 30 hours in a week even with extra trips added into their totals.

Here, Rasmussen drove more than 30 hours each week from the third week of school until early February, 2004 when the District cut her hours, which requires a conclusion that she thereupon became a school year full-time employee. The Association noted that during the weeks when Rasmussen drove less than 30 hours a school holiday fell, which meant she did not have any trips on those holidays and her hours of work were decreased. Furthermore, the Association questioned how the District could fairly maintain that Rasmussen was a part-time school year employee when it had voluntarily paid her from 6 to 7 hours pay for each holiday and one snow day which occurred before the District cut her hours, just as it paid other full-time school year employees. The only reason that Rasmussen was paid four hours pay per week in the beginning of the 2003-04 school year was because at that time those were the hours she was driving.

The Association strongly disagreed with the District's assertion that because four hours was the "standard time" for the Van Driver position that four hours was all the District had promised the Grievant and all it owed her. In this regard, the Association argued that Rasmussen had willingly worked more than the four hour guarantee and the District had taken advantage of her willingness and flexibility. The Association contended that "at some point we believe this reflects a continuing commitment on the part of the District to maintain Diane's level (of work hours) for the remainder of the 2003-04 school year at the 7 hours this job had turned into" (Assoc. Br. p. 19).

The Association also argued that the District's action in reducing Rasmussen's hours was "financially foolish." In this regard the Association noted that Rasmussen had worked from 33 to 35.5 hours per week in the two months just before her hours were reduced and Carrie was hired; that when the District hired Carrie it had to pay him the four hour per day minimum. This meant that the District could have saved \$1200 by allowing Rasmussen to continue driving the 13 to 15.5 hours per week instead of hiring Carrie. In addition, the Association observed that Rasmussen never requested that she receive health insurance as a full-time school year employee as part of this case or at any time.

As the Grievant was not the least senior Transportation Department employee she should not have been laid off. Even if she could have been properly laid off, the Association argued that the Grievant should have been given a 30 day notice of her layoff (implicitly arguing that during this period Rasmussen's hours could not have been reduced). However, the Association urged the Arbitrator to make Rasmussen whole by ordering the District to pay her \$2,777.52. The Association did not request any other relief.

The District:

The District argued that the Association has the burden of proof in this case to show that the Grievant's position was more than a four hour per day position and that it failed to do so. In this regard the District noted that the Van Driver position has always been a four hour per day position with non-guaranteed opportunities for additional hours at the employer's discretion and with the employer's approval; that the labor agreement does not unambiguously define the Van Driver position, but it does give the District discretion in Article II, Management Rights, to fill, define and regulate positions; and that a partial layoff is defined in Article VII, Section A, as a reduction in "the number of hours in any position."

Given the silence/ambiguity of the agreement concerning the issue before the Arbitrator, the District argued that extrinsic evidence is relevant to flesh out the parties' intent regarding the proper status and treatment of Van Drivers. On this point, the District noted that the history of the Van Driver position, Van Drivers' individual employment contracts, the District's past practice regarding Rasmussen's work hours and Rasmussen's testimony constitute strong evidence that the District did not violate the labor agreement in treating Rasmussen as it did herein.

Regarding the history of the Van Driver position and the employment contract arguments, the District urged that the evidence was undisputed that the need for and work hours for Van Drivers have fluctuated widely; that the District has never required Van Drivers to take extra trips; that from at least 2000 through 2005, the “standard hours” have been listed on all Van Driver individual employment contracts and these contracts have also consistently stated that the Van Driver positions are “less than 1000 hours.” In addition, the District contended that Rasmussen’s admissions herein showed that she understood that her position was only for four hours per day, that the extra hours she was offered by the District were not guaranteed to her and that she was never told by the District that she was guaranteed more than four hours per day. The fact that Rasmussen never grieved the reductions in her work hours from 2000-01 to 2001-02 and from 2001-02 to 2002-03 was particularly damaging to the Association’s case, in the District’s view, as there was no difference between these prior situations and the one giving rise to this case.

In addition, the undisputed facts showed that the hours needed for Van Drivers increased unexpectedly in 2003-04 and the District made a management decision that it needed an additional Van Driver as of February, 2004, because Rasmussen could not be in two places at once and the Association presented no evidence of any mutual understanding that Rasmussen’s position would at any time become full-time. The District pointed to Articles II, XIII and III to show that it had the right to reduce Rasmussen’s hours in February, 2004 and hire Rob Carrie.

Also, the layoff notices issued to Teacher Aide Spaeth and to Van Driver Carrie supported the District’s case. In this regard, the District noted that Carrie’s hours were eliminated and Spaeth’s were cut by 50% and both required a 30 day notice of layoff, as the hours involved were part of those positions as originally offered. In contrast, the hours involved in this case are extra hours, not hours that the District originally offered to Rasmussen by contract and which Rasmussen agreed by individual contract to fill.

Furthermore, the District asserted that the fact that Bus Drivers have never received layoff notices when their extra trips are cut — as when an extra curricular activity is discontinued — further supports the District’s case. Here, there is no contractual language referring to any reduction in hours or to a reduction in total hours as constituting a layoff and there is no support in the contract for the Association’s approach that Van Driver hours should be derived from a floating average.

Finally, the bargaining history evidence proffered by former District Administrator Wyatt was uncontradicted by the Association. Wyatt indicated that during the negotiations for the 2003-05 agreement, the parties never discussed layoffs in discussing the changes proposed by the Association in Article XV. Rather, Wyatt stated that the only discussions regarding Article XV centered around what would constitute an extra trip for Van Drivers, that the Association wanted Van Drivers to be treated more like Bus Drivers who received a two hour

minimum every time they stepped into their buses to drive. As a result, Wyatt stated that the District agreed that if Van Drivers' regular four hour days went beyond that time, the District would round-up their actual work time to pay Van Drivers for the inconvenience.

The District urged the Arbitrator to deny and dismiss the grievance in its entirety. In the alternative, the District asserted that even if the Arbitrator found a violation of the labor agreement in this case, that the Arbitrator is without authority to award Rasmussen more than 32.1 hours of back-pay, the difference between the hours she was paid in 2003-04 and the 1000 hour maximum she contracted to perform.

The Association in Reply

The Association asserted that the District's contention that the parties agree that Rasmussen's position is a four hour per day position is baseless. Rather, the Association pointed out, although the collective bargaining agreement pay schedule established the Van Driver position as a minimum of four hours per day, various facts proven herein showed that the new language of Article XV regarding Van Driver pay for time over four hours in a day, the fact that extra Van Driver trips have not been assigned on a rotating basis (as with Bus Drivers), the increase in Rasmussen's 2003-04 hours and the District's payment of increased holiday pay to Rasmussen in 2004, all show that Rasmussen's Van Driver 2003-04 hours had become regular hours and that the District considered her to have become school year full-time because she worked 30 to 35 hours per week on regular basis. The District's action in reducing Rasmussen from this level of hours to 20 hours per week therefore constituted a layoff.

The Association admitted that at the start of each new school year, "the clock" on Rasmussen's Van Driver job was "reset" such that she went back to a guarantee of four hours per day, but the Association argued that the District's increase in Rasmussen's hours in 2003-04 allowed Rasmussen to reasonably expect to keep those hours for the entire year. The Association further contended that the facts showed that the parties mutually intended to permanently change the hours of Rasmussen's Van Driver position; that each time Rasmussen was given another student to transport "those were permanent assignments." The Association likened this to a Bus Driver's being assigned a regular route which assignment requires a conclusion that the children on that regular route are permanently assigned to that Bus Driver. As the students originally assigned to Rasmussen continued to need transportation services throughout the 2003-04 school year, she should have been allowed to continue those services.

In the Association's view, the layoff clause, rather than restricting the remedy in this case, requires a conclusion that the District was not free to hire a third Van Driver (Carrie) when Rasmussen was partially laid off and while she remained ready, willing and able to perform the available work. The District's assertions that it had to reorganize the work due to unprecedented transportation needs and that Rasmussen could not physically drive all of the

necessary trips was undercut by Mr. Wyatt's admission that by cutting back Rasmussen's hours, he was really trying to avoid having to pay Rasmussen contractually required fringe benefits due to her increased hours. In all of the circumstances of this case, the Association sought \$2,777.52 in back-pay for Rasmussen based upon the District's violation of the agreement.

The District in Reply

The District noted that the Association made several admissions on page 3 of its initial brief that the District urged require an award for the District herein. The District argued that the logic of the Association's arguments is strained; that Article VII Section A can only be read to apply to the standard (4) hours of the Van Drivers; and that the District would not have changed the language of Article XV, Section B had it known that by doing so it had agreed to automatically and permanently include any and all extra Van Driver hours in each such position, effectively destroying the District's long-time decision that Van Drivers would be part-time school year employees.

In addition, the District noted that Rasmussen's individual employment contracts fill in the blanks where the labor agreement is silent and provide strong evidence of a binding past practice. The fact that Rasmussen signed her 2003-04 individual contract which described her position as part-time school year with an estimated annual salary based upon four standard hours of work per day, further supports the District's argument on this point. Rasmussen's formal contract relationship with the District was not and could not be changed by the District's offer and Rasmussen's acceptance of extra above-contract hours. Thus, the parties' agreement to changes in Article XV, Section B no more changed the nature of the Van Driver position as a four hour position than an agreement to pay custodians triple time pay for certain work would have done.

The District argued that the Association failed to prove the relevance of Rasmussen's seniority--that because Rasmussen was not the least senior Van Driver, she should not have been laid off. Also, the Association failed to prove the relevance of holiday pay to this case. In regard to the latter item, the District urged that Article XII Section A refers to the "number of hours the employee normally works" not the hours connected with the position or words to that effect. The District asserted that in any event, the amount of holiday pay Rasmussen received after Labor Day could have been an error.

The District asserted that the record fully supports its contention that the third Van Driver was hired because of valid operational needs and that the Association failed to submit any contradictory evidence on this point. The District observed that the Association never proved its assertion that the District hired Carrie in order to avoid paying Rasmussen fringe benefits. The District asserted that Rasmussen "was being paid for many hours she did not actually work;" and that the contract language concerning insurance refers to "scheduled hours," not to total paid hours, requiring a conclusion that Rasmussen would not have been entitled to insurance benefits in any event.

The District found the Association's argument that hiring Carrie was "financially foolish" irrelevant, not based upon record facts and therefore fatally flawed. Rather, the District argued that the record facts showed that had it followed the Association's approach in this case, that would have been financially foolish, as it would have had to retain Rasmussen at an alleged 30 to 35 hours per week and then hire Carrie and pay him a guarantee 20 hours per week for van driving hours in order to cover all of the transportation needs of the District.

Finally, the District asserted that the lack of any appropriate means of calculating potential above-contract back-pay in this case is another reason to deny the grievance. Even if the Association wins this grievance and the Arbitrator orders a remedy, the Association has over-estimated same by approximately \$2500, as Rasmussen was only entitled to \$260.80 for one hour per day over the 30 days' layoff notice period. Also, the District noted that Rasmussen was not available for all of the trips that Carrie drove as she could not be in two places at once. In all of the circumstances of this case, the District asked the Arbitrator to deny and dismiss the grievance. In the alternative, should the Association prevail, the District urged the Arbitrator to limit the remedy to \$260.80.

DISCUSSION

The Association has the burden of proof in this non-discipline case. As such, it has shouldered a heavy burden, to show that by the changes made in Article XV, the parties intended to automatically and permanently add hours to Rasmussen's Van Driver position beyond what was traditionally referred to in their individual contracts as the "standard" time for the position, 4 hours per day, or in the alternative, to show that the parties mutually agreed to amend Rasmussen's individual employment contract for 2003-04, so that the hours she drove over 4 per day became part of her Van Driver position giving her Article VII layoff and recall rights with regard to them. Here, the District has argued that the labor agreement is either silent on the salient points of this case or it is ambiguous, making extrinsic evidence – such as that involving past practice and bargaining history relevant and probative of the issues herein. I agree.

Initially, I note that Article VII defines a layoff as a reduction in the number of positions or "the number of hours in any position." In this case, the District has argued that the hours of the position must be the four standard Van Driver hours per day that Rasmussen contracted in writing to provide the District. As Article VII does not define a layoff as any reduction in hours or as a reduction in the total hours worked in a position and the labor agreement is silent regarding the shifts/hours of work of Van Drivers, I agree with the District on this point.

It is also significant that the 2003-05 labor agreement radically changed the language of Article XV, Section B. The change in the language of Article XV, Section B, as well as the Van Driver individual employment contracts issued prior to 2004, show that the 4 hours “standard time” for Van Driver positions was consistently guaranteed over the past 4 years. Also, the pay calculations contained in the Van Driver contracts show that prior to 2004, Van Driver pay was consistently based upon 4 hours of work per day and nothing more. Although “extra trips” were specifically referred to and the hourly rate of pay therefor was listed in these contracts, no extra hours were ever added into the totals. In addition, even after the 2003-05 contract changes were made in Article XV, the annual salaries of Van Drivers continued to be based upon 4 hours per day and no more. No reference was made in the 2003-04 and 2004-05 contracts to any extra trip hours and no extra hours were added into the contracts therefor.

This evidence shows that the hours of Van Driver position were consistently set at 4 hours per day and that any extra hours were never added to the position. The reference in the individual contracts issued from 2003 forward to the “Master Contract” does not require a different conclusion. This vague reference to the 2003-05 Master Contract is insufficient to prove that the District thereby intended to add any extra trip hours in 2003 or 2004 to the Van Driver position. Indeed, all individual Van Driver contracts from 2000 forward submitted herein stated that they were for “part-time” employees (less than 1000 hours).”⁷

Furthermore, Wyatt and Rasmussen’s testimony clearly indicated that in 2000-01, 2001-02 and 2002-03 they discussed and Rasmussen agreed to work hours over and above the 4 hours per day she was contracted to provide in each of those years; that later, in each of those years, Wyatt verbally notified Rasmussen before he cut her back to 4 hours per day. In none of these instances was Rasmussen given a formal written layoff notice and in no case did she file a grievance. This evidence weighs heavily against the Association’s arguments herein and it shows that there was no intent by the District or any past practice of counting Van Driver hours worked above the “standard” 4 hours per day into the Van Driver positions prior to 2003-04.

In addition, Rasmussen admitted herein that no one at the District ever told her that she was guaranteed more than 4 hours work per day. Indeed, the note that Rasmussen wrote on the bottom of her 2002-03 individual contract demonstrated that she understood that the hours of the Van Driver position were the “standard time,” 4 hours per day. Finally, the evidence of bargaining history proffered by the District stood uncontradicted regarding paragraph 3 of Article XV, Section B, showing that the parties discussed and agreed to treat Van Drivers like Bus Drivers (using identical language in substantive areas) regarding pay, rounding up to the nearest 30 minutes when Van Drivers are required to drive longer than their 4 standard daily

⁷ The Association urged that this title/legend on Van Driver individual contracts should have no weight herein. I disagree. Given the silence of the labor agreement regarding Van Driver hours of work, I find these titles/legends relevant to support the District’s valid past practice argument.

hours; and that no discussion occurred regarding what affect the new language of Article XV would have on an Article VII layoff. This evidence also undercuts the Association's arguments herein.

As the District noted, it was undisputed on this record that Van Driver hours increased greatly and unexpectedly in early 2004 and that the third Van Driver was hired in February, 2004 because Rasmussen could not be in two places at once. Even if part of the reason that Wyatt cut Rasmussen's above contract hours in 2000-01, 2001-02, 2002-03 and in 2004 was to assure that she remained a school year part-time, this is a valid non-arbitrary business reason for the decisions Wyatt made. It is significant that no evidence was proffered to show that the District cut Rasmussen's hours in these years in bad faith or for any discriminatory reason.

In my view, the evidence regarding Spaeth is not relevant to Rasmussen's situation or her position. Spaeth's hours as a teacher's aide prior to her partial layoff were the specific hours she had contracted in writing to provide, making it necessary for the District to give her 30 days notice of the reduction in the stated hours of her position. In addition, the evidence regarding Rob Carrie's layoff actually supports the District's arguments herein. There, the District entirely laid off Carrie when Van Driver hours decreased in 2005 and before it did so, it gave Carrie the contractually required 30 day notice. Rasmussen's contracted hours were never cut. Hence, she was never laid off and never entitled to a 30 day notice.

The Association has argued that the four standard hours per day should apply only to Bus Drivers. However, the language of the 2001-03 agreement, Van Driver individual ! contended that because the District paid Rasmussen 6 to 7 hours of holiday pay for each holiday after her hours increased in 2003 requires a conclusion that the District then considered Rasmussen a full-time employee. I disagree. Article XII Holidays, states that employees must be paid holiday pay for the number of hours the employee "normally works." In these circumstances, District payroll may simply have looked at Rasmussen's work hours during the week or month before each holiday to determine her normal work hours at the time. Had Article XII used the language of Article VII, stating that the employee should receive holiday pay based upon "the number of hours in any position", or words to that effect, the Association's argument would have more strongly supported its case herein. The Association also asserted that the District's decision to cut Rasmussen's hours and hire Carrie was "financially foolish." I find this argument entirely immaterial to this dispute. Therefore, it has not been considered herein.

Based upon the above analysis I issue the following

AWARD

The Districts' decision to reduce grievant Rasmussen's Van Driver hours during the 2003-04 school year did not amount to a layoff of the Grievant. Therefore, the District was not required to issue Rasmussen a 30 day layoff notice. In the circumstances proved here, the District's subsequent hire of a third Van Driver (Carrie) did not violate the labor agreement. Therefore, the grievance is denied and dismissed in its entirety.

Dated at Oshkosh, this 28th day of March, 2006.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator