

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
GREEN BAY AREA PUBLIC SCHOOL DISTRICT

and

**GREEN BAY BOARD OF EDUCATION
(NOON HOUR SUPERVISORS) EMPLOYEES UNION**

Case 236
No. 67478
MA-13915

Appearances:

Michael J. Wilson and **Mark DeLorme**, Staff Representatives, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite “B”, Madison, Wisconsin, appeared on behalf of the Union.¹

Jack D. Walker, Attorney at Law, 1106 Willow Lane, Madison, Wisconsin, appeared on behalf of the Employer.

ARBITRATION AWARD

Green Bay Board of Education (Noon Hour Supervisors) Employees Union, Local 3055, AFSCME, AFL-CIO, affiliated with the Wisconsin Council of County and Municipal Employees herein collectively referred to as the “Union,” and Green Bay Area Public School District, herein referred to as the “Employer,” jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Green Bay, Wisconsin, on April 15, 2008. Each party filed a post-hearing brief, the last of which was received July 14, 2008.

ISSUES

The parties were unable to agree to a statement of the issues and unable to agree that I might state them. I state them as follows:

¹ Mark DeLorme, participated in the briefing.

1. Was the grievance timely filed?
2. Did the Employer violate the agreement by refusing to apply the terms of the agreement to door monitoring work after September, 2007?
3. If so, what is the appropriate remedy?

RELEVANT AGREEMENT PROVISIONS

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I. PREAMBLE

To effectuate the purposes of the Municipal Employment Relations Act of the Wisconsin Statutes and to encourage and increase effective and harmonious working relationships between the Board of Education, Green Bay Area Public School District, hereinafter the “Employer” and its employees represented by the Green Bay Board of Education (Noon Hour Supervisors) Employees Union, Local 3055, AFSCME, AFL-CIO, and affiliated with the Wisconsin Council of County and Municipal Employees, hereinafter the “Union”.

The parties hereto agree as follows: S/he shall designate she or he and h/er shall designate him, his or her.

II. RECOGNITION AND UNIT REPRESENTATION

The Employer recognizes the Union as the exclusive collective bargaining representative for the purposes of conferences and negotiations with the Employer, or its lawfully authorized representatives, on questions of wages, hours, and conditions of employment for the unit of representation consisting of all employees of the Employer employed as follows:

1. All regular full-time and regular part-time noon hour supervisors employed by the Board of Education, Green Bay Area Public School District, excluding supervisors and all other employees of the Employer as certified by the Wisconsin Employment Relations Commission, dated June 6, 2002.

III. MANAGEMENT RIGHTS

The Employer, on its own behalf, hereby retains and reserves unto itself all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and the constitutions of the State of Wisconsin and of the

United States. Without limiting the generality of the foregoing, these rights include the following:

1. The executive management and administrative control of the school system and its properties and facilities and to direct all operations of the District;
2. To select and hire all employees, establish quality standards, evaluate employee performance and, subject to the provisions of law and this Agreement, to determine their qualifications and the conditions for their continued employment, their dismissal and transfer of all employees;
3. To determine hours of duty and assignment of work, including the assignment of overtime;
4. To establish new jobs and abolish or change existing jobs or positions;
5. To manage the work force and determine the number of employees required;
6. To introduce new or improved methods and facilities or to change existing methods and facilities;
7. To determine the methods, means, and personnel by which District operations are to be conducted;
8. To determine the kinds and amounts of services to be performed as it pertains to operations, and the number and kinds of classifications to perform such services;
9. To contract out for goods and services;
10. To maintain efficiency of District operations.

The exercise of management rights in the above shall be done in accordance with the specific terms of this Agreement and shall not be interpreted so as to deny the employees (sic) right of appeal.

The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Employer, the adoption of policies, rules, regulations, and practices in furtherance thereof, and the use of judgment and discretion in connection therewith, shall be limited only by the specific and express terms of

this Agreement and Wisconsin Statutes, Section 111.70, and then only to the extent such specific and express terms are in conformance with the constitution and laws of the State of Wisconsin and the constitution and laws of the United States.

IV. PRACTICES

Except as provided for specifically in this Agreement, all existing practices pertaining to hours, wages and working conditions that are mandatory subjects of bargaining shall continue to be applicable during the term of this Agreement. It is recognized that practices may vary from school to school.

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VI. PROBATIONARY AND EMPLOYMENT STATUS

All newly-hired employees shall be on probation for a period of one hundred eighty (180) work days from the date of their employment. The probationary rate is 90% of the rate for the employee's classification for the first ninety (90) work days. Probationary employees who are discharged shall not have access to the grievance procedure.

Continued employment beyond the probationary period is considered as satisfactory completion of probation.

A regular employee is one who is hired to fill a full-time or part-time position.

A temporary employee is one who is hired for a period not to exceed ninety (90) calendar days except in the case of long-term substitutes replacing regular employees who are on approved leaves of absence (paid or unpaid) and who intend to return to work or any other specified time as agreed to by the parties and who shall be separated on or before the end of said period. However, should a temporary employee be continued in employment as a part-time or full-time permanent employee without a service break, the calendar days of employment shall be considered as a part of the employee's probationary period.

VII. SENIORITY

Seniority shall be established for each employee and shall mean an employee's length of continuous service employed by the District commencing with the employee's most recent date of hire. Seniority rights terminate upon discharge or quitting.

In the event of layoff, employees shall be laid off in inverse order to the length of service; and the last employee laid off shall be the first to be called back from such layoff provided the employee's qualifications meets the needs of the Employer. In the event of equal seniority, the order of layoff shall be decided by lottery. Notice of layoff shall be in writing either personally or by certified letter, return receipt requested, sent to the employee's last address of record. Notification of recall shall be by certified mail, return receipt requested, sent to the employee's last address of record.

Permanent employees shall not be subject to layoff until all "temporary employees", as defined in this agreement, are laid off.

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IX. PAY POLICY

Employees will be paid on the sixteenth of each month and on the last workday of each month. If the sixteenth of the month or the last workday of each month should fall on a weekend or holiday, the pay date will be the last scheduled prior workday except in December and June.

Attached as an appendix to this Agreement are the pay schedules for each classification.

The Employer shall determine the number of employees to be assigned to each school. The Union shall be notified in advance of any change to be made in the number of positions.

Sundays and Holidays: Double time shall be paid for all work performed on these days.

Overtime: All work performed over eight (8) hours per workday or forty (40) hours per workweek shall be compensated for at the rate of time and one-half the employee's rate of pay. For overtime computation, holidays and sick leave shall be considered as time worked. All overtime work will be approved in advance by the Employer.

The pay plan attached shall remain in effect without change for the term of the labor agreement.

Prior to establishing a new job or materially changing the duties of an existing job, the Employer shall inform the Union. Subsequent to Union notification, the Employer will evaluate the new or materially changed job in comparison with other jobs whose relative worth are comparable and will

inform the Union of the new rate and effective date. The Union may immediately enter into negotiations with the Employer concerning such rate. Changes in such rate agreed upon within sixty (60) days, or an extended time mutually agreed to, shall be made retroactive to the effective date of the job changes or new job installation, which occasioned the rate adjustment. The establishment of disputed wage rates shall be a subject of arbitration.

All employees shall have their paychecks directly deposited.

Pay Stubs and W-2's will be available online only.

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XIV. GRIEVANCE PROCEDURE

All grievances, which may arise, shall be processed in the following manner:

- Step 1. The aggrieved employee shall present the grievance orally to h/er immediate supervisor within ten (10) workdays of the time in which the employee knows of or should have known of the suspected improper application. The aggrieved employee, with the representation of h/er steward if s/he so elects, shall attempt to resolve the grievance with the immediate supervisor. If it is not resolved at this level within ten (10) workdays of its initial presentation, the grievance may be processed further by the Union as outlined in Step 2.
- Step 2. The grievance shall be presented in writing to the immediate supervisor within ten (10) workdays of the supervisor's answer at Step 1; and if not resolved within ten (10) workdays at this level, it may be processed further by the Union as outlined in Step 3.
- Step 3. The grievance shall be presented in writing to the Superintendent of Schools or designee within ten (10) workdays of the supervisor's answer at Step 2; and if not resolved within ten (10) workdays at this level, it may be processed further by the Union as outlined in Step 4.
- Step 4. The grievance shall be presented by letter to the Superintendent or designee within ten (10) workdays of the answer at Step 3 for review by the Board of Education. If it is not resolved at this level within ten (10) workdays, it may be moved by the Union to an Arbitration Board as provided in Step 5.

Step 5. Within ten (10) workdays of the Board of Education's answer at Step 4, the grievance may be submitted by the Union to the Wisconsin Employment Relations Commission for arbitration by one of its members. The Arbitrator, after hearing both sides of the controversy, shall hand down h/er decision in writing and such decision shall be final and binding on both parties to this Agreement. The Arbitrator shall have no power to add to, subtract from, or modify any term of this Agreement. The cost, if any, of the Arbitrator and transcript shall be divided equally between the Employer and the Union.

Time Limits: Grievances not appealed within the designated time limits in any step of the grievance procedure will be considered as having been resolved on the basis of the last preceding answer of the Employer. Grievances not responded to by the Employer within the designated time limits in any step of the grievance procedure shall be considered denied by the Employer, and appeals taken from such a denial to further steps of the procedure must be within the time limits set for appeal after an answer to the grievance. The parties may mutually agree in writing to extend the time limits in any step of the grievance procedure.

General: Any employee shall have the right of the presence of a steward when h/er work performance, conduct, or other matter affecting h/er status as an employee are subjects of discussion for the record.

The Union shall determine composition of the grievance committee of the Union. Such committee shall not exceed four (4) employees.

If, in the judgment of the Union, a grievance affects a group or class of employees, the Union may submit such a grievance in writing to the Superintendent or h/er representative directly; and the processing of such grievance will be commenced at Step 3 of the grievance procedure. The Union shall designate the individuals for whom the grievance is being processed at the time of filing.

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XVI. WAIVER OF RIGHTS

Neither party to this Agreement waives any rights possessed by it or them under state and federal laws, regulations or statutes.

In the event any clause or portion of this Agreement is in conflict with the statutes, such clause or portion of the Agreement shall be declared invalid

and negotiations shall be instituted to adjust the invalidated clause or portion thereof.

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XVIII. JOB POSTINGS

When new jobs or vacancies are to be filled, the position shall be posted and a job outline shall be included. The posting shall contain the following information: school location, hours of work, deadline for application and rate of pay. Such notice shall be posted five (5) workdays before the position is filled. The Employer shall notify the Union when the position is filled and who received the position.

All employees seeking a posted position shall submit the Application Form for Posted Notice of Job Vacancy” form in duplicate with one (1) signed copy submitted to the Human Resources Office through the U. S.mail and one (1) signed copy to the Union secretary through the U.S. mail.

Qualifications being equal, the application of seniority will first be applied to those employees within the building where the posted position exists who have, on a timely basis, submitted the “Application Form for Posted Notice of Job Vacancy” and secondly to employees in all buildings who have, on a timely basis, submitted the “Application Form for Posted Notice of Job Vacancy.” Within the above parameters, the successful employee shall be given the opportunity to familiarize h/erself with that job. Said employee shall demonstrate h/er ability to perform the job posted within five (5) workdays and, if deemed qualified by the Employer, shall be assigned the job.

Should such employee not qualify, s/he shall be reassigned to h/er former job without loss of seniority. In such event, the process in the above paragraph shall be repeated until the Position is successfully filled or there are no internal candidates remaining. If no internal candidates remain, the Position is “Open to Hire.”

Qualification Disputes: Differences of opinion as to qualifications shall be resolved through the grievance procedure.

Notice of Postings to Employees Presently Not Working: If an employee is not actively working and wishes to have Postings sent to their home address they must notify Human Resources of that interest. The Employer shall then mail postings to said employee’s last known address.

Employee Familiarization: The Employer shall provide and ensure proper familiarization of new employees and to those changing positions.

Bulletin Board: A bulletin board will be placed in each school and BCO. All AFSCME job postings shall be posted on this board for the prescribed time period.

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XXIV. NONBARGAINING UNIT WORK

If any employee is requested to temporarily perform duties, which are not the regular duties of the employee and are generally performed by another bargaining unit at a lower rate of pay, the employee shall not be required to take a reduction in pay. If any employee is requested to temporarily perform duties, which are not the regular duties of the employee and are generally performed by another bargaining unit at a higher rate of pay, the employee shall receive the higher rate for all hours worked on such higher-rated job.

The Employer shall not contract out any work, which is normally performed by the Noon Hour Supervisor Union, which has the effect of displacing (laying off) bargaining unit members.

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GREEN BAY AREA SCHOOL DISTRICT

APPENDIX 1

SALARY SCHEDULE

<u>Classification</u>	<u>Hourly Rate</u> 7/1/05-6/30/06	<u>Hourly Rate</u> 7/1/06-6/30/07	<u>Hourly Rate</u> 7/1/07-6/30/08
Noon Hour Supervisor	\$11.45	\$11.79	\$12.14

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FACTS

The Employer is a Wisconsin K-12 school district. It has 26 elementary schools in its school system. The Employer's employees who are represented for labor relations purposes are organized in nine bargaining units. They are loosely called:

1. Teachers
2. Paraprofessionals

3. Monitors
4. Substitute Teachers
5. Clericals
6. Maintenance
7. Skilled Trades
8. Food Service
9. Noon Hour Supervisors

The bargaining unit involved herein is the Noon Hour Supervisors unit (herein “Supervisors”). The Union represents Supervisors and some of the other bargaining units. The paraprofessionals perform work to assist teachers in the classroom. They are employed in all of the Employer’s schools. The monitors are employed in the Employer’s high schools and middle schools to maintain order among students. They do not work in the elementary schools.² The Supervisors are the least skilled of the Employer’s employees. The primary responsibility of Supervisors is to actively supervise a section of playground when students are present on the playground (recess or noon hour). They deal with student concerns in a fair and consistent manner. They deal with any accident on the playground and then report any accidents to the school office and to teachers of the affected students. They also supervise students in the lunch room. The Supervisors provide assistance to teachers by copying, stapling, pasting, and stuffing. They also correct student papers. They may also be called upon to provide assistance to the school office by, for example, distributing classroom materials and messages. They may also be assigned data entry in the office. However, the work of assisting teachers and office personnel is also assigned to parent volunteers, paraprofessionals, and other teachers. On rare occasion managerial personnel might do some of that work.

Supervisors are normally assigned to work between one to six hours per day. Most of the Employer’s other staff works full school days. The Employer maintains a list of people willing to act as substitute employees for non-professionals in the schools. These include, but are not limited to, Supervisors. These temporary employees do work of the Supervisors, paraprofessionals, clericals and others. They are paid \$8.50 per hour.

In September, 2006, the Employer nearly had an incident. Students were caught in the process of preparing to inflict an incident similar to the tragedy at Columbine. As part of its response to that situation, the Employer determined to monitor the entrances to all of its schools. To that date, the entrances to its schools were not guarded in any respect and those having business with the school entered freely. The Employer was surprised by the incident and sought to provide security at each of the schools as quickly as possible surrounding and including the times when students were present in the school. It decided to have someone physically monitor the doors to its schools and require all non-employees seeking admittance to provide identification prior to being admitted.

² See, GREEN BAY AREA PUBLIC SCHOOLS, DEC. NO. 18910-A (WERC, 5/08).

The Employer's Assistant Superintendent for Human Resources John Wilson spoke with Union President Cheryl Follett by telephone prior to the time it implemented the new procedure. They discussed having Supervisors perform the door monitoring work in the elementary schools. The two agreed that they would perform the work in addition to their normal duties, all at their normal contractual rate, then \$11.79 per hour.³

The Employer also had other people doing this work. In some cases, parent volunteers, substitute employees and employees in other units watched entrance doors on a temporary or sporadic basis. At least one of the door monitors was hired shortly after the door monitoring program began. The Employer also decided to hire others to do the work. It established no job requirements and established no central hiring procedure as it had for its other positions. It did require that all people who were hired undergo a background check which may be required by law. The authority to hire door monitors was delegated by the Employer to school principals. The Supervisors performed the vast majority of the door monitoring work in the 2006-07, school year.

In September, 2007, Mr. Wilson and Ms. Follett had a discussion concerning the door monitoring work. Follett recalls the gist of the conversation as:

I asked you if Supervisors were receiving the contractual rate of \$12.14 per hour for watching the doors as they had been paid the contract rate the previous school year. . . . you told me that if the supervisors wanted to continue to continue performing this work, they would be paid \$10.00 per hour.
. . . .

During the second conversation a few days later, I called you to indicate . . . that Supervisors must be paid at the contract rate. You informed that the rate of pay would now be \$8.50 per hour and that if I did not accept this offer the District would give these hours to NWTC students and/or parents . . . of students. . . . I repeated that Supervisors would not perform this work for less than the contract rate.

Mr. Wilson did not have the same recollection of that conversation. He stated that in September, 2006, he had told Follett that even though the new position of door security was not going to be considered part of any bargaining unit that the Supervisors who were asked to do it would be paid their normal rate of pay. He noted that there had been discussions in negotiations in the past about requiring Supervisors to do non unit work and he did not want any of that to occur. The tenor of Ms. Follett's testimony is that Mr. Wilson made no direct statement in 2006, that this was not Supervisors' unit work. The Employer hired law enforcement students from Northern Wisconsin Technical College to perform door monitoring work. It paid them \$10 per hour to do the work. The Employer intended to use them in the grade schools, but it never did. He stated that he construed Article XXIV, which requires that

³ The normal wage rate for supervisors was increased to \$12.14 for the following school year.

the Employer pay Supervisors their regular rate when doing less-paid non unit work, to apply only during the Supervisor's own regular hours. Accordingly, the discussions with Ms. Follett were merely to offer Supervisors the chance to do door monitoring work outside their normal hours at the lower rate the Employer was then going to set.

The Employer no longer assigned the door monitoring work to unit employees after the discussions in September, 2007, in their role as unit employees, but it continued to hire door monitors and permanently assign substitute employees to the job. It also "hired" Supervisors to do be door monitors outside their normal working hours. It paid them \$10 per hour. The Employer took the position that those hired to do door monitoring work were not employees in any bargaining unit.

On September 26, 2007, the Union filed the instant grievance in which it alleged that the Employer violated Article II of the parties' agreement on the following basis:

Non bargaining unit employees have been performing bargaining unit work (e.g. parents, grandparents, translators)

The grievance was processed through all of the steps of the grievance procedure starting at step 1 to arbitration. The Employer did not meet with the Union to discuss the grievance at any step and it answered the grievance at each step only with blanket denials. The grievance was processed to arbitration. The Employer first objected to the timeliness of the grievance at the hearing herein.

POSITIONS OF THE PARTIES

Union

The Employer violated the agreement when it assigned the bargaining unit work of watching front doors away from the Noon Hour Supervisors to non-unit, unrepresented employees. Arbitrators have held that there must be some extraordinary reason to transfer work away from the bargaining unit. The right to job security is an essential assumption underlying collective bargaining agreements, in general, and this agreement specifically. This is inherent in the parties' recognition clause. Other cases have relied upon the business justification for removing unit work. In this case, the Employer has not offered any justification for its actions.

Watching the front doors of schools is work historically performed by bargaining unit members. Mr. Wilson threatened to remove this work from the unit if the Union did not agree to reduce the wages for those doing the work to less than that provided in the collective bargaining agreement. When the Union refused to do so, he proceeded to hire the disputed employees. The conversation was memorialized by a letter from the local union's President to the Assistant Superintendent. The Assistant Superintendent never denied the content of that letter.

The work was assigned to this unit during the 2006-07 school year. The employees in this unit did not volunteer, but were required to do the work. They did this work for an entire school year. The duration of time spent completing the duties as well as the proportion of the work day spent monitoring allowed such monitoring duties to become those customarily performed by unit employees. The Employer hired substitutes to monitor the doors when unit employees were reassigned away from the doors.

The Employer applied the agreement's seniority provisions during the 2006-07 to assign door monitoring work. This fact demonstrates that the Employer treated the work as unit work. The Employer also negotiated with the Union over the assignment of the work. At that time he never mentioned that it was assigned for a limited time.

The core of noon hour supervisor work is performing tasks which can be characterized as "teacher assistance." When the unit noon hour supervisors were required to watch the doors they also performed tasks to assist teachers such as cutting, pasting, etc. The Employer assigned this work to the non unit door monitors. "

The Union requests that I sustain the grievance and order to the Employer to make all of the affected employees whole and order it to cease and desist from the improper assignment of work and assign such work to employees of the bargaining unit.

Employer

The Employer takes the position that the sole issue is whether the door monitor work is solely that of the noon hour supervisors. The door work was never unit work. All told the noon hour supervisors have been given more of the work, but many others have also been given the work. It has never been historic unit work. The parties never reopened the collective bargaining agreement. Unit employees are not generally available during noon hour. They can only do the door work outside the regular shifts. Each and every noon hour supervisor who testified recognized that the door work was new work. The fact that the Employer never agreed to assign the work exclusively to the unit is confirmed by the fact that the Employer was assigning door monitoring work to other employees and new hires at the very same time in 2006-2007. The Employer's agents, from Principals on up, openly changed who they used to do the work. This manifested their understanding that the use of noon hour supervisors was for the convenience of the Employer and not a permanent alternation of the job of Noon Hours Supervisor.

It is clear that teacher work has been assigned to persons other than Noon Hour Supervisors. It has been assigned to employees in other bargaining units, volunteers, and principals. The question whether any teacher work is or is not the exclusive province of the Noon Hour Supervisors should not be reached in a case where there is no evidence of any assignment of the work outside the unit at all.

The only Agreement provision which the grievance alleges to have been breached by the Employer is the recognition clause. The district has not consented to the arbitration of any other issue at the hearing, the union surely appeared to try and distance itself from the recognition clause allegation. It is understandable. The WERC said in MILWAUKEE BOARD OF SCHOOL DIRECTORS, DECISION NO. 20399-A (1983) that a standard recognition clause is simply not a mandatory subject of bargaining. The Employer is required to provide such a recognition clause in writing, as a reflection of its legal obligation, not as matter of something agreed to. Thus no arbitrator can infer what any party meant by a recognition clause. The clause is for the WERC to interpret and is not the province of the arbitrator. No arbitrator can infer what a party means by recognition clause-neither party "meant" anything. There cannot have been any mutual intent arising out of a provision imposed by law. By contrast, the parties did in fact address job security issues by bargaining. This was done in Article XXIV. The Union does not claim there's been a breach of Article XXIV. Another reason not to imply exclusivity of unit assignment into a recognition clause (or any other provision) is that this would allow a party to avoid whether a work assignment is the result of a policy decision which is a non mandatory subject of bargaining. In this case, the policy choice is the level of security which the Employer may choose to provide. The choice may change repeatedly. In SCHOOL DISTRICT NO. 5, FRANKLIN, DECISION NO. 21846 (1984), the WERC recognized the importance of the policy choice principle. In this case, the door work is definitely not historical unit work. But even if the door work is treated as unit work, an attempt to make the work exclusively unit work implicates the FRANKLIN rationale. The policy choices as to what level of security should be provided and what level of training should be provided is a matter of management prerogative. A corollary reason why grievance arbitrators have no jurisdiction to consider whether any item of work is "unit work" is the danger of inconsistent claims by other unions, or the danger that the group of employees who the arbitrator might freeze out of all of the work themselves form a union. In WAUKESHA TECHNICAL COLLEGE, DECISION NO. 28952 (1996), the WERC said that in the absence of proof that a particular union has historically done the "vast majority" (as distinguished from any "majority") of an item of work, the work does not become "unit work" and the union could not insist on a work protection clause for that work. The opinion in the WAUKESHA TECHNICAL COLLEGE case also made the point that the unit employees who did the contested work did it on a voluntary basis, not on an assigned basis. The employee's herein volunteered for this work. Contrary to the position of the Union, the management's rights clause, Article III does not restrict the right of the employer to assign this work. It preserves all rights of the employer not restricted by the agreement or law. A provision which "expressed" that work assignments reducing work opportunities could be made to people in represented units, but could not be made in unrepresented units would be contrary to law because it would discriminate against persons were not represented. In any case, there's no limitation on the exercise of management rights in this contract. Even if there were such a clause, it would be subject to legal challenge by the Employer to the extent that it limits the Employer's choice of personnel and the policy choice as to the level of training and skills for security personnel, or policy choice as to the use of surveillance equipment and related electronic equipment operated by the office secretary. This Union wants an arbitrator to ignore those thorny issues and imply a clause whose proposed terms of limitations had nowhere been expressed by the Union, and thus cannot be tested. The

Union even wants to go one step further, and have the arbitrator imply a clause which would not only be non-mandatory, but illegal, because it would require the Employer to discriminate against employees who had not chosen unionization. Article VI says that temporary employees have to be terminated within 90 days. But the clause does not answer the question whether the particular person hired was or was not hired as a temporary employee in the unit. It begs that question. If the claim is that this clause has been breached, that claim is time barred as to every person who in fact was retained beyond 90 days before the time bar. As to the door work, the question whether the work ever became unit work needs to be answered before this clause is addressed and this provision cannot be used as a basis for making the work unit work. None of this work was ever exclusively unit work. The only work preservation provision in the agreement is Article XXIV. This does not prevent the assignments in question. Article IX is the wage rate provision for employees in the Supervisor classification. The rate does not put a person in that classification. In any case, as to the time bar, if the breach is as to pay rate, it is time barred. The Union has failed to establish any contractual restriction on the Employer's actions. The Employer requested that the grievance be dismissed.

Union Reply

The Employer said it could not require the Supervisors to do door monitor work. The Employer relied upon a document which was never provided to the Union to support its position. The fact that "door monitor work" is not included in this document is meaningless. Northwest Technical College students work only in the high schools and do not work in any of the elementary schools employing Supervisors. In addition, these NWTC students are no longer "non-union" employees. They were recently included in the monitors bargaining unit by the WERC.

The Employer claims that no door monitor has done any teacher work. The Union President testified that the vast majority of this work in kindergarten, first and second grade has been and continues to be done by Supervisors. In the 2007-08 school year she witnessed non-bargaining unit members performing this work. No other group was assigned these duties as part of their job. This work was the responsibility of the Supervisors.

Door monitoring work was a responsibility of the Supervisors and there is nothing in the record that the Employer communicated to the Supervisors that they could refuse to perform it.

The Employer also argues that Article XXIV demonstrates that the parties have contemplated the right of the Employer to transfer unit work out of the unit. This article deals with the rate of pay if employees are assigned to do non unit work. This case involves the wholesale assignment of unit work away from the unit.

The Employer's argument that door monitoring work is not unit work is not supported by the record. Supervisors performed the work in 2006-07 school year. The work was assigned using the seniority provisions of this agreement. With the exception of one school,

the fact that secretaries, volunteers, new hires, paraprofessionals, secretaries and substitutes completed significant door monitoring duties is not substantiated.

The Union argues that even if the work were not exclusively assigned to the unit, it is appropriately considered unit work because the unit did the predominant amount of the work.

The transfer of bargaining unit work violates the recognition, wage and benefit provisions and the agreement as a whole. The Employer operates under the false assumption that the lack of a contract provision gives it the unfettered right to move unit work out of the unit. Many arbitrators have concluded that the recognition clause of collective bargaining agreements provides a measure of protection of unit work.

Even if the arbitrator were not to find a clear and direct violation of the agreement, the Employer has undoubtedly violated the Agreement as a whole by engaging in bad faith bargaining. Arbitral authority holds that an employer must exercise "good faith" with respect to any of its rights so as to not undermine the Agreement. The Union requests that the Arbitrator order the Employer to make all affected employees whole and assign such work to the bargaining unit.

Employer Reply

Even if the Union were correct as to the nature of the discussions with Mr. Wilson, nothing he said was a guarantee that the work would always be with the unit. Regarding the Union's position that Mr. Wilson threatened to give the door monitoring work to another unit if they did not accede to a lower wage rate, the fact is that Mr. Wilson was never planning to give the work solely to the unit, but had always been planning and hiring door monitors and others to do the work. There is absolutely no testimony that any door monitor did teacher work. The Union's assertion that the teacher labor agreement guarantees that unit employees perform teacher work is not correct. It merely requires that they receive certain supplemental sources, but does not name who provides them. The Union's argument about substitutes doing unit work is contradictory. Substitutes have been doing work in this and other units. How does the Union square that with its allegation that the work is exclusively unit work? The door work was outside the normal hours of the Supervisors. Since this is new work, it is hard for the Union to argue "past practice." In fact, the Employer was making changes as it developed its response to the crisis. Contrary to the Union assertion, the Employer is arguing that door monitors are a separate position. There is no evidence that door monitors did teacher work. The private sector cases cited by the Union are inapplicable because this is a school setting and the work in question was assigned across units regularly. The award by Arbitrator Gallagher cited by the Union is inapposite because the employer therein assigned all of the work in question to another person outside the unit. The wage rate for Noon Hours Supervisors applies to Supervisors and not to "Supervisor work."

DISCUSSION

I. Issue

The Union stated the issue as:

1. Did the Employer violate the terms of the collective bargaining agreement by assigning bargaining unit work to non bargaining unit employees?
2. If so, what is the appropriate remedy?

The Employer stated the issues as:

1. Is the grievance time barred because it relates to certain events which occurred more than ten days prior to September 26, 2007 (the date of the filing of the grievance)?
2. If not, has the Employer violated Article 2, Recognition, by having non bargaining unit employees perform bargaining unit work; i.e. parents, grandparents, translators?
3. If so, what is the appropriate remedy?

The parties disagreed as to the proper statement of the issues and did not agree that I could phrase them. Timeliness of the grievance was in issue. I have stated that as an issue. The fundamental disagreement of the parties related to the matters which were substantively in dispute. The Employer's position is that the Union is limited to relying upon Article II, the recognition clause, as the sole provision alleged to have been violated. The Union relied upon that provision, but also relied upon substantially more provisions of the agreement in its argument. The grievance procedure requires merely that the grievance be "in writing." This is a very minimal requirement. It does not require that the Union specify the provisions which it alleges were violated as many other grievance procedures do. It also does not articulate the degree of specificity required for the substantive allegations. It contemplates that the parties will come to fully understand the dispute by processing the grievance through the grievance procedure. Under these circumstances I conclude that it requires only that the written grievance provide notice sufficient to identify the nature of the dispute. The Employer never availed itself of the opportunity to discuss the grievance in the grievance procedure. Therefore, the Employer may not claim surprise when it has failed to avail itself of its agreed-upon procedure for gaining an understanding of a grievance. I am satisfied that the grievance adequately identified the dispute. I also note that, in any event, the circumstances were different than stated by Mr. Wilson and the facts developed in ways which Union could not have anticipated at the time the grievance was filed. Finally, this dispute is in a class of cases which often involve allegations based upon fundamental assumption underlying the agreement,

implied terms, etc. By specifying that the Employer's actions violated the recognition clause the Union placed the Employer on adequate notice that it was claiming that the Employer's actions violated some of the assumptions underlying the whole agreement. The Employer's representatives should have recognized the nature of this dispute. Thus, I conclude that the Union is not confined to arguing under the recognition clause, but is entitled to rely upon other provisions of the agreement, and other factors to establish its case.

I have determined the statement of the issues by looking at the controversy as it was actually litigated by the parties. This is consistent with the nature of the grievance procedure and the way the parties have chosen to administer it. A careful review of the parties' positions indicates that there is a dispute as to the scope of this grievance in two respects. First, there is a dispute as to whether the issue of "teacher work" is properly before me. The grievance was first filed as to door monitoring work. No other work was mentioned. The Union contended at the hearing that the door monitors were doing "teacher work."⁴ The issue of door monitors doing teacher work was fully litigated at the hearing. I conclude that it is properly before me.

Next, there is a dispute as to whether the issue is related solely to the allegation that the door monitoring work is exclusively the work of the unit or whether the scope of the grievance is broader than that. The Employer takes the position that the sole substantive issue is whether work in question was exclusively unit work and, if not, it assumes that there are no other provisions regulating this work. Of course, it is not admitting there is any such thing as work which is "exclusively" unit work. The Union is arguing that the work is "bargaining unit" work to which the terms of the agreement apply. In its view, no bargaining work, exclusive or not, may be assigned to "non-bargaining" unit employees without the agreement of the Union. Irrespective of the legal positions of the parties as to the nature of the dispute which occurred, the real dispute is centered on the Union's view that Mr. Wilson essentially told Ms. Follett that this unit could continue to do this work only if it accepted a lower wage rate whereas Ms. Follett President insisted that unit employees do the work and that the unit employees be paid at the contractual rate. In this context, the Union's goal of having the work assigned to this unit alone is really a remedy issue. The substantive issue is whether the Employer violated the agreement by thereafter refusing to apply the terms of the agreement to any of the work in dispute.

II. Timeliness

The Employer objected to the timeliness of the grievance because it related to matters which occurred more than ten days prior to the filing of the grievance. The Union argued that the issue of timeliness was waived because the Employer did not raise it in the grievance procedure. It also argued that the grievance was timely because the grievance is a re-occurring grievance and each day is a new violation. The Employer argued that the events challenged happened with great regularity for a long time prior to the filing of the grievance and the Union had the ability to file earlier. The Union responded by stating that it did not seek a

⁴ "Teacher work" is cutting, pasting, stapling, coping, etc. done for teachers or to aid others in their work

remedy going back more than ten working days before the filing of the grievance. I addressed the timeliness issue at the hearing and concluded that the grievance was timely filed because the grievance was a class grievance, involved behavior that was continuing, and the Employer waived the objection by not raising it in the grievance procedure. After review of the facts, I modify that holding by adding the following. This grievance arose as a result of the discussions in September, 2007, between Mr. Wilson and Ms. Follett and the Employer's actions as a result of those discussions of refusing to use unit personnel to do the door monitoring work thereafter. The real issue in dispute is the fact that the Employer refused to apply the terms of the agreement to the door monitoring work at about the time the grievance was filed and it started to refuse to allow unit employees to perform any of this work. Those actions were taken within 10 working days of the filing of the grievance.

III. Standards

The esteemed arbitrator, Saul Wallen in *NEW BRITAIN MACHINE CO.*, 8 LA 720, 722 (1947) stated a principle widely regarded as a basic principle in labor arbitration:

Job security is an inherent element of the labor contract, a part of its very being. If wages is the heart of the labor agreement, job security may be considered its soul. . . . The transfer of work customarily performed by employees in the bargaining unit to others outside the unit must therefore be regarded as an attack on the job security of the employees whom the agreement covers and therefore on one of the contract's basic purposes.

Arbitrators have inferred limitations on an employer's attempt to assign bargaining unit work outside the bargaining unit from the recognition provisions of collective bargaining agreements even in the absence of express language.⁵ Those who would infer the least restriction on employers, rely upon management rights provisions provided the employer acts in good faith.⁶ The better view is to weigh the interests of the parties, their respective practices, the specific facts of the situation and the implications of the express or implied terms of the agreement as they relate to work transfer issues.⁷

IV. Violation

The work of monitoring at the doors is bargaining unit work. The work was newly created by the Employer after the near tragedy. The Employer has recognized that door monitoring work was unit work in the elementary schools. It originally assigned the work to unit employees in the 2006-07 school year and they performed the predominate amount of that

⁵ National Academy of Arbitrators, *The Common Law of the Workplace: The View of the Arbitrators* (BNA, 2d. Ed, 2005), Sec. 4.2. However, when there is an absence of express language, there are a variety of views. See, *CLEVELAND ELECTRIC ILLUMINATING CO.*, 105 LA 823, 822-3 (Franckiewicz, 1995)

⁶ *DANIEL SCHARLIN & ASSOCIATES*, 69 LA 394 (Lucas, 1977); *STEWART WARNER CORP.*, 22 LA 547 (Burns, 1954).

⁷ This view is necessary in order to carry out the intent of Article IX.

work, but the Employer used others to do that work. Mr. Wilson and Ms. Follett disagree about the specific nature of their conversation in September, 2007. I credit Ms. Follett's version. Both witnesses testified that they agreed in that discussion that unit employees might continue to perform that work if the parties agreed upon the pay rate. The main work unit employees do is to watch students during the noon hour. The core of this work is that noon hour supervisors have the interpersonal skills to watch children and provide for their protection. This entails recognizing potentially unusual situations. They must be able to deal with playground emergencies. It also requires interpersonal skills sufficient to properly interact with teachers, parents and others, to follow directions and maintain the decorum of a school setting. The door monitoring work is sedentary, requires the ability to maintain the decorum of the schools and the ability to greet those at the door appropriately. Properly done, the work would require some ability to recognize an unusual situation and take appropriate action. Thus, this work is work which the Employer has recognized that unit employees could perform and is work which is closely akin to the work they perform.

"Teacher work" is cutting, pasting and similar tasks designed to assist teachers. There is no dispute that this has always been work of the noon hour supervisors. Although the work is not exclusively performed by the bargaining unit, it is mainly unit work. This is evidenced by the Employer's practice. The teacher collective bargaining agreement provides that teachers will be provided support of this nature. The Employer only counts the work of this unit in the elementary schools toward the requirement in the teacher collective bargaining agreement.⁸

The Employer has argued that the purpose of Article II is solely to carry out the function of Sec. 111.70, Stats. It argues that because the provision is required by law, it is really without any meaning. I disagree. Article II is written to further the parties' mutual responsibilities under Sec. 111.70, Stats. It must be interpreted in the light of that purpose.⁹ One of the main purposes of the certification of bargaining units is stated in Sec. 111.70(2)(d)2.a.: "The Commission shall determine the appropriate collective bargaining unit . . . and shall whenever possible . . . avoid fragmentation by maintaining as few collective bargaining units as practicable. . . ." [Emphasis supplied.] The public policy on this subject was decided by the Commission in a closely related case, GREEN BAY AREA PUBLIC SCHOOL DISTRICT, WERC DEC. NO. 18910-A (WERC, 5/08). In that case, the WERC applied the anti-fragmentation principle to conclude that "security staff"¹⁰ who monitored doors should be included in the existing bargaining unit of "monitors." I conclude that the Commission would not treat the door monitors as a bargaining unit separate from the Supervisors' unit. I favor the choice of competing interpretations of ambiguous provisions of this agreement which are consistent with the Commission's view of public policy over those interpretations of the agreement which would be inconsistent with the Commission's view of public policy.

⁸ Tr. 136.

⁹ Cf. RACINE COUNTY v. IAM, 2008 WI 70 (2008)

¹⁰ Security staff are essentially police science students at Northeast Wisconsin Technical College (NWTC) who were hired to provide security at the doors and in other ways. The Employer intended to use them in the elementary schools but it was not able to hire enough of them to do so at all.

Article II provides that the Employer “recognizes” the Union as the exclusive bargaining agent for this bargaining unit. Ms. Follett and Mr. Wilson disagree as to the nature of the discussions which they had in September, 2007. Ms. Follett’s recorded recollection of what was said is better than Mr. Wilson’s recollection and I credit that description of what was said. I also do not believe that Mr. Wilson expressly told Ms. Follett that the new work would not be unit work as he alleged he had stated in September, 2006. As I view it, the essence of the discussion was that Mr. Wilson would not treat this work as unit work at all unless the Union agreed to do this work at a lesser rate. After the two failed to reach agreement the Employer never applied the terms of the agreement to this work and never had employees it chose to deem as unit employees perform this work. It did permit at least one unit employee to perform some of the work, but essentially treated those employees as “door monitor” employees not subject to the agreement. For example, it did not apply the posting provisions of this agreement to those assignments or the non bargaining unit work assignment clause to unit employees who served as door monitors. Unit employees are the lowest paid of the Employer’s employees. They are often assigned new tasks of a similar type including “teacher work.”

Parties can add meaning to recognition provisions. The parties have done so here. The meaning added to Article II can be inferred from the other provisions of the agreement. Article IX is an unusual provision. It provides for a method of dispute resolution when entirely new jobs are created. It provides in relevant part:

Prior to establishing a new job or materially changing the duties of an existing job, the Employer shall inform the Union. Subsequent to Union notification, the Employer will evaluate the new or materially changed job in comparison with other jobs whose relative worth are comparable and will inform the Union of the new rate and effective date. The Union may immediately enter into negotiations with the Employer concerning such rate. Changes in such rate agreed upon within sixty (60) days, or an extended time mutually agreed to, shall be made retroactive to the effective date of the job changes or new job installation, which occasioned the rate adjustment. The establishment of disputed wage rates shall be a subject of arbitration.

One of the assumptions of Article IX is that new jobs may be created in this unit. Article II must be interpreted in the light of this provision. Article II must apply to new jobs of a similar type. The work in question is entirely new work having never been done by this employer at all. It is work of a type which is normally unit work. Therefore, the recognition clause applies to that type of work.

Another implication of this part of Article IX is its broad authority to establish wage rates for new positions.¹¹ This is a somewhat unusual provision. Article II is properly broadly interpreted to preserve this method of resolution of disputes over new work. The Employer

¹¹ Compare, Sec. 111.70(4)(cm), Stats.

may not ignore this provision by merely treating closely similar work as “non unit” work. One of the purposes of this part of Article IX is to deter the Employer from subdividing unit work.

The Employer’s position is that if unit work is not “exclusive” there are no provisions in the agreement which prevent it from giving the work to someone who will do it cheaper. Article XVIII provides that when “new jobs or vacancies are to be filled, the position shall be posted” [Emphasis supplied.] The term “new job” is ambiguous as to whether it means merely an additional position of the existing kind or a newly created job of a type which did not exist at the time of the agreement was executed. I interpret this in the light of Article IX. Accordingly, it includes the door monitoring positions in dispute. The Employer never posted these positions after September, 2007. This provision, properly interpreted, implies that the parties have intended that unit employees be given an opportunity to perform newly created positions involving unit work.

Similarly, the parties’ past practice indicates Article II should be interpreted as preserving the unit’s right to do door monitoring work. The parties have a past practice in which work which is predominately that of the unit is done to a limited extent by others. Principal Fraley testified to this practice and Mr. Wilson also testified in a similar way.¹² Essentially, it is that unit work such as teacher work and monitoring was not normally exclusively assigned to the unit.¹³ As is common in schools, the Employer assigned some of this work to unpaid parent-volunteers. Management employees on rare occasion and other employees in other units might also perform this unit’s work for practical reasons. The Employer has never systematically excluded employees from performing unit work.¹⁴ Article XXIV Non Bargaining Unit work provides:

The Employer shall not contract out any work which is normally performed by the Noon Hour Supervisor Union, which has the effect of displacing (laying off) bargaining unit members.

This provision does not specifically apply to this situation because there is no contracting involved. It does evince the parties’ agreement to not use subcontracting to unreasonably erode the unit. It does not specifically address new work, but it would be inconsistent with the concept of this provision to allow the Employer to repeatedly subdivide unit work without a valid reason. Thus, this provision also suggests that Article II is properly construed to prevent the Employer from denying unit members the right to perform unit work.

The Employer has reserved to itself broad rights under Article III. The Employer has not specifically argued that its actions were justified under Article III. However, it is

¹² Tr. 22, tr. 136.

¹³ There was no evidence as to whether the supervision of students on playgrounds has ever been assigned to anyone other than noon hour supervisors or substitutes in accordance with the parties’ substitute practice

¹⁴ This past practice provides definition to Article II. I note that the parties have a specific provision dealing with past practice, Article IV. This past practice also falls within the terms of that provision.

necessary to address Article III, both as to the merits of this dispute and, again, as to the remedy. Article III, contains a specific restriction that the exercise of management rights will be done in accordance with the specific terms of the agreement and “shall not be interpreted so as to deny the employees the right of appeal. It is also restricted by Article IV, Practices.”¹⁵ The phrase “shall not be interpreted so as to deny the employees the right of appeal” is phrased not only to prohibit actions taken in bad faith by the Employer to deny employees their rights of appeal, it also prohibits actions which unreasonably have the effect of denying employees their right of appeal. The Employer’s actions of treating the agreement as not applying to door monitors interferes with the monitors’ right of appeal and interferes with the Supervisors’ rights to seek the positions and proper pay under Article IX. The Employer has offered no explanation for its actions other than its belief that it could just “do it.” I have reviewed Mr. Wilson’s testimony. He explained his actions in excluding unit employees from performing door monitoring work and paying them less than contract rate on a construction of Article XXIV which I conclude is intentionally strained. I don’t believe these actions were taken as a good faith exercise of management rights. For all of the reasons expressed above, I conclude that the Employer violated Article II by systematically excluding unit employees from performing door monitoring work commencing in September, 2007.

The Union has contended that the Employer assigned teacher work to door monitors. This is a cause for concern under the above principles. The evidence is insufficient to indicate that the Employer systematically assigned teacher work to any door monitor. Accordingly, the Union has failed to show that the Employer violated the Agreement with respect to teacher work.

V. Remedy

The Union seeks an order prohibiting the Employer from having any non-unit personnel perform door monitoring work. It has also sought an order requiring the Employer to pay door monitors at the rate specified in the agreement for Supervisors. The request for an order requiring the Employer to assign the door monitoring work only to unit employees is more extensive than that which is justified by the record in this case. The record indicates the Employer has taken advantage of technology to secure the doors of some elementary schools with a remotely controlled lock which is monitored by school secretaries or others who routinely work or volunteer for working in the school office in accordance with past practice. The use of technology or equipment in this manner is an appropriate exercise of management rights and the use of non unit office personnel in accordance with office past practice to monitor the door with a video camera does not violate this agreement. The Employer has not used NWTC students to do door monitoring work, but it intends to do so. The evidence is insufficient to make any judgment about those students doing door monitoring work. I reserve jurisdiction over that issue as specified below. Similarly, the use of unpaid volunteers to do door monitoring work is consistent with past practice and does not violate the agreement.

¹⁵ The violations of the specific terms of the agreement and the past practice issues are discussed elsewhere herein.

The Employer has “hired” Supervisors to perform door monitoring work, but treated that work as separate non unit employment as “door monitors.” I conclude the work is unit work and, therefore, Supervisors are entitled to the contractual rate. In any event, Article XXIV applies to non bargaining unit work. The Employer’s position that Article XXIV applies only to work during a unit employee’s normally scheduled hours is without merit. Thus, Article XXIV requires that unit employees be paid at the contractual rate even if the work were not unit work. These employees are entitled to be made whole for all lost wages for all hours worked from 10 days before the filing of the grievance.

The Employer has used substitute employees off of the non-professional substitute list as door monitors. Article VI covers temporary employees. The better view of the evidence is that they were used as “permanent employees.” They were not used with a planned limit of 90 days or to replace regular employees on leave. These employees are entitled to be made whole from 10 days prior to the filing of the grievance and to be paid in the future at the contractual rate. [The contractual rate is discussed in the next paragraph.]

The Union has requested that those hired as “door monitors” be paid at the rate in Appendix 1. Article IX permits that determination. The Employer obviously disagrees with that rate. The Employer elected to pay door monitors \$8.50 per hour, the substitute employee rate. It choose to pay NWTC students (security staff) \$10 per hour, although none were used in the elementary schools. Substitutes are temporary employees under this agreement. The temporary rate does not apply. There is no evidence that the Employer made any wage study related to this position as contemplated by Article IX and the credited version of the disputed conversation indicates that the Employer originally offered this unit \$10 per hour to perform this work, the NWTC student rate. The work in question requires that those hired undergo a background check as are all employees of the Employer. This position entails a very slight risk of serious violent confrontation with an intruder. This position requires training in how to handle those situations, but it appears that the training has not yet been provided. This risk is of the essence of the position. This responsibility is of equivalent value to the responsibility of Supervisors to handle emergency situations on the playground. Employees in this position must maintain school decorum and must interact with appropriate social skills with visitors, staff and students who come to the door. The better view of the evidence is that the door monitor position is of equivalent value to that of the Supervisors and the contractual rate (including probationary rate as appropriate) should have been applied. Accordingly, the Employer is directed to make all door monitors whole for all lost wages at the contractual rate for the period starting with ten days before the filing of this grievance. The parties have not addressed the application of other benefits and seniority. I reserve jurisdiction over those issues as specified in the order.

The WERC has the exclusive authority to determine appropriate bargaining units under Sec. 111.70(4)(d)2a, Stats. The order herein is not intended to conflict with any decision made by the WERC.

AWARD

1. The Employer violated the Agreement when it refused to let unit employees perform door monitoring work.

2. The evidence is insufficient to conclude that the Employer violated the agreement with respect to teacher work.

3. The Employer violated the Agreement when it paid door monitors less than the agreement rate for Noon Hours Supervisors.

4. The Employer shall make all affected employees, as specified in the text above, whole for all lost wages on hours starting from ten days prior to the filing of the grievance.

5. I reserve jurisdiction over the specification of remedy if either party requests in writing that I exercise that jurisdiction with a copy to opposing party within sixty (60) days of the date of this award.

Dated at Madison, Wisconsin, this 14th day of October, 2008.

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Arbitrator

