

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**WAUZEKA EDUCATION SUPPORT PERSONNEL ASSOCIATION**

and

**WAUZEKA-STEUBEN SCHOOL DISTRICT**

Case # 26

No. 68964

MA-14428

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Appearances:

**Joyce Bos**, Executive Director, South West Education Association, 960 Washington Street, Platteville, WI 53818, appearing on behalf of the Wauzeka Education Support Personnel Association.

**Eileen A. Brownlee**, Kramer & Brownlee, LLC, 1038 Lincoln Avenue, P.O. Box 87, Fennimore, WI, 53809, appearing on behalf of the Wauzeka-Steuben School District.

**ARBITRATION AWARD**

The Wauzeka-Steuben School District, hereinafter District or Employer, and the Wauzeka Education Support Personnel Association, hereinafter WESPA or Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to provide a panel of five Commissioners or Commission staff from which to select an arbitrator to resolve a dispute between them regarding the reassignment of a bus route. Commissioner Susan J.M. Bauman was selected. A hearing was held in Wauzeka, Wisconsin on September 9, 2009. A transcription was made of the hearing and was filed with the arbitrator on September 24, 2009. The record was closed on November 9, 2009, upon receipt of briefs and reply briefs from both parties filed in accordance with the schedule agreed upon by them.

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

### ISSUES

The parties were unable to stipulate to the issues to be decided by the arbitrator, but agreed to allow the undersigned to frame the issues. WESPA frames the issues as follows:

1. Did the Employer violate the contract when the Grievant's supervisor performed work normally done by the Grievant? If so, what is the appropriate remedy?
2. Did the Employer violate the contract when the most senior regular bus driver was involuntarily transferred to drive a different route? If so, what is the appropriate remedy?

The District frames the issue as follows:

1. Did the Employer violate the contract when it reassigned Mr. Welsh from one bus route to another?
2. If so, what is the remedy?

The undersigned frames the issues as follows:

1. Did the Employer violate the collective bargaining agreement when it assigned Mr. Welsh to drive the Steuben route?
2. If so, what is the appropriate remedy?

### FACTS

There is little dispute about the facts of this case. The Grievant, Robert Welsh, was hired by the District as a bus driver in 1966. In 1968, he started driving the "Wauzeka" route and continued to do so through the end of the 2007-2008 school year.

In July 2000, the District hired Peter Pomorenig as its Transportation Supervisor. He is a salaried employee, whose duties include bus maintenance, training of drivers, recordkeeping, assisting drivers in getting their licenses, making recommendations as to the purchase of new buses and scheduling of extracurricular activity driving responsibilities (extra trips). In addition, since August 2000, Mr. Pomorenig has driven a regular bus route. Until the events giving rise to the instant grievance, he drove the "Steuben" route, a route that takes a significantly longer period of time to complete than the Wauzeka route.

In August 2008, Pomorenig and Roger Kordus, the district administrator, discussed ways to make it possible for Pomorenig to be more available in the bus garage, particularly in the mornings, to handle calls from parents, prepare the school van and complete maintenance work. Having Pomorenig drive the Wauzeka route allows more time for him to perform these other tasks. Additionally, the District had just acquired a new, bigger bus. New buses are assigned to drivers on a rotational basis. At the time this particular bus was acquired by the District, it was the Grievant's turn to drive the newest bus. For safety reasons, it was logical to utilize the biggest bus on the route with the largest number of students, the Steuben route.

Shortly after the start of the 2008-2009 school year, Welsh was absent from the District for an approximately two month period on a health-related leave of absence. During this time, substitute drivers were hired to replace Welsh, and Pomorenig began to look at the drivers and the routes in an effort to reduce his time on the road. Pomorenig began driving the Wauzeka route and assigned the new bus to the Steuben route, with substitute drivers, thereby improving safety on that route and increasing his availability on site.

Upon Welsh's return to work in November 2008, Pomorenig advised him that he had been assigned to the Steuben route, with the new, bigger bus, rather than the Wauzeka route.

On December 22, 2008, Mr. Welsh filed a grievance contending that the District had switched the routes of the Grievant and another driver in violation of Article 11, Paragraph A; Article 14, Paragraphs A, B, and C; Article 36, Paragraph B; and any other provisions of the collective bargaining agreement which may apply. As a remedy, the Grievant sought to be restored to his former route and to be made whole for "all losses suffered as a result of the contract violations; cease and desist from violating contractual rights."

The grievance was processed through the steps of the grievance procedure without resolution. Accordingly, a hearing was held at which time both parties had the opportunity to present witness and evidence, and this Award ensued.

Additional facts are included in the **DISCUSSION** below.

### **RELEVANT CONTRACT PROVISIONS**

#### **ARTICLE 2 – RECOGNITION**

The District hereby recognizes the Association as the sole and exclusive bargaining representative for all regular full-time and regular part-time District support personnel employed by the District, but excluding

confidential employees; supervisory employees; managerial employees; professional employees; temporary employees; and casual employees for the purposes of collective bargaining as certified by the Wisconsin Employment Relations Commission on the 4<sup>th</sup> day of April, 2001, Case 20 No. 30079-A.

The above paragraph in this Article is set forth merely to describe the bargaining unit covered by the terms of this collective bargaining agreement and is not to be interpreted for any other purpose.

(Language is the same in the 2001-2004 and 2007-2009 agreements)

### **ARTICLE 3 – MANAGEMENT RIGHTS**

Management retains all rights of possession, care, control and management that it has by law, and retains the right to exercise these functions under the terms of the collective bargaining agreement. The exercise of such powers, rights, authority, duties and responsibilities by the Board, 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 to the extent such functions and rights are explicitly restricted by the specific and express terms of this Agreement and then only to the extent such specific and express terms hereof are in conformance with the Constitution and laws of the State of Wisconsin and the United States. These rights include, but are not limited by enumeration to, the following rights:

- A. To direct all operations of the school system;
- B. To establish and require observance of reasonable work rules and schedules of work;
- C. To hire, promote, transfer, schedule and assign employees in positions within the school system;
- D. To suspend, discharge and take other disciplinary action against employees;
- E. To relieve employees from their duties because of lack of work or any other legitimate reason;
- F. To maintain efficiency of school system operations;
- G. To take whatever action is necessary to comply with state or federal law, or to comply with state or federal court decisions or orders;
- H. To introduce new or improved methods or facilities;
- I. To select employees, establish quality standards and evaluate employee performance;

- J. To determine the methods, means and personnel by which school system operations are to be conducted;
- K. To take whatever action is necessary to carry out the functions of the school system in situations of emergency;
- L. To contract out for goods and services;
- M. To determine the educational policies of the School District.

(Language is the same in the 2001-2004 and 2007-2009 agreements)

## **ARTICLE 5 – GRIEVANCE PROCEDURE**

### A. Purpose

The purpose of this procedure is to provide a structure to ensure equitable solutions at the lowest possible level to grievances which may arise from time to time. This Article provides for the exclusive method for resolving grievances.

### B. Definitions

1. Grievance: A grievance is defined as any complaint that arises during the term of this Agreement regarding the interpretation or application of any article of this Agreement.
2. Grievant: A grievant may be an individual employee, a group of employees, or the Association.

### C. Procedure

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#### Step 4

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Grievance Arbitrator's Authority: The arbitrator shall schedule a hearing on the grievance and, after hearing such evidence and arguments as the parties desire to present, shall render a written decision. The arbitrator shall have no power to add to, subtract from, modify or amend any term of this agreement. The arbitrator shall have no authority to impose liability on the District for events arising before the effective date of this agreement. A decision of the arbitrator shall, within the scope of his/her authority, be binding upon the parties.

(Language is the same in the 2001-2004 and 2007-2009 agreements)

## **ARTICLE 7 – RULES GOVERNING AGREEMENT**

### **A. Full Agreement**

This Agreement reached as a result of collective bargaining, represents the full and complete Agreement between the parties and supersedes all previous agreements between the parties. Any supplemental amendment to this Agreement shall not be binding upon either party unless executed in writing by the parties hereto.

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(Language is the same in the 2001-2004 and 2007-2009 agreements)

## **ARTICLE 9 – LICENSES AND BUS DRIVER PROVISIONS (2001 - 2004 AGREEMENT ONLY)**

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D. Extra trip assignments (i.e., a school bus trip other than a regular daily route, such as an extra-curricular field trip or athletic event that requires a driver with a school bus operator's license) shall be first assigned to a driver currently driving one or more regular daily routes using a rotation system that offers a substantially equal distribution of offered extra-trip assignments.

1. If a driver who has been assigned to an extra trip requests to be excused (not including the taking of valid leave under this Agreement) from the assignment at least three (3) workdays in advance of the trip, the District shall attempt to accommodate the request by offering the trip to an available non-substitute driver who is not on leave and who is not otherwise scheduled for a trip. Offers to replace another regular driver under this paragraph shall also be made under a rotation system. If no other regular driver is available for or accepts the assignment, the District shall attempt to accommodate the request by attempting to find an available substitute driver. If no other driver accepts the assignment, the District may then require the driver requesting the excusal to drive the trip.

2. The District may attempt to accommodate a request to be excused from an extra-trip assignment that is made less than three (3) workdays before the trip by offering the trip, at the discretion of the District, to an available regular or substitute driver. If no other driver accepts the assignment, the District may then require the driver requesting the excusal to drive the trip.
3. When it is necessary to make an assignment on the day of an extra-trip, the trip may be assigned to a regular or substitute driver.
4. Nothing in Section C of this Article shall be construed to require the District to assign an extra trip to a regular driver if that assignment would result in the driver working more than forty (40) hours in any workweek.

D. If an extra trip requires an overnight stay, the driver shall be provided a motel/hotel room at the expense of the District. Accommodations shall generally be at the location provided for the students on the trip. If is necessary to use a different location, the cost of the room shall be pre-approved by the District if more that \$65.00 per night.

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## **ARTICLE 10 – SUBCONTRACTING**

The Board may choose to contract with an outside individual or outside entity for goods or services presently being provided by District employees provided that the Board’s decision to contract for such goods or services does not result in the full or partial layoff of any bargaining unit employee who is employed at the time that the transition to a contracting arrangement is made. Further, if the district wishes to initially subcontract a vacancy at a time when there is an employee on layoff with recall rights under Article 12 of this Agreement, the decision to subcontract the vacancy shall not interfere with the employee’s recall rights. Finally, it shall not be permissible for the District to intentionally subvert the protections provided by the first sentence of this Article through the use of involuntary employee transfers that cause the full or partial layoff of a bargaining unit employee due to subcontracting (e.g. transferring a bus driver to a teaching assistant position, subcontracting for the bus driver position, and then laying off a teaching assistant).

(Language is the same in the 2001-2004 and 2007-2009 agreements)

**ARTICLE 11 – SENIORITY**

- A. It shall be the policy of the District to recognize seniority. Seniority shall be defined as length of service with the District commencing on the most recent date of hire. No distinction will be made between full-time and part-time employees in calculating length of service. The District will annually produce a length of service list and forward that list to the president of the Association. The Association will raise any objections to the proposed length of service list within thirty (30) days of receipt or it will be considered accurate as prepared.
- B. If two or more employees have the same hiring date, the tie(s) will be resolved by selecting part-time employees for layoff before full-time employees. If this does not resolve the tie(s), then the employee(s) to be laid off will be determined by the administration.

. . .

(Language is the same in the 2001-2004 and 2007-2009 agreements)

**ARTICLE 14 - VACANCIES AND TRANSFER**

- A. A vacancy is defined as a newly created position or a current bargaining unit position which needs to be filled.
- B. When a position becomes vacant or a new position is created, notice of such available position shall be posted for a minimum of ten (10) working days. Vacancies may be simultaneously posted internally and externally at the discretion of the employer. In cases where a vacancy occurs during any District recess period exceeding five (5) working days, notice of vacancy will be sent to the Association President. The Employer retains the right to temporarily fill vacant positions at its discretion during the posting and selection period. Vacancies will be posted on a designated bulletin board in the school building. The notice shall include the date of posting, a description of the position available, the work hours of the position, the rate of pay for the position, the qualifications required for the position, starting date and shall be signed by the District Administrator.



- C. District retains the right to determine the qualifications needed for any vacant positions. The District may consider both internal and external applicants for vacancies. However, all internal applicants who meet the minimum qualifications for the position shall be granted interviews for vacant positions before the District makes a hiring decision. The District retains the right to select the most qualified applicant, internal or external, for any position. However, if two or more applicants are equally qualified for a position, the most senior internal applicant shall be selected.
- D. If the internal applicant is chosen for the vacant position, the employee will be on a trial period in the new job for sixty (60) calendar days. Prior to the expiration of this trial period, the employer may declare the trial period unsatisfactory and the employee shall return to his/her former position.
- E. Voluntary Transfers. If a vacancy is to be filled by a voluntary transfer the following procedure shall be followed:
1. The employee shall retain his/her pay rate if the transfer is to a job within the same pay range. If not at the maximum, he/she shall advance normally on the wage schedule.
  2. An employee going to a lower paying classification through a voluntary transfer shall retain his/her step placement.
  3. If the voluntary transfer is to a job in a higher paying classification, the employee shall be placed on the wage schedule at the step of the new classification which will give the employee the smallest wage increase. If not at the maximum, he/she shall thereafter advance normally on the salary schedule.
- F. Involuntary Transfers: When the District determines that an involuntary transfer of a bargaining unit employee is necessary, due to the District's inability to fill a vacancy or a new position according to the procedures set forth above in the Vacancy and Job Posting provisions of this Article, the District shall transfer the least senior employee in the District qualified for the position. No employee shall be involuntarily transferred by the District without a conference followed by a written notice from the District Administrator which will include the reasons for the transfer. Employees transferred involuntarily to temporarily fill a new or vacated position shall have the right to return to their previous position when the new or vacated position is permanently filled. An employee who is involuntarily transferred shall suffer no loss of wages, hours, insurance eligibility, or vacation eligibility (if any) as a result of such transfer. In addition, the following shall apply:

1. If the employee is temporarily or involuntarily transferred to a job in a lower paying classification, he/she shall receive no reduction in wages. The employee shall be placed at the step (if any) that gives the smallest wage increase. If there is no step in the new classification that offers equal or greater wages, the employee shall be frozen at the wage rate of the employee's former position until such time as the maximum wage rate of the new position exceeds the employee's frozen wage rate.
2. The employee shall retain his/her pay rate and step placement if the transfer is to a job within the same classification or an identically paying classification. If not at the maximum, he/she shall advance normally on the wage schedule.
3. If the employee is involuntarily transferred to a job in a higher paying classification, the employee shall be placed on the wage schedule at the step of the employee's former position. If not at the maximum, he/she shall thereafter advance normally on the salary scheduled.

A change in an employee's assigned duties does not constitute an involuntary transfer provided that the assigned duties are fairly within the scope of responsibilities applicable to the kind of work performed by the employee's position.

(Language is the same in the 2001-2004 and 2007-2009 agreements)

**ARTICLE 36 – BUS DRIVER PROVISIONS  
(2007-2009 AGREEMENT ONLY)**

- A. Due to the unique nature of their duties, Article 18.D shall not apply to drivers' routes and trips. It is understood that drivers will be permitted reasonable rest and meal breaks as necessary for safe operation of the vehicle, consistent with the travel needs of the students. Bus drivers driving curricular and extra-curricular trips will receive the "extra trip" hourly rate as noted in the wage schedule for all time during which the driver is on duty during the trip, including waiting time at the event.
- B. Extra trip assignment (i.e., a school bus trip other than a regular daily route, such as an extra-curricular field trip or athletic event that requires a driver with a school bus operator's license) shall be scheduled according to the following procedure:

1. While not all extra trips relate to athletics, the parties agree that prior to the commencement of each athletic season (Fall, Winter, Spring) the Transportation Supervisor will hold a trip selection meeting. The date, time, and location of the meeting will be announced sufficiently in advance to permit drivers to plan. A listing of available extra-curricular and athletic trips will be provided to each of the drivers at least one (1) week before the meeting.
2. The most senior driver will select (1) extra trip assignment. The second most senior driver will then select one (1) extra trip assignment. The third most senior driver will then select one (1) extra trip assignment, and so forth. Once all the drivers have selected one (1) extra trip assignment, the process will be repeated until either the extra trip assignments have all been selected, or no driver desires an additional available trip. A driver may pass his/her turn. If at the end of the process trips remain unselected, the Transportation Supervisor may offer the trips to substitutes. When trips remain unselected after the substitutes have been offered the trips, the Transportation Supervisor may assign the remaining trips to the drives. [sic]
3. The Transportation Supervisor may opt to be included in the selection rotation process above with two (2) provisos: 1) he/she will be treated as the least senior driver; and 2) he/she will have no selection until the second round.
4. In addition to picking trips, during this meeting a driver may identify one (1) or more dates during which he/she will not be available for extra trip assignments. It is understood that drivers will not be later assigned an extra trip on such days. If more than one (1) driver requests the same time off, the Transportation Supervisor may not be able to honor all requests for that day.
5. The resulting schedule will be posted immediately and will remain posted for the duration of the athletic season.
6. It is understood that some trips are not known at the time of the trip selection meeting. When such trips become known, they will be offered to the drivers by seniority. When a driver selects a route, he/she will be moved to the bottom of the list for the purpose of the order of offer for the next trip.

7. If a driver has selected an extra trip assignment but later wishes to be excused from that trip, the driver may attempt to find another driver to trade with, or the driver may attempt to relinquish the trip and ask the Transportation Supervisor to find a replacement. In the event of a trade, the employee will notify the Transportation Supervisor prior to the trip. In the event the driver wishes to relinquish the trip but the Supervisor is unable to find a regular or substitute driver, the District may require the driver requesting to be excused from the trip, to drive nonetheless.
  8. When it is necessary to make an assignment on the day of an extra-trip, the trip may be assigned to a regular or substitute driver.
  9. Nothing in this Article shall be construed to require the District to assign an extra trip to a regular driver if that assignment would result in the driver working more than forty (40) hours in any work week.
- C. If an extra trip requires an overnight stay, the driver shall be provided a motel/hotel room at the expense of the District. Accommodations shall generally be at the location provided for the students on the trip. If is necessary to use a different location, the cost of the room shall be pre-approved by the District if more that \$65.00 per night.
- D. Bus drivers shall be reimbursed at the extra-trip hourly rate for any time they are required to spend with police officers or in court to deal with traffic offenders they have reported to authorities in accordance with their job duties.

### DISCUSSION

WESPA makes numerous arguments in support of its contention that the Grievant should not have been assigned to drive the Steuben route after nearly four decades of driving the Wauzeka route. In addition to citing specific contract clauses alleged to be violated, WESPA included the catchall “any other provisions which may apply.” Despite the many arguments that it makes, WESPA has failed to establish that any of the Grievant’s contractual rights were violated when the Employer decided to assign him to the Steuben route.

The Union correctly states that the Transportation Supervisor, Pete Pomorenig, is not a member of the bargaining unit. Mr. Pomorenig is specifically excluded from the unit that was certified by the Wisconsin Employment Relations Commission in April, 2001, because he is either a supervisory or managerial employee.<sup>1</sup> The Union is also correct in stating that it is the sole and exclusive bargaining representative for employees of the District working in the job classifications, including bus driver, that are identified in the collective bargaining agreement as being part of the bargaining unit. The fact that Mr. Pomorenig is not a member of the bargaining unit and does not pay dues or “fair share” contributions does not translate into the notion that he cannot drive a bus route. Although the position of bus driver is a job classification represented by WESPA, Mr. Pomernig’s duties encompass a great many duties beyond that of the represented bus driver position. The collective bargaining agreement between the parties does not reserve all bargaining unit work to members of the bargaining unit. An individual who only drives a bus would, by the terms of the collective bargaining agreement, be included in the bargaining unit. An individual such as Mr. Pomorenig who drives a bus route in addition to many other duties, including supervisory and/or managerial duties, is not a member of the bargaining unit but is not prohibited from performing bargaining unit work.

The Union argues that the District failed to provide evidence that supports the need for the Transportation Supervisor to drive a regular bus route. In its discussion regarding this argument, WESPA contends that because the District never posted “the vacant Bus Driver” position, it did not know if there was an emergency or other reason for the Transportation Supervisor to drive a regular bus route. WESPA ignores the fact that Pomorenig had driven a regular route since he was hired. The change in regular route driven by the Transportation Supervisor was premised on the perceived need to have him more available at the garage to attend to other duties. Although the Union presented testimony to the effect that minor repairs such as taillight replacement and conveying information from parents to drivers did not occur as it should, this testimony is not relevant to the issue before the undersigned. The issue to be decided is whether the Employer violated the collective bargaining agreement when it assigned the Grievant to the Steuben route; the issue is not whether this re-assignment accomplished what the District sought to accomplish by making the route switch between the Grievant and the Transportation Supervisor. This issue is not whether the reasons given for the switch were accomplished by the switch, as long as the reasons were not arbitrary or capricious.

The Union is correct that the District could have increased the number of hours that the Transportation Supervisor is available in the garage by taking all bus driving

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<sup>1</sup> No testimony was offered as to the supervisory or managerial duties of the transportation supervisor. The parties are in agreement that he is excluded from the bargaining unit based on the duties of his position. The undersigned makes no determination as to supervisory or managerial duties that the incumbent might perform.

duties from him and hiring an additional bus driver who would be a member of the bargaining unit.<sup>2</sup> However, there is nothing in the collective bargaining agreement that required the District to address its needs by relieving the Transportation Supervisor of all driving duties and hiring another bus driver. It is a decision within management's rights to assign its employees as it sees fit, as long as it is in accordance with the specific terms of the collective bargaining agreement. It does not violate the collective bargaining agreement for the Employer to make the decision it did, even if it proves not to be the most effective or efficient manner in which to operate the District.

WESPA has incorrectly conflated the specific duty of driving a bus with the classification of bus driver. These are not one concept; they are two distinct legal constructs. The recognition clause of the collective bargaining agreement between the parties clearly includes support personnel employed by the District, but excludes those who perform supervisory or managerial duties. The recognition clause does not list the job classifications that are included in the bargaining unit, nor does it list those that are excluded. The parties have agreed that the classification of Bus Driver encompasses persons whose sole job assignment is to drive bus. The Transportation Supervisor has many other duties in addition to driving bus. It is a different job classification (set of duties and responsibilities) than bus driver and is not included in the bargaining unit because the position performs supervisory and managerial duties.

Testimony at hearing established that Mr. Pomorenig has driven a bus route since August 2000. WESPA was certified as the bargaining representative in 2001. The first collective bargaining agreement between WESPA and the District, executed in 2006, covered the period July 1, 2001 through June 30, 2004. Mr. Pomorenig was driving the Steuben bus route during that entire period. The parties agreed to a wage schedule for the period July 1, 2004 through June 30, 2007 and then negotiated a successor agreement covering the period July 1, 2007 through June 30, 2009. Mr. Pomorenig drove the Steuben bus route until August 2008 at which time he began to drive the Wauzeka route. There is no doubt that the Association knew Mr. Pomorenig was driving the Steuben route from August 2000 through August 2008. It was not until the Grievant's route was switched from the Wauzeka route to the Steuben route, effective December 1, 2008, that the Association took exception to Mr. Pomorenig's driving a bus route.

The collective bargaining agreement provides, at the end of Article 14 F that

A change in an employee's assigned duties does not constitute an involuntary transfer provided that the assigned duties are fairly within the scope of responsibilities applicable to the kind of work performed by the employee's position.

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<sup>2</sup> Had the District decided to follow this approach, the Posting language of Article 14 would be relevant.

There is no dispute that the assigned duties of a driver on the Wauzeka route and those of a driver on the Steuben route are essentially the same. Accordingly, there is agreement between the parties that an involuntary transfer did not occur. Rather, the Union contends that there is a violation of Article 14 A, B, and C:

**ARTICLE 14 - VACANCIES AND TRANSFER**

- A. A vacancy is defined as a newly created position or a current bargaining unit position which needs to be filled.
- B. When a position becomes vacant or a new position is created, notice of such available position shall be posted for a minimum of ten (10) working days. Vacancies may be simultaneously posted internally and externally at the discretion of the employer. In cases where a vacancy occurs during any District recess period exceeding five (5) working days, notice of vacancy will be sent to the Association President. The Employer retains the right to temporarily fill vacant positions at its discretion during the posting and selection period. Vacancies will be posted on a designated bulletin board in the school building. The notice shall include the date of posting, a description of the position available, the work hours of the position, the rate of pay for the position, the qualifications required for the position, starting date and shall be signed by the District Administrator.
- C. District retains the right to determine the qualifications needed for any vacant positions. The District may consider both internal and external applicants for vacancies. However, all internal applicants who meet the minimum qualifications for the position shall be granted interviews for vacant positions before the District makes a hiring decision. The District retains the right to select the most qualified applicant, internal or external, for any position. However, if two or more applicants are equally qualified for a position, the most senior internal applicant shall be selected.

The Union appears to argue that when Pomorenig determined that he would no longer drive the Steuben route, a vacancy occurred such that the posting provisions of Article 14 applied. Article 14 is applicable to situations when a new position is created, or when a current bargaining unit position needs to be filled as a result of a resignation, retirement, or reassignment. If Pomorenig's job was solely to drive the Steuben route, a vacancy would have occurred when he determined that he would no longer drive that route. Because, as indicated above, Pomorenig is not a member of the bargaining unit, and his position is not a bargaining unit position, no vacancy occurred when he no longer drove the Steuben route.

The Union's argument appears to be that driving a bus route means that one is a bus driver, a classification covered by the collective bargaining agreement. As stated above, this is not the case. Although bus drivers do drive bus routes, all those who drive bus routes are not bus drivers covered by the collective bargaining agreement if they perform other duties. The collective bargaining agreement requires that the District post new or vacant positions, not new or vacated duties, such as driving a specific route.

WESPA also argues that it is a new union and that the contract that was ratified in 2006 supersedes all previous agreements between the parties. As discussed above, the Transportation Supervisor was driving a route prior to, and after, the ratification of the initial collective bargaining agreement between the parties in 2006. Assuming *arguendo* that the fact that Pomorenig's driving of a bus route was an agreement between the parties that was superseded by the signing of the collective bargaining agreement, it is clearly a past practice in the District that both parties were aware of, understood, and ascribed to for a long time, from before the Union was certified through the initial contract between the parties and well into the successor contract. If the Union wanted to change this past practice, it would have to do so at the bargaining table, not through the grievance procedure.

In fact, there was a change in the collective bargaining agreement in the 2007 – 2009 agreement that affected the rights of persons in the classification of bus driver and the ability of the Transportation Supervisor to perform bargaining unit work, extra trips. Neither party presented bargaining history regarding this change at the hearing regarding Article 36, an entirely new article of the collective bargaining agreement entitled “Bus Driver Provisions”. The initial contract included bus driver provisions as part of Article 9 entitled “Licenses & Bus Driver Provisions”. In the 2007 - 2009 agreement, Section A of Article 9 of the 2001 - 2004 remains in Article 9 which has been re-titled “Licenses”. The new Article 36 is identical in all respects to the old Article 9 except that Section A is not present, the remaining articles have been re-lettered, and the old Section C, now Section B, relating to the assignment of extra trips, has been changed to provide that a trip selection meeting shall be called by the Transportation Supervisor prior to the commencement of each athletic season at which time extra trip selections are to be made on a seniority basis. Section B.2. provides that the Transportation Supervisor may participate in the selection rotation process with two provisos: he is to be treated as the least senior driver and he must wait until the second round of selections before he is eligible to make any selections. These are new provisions with the 2007 – 2009 contract, the 2001 – 2004 agreement having been silent regarding any limitations on the Transportation Supervisor driving any extra trips.

The Union and the Employer explain this change in the collective bargaining agreement in very divergent ways. The Union contends that the inclusion of this specific language as to when the Transportation Supervisor may drive buses allows that



individual to drive extra trips in accordance with the rotational selection process and that he may not drive school buses under any other circumstances. The District contends that this new language is a limitation on when the Transportation Supervisor may drive in the sense that he can drive a regular route and can drive extra trips only in accordance with the limitations contained in Article 36 B.2. That is, prior to the inclusion of this language in the contract, the Employer argues, there were no limitations whatsoever on the ability of the Transportation Supervisor's ability to drive school buses, be it a regular route or extra trips.

The Management Rights clause of the contract reserves to the Employer all rights it has by law, and permits it to exercise those rights and functions in accordance with the terms of the collective bargaining agreement. Prior to the formation and certification of the Union, the Employer had the right to assign bus driving duties to the Transportation Supervisor as it saw fit. With the execution of the initial contract in 2006, the Employer did not give up its right to assign duties to employees other than as specified in the contract. Nothing in the initial contract limited the ability of the Employer to assign a regular bus route to the Transportation Supervisor, and nothing in the initial contract limited the ability of the Transportation Supervisor to drive extra trips, other than the need to assign the extra trips, initially, to persons driving one or more regular daily routes, using a rotation system that offered a substantially equal distribution of the offered extra trips. Because the language in Article 9 Section C of the 2001 - 2004 contract did not specify that the Transportation Supervisor could not drive extra trips, given that he drove a regular route, there was no limitation on the ability of the Transportation Supervisor to drive extra trips.

The 2007 - 2009 collective bargaining agreement puts limitations on the ability of the Transportation Supervisor to drive extra trips in that he cannot participate in the selection process until the second round, and he must be the last to select an extra trip in that round. This contract, however, does not prevent the Transportation Supervisor from driving a regular route.

The Grievant has driven for the District for a very long time. He is the most senior bus driver in the District. WESPA argues that because of his seniority, the Grievant should not have been reassigned to the Steuben route. The Union points to Article 11 of the collective bargaining agreement entitled Seniority, and points to the language that states "It shall be the policy of the District to recognize seniority." This is a general contract provision that must be read in conjunction with other contractual provisions that address seniority. It is a well-established rule of contract construction that specific terms of an agreement modify more general terms. The general seniority language is contained in Article 11 which defines seniority, describes how full-time and part-time seniority shall be treated, how the seniority of employees hired on the same date will be determined, and how the seniority of probationary employees will be handled.

There are several articles that describe how the general principle of seniority is to be applied. Article 12 deals with layoffs, and addresses how the least senior employee in a department would be laid off first, unless this would unreasonably interfere with the operations of the District. Article 12 also addresses seniority in multiple departments and the impact on recall, as well as the process for recalling employees and how seniority affects recall rights. This case does not involve layoffs or recalls.

Article 14 addresses transfers and provides that when there is a vacant position and two (2) or more applicants are equally qualified for the position, the most senior internal applicant shall be selected. This case does not involve a voluntary transfer nor, as addressed above, an involuntary transfer.

Article 21 addresses additional hours and overtime and provides that when the District is offering overtime to bargaining unit members, it shall be offered on a rotating seniority basis to employees who are qualified and available to perform the work. Clearly, the instant case is not related to overtime hours.

As discussed above, Article 36 addresses the assignment of extra trips through a rotational selection process, with the most senior bus driver making the initial selection, the next most senior thereafter, and so on. In the second round, the Transportation Supervisor is permitted to select an extra trip, but only after the other bus drivers have made their selections, as the Transportation Supervisor is, for purposes of extra trip selection, considered to be the least senior.

The District and the Union entered into a collective bargaining agreement that recognizes seniority. They made specific reference to seniority in numerous articles of the agreement, demonstrating that when they agreed that seniority was a factor to be considered, they were capable of reducing that agreement to writing. There is nothing in the contract that states that the Employer must consider seniority when it re-assigns staff, or when it re-assigns a bus driver from one route to another. There is no question that the parties could have addressed this issue in bargaining, but they did not. There is also no question that the District could have decided to change all of the route assignments, not just switch the Wauzeka and Steuben routes between the Grievant and the Transportation Supervisor. The District could have announced to all the drivers that Pomorenig was going to drive the Wauzeka route during the 2008 - 2009 school year and permit the drivers, by seniority, to select the route they preferred. While the District could have done this, and it might have been a good idea to do this, there is nothing in the contract that requires the District to do so. The District did not violate the collective bargaining agreement or its recognition of seniority pursuant to Article 11 in making the decision it made.

The management rights clause of the collective bargaining agreement provides that the District retains its right to contract out for goods and services. This right is limited by the language of Article 10 on subcontracting. Although both parties address the relevance of this article to the instant situation, it is clear that Article 10 is not implicated in the transaction that occurred. The District did not subcontract to anyone to drive the Wauzeka route. All of the same people were driving bus routes before and after December 1, 2008. The only thing that changed was the routes that the Grievant and the Transportation Supervisor each drove. Whereas the Grievant previously had driven the Wauzeka route and now drives the Steuben route, the Transportation Supervisor previously drove the Steuben route and now he drives the Wauzeka route. No outside individual or entity is performing services for the District, and there has not been a full or partial layoff of any employee of the District.

The crux of the matter is that the Grievant was upset that he was moved from the Wauzeka route to the Steuben route because of two factors: first, he had driven the Wauzeka route for almost forty years, knew the route, and knew the families, kids and grandkids. He preferred to stay with that route rather than drive the newly acquired bus on the Steuben route. The second reason he didn't want to drive the Steuben route is that the route is longer, starts earlier in the morning and gets him back to the school later in the afternoon, after completing the route. According to the Grievant, because he gets back to school later, he is unavailable to drive the longer extra trips without having a substitute drive his regular route. The Grievant contends that he has lost money as a result of his inability to get back to the school in time to drive the longer extra trips and also drive his regular route.

Although this argument is not grounded on any contractual basis, it appears the Union is making an equitable argument that reassigning the Grievant to the Steuben route has resulted in a loss of income for him. On its face, this would appear to be a compelling argument.<sup>3</sup> When driving the Wauzeka route, the Grievant could return to the school early enough that he could drive extra trips and be paid for both the regular route and the extra trip. Although there had been times in the past when he would have a substitute on his route so he could drive the extra trips, the Grievant contends that this happens more often since he drives the Steuben route.

Unfortunately, although the Union seeks a make whole remedy, it did not present any evidence in support of its contention that the Grievant has lost money as a result of his reassignment to the Steuben route. To the contrary, the Employer presented data for three school years, 2006 – 2007, 2007 – 2008, and 2008 - 2009:

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<sup>3</sup> While compelling, the Arbitrator has no ability to decide the case on equitable grounds in the absence of a contractual violation.

School Year	Trips Docked substitute drove regular route	Co-Curricular Hours Driven
'06 - '07	13	194.25
'07 - '08	0	135.3
'08 - '09	1.5	131.72

The Grievant drove the Wauzeka route during the '06 - '07 and '07 - '08 school years. In the '08 - '09 school year, the Grievant was off work due to a medical condition from September 8 through November 18, missing in excess of two months of work, and then commenced driving the Steuben route.

The data presented by the District undermines the Grievant's contention that the change in route affected his ability to drive extra (co-curricular) trips. His argument that he would have to have another driver fill in for him is belied by the fact that in the 2006 - 2007 school year he had 13 trips docked because a substitute filled in for him, whereas in the year he started the Steuben route, he only had 1.5 trips docked. Additionally, although he was off work for two months in the year he started the Steuben route, he drove almost as many co-curricular hours that year as he did during all of the prior school year when he drove the Wauzeka route.

Although the undersigned is sympathetic to the concerns raised by the Grievant given the incredible amount of service he has provided to the District over four decades, there is nothing in the collective bargaining agreement that was violated when he was re-assigned to the Steuben route. Additionally, although this arbitrator has no authority to find for the Union on equitable grounds, there is no equitable remedy available as no loss of income by the Grievant has been established.

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

**AWARD**

The Employer did not violate the collective bargaining agreement when it assigned Mr. Welsh to the Steuben route.

The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 11<sup>th</sup> day of January 2010.

Susan J.M. Bauman /s/

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Susan J.M. Bauman, Arbitrator

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