BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**LOCAL 2765, DISTRICT COUNCIL NO. 40,
AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, AFL-CIO**

and

**SCHOOL DISTRICT OF MENOMONEE FALLS,
WAUKESHA COUNTY, WISCONSIN**

Case 87
No. 69553
MA-14649

Appearances:

Laurence S. Rodenstein, Representative at Large, AFSCME Council 40, Suite “B”, 8033 Excelsior Drive, Madison, Wisconsin 53717, for Local 2765, District Council No. 40, American Federation of State, County and Municipal Employees, AFL-CIO, which is referred to below as the Union.

James R. Korom, von Briesen & Roper, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53202, for School District of Menomonee Falls, Waukesha County, Wisconsin, which is referred to below as the District or as the Employer.

ARBITRATION AWARD

The Union and the District are parties to a collective bargaining agreement that provides for final and binding arbitration. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, to resolve Grievance 1003, filed on behalf of the “Custodial unit”. Hearing on the matter was held on December 7, 2010, in Menomonee Falls, Wisconsin. The hearing was not transcribed and the parties filed briefs by February 3, 2011.

ISSUES

The parties did not stipulate the issues for decision. The Union states the issues thus:

Did the School District violate the terms of the collective bargaining agreement by utilizing a practice which filled temporary vacancies on the basis of building-wide seniority?

If so, what is the appropriate remedy?

Did the School District violate the terms of the collective bargaining agreement by utilizing temporary/seasonal employees in the filling of temporary vacancies?

If so, what is the appropriate remedy?

The District states the issue thus:

Did the Employer violate the Collective Bargaining Agreement as alleged in the grievance?

If not, what is the appropriate remedy?

I adopt the District's statement of the issues.

RELEVANT CONTRACT PROVISIONS

ARTICLE 2 - MANAGEMENT RIGHTS

2.1 Rights: The employer possesses the sole right to operate the School District and all management rights repose in it, subject only to the provisions of this contract and applicable laws. These rights include, but are not limited to the following:

A. To direct all operation of the School District . . .
C. To hire, promote, transfer, schedule and assign employees in positions with the School District in accordance with the terms of this Agreement . . .
F. To maintain efficiency of School District operations . . .

ARTICLE 8 – SENIORITY

8.1 Definition: The Employer agrees to recognize seniority as provided in this and other articles of this Agreement. . . .

8.2 Application: Seniority shall apply in promotions, layoffs, recall from layoffs, and in filling vacant positions, provided however, that the qualifications of the employee shall be taken into consideration. Seniority

shall be applied on a District wide basis, except as provided in Article 10, Layoff and Recall. . . .

ARTICLE 9 - PROMOTIONS AND TRANSFERS

9.1 Vacancies: Whenever a vacancy occurs which the District desires to fill due to the retirement or termination of the incumbent employee, the creation of a new position, or for whatever reason, the job vacancy shall be made known to all employees through job posting.

9.2 Posting: Job vacancies shall be posted on bulletin boards in convenient locations in each school for at least five (5) working days with a minimum of two (2) days in each week. Each job vacancy shall be posted within fourteen (14) calendar days following the date at which said vacancy occurred, or the District shall notify the president of the Union in writing, that the position has been eliminated. . . .

9.5 Selection Procedure: The selection of an applicant to fill a job vacancy shall be made on the basis of skill, ability, and seniority; however, if the skill and ability of two (2) or more employees is relatively equal, the employee with the greatest District wide seniority shall be chosen. . . .

9.8 Temporary Assignment: The District may temporarily assign an employee to any job, and shall not be required to follow the procedures set forth in Section 9.01 and 9.02 above. An employee temporarily assigned to a job shall not be paid less than his her regular wage scale.

A. . . . For vacancies known to be longer than 30 working days, procedures set forth in Section 9.01 and 9.02 shall apply. . . .

9.9 Other Transfers: The Employer may make lateral transfers with the mutual consent of the employees to be transferred. The Employer may also laterally transfer an employee to a different building involuntarily but only for written reason(s) that is (are) not arbitrary, capricious, or in bad faith. The position of the employee to be involuntarily transferred shall be posted as available only to employees working the same number of hours in the same classification at a different building. Any resultant vacancy shall be posted as available only to employees working the same number of hours in the same classification. If no eligible bidder bids for the vacancy initially created by the involuntary transfer, then the District may require the least senior employee working the same number of hours in the same classification at a different building to take that vacancy in which case the District shall then post the resultant vacancy in the manner described above for other resultant vacancies. No employee shall be involuntarily transferred more than once in a 12 month period.

BACKGROUND

The April 6, 2009 grievance form states the "Work Location" as "All schools", the "Employee's Name" as "Custodial unit", and the "Date of the alleged infraction" as "Continuous". The form states the "Circumstances of Facts" thus:

> District not recognizing or using senior bargaining unit employees in filling higher paying openings. In most cases the District is not using bargaining unit employees at all. The wage disparity is substantial. Differences range from $2.09 to $11.11 hourly.

The form cites Sections 8.1 and 8.2 as the provisions governing the grievance, and adds, "any and all other Articles that may apply." The form seeks the following remedy: "To make all affected employees whole for lost wages and benefits."

Ronald James Kraft, the Union's President, filed the grievance. Dwight Crouse, the District's Director of Building and Grounds, filed an answer to the grievance, dated April 14, 2009, which states:

> The School District of Menomonee Falls meets the requirements of the contract under Article 9.8 of the contract between Local 2765 and the school District of Menomonee Falls. Employees are temporarily assigned to fill jobs due to sick calls, vacations, or other absences allowed by the union contract. If a vacancy exceeds 30 working days, the union contract Article 9.01 and 9.02 are adhered to. It has been reported to me that absences of this type have been assigned the same way for at least the last 25 years. This grievance is hereby denied.

The District Superintendent, Keith Marty, detailed the District's position in a letter dated May 12, 2009, which states:

> . . . The School District of Menomonee Falls does not define absences, vacations, or other reasons a regular employee would not be at work as an opening or vacancy. The practice of filling one day and short term absences with available and properly skilled and trained employees has been done for many years.
>
> The School District of Menomonee Falls does not intend to disturb several positions and schools in filling a short term absence or need.
>
> The School District of Menomonee Falls must fill positions due to absences with qualified, trained and skilled employees.
>
> The Superintendent does make the following recommendation as it relates to this grievance.

- First, conversation on this issue had occurred prior to the May 6th meeting. The district leadership agreed that given substantial notice of extended absences, the district would use a seniority process in filling the position while a regular employee is absent.

- The two parties, while currently not agreeing on the definition of a vacancy or opening, should attempt to reach a definition that is agreeable to both parties going forth. It is the district's strong belief that a one day or short term absence is not defined as an opening or vacancy.

- It is further the Superintendent's recommendation that the issue brought forth by the local union be addressed during the current collective bargaining process, given the previous discussion, the district's willingness to address seniority on a longer term basis, and the need to agree on a definition. The Superintendent believes the bargaining process could resolve the concerns in an open and collaborative format. . . .

The parties attempted to resolve the matter informally through at least March of 2010.

The balance of the evidentiary background is best set forth as an overview of witness testimony.

Ronald James Kraft

Kraft noted that the District went through a reduction in force in 2006. In his view, District practice regarding filling short-term absences changed after this. The reduction effectively eliminated part time positions and thus complicated coverage of short-term absences. Kraft views the contract as clear regarding the coverage of employee absences, and he detailed a series of examples to set the factual basis of the grievance.

Union Exhibit 3 sets forth a series examples, which concern District use of non-unit, temporary employees to fill in for unit employees. The first example concerns District use of a temporary employee at Thomas Jefferson Middle School in May and June of 2009. Kraft brought his concern to the District’s attention in June, prompting discussions that resulted in a June 1 memo from the District’s Human Resource Director to Kraft, which notes, “Both Dwight and Rick stated this would not happen again.” Union Exhibit 3 also details that Darlene Kolbe, a unit employee, filled in for a higher rated employee, Randy Nadwocki, in March and April of 2009 while he exhausted his vacation entitlement prior to retiring. The District covered Kolbe’s position through the use of two temporary, non-unit, employees. The exhibit also notes District use of a temporary employee to fill five hours of an eight hour shift on April 24, 2009, which was open due to Kolbe’s absence.

Kraft noted that he brought Union concerns to the District regarding the absences of Diane Schreck, a unit employee, between July 1, 2009 and June 30 of 2010. The parties discussed the matter and the District agreed that it "would make those senior CSI employees whole for those hours where Ms. Schreck, a CSII, was not replaced on student contact days." The employees made whole for the agreed-upon absences ranked 20 through 24 on seniority lists assembled by the Union and by the District.

Kraft noted that in March of 2009, Charles Vodicka, an Assistant Foreman on the night shift, requested fifteen days of vacation for the following April. The District covered the absence with Gregory Banach, a lower rated employee. Banach was not the most senior employee who could have performed the work. In much of 2009, Banach worked at Thomas Jefferson Middle School. He left that school prior to its permanent closure in August of 2009. A similar situation occurred between April 19 and April 30, 2010, when Banach again replaced Vodicka while he took vacation. In June of 2009, a similar incident occurred, in which an Assistant Foreman on the day shift, Jim Leffler, requested on May 19, 2009, to take eight days of vacation the following June. He did so, and was replaced by Jeff Knodl, who normally worked at a different school than Leffler and was not the most senior eligible employee.

Kraft detailed that Adam Mosio, a unit employee, received a higher rate of pay to perform higher rated work, including pool maintenance, at the High School for two work weeks in March of 2009. He was not the senior available employee and earned overtime in addition to the higher straight time rate. In late July and early August of 2010, Baldev Kalsi filled in for Charles Roskopf, an Assistant Foreman on the night shift. Baldev Kalsi was not the senior eligible employee and received a higher rate of pay for this work. Baldev Kalsi also filled in for Michael Klermund, an Assistant Foreman on the day shift, for roughly two work weeks in April of 2009. Baldev Kalsi received a higher rate of pay and was not the most senior employee eligible to do so.

The final example discussed by Kraft concerned District use of a temporary employee to fill in at the District's Central Office for Schreck's absence in late May of 2009. The District used the temporary employee to avoid offering the work to Danielle Breidenbach, who was then under investigation in a disciplinary matter. The parties discussed the matter and the District eventually paid Breidenbach for the fill in work it gave to the temporary employee. Kraft noted that other senior, qualified employees were available for the work and that the problem with District use of temporary employees is an ongoing issue.

Kraft noted that the Union exhibits reflect predominately post-grievance conduct because recreating pre-grievance incidents through payroll records is an impossible task. District use of temporary employees dates back a considerable period and is one of the main causes of the grievance. Since the 2006 reduction in force, District use of temporary employees has increased steadily. The ongoing discussions and resolutions on this issue were, to Kraft, "a cat and mouse game." The Union is at a disadvantage because it learns of such usage well after the fact, and only when an employee complains to Kraft. In his view, whatever procedure the District follows is known only to Stuettgen. Kraft thinks the procedure varies on a building by

building basis and prompts complaints of favoritism. He believed the District unduly favored use of Baldev Kalsi, who worked a July 4 holiday without receiving premium pay. That incident produced discussions and a settlement agreement between the parties.

Rick Stuettgen

Stuettgen currently works in the non-unit position of Custodial Supervisor. He started work for the District as a casual employee, and took a full-time position in October of 1975. He became a Foreman at Thomas Jefferson Middle School in the 1978-79 school year. He has served as Supervisor for roughly twenty years. District wage scales reflect a considerable range. The wage appendix effective January 1, 2009, ranges at the "Starting Rate" for Cleaner/Sweeper at $12.59 per hour to the "Starting Rate" for Assistant Maintenance Foreman at $23.87.

Stuettgen fills temporary absences based on the notice he receives. On short notice, he fills the absence however he can. If given adequate notice, he fills a short term absence from within the same building, by offering it to the most senior employee who would receive a raise. If he cannot fill an absence from within a building, he looks for the most senior employee, viewed on a unit-wide basis. This does not follow a rote list, since some employees have informed Stuettgen that they have no interest in working outside of their "home" building or have no interest in temporary assignments. Some employees do not have phones and some are unwilling to give out their phone number. If Stuettgen cannot fill a vacancy with a unit employee or if he lacks sufficient notice, he may use a temporary employee. When part-time unit positions are filled, he will call them prior to use of a temporary employee. His usage of part-time employees was extensive in 2009.

His preference to fill from within a building reflects business needs. Employees within the same building have access to all building keys, including those to breaker boxes and other specialized locks. Employees who work within a building also have the expertise that flows from experience with the building. That expertise extends to equipment, personnel and events. School events are not necessarily accurately or completely calendared. Roughly two weeks before the arbitration hearing, a fill in employee who was unfamiliar with a building could not turn on the building's PA system.

Stuettgen addressed the examples cited in Kraft's testimony. Stuettgen's use of a temporary employee to fill in at Thomas Jefferson in May and June of 2009 reflects that Banach had left the school prior to its closing. His position was open and posting was not an option, since the position would end with Jefferson's closure. Stuettgen played no role in addressing Kraft's concerns regarding filling the open position. His use of Kolbe to replace Nadwocki and Weisbrich in March and April of 2009 reflected his usual procedure, although he lacked clear recall of the incident. His use of Baldev Kalsi to replace Kolbe reflects only that John Parker, who works with Kolbe at Shady Lane School, was unavailable. Parker almost always covers Kolbe's absences. Stuettgen could not find another unit employee interested in the Friday work he gave to Jagmit Kalsi, who filled only five hours of the eight hour shift on April 24. His use of Janet Walker, a temporary employee, to fill in at Shady Lane on March 20, March 23, April 1,

and April 2, 2009 reflects that Parker was filling in for Kolbe, who was filling in for Nadwocki. Stuettgen had no unit alternative to fill the April 24, 2009 opening and did not fill the entire shift.

Stuettgen filled Vodicka's April, 2009 absences from within Thomas Jefferson. At that time, Banach was working at Jefferson. Similarly, Leffler's June, 2009 absences reflect a fill in through Stuettgen's normal procedure. He could not fill the absence from within the school because no employee was available who could fill in and receive a higher rate. He followed seniority and could not find a willing employee until he reached Knodl's spot on the seniority list. Mosio's fill-in in March of 2009 reflects only that he was the most senior High School employee who wanted the pool work. Stuettgen filled Roskopf's July and August, 2010 absences by following his standard procedure. Because summer work moves most employees to the day shift, Stuettgen had only one other employee available to call prior to calling Baldev Kalsi, who was qualified to do the work, which included pool work. His use of Baldev Kalsi to replace Klermund in April of 2009 reflects that no one in Ben Franklin School wanted the work. He could not recall any further specifics of his use of Baldev Kalsi. The District has routinely used non-unit employees to fill in at Central Office. The parties agreed that this should not have excluded Breidenbach from consideration and resolved the matter.

Stuettgen noted that the District has used the procedure described above since 1975. District preference to fill temporary vacancies from within a building predates his employment. He understood Kraft's perception of a problem and noted Kraft "is an honest guy." The problem is not, however, the absence of procedure. The procedure has been consistent over time. Rather, it reflects the ongoing difficulty of staffing buildings on a daily basis. Kraft's grievance is the first to challenge the procedure, which, in Stuettgen's view, governs staffing until collective bargaining changes it.

The District uses temporary employees only if unit employees are unavailable or unwilling to work. District use of temporary employees dates back over thirty years.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Union's Brief

After a review of the record, the Union contends that Arbitrator Richard Mittenthal's "scholarly analysis of the constituent elements and the arbitral application of past practice at the workplace" from "Past Practice and the Administration of Collective Bargaining Agreements", *Proceedings of the Fourteenth Annual Meeting of the National Academy of Arbitrators*, BNA, 1961, should guide the analysis of the grievance. The District contends that "it has followed a long-standing practice of assigning temporary vacancies to senior custodians within the building that the vacancy occurs." The Union notes that this argument cannot apply to District use of non-unit employees and that "(T)he use of temporary/seasonal employees . . . is plainly proscribed by the Agreement." Beyond this, the Union notes that it does not contest

the practice regarding filling temporary vacancies from within a building. Rather, it contends the practice "is in conflict with" Section 8.2, which is "a clear and unambiguous contract provision". Mittenthal's persuasive analysis of the role of past practice "renders the District's affirmative defense moot."

Section 8.2 establishes the parties' original intent "to apply seniority on a District-wide basis for filling vacancies." The grievance establishes, however, the Union's consistent effort to assert the original intent of Section 8.2. The District's assertion of practice offers no more than a justification of unilateral implementation of filling temporary vacancies. The evidence establishes that the unilateral implementation "excluded senior custodians from significant work and additional compensation opportunities."

Arbitral practice within and beyond Wisconsin affirms that past practice should not be permitted to modify the clear language of the labor agreement, citing SUN PRAIRIE SCHOOL DISTRICT, DEC. NO. 31190-A (GRATZ, 9/05). The Union concludes that the District "by failing to apply district-wide seniority to its decisions regarding . . . vacancies violates the clear and unambiguous terms of the Agreement." From this it follows that the "grievance should be sustained in all respects." The Union states the appropriate remedy thus:

> As remedy, the Arbitrator needs to make whole all custodial bargaining unit employees whose district-wide seniority was not considered in the assignment of custodians to temporary vacancies since April 6, 2009. Secondly, the Arbitrator should direct the District to adopt a policy, consistent with the Agreement, in the assignment of custodians to temporary vacancies.

The District's Brief

The District prefaces its arguments with an extensive review of the evidence, from which it asserts the District, through Stuettgen, has followed a consistent practice for nearly 25 years" regarding "replacing employees during short-term absences." More specifically, the District describes Stuettgen's consistent practice that starts with finding "the most senior employee (who is paid less than the absent employee) who normally works in the same building as the absent employee." This first step reflects the significance of intra-building expertise. Where Stuettgen cannot find an intra-building replacement, his next step "turns on how much notice he receives of the absence." Where he receives very short notice, "he uses any means necessary to find someone who can handle the situation best." If he receives adequate notice, "he normally goes through the entire seniority list, in order, to find the most senior employee who would receive a pay raise as a result of the temporary assignment." Even where he has adequate notice, he may not call employees who do not wish to leave a building or are otherwise unreachable.

The Union has failed to carry its burden to rebut this practice or to prove any specific violation of the agreement which "predated the filing of the grievance on April 6, 2009." At most, Kraft's testimony offers hearsay indications of employee complaints. Critical review of the Union's evidence establishes that:

> (T)he Union's payroll records can be categorized as follows. Exhibits 5, 7 and 8 show the situation where the senior employee in the building gets the temporary assignment, a practice the District readily admits. Exhibits 4 and 11 are situations where the District did not follow its own practice, and corrected their mistake promptly, but they do not show a strict bargaining unit seniority practice. All the remaining examples show someone other than the most senior bargaining unit employee doing the work, but no additional evidence was offered by the Union to explain why that occurred.

Analysis of the grievance must start with this factual basis.

The District contends that the labor agreement "does not, on its face, require the application of strict seniority when making temporary assignments." Article 2 states a reserved rights clause, which governs the resolution of any doubt regarding the District's authority unless another agreement provision limits it. Articles 8 and 9 "are the only places where potential limits on management's reserve rights might be found in this case."

More specifically, Section 8.1 demands the District "recognize seniority." If seniority controlled District decisions, there would be no need for Section 9.5, which specifies when seniority controls. Section 8.2 similarly establishes that seniority must be recognized, by using "shall apply" when referring to seniority, and using "shall" to refer to the consideration of qualifications. Beyond this, Section 8.2 governs "vacant positions" and "a temporary assignment" is not a "vacancy". Significantly, the practice applied by Stuettgen does "recognize seniority." The terms of the labor agreement establish that the strict seniority sought in the grievance has yet to be bargained by the Union, and thus must be achieved in collective bargaining prior to being enforced in arbitration.

Section 9.8 addresses a "temporary assignment" and exempts the District from the provisions of Sections 9.1 and 9.2, absent the filling of a temporary assignment exceeding thirty days, which is addressed in Subsection A. Since none of the Union's evidence concerns an absence covered by Subsection A, the record establishes there has been no violation of Section 9.8. Section 9.5 underscores that the District has wide discretion in the filling of temporary vacancies. The "District wide seniority" reference of Section 9.5 will not support the Union's arguments. Section 9.5 governs "a job vacancy" not "a temporary assignment." The "flavor" of Section 9.1 confirms that a vacancy connotes a position "which needs to be filled on a long-term or indefinite basis." Common sense and Black's Law Dictionary confirm this. Even if a temporary absence could be considered a vacancy, Section 9.5 permits the District to consider factors other than seniority to fill the absence. "Skill and ability" connote the expertise Stuettgen's practice relies on in the preference for intra-building substitutes.

If any or all of these contract provisions are considered less than unambiguous, the best guide to resolving their ambiguity is the District's long-standing practice. Union arguments ignore the practical reality of the District's practice as well as the fact that it has stood for twenty-five years without being grieved. The practice has survived the negotiation of a series of labor agreements and must be considered binding.

Even if the agreement could be read as the Union asserts, the Union "failed in its burden to produce a single aggrieved employee to testify they were not offered the temporary assignment or would have taken the assignment had it been offered." In a "contract interpretation case . . . the Union bears the full burden of proof". Even if less-senior employees were shown to have filled temporary assignments, there is no proof that more senior employees were available, willing or qualified to perform the work. It would be improper for an arbitrator "to 'wax philosophical' about what he thinks the language may or may not mean in an abstract sense." There are no proven facts to make any conclusion of a District violation anything more than speculation. From this, it follows that the grievance must be denied.

DISCUSSION

The District states the issue on the merits as stipulated, but the Union's statement breaks the issue into two component parts. That the parties' briefs do not state the same issues precludes characterizing them as stipulated. I have adopted the District's view of the issue as that appropriate to the record. This does not pose a major point, since addressing the Union's arguments covers each component of its statement.

Analysis of the issue starts with the most basic aspect of the dispute, which is whether District temporary assignments, which prefer intra-building employees, violate the labor agreement. The parties' arguments span Articles 2, 8 and 9. It is thus necessary to focus the contractual dimension of the dispute.

Article 2 plays no role in the grievance, since its general terms are "subject . . . to the provisions of this contract". Article 8 specifically governs seniority and Article 9 specifically governs "Temporary Assignments" at Section 9.8A. To the extent other agreement provisions can assist in resolution of the grievance, there is no evident reason to look beyond the specific provisions of Articles 8 and 9.

Ultimately, resolution of the grievance turns on the relationship of Sections 8.1 and 8.2 to Section 9.8A. The primary force of the Union's view turns on the reference of Section 8.2 that "Seniority shall be applied on a District wide basis", and more specifically on whether these terms unambiguously mandate that Stuettgen temporarily assign employees based on strict seniority, applied District-wide, without any intra-building preference.

The terms of Section 8.2 cannot be considered unambiguous because each party states a plausible view of their meaning. The District does not challenge the plausibility of the Union's view, but asserts that it lacks persuasive force when viewed against other agreement provisions. The District's view is plausible, thus pointing to the ambiguity of Section 8.2. Section 9.8A specifically governs temporary assignments. Each of the examples covered by Kraft fall within the "30 working days" period, which defines the point at which a temporary assignment becomes a vacancy governed by Sections 9.1 and 9.2. Section 9.8A is silent on the role of seniority, thus posing an ambiguity regarding its relationship to other agreement provisions.

Beyond Section 8.2, the strict seniority urged by the Union can come into Section 9.8A through Section 8.1, which requires the District "to recognize seniority". Whether viewed in relationship to Section 8.1 or 8.2 standing alone or to Section 8.1 and 8.2 read together, the relationship of Section 9.8A to Sections 8.1 and 8.2 poses ambiguity. There is no dispute Stuettgen's procedure applies District wide seniority in the sense that Union and District assembled seniority lists track seniority with the District, rather than seniority within a department, building or function. Stuettgen uses District wide seniority, but applies it within a building before moving employees from other buildings. This uses an intra-building preference "on a District wide basis". Whether this is a persuasive reading the three provisions cannot obscure that it is plausible.

The disputed provisions pose more fundamental ambiguities. As the District notes, what constitutes the "recognition" of seniority required by Section 8.1 is less than clear. Section 9.5 establishes that the recognition of seniority is not necessarily the application of strict seniority. The first sentence of Section 8.2 falls short of mandating strict seniority by demanding no more than that it "shall apply", and by mandating that "the qualifications of the employee . . . be taken into consideration." The second sentence underscores this by the reference "shall be applied". There is no dispute Stuettgen's procedure applies seniority. The interpretive issue is whether he applies it consistently with the contract. Standing alone, the language of Sections 8.1 and 8.2 fails to resolve this ambiguity.

Compounding the ambiguity is that Section 8.2 "shall apply" in "promotions, layoffs, recall from layoffs and in filling vacant positions." Each connotes assignments involving an extended period of time. More significantly, each has a specific section of the labor agreement governing it. That "Temporary Assignments" under Section 9.8A does not connote a period of time longer than "30 working days" contrasts starkly to this. Section 9.8A does not mention seniority. Thus, it lacks an unambiguous link to Section 8.2. This does not render seniority irrelevant, since Section 8.1 extends the recognition of seniority to "other articles of this Agreement." More to the point, the language of Sections 8.1, 8.2 and 9.8A cannot be considered clear and unambiguous because each party states a plausible reading of their terms.

Viewed solely on the language posed, there is no evident reason to link temporary assignments under Section 9.8A to the longer term employment actions listed in Section 8.2. Linking them complicates the interpretation of both articles. If the provisions of Section 8.2 are to be applied to Temporary Assignments under Section 9.8A, how is the Union's application of strict District wide seniority reconciled to the provisions of Section 9.9? There is no dispute Stuettgen's procedure accommodates employee wishes not to be moved from their "home" building, and there is no Union assertion that Stuettgen should ignore employee wishes in making temporary assignments. Against this background, there is no evident reason to tie Section 9.8A to the longer term assignments governed by Section 8.2. Viewed on the language posed, the District's position that Section 8.1 governs temporary assignments is more persuasive than the Union's focus on Section 8.2.

This essentially resolves the first component of the Union's arguments. There is no dispute that the District's long-term procedure regarding temporary assignments recognizes seniority. Nor is there a significant dispute that the procedure constitutes a binding past practice. As noted above, the governing language is ambiguous. Past practice is the most reliable guide to resolve this ambiguity, since it is rooted in the agreement manifested by the parties' conduct over a considerable period of time. Prior to the grievance, Stuettgen's application of an intra-building preference was unchallenged, open and broadly applied. That practice is, in my view, the most reliable means to define how seniority is "recognized" in temporary assignments.

The second component of the Union's arguments concerns District use of temporary employees. The use of such employees extends well beyond the 2006 layoffs. Stuettgen's assertion that he does not use temporary employees unless a unit employee is unavailable stands unrebutted. As noted above, the District and Union settled disputes concerning District use of temporary employees in May 2009, July 2009 and July 2010.

This poses a troublesome background to evaluation of the factual basis of the contract violations asserted by the Union. It is evident Kraft feels a "cat and mouse" game is being played regarding District use of temporary employees. This is understandable, but cannot substitute for solid evidence of a violation. The presence of a temporary employee on payroll records does not, standing alone, mean a unit employee was denied a temporary assignment at a higher rate of pay. There is no reliable evidence regarding any of the examples covered in Kraft's testimony to establish that a unit employee who wanted the work was not offered it.

The strongest evidence regarding District misuse of a temporary employee turns on the May and June, 2009 work performed at Jefferson by a temporary employee. That the District responded to Kraft's concern regarding the "open position" at Thomas Jefferson by asserting it "would not happen again" shows, at a minimum, the difficulty of posting an open position that ended with the school's permanent closure. However read, the statement affirms Stuettgen's testimony that he did not use temporary employees unless unit employees were unavailable. The temporary employee did not work beyond the limits set by Section 9.8A. There is no evidence that unit employees were willing to fill the position and were not offered it. Against this background, there is no reliable basis to conclude District use of the temporary employee at Jefferson violated Sections 8.1 and 9.8A.

In sum, the temporary assignments put at issue through the grievance and Kraft's testimony fail to establish a violation of the labor agreement. Section 9.8A of the agreement governs temporary assignments. Section 8.1 rather than Section 8.2 governs the role of seniority in Section 9.8A. Neither the language nor the relationship of these provisions is clear and unambiguous. Stuettgen's testimony establishes a past practice that is the best means available to clarify the application of Sections 8.1 and 9.8A.

These conclusions can be more tightly woven to the two components of the Union's arguments. The Union's statement of the issue points toward the application of Section 8.2. As noted above, that section has no clear applicability to temporary assignments under Section 9.8A,

while Section 8.1 has. Beyond this, the Union's arguments, in a sense, mischaracterize the proven practice by referring to it as "building-wide seniority". This highlights the contrast the Union wishes to draw between the practice and the reference in Section 8.2 to the application of "District wide" seniority. The evidence shows the practice applies District wide seniority with an intra-building preference. More significantly, the terms of neither Section 8.1 nor Section 8.2 is unambiguous. Beyond this, their relationship to Section 9.8A is unclear. The record establishes that Section 8.1, not Section 8.2, bears directly on Section 9.8A. The proven practice clarifies the District's "recognition" of seniority as required in Section 8.1 regarding temporary assignments under Section 9.8A. The temporary assignments made under established practice do not violate the labor agreement. Because the practice does not use temporary employees unless unit employees are unavailable, there is no reliable proof of District violation of the labor agreement in its use of temporary employees.

Before closing, it is appropriate to tie this conclusion more closely to some of the parties' arguments. Union citation of the Mittenthal paper cites strong persuasive authority for its arguments. The difficulty is that on this record, the practice does not stand in opposition to clear contract language. Rather, because contractual ambiguity is posed, the practice becomes a guide for "Clarifying Ambiguous Language" as Mittenthal addresses in the "Functions of Past Practice" portion of the paper (AT 36-38).

The Union's assertion that Section 8.2 is unambiguous is addressed above more as a matter of grammar than of practical effect. Its ambiguity is highlighted by the evident difficulty of applying what could become an elaborate, system-wide, bumping system to address a short-term temporary absence in a single building. It is reasonable to assume that the parties would create such a process with language clearer than that of Section 8.2.

The Union's arguments regarding a strict seniority system have a stronger basis in the contract language than the evidence. It is not clear that the settlements the parties reached regarding District misuse of temporary employees distributed money to unit employees on a strict seniority basis. The July, 2010 distribution was to employees well down on the seniority list. The evidence is not clear enough on this point to draw a reliable conclusion, but affords no basis to conclude the settlements undermine the practice.

Kraft's concerns with a "cat and mouse" game regarding the use of temporary employees are established in the evidence. That he receives complaints of favoritism regarding temporary assignments is proven. This poses no issue of hearsay. However, proof of favoritism or misuse of temporary employees demands a more solid evidentiary basis than this record affords. This does not demand applying the rules of evidence strictly. Nor does it demand a conclusion that either witness is less than credible. The cat and mouse game may involve misuse of temporary employees or may reflect employee complaints resting on something other than fact. The point is that whether a senior employee has been passed over for a temporary assignment demands persuasive evidence of a temporary vacancy and a specific unit employee who was available for, but not offered the assignment.

District concerns with post-grievance evidence are understandable, but it is apparent that this dispute has smoldered over a considerable period of time. That the proof concerns post-grievance conduct is less significant than the weakness of proof that Stuettgen's implementation of long-standing temporary assignment procedure passed over available and willing senior employees. Payroll records laid alongside a seniority list are not sufficient to establish the point. This does not mean the District cannot violate the agreement through a temporary assignment. Rather, it points out the need for case-by-case review that rests on solid evidence that Stuettgen failed to "recognize" seniority in a specific implementation of the practice.

AWARD

The Employer did not violate the Collective Bargaining Agreement as alleged in the grievance.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 7th day of March, 2011.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

RBM/gjc
7700