STATE OF WISCONSIN

BEFORE THE ARBITRATOR

In the Matter of the Petition of	
NICOLET EDUCATION ASSOCIATION	Case XV No. 24854
To Initiate Mediation-Arbitration Between Said Petitioner and	MED/ARB-468 Decision No. 17581-A
NICOLET HIGH SCHOOL DISTRICT	

Appearances:

Mr. Patrick A. Connolly, Executive Director, North Shore United Educators, appearing on behalf of the Nicolet Education Association.

Foley & Lardner, Attorneys at Law, by Mr. Herbert P. Wiedemann, appearing on behalf of Nicolet High School District.

ARBITRATION AWARD:

On February 11, 1980, the Wisconsin Employment Relations Commission appointed the undersigned as mediator-arbitrator, pursuant to Section 111.70 (4)(cm) 6.b. of the Municipal Employment Relations Act, in the matter of a dispute existing between the Nicolet Education Association, referred to herein as the Association, and Nicolet High School District, referred to herein as the Employer. Pursuant to the statutory responsibilities, the undersigned conducted mediation proceedings between the Association and the Employer on March 24, 1980, over matters which were in dispute between the parties as they were set forth in their final offers filed with the Wisconsin Employment Relations Commission. The dispute remained unresolved at the conclusion of the mediation phase of the proceedings, and consistent with prior notice that arbitration would be conducted on March 25, 1980, in the event the parties were unable to resolve the dispute in mediation, the Association and the Employer waived the statutory provisions of Section 111.70 (4)(cm) 6.c. which require the mediator-arbitrator to provide written notification to the parties and the Commission of his intent to arbitrate, and to establish a time limit within which each party may withdraw its final offer. Arbitration proceedings were conducted on March 25, 1980, at which time the parties were present and given full opportunity to present oral and written evidence, and to make relevant argument. The proceedings were transcribed, and briefs and reply briefs were filed in the matter. The final briefs were exchanged by the Arbitrator on May 8, 1980.

THE ISSUES:

The issues involved in these proceedings are reflected in the final offers of the parties as follows:

FINAL OFFER OF THE EMPLOYER:

APTICLE ____ - Fair Share Agreement

As the exclusive bargaining representative the Association will represent all teachers, members and non-members, fairly and equally, and teachers who do not pay Association dues as provided in Article ____ hereof will be, as provided in this Agreement, required to pay the cost of the collective bargaining process and contract administration as provided in this Agreement,

i.e., that amount certified as the proportionate share of the cost of the collective bargaining process and contract administration by the Association. No teacher shall be required to join the Association but membership in the Association shall be made available to all teachers who apply consistent with the Association constitution and by-laws.

The Board agrees that, beginning with the month following the month in which this Agreement is finally settled, either voluntarily or by issuance of a MED/ARB award, it will deduct, from the earnings of all teachers who are employed by the Board as of the settlement date and are members of the Association as of that date, the amount certified by the Association as the proportionate share of the collective bargaining process and contract administration. Said amount shall be deducted in equal monthly installments. Any teacher who is employed by the Board as of the settlement date and is not a member of the Association as of that date shall not be subject to such deduction unless such teacher later signs and submits to the Board a fair share payment authorization agreement, a copy of which is attached to this Agreement as Exhibit E, and in that event such deduction shall begin in the first month following the month in which such teacher signs and submits such fair share authorization agreement. Once fair share deductions are begun under this paragraph, they shall not be revocable.

The Board also agrees that, with respect to all teachers who are hired after the settlement date, it will make such deductions commencing with the month following the teacher's initial date of employment. The deductions for such new teachers will be made as provided above without any requirement that such new teachers sign a fair share payment authorization agreement. The Board shall pay the amounts deducted under this paragraph to the Treasurer of the Association within fourteen calendar days of the pay date on which such deduction was made.

Changes in the amount required to be deducted shall be accompanied by a certification from the Association that the new amount is, in fact, the proportionate share of the cost of the collective bargaining process and contract administration. Such changes will be made effective with the first month following receipt of such revised certification.

The Board shall not be required to submit any amounts to the Association under this Agreement for teachers otherwise covered who are on leave of absence or other status in which they receive no pay for the pay period normally used by the Board to make such deductions. The Board will provide the Association with a list of teachers from whom such deductions are made with each monthly remittance to the Association.

The Board shall not be liable to the Association, teacher or any party by reason of the requirements of this Article for the remittance or payment of any sum other than that constituting actual deductions made from teacher pay. The Association shall defend, indemnify and save the Board harmless against any and all claims, demands, suits, orders, judgments or other forms of liability that may arise out of or by reason of action taken or not taken by the Board under this Article.

In the event the Association violates any of the provisions of Article XX of this Agreement, this Article shall be deemed terminated, null and void.

The Association shall provide teachers who are not members of the Association with an internal mechanism within the Association which allows those teachers to challenge the fair share amount certified by the Association as the cost of representation and receive, where appropriate, a rebate of any monies determined to have been improperly collected by the Association pursuant to this Article. The Association will furnish a copy of this internal rebate procedure to the Board and teachers from whom fair share deductions are being made.

ARTICLE ____ - Dues Check-Off

The Board, upon receipt of a proper authorization card, shall deduct Association dues in ten monthly installments from the payroll checks of each teacher so authorizing the deduction in an amount certified by the Treasurer of the Association. Such dues authorization card shall be terminable by at least the end of any year of its life or earlier by the teacher giving at least thirty (30) days written notice of such termination to the Board and to the Association. Check-off shall become effective two pay periods after filing with the Board.

Changes in dues amounts to be deducted shall be certified by the Association at least four (4) weeks before the start of the pay period the increased deduction is to be effective.

The Association shall indemnify, defend and save the Board harmless against any and all claims, demands, suits or other forms of liability that shall arise out of or by reason of action taken or not taken by the Board in reliance upon teacher payroll deduction authorization cards submitted by the Association to the Board.

Teachers choosing to pay Association dues in one cash payment directly to the Association shall not have dues deducted from earnings. The Association shall furnish the Board with a list of said teachers no later than October 1st of each school year.

FAIR SHARE PAYMENT AUTHORIZATION

The undersigned hereby authorizes Nicolet High School to deduct fair share payments from his/her earnings pursuant to the terms of a Fair Share Agreement entered into by and between Nicolet High School and Nicolet Education Association and set forth in the collective bargaining agreement between said parties.

Dated this ____ day of _____, 1979.

_____

Witness:

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FINAL OFFER OF THE ASSOCIATION:

ARTICLE XXVII - DUES DEDUCTION AND FAIR SHARE

A. DUES DEDUCTION

The employer agrees to make monthly payroll dues deductions for Association members. The deduction will be made in eight equal amounts commencing with the last paycheck in September of each school year.

Dues Deduction Authorization Cards will be submitted to the employer ten days prior to the first scheduled deduction by the Association. Such cards will bear the signature of the Association members and the amount of dues as certified by the Association. New employees hired after September 15 will be given thirty days in which to sign Dues Deduction Authorization Cards.

The employer will remit such dues to the Association Treasurer within ten days after the deductions are made and a monthly update of the amounts deducted for each Association member on list showing all members of the bargaining unit.

B. FAIR SHARE

1. The Association, as the exclusive representative of all the employees in the bargaining unit, will represent all such employees, Association and non-Association, fairly and equally, and all employees in the unit will be required to pay, as provided in this article, their fair share of the costs of representation by the Association. No employee shall be required to join the Association, but membership in the Association shall be made available to all employees who apply consistent with the Association constitution and bylaws. No employee shall be denied Association membership because of race, creed, color, sex, handicap or age.

The employer agrees that effective the last paycheck in September or thirty days after the date of initial employment if after the opening of school, it will deduct from the paychecks of all employees in the collective bargaining unit who are not members of the Association subject to Section A., or whose membership dues have not been paid to the Association in some other manner, the amount certified by the Association to be the cost of representation. Such amounts shall be paid to the treasurer in the same manner and at the same time as those dues voluntarily deducted in A. above. The Association agrees to certify only such costs as are allowed by law and to inform the employer of any change in the certified costs of representation of non-Association employees required by law.

Changes in the amount of dues to be deducted shall be certified by the Association ten (10) days before the effective date of the change.

The employer will provide the Association with a list of employees from whom deductions are made with each monthly remittance to the Association.

2. Internal Rebate Procedure

The Association shall provide employees who are not members of the Association with an internal mechanism within the Association which allows those employees to challenge the fair share amount certified by the Association as the cost of representation and receive, where appropriate, a rebate of any monies determined to have been improperly collected by the Nicolet Education Association pursuant to this section.

3. Save Harmless Clause

The Association does hereby indemnify and shall save the District harmless against any and all claims, demands, suits, or other forms of liability, including court costs, that shall arise out of or by reason of action taken or not taken by the District, which District action or non-action is in compliance with the provisions of this Article, and in reliance on any lists or certificates which have been furnished to the District pursuant to this Article; provided that the defense of any such claims, demands, suits or other forms of liability shall be under the control of the Association and its attorneys. However, nothing in this section shall be interpreted to preclude the District from participating in any legal proceedings challenging the application or interpretation of this Article through representatives of its own choosing and at its own expense.

4. Referendum

This Fair Share provision shall become effective immediately after a vote of 50% plus one (1) of the eligible voters approving Fair Share in a referendum conducted by the Wisconsin Employment Relations Commission.

Modify p. 38 last paragraph as follows:

ARTICLE XVII - DISCIPLINE PROCEDURE

The District agrees that no teacher will be non-renewed except for incompetency, inefficiency, reduction in staff or other good and sufficient

reason. When the District determines that staff reduction is necessary, the following procedures shall be applied:

1. The District shall attempt to accomplish the necessary staff reduction through attrition resulting from teachers retiring or resigning.
2. Volunteers shall be considered next. In the event a teacher volunteers for layoff, he/she shall be accorded all rights under this Article.
3. If steps 1 and 2 are insufficient to accomplish the staff reduction, the District shall layoff teachers in inverse order of seniority with the condition that each teacher must have qualifications to teach a remaining assignment.

    a. Seniority is measured by the length of continuous full-time teaching service in the District measured from the earliest date on which each teacher began his/her first teaching assignment under an initial contract for full-time service. Full-time service shall include all years of full-time service before and after any prior layoff or District approved leave of absence.
    b. Qualifications:
        1. The teacher must be certificated to teach in the subjects to be offered by the District as determined by current Department of Public Instruction Certificates on file in the District Office.
        2. The teacher must have had experience within the District in those subjects to be offered by the District.

4. Recall Procedures:

    a. All laid off, available teachers shall be recalled in the inverse order of their being laid off on condition that they have qualifications to fill the vacancies that exist.
    b. The District shall mail the recall notice by certified mail, return receipt requested, to the teacher's last known address. If the District does not receive written notice of the teacher's acceptance of recall within thirty (30) calendar days from the date of the mailing notice, recall rights shall be waived for that specific recall opportunity.
    c. It is the responsibility of the laid-off teacher to keep the Superintendent informed of the address to which any recall notice is to be sent.
    d. A laid-off teacher shall be available for recall for a period of three years following the effective date of the layoff.
    e. A laid-off teacher may obtain other employment during the period of layoff.
    f. A laid-off teacher shall not accrue salary or benefits during the period of layoff. However, upon re-employment such teacher shall receive full credit for all salary and benefits earned prior to layoff.

5. Exceptions - If the District asserts that the application of the layoff procedure would result in a teacher being improperly retained such that the educational needs of the students cannot be satisfied, exceptions to the layoff procedures may be made according to the following procedures:

    a. The representatives of the District and the Association shall attempt to agree that an exception is necessary. If it is agreed that an exception is necessary, the parties shall attempt to agree on which teacher shall be laid off.
    b. If full agreement cannot be reached in (a) above, the matter shall be submitted to binding arbitration under Article XIX-Arbitration. Based on the evidence presented, the arbitrator shall determine:

1. If it is necessary for the District to make an exception to the layoff procedure.
2. In the event that the arbitrator determines that an exception is necessary, he shall select which teacher shall be laid off from among those eligible for layoff.

DISCUSSION:

The final offers of the parties set forth above raise three issues for determination by the Arbitrator. They are:

1. The form of fair share to be included in the Collective Bargaining Agreement.

2. Formalized seniority based layoff and recall procedures.

3. Standard of review for non-renewals (other than layoffs) which an arbitrator may consider should the non-renewal be contested.

Each of these issues will be discussed serially and will be considered in light of the statutory criteria which the arbitrator is directed to consider as found at Section 111.70 (4)(cm) 7, subparagraphs a through h, of the Municipal Employment Relations Act.

LAYOFF ISSUE

The Association has proposed that layoffs be initiated pursuant to the statutory time table for non-renewals, and that they be seniority based within areas of certification, provided a teacher has experience within the district for those subjects which he would be required to teach. Additionally, the Association has proposed that exceptions to the foregoing may be made so as to provide for the educational needs of the students either by the agreement of the Employer and the Association, or, if that fails, by the ruling of an arbitrator.

The Employer proposes that layoffs continue to be made pursuant to the terms of the predecessor agreement, which provides:

> The District agrees that no teacher will be non-renewed except for incompetency, inefficiency, reduction in staff or other good and sufficient reason. If the teacher disagrees with the Board's determination, the matter may be processed through the grievance and arbitration procedure of this Agreement. In the event of arbitration regarding non-renewal or in event a non-renewal decision is challenged through any type of litigation or administrative proceeding the judgment of the Board shall not be reversed or modified unless it is determined to be arbitrary, capricious, discriminatory or in bad faith.[1]

In support of its position the Association argues that the evidence with respect to the conditions at Nicolet Union High School justify the inclusion of layoff and recall procedures. The Association further argues that the evidence with respect to comparables justifies the Association proposal, which it contends to be less restrictive to the Employer than layoff provisions found in collective bargaining agreements among comparable employers.

The Employer argues, in anticipation of the Association reliance upon the comparables with respect to its layoff proposal, that the Employer school district is so unique among all other School Districts within the area or the State that comparables should not be applied when considering the layoff issue. The Employer further argues that comparability should not be the governing factor in this case in view of the fact that the language at issue is the result of hard bargaining, and arbitrators have held that a contractual provision once in place is not to be lightly taken away in arbitration, i.e., the

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1) Article XVII, lines 27-36 predecessor Collective Bargaining Agreement.

presumption favors the status quo.' Alternatively', the Employer argues that if comparables are to be considered and have bearing on this issue, then the sixteen districts which the Association proposes to be comparable are inappropriate in view of the Association's earlier position with respect to comparables, and this arbitrator's holdings with respect to comparables as it pertains to Nicolet School District and its three feeder school districts. The Employer further argues that because two of the three feeder schools, Glendale and Maple Dale, lie entirely within Milwaukee County and, therefore, are provided with statutory seniority based layoff protection at 118.23, only Fox Point-Bayside remains comparable, because it, like the Employer district, lies partially outside of Milwaukee County and, therefore, is not covered by 118.23. Lastly, the Employer argues that notwithstanding any of the foregoing, the Association offer is flawed in that it provides the equivalent of tenure from the first day of employment with no probationary concept; and that it provides no vehicle to assure that extracurricular programs will be staffed; and that the dispute resolution procedure provided for in the Association offer would be so time consuming so as to preclude a layoff within the statutory non-renewal time frames: and that the concept of an arbitrator making the selection for a teacher layoff for the parties is totally foreign to the concept of an arbitrator's function.

The Employer has urged that this arbitrator cannot consider comparables when dealing with the layoff issue, because of the Employer's representation that the District is so unique that comparables should not apply. The Employer points to the evidence of record which establishes that the Employer in recruiting seeks out those professionally oriented both in interests and in academic performance; that 80% of the staff have master's degrees or higher; and that the Employer recruits specifically for quality in other activities such as mass media, journalism, music, debate and theater. Additionally, the record supports a finding that the Employer has unique supervisory ratios in that department chairmen are excluded from the unit; are provided special management training; and that the ratio of administration and supervision to faculty is much lower than other conference schools or schools in the surrounding area. Finally, the Employer urges that this arbitrator adopt the findings of David Johnson, who issued a fact finding award over disputed issues between these same parties on May 7, 1974, in which fact finder Johnson in his opinion held the following:

> "Both parties agree that there is a unique quality about this school district. The tax base is greater than average, consisting of an unusual combination of industrial and high priced residential property. The teaching staff is superior. Teachers are especially well trained and have been loyal to the school. The statistics indicate that the student body is also superior and consists of a large proportion of high achievers who are mostly college bound.
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> In view of the unique qualities of the school district and the teaching staff, I find it hard to base an award in this case upon comparisons with other school districts. This district is a leader in the area. In addition, the parties have designed their salary schedule somewhat differently than those with whom the District has compared itself. In these circumstances my inclination is to base the award on changes that have taken place in the cost of living. This inclination is also supported by the fact that the feeder schools within this district have already adopted clauses that tie salary schedules to changes in the cost of living."

The undersigned rejects the Employer argument with respect to uniqueness. The statutory criteria found at 111.70 (4)(cm) 7.d. specifically directs the Arbitrator to consider a comparison of conditions of employment; and in view of that statutory direction the undersigned concludes that the arbitrator would err in dismissing the comparability criteria based on the uniqueness theory of the Employer. Furthermore, the undersigned notes that fact finder Johnson in making his findings with respect to the unique character of this Employer did

so within the consideration of a wage dispute, and not when considering a layoff issue, which is before this Arbitrator. The undersigned concludes that the disparity of the issues distinguishes the instant matter from the findings of fact finder Johnson, and further concludes that the unique character of this Employer's school district has no bearing on the layoff issue. The Employer is to be commended for what the record clearly shows to be a striving for excellence; however, the undersigned is unpersuaded that seniority based layoff would deteriorate the ability of the Employer to continue his efforts in this respect.

The parties are not in agreement as to where the comparables lie. The Employer urges that the comparables be limited to the three feeder districts which feed the Employer's school district. The Association opposes that limitation. In an earlier award, this Arbitrator in Fox Point Joint School District No. 8, Case X, No. 22657, Decision No. 16352-A, MED/ARB-50, limited the comparables to the feeder schools of Glendale, Maple Dale and Fox Point-Bayside, along with the instant Employer. Looking first at the narrower comparables espoused by the Employer and previously accepted by this Arbitrator, the undersigned is satisfied that these comparables support a seniority based layoff provision. The feeder districts of Glendale and Maple Dale lie entirely within the boundaries of Milwaukee County and thus are covered by the provisions of the Wisconsin Statutes at 118.23 (4), which provide that teachers shall be laid off in the inverse order of the appointment of the teacher. Thus, two of these comparable districts have seniority based layoff. The third feeder district, Fox Point-Bayside, is not entirely contained within the boundaries of Milwaukee County and, therefore, 118.23 does not apply to them, and there is no committment to a seniority based layoff there. Since two of the three feeder districts provide for seniority based layoff, the comparables support a finding that seniority based layoff is in order, even when considering the narrow comparables now being discussed. The undersigned considers it immaterial whether the seniority based layoff provision is the result of a statutory provision or negotiated contract terms. Once these employers are found to be comparable, then the conditions of employment found among the comparables control, without regard to whether said conditions of employment are established by contract or by statute.

While the undersigned has concluded that comparables necessarily must be considered in determining this dispute with respect to the layoff issue; the finding that the comparables support seniority based layoff is not the sole consideration to be made. The Employer has argued that the Association's offer is flawed for the reasons set forth earlier in this section. The undersigned agrees. The dispute resolution provisions of the Association offer cannot reasonably be expected to function rapidly enough to resolve disputes within the time constraints found in the Statutes at section 118.22, and as a result the District could well find itself unable to lay off any teacher because the notice time provided for in the Statute would have already run. Even more significant, however, is the flaw created by the lack of a probationary period provided for in the Association offer. The undersigned has concluded that the comparables support a finding for seniority based layoff, however, the comparable school districts of Maple Dale and Glendale, which provide for seniority based layoff because they are included entirely within Milwaukee County and are subject to 118.23, also include the probationary concept. Under 118.23 seniority based layoffs apply only to permanently employed teachers, and the Statute at 118.23 (2) defines permanently employed teachers as those who have completed three years of continuous and successful probation and have gained the fourth contract in the same school system. The Association, by not providing for a probationary period, is seeking in the terms of its layoff provision, terms superior to those provided in the comparables: and in so doing has created a serious flaw in its proposal. The undersigned considers that flaw to be fatal to the Association position and, therefore, would award for the Employer's position on the layoff issue.

STANDARD OF REVIEW FOR NON-RENEWALS

The Association in its proposal has modified the standard of review should a non-renewal for reasons other than layoff become subject to arbitrator's

review. The Employer proposes to continue the predecessor language which limits the arbitrator's standard of review to one of arbitrary, capricious, discriminatory or in bad faith. The thrust of the Association position in this matter would leave for the arbitrator to determine whether the non-renewal was for good and sufficient reason. The Association position with respect to non-renewals other than layoffs contained the same fatal flaw found in their layoff provision, i.e., the lack of a provision for a probationary period. For the same reasons as expressed in the preceding section of this Award, the undersigned concludes that the predecessor language should be continued for the term of this Agreement.

FAIR SHARE

Both parties have proposed a form of fair share in their final offers. The Association proposal includes a full fair share, which will become effective provided a majority of the bargaining unit members vote for fair share in a referendum vote conducted by the Wisconsin Employment Relations Commission. The Employer proposes that a modified fair share be provided for in the Collective Bargaining Agreement, which would fair share all existing members of the Association and all new hires, but would exempt those employees who are not now Association members from coverage.

Considerable evidence was submitted at hearing by both parties with respect to the fair share issue, and in their briefs both parties provided persuasive argument in support of their position on fair share. Additionally, both parties cited prior awards in mediation-arbitration proceedings in support of their respective positions. The undersigned has considered all of the evidence and argument with respect to the fair share issue, and is not persuaded to find for either party on the fair share issue as it is disputed here. In earlier awards this arbitrator has held that the inclusion or exclusion of the fair share provision in a collective bargaining agreement, where other issues are also disputed between the parties, will be determined by the decision with respect to the other disputed issues.[2] In view of the other issues involved in this dispute, which the undersigned considers to be of major import with respect to the relationships between the parties, the inclusion of full fair share or modified fair share as it is disputed here will turn on which party's final offer is selected for inclusion in the Collective Bargaining Agreement as it is determined from the other disputed issues. Fair share, therefore, is not a controlling issue in this dispute.

SUMMARY AND CONCLUSIONS:

Having concluded that the fair share issue will turn on the decision with respect to the disputed issues: and having concluded that the provisions of the predecessor agreement with respect to non-renewals for layoff and other reasons should be continued for the term of this Agreement: it follows that the final offer of the Employer is adopted.

Based on the record in its entirety, the argument of counsel, and after considering the statutory criteria, the undersigned makes the following:

AWARD

The final offer of the Employer, along with the stipulations of the parties which reflect prior agreements in bargaining: and the provisions of the predecessor Collective Bargaining Agreement which remained unchanged during the course of bargaining; are to be incorporated into the written Collective Bargaining Agreement of the parties.

Dated at Fond du Lac, Wisconsin, this 12th day of June, 1980.

Jos. B. Kerkman,
Mediator-Arbitrator

JBK:rr

2) See Fox Point Joint School District No. 8, Case X, No. 22657, Decision No. 16352-A, MED/ARB-50: Portage Community School District, Case X, No. 23316, Decision No. 16608-A, MED/ARB-169; Appleton Area School District, Case XXVII, No. 24838, Decision No. 17202-A, MED/ARB-461