WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
SCHOOL DISTRICT OF WEST ALLIS-WEST MILWAUKEE, et al	:	
and	:	AWARD AND OPINION
MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO, LOCAL 80	:	Decision No. 17760-A

Case No.	XXXII No. 24595, MED/ARB 396
Hearing Date	July 23, 1980
Appearances:	
For the School District	Foley & Lardner, Attorneys at Law, by MR. HERBERT P. WIEDEMANN
For the Union	Podell, Ugent & Cross., S.C., Attorneys at Law, by MS. NOLA J. HITCHCOCK CROSS
Arbitrator	MR. ROBERT J. MUELLER
Date of Award	October 8, 1980

BACKGROUND

Local 80 and Milwaukee District Council 48, AFSCME, AFL-CIO, hereinafter referred to as the Union, and the School District of West Allis-West Milwaukee, et al, hereinafter referred to as the District, were parties to a Collective Bargaining Agreement covering the custodian and maintenance employees employed by the Employer, which agreement expired on June 30, 1979.

Prior to its expiration, the parties engaged in negotiations for the purpose of reaching a negotiated agreement on the terms of a successor agreement. The parties were able to reach agreement on all terms and conditions of such successor agreement with the exception of one issue. On May 21, 1979, the Union filed a petition with the Commission requesting the initiation of mediation-arbitration. An impasse was thereafter certified and by order dated May 1, 1980, the Commission appointed the undersigned to serve as mediator-arbitrator.

Under date of May 6, 1980, the Notice of Initial Mediation-Arbitration Session was issued setting July 23, 1979, as the date at which mediation attempts would be made to secure resolution of the dispute and failing resolution through mediation efforts, that in the event the parties determined not to withdraw their final offers, that the matter would be heard in arbitration on that same date. Mediation was thereafter engaged in on such date, which failed to result in voluntary resolution of the parties' dispute. The matter was thereafter presented to the undersigned in arbitration for final and binding determination. Briefs were filed by both

parties and exchanged through the arbitrator on August 25, 1980.

ISSUE

The issue concerns the choice of the final offer of either the Union or the District on the basis of determining which offer is the more reasonable by application of factors A through H, Section 111.70(4)(cm7) of the Wisconsin Statutes.

FINAL OFFERS OF THE PARTIES

The provision of the prior Collective Bargaining Agreement to which the final offers of both parties relate, provided as follows:

"ARTICLE VI - Seniority.

"A. Strict seniority based upon the employee's last date of appointment to his current classification shall be used to determine the relative rights of employees.

"B. Strict seniority shall govern transfer of custodians and cleaners within classifications. When a permanent vacancy occurs that vacancy is to be posted and the most senior employee in that classification posting for the position shall be appointed to the position.

"The last remaining vacancy in a classification will be filled in accordance with the appropriate promotion procedure.

"C. A temporary vacancy within the classification of custodian shall be filled after the seventh (7th) calendar day in the following manner: first, by the most senior individual in that classification who is willing to accept the vacancy; then, by the highest ranking individual on the eligible list for the position who is willing to accept the position; finally, by the most senior employee in the next lower classification who is willing to accept the position. The steward shall furnish to the department head a list of custodians by classification who are available to fill temporary vacancies. The list shall be revised and brought up to date every six months, or upon request of the department head.

"D. In case an assignment is eliminated such as through the closing of a school, the employee so displaced may pick any assignment currently being held by an employee with less seniority in the same classification. The employee so displaced may bump any other employee in his classification with less seniority and so on down the line. If the Board decides to close a school it shall communicate that fact to the Union as promptly as is practical after the decision has been reached so that there will be opportunity for the Union to discuss with the Business Manager or his designee the specific employee moves which will be involved before such moves are implemented."

UNION'S FINAL OFFER

"The present contract language shall be changed as follows:

"Article VI, Paragraph D, 2nd sentence shall be changed to read, 'The employee so displaced may bump any other employee in his/her classification or lower classification with less seniority and this form of bumping shall continue until the least senior employee is laid off.

"'Employees shall be recalled from layoff according to their seniority. No new employees shall be hired until all employees on layoff status, who are qualified and desire to return to work, have been recalled.'"

DISTRICT'S FINAL OFFER

"Delete paragraph D of Article VI and replace it with the following paragraphs:

"D. In case an assignment is eliminated (sic) such as through the closing of a school, the employee so displaced may pick any assignment currently being held by an employee with less seniority in the same classification. The employee so displaced may bump any other employee in his classification with less seniority and so on down the line.

"E. An employee removed from a classification shall be entitled to replace the least senior employee in any lower-paid classification provided the employee in the higher classification (i) has greater seniority than the employee to be replaced, and (ii) has the necessary skills to perform satisfactorily the work of the lower-paid classification without training. If the employee in the higher classification is unable to replace another employee he shall be laid off.

"F. A laid off employee shall have the right of recall for a period of two (2) years following the date of layoff. Recall shall be in writing and shall be mailed, certified, return receipt requested, to the last address of the employee shown on the Board's records. It shall be the responsibility of each employee on layoff to keep the Board advised in writing of his current whereabouts. Such notice shall be mailed within five (5) working days after such job vacancy is known to exist. Within ten (10) working days after notice of recall is mailed to the employee he must advise the Board in writing that he accepts the position offered and that he will commence employment on the date specified by the Board. During any time consumed in implementing the notice and in receiving the employee's response, or during any time consumed by any extension of the reporting date which may be granted by the Board pursuant to the employee's request, the position may be filled by a temporary employee.

"G. If the Board decides to close a school it shall communicate that fact to the Union as promptly as is practical after the decision has been reached so that there will be opportunity for the Union to discuss with the Director of Business Services or his designee the specific

employee moves which will be involved before such moves are implemented. "

ARGUMENTS OF THE PARTIES
AND DISCUSSION

In its brief, at pages 2-4, the District describes the procedures and effect of the respective final offers of the parties as follows:

> "With respect to layoff, the final offer of the Union seeks to allow an employee displaced from his classification to 'bump' any employee in a lower classification, thereby selecting a specific work assignment, with subsequent bumping by others in that lower classification so that, only after a multiplicity of work assignment selections, the least senior employee would be removed; and the employee removed would be afforded the same opportunity to bump in thenext lower classification, with a consequent multiplicity of work assignment selections therein, and so on, until the least senior employee in the unit was laid off. The right to engage in this bumping would not be limited at all in the Union's final offer by any concept of ability to do the work. With respect to recall, the final offer of the Union would establish the right to recall without any procedure to govern the notice of recall and response thereto and without any limitation as to time.
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> "The final offer of the District would permit an employee displaced from a classification to bump into a lower classification but only to replace the least senior employee in that lower classification, thus avoiding a multiplicity of assignment changes, and then only if the individual seeking to bump could perform the work of the lower classification without training. With respect to recall, the final offer of the District would establish a procedure to govern recall notice and response and would extinguish recall rights after a period of layoff of two years."

The Union, in its brief, described the issues to be considered as reflected by the two final offers to consist of the following matters:

> "...The parties had reached agreement on all issues but except those relating to layoffs: (1) the bumping rights of senior employees, (2) the qualifications necessary for a senior employee wishing to bump a junior employee, (3) the length of time for which laid-off employees are to retain the right to be recalled, and (4) the use of non-bargaining unit employees to fill temporary vacancies pending completion of the recall procedure for a given position." (Union brief, page 1)

And, at pages 5-6 they state:

> "The Employer's severely limited bumping procedure proposal changes what the Union has regarded as a clearly established policy of district-wide bumping for more than twelve years. The original intent of the parties, according to the only witness who was party to the contract negotiations in 1967 when the bumping language was first negotiated, was that 'The order of reverse bumping was clear

You start with the No. 1, which would be the man with the most seniority, and all the way down the line.' (Galloway, Tr. 24)

"The Union's proposed bumping procedure provision is merely intended to clarify the existing bumping language because the Employer has recently chosen to put a different interpretation on the current wording. (Gregory, Tr. 47-48)....

"The very purpose of the contract provision, then, was to further seniority and this purpose must be kept in the forefront of any attempt to interpret its meaning. It is a well known and cardinal rule of construction that a provision must be interpreted in a manner which will further, not frustrate the very purpose of the provision which is, in this case, to reward seniority when layoffs are necessary."

The Union further contends that the interest and welfare of the public is best served by the Union's final proposal. They contend that in those cases involving promotion and transfer, that a number of custodial position changes take place at any one time during the meetings called for that purpose. They state at pages 8 and 10 of their brief as follows:

"...The District has not offered one shred of evidence to substantiate its claim that district-wide bumping would have a disruptive effect. The School District's concern is purely speculative and consists of no more than testimony which amounts to conjecture that disruption might occur....

"Thus, it is clear the Union's proposal would, in fact, be far less disruptive than the current assignment system which the District's Business Manager admits results in numerous reassignments in a single meeting. But to go even further, the District's proposal would itself be disruptive. It allows for absolutely no flexibility when bumping into a lower classification. The senior employee could not bump any less senior employee, but only the least senior employee. Thus, he would have no choice but to take a school assignment which might have severe consequences: require a long drive across town and thus indirectly increase the hours of work and noncompensable transportation expense; require more or different work such as grass cutting and working with children's furniture; loss of dayshift hours; loss of overtime opportunity; or even force the employee to work under a principal from whom the senior employee had previously sought and secured a transfer because of personality differences. Certainly, the public would be disadvantaged by the poor morale and perhaps lower productivity which may result from forcing a senior employee into an extremely undesirable school assignment while numerous less senior employees enjoy better hours and working conditions. While the contract would allow employees to transfer and promote to desirable assignments according to seniority, at the time of layoff under the District's proposal the employee would be forced into a single position without regard to seniority."

The Union further contended that the District's final offer would have a chilling effect on the willingness of employees to seek promotion. They contend that employees would be reluctant to

apply for promotion to a school that may be targeted for closure in the near future. They pointed to the fact that the District currently has a vacant position in the Custodian III classification and that the District has been unable to obtain any applicants for such position from the Custodian II employees and as a result has opened the promotion to employees classified as Custodian I's.

The Union further contends that with respect to the District's proposal that employees exercising bumping rights must possess the necessary skills to perform the work without training, that the "without training" condition could lead to or result in a strict interpretation that could possibly prevent even on-the-job orientation to an employee and thus serve to disqualify him from bumping into a lower classification job.

The Union contends that while their final proposal does not provide that the employee possess the ability to perform the job into which the employee seeks to bump, that such condition is an implicit contractual requirement. They state at page 15 as follows:

> "The Union's proposed final offer is again the more reasonable alternative. The lack of explicit qualifications does not change the general rule that a bumping employee must have the ability to perform the job bumped into. Here the bumping employees would be, for the most part, custodians with a broad range of experience. It is unlikely they will bump into a job with which they are totally unfamiliar. By avoiding unnecessary wordage the Union's proposed final offer also avoids artificial barriers which could certainly be used to prevent a senior employer from exercising seniority, when, after an orientation, he or she could perform the work."

With respect to the recall period during which employees would remain subject to recall while on layoff, the Union contends that from a comparison standpoint to other public employers, that the vast majority of such comparables provide unlimited recall rights and that the two-year recall period as proposed by the Employer would have an adverse effect on the stability of employment.

Finally, the Union contends that the District's proposal would allow the filling of temporary vacancies with non-bargining unit personnel and that if the District's proposed final offer were accepted, it would conflict with Section C of Article VI which has been stipulated by the parties as remaining in the contract.

In its brief, the Union contends that the relevant statutory factors which are to be applied by the arbitrator in resolving this dispute, are as follows:

> "...The general standard in Wisconsin is that the Arbitrator must select the most reasonable total package. To ensure that this goal is reached, the legislature has directed arbitrators to give weight to a list of the factors set forth in Sec. 111.70(4)(cm) 7, Wis. Stats. The relevant factors in this proceeding include the comparison of similar collective bargaining agreements, the continuity and stability of employment and changes in the stability of employment during the pendency of the arbitration proceedings."

At page 10 of their brief, the District addresses such point as follows:

> "The choice between the two positions comes down to a determination of which is more justified by comparison

with contractual provisions in effect for employees performing similar services in comparable school districts, i.e., the standard set forth in §111.70(4)(cm)7,d; none of the other standards is really applicable."

Section 111.70(4)(cm)7 of the Wisconsin Statutes states in relevant part as follows:

"7. 'Factors considered.' In making any decision under the arbitration procedures authorized by this subsection, the mediator-arbitrator shall give weight to the following factors:"

The Union's argument and evidence brings into application and consideration the following referred to factors of such statute.

"c. The interests and welfare of the public and the financial ability of the unit of government to meet the costs of any proposed settlement.

"d. Comparison of wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes performing similar services and with other employes generally in public employment in the same community and in comparable communities and in private employment in the same community and in comparable communities.

. . .

"h. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment."

The District's evidence and argument was directed primarily at the comparison factor of subparagraph d.

Both parties presented numerous exhibits which consisted of excerpts of primarily the layoff and recall provisions of neighboring school districts. The Union submitted excerpts from 22 collective bargaining agreements of school districts in the general Milwaukee area. The District presented excerpts of 14 school district contracts in the same general area. A number of exhibits presented by each involved the same contracts.

The arbitrator has undertaken an evaluation and comparison of all contracts submitted by both parties and has attempted to break down the comparison into three basic categories.

First, such contracts have been compared and examined in an attempt to determine comparability with respect to the procedure and extent of bumping that is provided for employees in cases of layoff. Of the 26 different contracts reviewed, such study and evaluation revealed that four contracts contained specific language similar to that posed by the District in their final offer whereby employees can bump within their classification with the last employee bumped from such classification being allowed to bump the least senior employee in a lower classification. Such contracts containing specific language of that nature were those of South

Milwaukee, Menominee Falls, (particularly Section 10.03 thereof), Whitefish Bay and North Shore Suburban.

Of the 26 contracts reviewed, 2 appear to specifically favor the Union's final proposal, namely Oak Creek-Franklin (Unit #1) and Shorewood.

The second group of contracts which appear to favor the District's final proposal by virtue of contract language which appears to provide that layoff is to be by seniority but where the right to assign or transfer employees appears to be vested in the Employer and that such transfer and/or assignment of employees is not subject to any particular vacancy being subject to posting and being filled by recognition of seniority, involves those contracts of Cudahy, Whitnall, Elmbrook and St. Francis.

A third group of contracts which arguably could be construed as slightly favoring the Union's final proposal by virtue of their containing layoff provisions providing that layoff is to be by seniority but where such contracts contain other provisions involving posting of vacancies which would appear to require that such vacancies be filled by posting and filled by reference to seniority or seniority and qualifications, involve those contracts of Glendale, Greendale, Maple Dale-Indian Hill, Waukesha, and Muskego-Norway. What makes an evaluation and determination of those contracts extremely difficult, is the fact that the total contracts were not placed into evidence and one cannot determine whether or not the seniority groups involved in each contract involved a number of different classifications or whether or not they involved but a single or possibly two or three separate classifications. The Greenfield contract could possibly be added to such category but it is specifically noted that the Greenfield contract contains only two job categories and employees appear to be allowed to bump into a lower job category but the right to assign and transfer appears to be vested in the Employer. For instance, the Oak Creek-Franklin (Unit #2) contract which covers custodial aide and laundry workers, contains a straight seniority layoff that is separately applied to each of the two separate classifications.

In both Waukesha and Muskego-Norway, the contract provides that the least senior employee is to be laid off irrespective of building location. It would then appear that such vacancies created by such layoffs would be filled subject to the posting provisions. It is not possible to tell from the exhibits presented as to how many different classifications are involved in either of such two contracts.

The Greendale contract likewise is not clear. Such contract appears to provide for seniority by classification, however, it appears that an employee can bump a less senior employee in a lower classification. It also appears that transfer of employees is subject to recognition of seniority.

The arbitrator has been unable to determine from an examination of the Franklin, Nicolet and Wauwatosa contracts whether such contracts' provisions would tend to favor either the District or the Union proposal. The Wauwatosa contract contains a number of references to the Civil Service procedures which have not been provided and are not before the arbitrator for evaluation. With respect to the Nicolet contract, it indicates that the least senior employee is to be laid off. It is not clear, however, as to the number of classifications that may be involved in the maintenance and custodial force or whether the right to assign is restricted

in any way or if vacancies are required to be posted and if so, whether they are subject to recognition of seniority.

The Franklin contract is similar to the Nicolet contract in that one is unable to determine whether or not vacancies are subject to posting and being filled by recognition of seniority. Such contract does contain in the management rights clause, a specific reference to the right of the Employer to assign employees.

A final analysis of the comparable contracts submitted as to the bumping procedures contained within such contracts, would appear to favor the District's proposal to some extent.

The second aspect from which the comparable contracts were evaluated, involved the consideration of whether or not the contracts contained reference to employees possessing the ability to perform the available work as a condition of bumping and retention of employment. In its brief, the Union contended that nine of the 22 contracts submitted by the Union as comparables, required qualification. Of the 14 comparable contracts submitted by the District, the Union contends that 6 called for qualifications.

In reviewing the total of 26 contracts that were submitted by both parties, the arbitrator arrives at the judgment that 19 of such contracts effectively provided as a condition of bumping that the bumping employee possess the ability to perform the available work. Such number is made up by those contracts where the contractual provisions specifically provide that such employee must possess the ability and qualifications to perform the available work or the work of the job into which he seeks to bump and the other group of contracts included within the 19 are placed there by virtue of the fact that such other contracts contain separate classification seniority and by virtue of such single classification grouping, all employees within such classification are deemed to be qualified and capable of performing the work of their classification.

Five of the 26 contracts do not appear to contain any provision referring to an employee being required to possess the ability and qualifications to perform the available work. It appears, however, that in those contracts, that there are very few separate classifications and that the employees are basically grouped into a single or several interchangeable qualifications wherein employees are deemed to be interchangeable and qualified in every respect.

In the West Allis-West Milwaukee contract involved in this case, the evidence reveals that the custodial and maintenance bargaining unit is made up of 14 different classifications. The listing of classifications and number of employees in each was presented as Employer's Exhibit 6 and was as follows:

Classification	Number of Employees
Electrician II	1
Plumber	1
Carpenter	4
Sr. Painter	1
Temp. Control	1
Welder	1
Painter	2
Custodian IV	3
Custodian III	3
Custodian II	22
Storekeeper	1

Utility Serviceman	1
Custodian I	18
Cleaners	64

It would appear from the above evaluation, that the comparables would indicate that the District's offer is the more comparable in that it requires that an employee who seeks to bump into a lower paid classification must have the necessary skills to perform satisfactorily the work of the lower paid classification.

The Union contended that the District's proposal which adds "without training" to such provision constitutes an undue restriction and therefore removes it from one of being comparable. The Union referred, however, to several reported arbitration cases to the effect that even where a contract requires an employee to possess the requisite ability to perform the work, that an employee is nevertheless entitled to a reasonable orientation period in order to become acquainted with the procedures and duties of a job. The undersigned has had occasion to rule on such type issue in the past and in the process has engaged in independent research of cases involving such issue, and the Union is correct in asserting that such interpretation is the one that is followed by the vast majority of arbitrators. It therefore follows that the District's offer in referring to the fact that an employee must possess the necessary skills to perform satisfactorily the work of the lower paid classification without training, that such provision does not include and mean that such employee is not to be granted a reasonable orientation and familiarization period of a new job.

The Union also argued that the Union proposal, even though it does not specifically refer to the fact that a bumping employee must possess the ability to perform the work, that their proposal does incorporate that condition as an implicit requirement. The Union has citedCopps Distributing Co., 53 LA 733 (Gundermann, 1969), in support of such position. The arbitrator is of the judgment that such case does not address the contention made by the Union. In that case, the contract contained no reference or condition that the senior employee must possess the ability and qualifications to perform the available work. That case, however, involved an employee who attempted to bump into a warehouseman's job where as part of the duties in such job, the employee was required to drive different vehicles. The evidence in that case revealed that such employee had been found to be medically unable to drive any type of vehicle by his own doctor. In that case, the employee was medically and factually unable to perform the work that was required of the job. The result in that case does not establish that the ability to perform the work of a particular job is in fact an implicit contractual requirement in any layoff type situation.

In Dana Corp., 27 LA 203, Arbitrator Richard Mittenthal, 1956, ruled that a provision which made seniority controlling in filling a job where there was no reference to qualifications to fill the job, that the arbitrator was without authority to read into such provision that implied condition and that the clear language as expressed by the parties, controlled. In such case, the arbitrator ruled that the senior employee was entitled to the award of a promotional job despite the clear showing that he was not qualified.

In the considered judgment of the undersigned, the fact that the Union's proposed amendment to Article VI, paragraph d, does not incorporate as a condition of bumping that such bumping employee possess the qualifications and ability to perform the available work of the job into which he bumps, is critical in this case.

The primary reason that the undersigned reaches that conclusion in this case, is the fact that the contract contains a large number of separate and distinct classifications. For example, the contract contains craft classifications involving electricians, plumbers, carpenters, welders, and painters. Clearly, those classifications are recognized as being skilled craft jobs. Where the Employer may have in its employ a plumber with relatively little seniority, and an employee in a cleaner classification finds his job eliminated and thereby seeks to bump into the plumber classification by virtue of having greater seniority than the plumber, one could have a situation where without reference to the employee having qualifications and ability to perform the work of the job, that one could have a cleaner with no plumbing experience whatsoever being entitled to bump into a craft position. That result is simply impractical and yet if one follows the reasoning expressed by Arbitrator Mittenthal to the effect that the literal contractual terms mean what they say and are unambiguous, then an arbitrator has no authority to modify clear and unambiguous language and such result would follow.

The arbitrator has also reviewed and analyzed the 26 labor contracts from the standpoint of finding comparability concerning the period during which employees remain subject to recall while on layoff. From an examination of the 26 contracts, it appears that the majority of such contracts favor the Union's proposal in that the period during which an employee on layoff remains subject to recall is unlimited. There are several contracts that provide for recall rights of one year, 18 months, 3 years, or the length of seniority of the laid off employee, but the majority of them either contain no reference to that subject matter or provide for an unlimited period during which they are subject to recall.

The arbitrator has likewise reviewed the various contracts for the purpose of determining comparability with respect to whether or not the majority of contracts contain some more specific reference to the procedure to be employed in recalling employees from layoff. From such examination, it appears that the majority of such comparable contracts do contain in varying degree some provisions that are somewhat specific in setting forth the procedure to be utilized in recalling employees from layoff and providing for a time period during which such employees are expected to respond. In that respect, it would appear that the District's offer is to be favored slightly.

From the above comparability analysis of the various elements involved in the provision in issue, it appears that from an overall standpoint, that the District's final offer is to be preferred by application of statutory factor d. Where there appear to be more than one or two classifications in the bargaining unit, it appears that the majority of such contracts do contain some various type restrictions or freedom of assignment within the Employer on the right of employees to bid and select positions into which they may bump in lower classifications.

The most critical aspect of the comparison, however, in the judgment of the arbitrator, concerns the fact that the Union's proposal does not contain any reference to the bumping employee being required to possess the qualifications and ability to perform the job into which he seeks to bump. In the judgment of the arbitrator, the lack of such provision is critical and one of extreme importance.

It is noted that in the Union's proposal, on recall, does refer to qualifications. It very well may have been that the Union was of the belief that qualifications were an