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WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STATE OF WISCONSIN

PUBLIC EMPLOYMENT RELATIONS BOARD

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| In the Matter of Mediation/ Arbitration | OPINION & AWARD |
| between | Interest Arbitration |
| Northwest United Educators | WERC Case No. 36786 |
| -and- | MED/ARB - 3868<br>Decision No. 23836-A |
| Lake Holcombe School District | Before: J.C. Fogelberg<br>Mediator/Arbitrator |

Representation -

For the Association:
Alan Manson, Executive Director

For the District:
Kathryn J. Prenn, Attorney

Preliminary Statement -

The Lake Holcombe School District, hereinafter referred to as the "District" or "Board" or "Employer," is a municipal employer maintaining its principal offices in Lake Holcombe, Wisconsin. The Northwest United Educators, hereinafter referred to as the "Association" or the "NUE," is exclusive collective bargaining representative for all regular full-time and part-time aides, cooks, busdrivers, secretaries, custodial, and maintenance employees employed by the District.

The District and the Association together have been parties to a Collective Bargaining Agreement covering the wages, hours and working conditions of the employees in the bargaining unit since 1983. Most recently, their contract expired on June 30, 1985. The parties were unsuccessful in their efforts to achieve a complete voluntary settlement regarding the terms of their new 1985-87 contract, and consequently on April 8, 1986 the Board filed a petition with the Wisconsin Employment Relations Commission requesting initiation of the mediation/arbitration process pursuant to Section 111.70(4)(cm)6 of the Wisconsin Statutes. On May 29, 1986 the investigator appointed by the Commission met with the parties in an effort to resolve their remaining differences. The results of this investigation indicated that the parties were "deadlocked" in their negotiations and accordingly he notified the Commission that the parties remained at impasse. Subsequently, the Commission ordered the parties to proceed to mediation/arbitration, and eventually the undersigned was chosen as the Neutral. On January 7, 1987 a meeting was conducted with the Association and the District whereupon efforts were undertaken to reach a voluntary settlement through mediation. When it became apparent that the matter was not going to be settled voluntarily, the mediator/arbitrator directed the parties to move

to arbitration which followed on that same date. At the hearing, evidence was received and testimony taken relative to the outstanding issue, at the conclusion of which the parties indicated a preference for filing summary briefs and thereafter reply briefs. The last of the written documents were received by the Neutral on or before April 3, 1987, at which time the hearing was deemed officially closed.

The Issue -

The only issue in dispute is whether the settlement of the 1985-87 contract will include a side letter regarding subcontracting. More particularly, the sentence in dispute reads as follows:

> "The Board agrees that during the term of this contract no employee will be laid off as a result of any subcontracting action by the Employer."

Position of the Parties -

District's Position: That the Collective Bargaining Agreement executed by the parties for the 1985-87 term exclude the aforequoted sentence concerning subcontracting.

Association's Position: The NUE, conversely, has proposed the retention of the sentence in issue during the term of the parties' third collective bargaining agreement in the form of a side letter as it has in the previous two

contracts.

Analysis of the Evidence

From even the most cursory examination of the evidence, it is quite clear that this particular dispute is rather unique in that the more common issues which are normally the subject of impasse proceedings arising under the statute, are absent in this instance. The resolution of this dispute centers on one narrowly defined issue: whether a single sentence heretofore utilized by the parties in their contract negotiations as a means of obtaining a settlement, should be continued during the term of the third contract. While the Arbitrator has given due consideration to the statutory criteria enumerated in Wisconsin Statutes 111.70 (4)(cm)7 as mandated, the more commonly relied upon factors such as wage comparisons, consumer price indexes, and overall compensation received by other (municipal) employees, are necessarily subordinate to "other factors not confined to the foregoing ...." (h). More particularly, and most significantly in the Arbitrator's view, is the matter of "status quo" (or the "dynamic status quo" as referred to by the Employer) as it relates to the issue of whether the previous language set forth in the parties' side letter

should remain in effect for the term of the successor agreement. As the Association points out in their summary brief, the "fundamental issue" that remains is whether the parties will "continue in effect the accommodation they previously made ..." (at page 2).

A review of the history of the contract negotiations in the District indicates that near the end of negotiations over the initial master agreement (April 1984) the issue of subcontracting remained outstanding. Robert West, then chief negotiator for the Association, testified that this question had become a "barrier" by the end of the 1983-84 school year, as both sides proposed language which would either prohibit subcontracting altogether (Association's position) or expressly authorize the Board to subcontract for services (Employer's position). The settlement ultimately arrived at was the same sentence now in issue, which took the form of a "side letter" and was appended to the Master Contract. During the negotiations over the successor contract (1984-85) the issue was again addressed and again the parties agreed to resolve the matter by way of a side letter which served as an addendum to the Contract (Employer Exhibit 5). The language utilized in the 1983-84 letter was continued verbatim. Additionally however, the summary document (drafted by the District's counsel at that time,

Stevens Riley) contained the following language, " ... it is understood that, with respect to the subcontracting matter, the side agreement is only good for the term of this collective bargaining agreement." Not unlike the preceding year, this supplementary agreement was executed toward the end of the contract term itself (April 1985). Subsequently the parties undertook efforts to reach a settlement on a new two-year contract covering the 1985-86 and 1986-87 school years. With the exception of the certified issue which is the subject of these proceedings, all matters including wages and related fringe benefits, had been agreed to by the parties. However, throughout the term of the proposed contract (1985-87) the Employer has continued to administer under the previous (1984-85) agreement. This includes the payment of wages, fringe benefits, vacation, sick leave, etc. At the commencement of the current school year however, the District (after conducting a feasibility study) began to subcontract its transportation services to an independent carrier.

Simply stated, the District asserts that the side letter executed by the parties in each of the preceding agreements is not part of the "status quo" and therefore the Board was not obligated to honor its terms after June 30, 1985. In support of this position the Board has relied upon the

"dynamic status quo doctrine" adopted by the Wisconsin Employment Relations Commission and the attendant criteria related to it which includes the bargaining history of the parties, past practice and the contract language itself. As referenced by the District in their written summary, the Commission identified certain essential elements of the doctrine in Kenosha County, Dec. No. 22167-B (March 1986) in which they state:

> "As we have defined it, the dynamic status quo doctrine calls for an examination of the language, past practice and bargaining history relevant to the manner in which employees have been compensated to determine what the status quo as to compensation is and whether said status quo contemplates changes in compensation during a contractual hiatus."

Though the subject matter addressed in the Kenosha and related decisions, dealt specifically with compensation schemes and schedules, the Arbitrator nevertheless finds that the same principle can be reasonably applied to a "language" issue such as the one certified in the instant matter.

In arguing their position, the Employer writes:

> "The tests for determining the status quo must be applied in a manner consistent with the purposes of the dynamic status quo doctrine: to preserve the intent of the parties as expressed in the predecessor agreement by affording the parties the full benefits of the bargain while a successor agreement is negotiated. It is the 'deal' which must be

> held in place. If changes in circumstances during hiatus require the parties to adjust their conduct to maintain compliance with the terms of the expired agreement, then the appropriate adjustment must be made. As this commission has noted, failure to make such adjustment amounts to a unilateral change which ...
>
> > ... undercuts the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith.
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> Wisconsin Rapids, at p. 14, citing NLRB v. Katz, 396 US 736, 50 LRRM 2177 (1962). City of Brookfield, dec. no. 19822-C (WERC, 11-84) at p. 12, and Green County, dec. no. 20308-B (WERC 11-84) at 18-19. The dynamic status quo doctrine aims to affect the parties' intent, guaranteeing that the parties' expectation interests will be fulfilled during the hiatus period while the successor agreement is consummated ... Accordingly, it is elementary that the dynamic status quo doctrine should not be applied in a manner which frustrates the intent of the parties." (emphasis provided)[1]

The Association does not really quarrel with the application of the doctrine itself to the immediate dispute (reply brief, p. 3) but quickly adds that it supports their position rather than the Board's. Further, the NUE contends that by unilaterally subcontracting the student transportation during the contract hiatus, the Employer has effectively undercut the integrity of the collective bargaining process and most particularly the very doctrine which the District now seeks to rely upon.

Applying the doctrine which both sides agree is most

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[1] Employer Summary Brief, p. 7.

relevant to the evidence as developed at the hearing, the Arbitrator finds that the employees' position is more persuasive. Contrary to the District's assertion, the record does not establish the "evaporation" of the side letter in June of 1985. Rather, the clear language in the summary letter authored by the Employer's representative in the spring of 1985 (Employer Exhibit 5) states (in relevant part) that: "With respect to the subcontracting matter, the side agreement is only good for the term of this collective bargaining agreement" (emphasis added). There is no dispute but that the sentence in issue was then included in the "addendum" to the 1984-85 contract, just as it was during the term of the preceding contract. There is also no argument that the language in question played an integral part in the settlement of both the 1983-84 and 1984-85 contracts and that it was treated as part of the overall agreement reached by the parties. Indeed, the document signed by the representatives for both sides in the spring of 1985 (authored by the Employer's attorney) states specifically that the summary of items agreed to was to "serve as an addendum" to the contract. It was, in the words of School Board President Don Moga, "attached to the contract" in each of the first two agreements. If the parties intended that the subcontracting

provision, along with the other amendments referenced in the April 22, 1985 letter, were to serve as a supplement, or "addendum" to the master agreement, then it is not unreasonable to conclude that it was an integral part of the parties' overall settlement and should be considered status quo. Clearly the issue of subcontracting was a major one in contract negotiations for both the first two agreements. It is equally clear from an examination of the evidence that the parties' failure to resolve this issue threatened any settlement possibilities in 1984 and again in 1985. As stated by Assistant Superintendent Don Lapp at the hearing, the letter was "put in as a way to get a contract." Moreover, it is significant to note that with the exception of the language here in issue, the District has continued to administer the predecessor (1984-85) agreement until the new (1985-87) contract is executed. If all other provisions agreed to by the parties in 1985 have been carried forward and honored by the District (to date) then it follows that there should be a clear manifestation of the parties' intent not to accord the side letter the same status.

The District maintains that the language in paragraph nine of their Exhibit 5 (the 1985 "agreements") is a clear indication of the parties' intent that the side letter would "terminate" at the expiration of the 1984-85 agreement and

would not continue as part of the status quo. This argument must be rejected however, in light of the unrefuted evidence that all other matters agreed to in the document continued beyond the contract term. Clearly, the District was concerned regarding the retention of its right to subcontract. The evidence substantiates this claim. However, the evidence does not support the Board's argument that paragraph nine specifically called for the "evaporation" of the side letter on June 30, 1985. Rather, the Neutral finds the Association's explanation of this language to be the more plausible. NUE Exhibit 4 indicates that the original side letter attached to the 1983-84 contract did not have an expiration date. While the letter itself was appended to the initial master contract, it was preceded immediately by Article 15 which addressed the effective and expiration dates. Between the language in Article 15 and the side letter were the signatures of the parties which normally indicates the consummation of any agreement. When both sides had reached a settlement on the successor contract which would again include the same side letter, the Employer proposed and the Association agreed to the language in paragraph nine. The NUE's chief negotiator, Robert West, explained that the primary reason for the additional clause however, was to specifically tie the expiration of the side letter to the Master Contract itself.

According to West, this was not objectionable to the Association as it coincided with their belief that the life of the letter was tied directly to the Contract's duration clause in the first place. As noted, West was the chief negotiator for the bargaining unit in 1985 and testified that he was present at all negotiation sessions. The testimony was not significantly refuted at the hearing. Moreover, the Employer's representative at the time (Stevens Riley) and the author of District Exhibit 5, was not present to testify.

In the final analysis, the Arbitrator believes that the evidence supports the position taken by the Association. Clearly, this matter has been the subject of considerable debate between the parties since the initial negotiations commenced in 1983. In bargaining over both the first and second labor agreement, this issue has expended an inordinate amount of their time and energies. The fact that it has remained as the only item preventing a settlement for the 1985-87 contract term, is further evidence of its significance. In the Arbitrator's view, the parties' "expectation interests" over what was to occur during the hiatus period, was to continue the status quo - not only with the contract provisions themselves, but also with regard to the (very pivotal) side letter. What the Association is proposing here is nothing more than what has been practiced in the

District since the inception of collective bargaining between these parties. By awarding the NUE final offer, there will in effect be a continuation of another "status quo" - the inclusion of the same language in a side letter as a means of establishing a new contract. Of the two final positions certified, the Association's best continues the parties' collective bargaining relationship. If one party to an agreement wishes to make a fundamental change in the collective bargaining relationship (absent a showing of exceptional circumstances) then that alteration can best be accomplished through the give and take of negotiations. Certainly the Arbitrator is cognizant of the financial environment in which this District finds itself and understands its desire to operate as efficiently as possible. However at the same time, whatever methods the Board chooses to utilize in an effort to control costs must necessarily be considered along with the realities of their obligation to the employees affected, and most significantly, when the changes proposed bear directly upon an established relationship.

Award -

Accordingly, for the reasons set forth above, any and all stipulations entered into by the parties and the