IN THE MATTER OF ARBITRATION	)	INTEREST AWARD
between	)	
School District of River Falls, Wisconsin	)	Wages Subcontracting
-and-	)	Case 19 No. 42611 INT/ARB-5335 Decision No. 26266-A
West Central Education Association (River Falls Special Education Assistants)	)	May 21, 1990

APPEARANCES

For School District of River Falls

Richard Ricci, Attorney, Mulcahy & Wherry, Eau Claire, Wisconsin
Charles Brenden, Superintendent
Steve Healy, School Board Member
Bernie Curti, School Board Member
Seth Sqeerstra, School Board Member
Barbara Rebhuhn, Director of Special Education
Elizabeth Kidd, Administrative Secretary

For West Central Education Association (River Falls Special Education Assistants)

Jeffrey L. Roy, Executive Director
Jim Begalke, Executive Director
Eileen Eggen, Negotiator

JURISDICTION OF ARBITRATOR

On April 11, 1989, the Parties, School District of River Falls (hereinafter referred to as the "School District" or "Employer") and the West Central Education Association (River Falls Special Education Assistants) (hereinafter referred to as the "Union" or "Association") exchanged initial proposals on matters to be included in a new collective bargaining agreement to succeed the agreement in effect from August 15, 1987 through August 14, 1989. Thereafter the Parties met on three occasions in efforts to reach an accord on a new collective bargaining agreement. The School District filed a petition for arbitration on July 27, 1989, requesting that the Commission initiate

arbitration pursuant to Sec. 111.70(4)(cm)6 of the Municipal Employment Act.

On October 11, 1989, Richard B. McLaughlin, a member of the Commission's staff, conducted an investigation which reflected that the Parties were deadlocked in their negotiations, and, by December 1, 1989, the Parties submitted to said Investigator their final offers, written positions regarding authorization of inclusion of nonresidents of Wisconsin on the arbitration panel to be submitted by the Commission, as well as a stipulation on matters agreed upon, and thereupon the Investigator notified the Parties that the investigation was closed; and that the said Investigator has advised the Commission that the Parties remain at impasse.

The Commission having, on December 21, 1989, issued an Order requiring that arbitration be initiated for the purpose of resolving the impasse arising in collective bargaining between the Parties on matters affecting wages, hours and conditions of employment of all full-time and regular part-time Special Education Assistants by the School District, excluding professional, managerial, supervisory, confidential, temporary, casual and all other employees of the School District; and on the same date the Commission having furnished the Parties a panel of arbitrators for the purpose of selecting a single arbitrator to resolve said impasse; and the Commission having, on January 12, 1990, been advised that the Parties selected Richard John Miller, New Hope, Minnesota, as the arbitrator.

A hearing in the matter convened on March 27, 1990, at the River Falls High School. Commencing at approximately 1:00 p.m., the undersigned mediated in an attempt to reach an agreement between the Parties. Unable to reach an agreement, both Parties submitted numerous exhibits and testimony at the arbitration hearing following the mediation session. Post hearing briefs were filed by the Parties. The briefs were exchanged through the arbitrator's office on May 3, 1990. The Parties agreed at the end of the arbitration hearing that they would waive the opportunity to file a reply brief, after which the record was considered closed on May 3, 1990.

POSITIONS OF THE PARTIES

This case is unusual in that salary and fringe benefits are not the primary issue in dispute between the Parties. The hourly wages offers of the Parties are the same for the 1989-90 school year and for the second year (1990-91), the Association is requesting $.05 more per hour as follows:

	SCHOOL BOARD OFFER		UNION OFFER	
	1989-90	1990-91	1989-90	1990-91
1. First Year	5.85	6.00	5.85	6.05
2. Second Year	6.05	6.20	6.05	6.25
3. Third Year	6.25	6.40	6.25	6.45
4. Fourth Year	6.45	6.60	6.45	6.65
5. Fifth Year	6.65	6.80	6.65	6.85
6. Sixth Year	6.95	7.10	6.95	7.15
7. Seventh Year	7.35	7.50	7.35	7.55
8. Eighth Year	7.75	7.90	7.75	7.95
9. Ninth Year and Thereafter	8.00	8.15	8.00	8.20

While there is a minor wage differential of $.05 per hour for the second year of the contract, this issue is secondary to the major stumbling block - that of the subcontracting language appearing in Article XVIII, Management Rights, Section L of the 1987-89 collective bargaining agreement. That provision currently provides:

> The Board shall reserve the right to subcontract for goods and services as it deems necessary. However, prior to August 15, 1989, the District shall not subcontract any services now being exclusively performed by bargaining unit members.

The Union's final offer proposes that the current phrase "prior to August 15, 1989" be changed to "prior to August 15, 1991". The Employer, on the other hand, proposes that the current phrase "prior to August 15, 1989" remain in the contract with no change in date which effectively reserves the School Board the right to subcontract for goods and services as it deems necessary.

ANALYSIS OF THE EVIDENCE

The arbitrator evaluated the final offers of the Parties in light of the criteria set forth in Wis. Stats. 111.70(4)(cm)7, which includes:

> 7. Factors considered. In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator shall give weight to the following factors:
>
> a. The lawful authority of the municipal employer.
>
> b. Stipulations of the parties.

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 employees involved in the arbitration proceedings with the wages, hours, and conditions of employment of other employees generally in public employment in the same community and in comparable communities.

e. Comparison of wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours, and conditions of employment of other employees performing similar services.

f. Comparison of wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours, and conditions of employment of other employees in private employment in the same community and in comparable communities.

g. The average consumer prices for goods and services, commonly known as the cost-of-living.

h. The overall compensation presently received by the municipal employees, including direct wage compensation, vacation, holidays and excused time, insurance and pension, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

i. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

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 River Falls Special Education Assistants (hereinafter referred to as "Assistants") are a special bargaining unit certified by the State of Wisconsin. The Assistants work with students from River Falls and surrounding school districts in West Central Wisconsin. These schools are in a number of athletic conferences which include the Big Rivers, Middle Border and Dunn-

St. Croix. These school districts, as well as Somerset, are also contained in the CESA #11 area.

River Falls is in a transitional period, moving from the Middle Border Athletic Conference (consisting of Amery, Baldwin-Woodville, Bloomer, Durand, Ellsworth, Hudson, Mondovi, and New Richmond) to the Big Rivers Athletic Conference that includes the generally larger schools of Chippewa Falls, Eau Claire, Hudson, Menomonie and Rice Lake. It would be unrealistic to expect River Falls to be automatically compared to Big Rivers schools in its first year of extra-curricular competition. It is therefore deemed appropriate to include the Middle Border schools among the comparables. For that reason both the Union and the School District use both conferences as a basis for comparison.

Included within CESA #11 are the schools contained in the Dunn-St. Croix Athletic Conference consisting of Arkansaw, Boyceville, Colfax, Elk Mound, Elmwood, Glenwood City, Plum City, Prescott, St. Croix Central, Somerset and Spring Valley. Since the Assistants work with special education students from Elmwood, Somerset and Prescott which are member schools of the Dunn-St. Croix Athletic Conference, it would reasonable to include this entire Conference as a comparable. Moreover, this data base is desperately needed for comparison purposes for the 1990-91 school year as there is only the non-union settlement in Hudson and Menomonie's as yet undetermined cost-of-living increase among the other agreed upon comparables.

In addition, the Assistants in CESA #11 is a valid comparable since they are in a similar situation as the River Falls Assistants. In CESA #11, the Assistants are certified and are assigned to different school districts to work with special education students. In the case of River Falls Assistants, the surrounding schools send their special education students to the School District and they are taught there.

Prior to the arbitration hearing, the arbitrator attempted to resolve the issue of extending the date in the subcontracting language found in Article XVIII, Section L of the contract. Both Parties had expressed that the nickel per hour greater difference in the Association's position compared to that of the School District for 1990-91 was not a real issue in dispute. In fact, it was stated by the School District that if the Association would agree to allow the Employer the right to subcontract it would agree to give the nickel difference on the hourly rate. Likewise, the Association stated that if the School District would agree to extend the date to the end of the new contract period (August 15, 1991) in the subcontracting language, it would give up the nickel difference on the hourly rate for 1990-91.

Suffice it to say, there is no serious issue over wages. Even if there was a significant issue, the difference in total

compensation between the hourly rates of the Parties for 1990-91 is only $778.00. The School District never alleged that it was unable to adequately fund that amount.

Although the Parties agreed to a $.25 per hour wage across-the-board wage increase for 1989-90, the average increase per employee is $.48 per hour with step advancement. That figure is 7.61% over 1988-89. The Employer's offer for 1990-91 represents a $.15 per hour increase across-the-board, with the average increase per employee of $.33 per hour for a 4.56% increase over 1989-90. The Association's final offer of a nickel more than the School District's offer represents an average increase per employee of 5.28%. In essence, the School Board is offering a 12.17% wage only increase over the two years of the agreement and a two-year total package increase of 12.80%. This compares to the Association's final offer of a 12.89% wage only increase over the two years and a two-year total package increase of 13.53%.

From the data which is available for 1989-90 wages, River Falls compares favorably at the minimum and maximum wage rates to the Middle Border Conference schools while near the bottom among the larger Big Rivers Conference schools. Based on 1989-90 only, Rivers Falls' increase in wages only, at 7.61%, is well above the majority of the comparables - second only to Menomonie in the Big Rivers Conference and to Baldwin-Woodville in the Middle Border.

It is an exercise in futility to attempt a justification of either of the Parties' final offers for 1990-91, based on the non-union settlement in Hudson, Menomonie's as yet undetermined cost-of-living increase, and CESA #11 as yet undetermined increase which is one percent less than the percentile settlement of the CESA #11 professional staff. Although Hudson has agreed upon a two-year wages only increase of 9.5%, which is behind the School District's offer of 12.17%, one settlement is not a valid basis to accept any of the Parties' final offer, let alone concluding that the School District's offer is the best as it is closer to the sole settlement.

The School District's total package two-year offer of 12.89% is higher than the two-year total of its bus drivers (11.66%), custodians (12.5%), paraprofessionals (12.01%), and below its food service employees (13.13%). Yet, all of these groups are non-union and do not collectively bargain with the School District. The only other unionized unit beside the Assistants are the secretaries. They like the Assistants are in the binding arbitration mode. However, the School District's total package offer made to the secretaries (14.13%) is more than that sought by the Association for its Assistants. The School District claims their offer to the secretaries bargaining unit is based on catch-up. If anything, the internal data shows that the School District's total package offer over two years of 12.89% is hardly less reasonable than that of the Union's at 13.53%.

Because it cannot be determined at this time what the cost of living will be for the remaining months in 1990, let alone until the end of the effective date of the contract on August 15, 1991, this factor can be given very little weight. At the present the CPI (4.20%) is running closer to the School District's final total package offer of 4.62% than the Union's offer of 5.34%. Time, of course, will tell whether this trend will continue until the duration of the contract in 1991.

Not only has the Parties determined that wages is not the important issue in this proceeding, the record is also devoid of any large sampling of external settlement data among any of the comparables that would substantiate either of the Parties' final wage offers for 1990-91. This same conclusion also applies to internal comparisons and the cost of living data. The arbitrator is thus left with deciding the outcome of this case on the subcontracting issue.

At first blush while reading the Parties' briefs, the arbitrator was certain that the Parties had reached a settlement on the subcontracting issue since they both were arguing to maintain the status quo. Of course, the arbitrator was in error about a settlement of this issue, but not over the apparent difference between the Parties concerning the meaning of status quo.

Black Law Dictionary, Fifth Edition, 1979, West Publ. Co., defines status quo as the "existing state of things at any given date." By extending the date in the new contract to August 15, 1991, the intent of the language would be the same as it was in the current contract - to prohibit the School District from subcontracting for goods and services as it deems necessary. Allowing the language to expire in the new contract would alter the "existing state of" conditions which exist in the current contract and would give the School District the right to contract out for goods and services now being exclusively performed by bargaining unit members. Contrary to the position taken by the School District, this changes the "status quo".

It is universally held by arbitrators that two conditions must be satisfied by the moving party to sustain its burden of proof to alter the status quo. The first condition is that there must be a demonstrated need for the change. The second condition is if the need has been demonstrated, has the moving party provided a quid pro quo for the proposed change.

Ironic as it may seem, the School District has not demonstrated a business need to subcontract for goods and/or services as it openly admits that it has no intention during the duration of this contract to subcontract for any work that is now being exclusively performed by bargaining unit members.

Further, there has been no offer for a "quid pro quo" made by the School District. To the contrary, the wage offer made to the Association was a nickel less per hour than offered by the Association.

Since neither a need for change has been demonstrated nor a quid pro quo has been made by the School District, the Employer's proposal to allow the right to subcontract for the first time has no merit. Moreover, since the School District has no plans for subcontracting any goods or services out of this bargaining unit, there is no valid reason to allow the School District to change the status quo for something they may want to do in the future. If the School District desires to subcontract in the future, it should be done in bargaining where tradeoffs can be made. Under these circumstances, the arbitrator is unwilling to grant to the School District in arbitration the unilateral right to subcontract for which it was unable to successfully achieve in bargaining without making further concessions to the Union.

Not only has the School District failed to meet the conditions to change the status quo, external comparables show that very few of the schools grant that sought by the School District - the unfettered right to subcontract for goods and services as it deems necessary. In fact, most of the schools do not have the right to subcontract. Of the schools that have the right to subcontract most have modifying language such as staff will not be reduced as a result of subcontracting; subcontracting must be bargained; subcontracting cannot be arbitrary or capricious, etc.

Taking the School District alone, the internal comparables show that the Employer has the right to subcontract with modified conditions in regards to non-represented employees. The language in the 1987-89 secretarial contract is identical to that in the current Assistants contract. The secretaries like the Assistants have resisted the School District's right to subcontract and are so serious about this issue, it is before an interest arbitrator.

The School District vigorously contends that the existing subcontracting language was agreed upon by the Employer as a sunsetting provision in order to effect a settlement in the initial current contract between the Parties. The Association disagrees with that position and instead proposes to extend the date in the current contract from August 15, 1989 to August 15, 1991.

The arbitrator has spent an enormous amount of time reviewing the testimony, negotiations proposals and the notes taken by the Parties' negotiators during the 1987 negotiations leading to the current subcontracting language in dispute. In a nutshell, the record is devoid of any **mutual** understanding between the Parties that the current subcontracting language would be a sunset

provision. This may have been the understanding of the School District's negotiators, but it was never agreed to by the Association during the first time bargaining of this language. Nor is the language itself a sunset provision. Had the School District obtained language such as "for the term of this agreement only" which it once proposed, it would have been a "sunset provision" that would dissolve at the end of the contract date. By placing a date in the contract, the current language became a negotiable item for consideration by the Parties in negotiations for the new contract rather than being a mere sunset provision which ended August 15, 1989.

In summary, the Union has established no need to change the status quo, nor is such a change supported by external or internal comparables. In addition, there was no mutual understanding or agreement that the existing subcontracting language in Article XVIII, Section L was a sunset provision ending August 15, 1989. As such, the Union's proposal to change the date to August 15, 1991, must be awarded.

AWARD

Based upon the statutory criteria in Wis. Stats. 111.70(4)(cm)(7), the above evidence and the entire record, the arbitrator selects the final offer of the Association and directs that it, along with any and all stipulations entered into by the Parties, be incorporated into the new collective bargaining agreement.

Richard John Miller

Dated May 21, 1990, at New Hope, Minnesota.