

STATE OF WISCONSIN

:

CIRCUIT COURT
BRANCH IV

:

DANE COUNTY

MADISON METROPOLITAN SCHOOL DISTRICT,
CITY OF MADISON, VILLAGES OF MAPLE BLUFF
AND SHOREWOOD HILLS, TOWNS OF MADISON,
BLOOMING GROVE, FITCHBURG AND BURKE:
THE BOARD OF EDUCATION OF MADISON METRO-
POLITAN SCHOOL DISTRICT, CITY OF MADISON,
ET AL.,

Petitioner,

Case #157-075

DECISION

-vs-

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent,

Decision No. 14038-B

MADISON TEACHERS INCORPORATED,

Intervenor Respondent.

The several petitioners have commenced this action for review of a decision and order of the Wisconsin Employment Relations Commission dated April 5, 1977. That decision affirmed the findings of fact and conclusions of law made by Examiner Byron Yaffe after a hearing was conducted upon a complaint filed by Madison Teachers Incorporated. The examiner and the Commission found that the petitioner school district had refused to comply with an arbitration award made on August 19, 1975 by Arbitrator Max Raskin concerning the assignability of bus loading supervision duties at Cherokee Middle School and, therefore, the school district had committed a prohibited practice under Wis. Stats. Section 111.70(3)(a)5, the Municipal Employment Relations Act.

The petitioners believe that the Commission has erroneously interpreted Wis. Stats. Section 298.10(1)(d) and that a proper interpretation will compel the Commission to set aside their order and vacate the arbitrator's award pursuant to Wis. Stats. Section 227.20(5) and (8). In short, they claim that the arbitration award is not "final and binding on all parties" because it is forbidden by law.

The factual background that led to the filing of the grievance and resulting arbitration process need only be briefly recounted here.

Since a school boundary change in 1971, Cherokee Junior High School has extensively utilized buses to transport students to and from school. Specifically, two yellow school buses owned and operated by Richardson Bus Co. have been used to transport students residing in the Town of Fitchburg, four "specials" (grey buses owned and operated by the Madison Metro Transportation Service) which have been used by students residing in Madison, and a regular main line Madison Metro bus has been used by students. The "special" buses were open to the public, although they were used predominantly by students.

To avoid a safety hazard during the after school boarding process, the principal of Cherokee Middle School, Mr. Donald Stoddard, assigned teachers to supervise students as they boarded the buses. This "bus duty" policy continued in effect from 1971 until the present.

The teachers who were assigned to the "bus duty" spent ten to fifteen minutes outside until 3:30 p.m. each day after classes for one week, twice each year. Normal school hours under the Teacher's Collective Bargaining Agreement for the period of January 1, 1973 through December 31, 1974, were 8:00 a.m. to 4:00 p.m. Thus, the assignment was completed within the normal teacher's work day.

The subject of "bus duty" was not specifically mentioned in the collective bargaining agreement; however, various provisions of that agreement were considered relevant by the arbitrator and the parties:

I. A. (1)(a) Management Rights Clause

"The Board of Education on its own behalf hereby retains and reserves unto itself, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by applicable law, rules, and regulations to establish the framework of school policies and projects including, (but without limitation) because of enumeration, the right:

- a. To the executive management and administrative control of the school system and its properties, programs and facilities.
- b. To employ all personnel and, subject to the provisions of law or State Department of Public Instruction regulations, determine their qualifications and conditions of employment, or their dismissal or demotion, their promotion and their work assignment.
- c. To establish and supervise the program of instruction and to establish and provide supervision under agreed upon rules for such programs of an extra-curricular nature as the Board of Education feels are of benefit to students.
- d. To determine means and methods of instructions, selection of textbooks, and other teaching materials, the use of teaching aids, class schedules, hours of instruction, length of school year, and terms and conditions of employment." (Emphasis added).

III.M. Extra Duty Compensation Schedule

1. "Teachers performing in a professional extra duty situation as listed on the extra duty compensation schedule shall be paid a percent of one of three base rates. . . .
 3. A schedule for teacher supervision at athletic events, social activities and other school related functions is effective 1-1-71. . . .
 - a. All employment shall be voluntary. No position shall require assignment of teachers.
 - b. Teachers assigned to a particular school who wish to volunteer for such employment as listed below, shall submit their names to their principal. The principal shall place these names on a list and make assignments from the list.
 - c. If there are fewer applicants than there are openings, teachers from other schools may be solicited to volunteer.
 - d. Teachers who volunteer for this employment shall be paid at the rate of .0007 X base per hour.
. . . .
- * Noon Hour Playground and Lunchroom Supervision .0006 X base per hour (Bases 2 and 3 not used) Compensation is computed in 1/2 hour lots"
(Emphasis added)

V.F. Supervision of Elementary Playgrounds

1. "School grounds are supervised by school personnel fifteen minutes before classes convene in the morning, during the school day when pupils are participating in a scheduled school activity, and until school is officially dismissed.
2. Pupils are not to be on the school grounds prior to the designated and supervised period in the morning; pupils are to leave the school grounds immediately upon dismissal in the afternoon unless participating in a teacher supervised activity.
3. Elementary teachers shall not be required as part of their regular teaching duties to supervise playground activity during the noon lunch period and more particularly during that period fifteen minutes before school opens at noon, except as provided in Article V, Paragraph N hereof (Duty Free Lunch)."

V.N. Duty Free Lunch

1. "All members of the professional staff shall be provided with a daily duty-free lunch period of at least 30 continuous minutes.
2. The principals of the schools shall seek to employ adequate and responsible lay personnel to supervise the lunch period.
3. If it is not possible to employ such adequate and responsible lay personnel, and if individual teachers employed at the school do not volunteer to serve in a supervisory capacity during the noon lunch period, then--
 - a. The principal shall declare a condition of emergency and shall appeal to the Area Director for relief. . . .
 - c. If, in the opinion of the Superintendent, following this review no solution can be reached, then, the Superintendent shall have the authority to order the principal to assign all teachers employed in the school to serve lunch duty on a rotating basis.
 - d. Such lunch duty shall be compensated for at the agreed upon rate and shall not replace the guaranteed 1/2 hour duty-free lunch. . . ."

The petitioners believe that Arbitrator Raskin's award enjoining further non-negotiated "bus duty" assignments was a "perverse misconstruction" of the collective bargaining agreement; unsupported by principles of contract construction and the law of the shop.

The Commission determined that the petitioners committed a prohibited practice under Wis. Stats. Section 111.70(3)(a)5 by failing to comply with the arbitration award. Although neither party sought to confirm or vacate the award directly under Wis. Stats. Section 298.09 and Section 298.10, this Court must necessarily now review that award.

The parties have ably set forth the standards of review upon which this Court must proceed. The basic standards for review are set out in Wis. Stats. Section 298.10(1) which provides in part:

"(1) In either of the following cases the court in and for the county wherein the award was made must make an order vacating the award upon the application of any party to the arbitration: . . .

- (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

Similar standards are reflected in common law rulings. "[A]n award may be set aside for fraud or partiality or gross mistake by the arbitrator; fraud or misconduct of the parties affecting the result; or want of jurisdiction in the arbitrator." Jt. School Dist. No. 10 v. Jefferson Ed. Assoc., (1977) 78 Wis. 2d 94, 116, 253 N.W. 2d 536. An arbitrator's award is considered legitimate "only so long as it draws its essence from the Collective Bargaining Agreement." United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 4 L.Ed. 2d 1424, 80 S. Ct. 1358 (1960). This "essence" test has been interpreted to mean that an arbitrator's award must be upheld "if the interpretation can in any rational way be derived from the agreement viewed in the light of its language, its context, and any other indicia of the parties' intention." The reviewing court may vacate the award when "there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop." Ludwig Honold Mfg. Co. v. Fletcher, 405 F. 2d 1128 (1969). The rule in Wisconsin was stated in Jefferson, supra, at p. 117-118:

"The decision of an arbitrator cannot be interfered with for mere errors of judgment as to law or fact. Courts will overturn an arbitrator's award if there is a perverse misconstruction or if there is positive misconduct plainly established, or if there is a manifest disregard of the law, or if the award itself is illegal or violates strong public policy."

The arbitrator's award states at p. 7:

"While the contract is silent on the subject of bus duty assignment, it does speak of a number of duties that teachers may undertake on a voluntary basis such as supervision at athletic, social, and other school related functions of a non-academic nature . . . "

This portion of his decision obviously refers to Section III.M.(3) of the collective bargaining agreement.

Finally, the arbitrator stated:

"Bus loading supervision on the part of teachers is not within the scope of their employment nor is it reasonably related to professional teachers services."

Thus, the arbitrator found that (as a factual matter) "bus duty" was something of an extra-curricular nature; yet a school related function. As such "supervision" may only be established "under agreed upon rules". The arbitrator apparently also reasoned ejusdem generis that "bus duty" should be included within the intended meaning of the phrase "and other school related functions" at III.M.(3) of the agreement, and, therefore, such duty must be "voluntary" and compensated according to that section.

Although this interpretation may not be identical with the interpretation this Court would give this contract, this is not to be a de novo determination. We are convinced that the reasoning of the arbitrator is not a "perverse misconstruction" nor is it a "manifest disregard of the law." Since the award is tied to contractual terms, the controversy was properly arbitrable, and no "concession" was "compelled" contrary to public policy. The arbitrator did not exceed his powers, and his award must be accorded finality.

While the scope of review available to this Court is very narrow, we feel that the legal arguments presented in this matter were not insubstantial and the petitioners refusal to comply with the arbitration award was not done in bad faith. Accordingly, this court will not award the respondents attorney's fees.

The order of the Commission is affirmed in all respects.

Judgment may be entered accordingly.

Dated this 28th day of December, 1977.

BY THE COURT:

William C. Sachtjen /s/
William C. Sachtjen
Circuit Judge

cc: Niemisto, Kops, Kelly