BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
JOURNAL/SENTINEL, INC.	Case 8 No. 41639 A-4398
and	
MILWAUKEE NEWSPAPER GUILD LOCAL 51	

Appearances:
Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Robert W. Mulcahy, on behalf of the Company.
Perry, Lerner & Quindel, S.C., Attorneys at Law, by Ms. Barbara Zack Quindel, on behalf of the Union.

ARBITRATION AWARD

The above-entitled parties, herein the Employer and Union, are privy to a collective bargaining agreement providing for final and binding arbitration before a Wisconsin Employment Relations Commission staff arbitrator. Pursuant thereto, I heard this matter on March 27, 1989 in Milwaukee, Wisconsin. The hearing was transcribed and both parties filed briefs and reply briefs which were received by June 19, 1989.

Based upon the entire record, I issue the following Award.

ISSUES:

1. Did the Employer violate Article XVIII, Section 4, and/or Article VII, Section 4, of the contract when it reduced the hourly wages of Tina Daniell, Marybeth Jacobson, and Mary Dooley when they went from full-time to part-time status and, if so, what is the appropriate remedy?

2. Is Robert Lynch's grievance arbitrable; is so, did the Employer violate Article XVIII, Section 4, when it reduced his hourly wage when he went from full-time to part-time status and, if so, what is the appropriate remedy?

DISCUSSION:

From 1970 onward the Employer paid about five employes - Michael Zahn, David Lagerman, Barbara Koppe, David Herrin Seeger, and Joy Sanasarian - the same part-time hourly rate that they earned as full-time employes. In two other instances involving employes David Lagerman and Kathleen N. Lynch it lowered their hourly wages.

On March 7, 1988, employe Tina Daniell, classified as a Journalist, went from full-time to part-time status after she returned from maternity leave and her hourly rate was cut from $14.28 to $13.75. 1/ Union Second Vice President Dave Hendrickson on April 20, 1988 filed a grievance over said reduction and Deputy Managing Editor Howard R. Fibich by letter dated May 8, 1988, denied it. Hendrickson by letter dated May 13, 1988 appealed said denial and on July 22, 1988 added Journalist Marybeth Jacobson as a grievant; when she went from full-time to part-time status upon returning from maternity leave she was reduced

1/ Daniell subsequently was restored to her 40 hour week schedule shortly before the hearing, but at the lower part-time rate of $13.75 an hour.

from $16.22 to $14.00 an hour. The Union by letter dated February 26, 1989 informed the Company that Journalist Mary Dooley would also be added to the case; upon her return from maternity leave she requested to go part-time but was turned down because no part-time work was available and she therefore had to work full-time. After threatening to quit if she was not given part-time status, the Employer reduced her hours on February 20, 1989, at which point her hourly rate was reduced from $15.62 to $14.00. On the day of the hearing, March 28, 1989, the Union amended its grievance again to include Robert Lynch whose hourly wage was cut from $6.50 as a Metro-Secretary to $5.20 as a Vitals Clerk when he went from full-time to part-time status on January 24, 1988.

The Employer establishes the hourly rates of employes who go from full-time to part-time status after consulting with them and it sometimes will raise those rates if requested to do so by employes, as it did here for Jacobson. In setting these wage rates, Employer representatives do not consult an employe's former supervisor for an evaluation of their worth. As to why it cuts the wage rates for employes who go from full to part-time, Deputy Managing Editor Fibich explained at hearing: "Part-time people are worth less to us that's why we pay them less and that's why we treat them the way we do.".

In support of its grievance, the Union primarily claims that Article XVIII, Section 4, of the contract prohibits the Employer from reducing the salary of bargaining unit members; that any other result would yield a harsh and arbitrary result; that the contract prohibits individual bargaining; and that the Employer violated Article VII, Section 4, by reducing the salary of women returning from maternity leave despite no change in their productive ability and that said change constituted sex discrimination. As to the Robert Lynch grievance, the Union asserts that his grievance is arbitrable because it did not know until the day of the hearing that the Employer had also reduced his salary when he went from full-time to part-time status so that he could return to school. As a remedy, the Union seeks: (1) a cease and desist order prohibiting the Employer from reducing the salary of employes who change from full to part-time status; and (2) making all the grievants whole by paying them the difference that they should have earned had their hourly wages not been reduced.

In reply, the Employer maintains that Article XVIII, Section 4, does not govern this dispute because the bargaining history surrounding said language only addressed full-time employes; because there is no set wage scale for either full-time or part-time employes in the contact other than the provision which mandates that the minimum salary for part-time employes cannot be less than 80 percent of full-time salaries; and because the Union in negotiations twice dropped proposals for full-time and part-time wage parity after this provision was negotiated. Furthermore, the Employer maintains that a past practice supports its position of lowering the hourly wages of full-time employes who switch to part-time status and it disputes any suggestion that it discriminates among its employes on the basis of sex, child bearing, or other reasons. Lastly, it argues that the Lynch grievance was untimely filed past the thirty-one (31) calendar days provided for in Article V, Section 1, of the grievance procedure and that it therefore is not arbitrable.

The resolution of this dispute must first start with Article XVIII, Section 4, of the contract which provides:

> There shall be no reduction in the salary of any employee during the life of this Agreement, except in those cases that are consistent with past practice.

The record shows that this reference to past practice was meant to cover a single situation involving a disabled employe. The record also shows, as noted above, that the Employer in the past has followed a mixed practice of what it pays employes who go from full-time to part-time status. Hence, this past practice proviso has no application here.

Standing alone, the remaining language supports the Union's grievance since its broad prohibition does not exclude those employes who go from full-time to part-time status, thereby indicating that they, too, cannot suffer any salary reduction.

Moreover, the record shows that Daniell, Jacobson and Dooley all performed similar duties as part-timers that they had performed as full-timers and that each one of them is highly competent, a point not disputed by the Employer. Furthermore, the Employer admits that this language precludes it from cutting the wages of either full-time employes who move to other full-time positions or part-time employes who move to other part-time positions even if the quality of their work declines or if they have fewer job responsibilities. That being so, the same principle seemingly would also apply to full-timers who become part-timers.

Section 2(E) of this same Article, however, casts a shadow over this principle since it provides that:

> The minimum rate of pay for part-time employes will be 80% of the full-time rate for their classification.

Well here, all of the grievants are part-time employes and all have been paid at least 80% of their former full-time salary, hence indicating that the Employer's actions are not violative of this part of the contract. Thus, what Article XVIII, Section 4, apparently giveth to employes, Article XVIII, Section 2(E), apparently taketh away.

In this connection, the Union asserts that this latter proviso is applicable only for new hires and that once employes are hired, the Employer is precluded under Article XVIII, Section 4, from cutting their wages for any reason. The problem with this assertion is that Article XVIII, Section 2(E), on its face does not say that since it has no words of limitation to that effect, hence indicating that it must be interpreted and applied as broadly as Article XVIII, Section 4.

These two contradictory provisions can be explained only by looking at bargaining history.

Article XVIII, Section 4, was agreed upon to deal with one problem, i.e., what happens when employes move from one full-time position to another full-time position and from one part-time position to another part-time position. Union representative Bruce Nelson, who headed the Union's bargaining team when this language was put into the contract, testified that it was aimed at prohibiting any reduction of pay for any reason during the life of the contract so that employes "would have the certainty during the life of the contract knowing that whatever else might happen, whatever other job that they were moved into or whatever other decision was made regarding merit pay or a transfer or a promotion, demotion, that their pay would be set, that it would not be less than that . . .". Employer Labor Relations Manager Richard Williams agreed that a person's salary should be frozen, testifying that when a full-time person moves from one full-time bargaining unit position to another "even if the responsibilities are reduced, you cannot reduce the employees rate of pay through a caveat of past practice".

A look at the contractual job classifications reveals why the parties were concerned over this issue: they show that there are four separate job classifi-cations - Journalists, News Information Center, Clerical and Secretarial, and Editorial Assistants - and that each classification has between 2 and 4 sub-classifications, thus producing a total of 13 subclassifications. This multiplicity of jobs can lead to considerable difficulty if the parties had to decide in every transfer situation whether an employe's salary should go up, remain the same, or go down. Hence, there is a very sound policy reason for the language found in Article XVIII, Section 4.

Article XVIII, Section 2(E), addresses another problem: should part-time employes be paid the same as full-time employes? The Union in past negotiations wanted to bring achieve parity between full-time and part-time employes and such parity remains one of its chief bargaining goals. The Employer, on the other hand, wants to maintain the historical differential between full and part-timers for the reason voted by Fibich earlier, i.e., the Employer's belief that "part-time people are worth less to us . . .".

The Union's brief attacks this claim and points to various record testimony to show that part-timers in fact are as valuable to the Employer as full-timers. That may or may not be so. But that cannot negate the fact that the Union in negotiations ultimately agreed to Article XVIII, Section 2(E), which recognized the difference between these two groups. Having agreed to that distinction, the Union now cannot complain over how the Employer has exercised its discretion on a case-by-case basis unless it violates another provision of the contract such as sex discrimination.

The parties thus agreed to two separate and different principles: (1) that no employes are to take a cut in pay when they laterally move from either one full-time job to another or from one part-time job to another; and (2) that part-timers are to be paid less than full-timers. But there was no agreement on a third principle: i.e., what is to happen when, as here, we have a hybrid situation of where full-timers voluntarily become part-timers. There was no agreement for a very simple reason: there was no discussion whatsoever between the parties over such situations, thereby leaving unanswered whether Article XVIII, Section 4, or Article XVIII, Section 2(E), prevails. 2/

Both parties acknowledge this lack of discussion and assert that it was the other side's burden to obtain language favoring the position they advance here. The Union thus argues that "If company spokespersons were aware of a specific practice of wage reduction when moving from full to part-time employment, the Employer should have negotiated for this exception as well", and that, moreover, no evidence was introduced "that Union negotiators knew of the history of full-time to part-time movement of employees . . ." when they negotiated the two past agreements. The Union also asserts that the only exception to Article XVIII, Section 4's, broad sweep involves an employe's physical disability and that if the Employer wished to exempt part-timers from under this language "it was incumbent upon the Company to negotiate a further exception . . .".

The Employer contends that since the Union proposed the language found in Article XVIII, Section 4, any ambiguity therein must be construed against the Union pursuant to well established arbitrable principles.

This burden of proof question goes to the heart of this controversy: was the Union or the Employer responsible for obtaining precise contract language to cover the problem presented here. The record shows that Union representatives in negotiations for the two contracts were unaware of this problem when they negotiated the disputed language. The fact remains, though, that there has been a mixed practice of the Employer in various cases either raising, lowering, or retaining the wages of full-time employes who went to part-time status. Those employes were certainly aware of their own situations and their knowledge must be chargeable to the Union since it represents them and since it is the one which wishes to tie the Employer's hands by taking away its historical discretion over what it pays employes going from full to part-time status. Having failed to obtain contract language restricting that discretion, it must be concluded that the Employer remains free to reduce the wages of such employes particularly when the record shows that there always has been a disparity between what full-timers and part-timers earn, a disparity which is codified in Article XVIII, Section 2(E). It thus follows that the Employer did not violate Article XVIII, Section 4, when it reduced the wages of the grievants.

Because of this finding, it is unnecessary to decide whether Robert Lynch's grievance is arbitrable. For even assuming arguendo that it is, it must be dismissed for this same reason, i.e., that there is nothing in the contract to prevent the Employer from cutting the wages of full-time employes who go to part-time.

Left for consideration is the Union's additional claim that the Employer violated Article VII, Section 4, "by reducing the salary of women returning from maternity leave despite no change in their productive ability", charging that the Employer's pay reduction policy has a disparate impact on women returning from maternity leaves, as reflected by Fibich's statement to grievant Jacobson: "We've had a lot of these women lately who want to go part-time

---

2/ Both parties point out that the other side in negotiations has tried to obtain language bearing on this issue, with the Employer attempting in recent negotiations to remove Section 4 of Article XVIII from the contract and with the Union in 1985 and 1987 negotiations attempting to obtain complete parity by deleting Article XVIII, Section 2(E). These efforts, though, cannot be given much consideration since they do not go to the crux of this dispute, i.e., that the parties never discussed the particular problem herein when they agreed to Article XVIII, Section 2(E) and Section 4. It is this absence of agreement which controls rather than what parties did on other related, but collateral, issues.

after they have babies and we're about full up".

Under different circumstances such a remark could be proof of sex discrimination thereby violating Article VII, Section 4, which provides:

> There shall be no dismissal of or other discrimination against an employe because of membership or activity in the Guild, nor because of age, sex, race, breed, color, national origin, marital or parental status, sexual orientation, or irrelevant mental or physical handicaps.

But here Fibich's statement to Jacobson referred to the limited number of part-time slots available, a legitimate Employer concern. Furthermore, the Employer correctly points out there was no discrimination since the Employer has treated men and women the same by also reducing the wages of some men who went from full-time to part-time status, including grievant Robert Lynch. Arguing otherwise, the Union asserts that statistics show that more women than men have had their wages reduced. That is true. But, it is true only because the statistical sample used - only 12 or so employes -is too small to show a meaningful pattern to that effect, especially since there was about only a 10 percent difference between the number of women and men who had their pay reduced, a difference which is too small in the context of the varying job responsibilities that all these employes performed. Furthermore, the record shows that the Employer has gone out of its way to accommodate the needs of child rearing mothers since it created special part-time positions for grievants Dooley and Jacobson, with Dooley acknowledging that Fibich "was sympathetic to my situation" and that "he encouraged me to come to him with any ideas that I had for part-time work for myself". Said statement fairly represents the Employer's actions on this issue, hence negating any claim of sex discrimin-ation. This grievance allegation therefore must also be denied and dismissed.

In light of the foregoing, it is my

AWARD

1. That the Employer did not violate Article XVIII, Section 4, or Article VII, Section 4, when it reduced the hourly wages of Tina Daniell, Marybeth Jacobson, and Mary Dooley when they went from full-time to part-time status.

2. That even assuming arguendo that his grievance was timely filed, the Employer did not violate Article XVIII, Section 4, when it reduced the hourly wages of Robert Lynch.

3. That the grievance is hereby denied and dismissed.

Dated at Madison, Wisconsin this 22nd day of September, 1989.

By _____
Amedeo Greco, Arbitrator