

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

HOWARD-SUAMICO SCHOOL DISTRICT

and

HOWARD-SUAMICO BOARD OF EDUCATION
EMPLOYEES LOCAL 3055, AFSCME, AFL-CIO

Case 32
No. 43103
MA-5896

Appearances:

Mulcahy and Wherry, S.C., by Mr. Robert W. Burns, on behalf of the
District.

Mr. James W. Miller, Staff Representative, Wisconsin Council #40, on behalf of the
Union.

ARBITRATION AWARD

The above-captioned parties, hereinafter the District and the Union respectively, are signatories to a collective bargaining agreement which provides for final and binding arbitration. Pursuant to said agreement, the undersigned was appointed by the Wisconsin Employment Relations Commission to hear the instant dispute. Hearing was held on January 10, 1990, in Green Bay, Wisconsin. A stenographic transcript was made and received by January 16, 1990. The parties concluded their briefing schedule on March 26, 1990. Based upon the record herein and the arguments of the parties, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to the framing of the issue.

The Union frames it as follows:

Did the District violate the collective bargaining agreement when it failed to post the new custodial (janitorial) position? If so, what is the appropriate remedy?

The District would define the issue as follows:

Did the District violate Article XVII, Job Postings, when it adjusted the hours of an employe, Jeff Blake, at Bayport High School?

PERTINENT CONTRACT PROVISIONS

ARTICLE II

MANAGEMENT RIGHTS

The Board possesses the sole right to operate the school system and all management, rights repose in it. These rights include, but are not limited to, the following:

- A. To direct all operations of the school system;
- B. To establish reasonable work rules and schedules of work;
- C. To create, combine, modify and eliminate positions within the school system;
- D. To hire, promote, transfer, schedule and assign employees in positions within the school system;
- E. To suspend, demote, discharge and take other disciplinary action against employees with reasonable cause;
- F. To relieve employees from their duties;
- G. To maintain efficiency of school system operation;
- H. To take whatever action is necessary to comply with State or Federal law;
- I. To introduce new or improved methods or facilities;
- J. To change existing methods or facilities;
- K. To determine the kinds and amounts of services to be performed as pertain to school system operations; and the number and kind of classifications to perform such services;
- L. To contract out for goods and services not within the scope of employee job descriptions;
- M. To determine the methods, means and personnel by which school system

- operations are to be conducted.
- N. To take whatever action is necessary to carry out the functions of the school system in situations of emergency.

The exercise of management rights in the above shall be done in accordance with the specific terms of this Agreement and shall not be interpreted so as to deny the employee's right of appeal.

. . .

ARTICLE XIII

HOURS OF WORK

Generally the hours of work for the various shifts are as follows:

- Day Shift (DS): 6:30 A.M. to 3:00 P.M.
- Night Shift (NS): 3:00 P.M. to 11:30 P.M.
- Late Shift (LS): 4:00 P.M. to 12:30 P.M.

Variances in these hours to conform with changing operational needs shall be discussed with the Union prior to making changes.

. . .

ARTICLE XVII

JOB POSTINGS

When new jobs are created or vacancies occur, such jobs shall be posted immediately and a job outline shall be included. The posting shall contain the following information: school, hours of work and rate of pay. Such postings shall remain posted for five (5) workdays before operation begins. Postings shall be mailed to the employee during the employee's vacation period.

The Employee seeking posted position shall submit the "Application Form for Posted Notice of Job Vacancy" form in duplicate with one (1) signed copy submitted to the District Office through the U.S. mail and one (1) signed copy to the Union Secretary. All bids received shall be opened at the end of the posting period.

Temporary employees shall not be eligible to bid for a posting.
Probationary employees shall be eligible to bid for a posting.
Probationary employees who are successful bidders shall serve

ninety (90) days probation from the date of the new assignment.

Seniority shall govern which employee gets the position if other qualifications are equal.

The successful applicant on all job postings shall be notified within forty-eight (48) hours when to report. Employees selected shall be allowed seven (7) calendar days to become familiar with the job, and there shall be no waiver of this period by the Employer or the employee.

. . .

ARTICLE XXIII

GRIEVANCE PROCEDURE

Definition of Grievance: A grievance shall mean a dispute concerning the interpretation or application of this contract. A grievant may be an individual, a group of employees or a representative of the Union.

. . .

Step 4 . . . The Arbitrator shall have no power to add to or subtract from or modify any term(s) of this Agreement. (The cost, if any of the Arbitrator shall be divided equally between the Employer and the Union.)

. . .

FACTS

The District hired a new Director of Business Services in August of 1987. During the course of the 1987-88 school year, he determined that a new janitorial position should be added at Bayport High School (the full-time custodial staff then consisted of one custodian during the day and two janitors in the evening.) The new position was posted, no bids were submitted and Jeff Blake was hired on or around September 24, 1988 to perform janitorial duties from 5:30 p.m. until 2:00 a.m. at the High School.

In August of 1989, Business Director John Keller and James Wenzel, the District's Director of Buildings and Grounds, determined that the high school's janitorial needs were not being met. They changed Blake's hours from 5:30 p.m. - 2:00 a.m. to 11:00 a.m. - 7:00 p.m. and shifted many of his work duties. Blake was reassigned from performing inside janitorial duties in the upstairs band and chorus room for the full eight hours to performing four hours of inside duties in

the shop area of the high school and four hours of outside duties such as lawn cutting, raking, walk shoveling, trash pick-up, etc. These outside duties had previously been performed by summer help and part-time help. Blake's band and chorus areas were then assigned to other housekeeping and janitorial staff.

Prior to adjusting Blake's hours, Keller and Wenzel discussed the matter with Michael Sheedy, President of the Union. They did not, however, post this hour and assignment change, but notified Blake of the schedule change by memorandum dated August 25, 1989. On September 11, 1989, another janitor in the District filed the instant grievance objecting to the District's failure to post a newly-created position.

POSITION OF THE PARTIES

Union

The Union maintains that this is a classic case of the employer posting and filling one position and then changing the hours and duties from unfavorable to more favorable hours and conditions of employment. The Union also cites Article XVII, line 539 which states, "When new jobs or vacancies occur. . ." strenuously asserting that this is a job as a janitor which never existed before.

According to the Union, although janitors have worked outside periodically, they have never been assigned to perform outdoor work on a regular or permanent basis. Because both the hours and duties were changed, it is clear that a new job was created.

In response to District arguments, the Union stresses that what the District is really saying is the following: "We didn't create a new job; we only changed the hours of the existing job, changed the duties of the existing job, changed all the work assignments of other people working at the school to accommodate this new job, and changed the assignment from eight hours of inside duty in a new area and four hours of outside duty, but we have not created a new job; it's the same job with a whole lot of changes." This argument, the Union asserts, is smoke and mirrors and of no substance because a new job has been created.

The Union stresses that it is not attempting to prohibit the District from creating jobs or changing hours but rather insists that if you change the job, the newly-changed job must be posted.

District

The District argues that it has the right to adjust hours of employes to meet its operational needs, relying upon inherent management rights, its management rights clause, Article II, Sections A, B and D and Article XIII, the Hours of Work provision of the agreement.

Pointing to Sections A, B and D, it notes that it has the right to "establish. . . schedules of work" and "schedule and assign employees. . ." Moreover, the Hours of Work provision notes "the hours of work" but recognizes variances in these hours" with the only restriction being that the District discuss such changes with the Union prior to implementation.

Stressing that there is no evidence to suggest that the operational concerns were not genuine, the District asserts, that this coupled with the clear language of the contract, conclusively establishes that the District was fully within its rights to adjust Blake's hours.

The District, in anticipation of Union arguments, avers that Article XVII - Job Posting is inapplicable because mere adjustment of an employees' hours is not "a new job or vacancy" pursuant to Article XVII which is the only circumstance under which the District is required to post. According to the District, while specific day-to-day tasks within certain time periods of the day may have changed, the job remained janitorial in form and substance and was consistent with the needs for which the position was created.

Noting that the District did post the new janitorial position when it was created the year before, it strenuously asserts that it did not have to repost it later when it only changed the hours of the job. According to the District, the Union is attempting to lump together a change in hours in an existing job with the creation of a new one, and these are two very different things.

Contending that nothing in Article XVII even hints that a change of hours occasions a posting obligation on the District's part, the District also alleges that the District has previously adjusted the work hours of another employe with no contention that the adjustment should have been posted as a "new job".

The District also points out that should the Union's argument be accepted, it would render the District's expressly recognized right to change hours as meaningless. If the Union's position were upheld, it could be argued that should the Union's argument be accepted, it would render the District's expressly recognized right to change hours as meaningless. If the Union's position were upheld, it could be argued that telling one of the janitors to clean a different room on a regular basis creates a new job, i.e., trading or changing cleaning areas between two janitors would result in two new jobs.

In conclusion, the District argues that by adjusting the hours of janitorial employe Blake, it complied with the agreement because the District discussed the matter with the Union prior to implementation and there was no obligation to post the change in hours. It requests that the grievance be obligation to post the change in hours. It requests that the grievance be denied in its entirety.

DISCUSSION

The crux of the instant dispute is whether or not the District may change Blake's hours and job duties without posting pursuant to Article XVII. While it is clear that both Article II and to some extent Article XIII permit the District to make work schedule changes or variances, nevertheless Articles II and XIII must be read in conjunction with Article XVII. Moreover, all three Articles must be harmonized, if possible.

Article XVII, the Job Posting provision, requires that postings contain the following information: "school, hours of work and rate of pay." These factors are listed so employes can consider location and shift along with the rate of pay in bidding for open positions as they arise.

The Union does not contest the District's original decision to hire an additional janitor onto a late shift which is at a slight variance with the hours set forth in Article XIII. The District was operating within its managerial prerogative in accordance with Articles II and XIII; and, more importantly, the position was posted as required by Article XVII. Clearly it was a "new job" and thus subject to the posting procedure.

When the District decided to change both the shift and job content of the posted position, the action which gives rise to the instant grievance, it did not post this opportunity. Stressing that the job is still simply janitorial in nature and that only the hours have been changed, the District argues that no "new job" was created.

The undersigned disagrees. Where, as here, the hours were significantly changed so that the employe is, in effect, working an entirely different shift and at least half of the job duties have been altered, it must be concluded based upon the following rationale that the District has "created a new job" subject to the posting provisions of Article XVII.

Article XVII, as noted above, sets forth the key elements which an employe would consider in deciding whether or not to post for a job. They are shift, location, pay and an outline of the job duties. Certainly such factors as shift, location and the type of duties to be performed make up the major components of any job. While any one of these factors may be adjusted slightly without the result constituting the creation of a new job, where as here, two of the major factors have been changed substantially, the job has not merely been modified.

The original posting was for performance of janitorial duties on a night shift at the High School from 5:30 p.m. - 2:00 a.m. To many employes, night shift work is less desirable. Although the record is vague as to actually what job outline of duties was provided in the original posting, the record evidence establishes that the job duties were modified to include performance of outside janitorial duties for approximately half of the work day. Again to many employes, the opportunity to work out-of-doors approximately half of the time may be more desirable. To others, it may appear less desirable. Because the District has significantly changed two of the key components of the job in question, it has under these circumstances created a "new job". 1/

1/ By so ruling the undersigned does not find that merely changing certain job duties of a custodial nature or exchanging duties constitutes the creation of a "new job" nor does making minor variations in scheduled work hours in and of itself result in the creation of a "new job".

By so ruling, the arbitrator does not create a nonsensical result which renders the management rights and hours of work provisions meaningless. Clearly the District still has the authority to make the requisite changes in hours and schedules to meet its operational needs pursuant to these articles. However, when the change results in substantially different hours, i.e., shifts, or a different location, the District must post the newly-created position so that the more senior qualified bargaining unit employes have an opportunity to bid on it. This interpretation gives meaning to all of the above provisions and harmonizes them rather than favoring any provision over another.

The District makes much of one other instance where it adjusted an employe's hours without posting and without the Union's objection. This instance is not persuasive because one instance, under these circumstances, does not constitute a waiver or a contrary past practice establish and, more significantly, the adjustment in the employe's work schedule was minor.

Accordingly, it is my decision and

AWARD

1. That the District violated Article XVII when it adjusted the hours and job content of employe Jeff Blake, without posting the newly-created position.
2. That the District is ordered to post said position pursuant to Article XVII.

Dated at Madison, Wisconsin this 24th day of April, 1990.

By _____
Mary Jo Schiavoni, Arbitrator