BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MILWAUKEE AREA VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT	
and	Case 306 No. 42817 MA-5813
LOCAL 587, AFSCME, AFL-CIO	

Appearances:
Quarles and Brady, Attorneys at Law, by Mr. David B. Kern, on behalf of the District.
Podell, Ugent & Cross, S.C., by Ms. Monica M. Murphy, on behalf of the Union.

ARBITRATION AWARD

The above captioned parties, hereinafter the District and the Union respectively, are parties 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 February 1, 1990 in Milwaukee, Wisconsin. No stenographic transcript was made. The parties concluded their briefing schedules on March 14, 1990. Based upon the record herein and the arguments of the parties, the undersigned issues the following Award.

ISSUE:

The parties at hearing stipulated that various affected employes were not paid shift differential and that they should have been so paid.

The sole issue for resolution is the period of backpay owed to the affected employes.

The parties further stipulate they will be able to compute what is owed once the period of backpay is determined.

RELEVANT CONTRACT PROVISIONS:

ARTICLE V. Grievance and Complaint Procedure.

Section 1 -- Definition of Grievance.

> It is agreed that a grievance is any matter which involves a violation of one or more specific provisions of this Agreement.

Section 2 - Steps.

Step 1. Verbal

> The union steward or officer, with or without the employee, shall take up the grievance verbally with the employee's immediate supervisor within twenty-five (25) working days of its occurrence; if at the time the Steward or officer is unaware of the grievance, he/she shall take it up within twenty-five (25) working days of his/her knowledge of its occurrence. The employee's immediate supervisor shall attempt to resolve the matter and shall respond verbally to the steward or officer within three (3) working days.

Step 2. Written

If the grievance has not been resolved satisfactorily, it shall be presented in writing by the union steward or officer to the employee's immediate supervisor within seven (7) working days after the supervisor's verbal response was due. The employee's immediate supervisor shall respond to the union steward or officer and employee within five (5) working days.

* * *

Step 5. Arbitration

If the grievance is not resolved satisfactorily, either party may appeal within twenty-five (25) working days after the written response of the manager of labor relations, or designee is due, for arbitration. The provisions covering arbitration are as follows:

a. Within five (5) working days of such appeal, either party may request the Wisconsin Employment Relations Commission to appoint an impartial arbitrator, who will arbitrate the grievance in accordance with Section 298.01 of the State Statutes.

b. The Arbitrator shall determine whether there has been a violation of one or more specific provisions of this Agreement, but shall have no power to amend this Agreement.

* * *

Section 4. Application of Time Limits.

a. Any time limit in this procedure may be extended by mutual consent, in writing, using the forms agreed upon by the parties.

b. If the grievance is not appealed to the next step of the procedure by the union within the prescribed time limits, it shall be considered closed.

c. Failure of the appropriate respondent to communicate the decision on a grievance at any step of the procedure within the specified time limit shall automatically allow the appeal of the grievance to the next step of the procedure.

ARTICLE XVIII -- SAVING CLAUSE.

* * *

The Board shall negotiate in good faith an attempt to reach an agreement with the Union (prior to implementation) on all matters concerning hours, wages, and working conditions in regard to the creation of a new classification or a reclassification resulting from the creation of a new operation, a new installation, or new equipment. If the parties are unable to reach an agreement on the adjustment to wages, hours, and working conditions as a result of such new equipment, operations, or installation, the Board may implement such change, provided, however, that the Union may utilize the regular grievance -- arbitration procedure (except that the Arbitrator shall be selected from a panel of private arbitrators furnished by the WERC) to review whether the failure of the Board to adjust the salary schedule for any affected position is arbitrary and inequitable, and if the arbitrator so determines, the remedy may include establishment of the appropriate salary schedule for the position with retroactivity to the extent determined appropriate by the arbitrator and not necessarily limited to the date of complaint (emphasis added).

POSITIONS OF THE PARTIES:

Union:

The Union maintains that the affected employes are entitled to all shift differential pay that they are owed dating back to the commencement of the collective bargaining agreement in July of 1987. It notes that arbitrators generally have authority to fashion a make-whole remedy unless otherwise

restricted by the agreement. According to the Union, other than the limitation imposed by the agreement against amending the agreement, there are no restrictions placed upon the arbitrator's ability to order a make-whole remedy.

The Union stresses that nothing short of an order awarding backpay from the initial date of the contract will suffice to remedy the alleged violation. It claims that the District is attempting to impose an artificial limit on its backpay liability. The appropriate starting point for the remedy is the start of the violation not the later discovery of the violation. The Union also argues that adopting the District's position would result in unjust enrichment to the District and would encourage further contract violations. Accordingly, it urges the undersigned to order a make-whole remedy from July 1, 1987, the start of the contract term.

District:

The main thrust of the District's argument is that the period of back pay should not extend prior to May 5, 1989 in light of the time limit for filing grievances set forth in the agreement. Pointing to the fact that a written grievance was initiated no earlier than June 26, 1989, it stresses that the grievance could cover action taken by the District no earlier than 35 working days prior to its filing, i.e. May 5, 1989. Any action by the District which was not the subject of a timely grievance is, in effect, a nullity even though it may constitute a "continuing violation."

According to the District, only the action by the District which falls within the time period for filing a grievance can appropriately be subject to a backpay order in this case. It further points out that any argument that the parties implicitly granted the arbitrator authority to grant backpay retroactive to the start of the contract is undercut by specific language which the parties did negotiate in another section of the agreement, the Savings clause.

The District also avers that an order applying backpay from the May 5, 1989 date is also in keeping with the equities of the case insofar as both parties have acknowledged that they are not aware of exactly when the problem arose or how many people are affected. It submits that to extend backpay to the initial date of the contract could have much broader implications in future cases where grieved conduct occurred prior to the 25-day time limit but during the contract term. Such a holding, the District claims, could read the grievance filing time limits right out of the contract. It therefore requests that backpay be limited to the May 5, 1989 date.

DISCUSSION:

The Union is correct when it points out that the arbitrator has the authority to fashion an appropriate make-whole remedy to correct the contract violation. The Union, however, must establish to the arbitrator's satisfaction the appropriate period for determining backpay. The Union has not, in the instant case, established entitlement by the grievants to back pay from the initial date of the contract. By the parties own admission, the Union and the District are unaware of when the problem arose. The Union, not the District, had and has the burden of proving the appropriate time period for the remedy.

The instant case presents a situation wherein no blame can be placed upon the Union for failing to proceed with a grievance with respect to a problem of which it was unaware. The same, however, cannot be said for the affected employes.

The grievance itself dated June 29, 1989 indicates that the affected employes were aware of the problem since at least the fall of 1988. It states "that the problem was discovered last fall but they still have not been paid." In response to the question "On what date did the above action or situation occur?", the answer listed is "It has been an ongoing situation since Ms. Pennington began; it has not been resolved since brought to MATC's attention last fall." Thus the employes were aware that the problem was continuing without being addressed by the District. Nevertheless the employes did not file a grievance or make a steward aware of the problem until on or around the grievance initiation date of June 29, 1989.

In cases where there has been undue delay, many arbitrators have either completely denied backpay or limited the award to partial backpay. This has been the case where either one or both of the parties are found remiss under the contract. 1/

Arbitrator Harry Dworkin ruled that an employe has the obligation to initiate a grievance within a reasonable time period even though the contract sets forth no time limitation. Furthermore, the arbitrator declared:

An employee may not passively observe conduct which if

1/ Remedies in Arbitration, Marwin Hill, Jr. and Anthony V. Sinicropi, p. 87.

> permitted to continue would give rise to a claim for monetary compensation, without acting in a reasonably prudent manner. A union, or an employee, may not sit idly by in the face of a contract violation with the expectation of reaping benefits incurring from the conduct of the employer. The foregoing principles have been enunciated in various forms; they are suggested by the phrases "equitable estoppel," "Rule of Laches," and "failure to make timely protest."
>
> The contract terms are designed to provide relief to an innocent victim. The contract is not intended to invest an employee with a claim for compensation, which liability could have been prevented by timely action on the part of the employee. An employee is generally charged with the responsibility of acting in a reasonably prudent manner so as to minimize damages where he has the power, the right and responsibility to act in the context of the employment relationship. 2/

Arbitrator Peter Kelliher has similarly stated:

> . . .(T)he Grievant cannot sit back and let the financial liability of the Company mount. He has a duty to mitigate damages by promptly filing a Grievance 3/

The undersigned would not, however, preclude receipt of all backpay. Rather in view of the fact that the error constitutes a "continuing violation" and that the Union has established entitlement at least from the date of the filing of the grievance, it is appropriate to find that backpay should be computed from the May 5, 1989 date, which is thirty-five (35) working days prior to the initiation of the grievance on June 26, 1989. This ruling gives full meaning to the time limits set forth in the parties' grievance procedure.

2/ Dayton Fire and Rubber Co., 48 LA 83, 86 (1967).

3/ Western Electric Brake & Clutch Co., 31 LA 219, 220 (1938).

Accordingly, it is my decision and

AWARD

That the period of backpay owed to affected employes who were no paid shift differential commences on May 5, 1989, thirty-five (35) working days prior to the initiation of the grievance.

Dated at Madison, Wisconsin this 8th day of May, 1990.

By _____
Mary Jo Schiavoni, Arbitrator