BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GREEN BAY BOARD OF EDUCATION EMPLOYEES (CLERICAL) UNION, LOCAL 3055B, AFSCME, AFL-CIO

and

GREEN BAY AREA PUBLIC SCHOOL DISTRICT

Case 118
No. 43244
MA-5936

Case 119
No. 43245
MA-5937

Appearances:

Mr. James W. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. John Dennis McKay, Attorney at Law, appearing on behalf of the District.

ARBITRATION AWARD

The Union and the District named above are parties to a 1988-1990 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The Union made a request, with the concurrence of the District, that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve grievances concerning hours of work. The undersigned was appointed and held a hearing on February 27, 1990, in Green Bay, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. Following distribution of a transcript, the parties completed their briefing schedule on June 28, 1990, and the record was closed.

ISSUES:

The Union frames the issue to be decided as follows:

> Did the employer violate the collective bargaining agreement when it unilaterally changed the starting and quitting times of the Library Secretary at East High School and the Attendance/Guidance Secretary at Preble High School? If so, what is the appropriate remedy?

The District frames the issues as the following:

> Did the employer violate the collective bargaining agreement when it changed the hours of the Preble High School Attendance/Guidance Secretary for the 1989-1990 school year?
>
> Did the employer violate the collective bargaining agreement when it changed the hours of the East High School Library Secretary for the 1989-1990 school year?

The Arbitrator frames the issue as this:

> Did the Employer violate the collective bargaining agreement when it changed the hours of the Preble High School Attendance/Guidance Secretary and the East High School Library Secretary? If so, what is the appropriate remedy?

CONTRACT PROVISIONS:

ARTICLE XIV

HOURS OF WORK -- SCHOOL CLOSING

> The present schedule of hours and the present working hours of the Clerical Department shall remain as presently scheduled. The Union shall be notified prior to any changes in hours and such changes shall be the subject of negotiations.

. . .

ARTICLE XXII

REOPENER

> During the course of the contract year, any article of this Agreement may be opened for negotiations by mutual consent of both parties to this Agreement. Negotiations under this article shall be restricted to that article in the request for discussion.

BACKGROUND:

The parties stipulated to 15 joint exhibits and to the fact that the Employer changed the hours of the Preble High School Attendance Secretary and the East High School Library Secretary for the 1989-1990 school year and that the Union has not negotiated nor attempted to negotiate with the Employer any changes in hours with respect to those positions. The parties presented no other evidence at the hearing.

On July 27 and August 10, 1989, 1/ Arbitrator Coleen A. Burns issued two separate arbitration awards in which she found in both cases that the District violated the collective bargaining agreement by changing hours of work.

On August 15, the Assistant Principal of Preble High School, J. Renard, sent a memo to Dr. David Kampschroer, Executive Director of Employee Relations, notifying him of the following:

> The hours of employment of Mercedes Rentmeester, Level One, Attendance Secretary, will be changed from 7:15 a.m. - 3:15 p.m. to 8:15 a.m. - 4:15 p.m. for the 1989-1990 school year.

On August 28, Kampschroer sent a memo to Union President Ed DeRubis regarding the revised hours for the Attendance/Guidance Secretary at Preble High School:

> In early summer the need for a change in hours for the above position was brought to my attention. During the 1989-90 school year, it will be necessary for the attendance/guidance secretary to work from 8:15 a.m. to 4:15 p.m. This position will be posted immediately and if you have any problems with the change we will deal with them during the posting period.
>
> Please advise me immediately of any concerns you have regarding this change.

On the same day, the position of the Attendance/Guidance Secretary was posted with the hours of work listed as 8:15 a.m. to 4:15 p.m. The position of Library Secretary at East High School was posted the same day, with posted hours of 7:15 a.m. to 3:15 p.m.

On August 29, DeRubis responded to Kampschroer with the following memo:

> If the Preble Attendance/Guidance position hours are changed the Union will grieve said change under Article XIV Hours of Work -- School Closing.
>
> The Union will discuss your proposal in regards to 10-month secretaries in Special Education and will advise the District of our position after such meeting is held.

1/ All dates are for 1989 unless otherwise noted.

On September 6, the Union filed two grievances, one over the change in work hours at Preble High School and another over the change in work hours of the Library Secretary at East High School.

On September 13, Kampschroer sent the following memo to DeRubis:

> We do not feel that the change in hours for the Level 1 Senior High Attendance/Guidance Secretary at Preble High School has anything to do with the judisdiction of the recent arbitration award. As I stated to you on August 28th, the need for these hours came well before the current award regarding employees working 1987-88 hours.
>
> Rather than grieve the changing of these hours we would suggest and recommend that we follow Article XIV and negotiate the change.
>
> As these positions become vacant, we would suggest that we discuss changing hours and negotiating any changes necessary as a result of the change because we would certainly not want to be affecting bargaining unit members already working for the district.
>
> Please advise.

On September 26, Kampschroer sent a memo to Sharon Ducat, Vice-President of the Union, regarding the two grievances:

> I am responding to these grievances presented to my office at Step 4 of the grievance procedure and received in my office on September 20, 1989.
>
> On August 21, 1989, Attorney McKay specifically requested that a session for the purpose of negotiating a change in these hours be scheduled prior to August 31, 1989. On August 25, 1989, James Miller responded to Attorney McKay that the Clerican Union does not "agree to, nor do they wish to re-open the current agreement as per your request." It is the District's opinion that this would be a clear violation of Arbitrator Burns' award and would be an incorrect interpretation of the language cited at Article XIV which makes these changes a subject of negotiations. Your continued resistance to not negotiating these changes in hours until we are into our next round of contract negotiations would be a clear violation of both the bargaining agreement and Arbitrator Burns' decision.
>
> We would ask again and demand that the Union come forward to the negotiating table to negotiate these changes in hours. Should you continue with your position of not negotiating these changes until the current contract re-opens, we would go on record to state that these changes in hours in dispute under grievances 58 and 59 would be implemented effective the week of October 2, 1989, as a result of the Union's unwillingness to negotiate.
>
> The District would expect that this letter serves as continued documentation back to August whereby we have requested complete compliance with the Burns' award by requesting that the Union come back to the table and negotiate these changes in hours. Because of the Union's interpretation of not re-opening the contract to accomplish this, the District feels we are not liable for any prospective costs stated in the Burns' award. We have already presented to the Union some settlement figures to comply with her award.
>
> Please advise in writing before October 2nd the Union's position of scheduling a negotiating session on this matter or of maintaining the same position Miller articulates in his August 25, 1989, correspondence to Attorney McKay.

On October 3, James Miller, Staff Representative, Wisconsin Council 40, AFSCME, sent Kampschroer the following letter:

> Your separate letters dated 9/26 have been refered to me for response, I must admit that I read them over and over again and am totally amazed at your attempt to lay the

problems of the mishandled change of hours at the feet of the Union. There seems to be some misplaced conception on the part of the Employer 1) That you deny Union Grievances, and Force the Union to Arbitration, 2) and when the Union wins the Union is under some moral obligation to reopen the contract and to agree with your original changes in hours as if nothing had happened. I must point out to you that the Arbitrator said "you lose" and if someone is telling you differently I would strongly suggest a rereading of the award. I must further point out to you that the amount of money already squandered on the issue of unilaterly changing hours and we are talking in excess of $40,000, can be greatly enlarged if your belief is that you can impliment some sort of unilateral change in work hours. In other words if you change the hours uniliaterly and we do this waltz all over again, we will seek greater damages than those already needlessly paid out by the Board of Education.

The Union is not going to "reopen" the current labor agreement for negotiations. Arbitrator Burns did not order us to reopen the contract and a procedure is in place that calls for mutual agreement to reopening the contract. If the Board of Education has additional money they wish to squander it is their right to do so, however, the Union is not going to be held responsible for the mistakes of management. Somewhere, someone has to be made accountable for the bad advice.

. . .

On October 10, Kampschroer notified Mercedes Rentmeester that she was the successful bidder for the Attendance/Guidance Secretary position at Preble High School, a job she was holding but posted with new hours, and that as she was the incumbent in the same position with the "old hours," she would now be transferred to the new hours of 8:15 a.m. to 4:15 p.m. effective October 16.

On October 12, Attorney J.D. McKay sent Miller the following letter regarding the pending grievances:

I am in receipt of a copy of your letter to Dr. Kampschroer dated October 3, 1989, regarding the above.

I'm going to start this letter with the suggestion that the parties meet to discuss all of the above as soon as possible. This initial meeting does not need to be perceived by anyone as "negotiating", but merely an attempt to address unresolved and pending matters between the parties. The results of such a meeting can then be appropriately designated. Please let me know of your availability for such a meeting.

Now, I would attempt to respond separately, or at least comment on, each of the concerns raised in your letter of October 3rd.

(1) Grievance 58: The District is willing to negotiate the changes in hours for the Preble High School attendance/guidance secretary in compliance with Article XIV of the collective bargaining agreement. When do you propose to do that?

(2) Grievance 59: The District is again willing to negotiate the changes in hours for the East High library secretary in compliance with Article XIV of the collective bargaining agreement. Again, when do you propose to do that? It seems obvious to me that both grievances 58 and 59 can be handled at the same time.

. . .

Finally, on November 7, McKay notified Miller that it was his understanding that the two grievances were not resolvable. The Union processed the grievances to arbitration.

THE PARTIES' POSITIONS:

The Union points out that the issue of unilateral change of hours without negotiations or agreement by the Union has been settled by Arbitrator Burns on two separate occasions. The Union argues that the present Arbitrator must read the entire agreement and note that under Article XXII, Reopener, the Union has no obligation to reopen the agreement. There must be mutual consent. While

the Employer has proposed reopening the contract to negotiate the hours change, the Union has not agreed. Therefore, the Employer cannot unilaterally change the hours of work, because Article XIV is clear and unambiguous, stating: "The present schedule of hours and present working hours of the Clerical Department shall remain as presently scheduled." The Union finds no conflict in language between Article XIV and Article XXII, and there is no language in the contract for an automatic reopening of the contract for negotiations. Finally, the Union submits that any suggestion made by Arbitrator Burns that changes in hours could be done by negotiations is not binding nor a part of her award.

The District asserts that the Union was notified that the District was willing to negotiate the change in hours pursuant to the collective bargaining agreement and the prior arbitration award. There were no limitations placed on that willingness to negotiate, as had been the perception of Arbitrator Burns in the previous case. The District had said on more than one occasion that it will negotiate these hours changes, and the Union has merely said "no" and has grieved. Therefore, the District submits that the grievances should be denied, as the facts do not support the contention that it violated the collective bargaining agreement.

DISCUSSION:

The main thrust of the Union's argument in this case is that it has no obligation to reopen the contract under Article XXII. Therefore, if the Union fails to give its consent to reopen the contract, the District cannot change the hours of work under the terms of Article XIV.

The Arbitrator disagrees. The language of Article XIV clearly contemplates that a change in hours could take place during the term of the contract under certain conditions -- that the Union be notified prior to such change and that the change be the subject of negotiations. The use of the words "subject to negotiations" does not mean that the change in hours becomes a subject for contract negotiations or that the contract be reopened pursuant to the terms of Article XXII. If the District could change hours only by engaging in negotiations over them during contract negotiations or through the process described in the reopener clause, the language of Article XIV would be meaningless.

The Union has brought this argument once before, as noted in the Burns Award (Case 112, No. 41253, MA-5341, August 10, 1989). Arbitrator Burns stated:

> The Union argues that the District was required to propose the change in hours as a bargaining proposal for the successor agreement. While the District and the Union were certainly free to negotiate the hours change within the context of contract negotiations, Article XIV does not limit such negotiations to contract negotiations. Article XIV states that the changes in hours "shall be the subject of negotiations." It does not state that the changes "shall be the subject of contract negotiations." (Emphasis supplied) The arbitrator, however, does not consider the Union's misconstruction of Article XIV to be fatal to its claim. The reason being that the District's unwillingness to negotiate the change in hours did not stem from its belief that the Union was insisting upon making the change in hours a subject of contract negotiations, but rather, stemmed from a belief that it had the management right to unilaterally change the hours, subject to notification of the change and an offer to negotiate impact, if any.

The Union considers the above language regarding its misconstruction of Article XIV to be dicta, and that may be so. But now, the question has been directly asked and answered -- no, Article XIV does not limit negotiations over changes in hours to be the subject of contract negotiations, subject to the requirements of mutual consent under Article XXII.

Once the District expressed its willingness to negotiate the changes in hours over the two positions in question in this case, the Union could no longer have it both ways -- it could not both refuse to negotiate and grieve (at least successfully) that the District violated the contract.

Accordingly, I find that the District did not violate the collective bargaining agreement when it changed the hours of the two secretaries at two high schools where the District offered to negotiate over those changes with the Union and the Union refused to engage in negotiations.

AWARD

The grievances are denied.

cwl

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Dated at Madison, Wisconsin this 2nd day of July, 1990.

By ______________________________________
Karen J. Mawhinney, Arbitrator