

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

TEAMSTERS, LOCAL 662

and

STANLEY-BOYD AREA SCHOOL DISTRICT

Case 45
No. 43946
MA-6119

Appearances:

Mr. Kurt C. Kobelt, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 788 North Jefferson, Room 600, P.O. Box 92099, Milwaukee, WI 53202, appearing on behalf of the Union.

Mr. Roger E. Walsh, Davis & Kuelthau, S.C., Attorneys at Law, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, WI 53202-3101, appearing on behalf of the District.

ARBITRATION AWARD

The Union and the Employer named above are parties to a 1989-1990 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The Union, with the concurrence of the Employer, made a request that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance regarding hours of work. The undersigned was appointed and held a hearing on August 31, 1990, in Stanley, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. The parties filed post-hearing briefs by September 19, 1990.

ISSUE

The Union frames the issue to be decided as follows:

Did the District violate the collective bargaining agreement and Memorandum of Understanding by discontinuing its practice of paying employees one-half hour for lunch?

The District frames the issue as the following:

Did the District violate Article 18 and/or Item 1 of the Memorandum of Understanding of the 1989-90 contract by its schedule of work hours of the employees in the bargaining unit? If so, what is the appropriate remedy under the contract?

The Arbitrator frames the issue as follows:

Did the District violate Article 18 or the Memorandum of Understanding of the collective bargaining agreement by scheduling bargaining unit employees without a paid lunch period?

If so, what is the appropriate remedy?

CONTRACT PROVISIONS

ARTICLE 17

WORK WEEK

Section 1. Employees' work hours will be scheduled by the Board. Employees will be paid when School is closed for emergencies which do not have to be made up.

...

ARTICLE 18

MEALS

The Board's present arrangement for providing meals for all employees covered under this Agreement shall remain the same during the term of this Agreement.

MEMORANDUM OF UNDERSTANDING

The following is agreed by the parties:

(1) The current staff (i.e. those on the payroll as of April 13, 1988) of Secretaries and Aides will not have their hours reduced from those in effect as of April 13, 1988, unless the employee bids a reduced hour position. Hours may then be reduced for the duration of the bid. Nothing herein is to be construed to prohibit the Board from totally eliminating any of the

above positions.

(2) As any of the above current staff terminate the position they were in as of April 13, 1988, the Board has the option of changing the hours of the position.

. . .

BACKGROUND

This is a class action grievance filed by Chief Union Steward Patricia LaMarche on behalf of aides and clerical employees in the District concerning the elimination of a paid lunch period for some of the bargaining unit members.

Until August of 1989, bargaining unit members were receiving one-half hour paid lunch period as part of their work day. According to LaMarche, employees were then notified by their supervisors that there would be no more paid lunch period, and that they should punch out for lunch unless they actually worked. LaMarche stated that no reason was given for the change, and after talking with bargaining unit members, she filed a grievance because some employees lost one-half hour paid time. Although employees were told that they could work an extra one-half hour, some employees did not do so, according to LaMarche.

On September 8, 1989, District Administrator Charles Poulter responded to LaMarche's grievance with the following letter:

I am in receipt of your grievance of August 28 in reference to reducing of hours for aides and secretaries.

In an effort to clarify duties and responsibilities during lunch periods, we have tried to provide most people with a thirty minute duty free lunch period. In those cases where this was not possible, specifically Sylvia Gerrtis, Janet Booth and Jan Hoffstatter, we will pay them for that thirty minutes. All others will have the thirty minutes and will "punch out" during that time.

At the beginning of the school year we offered to adjust hours so no one would lose pay. A number of people requested this and we have tried to work something out. I would continue to make that offer but would ask why they didn't come forward before now if it is a problem.

The one group where there may be concerns is with special

education aides. Their hours are tied to student contact and may be difficult to adjust. I feel, however, the hours of special education aides have been discussed in the past, particularly in negotiations, and our position regarding guaranteeing hours for these people is quite clear. I will, however, be willing to discuss any of these concerns with you.

Poulter prepared following document to show the difference in hours between the 1988-89 and 1989-90 school years:

	<u>1988-89</u>	<u>1989-90</u>	
3:00	Andrew, Shirley	8:00-11:30	12:00-
3:30	Blanchette, Darlene	8:00-3:00	8:00-12:30
	Booth, Janet-lunch hr. pd.	7:30-3:30	7:30- 3:30
4:15	Chirhart, Mary	7:45-3:45	7:45-12:00
	Gerrits, Sylvia-Lunch hr. pd.	8:00-3:30	8:00- 3:30
3:15	Haas, Kim	8:00-3:15	7:30-12:30
3:00	Haas, Karen		8:00-12:00
	Janet Hoffstatter- lunch hr. pd.	7:45-3:45	7:45- 3:45
2:30	LaMarche, Patty	7:45-2:30	7:45-12:30
	Long, Delores	9:00-1:15	9:00- 1:45
	Moore, Diane	8:30-3:00	8:15-11:00
			11:30-3:00

	Moore, Sandy	8:15-3:00	8:00-12:30	1:00-3:15
3:30	Patten, Carol	8:00-3:00	8:00-12:00	12:30-
	Savina, Norma	9:00-4:30	8:30- 1:00	1:30-4:30
3:30	Stangl, Diane	8:00-3:30	8:00-12:00	12:30-
	Dimmer, Janice	8:00-4:00	8:00- 4:00	(Salaried-does not punch a time clock)

Shirley Andrew and Karen Haas were new employees in the 1989-90 school year. Three employees -- Janet Booth, Sylvia Gerrits, and Janet Hoffstatter - were told that their services were needed during lunch, so they take their lunch on the run and are paid for a lunch period. Janice Dinner is paid a salary. The rest of the employees have a duty free lunch and may leave the premises. Only three employees worked fewer hours in 1989-90 than in 1988-89. LaMarche worked one-half hour less, although she was given the opportunity to work longer. Diane Moore worked 15 minutes less than the previous year, and Diane Stangl worked one-half hour less. 1/

Poulter testified that prior to the change regarding lunch periods, the aides could have taken a half-hour lunch when they were not working, and that he was not aware of any instances where aides performed work during their lunch periods. LaMarche, who is an aide, stated that prior to August of 1989, she ate her lunch in the Boyd school cafeteria, that she was available for anyone that called her, and that she worked during the lunch period about once a week. LaMarche has been an aide for five years, and always had a half-hour paid lunch up until August of 1989. Gerrits testified that prior to August of 1989, a number of employees -- such as Hoffstaffer, Moore, Patten, Stangl, and Blanchette -- ate lunch in a teacher preparation room near the District's main office, but that they do not eat their lunch in that room any longer. When employees took their lunch in the teacher preparation room, they could be reached if needed, but currently, some leave the building and could not be reached during their lunch periods.

After the Union was certified in 1987, Teamsters Local 662 President and Business Agent

1/ During the hearing, the District stated that it had not offered Moore and Stangl additional time, and it further acknowledged that it had violated the labor contract with respect to Moore and Stangl and agreed to pay them for such time, pursuant to the Memorandum of Understanding.

James Newell was the principal spokesman in negotiations for the first collective bargaining agreement for the aides and clerical employees. Newell testified that the Union attempted to get contract language to mirror the custodian's bargaining agreement. The Union proposed a maintenance of standards clause, which the District rejected. Newell testified that he recalled discussing a paid lunch period as well as the District's practice regarding meals. Employees working with a lunch program had been provided with free meals. It was the Union that proposed the language in Article 18, and Newell understood the language to encompass two aspects of the District's existing practice regarding meals -- one, the practice of giving employees one-half hour paid lunch period, and two, the practice of giving free meals to those working with the lunch program.

District Administrator Poulter was also involved in the bargaining for the first contract, the predecessor contract to the current contract. Poulter's recollection of the discussions for Article 18 differs from Newell's, in that Poulter recalled that the discussion centered on the District's practice of paying for food or meals for employees. Poulter did not recall a discussion about a paid lunch period. A document prepared during bargaining (District Ex. #8), which may not have been given to the Union, showed which employees were getting free meals. Poulter's understanding of Article 18 was that the District would maintain the present arrangement of providing meals to certain employees. Poulter was aware at the time the contract was being negotiated that aides, clericals, and custodians were receiving a half hour paid lunch period.

Newell also testified that the Union wanted some guarantee for a specific number of hours for bargaining unit employees. The language that appears now in the Memorandum of Understanding was the product of both parties. The union's understanding of this provision is that the District's records would show the number of hours employees worked, and that those hours were to be maintained with one exception. Newell testified that he believed the Memorandum to refer to the number of hours but not specific work hours.

THE PARTIES' POSITIONS

The Union

The Union submits that the District violated Article 18 and the Memorandum of Understanding by unilaterally abolishing its long practice of providing employees with a paid lunch, and that the only meaningful remedy is to restore that policy. The Union notes that Newell understood that employees were receiving one-half hour paid lunch and a free lunch if the employee worked through lunch, and when negotiating the term "present arrangement" as seen in Article 18, the one-half hour paid lunch was incorporated into the contract. Further, the Union proposed a guarantee of hours, embodied in the Memorandum of Understanding.

The Union argues that arbitrators have long held that paid lunches are an important term and condition of employment and may not be unilaterally altered. Further, the Union argues,

arbitrators have sustained past practices of paying employees for lunch periods even in the face of employers' claims that they have the managerial right to set work schedules, similar to that relied upon by the District in Article 17.

The District has no compelling economic or justification for its unilateral change, the Union contends. Poulter could not identify any aides who worked during lunch periods before the change. The union asserts that while some aides now leave the school building during lunch, nothing suggests that they could not do so before the change.

The Union submits that the bargaining following the filing of the grievance supports its position, as the District proposed specific contract language which implied that it lacked the power to impose an unpaid lunch period. Further, the Union asserts that apart from the contract language, the parties' conduct established a past practice which cannot be altered.

While the District acknowledged that Moore and Stangl were entitled to back pay, the Union contends that other employees are entitled to back pay for hours lost as a result of the elimination of the paid lunch period. Employees had to make accommodations for personal reasons, and the only complete remedy is to order the District to reinstate its practice of paying employees for lunch or a restoration of the status quo ante.

The District

The District asserts that the contract clearly and unambiguously provides that it has the exclusive right to schedule hours under Article 17, Section 1, and the only restriction is contained in paragraph 1 of the Memorandum of Understanding. The work schedule set by the Board for the 1989-90 school year maintained the same number of work hours for each employee except for Moore, Stangl and LaMarche. Because the Board did not offer Moore or Stangl the same number of hours for that school year, the Board agreed during the arbitration hearing that it had not followed the Memorandum of Understanding in those two cases, and agreed to pay them for the reduced time.

However, the District notes that it offered LaMarche an opportunity to work an additional 30 minutes either before or at the end of her work day, but LaMarche never asked for an adjustment to her schedule. Therefore, the District submits that LaMarche has waived her right to claim that the District violated the Memorandum of Understanding.

During the bargaining for the initial contract, the Union proposed language that "current hours of unit employees to be maintained," but the District's position that employees' work hours would be scheduled by the Board was included in the contract. The District asserts that the Memorandum which includes the phrase "hours reduced" refers to the number of hours, not the time during which the hours are worked. The District contends that Article 18 is inapplicable to this grievance, because it refers to "providing meals" and not to providing an unpaid lunch period.

The District further argues that it is not required to maintain a paid lunch period on the basis of past practice, where in the past, employees were scheduled to be on call during their lunch period but were not required to be on call during the 1989-90 school year. The District notes that the Union proposed a maintenance of standards clause during the bargaining for the initial contract, but was unsuccessful in obtaining such a clause.

The District contends that its proposal dealing with this subject made for a successor contract after this grievance was filed is irrelevant, as events that occur after the filing of the grievance cannot be used to determine the grievance.

Finally, the District states that in the event the Arbitrator finds a violation of the contract, the remedy should be to order a prospective resumption of the paid lunch period rather than back pay for the lunch period. The District notes that since employees did not work during their lunch period, a backpay remedy would amount to a windfall.

DISCUSSION

Article 17, read in conjunction with the Memorandum of Understanding, clearly allows the District to schedule work hours as long as the hours are not reduced. Union negotiator Newell agreed that the language in the Memorandum which calls for secretaries and aides to "...not have their hours reduced..." referred to the number of hours, but not the specific work hours.

Additionally, the Union acknowledged that the District proposed the language currently in Article 17, while the Union had made a proposal that current hours" of employees were to be guaranteed. The end result was that the contract allowed the Board to schedule work hours, as long as the total number of hours was not reduced.

Article 18 does not on its face protect a paid lunch period. The language clearly calls for maintaining the "present arrangement for providing meals." It does not say anything about maintaining the present arrangement of a paid lunch period. It was Newell's understanding that the language of Article 18 was intended to cover the practice of one-half hour paid lunch as well as providing free meals to employees working with the lunch program. However, the District did not have the same understanding of the language of Article 18. If the parties intended the practice of the paid lunch period to be included, they could have easily stated so. The language must be accepted according to its ordinary meaning. While the District jokingly referred to the old adage that there's no such thing as a free lunch, there is here -- and Article 18 is it. However, that's all that Article 18 stands for. The paid lunch period was never contractually protected.

District Exhibit #6 shows that the hours of most employees were extended, once the paid lunch period was eliminated. Only three people had their hours reduced, and the District has

admitted to a contract violation regarding two of them, Moore and Stangl. LaMarche is the only other person with reduced hours. LaMarche admitted that she never requested the District to adjust her hours to work longer, although she could have worked another half-hour to compensate for the reduction in time.

Much of LaMarche's testimony centered around the personal inconvenience of employees having to work an extended work day to pick up the same amount of time after the elimination of the paid lunch period. Certainly, all employees have concerns over personal inconveniences, whether arranging for child care or doctors' appointments or doing any business during normal business hours. That is a fact of life today for anyone who works at any job. However, this has no bearing on whether the District could eliminate the paid lunch period without violating the contract.

While the Union argues that it should prevail in this grievance on a past practice theory, two elements work against that theory in this case. One is that the Union sought a maintenance of standards clause, which may well have protected the paid lunch period, but was unsuccessful in negotiating such a clause. The other is that the District's underlying basis for providing a paid lunch period in the first place had changed, where the District previously considered employees on call during lunch. The District kept three employees on call and continued to provide them with a paid lunch period, but it did not need to keep all these employees on call during a lunch period.

The authority to establish work schedules, including time for lunch periods, carries with it the power to make reasonable changes when warranted by the circumstances, unless prohibited by the labor agreement. 2/ The District's decision to not have the majority of the bargaining unit on call during lunch, where few employees were actually called to work during lunch, is reasonable.

Therefore, I find that the District did not violate the collective bargaining agreement by scheduling employees without a paid lunch period, where the District did not reduce the hours of employees by offering to allow employees to work the same number of total hours per the Memorandum of Understanding, and where the paid lunch period was never included in Article 18 or could be considered a binding past practice which could not be changed during the term of the contract.

Accordingly, based on the entire record, 3/ the grievance is denied.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 1st day of October, 1990

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

2/ See B.F. Goodrich Chemical Co., 77-1 CCH ARB Para. 8221 (Volz, 1977).

3/ The District's proposals for a successor contract are accorded no weight in this decision. The proposals regarding Article 18 were made after the grievance arose, and the grievance must stand or fall on the contract language as written at the time it arose. Further, to give weight to subsequent proposals would have a chilling effect on the bargaining process, where either party may seek to clarify language following a grievance.