

BEFORE THE ARBITRATOR

 :
 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 SCHOOL DISTRICT OF WAUKESHA EMPLOYEES : Case 57
 UNION LOCAL 2485, affiliated with : No. 42216
 DISTRICT COUNCIL 40, AFSCME, AFL-CIO : MA-5612
 :
 and :
 :
 WAUKESHA SCHOOL DISTRICT :
 :

Appearances:

Mr. Jack Bernfeld, Staff Representative, Wisconsin Council 40, 5 Odana Court, Madison, Wisconsin 53719, appearing on behalf of the Union.
 Davis and Kuelthau, S.C., 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202-3101 by Mr. Gary M. Ruesch, Attorney at Law, appearing on behalf of the District.

ARBITRATION AWARD

School District of Waukesha Employees Union Local 2485, affiliated with District Council 40, AFSCME, AFL-CIO, hereinafter the Union, and Waukesha School District, hereinafter the District or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to appoint a staff member as a single, impartial arbitrator to resolve the instant grievance. On June 9, 1989, the Commission appointed Coleen A. Burns, a member of its staff, as arbitrator. Hearing was held on September 12 and October 19, 1990 in Waukesha, Wisconsin. The hearing was transcribed and the record was closed on January 16, 1991, upon completion of the briefing schedule.

ISSUE

The parties were unable to agree upon a statement of the issue. The Union frames the issue as follows:

Did the District violate the contract when it did not assign a bargaining unit employe to cover Stampede Soccer?

If so, what is the appropriate remedy?

The District frames the issue as follows:

Did the District violate the contract when it did not assign a bargaining unit employe to cover Stampede Soccer during the second semester of the 1988-89 school year?

If so, what is the appropriate remedy?

The Arbitrator frames the issue as follows:

Did the District violate the 1987-89 collective bargaining agreement when it did not assign a bargaining unit employe to cover Stampede Soccer during the second semester of the 1988-89 school year?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE I - MANAGEMENT RIGHTS RESERVED

1.01 Rights. Unless otherwise herein provided, the management of the work force and the direction of the working forces, including the right to hire, promote, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason is vested in the Employer. Effective February 1, 1984, the District shall have the right to subcontract second shift cleaning at Butler Middle School

for the term of the labor agreement. The employees laid off as a result of this section shall be subject to the layoffs and recall provision of the contract.

1.02 Employer Action. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due him/her for such period of time involved in this matter.

1.03 Rules. The Employer may adopt reasonable rules and amend the same from time to time.

. . .

ARTICLE VII - WORK DAY AND WORK WEEK

7.04 Preparation of Work Schedules. The Facilities Manager, or designee, shall be responsible for the preparation of work schedules in accordance with Paragraph 8.01 below and informing the employees of their respective hours of work.

. . .

ARTICLE IX - CALL-IN TIME

9.01 Two (2) Hour Minimum. Employees who shall be called in to work on other than a regularly scheduled time shall be entitled to at least two (2) hours work, or pay, therefore, at time and one-half (1-1/2) regardless of the length of time less than two (2) hours which they may have worked. If such call in occurs on a Sunday or a holiday, employees shall be compensated at the rate of two (2) times their regular rate of pay. Employees so called in may be required to work the full two (2) hours.

. . .

ARTICLE X - BUILDING CHECKS

10.04 General Schedule. The general schedule of weekend, vacation and convention period building checks will be as follows:

A. March 15 - November 15: During the period beginning March 15th and ending November 15th, one (1) building check per weekend will be the normal schedule and will be performed on Sunday morning.

B. November 15 - March 15: During the period beginning November 15th and ending March 15th, two (2) building checks per weekend will be the normal schedule. One (1) check will be performed on Saturday and one (1) check will be performed on Sunday. Whenever overtime is required because of extra activities in a building, the Head of Building will assign building checks to coordinate with the overtime.

. . .

10.06 Departures From Normal. This Article is intended to cover the majority of situations involved with building checks. Departures from the normal will be made by the Facilities Manager or designee, or the Executive Director of Business Affairs, if circumstances warrant. In the event that neither of the above can be contacted, the Head of Building may authorize said departure, subject to the subsequent approval of the Facilities Manager or designee.

. . .

10.08 Discontinuation. In the event that the Board discontinues the building checks in one or more of the Buildings being operated by the District, the Union shall be provided the opportunity to

bargain the impact, if any, of that discontinuation. (Emphasis added).

. . .

APPENDIX B -- OTHER AGREEMENTS

1. Any benefit presently in effect but not specifically referred to in this Agreement shall remain in effect for the life of this Agreement.

. . .

BACKGROUND

The District rents its facilities to community groups. Activities sponsored by such community groups are considered "outside" activities. For five consecutive Saturdays, commencing on February 18, 1989, the District's Butler Middle School gym was used for an "outside" activity, i.e., Stampede Soccer. 1/ James Haessly, the District's Director of Student Services Exceptional Education, was a coach for one of the Stampede Soccer teams and a member of its governing board. Haessly, who signed the contract for the use of the school facility, was present during the Stampede Soccer activity.

In February 1989, Phil Oofferdahl, the Principal at the Butler Middle School, informed Robert Petrie, the school's Head Custodian, that an outside group would be using the school on a number of weekends to play soccer and that custodial coverage would be needed. Prior to the first weekend of use by this group, Oofferdahl instructed Petrie that he did not have to cover the activity because Haessly would cover the activity.

Haessly was present during the Stampede Soccer activity. Haessly did not receive any District pay for the Stampede Soccer activity. On or about February 17, 1989, Petrie filed a grievance alleging that the District had violated B-1, B-10 and any other applicable article of the collective bargaining agreement by denying Petrie overtime to provide coverage for the Stampede Soccer activity. The grievance was denied at all steps and, thereafter, submitted to grievance arbitration.

POSITIONS OF THE PARTIES

Union

The District violated the contract when it did not assign a bargaining unit member to cover Stampede Soccer for the five (5) consecutive Saturdays, commencing February 18, 1989, that the group used Butler Middle School. Use of the District's facilities by Stampede Soccer thereafter would also violate the contract.

There exists a past practice of assigning custodial employes to cover activities held by outside groups in the District schools. This practice, which is long standing and has occurred with the full knowledge and understanding of both parties, results in substantial income to unit employes.

The provisions of Article 10, Section 10.04(B) reference the right and expectation of overtime to cover extra activities such as Stampede Soccer. The District was obligated to assign unit members, Petrie and Kultz, on rotating weekends, to cover this activity.

The District's policy regarding the use of its facilities by outside groups supports the Union's position in that it explicitly requires that "there will always be a school employee on duty when school facilities are being used." To be "on-duty" means that one must be working in their official capacity as a school employe. Haessly worked solely in his capacity as an official of Stampede Soccer and not as a school employe and was not "on-duty" at any time. The coverage of such activities and its attendant responsibilities is bargaining unit work. Haessly was not a bargaining unit member. Except for second shift cleaning at Butler Middle School, the District does not have the right to subcontract unit work. Haessly's activity violates the requirements of the contract and the District's policy.

Assuming arguendo, that the Arbitrator were to find that the employes' right to cover the Stampede Soccer activity is not precisely identified in the contract, it is a benefit within the meaning of Appendix B(1) and, therefore, required to be maintained during the term of the 1987-1989 agreement. The District attempted, through the testimony of Superintendent George Schiroda to limit the impact of Appendix B(1). Schiroda's vague and ambiguous testimony

1/ Union Exhibit #22.

about negotiations that allegedly occurred nearly 20 years ago should not be considered to be persuasive. Moreover, Union witness Mark Mathias disputed Schiroda's obscure assertions.

The long standing practice of assigning bargaining unit employes to cover outside activities such as Stampede Soccer has been accepted by the parties, has become a part of the collective bargaining agreement, and has as much force as any of its written provisions.

The District does not dispute that custodians are, as a matter of policy, assigned to cover the activities of outside groups. It asserts, however, that there is an exception to the policy, i.e., that if employes of the District sponsor the outside group and are responsible for the area used by the outside group, then a custodian is not assigned to cover the activity. Union witnesses however, uniformly testified that the custodial right to cover outside activities is long standing and without deviation. In support of its position, the District offered a mere six events which they contend support their position. These examples, however, do not survive close scrutiny.

The District violated the contract when it did not assign a member of the bargaining unit to cover the Stampede Soccer activity. To remedy this violation, the Arbitrator should find the action of the District to be violative of the collective bargaining agreement, order the District to cease and desist from violating the contract and to make the affected employes whole.

District

The express language of Section 1.01 of the collective bargaining agreement provides the District with the right to manage and assign the work force. Further, Section 1.03 provides the District with the right to adopt reasonable rules and amend the same from time to time. There is no language which prohibits the use of non-custodial employes from volunteering their time to supervise activities that take place in District buildings. In the absence of a specific restriction in the contract, management has a right to assign and distribute work.

The District's policy regarding the use of school facilities is consistent with contract language. The policy does not state that a custodian must be on duty when school facilities are being used. It simply states that it must be a school employe. In the instance case, a school employe was in fact on duty when Butler Middle School's facilities were being used.

Prior to the instant case, there were numerous incidents of outside groups with a District employe present using facilities without a custodial supervisor. None of these cases were grieved. The District's position herein is consistent with the evidence of the mutual interpretation of the applicable contract section. The Union should be held to such interpretation.

Assuming arguendo, that the applicable contract language and District policy were found to be ambiguous, this grievance should be denied since the District has acted in complete conformity with its past practice and the Union has never successfully grieved it. The District has demonstrated that it continuously followed the unchallenged practice of not requiring the presence of a paid custodian when another responsible District employe is present for the activity.

Section 10.04(B) does not set minimum overtime, scheduling requirements or demand that overtime be scheduled whenever outside activities take place on the weekend in a District facility. It merely acts to lessen the overtime required by coordinating two different activities.

If the provisions of Appendix B(1) are to be applicable, minimally there must be a "benefit," it must be "in effect" and it must not be otherwise addressed in the collective bargaining agreement. None of these requirements is met here. As explained by Superintendent Schiroda, the term "benefit" was agreed in bargaining by both parties to apply to a "fringe benefit," such as insurance, which was not already in the agreement. The assignment of overtime is hardly a fringe benefit of the type described by Superintendent Schiroda. Moreover, the inclusion of language concerning the assignment of overtime and the impact thereof is addressed in the collective bargaining agreement. Finally, it is evident that no benefit or practice as argued by the Union was in effect.

The District facility use policy, stating that there will always be a school employe on duty when school facilities are being used, is subject to the interpretation of the District's Executive Director of Business Affairs. Since the phrase is not part of the parties collective bargaining agreement, it is not subject to the jurisdiction of the Arbitrator.

Assuming arguendo, that the facts support the Union's position concerning the existence of a past practice, the past practice is not binding since the decision not to assign a custodian is a unilateral exercise of management rights. The alleged practice is merely a "present way" of doing things not a

"prescribed way" of doing things.

It is axiomatic that in order for a past practice to be relevant in interpreting contract language, the language in question must be ambiguous. In this case the relevant language of Article 1 is clear and unambiguous. The District retains the exclusive right to determine when to assign overtime. Only the impact of such assignments is governed by the agreement. The Grievance is without merit and should be denied.

DISCUSSION

Article 26 of the Agreement provides the Arbitrator with jurisdiction to determine alleged violations of a specific article or section of the Agreement.

As the District argues, the Arbitrator does not have jurisdiction to determine whether or not the District's Executive Director of Business Affairs has accurately interpreted the District's "Use of School Facilities" policy.

Article X is entitled "Building Checks" and Section 10.04 of that article addresses the scheduling of weekend, vacation and convention period building checks. Section 10.04 (B) provides a mechanism for coordinating building checks with overtime which is required because of extra activities in a building. Section 10.04 (B) does not contain any language which expresses or implies a limitation on the District's right to determine whether overtime is required because of extra activities in a building.

The language of Appendix B(1) requires the District to maintain, during the life of the 1987-89 agreement, those benefits not specifically referred to in the agreement but which were enjoyed by the Union's bargaining unit members at the time that the parties entered into this agreement. The parties executed their 1987-89 agreement on September 14, 1988.

The parties disagree as to whether or not the assignment of the overtime in dispute is a "benefit" within the meaning of Appendix B(1). Assuming arguendo, that it is such a "benefit," it is protected by Appendix B(1) only if the record establishes that it was enjoyed by the bargaining unit membership at the time that the parties entered into their 1987-1989 collective bargaining agreement.

At all times material herein, the District has rented its facilities to community groups, i.e., a group or organization which is not sponsored by or affiliated with the District. The American Basketball Players of America, an organization of adults who play basketball, is one of these community groups. On several occasions, Jonathan Sims, acting on behalf of the American Basketball Players of America, executed a contract with the District to rent the Hadfield School gym for basketball practice. The gym was rented for September 6, 13, and 20, 1987; December 6, 13, 20, 1987; January 3, 10, 17, 24, 31, 1988; February 7, 14, 21, and 28, 1988; March 6, 13, 20, and 27, 1988; April 10, 17 and 24, 1988; May 8, 15, 22, 1988 and June 5, 1988. According to Sims, the group last used the gym in the Spring of 1989.

When Sims, a District custodial employe, signed the initial contract to use the gym on September 6, 13 and 29 of 1987, he was charged \$7.50 per hour for the gym and \$23.00 per hour for custodial overtime. Sims was paid the custodial overtime charged for these practices. When Sims signed his second contract, on December 1, 1987, the group was charged only for the rental of the gym. According to Sims, the building principal had advised Sims that it was not necessary for Sims to charge his time or for the group to pay for his time.

Sims' group was not charged for custodial overtime for practices occurring after September of 1987.

On January 12, 1988, Gretchen Zipperer, a District employe, signed a contract to rent the Bethesda School gym for use by the 416 Soccer Waukesha Select team, a community organization. The gym was used for three hours on Sunday, January, 1988. Zipperer was charged \$7.50 per hour for rental of the gym. Zipperer was not charged any custodial fee and the District did not assign a custodial employe to cover the activity.

On January 22, 1988, Sue Bear signed a contract to rent the Lowell School gym for use by the Horning Tournament Basketball Team, a community group. The gym was used on Sunday, January 24, 1988. Ted Bear, the Assistant Principal at the District's North High School, was in charge of the practice. The Bear's were charged the \$7.50 per hour rental fee but were not charged any custodial fee and the District did not assign a custodial employe to cover the activity.

Contrary to the argument of the Union, it is not evident that, at the time that the parties entered into their 1987-89 collective bargaining agreement, that the bargaining unit employes enjoyed the benefit of covering all weekend activities involving community groups. Rather, the record demonstrates that custodians were not assigned to cover weekend activities involving community groups when a District employe was a member of the group and was willing to assume responsibility for the conduct of the group.

The record does not demonstrate that Haessly was performing bargaining

unit work when he supervised the Stampede Soccer activity. Accordingly, the work in dispute would not be subject to any contractual prohibition against subcontracting bargaining unit work. Contrary to the argument of the Union, the District is not contractually required to assign a custodial employe to work the Stampede Soccer activity in dispute herein. 2/

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

1. The District did not violate the 1987-89 collective bargaining agreement when the District did not assign a bargaining unit employe to cover Stampede Soccer during the second semester of the 1988-89 school year.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 9th day of April, 1991.

By _____
Coleen A. Burns, Arbitrator

2/ Nor does the evidence involving the Epper grievance of 1984 demonstrate that the parties mutually agreed that custodial employes would be assigned to work whenever there was a weekend outside activity.