BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
HOWARD-SUAMICO EDUCATION ASSOCIATION	Case 37 No. 44379 MA-6276
and	
HOWARD-SUAMICO SCHOOL DISTRICT	

Appearances:
Mr. Lawrence Gerue, Executive Director, United Northeast Educators, appear
Godfrey and Kahn, S.C., Attorneys at Law by Mr. Dennis Rader, appearing on beh

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and District respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing was held on December 18, 1990 in Green Bay, Wisconsin. The hearing was transcribed and the parties filed briefs which were received by March 7, 1991. Based on the entire record, the undersigned issues the following Award.

ISSUES

There was no stipulation of the issue(s) and the parties asked that the undersigned frame it in his Award. From a review of the record, the opening statements at hearing and the briefs, 1/ the undersigned believes the issues may be fairly stated as follows: 2/

1. Was the grievance timely filed?

2. Does the contract require that teachers be reduced from six classes to five classes in order to create more classes for a part-time teacher? If so, what is the appropriate remedy here?

1/ The Association states the issue as:

Whether or not the Board violated Article VI, R by assigning two social studies department staff members six classes while another department member was employed on a reduced contract basis (three classes).

While the District states the issues as:

1.Was the grievance timely filed?

2.Does the contract language require the District to reduce the workload of teachers assigned six classes in order to increase the workload of a part-time teacher who was hired after the six-class workloads were assigned?

2/ At the hearing the Association also raised the question of whether a sixth class needs to be assigned by seniority. In their brief though the Association revised their statement of the issue to that noted in Footnote 1 and deleted any reference to the question of whether a sixth class needs to be assigned by seniority. In light thereof, the undersigned has not included this question in his statement of the issues.

PERTINENT CONTRACT PROVISIONS

The parties' 1989-91 collective bargaining agreement contains the following pertinent provisions:

ARTICLE IV -- GRIEVANCE PROCEDURE

Purpose -- The purpose of this procedure is to provide an orderly method of resolving differences arising during the term of this agreement. A determined effort shall be made to settle any such difference through the use of the grievance procedure.

For the purpose of this Agreement, a grievance is defined as any complaint by a teacher, teachers and/or the Association regarding or relating to the interpretation, application or alleged violation of the terms of this Agreement.

Procedure--

1. An earnest effort shall first be made to settle the matter informally between the teacher and his building principal or in the instance where there is not a building principal involved, the immediate supervisor. The supervisor should be made aware that this complaint may result in a grievance.

2. If the matter is not resolved, the grievance shall be presented in writing by the teacher to the immediate supervisor within ten (10) days after the facts upon which the grievance is based first occurred or became known. The immediate supervisor shall give his written answer within ten (10) days of the time the grievance was presented to him in writing. Grievances shall be filed on forms set forth in Appendix "D".

. . .

ARTICLE VI -- SALARY

R. High school teachers assigned a seventh duty shall receive compensation based upon one-sixth of the pro-rata daily rate of the BA base salary.

If an 8-period day is implemented, all teachers shall be assigned to six duties and two duty-free preparation periods. Duties shall be defined as either a period of teaching class or supervision of students (homeroom excluded).

No teacher will be assigned six classes until all teachers in that department have been assigned at least five classes. This prevents assigning a 6th class to several teachers to create a layoff.

If assignment of more than five classes becomes necessary, teachers with the most seniority would be given first choice as to whether or not they are assigned additional classes.

. . .

MEMORANDUM OF AGREEMENT

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> The introduction of an eight (8) period day at Bay Port High School shall not result in the layoff or reduction of contracts for any teachers who have been in the faculty bargaining unit prior to January 1, 1990.
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> . . .

FACTS

Bay Port High School Principal Larry Dunning began developing a plan several years ago to expand the daily schedule at the high school from a seven-period day to eight periods. Dunning discussed his ideas concerning same with staff and in doing so learned that a main concern teachers had with the idea was that they did not want an additional teaching assignment used to create a layoff of teachers. Dunning later wrote and distributed two memos concerning switching from a seven-period day to an eight-period day. The first was a 17-page memo dated January 16, 1989 entitled "Recommendations and Considerations for Change of the Daily Schedule at Bay Port High School" that was distributed to both staff and the school board. It provided in pertinent part:

> I would like to suggest the following guidelines that address these questions:
>
> 1. Teachers in the core academic areas of English, Math, Science and Social Studies would continue to be assigned only five classes per day since those areas will probably experience the smallest growth as a result of the eight period day.
>
> 2. Teachers in all other departments would be assigned either five or six classes depending on need. It is my estimate that about half of the teachers would have five classes and the other half would have six.
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> 3. A. Teachers with five classes would be assigned two periods of supervision and one period for preparation.
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> B. Teachers with six classes would be given two preparation periods and no periods of supervision.
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> 4. Teachers can express a desire to teach five or six classes. Those with the most seniority would be given first choice as to whether they are assigned to five or six classes. It must be understood that it will not be likely that all such requests could be satisfied.
>
> 5. No teacher will be assigned six classes until all teachers in that department have been assigned at least five classes. This would prevent the possibility of several teachers in one department being assigned six classes to make it possible to lay off another department member.
>
> The above guidelines will make the eight period day work and hopefully alleviate fears that teacher reductions or layoffs would occur. They are offered as starting points for discussion.

The second was a one-page memo dealing with options concerning an eight-period day that was distributed to the staff in February or March, 1989. It provided in pertinent part:

> In the assignment of classes at Bay Port in an 8 period day the following guidelines shall be observed:
>
> 1. Whenever a teaching load of 3 or more classes become available in a given department an additional teacher shall be hired rather than assign them as 6th classes to other teachers.
>
> 2. Teachers shall be able to express a desire to teach either 5 or 6 classes. Those with the most seniority would be given first choice as to

whether they are assigned to teach 5 or 6 classes. It must be understood that it will be likely that not all such requests could be satisfied.

3. No teacher would be assigned six classes until all teachers in that department have been assigned at least 5 classes. (Prevents assigning a 6th class to several teachers to create a layoff.)

Later that year the District raised the issue of an eight-period day in contract negotiations with the Association and attempted to negotiate it into the contract. This issue was withdrawn from the bargaining table in November, 1989. It rearose during a contract mediation session on January 9, 1990. During that mediation session the parties agreed that the District could implement an eight-period school day. The Association proposed that some language from Dunning's above-noted memos be incorporated into contract language, which is what happened. Specifically, the parties incorporated part of paragraphs 3 B, 4 and 5 from Dunning's January, 1989 memo and part of paragraphs 2 and 3 from Dunning's February/March, 1989 memo into the following new contractual language (Article VI, R):

> High school teachers assigned a seventh duty shall receive compensation based upon one-sixth of the pro rata daily rate of the BA base salary.
>
> If an 8-period day is implemented, all teachers shall be assigned to six duties and two duty-free preparation periods. Duties shall be defined as either a period of teaching class or supervision of students (homeroom excluded).
>
> No teacher will be assigned six classes until all teachers in that department have been assigned to at least five classes. This prevents assigning a 6th class to several teachers to create a layoff.
>
> If assignment of more than five classes becomes necessary, teachers with the most seniority would be given first choice as to whether or not they are assigned additional classes.

In addition to the above, the following Memorandum of Agreement was also added to the contract:

MEMORANDUM OF AGREEMENT

> The introduction of an eight (8) period day at Bay Port High School shall not result in the layoff or reduction of contracts for any teachers who have been in the faculty bargaining unit prior to January 1, 1990.

Following the adoption of the new contract language identified above, Dunning analyzed the impact implementation of the eight-period day would have on course enrollments and staffing needs at Bay Port High School. After doing so, he concluded the impact was that additional teachers needed to be hired in order to schedule the eight-period day. He recommended to Superintendent Fred Stieg that additional staff be hired, specifically 6.7 new FTE's overall. In the social studies department, the department involved here, he recommended that a part-time teacher be hired for three classes a day.

In the spring of 1990 3/ Dunning posted the preliminary teaching schedule for the upcoming 1990-91 school year at the high school. The assignment pertinent here was that two social studies teachers (Schadewald and Jameson) were assigned six classes while five teachers in that department were assigned five classes.

On May 17 notice of nine teaching vacancies in the District was posted, one of which was in the social studies department on a part-time basis. That same day, Schadewald wrote Dunning and requested that he not be assigned a sixth class as planned but that the sixth class period be instead assigned to the new part-time social studies teacher who he knew was going to be hired. The Association formally grieved the matter on July 12. The District hired Bob Casey as the new part-time social studies teacher in mid-July and assigned him three classes per Dunning's recommendation. Around July 15, the District formally notified teachers what classes they would be teaching in the upcoming school year. The District did not reduce the teaching assignment of either Schadewald or Jameson as requested.

3/ All dates hereinafter refer to 1990.

The eight-period school day was implemented at Bay Port High School at the start of the 1990-91 school year.

POSITIONS OF THE PARTIES

The Association initially challenges the District's assertion that the grievance was untimely. In doing so, it acknowledges that there may well have been other dates both before and after July 12 when this grievance could have been filed. For example, the Association submits that it could have waited until the start of the 1990-91 school year to file the instant grievance because up to that point in time the District could have changed its position concerning assignments in the social studies department. Given this flexibility concerning when the grievance arose, the Association contends that the grievance was filed in a timely fashion. With regard to the merits, it is the Association's position that the arbitrator's function in this case is to simply look to the first sentence of the third paragraph of Article VI, R which provides that "no teacher will be assigned six classes until all teachers in that department have been assigned at least five classes." The Association reads this sentence as not permitting any department member to be scheduled for a sixth teaching assignment until all others have five classes. Inasmuch as what happened here was that the District assigned two social studies teachers six classes while another department member taught three classes, the Association submits that the District violated this section. The Association argues that there is no need for the arbitrator to rely on other portions of Article VI, R to decide this matter, specifically the sentence which follows the aforementioned one. The Association also relies on a non-contractual basis to support its position here, namely the representations Principal Dunning made to teachers when he was pushing the eight-period day concept. In this regard the Association notes that Dunning wrote the following key "guidelines":

> 1. Teachers in the core academic areas of English, Math, Science and Social Studies would continue to be assigned only five classes per day since those areas will probably experience the smallest growth as a result of the eight-period day. (From Dunning's January, 1989 memo.)
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> . . .
>
> 1. Whenever a teaching load of three or more classes become available in a given department an additional teacher shall be hired rather than assign them as sixth classes to other teachers. (From Dunning's February/March, 1989 memo.)

The Association asserts that these "guidelines" were important to its negotiators and they believed that Dunning "would follow through" in implementing same. In the Association's view though, that has not happened here. In order to remedy this alleged contractual breach the Association asks the arbitrator to sustain the grievance and direct the District to reduce the workload of the two social studies teachers from the current six teaching periods to five and that these classes be awarded to Casey, the part-time department member. The Association further requests that Casey's contract be adjusted accordingly and that all wages and benefits which should have been paid to him beginning with the first work day of the 1990-91 contract year be paid according to the contract.

The District initially contends that the grievance was untimely filed. In this regard it notes that the Association was well aware of the facts that formed the basis of the grievance as early as May 17 but the grievance was not filed until July 12, well after the ten-day limitation for filing grievances. With regard to the merits, it is the District's position that the contract language does not support the Association's position that the District is required to distribute workloads when a part-time teacher is hired. The District relies on the parties' bargaining history for the proposition that it proves that the specific language in issue (Article VI, R) and the Memorandum of Agreement was entered into by the parties as a precaution to assure the Association that the newly-created eight-period school day would not be used by the District to create layoffs of teaching staff. The District also asserts that the Association's use of the handouts the members received from Principal Dunning is inappropriate in that the Association only uses a portion of the language of the handout which does not take into effect the entire meaning of the document. Finally, the District contends that the facts of this case prove that a layoff did not occur when the District assigned six duties to the two teachers in the social studies department. The District therefore requests that the grievance be denied.

DISCUSSION

Procedural Arbitrability

Since the District contends the grievance was untimely filed, it follows that this is the threshhold issue. Accordingly, attention is focused first on

the question of whether the grievance is procedurally arbitrable.

The first level of the contractual grievance procedure (Article IV, C,2) provides that "the grievance shall be presented in writing by the teacher to the immediate supervisor within ten (10) days after the facts upon which the grievance is based first occurred or became known." The facts pertinent here are as follows. Members of the social studies department knew by late spring what their preliminary teaching assignments would be for the next year. On May 17 the District posted a notice of vacancies. This notice effectively advised the Association that the District would be hiring a part-time person in the social studies department for the upcoming school year. The Association formally grieved this matter on July 12. The part-time person in question was hired about the same time and given an assignment. Teachers were formally notified around July 15 of their assignments for the upcoming school year.

Given the foregoing facts, the question here is what occurrence triggered the running of the ten day time limitation found in the first level of the grievance procedure. For example, was the occurrence when the social studies teachers received their preliminary notice of their teaching assignments for the next year, was it when the Association learned the District was hiring a part-time person in the social studies department, was it when the part-time person was actually hired, was it when teachers were formally notified of their assignments for the upcoming school year, or was it when the school year started and the teaching assignments were finalized.

In situations such as this where a party announces its intention to do a given act but does not do or culminate the act until a later date, arbitrators have held that the occurrence for purposes of applying contractual time limits is the later date. 4/ In accordance therewith, the undersigned concludes that the occurrence for purposes of applying the contractual time limits here is not when the social studies teachers received their preliminary teaching assignments for the upcoming year or when the Association learned that the District would be hiring a part-time person in that department. This is because it was possible that the District could have changed its position concerning the assignment of classes in the social studies department after those dates. That being the case, the activity complained of (i.e. the assignment of classes in the social studies department) did not ripen or come to fruition until school started. Since the instant grievance was filed not only before school started but also before teachers in that department were formally notified of their assignments for the upcoming school year, I find that the grievance was timely filed. As a practical matter, the grievance could have been timely filed at any point up to the start of the new school year. The instant grievance was therefore filed earlier than was necessary, but there is nothing in the grievance procedure prohibiting such an early filing (of a grievance). In light of this finding then it is held that the grievance is procedurally arbitrable.

Merits

Attention is now turned to the substantive merits of the grievance. This case involves an interpretation of the new language concerning the eight-period school day which the parties placed in their present contract, specifically Article VI, R. The first part of the second paragraph of Article VI, R establishes a precondition that must be met before that sentence is applicable, namely: "if an eight-period day is implemented. . ." (emphasis added). This precondition was met because the District has established an eight-period day at Bay Port High School. Inasmuch as this precondition has been met, it follows that the remainder of that sentence is now applicable. The next part of the sentence provides: "all teachers shall be assigned to six duties and two duty-free preparation periods." This language clearly authorizes the District to asssign teachers six classes (i.e. duties) and two duty-free preparation periods." That is exactly what occurred here to social studies teachers Schadewald and Jameson.

The Association essentially ignores the above-noted provision and relies instead on another provision to support its case herein. Specifically, the Association focuses attention on the first sentence of the third paragraph of Article VI, R which provides: "no teacher will be assigned six classes until all teachers in that department have been assigned five classes." This language is noteworthy because when the District assigned social studies teachers Schadewald and Jameson to teach six classes, there was another member of the department (Casey) who was not teaching five classes. Casey was assigned three classes. The Association contends this assignment ran afoul of the contractual mandate that "no teacher will be assigned six classes until all teachers in that department have been assigned at least five classes." On its face, this language seemingly precludes the District from making the assignment it made (i.e. giving two teachers six classes when another in the department was only assigned three classes).

Having said that though, it is a well-established arbitral principle that the meaning of each contract provision must be determined in relation to the

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4/ Elkouri and Elkouri, How Arbitration Works, Fourth Edition, p. 196.

contract as a whole. Thus, the above-noted sentence cannot be isolated from the rest of the agreement as proposed by the Association. Instead, it must be reviewed in its overall context. That being so, a review of the totality of the pertinent language follows.

As previously noted, the first sentence of the third paragraph of Article VI, R sets forth the following general principle: "no teacher will be assigned six classes until all teachers in that department have been assigned at least five classes." This sentence does not contain any limitations or exceptions. At first glance then it would certainly appear that this general principle applies to every factual situation that could be envisioned. However, a limitation is found in the very next sentence. There it provides: "this prevents assigning a 6th class to several teachers to create a layoff." This (second) sentence establishes that the general principle of the first sentence is not completely open-ended in its scope but rather is limited to a particular set of circumstances, namely where a layoff arises after a sixth class is added. Consequently, I read the two sentences together as meaning that no layoffs are to occur as a result of assigning a sixth class.

Having so found, attention is now turned to the question of whether a layoff occurred as a result of the District's assigning a sixth class to the two social studies teachers. I find it did not. Foremost in reaching this conclusion is the fact that the District's implementation of the eight-period school day resulted in additional staff being hired, one of which was a new part-time social studies teacher (Casey). Inasmuch as the social studies department at the high school ended up with more staff after the eight-period day was implemented than it had before that occurred, it logically follows that no one in the department suffered a layoff or a reduction in hours, and specifically Schadewald and Jameson. Finally, it cannot be said that Casey suffered a layoff or had his hours reduced. This is because he did not go from full-time to part-time status. Instead, the converse is true; he went from nothing to half-time employment with the District. While the District could have chosen to employ Casey on more than a part-time basis or assign him more than three classes, that was their call to make. In light of the foregoing then, it is held that no layoff occurred as a result of the District's assigning a sixth class to the two social studies teachers.

As a practical matter, this holding means that the general principle established in the first sentence of the third paragraph of Articles VI, R is inapplicable here because no layoff was shown to exist after the District assigned two teachers in the social studies department a sixth class. As a result, no contractual violation of Article VI, R has been found.

This finding is further supported by the parties' bargaining history. The record shows that the parties negotiated the language found in Article VI, R and the Memorandum of Agreement to assure the Association that the newly created eight-period school day would not be used by the District to create layoffs. Thus, their mutual intent was to protect teachers (particularly the present staff) from layoffs. That being the case, the purpose of Article VI, R was simply to implement an eight-period day and provide layoff protection to current teachers.

What the Association essentially proposes to do here is to extend the aforementioned language to also provide for a de facto work load distribution system. As seen above, the first sentence of the third paragraph of Article VI, R could be applied to the instant facts to require that Casey be given five classes before anyone else in the social studies department received six. Of course, as a part-time employe Casey was only assigned three classes and assigning him two more for a total of five classes would have the practical effect of turning him into a full-time employe. Thus, it is apparent that this sentence could be used to build up the workload of a part-time employe. Be that as it may, the problem with this proposition is that nothing was said at the bargaining table that this is what the Association, let alone the District, intended this language to cover. As noted above, the only mutual intent the parties had concerning this language was to prevent layoffs; no other purpose was ever even discussed. Had the parties intended this sentence to be used as a mechanism to build up the workload of part-time teachers, it is logical to assume that they would have discussed that possibility. Since they did not, it can be said with absolute certainty that the parties did not mutually contemplate that this sentence would be used as a work distribution clause to assure more classes for part-time teachers. Consequently, the undersigned believes it would be a circumvention of the bargaining process to allow the first sentence of the third paragraph of Article VI, R to be used as a mechanism to create additional work for part-time teachers.

Attention is now turned to the Association's remaining theory in this case, namely the representations Dunning made to teachers concerning the eight-period day concept. Dunning wrote two memos to staff pertinent here that addressed the topic of a proposed eight-period day. Included in these two memos were the following two paragraphs:

> 1. Teachers in the core academic areas of English, Math, Science and Social Studies would continue to be assigned only five classes per day since

those areas will probably experience the smallest growth as a result of the eight-period day. (From Dunning's January, 1989 memo.)

. . .

1. Whenever a teaching load of three or more classes become available in a given department an additional teacher shall be hired rather than assign them as sixth classes to other teachers. (From Dunning's February/March, 1989 memo.)

The Association believes that inasmuch as Dunning made these particular statements in writing, the District should be bound to them. The problem with this contention though is that while some statements from Dunning's memos were incorporated into actual contract language (specifically paragraphs 3 B, 4 and 5 from the January, 1989 memo and paragraphs 2 and 3 from the February/March, 1989 memo ended up in Article VI, R), that is not true of the two above-noted paragraphs. These paragraphs were not incorporated into the contract. Said another way, these particular paragraphs from Dunning's memos never saw the light of day as contract language. That being the case, the undersigned cannot simply overlook this point as implicitly suggested by the Association and consider these statements as obligations which the District is now required to implement. Contractually speaking, they are not. As a result, the District is not contractually obligated to implement the two above-noted paragraphs which were part of Dunning's 1989 memos concerning the eight-period day.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

1. That the grievance was timely filed; and

2. That the contract does not require that teachers be reduced from six classes to five classes in order to create more classes for a part-time teacher. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 8th day of May, 1991.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator