

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 COUNCIL #10 CUSTODIAL EMPLOYEES : Case: 51
 : No: 44486
 and : MA-6311
 :
 BOARD OF EDUCATION, OAK CREEK- :
 FRANKLIN JOINT SCHOOL DISTRICT :
 :

Appearances:

Richard Perry, Perry, Lerner & Quindel, S.C., Attorneys at Law, 823 North
 Cass Street, Milwaukee, Wisconsin 53202-3908, appearing on
 behalf of Council #10 Custodial Employees.
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ARBITRATION AWARD

Council #10 Custodial Employees (hereinafter Union) and Board of Education, Oak Creek-Franklin Joint School District (hereinafter District) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for arbitration of unresolved grievances by an impartial arbitrator appointed by the Wisconsin Employment Relations Commission. On September 25, 1990, the Union filed a request with the Commission to initiate grievance arbitration, which request was concurred in by the District on October 1, 1990. On October 8, 1990, the Commission appointed James W. Engmann, a member of its staff, as the impartial arbitrator in this matter. A hearing was held on December 12, 1990, in Oak Creek, Wisconsin, at which time the parties were afforded the opportunity to present evidence and to make arguments as they wished. A transcript was made of the hearing, a copy of which was received on January 4, 1991. The parties submitted briefs on or before March 19, 1990, and they waived the submission of reply briefs in letters received on or before May 24, 1991. Full consideration has been given to the evidence and arguments of the parties in reaching this decision.

STATEMENT OF FACTS

The District employs 13 school custodians and three or four maintenance mechanics. In the job description for the school custodian, the following job responsibilities are included:

- (14) Makes such minor building repairs as he is capable of.
- (15) Reports major repairs needed promptly to the Supervisor of Buildings and Grounds.
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- (21) Conducts an ongoing program of general maintenance, upkeep, and repair.
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- (27) Performs such other duties as shall be assigned by the immediate supervisor, building administrator, or Supervisor of Buildings and Grounds.

The 1990 wage scale for school custodians ranges from \$12.60 to \$13.42 an hour.

The job description of the maintenance mechanic includes the following job responsibilities:

The maintenance mechanic shall:

. . .

(2) Be expected to fill in as a substitute for custodial help when needed in the district.

. . .

(6) Ability to make repairs in all areas related to maintaining a school plant. If repairs are beyond their ability, reporting area of concern to immediate supervisor so that necessary help to make repairs is secured.

The 1990 wage scale for maintenance mechanics ranges from \$12.88 to \$14.16 an hour.

The District by the Board of Education authorized the replacement of the showerheads in the locker rooms of the high school. The District budgeted \$25,000 to install Bradley Washfountain Kits at a cost of \$300 each. These shower kits were designed by the Bradley Corporation specifically for installation at Oak Creek High School. The District decided that the kits would be installed by in-house school custodians rather than by in-house maintenance mechanics or an outside contractor. As the instructions on the kits were not sufficient, the District decided that the Head Custodian would work directly with the school custodians on a regular basis while the showers were being changed. Normally the Head Custodian does not stay with the school custodians throughout the day. During May and June of 1990, school custodians under the direct supervision of the Head Custodian replaced all the dual control showerheads with the unitary control Bradley Washfountain Kits. The installation was performed in teams, and the process took three minutes work per person for a total installation time of ten minutes per unit. The installation of these shower kits required no re-piping, retiling or wall reconstruction. The project took one and one-half months to complete.

The District by the Board of Education also authorized replacement of the doors at the high school, budgeting \$35,000 for replacing the 86 doors. The District decided to have the door replacement project performed in-house by school custodians rather than to have in-house maintenance mechanics or an outside contractor perform the task. A major project of this dimension had never been performed by employees of the District before. In the past, school custodians have removed and rehung individual doors that needed minor repairs and, previously, maintenance mechanics had hung new gym doors. During the summer and fall of 1990, school custodians under the direct supervision of the Head Custodian carried out the high school door replacement project. Normally, the Head Custodian assigns the school custodians their regular preventive maintenance schedules and from time to time will check to see if they are performing their assigned duties. In this instance, the Head Custodian worked with the school custodians, although he was called away for short periods of time. The doors installed weighed 85 pounds each.

PERTINENT CONTRACT LANGUAGE

ARTICLE I

RECOGNITION

The Board hereby recognizes the Union as the exclusive collective bargaining agent for all regular full-time custodial and maintenance employees including the truck driver and warehouseman in the employ of the Board and excluding supervisors, security guards, summer help and confidential employees.

. . .

ARTICLE IV

MANAGEMENT RIGHTS

The Board possesses the sole right to operate the school system and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to, the following:

1.To direct all operations of the school system;

. . .

3.To hire, promote, transfer, schedule and assign employees in positions and shifts within the school system. Transfers to buildings shall be on a voluntary basis. If there are no volunteers, seniority and qualifications shall prevail;

. . .

6.To maintain efficiency of school system operations;

. . .

8.To introduce new or improved methods or facilities, or to change existing methods or facilities;

9.To determine the kinds and amounts of services to be performed as pertains to school system operations, and the number and kind of positions and job classifications to perform such services;

. . .

ARTICLE XIV

GRIEVANCE PROCEDURE

1.Definition of Grievance: A grievance shall mean a dispute concerning the interpretation or application of this contract.

2.Time Limitations: The failure of the party to file or appeal the grievance in a timely fashion as provided herein shall be deemed a settlement and

waiver of the grievance. The party who fails to receive a reply in a timely fashion shall have the right to automatically proceed to the next step of the grievance procedure. However, if it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent in writing.

3. Settlement of Grievance: Any grievance shall be considered settled at the completion of any step in the procedure, if all parties concerned are mutually satisfied. Dissatisfaction is implied in recourse from one step to the next.

Steps of Grievance Procedure

Step 1: The employee, individually or with a Union representative, shall orally state the grievance with his/her immediate supervisor within five (5) working days after the employee knew or should have known the cause of such grievance. The immediate supervisor shall confer with the employee in relation to the grievance, after the Union representative is given opportunity to be present at said conference. The immediate supervisor shall, within five (5) working days, orally inform the employee and the Union representative of the decision.

. . .

Arbitration

5. Decision of the Arbitrator: The decision of the arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the contract in the area where the alleged breach occurred. The arbitrator shall not modify, add to, or delete from the express terms of the Agreement.

. . .

ARTICLE XV

WAGES AND HOURS OF WORK

1. The wage scales which are to be in effect for the term of this Agreement are attached as Appendix A.

. . .

APPENDIX A

. . .

1990 WAGE SCALE

		<u>Start</u>	<u>Step I</u>	<u>Step II</u>	<u>Step III</u>
		. . .			
School Custodian	12.60	12.88	13.15	13.42	
		. . .			
Maintenance Mechanic I	12.88	13.30	13.73	14.16	

ISSUE

The Union frames the issue as follows:

Did the Employer violate the contract, Article XV, Wages and Hours of Work, Section 1 and Appendix A, when it required custodial employes Howard Stuart, Frank Spaeth, and Rick Schulte to perform the duties of the maintenance mechanic I position, that is, the installation of showers and the assembling and installation of doors at the high school while compensating them at the lower rate of pay negotiated to the custodial employes as set forth in the grievance dated August 2, 1990?

If so, what should be the remedy?

The District frames the issue as follows:

Is the grievance arbitrable?

If the grievance is arbitrable, did the District violate the terms of Article XIV of the 1989-90 contract when it assigned three custodial employees to perform shower installation work and assembly and installation of doors at the Oak Creek High School in the spring and summer of 1990?

If so, what is the remedy?

The Arbitrator frames the issue as follows:

Is the grievance properly before the Arbitrator?

If so, did the District violate the collective bargaining agreement when it paid school custodians their normal wage rate when they installed shower kits and hung new doors?

If so, what is the remedy?

POSITIONS OF THE PARTIES

Union

As to the District's procedural arguments, the Union argues that the District waived its procedural timeline objection by not raising it during the processing of the grievance prior to the arbitration hearing; that the conduct objected to in the grievance constituted a continuing grievance which occurred anew each day the custodians were ordered to replace the doors and the shower fixtures; and that since the District's Business Manager was the administrative official who made the decision to order the custodians to perform the maintenance mechanic's duties, the grievance was properly filed at the step at which the violation occurred and at which it could be corrected.

As to the merits, the Union argues that by assigning to custodians on a protracted basis the two major repair projects complained of in the grievance, the District has violated the contractual wage rates negotiated with Council #10 for those duties and the job descriptions which are in effect for the custodians; and the Union requests the arbitrator to order the District to make

whole those custodians who were required to perform the duties of maintenance mechanics while being paid at the lower rate of pay while performing those duties.

District

As to the issue of timeliness, The District argues that the collective bargaining agreement is clear in establishing time limitations at the various steps in the grievance procedure and must be enforced as written and submits that the grievance must be denied and dismissed.

As to the merits, the District argues that the operative collective bargaining agreement does not state that employes are to be paid for work out of grade; that the rights of the District to assign work are not restricted by the contract; that the District has never, in the past, paid employes different contract rates for alleged work out of grade; that neither the Union nor any employe has ever filed a grievance alleging that employees are to be paid for alleged work out of grade; and that the Union proposed, during the course of the 1990 negotiations with the District, to include language in the collective bargaining agreement which would provide employes with pay for out of grade work.

In addition, the District argues that the work performed by custodial employes which is at issue here is work of a type that has been performed in the past by custodial employes without grievance or protest; that custodial employes have hung doors in the past; that custodial employes routinely performed plumbing work of the type which is at issue here; and that the installation of the "Adapt-a-Brad" kits in the shower rooms at the Oak Creek Senior High school was not maintenance work and did not justify payment of maintenance rates.

DISCUSSION

Timeliness

The District argues that the grievance is untimely and improperly filed. It is clear on the record that the District did not raise either procedural defense until the arbitration hearing in this matter. It is well settled that failure to raise a procedural defense in the stages of the grievance procedure prior to arbitration estops the party from using such defense at the arbitration hearing. 1/ As the District did not raise its procedural objections until the arbitration hearing, the objections are deemed waived and the merits will be considered.

Merits

The first major problem that the Union faces in prevailing in this

1/ See, i.e., Vendo Company, 65 LA 1267, 1269 (Madden, 1976), citing numerous cases and quoting several arbitrators for the proposition that delay in raising such a defense is fatal to its efficacy.

grievance is that it can not point to any specific language in the collective bargaining agreement which states that school custodians will be paid mechanic maintenance rates when performing maintenance duties. Nothing in the agreement between the parties says that "an employee will receive a pay differential for all work performed in a higher pay grade" or words to that effect. The Union attempts to overcome this major problem by noting that the parties have negotiated wage rates for various classifications of employes, that said rates are set forth in Appendix A of the collective bargaining agreement, and that said rates are incorporated into the contract proper by Article XV, Section 1. The Union does not cite any authority, nor was any found, for the proposition that a wage scale for various employe classifications creates a right of the employe to receive or an obligation on the employer to pay out of class pay for temporary work in a higher pay grade.

Indeed, the inference from the case law is to the contrary. Every case found involving out of classification pay had contract language specifying that out of class rates would be paid for work in a higher pay grade. The question before the Arbitrator was whether the work involved in the case was truly out of class. If a wage scale is sufficient to guarantee out of class pay, a lot of contracts contain superfluous language specifying that guarantee. A more likely proposition is that a wage scale, in and of itself, is not sufficient to require out of class pay for temporary work in a higher pay grade.

Assuming, argumento, that the agreement between the parties does provide for out of classification pay, the Union faces a second major problem in proving that the installation of the shower kits and the hanging of the new doors is maintenance mechanics' work. The Union's overall argument is that the shower and door projects are major repairs, as specified in the job description of the maintenance mechanics, and not minor repairs, as specified in the school custodians' job description. Therefore, as these school custodians were doing major repair work as described in the maintenance mechanics' job description, they should have been paid maintenance mechanics' rates per the wage scale stated in Appendix A.

More specifically, the Union argues that the shower and door projects were major decisions made at the Board of Education level which required major prior evaluation and major budget commitments. The fact that these were major projects in terms of decision making and cost impact do not make the tasks of installing shower kits and hanging new doors major repairs. The Board could decide to change every light bulb in the school at some great expense but this, in and of itself, does not make the changing of the light bulbs a major repair.

The Union also argues that installation of the shower kits and the hanging of the new doors were major repairs because direct supervision by the Head Custodian was required by the District. But such supervision does not, in and of itself, make for a major repair. The District could purchase a new snow blower or floor waxer and have the Head Supervisor directly involved to teach and supervise the employes on how to operate the machine or do the job. Indeed, the presence of the head custodian in this situation did not make these major repairs, especially since the Head Custodian appeared to be acting as a lead worker.

In addition, the Union argues that the large-scale scope of the two projects (86 doors, numerous shower kits) makes this a major repair. No doubt these were major projects, requiring a large amount of work time and money. However, if installing one shower kit or hanging one new door is a minor repair, the fact that there are many kits or doors does not make these major repairs; it just makes for a lot of minor repairs.

This is not a case where the employes in a lower wage classification are doing work that has traditionally or consistently been done by employes in a higher wage classification. When presented with such a case and applicable contract language, arbitrators have consistently ordered payment of the higher rate. 2/ It is undisputed that both the shower and the door projects were unique. The record is clear that the showers had not been changed in the 28 years of the school's existence, so neither the maintenance mechanics nor the school custodians traditionally did this work. While the maintenance mechanics had in one instance hung new gym doors, the record also shows that school custodians have removed, repaired and hung doors on various occasions in the past. On this record, therefore, the work of hanging doors has not been traditionally or consistently done by either group.

In terms of the shower installation, the Union did not show that this was a particularly difficult job. It involved no advance knowledge of a technical or mechanical nature, nor did it require any complex skills or use of tools, characteristics one would expect to find in a major repair. In terms of hanging the doors, the record is clear that custodians have done this work before and, again, the Union did not show that this was a particular complex job. In neither case does the record support a finding that these were major repairs. Therefore, even if the agreement provided for out of class pay, the record

2/ The Union argues that in the past a truck driver was paid at the school custodian rate for a summer when he was assigned the cleaning and waxing of floors. That instance is distinguishable in that the truck driver was doing work traditionally done by school custodians.

herein does not show that the school custodians were doing work out of class for which they should be compensated for at the maintenance mechanics' rate of pay.

For these reasons, based upon the foregoing facts and discussion, the Arbitrator issues the following

AWARD

1. The grievance is properly before the Arbitrator.
2. The District did not violated the collective bargaining agreement when it paid school custodians their normal wage rate when they installed shower kits and hung new doors.
3. The grievance is denied and dismissed.

By _____
James W. Engmann, Arbitrator