

BEFORE THE ARBITRATOR

 :
 In the Matter of the Arbitration :
 of a Dispute Between : Case 102
 : No. 45391
 SUPERIOR SCHOOL DISTRICT EMPLOYEES, : MA-6586
 LOCAL 1397, AFSCME, AFL-CIO :
 : Case 103
 and : No. 45392
 : MA-6587
 BOARD OF EDUCATION - SCHOOL DISTRICT :
 OF SUPERIOR :
 :

Appearances:

Mr. Victor Musial and Mr. James Mattson, Staff Representatives, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.
 Gee, Hendricks, Knudson and Gee, S.C., Attorneys at Law, by Mr. Kenneth

Knudson

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the District or Employer 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 two grievances. A hearing on both grievances was held on June 27, 1991 in Superior, Wisconsin. The hearing was not transcribed. Afterwards, the parties filed briefs and reply briefs which were received by August 21, 1991. Based on the entire record, the undersigned issues the following Award.

ISSUE:

The parties stipulated to the following issue:

Did the Employer violate the contract, past practice or previous settlements by not assigning noon bus runs on a seniority basis?

PERTINENT CONTRACT PROVISIONS:

The parties' 1990-1993 collective bargaining agreement contains the following pertinent provisions:

Article 6 - Salary Schedule - Paydays - Guaranteed Hours of Work
Shift Differential Pay - Overtime Pay

. . . .

Section 3. Overtime Pay. For the purpose of computing overtime pay for all non-instructional employees the following shall apply:

. . .

- G. Past practice shall be used in assigning bus runs involving overtime work. All overtime for non-bus drivers will be done by seniority and job classification; school building seniority will prevail where applicable.

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Article 7 - Seniority - Promotions - Layoffs

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Section 5. Definition of routes and Bidding Procedures for Bus Drivers

A. Definitions:

1. Regular Route: Transporting students to and from school on a daily and regular basis. Such assignments will be subject to the bid process as defined below.
2. Extra-Curricular Route: Transporting students from school to the site of an extra-curricular activity (and vice versa). Such assignments occur on an irregular basis and will be assigned according to "seniority" and "proximity".
3. Co-Curricular Route: Transporting students to and from school and/or between two or more school sites as needed and on a regular basis. Such routes may be assigned only to drivers who are assigned regular routes (as defined above). Such assignments will be made according to "seniority" and "proximity".
4. City Route: Any route which begins and ends within the boundaries of the City of Superior and/or the Village of Superior. In order to qualify for assignment to a city route an employee must reside within the boundaries defined above. In addition, senior rural drivers whose residence is ten (10) or fewer miles from the start of an available city route, are eligible for assignment to that route. Bus routes currently being driven by drivers known as "intracity drivers" are covered by the Addendum B to the collective

bargaining agreement dated June 22, 1983, and thus may be contracted to private vendors at the discretion of the Board.

5. Rural Route: Any route which either begins or ends (or both) within the boundaries of the School District of Superior but not inside the boundaries of the City of Superior and/or Village of Superior. In order to qualify for assignment to a rural route an employee must reside within the boundaries defined above. In addition, senior city drivers whose residence is ten or fewer miles from the start of an available rural route are eligible for assignment to that route.
6. Deadhead Driver Time: Minutes required to drive to and from the start of a route and to and from the end of a route.

B. Bidding Procedure for Bus Drivers

1. All current bids will be maintained under current practice.
2. The current bidding procedure by area will be eliminated. All future bids for "regular routes" will be governed by seniority and classification. Drivers assigned routes classified as "city routes" may bid for such routes when vacant but will not be eligible to bid routes classified as "rural routes". Conversely, drivers assigned routes classified as "rural routes" will not be eligible to bid routes classified as "city routes". Exception to this rule is defined under A4 and A5.
3. Drivers who bid on available rural routes will receive up to one hour and 30 minutes (90 minutes) per day to cover "deadhead driver time".
4. No other changes in current practice, including payment for "layovers", which is time spent in town or at a school between runs, will be made.
5. This agreement is subject to approval by attorneys for both the school district and the union. Any

language agreed which is found contrary to the Fair Labor Standards Act shall be null and void.

. . . .

Article 22 - Management Rights

Section 1. The Board, on its own behalf, and on behalf of the electors of the District, hereby retains and reserves unto itself, without limitations, all powers, rights, authority, duties, and responsibilities conferred upon and vested in it by the laws and the Constitution of the State of Wisconsin, and the United States, included, but without limiting the generality of the foregoing, the right:

- A. To the executive management and administrative control of the total school system and its properties and facilities, and the assigned school activities of the employees;
- B. To hire all employees;
- C. To establish job specifications and duties for their employees, the reasonableness of which shall be subject to arbitration.

Section 2. The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specified and express terms of this Agreement, and then only to the extent such specific and express terms hereof are in conformance with the Constitution and laws of the State of Wisconsin, and the Constitution and laws of the United States.

FACTS

John Stupak formerly drove the noon kindergarten bus runs at issue here. Stupak had an unusual work schedule in that he worked twelve hours a day with four hours daily overtime. Stupak's long workday was the result of his being assigned to mid-day and noon kindergarten runs by virtue of his status as the most senior bus driver. Stupak retired in June, 1990. After he retired, the District restructured Stupak's route so that there would no longer be anyone working twelve hours on a daily basis. Specifically, the District divided Stupak's old route, including his noon kindergarten runs, into two different routes: a city route and a rural route. This was apparently the first time the District included any kindergarten runs in a restructured route. The Employer then put Stupak's restructured route(s) up for bid. Two employees bid on the routes and were awarded them. Afterwards, bus drivers Shirley Wiskerchen and Jean Carlson, who did not bid on either route but who have more seniority than the employees who bid on and were awarded Stupak's restructured routes, filed grievances contending that the District should have assigned them the noon kindergarten runs formerly made by Stupak. Their grievances were appealed to

arbitration.

The posting referred to above named the person who had formerly driven the route (i.e. Stupak) but did not indicate how long the route(s) took to drive. Union witnesses testified that past postings indicated both who had previously driven the route and the time the route took to drive.

In 1980, the then District Superintendent wrote to the then Council 40 Staff Representative concerning several route assignment grievances that were pending at the time. This letter indicated in pertinent part: "Mid-day and noon routes are filled on a seniority basis." So far as the record shows, noon kindergarten runs were thereafter assigned on a seniority basis until Stupak retired.

The record indicates that when the above-noted letter written in 1980, the parties' labor agreement did not provide a definition of routes or a bidding procedure to fill routes. Language addressing same was negotiated in 1987 and placed in the parties' 1987-90 contract in Article 7, Section 5. The language found in Article 7, Section 5 of the current contract is identical to that contained in the parties' 1987-90 contract.

POSITIONS OF THE PARTIES

It is the Union's position that if the District had assigned the kindergarten runs in question by seniority and not incorporated them into the two newly restructured routes, then the District would have been in compliance with both the contract and the past practice concerning same. However, according to the Union that did not happen here so the District violated both.

The Union first contends that the testimony of its witnesses and the letter from the then District Superintendent to the then Council 40 Staff Representative establish that noon kindergarten bus runs had been assigned on a seniority basis since 1980. Inasmuch as the noon runs involved here were not assigned by seniority, the Union submits that the District failed to comply with its past practice as it is obligated to do by Article 6, Section 3, G. Next, the Union asserts that by incorporating these kindergarten runs into the two restructured routes after Stupak retired, the District also arbitrarily changed its past practice and undermined the contractual rights of the bus drivers. Finally, the Union contends that when the District posted Stupak's restructured route(s), it did not divulge the time involved for the route. In the Union's opinion, this is a change from what it had done in previous postings, and hence a contractual violation. In order to remedy these alleged violations of the contract and past practice, the Union requests that all noon kindergarten runs be assigned to bus drivers based on seniority and that both grievants Wiskerchen and Carlson be made whole for all kindergarten runs they have missed since August, 1990.

The District's position is that it complied with the labor contract when it established bus routes for the 1990-91 school year. According to the Employer, the routes at issue here qualify as regular routes, not co-curricular routes. It notes that Article 7, Section 5, A, 1 provides regular routes will be filled by bidding and it asserts that it followed the bidding procedure here. Since it did so, it contends the grievances are without merit. With regards to the 1980 letter from the District Superintendent which the Union relies upon, the District submits that the letter dealt with a different situation than currently exists and addressed an issue at a time when the contract did not provide a definition of routes or a bidding procedure to fill them. It points out in this regard that the parties' 1985 contract made no mention of either a definition for a "regular route" or for a bidding procedure to fill "regular routes", while the parties' 1987 contract (as well as the current contract) does. The Employer contends this contractual language

superceded the 1980 letter and therefore should be applied here. In the Employer's view, the instant grievances are an attempt to avoid this negotiated language. Finally, the Employer contends that if the arbitrator were to sustain the grievances, this would provide for mandatory overtime on a daily scheduled basis, may violate the Fair Labor Standards Act and may have unfavorable safety implications. The District therefore requests that the grievances be denied.

DISCUSSION

What happened here is that certain noon kindergarten runs were previously assigned to John Stupak. After he retired the Employer did not reassign these noon runs by seniority. Instead, the District restructured Stupak's old route into two different routes and incorporated his noon kindergarten runs into them. Then, the Employer put the two new routes up for bid. The Union contends this action (i.e. including Stupak's noon kindergarten runs in the restructured routes and not assigning those runs by seniority) violated both the contract and past practice. The Employer obviously disputes this assertion.

Attention is focused initially on the question of whether the Employer could restructure Stupak's former bus route into two new routes and incorporate his noon kindergarten runs into them. A review of the labor agreement indicates it does not address the restructuring of bus routes in any way, shape or form. This of course means that the parties have not included language in their present agreement covering this situation (i.e. the restructuring of bus routes). Given this contractual silence on the subject, management has retained the right, under the Management Rights clause (Article 22) to determine what the bus routes will be and how they will be structured. Since management has the right to determine how the bus routes will be structured, it must likewise have the right to determine if noon kindergarten runs will be included in the restructured routes.

The Union argues that the Employer is nevertheless precluded from incorporating Stupak's noon kindergarten runs into the two restructured routes because a practice allegedly exists that noon kindergarten runs will not be included in restructured bus routes. In support thereof, the Union cites the fact that so far as the record shows, the Employer has never included noon kindergarten runs in a restructured route prior to doing so here. However, just because the Employer has never included noon kindergarten runs in a restructured bus route does not mean that a "practice" against it exists. As noted above, the Employer's restructuring of Stupak's former route into two separate routes and incorporating his noon kindergarten runs into them was a legitimate management function. The Employer's failure to exercise that right until now does not mean that it has somehow surrendered that right or is precluded from now exercising same. This is because mere non-use of a (management) right does not entail a loss of it. 1/ That being so, it is found that the Employer could restructure Stupak's former route into two routes and incorporate his noon kindergarten runs into them.

Having so held, attention is now turned to the question of whether Stupak's old noon kindergarten runs should have been assigned by seniority. In resolving this question the undersigned will review both the applicable contract language and an alleged past practice covering the matter.

Inasmuch as the parties dispute which section of the contract is applicable here, it follows that this question must be addressed first. The

1/ Standard Oil Company, 16 LA 73, 74 (McCoy, 1951).

Union contends the pertinent language is found in Article 6, Section 3, G, which provides "past practice shall be followed in assigning bus runs involving overtime work." Simply put, this language requires the Employer to follow the past practice in assigning bus runs involving overtime. Since the stipulated issue requires a finding as to whether "the Employer violated the . . . past practice . . . by not assigning noon bus runs on a seniority basis", the Union's contention that this section is applicable here certainly appears reasonable. However, just because the issue refers to "past practice" and this section does too does not mean this section is the only one applicable to this case. It may be that other provisions of the contract are applicable as well. That being the case, the undersigned will also review the contractual language cited by the Employer. Afterwards, a finding will be made concerning which section of the contract controls here.

The Employer contends that the pertinent language is found in Article 7, Section 5. This language was added to the contract in 1987; it did not exist prior to that. Article 7, Section 5, A defines the various routes bus drivers can have while Article 7, Section 5, B contains the bidding procedure for bus drivers. Attention is focused first on Section A. Two of the routes defined in Section A are involved here (i.e. "regular route" and "co-curricular route") because the parties dispute which category is applicable to noon kindergarten runs. The Employer contends that noon kindergarten runs qualify as "regular routes" while the Union infers they are "co-curricular routes". This distinction is important because "regular routes" are made "subject to the bid procedure" while "co-curricular" assignments are made according to 'seniority' and 'proximity'." A "regular route" is defined as "transporting students to and from school on a daily and regular basis", while a "co-curricular route" is defined as "transporting students to and from school and/or between two or more school sites as needed and on a regular basis." On its face, neither definition explicitly mentions noon kindergarten runs. That being so, it is necessary to determine which category is applicable to such runs. The undersigned finds that since a noon kindergarten run involves the delivery of students from school to their homes every day of the week, it qualifies as a "regular route". The basis for this finding is quite simple; there is nothing in the record that conclusively indicates otherwise.

Having found that noon kindergarten runs qualify as regular routes, this means that they are to be made "subject to the bid procedure" found in Section B of Article 7, Section 5 and not assigned by seniority. That is exactly what happened here. After restructuring Stupak's former route into two different routes, the Employer put them up for bid and they were bid upon by individuals not named in the record. Since the Employer put the routes up for bid, it complied with its contractual requirement to do so. 2/ The Employer was not required, under the language of Article 7, Section 5, to assign Stupak's former noon kindergarten bus runs by seniority.

The crux of this case is that the Union contends that the Employer is nevertheless obligated to assign noon bus runs by seniority because of an alleged past practice covering same. The Employer does not deny that the noon runs involved here were previously assigned on a seniority basis. Lest there be any question about it, the record indicates that the then District

2/ While the Union notes that the posting involved here did not list the approximate hours the route took to drive and contends this was a departure from past postings that did include this information, there is no contractual requirement that such information be included on a posting. As a result, the posting in question has not been shown to be contractually deficient.

Superintendent wrote to the then Council 40 Staff Representative in 1980 and indicated that "mid-day and noon routes are filled on a seniority basis." So far as the record shows, this has been the practice since then.

Given the existence of this practice, the critical question here is whether it (i.e. the practice) overrides the language found in Article 7, Section 5. I find that it does not for the following reasons. To begin with, the general rule in arbitration is that a past practice cannot be used to alter, change or otherwise modify clear contract language. 3/ In the opinion of the undersigned, that is exactly what the Union is trying to do here. Next, it is noted that when the past practice arose (and the letter supporting same was written in 1980), the situation was different than currently exists. This is because at that time the contract did not provide a definition of routes or a bidding procedure to fill them. This changed in 1987 when the parties negotiated language to provide for same. Third, the fact that Stupak's noon kindergarten runs were still assigned to him by seniority after the contract language changed in 1987 can be explained by the fact that Article 7, Section 5, B, 1 expressly authorized same. That section provides: "All current bids will be maintained under the current practice." This provision allowed Stupak to keep his pre-1987 route which included the noon runs assigned by seniority. However, in accordance with Article 7, Section 5, B, 2 when Stupak retired so did his unique route which included the noon runs assigned by seniority. Thereafter, the Employer was free to fill Stupak's former route, and his former noon kindergarten runs, by the bid process found in Article 7, Section 5, B.

In summary then, it is held that the Employer could restructure Stupak's old route into two separate routes and incorporate his noon kindergarten runs into them. Additionally, it is held that the route(s) in question were to be made subject to the bid procedure and that the Employer complied with this contractual requirement. Finally, it is held that the practice of assigning noon kindergarten runs by seniority does not override the language found in Article 7, Section 5. Therefore, that contractual language has been applied here rather than the past practice.

In so finding, it is noted that although the Employer also argues that sustaining the grievances would provide for mandatory overtime, may violate the FLSA and may have unfavorable safety implications, this decision has not been based on any of these arguments.

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

AWARD

That the Employer did not violate the contract, past practice or previous settlements by not assigning noon bus runs on a seniority basis. Therefore, the grievances are denied.

Dated at Madison, Wisconsin this 11th day of November, 1991.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator

3/ MANAGEMENT RIGHTS, Hill and Sinicropi, (BNA 1986) at page 50.

