BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
WISCONSIN DELLS SCHOOL DISTRICT	Case 25 No. 46095 MA-6865
and	
WISCONSIN DELLS SCHOOL DISTRICT EMPLOYEE'S UNION, LOCAL 1401-A, AFSCME, AFL-CIO	

Appearances:
Mr. Steven J. Holzhausen, Membership Consultant, Wisconsin Association of School Boards, Inc., on behalf of the District.
Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Union.

ARBITRATION AWARD

The above-captioned parties, hereinafter the District and the Union respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration. The parties jointly requested the undersigned, a member of the staff of the Wisconsin Employment Relations Commission, to hear the instant dispute. Hearing was held on October 17, 1991, at Wisconsin Dells, Wisconsin. No stenographic transcript was made. The parties completed their briefing schedule on December 5, 1991. Based upon the record herein and the arguments of the parties, the undersigned issues the following Award.

ISSUE:

The parties did not stipulate to the framing of the issue. Accordingly, the undersigned would frame it as follows:

> Did the District violate the express or implied terms of the collective bargaining agreement when it declined grievant Elston Freel's job assignment request as indicated in his February 18, 1991 letter? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

Article 1 - Recognition

> 1.01 The Board hereby recognizes the Union as the exclusive collective bargaining agent of all employees of the School District of Wisconsin Dells, consisting of all regular full-time and regular part-time employees, but excluding supervisory employees, confidential employees, managerial employees, and professional employees, as certified by the Wisconsin Employment Relations Commission on the 12th of August, 1987, Decision No. 24604-B.

Article 2 - Management Rights

> 2.01 Except as otherwise provided in this Agreement, nothing herein shall limit the Employer in the exercise

of the rights and functions of ownership or management, including, but not limited to, the right to manage the operations of the Employer and direct the working forces, the right to hire new employees, to assign work, to determine the number and location of its operations, the services required therein, and the quality of such service, including the means and processes of services and the materials used therein. This provision shall not be used to discriminate against any employee.

. . .

Article 5 - Grievance Procedure

5.01

a. Definition

Grievance is defined to be and limited to a dispute concerning the interpretation or application of the written agreement entered into between the parties on wages, hours and conditions of employment for the employees for whom Local 1401-A, WCCME, AFSCME, AFL-CIO is the negotiating representative.

f. The arbitrator shall schedule a hearing on the grievance and, after hearing such evidence as the parties desire to present, shall render a written decision. The arbitrator shall have no power to advise on salary adjustments, except as to the improper application thereof. Nor shall the arbitrator have the power to hear or determine any dispute except those limited to the interpretation or application of the express and specific provision(s) of this written agreement, nor to add to, subtract from, modify or amend any terms of this agreement. The arbitrator shall have no power to substitute his discretion for that of the Board in any matter not specifically contracted away by the Board. the decision of the arbitrator shall, within the scope of his authority, be final and binding upon the parties.

. . .

Article 8 - Employee Definitions

8.01 Regular Full-Time Employee: A regular full-time employee is hereby defined as an employee who works nine (9) or more months per year at six (6) or more hours per day.

8.02 Regular Part-Time Employee: A regular part-time employee is hereby defined as an employee who

works nine (9) months at less than six (6) hours per day.

Article 9 - Seniority

9.01 It is the policy of the Employer to recognize seniority. There shall be five (5) departments defined as follows for employees covered by Local 1401-A:

a. Maintenance and Custodial (including Laundry);
b. Clerical and Secretarial;
c. Food Service;
d. Aides;
e. Transportation.

. . .

9.03 Seniority shall consist of the total calendar time elapsed since the date of original employment with the School District of Wisconsin Dells in a bargaining unit position with the department named above; provided, however, that no time prior to a discharge for cause or a quit shall be included; and provided that seniority shall not be diminished by temporary layoff or leaves of absence of less than one (1) year duration. To retain seniority upon recall from layoff, an employee must notify the Employer within five (5) work days of his/her intention to return and must report for work within an additional ten (10) work days.

9.09 An employee shall lose seniority in the event the employee:

A. Retires, resigns, or is discharged for just cause;

B. Is not recalled from layoff for a period of two (2) years;

C. Is recalled from layoff and does not report for work within fifteen (15) days after a notice of recall is sent to the last known address by certified mail.

D. Does not return within three (3) work days at the expiration of a leave of absence, unless the employee could not return due to circumstances beyond the employee's control;

E. Is absent from work for three (3) or more work days without notification to the District, unless the employee could not notify the Employer due to circumstances beyond the employee's control.

APPENDIX B - BUS DRIVER SALARY SCHEDULE

Additional Provisions

3. Bus drivers will be assigned to routes developed by the School District and the transportation supervisor.

11. Route assignment will be made on the basis of seniority. Seniority will be applied to vacant routes.

12. Any driver who transfers from a regular route to substitute status and then returns to a regular route, will retain all seniority earned while on a regular route, however, no additional seniority shall be earned by the employee while on substitute status.

NOTE: Except for retirement benefits the above represents the complete wages and benefits for the bus drivers.

FACTS:

The grievant, Elston Freel, has been employed as a bus driver by the District since 1981. During the 1990-91 school year, Freel drove a morning and afternoon route (a.m. and p.m. route) a hot lunch route and mail route and a kindergarten route daily. He also drove a band route two days a week. In February of 1991, Freel, in anticipation of drawing social security benefits informed the District that he would no longer be able to drive full-time. He requested permission to relinquish kindergarten, afternoon (p.m.) and band routes, while continuing to drive his regular morning (a.m.) route and the noon mail and hot lunch routes. The District conditionally granted Freel's request for the remainder of that school year but informed him that in order to be considered and remain a regular driver, he would be required to maintain an a.m. and p.m. route or change his status to that of a substitute driver. According to testimony by Transportation Supervisor Ed Anen, a substitute driver drives only at the request of Amen and may not be a regular full-time or regular part-time employe or even a bargaining unit employe.

The record indicated a number of examples in the past where the District permitted drivers to drive only an a.m. or a p.m. route without considering them to be substitutes. Moreover, one a.m. - p.m. route is job-shared by a husband and wife team, Harlan and Judy Grubb. Harlan Grubb drives the a.m. route while Judy drives the p.m. route. The Grubbs are not considered substitutes.

POSITION OF THE PARTIES:

Union

The Union contends that past practice supports its position because there are numerous examples of drivers being permitted to drive only a morning route or only an afternoon route over a long period of time. Most of these examples occurred, however, prior to the certification of the Union as the bargaining representative. According to the Union, there is absolutely no justification for the District to require the grievant to drive both a morning and afternoon route in order to maintain his status as a regular employe when so many other drivers have been permitted to drive just one portion in the past and continue

to be so permitted.

The Union asserts that the District's requirement strips the grievant of his seniority rights pursuant to the agreement. To accept the District's position would deprive the grievant of his seniority to obtain other routes, such as a lunch and mail route, a kindergarten route, etc. Noting that in the reasons for losing seniority, there is no mention of failing to maintain both an a.m. and p.m. route, the Union asserts that the District may not rewrite the contract to include this among the reasons for loss of seniority.

The Union further notes that nowhere in the contract is there any requirement that drivers maintain a morning and an afternoon route in order to be considered a "regular" driver. The lack of any contractual basis, it points out, is made all the more clear by the fact that the District has in its most recent negotiations proposed to insert language requiring a "regular" driver to drive both an a.m. and p.m. route. The District would not be proposing such language if the agreement already contained this requirement.

The Union claims that the District's position yields harsh, absurd and nonsensical results. Should the District prevail and force the grievant to drive both a.m. and p.m. routes, his other routes would be vacant. If the District were unable to fill them, it would be forced to hire a new driver who would not be considered a "regular" driver because no a.m. and p.m. routes were driven nor a substitute inasmuch as this driver would drive every day. A "catch-22" for the new driver would be created by this acceptance which could last for years.

One other certain result, would be the application of the new requirement to all other employes across the board including the Grubbs, relegating both of them to substitute status. The Union urges the undersigned to reject the District's requirement as yielding harsh and absurd results.

Lastly, the Union stresses that if the District is concerned about how the routes are distributed among its drivers, it should seek to address those concerns at the bargaining table -- not through unilateral implementation of ill-advised requirements. It requests that the grievance be granted and the grievant permitted to drive only his morning route and lunch and mail route without being required to drive an afternoon route.

District

The District makes three basic arguments. It argues that the past practice theory advanced by the Union in this case cannot be sustained because the grievance procedure defines a grievance as a dispute of the terms of the written agreement and limits the Arbitrator's authority to interpretation of the written agreement. It also claims that the contract is silent on the issue of what constitutes a regular full-time bus driver versus a substitute driver and absent such language, the District has the right to make such a determination. Thirdly, and most importantly, the District submits that it is merely utilizing its managerial right to assign work noting that there is nothing in the contract which would require the District to grant the grievant's request to unilaterally determine which bus routes he wants to drive.

With respect to the Union's past practice argument, it is the District's position that the Union improperly framed the issue by alleging a violation not only of the written agreement, but of the past practice between the parties in regards to what constitutes regular versus substitute bus driving status. The District contends that Union reliance upon past practice is misplaced because the Arbitrator has very limited discretion pursuant to the clear and

unambiguous grievance procedure language. It asserts that the Arbitrator must decide this case based solely on whether there was a violation of the written agreement. Should the Arbitrator nevertheless consider past practice, the District asserts that consideration must be limited to the practices which occurred after July 1, 1988, the date of the initial agreement between the parties.

According to the District, only two cases can arguably be considered as relating to past practice, that of Martha Schultz and Robert Fawcett and that of Harlan and Judy Grubb. It distinguishes both from the instant situation.

The District stresses the fact that there is absolutely no practice in the record of the District allowing an employe to pick-and-choose his own work schedule. One instance of allowing an employe to work a reduced number of hours does not establish a binding past practice. Moreover, there is no obligation on the District's part to allow employes to determine their own work schedules.

The District avers that in the contract, pursuant to Appendix B, there is a distinction between regular part-time employes and bus drivers, but that it is not clear what the distinction between regular and substitute drivers is. Because the agreement is silent on this point, the District submits that Appendix B and the Letters of Intent lead to the conclusion that the District's position is correct.

In response to Union arguments that its language proposal for a successor agreement somehow weakens the District's position, the District maintains that its proposal is merely an attempt to codify the current practice regarding bus driver status. Further proof of this position, it submits, are the exhibits introduced by the District to support the fact that at least two bus drivers agreed that a driver must drive both an a.m. and p.m. route in order to be considered a regular driver.

Finally, the District submits that the main issue in this case is whether the District has the right to assign its work force. Even if it were determined that past practice supports the Union's position, there is absolutely no basis for the grievant's claim that he be allowed to select which routes he will drive. Both Article 2 and paragraph 3 of Appendix B make it clear that the District possesses the right to assign routes.

Contradicting Union assertions that the seniority language must be considered and that said language would allow the grievant to pick-and-choose which routes he wanted to drive on the basis of seniority, the District argues that said language applies only in the event a vacancy occurs. Pointing to the need for efficiency and the difficulty in obtaining regular drivers for the a.m. and p.m. runs, the District stresses that the key issue in the case is the District's right to assign its work force. It requests that the grievance be denied.

DISCUSSION:

The Union relies heavily upon a series of alleged past practices to support its position in the instant dispute. The District on the other hand maintains that the undersigned is prohibited from any consideration of past practice by clear and unambiguous contract language in the grievance procedure provision of the collective bargaining agreement.

It is unnecessary to address the District's contention in this respect because the Union has been unable to establish an unequivocal, clearly enunciated and acted upon, readily ascertainable practice over a reasonable

period of time as a fixed and established practice accepted by both parties. 1/ First, it appears that the District's practice prior to the advent of the Union has been anything but unequivocal and clearly enunciated. The enunciated policy was to attempt to hire full-time drivers to drive both a.m. and p.m. routes but the District made deviations from this policy as circumstances dictated. The Union, since its certification, can point to only two instances where drivers retained their status as regular drivers while driving only an a.m. or p.m. route. Prior to this time, the District was free to act as it so desired and any practice which existed was not a mutual one accepted by both parties. The Union can only look to the Harlan and Judy Grubb job-sharing example and the resolution of a potential grievance involving Martha Schultz and Robert Fawcett. In the opinion of the undersigned, these two instances do not constitute a mutually accepted, readily ascertainable practice over a reasonable period of time. If anything, these two instances appear to be exceptions to the District practice of requiring full-time regular drivers to drive both a.m. and p.m. routes. Thus, past practice cannot be utilized to sustain the Union's position.

The Union argues that paragraph 11, the seniority provision of Appendix B, supports Freel's right to pick and choose his routes based upon seniority. The District asserts that this seniority provision applies strictly to vacant routes. The District argues that it has the right to make job assignments pursuant to Article 2 and paragraph 3 of Appendix B.

Whenever possible, provisions which may appear conflicting or contradictory must be harmonized. Harmonization should give meaning to all the applicable provisions without rendering any clause null or devoid of meaning. For this reason Article 2 and paragraph 3 of Appendix B must be read in conjunction with Article 9 and paragraph 11 of Appendix B.

Both Article 2 and paragraph 3 of Appendix B reaffirm the District's managerial right to make route assignments developed by the District and transportation supervisor. In the absence of any further qualifying language, Article 2 and paragraph 3 would be dispositive of the instant dispute. Thus the issue remains as to whether Article 9 and paragraph 11 of Appendix B in some way qualify the management right provisions. A fair reading of all of the provisions involved is to find that management has the right to set the routes and to determine work schedules. It is certainly free to require the same driver to drive both the a.m. and p.m. runs of a given route, i.e., the same a.m. and p.m. route if it determines that this is in the best interests of the children serviced by the District drivers. Once management has set the routes, route assignment will be made at the beginning of the school year on the basis of seniority. Seniority will then be applied to vacant routes as vacancies arise. This interpretation gives meaning to all of the disputed clauses without rendering any phrase or clause null and void.

The District's position that seniority only applies to vacant routes is rejected because it ignores the broad mandate set forth in the first sentence of paragraph 11 and fails to explain why the first sentence even exists inasmuch as the second sentence specifically addresses the occasion when a vacancy arises.

The undersigned's reading, in contrast to the positions advanced by either the District or the Union, recognizes all phrases as relevant. Applying this interpretation to the instant dispute, it is clear that the District has the right to determine routes, to combine routes or to package them in such a

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1/ Elkouri and Elkouri, How Arbitration Works, Fourth Edition, p. 439.

manner so that an a.m. and p.m. run constitute a single route. The District has the right to set the schedules for said routes. It is not obligated to let employes pick and choose portions of routes or to set their own schedules. However, once

the routes are established at the beginning of the school year, assignment will be made on the basis of seniority. If a vacancy arises, seniority will also apply.

Freel advised the District that he did not wish to continue with both his a.m. and p.m. route preferring only to drive the a.m.. The District was not obligated to accommodate him if it desired to maintain the same driver on the a.m. route and the p.m. route. It was free to remove him from both his a.m. and p.m. route in the event that he could not or would not drive both. Whether or not he was entitled to keep his remaining routes depends upon whether or not he retains his status as a regular bargaining unit employe. While the contract does not address or define substitute status, it does define pursuant to Article 8, Section 8.02, a "Regular Part-time Employe." It provides that a regular part-time employe is defined as an employe who works nine (9) months at less than six (6) hours per day. Therefore, if Freel, by exercise of his seniority rights, is entitled to a route which occurs regularly for even one hour per day, he would be a regular part-time employe pursuant to this language until his hours are at least six (6) hours per day. The District contention that Appendix B creates a distinction between bus drivers and regular part-time employes as defined by the agreement is rejected. While it is true that Appendix B sets the terms and conditions of employment for bus drivers such that other provisions which apply to other part-time employes do not apply to bus drivers, Article 1, Section 1.01 and Article 8 are broad enough to and do include bus drivers as a category of regular part-time employes within the provisions of the collective bargaining agreement. Therefore, a regular full-time or regular part-time bus driver is a regular part-time employe as long as the route to which he is assigned is a regular route, driven regularly, but for such employes, contractual rights are expressly defined in Appendix B. Under this interpretation Freel is a regular part-time employe as are Harlan and Judy Grubb, Martha Schultz, etc.. Therefore, upon deprivation of his a.m. and p.m. route, Freel remains entitled to any other routes for which he possesses the requisite seniority. His status is then dictated by whether or not he is scheduled for regular routes pursuant to the exercise of such seniority.

Contrary to the contentions of the Union, the result is neither unfair, harsh or nonsensical, but preserves the District's contractual rights to assign and manage and employes' rights to bid based upon their seniority.

Accordingly, it is my decision and

AWARD

That the District did not violate the collective bargaining agreement when it declined Elston Freel's job assignment request as indicated in his letter of February 18, 1991.

Dated at Madison, Wisconsin this 17th day of January, 1992.

By _____
Mary Jo Schiavoni, Arbitrator