

BEFORE THE ARBITRATOR

-----  
:
  
In the Matter of the Arbitration :
  
of a Dispute Between :
  
:
  
UNITED LAKELAND EDUCATORS : Case 32
  
: No. 48982
  
and : MA-7781
  
:
  
ARBOR VITAE-WOODRUFF SCHOOL DISTRICT :
  
:
  
-----

Appearances:

Mr. Gene Degner, Executive Director, WEAC UniServ Council #18, appearing on behalf of the Union.  
Ruder, Ware & Michler, S.C., Attorneys at Law, by Mr. Ronald J. Rutlin and Mr. Jeffrey T. Jones, appearing on behalf of the District.

ARBITRATION AWARD

Pursuant to a request by United Lakeland Educators, herein the Union, and the subsequent concurrence by Arbor Vitae-Woodruff School District, herein the District, the undersigned was appointed arbitrator by the Wisconsin Employment Relations Commission on April 8, 1993 pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on July 8, 1993 at Woodruff, Wisconsin. The hearing was transcribed. The parties completed their briefing schedule on September 28, 1993.

After considering the entire record, I issue the following decision and Award.

ISSUES:

The parties were unable to stipulate as to the issues.

The Association frames the issue as follows:

Whether Article XXIV of the collective bargaining agreement provides for 178 or 180 face-to-face teaching days for the 1993-94 school year?

The District frames the issues in the following manner:

1. Is the grievance arbitrable?

2. Whether or not Article XXIV (F) of the  
1991-94 contract between the Board and the

Union should be reformed to provide for 180 pupil/teacher face-to-face days instead of 178 days and three in-service days instead of five in-service days?

Having reviewed the entire record, the Arbitrator frames the issues as follows:

1. Is the grievance arbitrable?
2. Did the District violate Article XXIV of the collective bargaining agreement by scheduling 180 face-to-face teaching days for the 1993-94 school year or should Article XXIV (F) of the agreement be reformed to provide for 180 face-to-face days instead of 178 days and three in-service days instead of five in-service days?
3. What is the appropriate remedy?

FACTUAL BACKGROUND:

Prior to negotiations for the instant collective bargaining agreement the District and the Union agreed to negotiate the school calendar separately from regular contract negotiations. These calendar negotiations were conducted with other Lakeland area schools and employe representatives in an attempt to reach a unified calendar. Schools represented in the common calendar negotiations included Arbor Vitae/Woodruff (the District), Minocqua, Hazelhurst, Lake Tomahawk (MHLT), North Lakeland Elementary, Lakeland Union High School, and Lac du Flambeau.

During the common calendar negotiations for the 1991-92 and 1992-93 school calendars, the District was represented by Dr. William Pollard, District Administrator while the chief spokesperson for the Union was Linda Cleveland.

On December 6, 1990, Richard Vought, District Administrator for Lac du Flambeau Public School, sent Union representative Gene Degner a letter enclosing the calendars developed by the Lakeland Area Administrators for the 1991-92 and 1992-93 school years. These calendars provided for 180 pupil/teacher face-to-face days, three in-service days and two conference days. In forwarding the aforesaid calendar proposal to Degner, Vought noted:

For the first time, the calendars for AV-W, MHLT, LUHS, and LDF will be common. This will prove beneficial to the parents and staff of our school . . .

By letter dated January 30, 1991, Degner sent Dr. Pollard the Union's proposal for the 1991-92 and 1992-93 calendar. Said proposal provided, in relevant part, for 178 student contact days, Union should be reformed to provide for 180 pupil/teacher face-to-face days instead of 178 days and three in-service days instead of five in-service days?

four in-service days and one floating in-service day. Degner noted in the letter that:

Representatives of each teacher bargaining unit met to discuss a common calendar. All five teacher bargaining units were represented.

. . .

In an effort to get talks started, a committee of one member from each of the five bargaining units would like to meet with one representative from each of the respective school districts. Making the first move to get a date, the committee is recommending they meet with district representatives Wednesday, February 6, 1991, at 4:30 p.m. at Lakeland Union High School. If this date is not acceptable, please contact myself or a member of the committee.

The committee looks forward to meeting on February 6th.

On or about February 6, 1991, the parties' calendar negotiation teams met for the first time to discuss calendars.

By letter dated February 11, 1991, Degner sent Dr. Pollard the Union's "proposal for a new contract covering the 1991-92 and 1992-93 school years." Regarding calendar, said proposal provided: "ULE will propose the same calendar as they proposed to the Joint Calendar Committee and will continue to bargain on the calendar with the AVW Board."

By letter dated February 27, 1991, Ronald J. Rutlin, attorney and chief spokesperson for the District, sent the Union the District's proposal for the upcoming negotiations. Said proposal made no mention of calendar.

In March of 1991, the parties met and began contract negotiations with respect to a new successor collective bargaining agreement. In said negotiations, health insurance proved to be a "stumbling block" and, consequently, the parties were unable to reach an agreement.

While the regular contract negotiations were proceeding, the separate negotiations with respect to the school calendar were also proceeding. Ultimately, the parties reached an agreement with respect to the school calendar. As part of that agreement, the parties agreed to implement 180 pupil/teacher face-to-face contact days for the 1991-92 and 1992-93 school years. At the time, Union representatives agreed to 180 contact days based on their understanding of what was required by state law.

The contract negotiations for a successor agreement continued. In those negotiations the parties agreed to go with whatever was agreed to as part of the common calendar negotiations.

On October 7, 1991, a mediation session was conducted by Thomas Yaeger of the Wisconsin Employment Relations Commission with respect to the regular contract negotiations for a successor agreement. Prior to the mediation session, the parties had not discussed the possibility of a three year deal. However, in the mediation session, the parties discussed and agreed to a three year agreement. As part of the parties' agreement, the Union was to receive fully paid health insurance, and an additional one percent catch-up wage increase, in return to agreeing to a 80-20 co-pay arrangement (which was to be implemented in the third year). The additional one percent wage increase (which was on top of five percent for each of the three years) was effective half way through the 1992-93 school year.

During the mediation session, the parties did not discuss the issue of the school calendar. The parties did not do so because of their understanding that what was agreed to in the joint calendar negotiations would constitute the school calendar. However, during their caucus, the District's bargaining team did discuss the school calendar in the context of justifying the proposed settlement. Basically, the rationale discussed during the caucus for agreeing to the settlement was that the District was obtaining the co-pay provision in the health insurance and the two additional pupil/teacher face-to-face days that had already been agreed to in the common calendar negotiations. In return, the District was agreeing to an additional one percent "catch-up" to bring the District's salary schedule in line with the other schools in the Lakeland area. In other words, because the school districts were moving toward greater commonality if the District

teachers had the same number of pupil/teacher face-to-face days, the additional salary increase could be justified.

By letter dated October 14, 1991, Rutlin forwarded a summary of the settlement terms for the successor agreement to Dr. Pollard. By copy of that letter, Degner received a copy of the settlement terms. The summary did not discuss the school calendar.

Rutlin and Degner then provided Dr. Pollard's secretary with the revisions to be made to the collective bargaining agreement based on the settlement terms. Degner forwarded to Dr. Pollard a copy of the prior agreement with highlighted areas to indicate where the revisions were to be made. In regard to the school calendar contract negotiations, Degner simply indicated that he did not have the calendars. Article XXIV (F) of the prior agreement provided:

The school calendar for the 1989-90 and 1990-1991 terms shall be negotiated and set forth in Appendix 'A'. The calendar shall contain 178 pupil-teacher face-to-face days, 2 parent-teacher conference days, 5 in-service days, and 2 holidays.

In retyping the collective bargaining agreement, the District simply attached calendars for the 1991-92 and 1992-93 school year which contained 178 pupil/teacher face-to-face days. The District also did not delete "178 pupil/teacher face-to-face days" and insert "180 pupil/teacher face-to-face days" in Article XXIV (F).

Subsequently, new school calendars for the 1991-92 and 1992-93 school years were distributed to the teachers. The calendars contained 180 pupil/teacher face-to-face days as agreed to in the common calendar negotiations. The District operated under these calendars for the 1991-92 and 1992-93 school years. At least in the 1991-92 school year, the District received no formal complaints from any teachers in regard to the new calendars.

The issue of teacher contact days arose during the 1992-93 school year. In late September or early October of that school year, several teachers approached Dr. Pollard with documents which purported to show that it was the number of hours the State was concerned with not 180 days. No agreement was reached at this meeting. The teachers left the meeting determined to do more research on the matter.

By letter dated December 15, 1992, Dr. Pollard wrote to Degner as follows:

I am writing you this letter per our conversation of December 15, 1992. Last night the Board of Education adopted the enclosed common calendar of the Lakeland Area Schools.

This follows the same pattern as the 1991-1992 and 1992-1993 calendars of 180 face to face days.

I have had oral concerns expressed of the number of face to face days at 180. On page 17 of the contract under Article XXIX (F), the contract states the calendar shall contain 178 face to face day (sic).

My negotiations notes reflect only that we will use a common calendar. Both calendars followed the same pattern of 180 face to face days, 3 in-service days, and 2 parent conference days.

My concern is that if there is a concern we discuss it and try to resolve this issue so we can address the education issues for children.

Thank you for your interest.

After talking with Union representatives, Degner wrote Dr. Pollard on January 20, 1993 indicating that the Association "would be willing to open the contract and agree to 180 pupil/teacher face-to-face days" in return for certain modifications regarding preparation time. Degner suggested a meeting with the Board to discuss the options.

The District responded in a letter dated February 1, 1993, from Rutlin to Degner as follows:

I am writing to you regarding recent discussions with Bill Pollard relative to the 1993-94 calendar. From reviewing this matter, it is the position of the District that the parties agreed to adopt the calendar of the Lakeland Area Schools which includes 180 face-to-face days for the 1991-92, 1992-93, and 1993-94 school years. Inclusion of reference to a 178 face-to-face days in the contract does not reflect the agreement between the parties and was included by mutual mistake.

We see no reason to reopen the contract on this issue. Our agreement to bring the AVW salary schedule in line with the other area schools was, in part, in exchange

for the ULE agreeing to the additional face-to-face days. The last two years are the best evidence of the parties' intent. We would hope that ULE will mutually agree to reform the contract. If not, we will have to seek third party intervention to accomplish reformation if necessary.

Please contact me to discuss this matter further.

By letter dated February 5, 1993, Degner responded, in relevant part, as follows:

. . .

Review of the record does not support the conclusion regarding the calendar proposed by the board. While the Lakeland Area Schools have adopted a common calendar in the past, it has never meant that each district work the same number of student days, parent-teacher days, or the same number of in-service days. .

. .

The calendar for the 1991-92 and 1992-93 was presented during negotiations for the recent three year collective bargaining agreement. However, at the time that agreement was reached, there was no common calendar for 1993-94. While negotiations for a calendar never reached a conclusion between the parties, the calendar was sort of imposed and teachers acquiescence to it by the fact of time constraints and no other solution that immediate enough to change the way the calendar was implemented. However, when the parties extended the two year agreement into a three-year agreement, they accepted the premise that they would work from the outline of the common calendar. However, the days within that calendar would be defined by the collective bargaining agreement reached with the employer.

I believe the language of the collective bargaining agreement speaks for itself. There was never a quid pro quo trade at any time at AVW to add two extra face-to-face days to the calendar.

. . .

If I read your letter correctly, it appears the board is going to implement 180 days face-to-face and therefore it is (sic) appropriate time for the union to file a grievance on



violation of the collective bargaining agreement. Therefore, with this letter, I have attached a grievance which is being filed at the board level, since it appears, by your communication and communication with Mr. Pollard, that is the appropriate level in which to enter the grievance process on this matter.

. . .

If the board wishes to set up a meeting to discuss this matter, we can do so. If not, please let me know and we can go directly to arbitration on the matter. . . .

On February 5, 1993, "ULE/AVW" filed a grievance with the board at Step 3 which provided as follows:

STATEMENT OF GRIEVANCE:

The Board of Education is violating the collective bargaining agreement, Article XXIV, General Provision, paragraph F, where it states, ". . . The calendar shall contain 178 pupil-teacher face-to-face days, . . ." by implementing a calendar for the 1993-94 school year which contains 180 face-to-face days.

ACTION REQUESTED:

That the Board of Education not implement a 1993-94 calendar which contains 180 face-to-face days but rather honors the contract with a calendar that contains 178 days. Should a 180 face-to-face day calendar be implemented, the district shall pay each employee 2/187 of their annual salary, with interest, as a result of this contractual violation.

The grievance was signed by Degner.

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE XVIII

GRIEVANCE PROCEDURE

A. Definitions.

1. A "grievance" is a claim based upon an alleged event or condition which affects the interpretation, meaning or application of any of the provisions of the agreement.
2. The term "days" when used in this

article shall, except where otherwise indicated, mean working school days, thus, weekend or vacation days are excluded.

B. Purpose.

1. The purpose of this procedure is to secure, at the lowest possible administrative level, equitable solutions to the problems which may from time to time arise which affect the welfare in working conditions of teachers.

C. Initiation and Processing

1. Level One. The grievant will first discuss the grievance with the Principal within ten (10) days of its occurrence.

2. Level Two

- (a) If the grievant is not satisfied with the disposition of the grievance at Level One, or if no decision has been rendered within ten (10) days after presentation of the grievance, the grievant may file the grievance in writing with the District Administrator. The grievance shall be a clear and concise statement of the facts upon which the grievance is based, the issue involved, the specific section of the agreement alleged to have been violated, the remedy sought, and the signature of the grievant.

. . . .

4. Level Four.

- (a) If the grievant is not satisfied with the disposition

of the grievance, or if no decision has been rendered, ULE, on behalf of the grievant, may submit the grievance to the Wisconsin Employment Relations Commission (WERC) for arbitration under its rules, within ten (10) days. The decision of the arbitrator shall be final and binding on the parties. The decision of the arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the Agreement in the area where the alleged breach occurred.

. . .

5. Initiation of Group Grievances.

- (1) If, in the judgment of ULE, a grievance affects a group or class of teachers, the grievance committee may submit such grievance in writing to the District Administrator directly, and the processing of such grievance will be commenced at Level Two. The written grievance shall identify by name those members of the group or class of teachers affected.

D. General Procedures.

1. Since it is important that grievances be processed as rapidly as possible, the number of days indicated at each level should be considered as a maximum and every effort should be made to expedite the process. The time limits specified may, however, be extended by mutual agreement.

. . .

ARTICLE XXIV

GENERAL PROVISIONS

. . .

- E. The 1991-1992 and 1992-1993 calendars are attached as examples Appendix A-1 and Appendix A-2.
  
- F. The school calendar for the 1993-1994 term shall be negotiated and set forth in Appendix 'A-3'. The calendar shall contain 178 pupil-teacher face-to-face days, 2 parent-teacher conference days, 5 in-

servi  
ce  
days,  
and 2  
holid  
ays.

RELEVANT STATUTORY PROVISIONS:

Section 121.02, School District Standards, provides in part:

(1) Each school board shall:

. . . .

(f) 1. Schedule at least 180 school days annually, less any days during which the state superintendent determines that school is not held or educational standards are not maintained as the result of a strike by school district employes.

2. Annually, schedule at least 437 hours of direct pupil instruction in kindergarten, at least 1,050 hours of direct pupil instruction in grades 1 to 6 and at least 1,137 hours of direct pupil instruction in grades 7 to 12. Scheduled hours under this subdivision include recess and time for pupils to transfer between classes but do not include the lunch period. A school board operation a 4-year-old kindergarten program may use up to 87.5 of the scheduled hours for outreach activities.  
(Emphasis supplied)

Section 120.12, School Board Duties, provides in part:

(15) SCHOOL HOURS. Establish rules

scheduling the hours of a normal school day. The school board may differentiate between the various elementary and high school grades in scheduling the school day. The equivalent of 180 such days, as defined in s. 115.01(10), shall be held during the school term. This subsection shall not be construed to eliminate a school district's duty to bargain with the employe's collective bargaining representative over any calendaring proposal which is primarily related to wages, hours and conditions of employment. (Emphasis supplied)

PARTIES' POSITIONS:

The Association rejects the District's claim that the grievance is not arbitrable because, contrary to the District's allegations, one, the group grievance was properly submitted by the Association on behalf of all the teachers at the District and this was clear on the face of the grievance; two, the Association addressed the calendar issue in the manner suggested by the District; three, the grievance was timely filed within five (5) days of final action by the District on the matter; and four, the District raised its arbitrability objection in an untimely fashion.

With respect to the merits of the case, the Association argues that the contract language is clear and supports its position that the school calendar for the 1993-94 school year shall contain 178 pupil/teacher face-to-face days. In addition, the Association argues that the District's understanding that it was agreeing to 180 pupil/teacher face-to-face days as part of a three year agreement was never communicated to the Association. The Association claims the District had a contractual duty to bargain the calendar for the 1993-94 school year which it did not fulfill.

For a remedy the Association requests that the Arbitrator sustain the grievance and enforce the terms of Article XXIV (F) of the parties' collective bargaining agreement.

The District initially argues that the grievance is not arbitral and should be dismissed. In support of its arbitrability claim, the District maintains that since the grievance is a group grievance it should identify, by name, those members of the group or class of teachers affected as required by Article XVIII (C) 5 (a). The District also maintains that the grievance should have been commenced at Level Two of the grievance procedure as required by the aforesaid contractual provision. Finally, the District argues that the grievance was not filed within ten working days of the "occurrence" giving rise to the grievance as required by Article XVIII (C) and (D) 1.

The District next argues that Article XXIV (F) should be reformed to reflect the parties' intent. In support thereof, the District maintains that arbitral law establishes that the remedy of reformation is available to correct a mistake in a contract and that the evidence demonstrates that the parties made a mutual mistake in regard to the language of Article XXIV (F). With respect to the evidence, the District admits that Article XXIV (F) states that the "calendar shall contain 178 pupil/teacher face-to-face days . . . ." The District maintains, however, that the record evidence supports a finding that the parties' intent was to implement, as the parties had for the 1991-92 and 1992-93 school years, 180 pupil/teacher face-to-face days for the 1993-94 school year. The District feels therefore that the inclusion of "178 pupil/teacher face-to-face days", was an error and that in light of the parties' intent that said Article should be reformed to reflect 180 pupil/teacher face-to-face days.

For the foregoing reasons, the District requests that the grievance be denied and the matter dismissed.

Both parties cite numerous arbitration awards, Elkouri and Elkouri, How Arbitration Works, Fourth Edition, (1985) and other authorities in support of their respective positions.

#### DISCUSSION:

The District initially raises several issues regarding arbitrability. In this regard, the District first argues that since the instant grievance is a group grievance the Association violated Article XVIII (C) 5(a) by failing to list all the teachers by name on the grievance. It is true that said provision requires that a written grievance "identify by name those members of the group or class of teachers affected." However, it would be absurd to require a grievance to list all of the District's teachers by name where, as here, the grievance on its face applies to "each employee" of the District, and clearly identifies the Association as the affected individual and the grievant as United Lakeland Educators/AVW. In addition, the record is undisputed that at no time material herein was the District confused as to whom the grievance applied. Finally, a more common sense reading of the aforesaid contractual requirement indicates that said provision requires listing by name of groups or classes of teachers where same is something less than the whole. Therefore, for the foregoing reasons, the Arbitrator rejects this claim of the District.

The District also argues that the grievance should have been initiated at Step 2 of the grievance procedure. Step 2 requires that a written grievance be filed with the District Administrator.

However, Gene Degner on behalf of the Association had been unsuccessfully discussing resolution of the dispute during the relevant period of time with both the District Administrator and the District's Attorney Ronald J. Rutlin. Having exhausted the remedies available at Step 2 and pursuant to Rutlin's letter dated February 1, 1993 wherein he suggested that if the parties were unable to settle the dispute "we will have to seek third party intervention to accomplish reformation if necessary" Degner wrote to Rutlin on February 5, 1993 that "a grievance is being filed at the board level, since it appears, by your communication and communication with Mr. Pollard, that is the appropriate level in which to enter the grievance process on this matter." Since the District did not object to this approach at any time material herein prior to the arbitration hearing, the Arbitrator finds that the District has waived any objection to the Association's filing of the grievance at Step 3 by its conduct noted above.

Finally, the District argues that the grievance is not timely. Article XVIII (C) specifies that a grievance be filed within ten days of the "occurrence" giving rise to the grievance. In this regard, the District argues that the Association was aware that the District had adopted, and subsequently implemented, calendars for the 1991-92 and 1992-93 school years, which included 180 pupil/teacher face-to-face days and never challenged same. However, the Association is only grieving 180 pupil/teacher face-to-face days for the 1993-94 school year so the Arbitrator rejects this claim of the District. With respect to the 1993-94 school year, the District argues the District Administrator informed the Association's representative, Degner, on December 15, 1992, that the District had adopted a calendar which included 180 pupil/teacher face-to-face days and even pointed out that this action was inconsistent with the language of Article XXIV (F). The District argues that the Association should have filed the grievance within ten days of this notification. It is true as the District points out that the District Administrator informed the Association of the Board's decision that there be 180 face-to-face days by letter as noted above. However, in the same letter, the District Administrator wrote: "My negotiation notes reflect only that we will use a common calendar. Both calendars followed the same pattern of 180 face to face days . . . . My concern is that if there is a concern we discuss it and try to resolve this issue so we can address the education issues for the children." This is exactly what the parties did. It wasn't until a letter by the District's representative, Rutlin, on February 1, 1993, that the Association was informed that the District was sticking to its position of 180 face-to-face days and that the matter couldn't be resolved. The Association subsequently filed a grievance on February 5, 1993 well within the ten day timelines contained in Article XVIII (C). The Arbitrator is of the opinion that the Association acted properly within the meaning of the aforesaid



contractual provision since the District, by its December, 1992 letter opened the door on the matter by inviting further "discussion" with the Association over calendar before shutting that door closed on February 1, 1993. Consequently, the District did not take "final" action on the matter creating a grievable offense until February 1, 1993.

Based on all of the above, the Arbitrator finds that the answer to the first issue as framed by the undersigned is YES, the grievance is arbitrable.

The Arbitrator next turns his attention to the merits of the dispute. At issue is whether the Arbitrator should enforce clear contract language or whether Article XXIV (F) should be reformed to reflect the parties' intent and to correct a mistake in the

contract. As noted above, the parties take opposite positions on this point.

Both parties cite past practice and bargaining history in support of their positions. However, neither past practice nor bargaining history provides an answer to the parties' dispute. The contract also does not provide a solution to the problem. Conflicting testimony indicates the parties are unable to agree on what they did.

Some legislating or gap-filling is a natural part of interpreting or applying contracts. However, an arbitrator may refuse to fill "gaps" where he is convinced that to do so would constitute contract-making rather than contract interpretation or application. In such cases arbitrators have concluded that the dispute should be resolved by the parties through negotiations.

It is clear that the parties have different and inconsistent versions of what was agreed to regarding the school calendar. After careful examination the undersigned is of the opinion that the instant record does not provide an answer to the issue as framed by the Arbitrator. Said finding by the undersigned precludes him from determining the answer to the second issue; and, therefore, it is my decision and

#### AWARD

That the duly authorized representatives of the District shall, upon request, bargain collectively with the Association over the issue of school calendar for the 1993-1994 school year as contained in Article XXIV (F) particularly with respect to the issue of the number of pupil/teacher face-to-face days, and number of in-service days.

The above parties shall notify the undersigned with sixty (60) days of the receipt of this Award whether they have reached agreement over the above issues. The parties can extend said deadline by mutual consent and by notifying the undersigned. The undersigned retains jurisdiction of this Award, and if the parties are unable to reach an agreement as noted above, the Arbitrator will at his option reopen the hearing to take additional evidence regarding the dispute; and dispose of the grievance.

Dated at Madison, Wisconsin this 5th day of November, 1993.

By Dennis P. McGilligan /s/

