BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	Case 29 No. 48765 MA-7698
SOUTH MILWAUKEE SCHOOL DISTRICT EMPLOYEES LOCAL 883, AFSCME, AFL-CIO	:	
and	:	Case 30 No. 48766 MA-7699
SOUTH MILWAUKEE SCHOOL DISTRICT	:	

Appearances:
Podell, Ugent & Cross, S.C. 611 North Broadway, Suite 200, Milwaukee, Wiscon
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ARBITRATION AWARD

South Milwaukee School District Employees, Local 883, AFSCME, AFL-CIO (the Union), and South Milwaukee School District (the District), are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to the parties' request for the appointment of an arbitrator, the Wisconsin Employment Relations Commission, on March 5, 1993, appointed Jane B. Buffett to hear and decide a dispute regarding the interpretation and application of said agreement. Hearing was held in South Milwaukee, Wisconsin on June 3 and July 19, 1993. The transcript was received August 4, 1993. The parties filed briefs, the last of which was received January 4, 1994.

ISSUES

The parties were unable to stipulate to a statement of the issue. Having considered the proposed issues of both parties, the arbitrator frames the issues as follows:

1. Did the District violate the collective bargaining agreement on October 24, 1992, when it assigned work to Recreation Department employes, who are outside the bargaining unit, and did not assign overtime work to Grievant Thomas Griffith? If so, what is the appropriate remedy?

2. Did the District violate the collective bargaining agreement on September 26, 1992, when it assigned work to Recreation Department employes, who are outside the bargaining unit, and did not assign overtime work to Grievant Paul Mikula? If so, what is the appropriate remedy?

BACKGROUND

Thomas Griffith is employed by the District as a groundskeeper in a bargaining unit represented by the Union. His duties include, among other things, the maintenance of the playing fields used by the schools and the community recreation program. He works on both general maintenance and daily preparation of fields for games. On October 27, 1992, he filed a grievance asserting that he should have been assigned overtime to work with the Recreation Department employes who moved dirt on the Rawson School baseball diamond on the Saturday, October 24, 1992. The grievance was denied.

Paul Mikula, a truck driver, is also employed by the District in the same bargaining unit as Mr. Griffith. On approximately November 5, 1992 he filed a grievance asserting he should have been assigned overtime on September 26, 1992, when Recreation Department employes worked on the playing fields. The grievance was denied.

RELEVANT CONTRACT PROVISIONS

ARTICLE VII

. . .

Section 2 - Step I of the Grievance Procedure

The employee who has an individual complaint shall discuss it with the Operations Manager within twenty (20) calendar days after the event giving rise to the complaint occurred, or the employee could reasonably have been expected to have knowledge of it.

. . .

ARTICLE XXVII

WORKING CONDITIONS

Agreements pertaining to work conditions in effect as of the time of this Agreement should remain in effect, unless changed by mutual consent, in writing, during the term of this Agreement. Neither party shall refuse any reasonable request to change any existing working conditions.

. . .

RELEVANT SIDE AGREEMENTS

SETTLEMENT AGREEMENT

. . .

2. The parties agree that during the term of the agreement the groundskeeper will be offered overtime to prepare the baseball diamonds at Rawson Field prior to the utilization of non-bargaining unit employees of the Recreation Department; (emphasis added).

[Signatures and dates follow. The latest date is 2-23-87]

. . .

[Untitled Settlement Agreement]

. . .

1. The District will provide the Union with a copy of the current schedule of building checks.

2. The District will, prior to changing its schedule of building checks, notify the Union and sit down with Union representatives to discuss reasons and options. This will not constitute or be construed as bargaining.

3. The grievance (#2-92) is withdrawn with prejudice and the parties acknowledge the discretion of the District to schedule or not schedule overtime and building checks.

4. In consideration of the agreements herein, the District agrees to pay a lump sum of $5850 subject to ratification by both parties.

[Signatures follow. The document is dated 10-9-92]

POSITIONS OF THE PARTIES

The Union

The Union argues that it is neither seeking guaranteed overtime nor the exclusive right to baseball diamond work, but it is merely asserting that the overtime work on the baseball diamond be shared in the manner in which was shared in the past. It asserts that since at least the 1970's there has been a past practice of assigning the groundskeeper to work with any Recreation Department crew doing baseball diamond work after hours or on weekends. The practice predates the documentation of the practice in February, 1987. Although that agreement refers to the term of the collective bargaining agreement, the practices survived the term of the collective bargaining agreement, and was never repudiated by the District. The Union also relies on Article XVII to show that the practice still obligates the District. The Union finds Harry Proctor's March 17, 1992 memo insufficient to repudiate the practice. Similarly, the Union argues the resolution of the building checks grievance does not terminate the practice regarding the groundskeeper. The Union denies that the practice treated emergency work any differently from nonemergency or weekend work. The Union finds the District evidence

insufficient to establish that there was any variation from the past practice or, in the alternative, if there were any, it was unknown to the Union.

As to the question of the timeliness of the Mikula grievance, the Union argues that it was filed within twenty days of his learning of the event and furthermore that the District has waived its timeliness objection by failing to raise it until the hearing.

The District

The District asserts the October 9, 1992 settlement agreement governs this grievance and gives the Board the sole discretion to determine whether to schedule overtime. The District notes that the Union cannot cite any provision of the collective bargaining agreement which obligates the District to assign the overtime in question to the bargaining unit member, and in the absence of such a provision, the Union cannot grieve the District's action and the arbitrator is prevented by the Article VII, Section 6 from interpreting anything beyond the provisions of the contract. According to the District, the February 23, 1987 settlement agreement which is limited on its face to the term of the agreement, does not govern this dispute. Even if the settlement agreement has survived the expiration of the 1985-88 contract, that settlement covered "emergency overtime," that is, overtime necessary to prepare diamonds for play on the same day. The District argues that there is a clear past practice of Recreation Department employes performing work on baseball diamonds that would have been overtime work had it been performed by the members of the bargaining unit. The District argues that it had a longstanding practice of using recreation department employes to perform work similar to that performed by the members of the bargaining unit and the Union never grieved the use of the Recreation Department employes. The District points to several contract provisions which it alleges support its position. And finally, it asserts the Mikula grievance is untimely.

ADDITIONAL FACTS AND DISCUSSION

I. Arbitrability of the Mikula Grievance

According to Grievant Mikula's testimony, the assignment through which he asserts he was entitled to overtime work took place September 26, 1992, but he only learned of the work approximately a week later. The grievance was not filed until November 5, 1992, approximately thirty-one days 1/ after the event, and eleven days beyond the time limit set forth in the grievance procedure. The Union argued that since the District had not, prior to the hearing, challenged the timeliness of the grievance filing, the District had waived that right.

The record indicates, however, that the District only first learned of the date on which the alleged infraction took place at the hearing; 2/ consequently, the District's failure to raise the arbitrability question prior to the hearing cannot be found to be waiver.

1/ Since the testimony was that Mikula learned of the work approximately a week afterwards, I have assumed that the latest date that would fit this description would be Monday, October 5, which is ten days after the work in question. It is possible that Mikula learned of the event earlier than October 5, but even by this calculation most favorable to the Union's position, the grievance was filed after the time limits had expired.

2/ The record does not indicate why the date in question did not come to light during labor-management discussions of the grievance.

Since the Union has neither shown any exceptional circumstances that would overcome the timeliness requirements of the grievance procedure, nor has it shown any mutual acceptance by the parties of previous late grievance filing, this Arbitrator concludes that the Mikula grievance was untimely filed and is therefore not arbitrable.

II. Merits of the Griffith Grievance

To answer the issue posed by the grievance, it must be determined whether the District is obligated to assign overtime work to the groundskeeper or another bargaining unit member during any time that the members of the Recreation Department, who are not bargaining unit employes, are assigned to work on the baseball diamonds

In support of its position, the Union cannot point to any contract provision that creates a right to overtime work either in general or specifically for the baseball diamond work. ARTICLE XX - EQUAL DISTRIBUTION OF OVERTIME sets forth in detail how overtime is to be assigned and who is to be called in for overtime and other related procedures, but does not address the question of when overtime must be used. ARTICLE XXI - HOURS OF WORK sets forth the regular work hours and provides for the determination of hours that qualify for shift premium. Neither of these articles requires the District to use overtime, or requires the use of bargaining unit employes at all times when Recreation Department employes work. In order to prevail in this matter, then, the Union must either show a binding past practice or a side agreement that creates such a right. In fact, it can do neither.

The Union points to evidence that the groundskeeper was frequently assigned overtime to work past 3:30 p.m. with Recreation Department employes in order to have the fields in condition for play that same day.

On the other hand, the evidence also demonstrates that there were occasions when Recreation Department employes performed maintenance tasks at times when the groundskeeper was not assigned to work. Operations Manager Harry Proctor, who supervises the bargaining unit employes, testified that there were days when Recreation Department employes worked on general maintenance of the fields but neither the groundskeeper nor any other bargaining unit employe were assigned overtime work. Although the exhibit showing the days when Recreation Department employes worked evenings and weekends was not cross-referenced by a similar exhibit of the days on which the Groundskeeper worked, Proctor testified without contradiction that the groundskeeper did not invariably work whenever the Recreation Department employes worked.

In this case, in which the Union is seeking to prove that even without a written contractual provision, the employer is bound by a past practice, the asserted practice must, among other things, be consistent. A custom which is frequent, but not invariable, is insufficient to create a binding past practice for the parties. Likewise, the frequent, but not invariable use of bargaining unit employes during time that would have been overtime for them, cannot be found to qualify as a working condition protected by Article XXVII. (This award assumes, for the sake of analysis, that "working conditions" refers to the overtime entitlement advanced by the Union in this case. The parties did not argue that question and this award does not reach any conclusions in that regard.)

Nor was the asserted right to over time created by the February 23, 1987 Settlement Agreement. That Agreement was limited, by its own language, to the duration of the collective bargaining agreement, which was 1985-88. Although the Union acknowledged the duration of the agreement, it argued that the District had imbued the settlement agreement with continued vitality by

continuing to respect its terms. However, as noted above, the District did not continue to comply with the agreement after its expiration, for it did not invariably assign such overtime to bargaining unit employes. The February 23, 1987 agreement, then, did not govern the parties after the expiration of the 1985-88 contract.

It should be noted that this conclusion is not based upon the resolution of the building check grievance reached by the parties on October 9, 1992. (See "Relevant Side Agreements," above.) That agreement resolved a grievance involving the same collective bargaining agreement, however the grievance involved overtime assigned for building checks, not groundskeeper work. Each of the agreement's paragraphs, except the final one stating the financial settlement, references the building checks, raising the inference that the settlement governs only building checks. Notwithstanding that inference, some ambiguity is introduced by the clause of paragraph three: "the parties acknowledge the discretion of the district to schedule or not schedule overtime and building checks." That clause suggests the possibility that the District's discretion under this agreement might extend to work other than building checks. However, the testimony of both Union and District representatives who were involved in the settlement of that grievance reflected that the discussion related to the building checks. Whatever may have been in the unilateral understanding of the each of the parties, there is no evidence that the parties communicated to each other that more than building check overtime was being governed by that agreement.

In summary, finding that there is no contract provision that requires the District to assign overtime to groundskeepers in all instances when Recreation Department employes work and no past practice or side agreement that obligates the District to do so, the undersigned finds Grievant Griffith was not entitled to be assigned overtime on Saturday, October 24, 1992.

In light of the record, the argument of the parties and the above discussion, the arbitrator issues the following

AWARD

1. The grievance asserting the District violated the collective bargaining agreement on September 26, 1992, when it assigned work to Recreation Department employes, who are outside the bargaining unit, and did not assign overtime work to Grievant Paul Mikula, is not arbitrable.

2. The District did not violate the collective bargaining agreement on October 24, 1992, when it assigned work to Recreation Department employes, who are outside the bargaining unit, and did not assign overtime work to Grievant Thomas Griffith.

3. The grievances are denied and dismissed in their entirety.

Dated at Madison, Wisconsin this 18th day of March, 1994.

By Jane B. Buffett /s/
Jane B. Buffett, Arbitrator