

BEFORE THE ARBITRATOR

In the Matter of the Arbitration :
of a Dispute Between :
 :
NORTH CENTRAL VOCATIONAL, TECHNICAL :
AND ADULT EDUCATION DISTRICT : Case 46
 : No. 46271
and : MA-6929
 :
NORTH CENTRAL FACULTY ASSOCIATION :
 :

Appearances:

Mr. Thomas J. Coffey, UniServ Director, Central Wisconsin
UniServ Council-North, on behalf of the Association.
Mr. Dean R. Dietrich, Ruder, Ware & Michler, S.C., on behalf
of the District.

ARBITRATION AWARD

According to the terms of the 1989-91 collective bargaining agreement between North Central Vocational, Technical & Adult Education District (hereafter District) and North Central Faculty Association (hereafter Association), the parties requested that the Wisconsin Employment Relations Commission designate an impartial arbitrator to resolve a dispute between them involving whether Agriculture Instructor Roger Nielsen should receive travel time pay for travel time allegedly in excess of his assigned 35 hour work week. The Commission designated the undersigned arbitrator. A hearing was scheduled for February 20, 1992 but at that time the parties agreed to hold the grievance in abeyance based on the following settlement agreement:

- A. The Nielsen grievance will be held in abeyance by the Arbitrator and will not be processed further unless either party requests the Arbitrator to schedule a new hearing;
- B. The parties agree to refer the matter of workload for Agricultural Instructors teaching in farm-related educational programs to the newly established Workload Committee created by the District and the Northcentral (sic) Faculty Association for review;
- C. If the issue of workload for Agricultural Instructors is not resolved voluntarily by the Workload Committee, the parties

agree that the issue of workload for Agricultural Instructors shall be subject to the limited reopener found in Article XI - Rules of Agreement, paragraph C - Limited Re-Opening of the 1991-93 Professional Contract Supplement between the District and the Association.

- D. If the issue of workload for Agricultural Instructors is not resolved during negotiations under the Limited Re-Opener Provision in Article XI - Rules of Agreement and is processed to interest arbitration, the parties agree that the processing of this dispute to interest arbitration shall be the sole forum for litigation of this issue and the pending grievance shall be withdrawn by the Association.
- E. If the issue of workload for Agricultural Instructors is not resolved under the Limited Re-Opener Provision of Article XI - Rules of Agreement and is not subject to an interest arbitration proceeding between the District and the Association, the parties agree that this grievance may be resubmitted to the Arbitrator and processed pursuant to the appropriate arbitration provisions. (Jt. Exhibit 14)

Thereafter, on February 24, 1992 Nielsen's supervisor, Joseph Giovanoni, advised Nielsen in a memo that he (Nielsen) was not authorized to work beyond 35 hours per week without prior approval. Nielsen then filed a grievance over this memo and also filed another grievance essentially reiterating the substance of his original grievance asserting travel money due for the 1991-92 school year. On December 8, 1993 Nielsen filed another grievance covering the school years 1990 through 1993 listing an amount due in travel time pay of \$5,798.38.

The parties having failed to settle this case pursuant to the above-quoted settlement agreement, they contacted the undersigned and a hearing was held on June 14, 1994 at Wausau, Wisconsin. No stenographic transcript of the proceedings was taken. By agreement, the parties submitted their post hearing briefs by August 23, 1994 which the undersigned exchanged for them, whereupon the record was closed.

Issues:

The parties were unable to stipulate to the issues to be

determined in this case although they stipulated that the undersigned could frame the issues based upon the relevant evidence and argument submitted in this case.

The Union suggested the following issues for decision:

Did the failure of the District to pay Roger Nielsen travel pay violate Article V, Section B of the collective bargaining agreement?

If so, what is the remedy?

The District suggested the following issues statement:

Did the college violate the Professional Contract Supplement when it failed to pay travel time compensation to the grievant for hours allegedly worked beyond the 35 hour work week for the 1990-91, 1991-92 and 1992-93 school years?

If so, what is the appropriate remedy?

Based upon the relevant evidence and argument submitted, the undersigned concludes that the Union's issues statement shall be determined in this case.

Relevant Contract Provisions from the 1989-91 Contract:

ARTICLE V

Salaries not Included on the
Salary Schedule

. . .

B. Travel Time Compensation

Those instructors who are traveling and conducting classes away from the base school, outside their basic thirty-five hours per week employment, will be paid for their travel time based upon a rate of \$7.00 per hour. Time allocated for travel from base school to branch campus is as follows:

Zone 1	1 hour round trip
	(10-25 mile radius -- Merrill, Mosinee, Marathon)
Zone 2	1-1/2 hour round trip
	(26-40 mile radius -- Antigo and Stratford)
Zone 3	2 hour round trip
	(41-55 mile radius -- Medford)
Zone 4	3 hour round trip
	(56-70 mile radius)
Zone 5	3-1/2 hour round trip
	(71-85 mile radius -- Prentice and Phillips)

Instructors will also be paid the IRS standard mileage rate for conducting these classes away from the main campus, as well as room and board when it falls within the job assignment. Mileage will be computed on a school-to-school basis.

Notwithstanding the above, no reimbursement shall be made for miles not actually traveled.

If a change in the IRS standard mileage rate occurs during the term of the contract, then the change in rate will occur on the effective date. However, if the new rate has an effective date that is retroactive, then the new rate will be effective on the date the rate is approved with no retroactivity. When a change occurs in the IRS standard mileage rate, the Business Office will notify instructors as soon as possible of the new rate.

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ARTICLE III

Conditions of Employment

. . .

E. Instructional Responsibilities

. . .

5. Additional criteria established by the Wisconsin Board of Vocational, Technical and Adult Education and the North Central Association of Colleges and Secondary schools, Commission on Higher Education, the Wisconsin State Board of Nursing, and other accrediting agencies deemed necessary for the successful operation of the programs must be complied with, and will take precedence over the previously described load formula.

Because of their special nature, the following positions shall not be included in D.2. and E.1., 2., 3., and 4, aforementioned. Time

schedules for these positions shall be established to coincide with the special nature of the programs.

- a. Health Occupations faculty (except Associate Degree Nursing)
- b. Agricultural instructors teaching in farm-related educational programs such as the Farm Training, Agri-Development and Production Agriculture programs
- c. Biology instructor - Wausau
- d. Counselors
- e. Outreach Services instructors

The language of Article III, Section E, was not changed in the 1991-93 agreement. It was changed in the 1993-95 contract by deletion of the reference to E.1 to read as follows:

. . . Because of their special nature, the following positions shall not be included in D2. and E2., 3., and 4., aforementioned. . . .

Article III, Sections D2 and E1 through 4 from which Agricultural instructors were exempted read as follows:

D. Period of Employment

. . . .

- 2. The salary schedule covers thirty-eight weeks including thirty-five hours in school each week.
 - a. Regular day school classes shall be scheduled from 7:30 a.m. to 10:20 p.m. Instructors under a thirty-eight week contract shall be scheduled eight consecutive hours including one hour for lunch, starting at 7:30 a.m., 8:30 a.m., or 9:30 a.m.

. . .

- c. These assignments shall be considered as a part of his/her full-time teaching responsibility at no increase in compensation and no increase over a minimum thirty-five hours per week contract responsibility. It is understood that the eight consecutive hour day provision may be modified under such an arrangement to meet the educational needs of the students and the convenience of the instructor.

. . .

E. Instructional Responsibilities

- 1. It is recognized that certain responsibilities and obligations are inherent in the job of a professional educator. This is necessary in order to insure quality educational programs.

Typical but not an all-inclusive list of responsibilities expected of all instructors shall include:

- a. Meet assigned classes on a scheduled basis for the scheduled length of time.
- b. Maintain course outlines and courses of study for classes being taught.
- c. Attend and participate in regularly schedule departmental, total faculty, in-service, and committee meetings.
- d. Maintain accurate records of students' attendance, and achievement and furnish such information when required.
- e. Maintain a minimum of five office hours per week on no fewer than three different days at such times as will accommodate the needs of students provided these office hours are not required over and above a thirty-five hour week.
- f. Evaluate and recommend appropriate textbooks, equipment and supplies.
- g. Maintain a safe environment in the instructional area. Practice and enforce Board safety practices and OSHA guidelines.
- h. Furnish written evaluations of individual students for placement purposes when requested by the student under the condition that the Board will provide the required legal protection should a

lawsuit ensue from such written recommendations.

- i. Assist in preparing budget requests and in purchasing appropriate instructional equipment and supplies when requested.
- j. Enforce and perform minor preventative maintenance on instructional equipment when competent to do so.

2. Instructional responsibility shall be assigned in accordance with the "Instructor Responsibility Table of Percentages" as described in Appendix "G" for courses taught during the day in State Board approved full-time programs and the following provisions.

a. Course Size: An additional weekly instructional load will be added according to the following table:

<u>Course Size</u>	<u>33-55</u>	<u>56-99</u>	<u>100 &</u>
Additional %	25% of the	50% of the	75% of
per course	course	course	course
	load %	load %	load %

(1) Course size shall be calculated on the first day of the fourth week of each semester.

(2) Courses combined for a common Type 1 class time but separate Type II class times will be counted as one class when computing Type 1 class size.

- (3) In ATL instruction when the ratio of students to teacher(s) in the lab averages over 32:1, overload pay provisions will go into effect on the basis of this ratio, proportionately to the periods involved.
- b. Preparations: An additional weekly instructional load of five percent will be added for each course assigned over the maximum limit of three. Courses with less than three contact hours per week will be totaled together, with one preparation allowed for each three contact hours or prorated accordingly, repetitive sections not included.
- (1) A preparation is a course with a unique course number and title.
 - (2) In ATL or Type OE instruction, ten hours or less per week will equal one preparation and any assignment of over ten hours per week will equal two preparations regardless of the number of unique course numbers and titles involved.
- c. Course Assignments: A maximum of three of the following courses or combinations thereof may be assigned in any given semester to one instructor.
- (1) Technical Reporting
 - (2) Business Communications

(3) Business Correspondence

- d. In the determination of a semester load for a full-time instructor in the Associate Degree Nursing Program, seventeen (17) weekly loads using the "Instructor Responsibility Table of Percentages," the "Course Size" provision, and the "Preparation" provision will be calculated, and then these seventeen (17) weekly loads will be averaged to determine the semester load.
 - e. Telecourses, when assigned as part of an instructor's load, shall have a value of 4 percent per credit and a maximum enrollment of 50 students.
3. The following definitions shall apply in determining instructional responsibility as contained in the "Instructor Responsibility Table of Percentages", Appendix "G".
- a. Type I: Group instruction that includes presentation of material by the instructor through lecture, including supplementation through the use of audiovisual aids and a limited amount of discussion and related classroom activity. Responsibilities include the instructor pre-class preparation and post-class evaluation activities as well as the in-class instructional activity.
 - b. Type II: Course in which students can enter at any time during the semester and can exit at any time provided the students have successfully completed the course requirements. (Open entry - Open exit).

- c. Type III: Clinical/laboratory instruction in the Associate Degree Nursing Program.
 - d. Type IV: Course in which student activity is supervised and aided by the instructor. Emphasis is upon student participation to learn or apply concepts and principles and/or to develop manipulative skills. Responsibilities include pre-class preparation, post-class evaluation activities and in-class instructional activity. Typical in-class activities include:
 - (1) Discussion groups
 - (2) Small student work groups
 - (3) Student project method of instruction
 - (4) Laboratory courses
 - (5) Shop courses
 - (6) Short point of information discourse or lab demonstration by the instructor
 - (7) ATL instruction
 - e. Special Assignment: Activities approved by Instructional Services Administrator to improve, promote and enhance the total education program. Designation of a specific instructor assignment will be made by the respective department chairperson after conferring with the instructor.
4. Instructor responsibility totaling 92% to 108% shall constitute a full semester load. Instructors who volunteer to accept an overload will be paid on a direct pro rata basis for the percentage of teaching in excess of 108% according to the provisions

applying to the "Instructor
Responsibility Table of
Percentages" as applied to the
total load each semester.

All overloads resulting from scheduling of instructional hours as determined by the "Instructor Responsibility Table of Percentages" as described in Appendix "G," but not including those overloads resulting from class size as described in Article III, E., 2, a. "Course Size," shall commence being paid on the first check of the overload period and shall continue to be paid in even amounts on the ensuing checks for the duration of the period of the overload. In circumstances where overloads are not confirmed in sufficient time to meet the datelines of a pay period, then the payment of the overload shall commence on the next paycheck.

If a lack of volunteers among all instructors in the bargaining unit qualified to teach a course would result in that course not being offered in its regular sequence, any qualified instructor can be required to teach such course, subject to the above mentioned overload pay provisions.

An explanation of the "Instructor Responsibility Table of Percentages" and these criteria can be obtained from the faculty member's respective department chairperson or the curriculum supervisor.

A reasonable effort will be made to provide each instructor with his/her tentative schedule prior to one month from the end of the preceding semester. The association will receive copies of all bargaining unit members' schedules. The percent of load will be on each schedule, except those bargaining unit-positions excluded from the work-load formula in Article III., Section E., 5. These schedules must be given to the Association by November 1 for

the first semester and by March 1
for the second semester.

Facts:

Roger Nielsen has been employed by the District as an Agricultural Instructor for the past 20 years. For fourteen years, the Farm Development Program at the District was federally funded. This program was designed to assist farmers in developing farming skills and to give experienced farmers techniques to solve on-going complex agricultural problems. During this fourteen year period, Agricultural instruction became a regular curriculum area

included within the Technology and Industry Department at the District. In approximately 1988, Federal funding for Farm Development was phased out and the District's seven Agricultural Instructors, including Nielsen, were then paid without subsidy, by the District. 1/

The Farm Business and Production Management Program at the District includes courses in Farm Business, Soils Management, Crop Management, Livestock Nutrition and Management Farm Records and Business Analysis. At all times relevant to this case, Agricultural Instructors including Nielsen have regularly performed the following duties: teaching evening on-campus group classes (30 hours) providing on-farm individual instruction sessions for all enrolled farmers (12 hours), teaching seminars and conducting farm tours (15 hours). Much of the work performed must be done in the evenings and therefore, the District Agricultural Instructors set their own work hours which do not need to be approved by the District. Agricultural Instructors are also encouraged to recruit new program participants, apparently on their own time. In the years since the District has employed Agricultural Instructors and paid them with District funds, it is undisputed that no Agricultural Instructor has requested Article V travel time pay until Nielsen did so through his 1990 grievance. It is also undisputed that other State VTAE Districts pay Agricultural Instructors for 35 hours per week which includes their travel time.

Nielsen admitted that Agricultural Instructors are not subject to the workload provisions of the labor agreement (Article III, Section E). Nielsen also admitted that at all times relevant, he has set and scheduled his own hours of work and that the District has never assigned him to work on curriculum or to work more than 35 hours per week.

Nielsen submitted undisputed evidence to show that from 1990 through 1993 Nielsen traveled the following hours beyond 35 hours per week on a 45 week schedule, as follows:

1990-91	1,621 hours
1991-92	1,550 hours
1992-93	<u>1,490 hours</u>
	4,666 hours

Nielsen stated that he used the guidelines stated in Article III, Section E regarding workload to calculate the time he spent on old and new class preparation (at 10% or 25% respectively of his scheduled time) Nielsen also submitted a summary showing the miles he traveled in 1990-93 all of which he stated he traveled outside

1/ At the time of the instant hearing, the District employed five and one-half Agricultural Instructors, including Nielsen.

his normal 35 hour work week.

Positions of the Parties

Association:

The Union contended that the unrefuted evidence established that Roger Nielsen traveled for work outside his basic (35 hour) work week, in proven specified amounts for each school year, 1990 through 1993. The Union urged that the District refused to pay Nielsen for his travel time despite the clear language of Article V, Section B, which requires the District to pay all Instructors, including Nielsen for travel time outside the work week without restriction. The Union strongly objected to the District's assertion that Nielsen's requests for travel pay constitute self-help. The Union argued that the District's further assertions that budgetary concerns and its February 6, 1992 memo stating travel time would not be paid to Agriculture Instructors, are not relevant to this case. Nor do these assertions, even if true, abrogate the clear requirement to pay travel time contained in Article V of the labor agreement.

Furthermore, the Union asserted that the contract workload formula has no applicability to this case: Contractual travel time pay, the Union notes, is absolute, not conditional in Article V. Therefore, the Union sought that the grievance be granted and that Nielsen's travel time be paid with interest.

District:

The District urged that the travel time provisions of the labor agreement do not apply to Agricultural Instructors to whom the contractual workload provisions do not apply and who set their own work schedules without supervisory approval. The District contended that the contract must be read as a whole and given a reasonable construction to avoid harsh, illogical or absurd results. The District observed that the contractual workload formula and the travel time pay provisions are interrelated and dependent upon each other. Because Agricultural Instructors set their own work schedules and compensation for travel time implies applicability of the workload formula or prior authorization for travel, it would be illogical to pay Agricultural Instructors for travel time they arrange on their own. The District pointed out that the workload formula has never been applied to Agricultural Instructors and that none of them has ever requested travel time pay before Nielsen made his claims. In these circumstances, to read the contract as the Union has urged, might result in abuse and would necessitate an illogical and absurd reading of Article V B.

In addition, the District argued, Nielsen failed to prove the hours he actually worked were in excess of 35 hours in any week. Also, Nielsen never showed these hours lists to his supervisors

during the three-year period in question. The District observed that Nielsen admitted that his hours lists were in error in some areas. Finally, the District observed that Nielsen failed at any time to get authorization to work beyond his normal 35-hour work week.

The District argued that the undersigned would exceed her authority were she to rule in favor of the Union and grant the remedy requested. It urged that the grievance be denied and dismissed in its entirety.

Reply Briefs

Association:

The Union noted that Article V does not exclude Agricultural Instructors and makes no reference to the contractual workload formula. The Union also observed that the District failed to prove that Nielsen had inflated his travel time records. In addition, the fact that no other Agricultural Instructor has requested travel pay is not determinative of Nielsen's case. Finally, the February, 1992 Memo (coming long after the initial grievance was filed), which denied all (future) travel pay, cannot form the basis for a legitimate claim that the District is not responsible for such payments to Nielsen.

District:

The District disputed the Union's claims in its initial brief that Nielsen's travel time records stand unrefuted. The District noted that it is the Union's burden to prove any amounts allegedly due, which burden the District contended the Union has not met. The District further observed that the travel time and mileage proof offered by Nielsen failed to demonstrate that Nielsen ever worked beyond 35 hours per week.

Discussion:

It is axiomatic in grievance arbitration proceedings that where contract language is clear and unambiguous extrinsic evidence may not be admitted to modify or vary the clear language of the agreement. However, where the terms of the contract are ambiguous or unclear, parol evidence or past practice may be admitted to prove the true intent of the parties in drafting the extant language. It is also a well accepted principle of arbitration that contract provisions must be read together in order to avoid harsh, illogical or absurd results.

In this case, it is clear that contractual workload provisions, referring to regular hours of work for Instructors and

supervisory approval for work beyond the normal work day or work week have not been applied to Agricultural Instructors in the history of the Farm Program. Indeed, Agricultural Instructors have set their own hours of work without any supervisory approval since the inception of the Farm Program at the District. In addition, it is undisputed that the District has never assigned Grievant Nielsen or any other Agricultural Instructor to work more than 35 hours per week. Finally, Nielsen is the only Agricultural Instructor who has requested travel time pay in the past 20 years.

Thus, the lack of any explanation or indication how, if at all, Article V applies to Agricultural Instructors, requires the consideration of other provisions of the contract as well as parole evidence on the point to help clear up this ambiguity.

Although the Union is correct that Article V, Section B does not exclude travel time payment to Agricultural Instructors, this provision of the contract implicitly applies only to those Instructors who meet certain conditions precedent -- they must travel and conduct classes away from the base school outside an assigned 35 hours' per week employment. The logical implication of this language is that the District must have first knowingly assigned the Instructors to work a set 35 hour week and to travel and conduct classes outside that set workweek.

The evidence in this case clearly shows that the District does not assign set work hours to Agricultural Instructors. In fact, the Agricultural Instructors schedule their own hours without any prior or subsequent supervisory approval. Article III, Section E(5), specifically excludes Agricultural Instructors "teaching in farm-related programs", not only from the regular work day and work week provisions of Article III, Section D(2), but also from the workload and overload formula stated in Article III, Section E. Given the specific exclusion of Agricultural Instructors from the provisions of Article III, Sections D and E, to allow these Instructors to schedule their own travel time outside a 35-hour workweek which they alone have arranged, would result, as the District urged, in the illogical, uneven and unreasonable application of Article V. 2/ Thus, the District is correct in its assertions that Articles V and III must be read together so that all terms of the agreement will be given as full effect as possible, including the necessary conditions for travel time pay eligibility.

2/ It is significant that the contract is entirely silent regarding the hours of work of Agricultural Instructors, yet Article V, Section B(2), refers to time "outside their basic 35 hours' per week employment."

In all of the circumstances of this case 3/ and given the overwhelming record evidence proffered by the District to show that Agricultural Instructors have never been assigned a set 35 hour weekly schedule and travel time pay was never previously requested by or granted to Agricultural Instructors, I issue the following

AWARD

The District's failure to pay Roger Nielsen travel time pay did not violate Article V, Section B of the collective bargaining agreement. The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 21st day of November, 1994.

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

3/ Based upon the evidence in this case, I need not and do not reach the question whether grievant Nielsen actually worked beyond 35 hours in any work week during the school years 1990 through 1993.