BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GREEN BAY SCHOOL DISTRICT

and

GREEN BAY BOARD OF EDUCATION EMPLOYEES UNION, LOCAL 3055, AFSCME, AFL-CIO

Case 154
No. 51055
MA-8476

Appearances:

McKay Law Offices, S.C., by Mr. J. D. McKay, 414 East Walnut Street, Green Bay, Wisconsin, 54301, on behalf of the School District.

Mr. James E. Miller, Staff Representative, 936 Pilgrim Way, No. 6, Green Bay, Wisconsin, 54304, on behalf of Local 3055.

ARBITRATION AWARD

According to the terms of the 1992-94 collective bargaining agreement between Green Bay School District (hereafter District) and Green Bay Board of Education Employees Union, Local 3055, AFSCME, AFL-CIO (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them regarding whether the District must call in bargaining unit personnel during non-work hours to perform maintenance duties at the District's facilities. The Commission appointed Sharon A. Gallagher to hear and resolve the dispute between the parties. A hearing was held in Green Bay, Wisconsin on July 27, 1994. A stenographic transcript of the proceedings was made and received by August 10, 1994. The parties submitted their initial briefs and reply briefs by October 10, 1994, which were exchanged by the undersigned, whereupon the record was closed.

Issues:

The parties were unable to stipulate to the issues to be decided in this case. However, the parties stipulated that the undersigned could frame the issues based upon the relevant evidence and arguments in this case. The Union suggested the following issues statement:

> Did the Employer violate Article XI of the collective bargaining agreement when it did not call in bargaining unit personnel during non-work hours to perform maintenance duties but instead relied on management staff to perform such tasks?
>
> If so, what is the appropriate remedy?

The District suggested the following issues to be determined in this case:

> Was the grievance timely filed?
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> If so, did the Employer violate Article XI?
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> If so, what is the appropriate remedy?

Based upon the relevant evidence and argument in this case, and given the fact that the District's timeliness argument actually constitutes a waiver argument in its defense, the Union's issues shall be determined in the following award.

Relevant Contract Provisions:

ARTICLE XI - CALL-IN PAY, STANDBY PAY AND BUILDING CHECKS

A minimum of three (3) hours' pay will be allowed each time an employee is called out from home for duty. The overtime provision shall apply to call-in time. Hours worked in conjunction with the employe's normal work day will be exempt from call-in pay.

Employees who are placed on standby duty shall receive two (2) hours' regular pay for the period Monday through Friday. For the Saturday and Sunday time period, the employee shall receive three (3) hours' regular pay for each day. One (1) hour's additional regular pay shall be allocated if a holiday is included in the standby period. Standby assignments to answer emergency calls shall be for a seven (7) day period. This shall be paid in addition to time actually worked. Written notice shall be given to each employee when s/he is placed on standby duty.

The call-in provisions for overtime pay shall apply for any employee on standby who is called out.

Standby shall be assigned to qualified employees at the discretion of the Executive Director of Facilities and Related Services.

Building checks: Elementary schools:

Employees who are required to check their building, other than call-in, shall be paid for the time actually worked or one (1) hour's pay, whichever is greater, at the applicable rate of pay.

Building checks: Secondary schools and Broadway Central Office:

Employees who are required to check their building, other than call-in, shall be paid for the time actually worked or two (2) hours' pay, whichever is greater, at the applicable rate of pay.

If there is a suspected malfunctioning control system, or if a sudden turn in the weather occurs, or an electrical storm, or power outage occurs, some

individual judgement will be necessary. If it is felt a check should be made, it will not be necessary to call for permission; however, a notation shall be made on the overtime sheet as to reasons for the additional check.

Building checks will be made as assigned by the Executive Director of Facilities and Related Services.

Facts:

The Green Bay School District has, at all relevant times, maintained an automatic alarm system to moniter various areas in its facilities. Those areas include pool pumps, air compressors, boilers, security alarms, freezers and the like. If one of these alarms is triggered, then a message goes immediately to an answering service. This contracted answering service monitors all School District alarms. When the service receives an alarm, they refer to a book which lists the procedures by which they are to notify District personnel of the alarm. The book also indicates who should be called immediately if an alarm should sound. The answering service starts at the top of its management list and calls until it reaches one of the managers at home. Each one of the alarms is keyed so that the answering service knows the type of alarm that has sounded, where to look in the procedure book and which managers to call. The answering service is an independent contractor. J. J. Security is also an independent contractor that has keys to all of the District's facilities. The District contracts with J. J. Security to provide initial security for all of its buildings. J. J. Security is empowered to let the police into the District's buildings if need be. As a general matter, after an alarm sounds the answering service alerts J. J. Security so that their agents can go into the building and assess the problem. According to the procedure book, the answering service may also call a District manager to inform them of the alarm. If it is a mechanical/maintenance alarm, then the answering service generally calls a District Manager at home to answer the alarm call.

When a District manager responds to an alarm call, he/she generally goes to the District's building to evaluate the alarm. If it is a simple matter, the manager may press the restart button to simply start the equipment again. The manager also has the power to call an outside repair contractor if the equipment needs to be repaired immediately or the manager may call a bargaining unit maintenance employe or an outside trades person to fix the problem. There are currently five managers listed on the answering service's alarm call list. If the District manager who is called out to assess a problem finds a boiler problem or a broken window, the manager would then call the appropriate person to make repairs. It is estimated that generally during the months of November through March in any year, District managers receive a total of twenty alarm calls. During each year from March to November, the number of alarm calls is far less, as the District's boilers are not then running. The District managers on the alarm call list have the authority to make decisions on site without calling their superiors for approval.

Since approximately 1987, the standby crew system described in Article XI of the contract was eliminated by the District and replaced by the above-described management response system. At Mr. Jossie's 1/ direction some building checks are still required and those are done by bargaining unit personnel. These building checks are not generally for emergency purposes and are set up in advance by Mr. Jossie for a weekend day.

Union Steward Tom Tedford filed the grievance in this case. Tedford had

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1/ James Jossie is the manager of all custodial and related services for the District.

been assigned to standby crew duties in 1985 and 1986 but he stated that he has not performed standby duties since 1986 when he transferred into a different position. In 1985 and 1986 when Tedford was assigned to standby duties, a list of standby crew members was regularly published by the District. This was a list of bargaining unit employes who had applied for standby crew duties and had been deemed qualified to perform them. Tedford admitted that he always received written notice that he had been placed on the standby crew when he was expected to perform those duties in 1985 and 1986. Tedford also admitted that whenever unit employes were assigned and performed building checks they were paid for these duties both before and after 1986. Finally, Tedford stated that he could point to no actual instances in which employes had performed standby duties or building checks and had not been paid appropriately.

Tedford stated that after his transfer in 1986, he was unaware that standby crew duties were not being performed. He stated that he had no reason to disbelieve Mr. Jossie's testimony that standby duties were eliminated in 1986, however. Tedford stated that the reason that he filed the grievance in the instant case was that the Union felt it had a contract that provided that bargaining unit employes should be assigned standby crew duties and that this had not been occurring for emergency calls as had been done in the past.

The parties have had continuous collective bargaining agreements for many years, prior to 1985 and to date. It is undisputed that the parties have not bargained regarding the contents of Article IX since at least 1990.

Positions of the Parties:

Union:

Regarding the timeliness issue, the Union observed that in its request for a remedy, it has simply asked that the Employer be required in the future to assign standby crew duties to bargaining unit employes and to cease having managers do this bargaining unit work. Thus, the Union urged that the grievance was timely because the Union was not attempting to go back over a long period of time for a remedy but was seeking to cure a problem from the grievance filing date forward.

Regarding the merits of the case, the Union asserted that the responses of Department managers to mechanical alarms, demonstrated that the managers must have performed some unit work by their assessment of the problems, by pushing reset buttons on machinery/equipment, etc. The Union expressed concern at the lack of any method by which it could track when or how management decisions would be made to either call in or not to call in a unit employe to assist regarding an alarm.

The Union sought no backpay in regard to this grievance, but sought an award sustaining the grievance and an order that the District assign standby crew duties outside of normal unit work hours to bargaining unit employes in the future.

District:

The District argued that the last standby crew was used by the District in 1986; that no standby crews have been assigned since 1986; and that the Union has failed, since 1986, to file a grievance or seek bargaining regarding the use of standby crews. Thus, the District urged, the instant grievance is untimely filed and should be dismissed.

Regarding the merits of the case, the District pointed to the language in Article XI which states,

. . .

> Standby shall be assigned to qualified employees at the discretion of the Executive Director of Facilities and Related Services.

The District noted that nothing in the collective bargaining agreement requires the assignment of standby crews.

The District observed that the Union's witnesses failed to claim that any employes at any time were not paid for standby, building check or call-in duties if they were assigned them either before 1986 or to date. The District therefore sought denial and dismissal of the grievance in its entirety.

Reply Briefs:

The Union chose not to file a reply brief in this case.

District's Reply:

The District submitted its reply brief on October 10, 1994. The District urged that the grievance on its face is untimely. The District also argued that no relevant evidence had been submitted by the Union at the hearing to prove a violation of the collective bargaining agreement on the merits. The District therefore urged that the grievance be denied and dismissed.

Discussion:

The District argued that the grievance was not timely filed. Its argument, in fact, essentially constitutes a waiver argument in its defense, that the Union sat on its hands for eight years after the District ceased regularly posting and assigning standby crews to work during non-work hours, before the Union filed the instant grievance. No evidence was offered to show that the Union did not meet the other procedural/timeliness guidelines of Article XVII in this case. In these circumstances, it is appropriate to deal with the District's waiver argument while determining the merits of this case.

Article XI clearly states that "standby shall be assigned . . . at the discretion of the Executive Director of Facilities and Related Services" and that "(b)uilding checks will be made as assigned by the Executive Director of Facilities and Related Services." Thus, there is no contractual requirement

in Article XI that standby crews or building checks must be assigned, designated or employed to perform work outside normal work hours. Furthermore, there is no other provision in the contract which requires the standby assignments which the Union has sought through this grievance.

It is a long-standing principle of arbitration that evidence outside the four corners of the contract is admissible to support clear and unambiguous contract language. In this regard, the extrinsic evidence supports a conclusion that at least since 1986, the District has consistently assigned standby work available during non-work hours to its managers and that the Union has never objected to this apparent loss of work for its members, until it filed the instant grievance. I note that prior to 1986, the District regularly posted the names of employes qualified to work on standby crews and that it regularly used listed employes for standby crew work. 2/ After 1986, the standby lists were no longer posted, yet the Union did not inquire or object. In addition, since 1986, the District put in place and has utilized an elaborate system of alarms and outside contractors to provide an initial answering service, a security service, and a management call-in procedure. Also since 1986, the Union has not complained or objected to the District's assigning its managers to essentially perform standby duties. Nor has the Union sought to bargain regarding standby crew work since at least 1986. Finally, no evidence was proferred to show that any unit employes have ever been denied pay for any properly assigned standby duties, building checks or call-in duties. In all the circumstances of this case, the Union has failed to meet its burden of proof and I issue the following

AWARD

The District did not violate Article XI of the collective bargaining agreement when it did not call in bargaining unit personnel during non-work hours to perform maintenance duties but instead relied on management staff to perform such tasks. The grievance is therefore denied and dismissed.

Dated at Oshkosh, Wisconsin this 15th day of December, 1994.

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

2/ Union witness Tedford confirmed this pre-1986 practice.