BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LOCAL #216 OF THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

and

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF ASHLAND

Case 89
No. 51616
MA-8675

Appearances:

Mr. James E. Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1701 East Seventh Street, Superior, Wisconsin 54880, appearing on behalf of Local #216 of the American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the Union.

Mr. Kenneth A. Knudson, Hendricks, Knudson, Gee & Hayden, S.C., Attorneys at Law, 312 Board of Trade Building, Superior, Wisconsin 54880, appearing on behalf of the Board of Education of the School District of Ashland, referred to below as the Board or as the Employer.

ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested and the Board agreed that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of all custodians represented by the Union. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on February 22, 1995, in Ashland, Wisconsin. The hearing was not transcribed. The parties filed briefs and reply briefs, the last of which was filed with the Commission on May 23, 1995.

ISSUES

The parties were unable to stipulate the issues for decision. I have determined the record poses the following issues:

Did the Board violate Addendum A by paying wages based on a formula which presumes each work year consists of 2,080 hours?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ADDENDUM A

. . .

3. Employees covered by this agreement shall be paid on alternate Thursdays.

BACKGROUND

The grievance, filed on July 7, 1994, states the "applicable violation" thus:

> District's method of calculating wages in prior years (pay for only 2080 hrs. even in years with excess of 2080 hrs.)

The form lists no contract provision violated. The District's fiscal year runs from July 1 through the following June 30. By the Union's calculation, the following fiscal years had the following number of work days/hours:

FISCAL YEAR	WORK DAYS	WORK HOURS
1989-90	259	2,072
1990-91	260	2,080
1991-92	262	2,096
1992-93	261	2,088
1993-94	261	2,088

Until the negotiation of a 1994-96 labor agreement, the Board calculated its wage payments by annualizing an hourly or monthly rate of pay, then dividing the annualized rate by the number of pay periods. This method treats any work year as containing the same number of work hours.

The grievance challenges this means of computation.

The parties' 1980-81 labor agreement, under the heading "Wage rates," lists eleven classifications. Nine of these include a monthly wage rate, and the remaining two classifications include an hourly rate. The parties' 1981-82 labor agreement prefaces the stated wage rates thus:

> ARTICLE XVI - WAGES
>
> 1. Employees covered by this agreement shall be paid on the 15th and 30th of each month.
>
> 2. The following salary schedule shall be in effect July 1, 1981 through June 30, 1982.

Each of the classifications listed in Article XVI is given an hourly wage rate. Article XVI of the parties' 1982-83 labor agreement continued this format, the only changes being the relevant dates of the fiscal year and the hourly rates.

In the parties' 1983-84 labor agreement, Article XVI continued to state wage rates as hourly rates, but Section 1 was amended to read thus:

> 1. Employees covered by this agreement shall be paid on alternate Thursdays.

In each of the agreements from 1980 through 1991, a longevity payment is afforded. In each of these agreements, the payment is set as a dollar amount pegged to years of service and stated at a "per month" rate.

In the parties' 1992-94 labor agreement the wage rates are stated in Addendum A under the heading "Salary Schedule." Section 1 of Addendum A is headed "Longevity," and includes the following reference: "NOTE: These rates are included in salary schedule above."

The parties 1994-96 labor agreement also states the wage rates at Addendum A, under the heading "Custodial Salary Schedule." The addendum also includes the following as Section 2:

> Employees covered by this agreement shall be paid on alternate Thursdays. Employees will be paid on an hourly basis. Pay periods will end on the Sunday preceding the Thursday pay day.

Ron Hallstadt is the Board's Assistant Superintendent of Business, and has been for roughly seventeen years. He testified that under the 1980-81 labor agreement, the Board paid the monthly wage rate twice per month. He noted the Board calculated the wage rate by the following formula:

$$\frac{\text{Monthly Rate x 12}}{24}$$

He also noted longevity was calculated in the same way, and blended into the hourly rate of any employe whose years of service met the contractual requirements. This means of calculating longevity remained constant at all times relevant to the grievance.

The Board implemented the change to hourly rates in the 1981-82 labor agreement with this formula:

$$\frac{\text{Hourly Wage Rate x 40 x 52}}{24}$$

This formula was used until the 1983-84 labor agreement, which required wage payments to be made on alternate Thursdays. The Board accommodated this change by changing the denominator of the formula from 24 to 26.

The formula put into effect by the Board for the 1983-84 labor agreement was neither announced to nor challenged by the Union until the grievance filed in July of 1994. Typically, a twelve-month calendar or fiscal year includes twenty six "alternate Thursdays." The fiscal year at issue here, however, included twenty seven "alternate Thursdays."

Ron Schwiesow has been employed by the Board for twenty-three years, is the most senior member of the bargaining unit, and has served the Union in a variety of positions. Sometime at the start of the Board's 1994 fiscal year a payroll clerk observed to Schwiesow that the checks of unit-members would be smaller because the upcoming fiscal year included twenty seven "alternate Thursdays." He noted he assumed he was paid on an hourly basis for a preceding two week period, and was informed by the payroll clerk that this was not how the checks were calculated. This prompted the grievance.

Neither Schwiesow nor any other of the testifying Union witnesses was aware, until July of 1994, that the Board was annualizing their hourly rates. No testifying witness could recall any

time at which the annualizing of hourly or monthly rates had been addressed in bargaining.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The Union's Initial Brief

The Union states the issues for decision thus:

> Did the Employer violate the terms of the Collective Bargaining Agreement by not paying represented employees for all hours worked.

After a review of the evidence, the Union argues that no past practice exists "as to the payment of employees on an annualized basis." Since a practice must be mutually known, and since the Union had no knowledge of the Board's payroll calculations, the Union concludes that no binding practice has been proven. That the Board never notified the Union of its method of calculating pay, and that the parties never addressed the issue in negotiations underscores this conclusion, according to the Union.

Noting that it filed a grievance when it first became aware of the problem, the Union concludes that the grievance must be considered timely. Beyond this, the Union notes that the "occurrence of Thursdays which also happen to be paydays which results in twenty seven such days within a fiscal year last happened in 1981." Since this preceded the implementation of an alternate Thursday pay system, the Union concludes that it cannot be faulted for failing to file a grievance before July 7. No other situations occurred which should have prompted a grievance, according to the Union, which adds that such situations should have come up regarding new hires if the payroll calculations asserted by the Board as a practice actually existed as a practice.

The Board's merging of longevity payments with the bi-weekly payroll is irrelevant to the issues posed here, according to the Union. The parties' agreement to "the newly negotiated language contained in Addendum A" is, the Union contends, no more than a clarification of the proper method of payroll calculations.

The Union then contends that the Board's view of the grievance wrongfully makes hourly paid employes salaried. This view, the Union contends, ignores the fundamental fact that "employees worked for two weeks and were subsequently paid for the time worked at the next pay day." The Board's view is, the Union asserts, "an unusual pay roll practice if it indeed existed."

The Union concludes by requesting "the Arbitrator to sustain the grievance and to make whole all employees for wages and benefits lost due to the District's erroneous method of making annualized/salary pay rolls for hourly paid employees in violation of the Agreement."

The Board's Reply

The Board states the issue for decision thus:

> Is compensation and the method of payment properly an item for negotiation in a collective bargaining agreement?

After a statement of the facts, the Board notes that "the parties negotiated the payment and amount of wages from 1980 to the present." The Board notes that agreements dating back to 1980 show a monthly rate of pay for wages and longevity. The 1981 agreement made the fifteenth and thirtieth of each month a pay day and included "a monthly differential for longevity." This system was implemented, the Board notes, by "multiplying the weekly rate by 52 weeks per year and dividing the total by 24 to reflect the negotiated two paydays per month" to pay wages. The monthly longevity rate, the Board notes, "was also multiplied by 12 and divided by 24 to reflect the negotiated paydays." Because "months are not equal in the number of work days" the Board concludes that the equal payments could not reasonably have been perceived as an hourly payment. The 1983-84 change in payment "was easy to accomplish," according to the Board, since the "only change was to divide the annualized salary by 26 as opposed to 24." From this point until 1994, the Board calculated wages by multiplying the hourly rate by forty, yielding a weekly rate which was multiplied by fifty-two to yield an annual rate, then divided by 26 to yield the bi-weekly pay.

This background, the Board concludes, demonstrates that "the method of computation was as negotiated between the parties and does constitute a past practice." The calculation of longevity is consistent with the calculation of wages and underscores, according to the Board, that a practice exists.

The Board then asserts that the Union's request that over and under payments be calculated for 1983 through the present "points out the inconsistency and the lack of timeliness in this grievance." This recalculation, the Board argues, "would be improper" for it would grant the Union a benefit it never negotiated. This "usurps the role of the parties to negotiate these contracts," according to the Board. The Board concludes that the grievance should either be found untimely or denied.

The Union's Reply

The Union argues initially that the evidence shows no past practice ever existed. Arbitral precedent requires mutuality to make a practice binding, and the Union contends that no such mutuality has been proven here. Any implementation of the negotiated agreements was, the Union concludes, done "secretly and in a unilateral manner." Beyond this, the Union notes that

the annualized method of calculating wage payments has never been addressed at the bargaining table. Asserting longevity payments are "unrelated" to wage payments, the Union concludes the Board's linkage of the two "is grasping at 'proverbial straws.'" The Union's final line of argument is that it does not seek to have the Arbitrator renegotiate anything. Rather, the Union asserts that "(t)he Arbitrator is exercising his rightful authority to insure that justice is done and that employees who have been denied wages for the hours that they have worked . . . be properly compensated." Labelling the Board's payroll calculations "erroneous and bizarre," the Union repeats its request that the grievance be sustained and affected employes be made whole.

DISCUSSION

The issue I have adopted focuses on the contract provision cited by the Union. I have not stated a separate issue on the timeliness of the grievance. As argued by the Board, the timeliness issue is less a question concerning the interpretation of the grievance procedure than a means to highlight its view of the inconsistency in the Union's view.

As preface to addressing the merits of the grievance, it is necessary to underscore that the parties have addressed the ambiguity posed here in Addendum A of the 1994-96 labor agreement. The grievance concerns, then, prior agreements.

This is a difficult interpretive issue. Each party's view of the merits manifests fundamental flaws which highlight the difficulty of resolving the issue. The Union aptly points out that the past practice cited by the Board reflects less than a mutual understanding. The mutual understanding manifested by the conduct of the bargaining parties is the essence of the binding force of past practice. 1/ Thus, the long history of payment cited by the Board stands as less than a binding past practice. Similarly, the Board's assertion that the payment formula was negotiated is a bit of a stretch. No testifying witness could recall the payment formula ever being discussed at the bargaining table. Nor is the Union's case without weakness. The contract provision it cites mandates only that employes "be paid on alternate Thursdays." There is no dispute they were. Rather, the dispute the Union points to is that they were not properly paid. Addendum A is, however, silent on this point. The Union also glosses over how the parties negotiated the means of wage calculation it seeks, since the point has never been addressed in bargaining.

The weaknesses cited above reflect not a failing in the parties' presentations, but the basic fact that no one considered this issue until it was posed by the twenty-seven alternate Thursdays of the 1994 fiscal year. As noted above, the contract is silent on this point. This

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1/ See, generally, How Arbitration Works, Elkouri & Elkouri (Fourth Edition, BNA, 1985) at Chapter 12; and "Past Practice And The Administration Of Collective Bargaining Agreements," Richard Mittenthal, from Arbitration And Public Policy, (BNA, 1961).

silence creates an ambiguity. Contractual ambiguity is most persuasively resolved by past practice or bargaining history, since each focuses on the conduct of the parties whose intent is the source and the goal of contract interpretation. In this case, however, neither guide is available.

Burden of proof concepts are sometimes used in arbitration. This approach cannot be dismissed as inappropriate, but should be sparingly used, for it risks addressing difficult factual or interpretive issues by ignoring them.

On balance, the evidence somewhat favors the Board's view of Addendum A. It is significant that the Union can point to no language violated by the Board's formula. Section 3 of Addendum A, cited by the Union as the basis of the grievance, has no direct bearing on how to calculate wages. It provides only that, however calculated, wages must be paid on alternate Thursdays.

The balance of the language of Addendum A supports the Board's formula. Addendum A does state pay at hourly rates, but states those rates as a "Salary Schedule." This mixture of the potentially conflicting concepts of "hourly" and "salary" pay reflects the Board's formula, which uses an hourly rate to create an annualized salary.

Even though neither party can point to specific negotiation on the precise point posed here, the Board, unlike the Union, makes a credible claim that its view is rooted in a mutual understanding. The 1980-81 labor agreement stated wages as a monthly rate. This rate exists partially independent of the hourly rate, since the number of work days varies from month to month. Thus, the monthly rate, which was bargained, reflects the same type of relationship to the hourly rate as does the annualizing formula used by the Board in subsequent contracts. That the parties separately stated two hourly rates underscores that the statement of monthly rates had some independent significance. The Union contends the crucial point in the parties' bargaining came in 1983-84, when the parties agreed to the alternate Thursday method of payment which made the dispute posed here inevitable. This ignores, however, that the parties, in the 1981-82 labor agreement, changed to hourly rates. That no employe objected to the fact that the checks were equal each week may not reflect a binding practice, but it does indicate the "equalization" of checks was an accepted part of the relationship. That longevity has consistently been "equalized" underscores this point.

In sum, the Union can point to no language directly supporting its view, while what relevant language exists in Addendum A favors the Board's view. Beyond this, the Board's annualization of hourly rates is rooted in the 1980-81 agreement, which equalized hours of work on a monthly basis. The parties did not specifically bargain the formula at issue here. However, the formula flows from the 1980-81 agreement, and the Union never bargained to change the equalization of hours of work present in that agreement and continued through the 1992-94 agreement. This cuts more against the Union's position than the Board's. It is less striking that the Board would continue its formula than that the Union would not challenge it

when all rates became hourly. As noted above, this amounts to less than a binding practice. Since, however, the evidence tends to favor the Board's position, there is no basis upon which the grievance can be granted.

Before closing, certain points raised by the Union should be touched upon. The Union points out that the method of payment used by the Board is not typical. This point has force, but it should be noted that it is not atypical for a school district to annualize salaries. A teacher's pay, for example, may be earned in nine months, but paid over twelve. Even if the Board's formula is atypical, it is not unprecedented in the parties' bargaining relationship, given the 1980-81 labor agreement.

The Union's contention that the Board's payment formula made unit employes salaried would have dispositive force if it was better rooted in the evidence. There is no evidence any unit member was denied overtime, which is one of the key distinctions between hourly and salaried employes. Nor is there evidence a unit employe was denied such benefits as call-in pay or change of shift notice. If benefits traceable to hourly pay status continued, it is difficult to conclude unit employes became salaried.

The Union challenges the injustice of the Board's formula. This point has persuasive force. The years surveyed by the Union indicate unit employes may have lost pay for hours worked in years which generated more than 260 work days. The survey is, however, incomplete and indicates no more than that certain years resulted in overpayments, others resulted in underpayments. If the grievance had arisen in a year of overpayment, the alleged injustice would be reversed. This does not fully address the Union's argument, but points out the issue is less one of determining equity, which on these facts changed from year to year, than of determining what the parties did or did not bargain.

AWARD

The Board did not violate Addendum A by paying wages based on a formula which presumes each work year consists of 2,080 hours.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 22nd day of August, 1995.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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