

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

RICHLAND SCHOOL DISTRICT EMPLOYEES,
LOCAL 2085-B, AFSCME, AFL-CIO

and

BOARD OF EDUCATION OF THE RICHLAND
SCHOOL DISTRICT

Case 32
No. 51563
MA-8645

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, for Richland School District Employees, Local 2085-B, AFSCME, AFL-CIO, referred to below as the Union.

Mr. Kirk D. Strang, Lathrop & Clark, Attorneys at Law, 122 West Washington Avenue, Suite 100, P. O. Box 1507, Madison, Wisconsin 53701-1507, for the Board of Education of the Richland School District, referred to below as the Board.

ARBITRATION AWARD

The Union and the Board 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 parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute concerning the payment of holiday pay to term employees for the Good Friday holiday. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on November 8, 1996, in Richland Center, Wisconsin. The hearing was not transcribed, and the parties filed briefs and reply briefs by February 14, 1997.

ISSUES

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

Did the Board violate the collective bargaining agreement when it failed to pay term employees holiday pay for the Good Friday holiday?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE VII - DEFINITIONS

. . .

2. Term Employees: Personnel who are employed by the Richland School District from 170 to 220 workdays each school term for 4 or more hours each day.

. . .

ARTICLE XI - HOLIDAYS

. . .

Section 2. Term Employees. The following special observance days will be considered paid holidays: Labor Day, Thanksgiving Day, one-half day on Good Friday, and Memorial Day.

When a term employee works through the Christmas holidays, the day prior to Christmas Day, Christmas Day, one-half of the day before New Year's Day and New Year's Day will be considered paid holidays.

An employee must work the day before and the day immediately following the above holidays to qualify for holiday pay unless on an approved paid leave.

BACKGROUND

The grievance was initially filed on April 20, 1993, on behalf of "All term employees," and challenged the Board's failure to pay represented term employees for the Good Friday Holiday which occurred on April 9, 1993.

The Commission certified the Union as the exclusive collective bargaining representative for this bargaining unit, which is referred to below as the Overall Unit, on October 9, 1987. The Overall Unit includes term employees, but does not include custodial/maintenance employees. The Board employs between fifteen and twenty full year custodial/maintenance employees who formed a bargaining unit prior to the certification of the Overall Unit. The Board employs roughly six term custodial/maintenance employees who are not members of a bargaining unit.

At the time the Union started negotiating with the Board for the initial contract covering the Overall Unit, the Board had a written policy governing fringe benefits for term employees. That policy included the following provisions:

Definitions

. . .

Term Employees: Personnel who are employed by the Richland School District from 170 to 220 work days each school term for 4 or more hours each day . . .

Holidays - Term Employees

The following special observance days will be considered paid holidays. Labor Day, Thanksgiving Day, one half day on good (sic) Friday and Memorial Day.

When a term employee works through the Christmas holidays, the day prior to Christmas, Christmas Day, one half of the day before New Year's Day and New Year's Day will be considered paid holidays.

An employee must work the day before and the day immediately following the above holidays to qualify for holiday pay unless on an approved paid leave.

The Board applied this policy to require that an employee work the business day before and after a holiday to receive pay for the holiday. As implemented by the Board, this required a term employee to work the business day immediately preceding and following Good Friday. Depending on the school calendar, this could, for example, require employees to work the morning of Good Friday and the following Monday to be eligible for the holiday pay. This had the effect of denying the benefit to the vast majority of term employees. Food service workers, for example, would not

be scheduled for the half-day of Good Friday. Similarly, when Good Friday was not a student contact day, any Aides who worked with students would not be scheduled for the half-day of Good Friday. The policy could also deny holidays to term employees depending on when the school year or the school program began or ended. For example, if the Early Childhood Program started after Labor Day, Aides in that program would not be eligible for holiday pay for Labor Day.

The Custodial/Maintenance unit had a labor agreement in effect for the period from July 1, 1987 through June 30, 1989. Article XI of that agreement governed holidays, and Section 2 of that article reads thus:

Section 2. Holidays - Term Employees: The following special observance days will be considered paid holidays: Labor Day, Thanksgiving Day, the day after Thanksgiving, one-half day on Good Friday and Memorial Day.

When a term employee works through the Christmas holidays, the day prior to Christmas, Christmas Day, one-half of the day before New Year's Day and New Year's Day will be considered paid holidays.

An employee must work the day before and the day immediately following the above holidays to qualify for holiday pay unless on an approved paid leave.

On December 14, 1987, the Union and the Board exchanged initial proposals for a contract to cover the Overall Unit. Article XI of the Union's initial proposal governed holidays. Section 2 of that proposal reads thus:

Section 2. Holidays - Term Employees: The following special observance days will be considered paid holidays: Labor Day, Thanksgiving Day, the day after Thanksgiving, one-half day on Good Friday and Memorial Day.

When a term employee works the last day students are present and the first day students are back in school, the day prior to Christmas, Christmas Day, one-half of the day before New Year's Day and New Year's Day will be considered paid holidays.

A number of employes on the Union's bargaining team were term employes.

Bargaining for the first contract proved to be protracted. The parties met on February 9, 1988. At this session, the Union noted its desire to treat the Custodial/Maintenance agreement as the status quo from which it desired to bargain. The Board noted to the Union that its Holiday proposal for the Overall Unit did not mirror Section XI, Section 2 of the contract covering the Custodial/Maintenance unit.

The parties met on May 4 and 23, 1988. The Board maintained its proposal to incorporate its holiday policy into the labor agreement. After these sessions, the parties sought the assistance of a mediator. On September 6, 1988, the parties participated in a mediation session, but neither party changed its position on the holiday pay issue. The next mediation session took place on November 8, 1988. The Union changed its proposal on holidays to mirror Article XII, Section 2 of the Custodial/Maintenance contract. The Board rejected this offer and maintained its insistence on incorporating Board policy into the labor agreement. The Union then made a counter-proposal which offered the status quo on the holiday issue. From this point on, the Board treated the holiday issue as a tentative agreement. Maintaining the status quo on holidays for term employees was confirmed through the mediator and at a face-to-face session.

The parties' first contract was in effect from July 1, 1987 through June 30, 1989. Article XI, Section 2 of that agreement contained the same language as the Board policy on holidays for term employees.

In its initial proposal for a successor to the 1987-89 agreement, the Union proposed to amend Article XI, Section 2 by making Good Friday a full day holiday. The Union also proposed that the Board provide "three (3) paid noncumulative holidays per year for all unit employees." The Union was unable to secure the Board's agreement to its holiday proposals. In its initial proposal for a 1991-93 agreement and in its initial proposal for a successor to the 1991-93 agreement, the Union attempted to make Good Friday a full day holiday.

From the 1987-89 agreement through that at issue here, the Board has implemented the holiday benefit for term employees as it did when the benefit was set by Board policy. This has effectively denied the benefit to the bulk of term employees in the Overall Unit. One employee who served as the Middle School Secretary and as the Guidance Secretary at the High School has received pay for the Good Friday holiday. He is, however, no longer a term employe. The Board does provide Good Friday holiday pay to non-represented term custodial/maintenance employees and to employees covered by the Custodial/Maintenance agreement if those employees work the business day before and after Good Friday.

No grievance was filed by a term employe regarding the Good Friday holiday benefit from the first contract through the Good Friday of 1993. The Board's business office annually receives questions concerning Good Friday from represented term employees who want to know if the day should be claimed as a holiday on their time sheets. The Board's Business Manager and her Payroll Secretary have consistently told such employees the Board will not pay the Good Friday

Holiday unless the employe works the business day preceding and following Good Friday.

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

THE PARTIES' POSITIONS

The Union's Initial Brief

The Union contends that the contract clearly and unambiguously grants term employes one-half day paid holiday for Good Friday. The sole limitation on the pay is that the employe must work the day before and the day after the holiday. This limitation cannot be persuasively read to require that a school business day immediately precede and follow a holiday, unless the business day is a student contact day. The Union asserts the more persuasive reading of the contract can be put thus:

The fact of the matter is that the parties agreed to provide the term employees with three and one-half holidays, provided that the employee does not engage in conduct to extend holidays by not showing up for work the day before or the day after.

Any other reading would deny the Good Friday holiday to "80% of the bargaining unit," and would render the qualifying language meaningless.

The Board's interpretation leads to the absurd result that this unit has ceded control over the holidays in its labor agreement to parties not bound by the agreement. Changes in the school calendar, for example, can deny this unit's employes a holiday, yet the school calendar is set by the Board and the teachers' union. Similarly, negotiations with the custodial union could lead to a denial of this unit's holiday pay for Thanksgiving.

The Union concludes that "the Arbitrator find that the District has, indeed, violated the labor agreement . . . and order that employees who so worked be made whole for any losses they have suffered."

The Board's Initial Brief

The Board argues that the term employes covered by the grievance are not entitled to holiday pay for Good Friday because the labor agreement expressly requires that they must work

the day before and the day after the holiday to receive the holiday pay. None of them did, and thus none of them qualify for the pay.

The Board then contends that its interpretation of the "work before and after" requirement "(i)s mandated by the parties' past practice and bargaining history." The Board contends its interpretation of this requirement cannot be characterized as "absurd." Rather, its interpretation gives contractual and practical affect to the "work before and after" requirement by paying those custodial and term employes who work the day before and after a holiday. As a matter of contract interpretation, the Board's view enforces the plain meaning of the terms of Article XI, Section 2.

Because both parties' interpretations of Article XI, Section 2 are something other than a literal reading of the section, it follows that recourse to extrinsic evidence is necessary and appropriate. The Board contends that bargaining history should be given "Dispositive Weight." A detailed review of that evidence establishes, according to the Board, that the "Union has . . . lost its institutional memory" regarding the negotiations which created Article XI, Section 2. The Board argues that the Union attempted, in the bargaining for the parties' initial agreement, to change the Board's established practice regarding the "work before and after" requirement. The parties' creation of an initial agreement codified the Board's desire to retain its prior practice on this point. Subsequent bargaining has never altered this agreement.

Past practice further underscores this assertion. The Board contends that its "uniform" enforcement of the "work before and after" rule "has been consistent over the course of several collective bargaining agreements." Beyond this, the "practice is mutual," since employes have inquired about the Board's interpretation of its rule annually since the parties' first agreement. The Board's response to such inquiries has been a consistent affirmance of the practice which preceded the bargaining of an initial agreement.

To sustain the grievance would be "inconsistent with the intent of the parties" and would be inequitable to those employes who actually work on the day preceding and following a holiday rather than simply claim pay for it. The Board concludes that the grievance must be denied.

The Union's Reply Brief

The Union does not dispute the Board's recitation of the "facts relating to bargaining history," but does challenge "the interpretation of those facts that are in dispute." The "dispositive" bargaining history "cannot overcome the flaws in the District's interpretation."

Nor can the evidence of the Board's implementation of the holiday pay provision be considered to establish a binding practice. Beyond this, the Union argues that although the Board has asserted term employes can receive holiday pay, it has been unable to name, with certainty, any term employe who actually has received holiday pay for Good Friday. Even if the Board could have supplied such examples, it is not clear its implementation of the "work before and after" rule is consistent with Article XI, Section 2.

The Union contends that its interpretation of the "work before and after" rule gives the terms of Article XI, Section 2 their "common sense" meaning, is consistent with the commonly understood purpose of such provisions, and avoids holding this Union's labor agreement hostage to other bargaining units.

Beyond this, the Union points out that application of a "work before and after" rule to custodians, whose work is not dependent on student contact, is dissimilar to the application of the rule to the term employees at issue here. Nor is it meaningful for the Board to assert that term employees seek an advantage over employees who do work the day before and after a holiday. Term employees are prevented from working the days the Board seeks to hold against them. The Union concludes that the "work before and after" rule must be applied to different days for term employees than for non-term employees. To fail to do so is to read the bargained-for holiday pay out of existence.

The Board's Reply Brief

The Board contends that the Union's arguments share a common flaw: "they seek to evade, rather than to ascertain the intent of the parties." The broad principles of interpretation cited by the Union to support its interpretation are not invalid, but are "insensitive to the record before the Arbitrator."

More specifically, the Board contends that the assertion that "work before and after" rules have a commonly understood purpose in labor agreements ignores that the origin of the rule in this case is an unbargained Board policy. Even granting the commonly understood purpose asserted by the Union cannot obscure that the rule serves an additional purpose.

The Union's assertion that the Board's interpretation adversely impacts 80% of the unit does not establish that the interpretation renders an agreement provision meaningless. Rather, the Board argues it shows that the interpretation yields a meaningful result, but one not favored by the Union. Nor can the Board's interpretation be considered absurd. That it bargains calendar with another unit states no more than fact. The Board argues that the assertion ignores that the term "absurd" cannot meaningfully be applied to a longstanding Board policy specifically recognized and continued through the bargaining process. That the parties may disagree on the equity of the policy should not obscure that the policy serves recognized purposes, and because it does so, cannot be characterized as absurd.

DISCUSSION

I have adopted the Union's statement of the issues as that appropriate to the record. Article XI, Section 2 governs the issue on the merits of the grievance. The facts are essentially

undisputed.

The Union and the Board advance plausible interpretations of Article XI, Section 2. It follows from this that its terms cannot be considered clear and unambiguous.

The dispute focuses on the terms of the third paragraph of Article XI, Section 2. It is clear that the first paragraph grants term employees "one-half day on Good Friday" as a paid holiday. The second paragraph has no direct applicability to the Good Friday holiday. The final paragraph, however, limits the eligibility of an employee "to qualify for holiday pay." The limitation is that the "employee must work the day before and the day immediately following" Good Friday.

Both parties acknowledge that the limitation of the third paragraph cannot be read literally. Employees do not work the weekend following Good Friday. Neither party asserts either of the weekend days should be considered "the day immediately following" Good Friday. The ambiguity posed is whether the days "before and after" Good Friday should be considered the preceding and succeeding days on which Board facilities are open for business or the preceding and succeeding days scheduled for student contact.

Resolution of the grievance thus turns on the determination of the most appropriate guide for addressing this ambiguity. In my opinion, the most persuasive guides for the resolution of contractual ambiguity are past practice and bargaining history, since each focuses on the conduct of the bargaining parties whose intent is the source and the goal of contract interpretation.

Only bargaining history is available here, and that guide favors the Board's interpretation. The relevant factual background establishes that the Board consistently demanded the incorporation of its policy on holidays for term employees into the parties' first labor agreement. That policy was inserted into the agreement as Article XI, Section 2, and has remained unchanged to the present.

Several factors underscore the significance of the evidence of bargaining history. First, the Union's initial proposal sought to eliminate the third paragraph of the Board policy. This underscores that the Union sought to change the Board's implementation of its policy. Second, the Board consistently refused to alter its written policy in any way. This underscores the significance the Board attached to its policy. Third, the parties reached agreement only when the Union proposed to continue the status quo. There is no dispute that the Board has consistently applied its holiday policy to term employees, and thus the agreement on the status quo brought that consistent application with it. Finally, the agreement codified as Article XI, Section 2 has never been changed since the initial contract. Thus, the parties agreed to incorporate Board policy on holidays for term employees, and have never agreed to alter it.

Other factors surrounding the bargaining process underscore the conclusion that the Union has not negotiated a change in Board policy. The bargaining for the first contract was protracted, and term employees served on the Union's negotiating team. The Board's consistent application of

Article XI, Section 2 regarding term employees was not challenged until several agreements had been negotiated. It is unlikely that the Union's first negotiating team would look the other way on the implementation of a benefit of significance to a drawn out bargaining process. The more probable inference is that the Union accepted Board policy on holidays to secure other, more highly valued, benefits. Even looking beyond the initial bargaining, it is undisputed that the Board has consistently advised term employees of its "before and after" rule concerning Good Friday. Against this background, it is impossible to conclude the delay between the negotiation of Article XI, Section 2 and the grievance concerning its application to Good Friday was due to inadvertence.

In sum, bargaining history establishes that the Board implemented the eligibility requirement of the third paragraph of Article XI, Section 2 in the same fashion as it had since it implemented a written holiday policy for term employees. Evidence on the bargaining for an initial contract establishes that the Union gave up an attempt to change Board policy, while the Board consistently demanded the incorporation of its policy into the labor agreement. To read the disputed paragraph as the Union asserts would grant the Union a benefit through arbitration it never acquired in negotiation.

Before closing, it is appropriate to tie this conclusion more closely to the parties' arguments. The Board's assertion that its implementation of Article XI, Section 2 can be considered a binding practice is difficult to distinguish from its assertion of the significance of bargaining history. Whether or not the Board's consistent implementation of Article XI, Section 2 would, standing alone, establish a binding practice cannot be meaningfully assessed. More to the point, the practice does not stand alone, and the consistency and openness of the Board's implementation of its policy underscores the inference that the parties mutually accepted the continuation of an established Board policy when they agreed to the creation of Article XI, Section 2.

It should be stressed that the grievance turns on this evidence of bargaining history. In the absence of that evidence, the Union's resolution of the disputed paragraph is more persuasive than the Board's. As the Union points out, its interpretation is well-rooted in the normal labor relations sense of the "before and after" requirement. While it may overstate the point to assert the Board's interpretation renders the Good Friday holiday meaningless, it does not overstate the point by much. The holiday turns on events not controllable by the Union, and has apparently been restricted to few term employees, perhaps as few as one. That the Board may afford the benefit to unrepresented term employees or to Custodial/Maintenance employees has no bearing on this agreement.

The Union's contention that the Board's interpretation renders Article XI, Section 2 more appearance than reality has persuasive force. However, it can be noted that the second paragraph of the section underscores what appears to be a consistent Board emphasis on paying for holidays only when those holidays are surrounded by work days. Ultimately, the persuasive force of the

Union's contention turns on broad policy considerations. These considerations are, however, less significant in grievance arbitration than the fundamental effort to determine what the parties agreed to.

The difficulty with the Union's arguments is that the terms used by parties to an agreement should be set to the fullest extent possible by those parties. That other agreements may apply the "before and after" rule differently than has been done in this case cannot obscure that this Board successfully insisted on mutual agreement to its application of its holiday policy. What the Board gave and the Union got for agreeing on that insistence or how other parties apply similar language is less important than the need to honor the agreement reached in this case by these parties.

AWARD

The Board did not violate the collective bargaining agreement when it failed to pay term employees holiday pay for the Good Friday holiday.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 9th day of May, 1997.

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