BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NECEDAH AREA SUPPORT STAFF

and

NECEDAH AREA SCHOOL DISTRICT

Case 20
No. 58146
MA-10854

Appearances:

Ms. Deborah K. Byers, Executive Director, Coulee Region United Educators, NEA-WEAC, appearing on behalf of the Union.

Godfrey & Kahn, S.C., Attorneys at Law**,** by **Attorney Edward J. Williams**, appearing on behalf of the District.

ARBITRATION AWARD

The Necedah Area Support Personnel (herein the Union) and the Necedah Area School District (herein the District) are parties to a collective bargaining agreement, dated September 29, 1999, covering the period from July 1, 1998, through June 30, 2000, and providing for binding arbitration of certain disputes between the parties. On November 1, 1999, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration as a result of a reduction of hours imposed on certain members of the food service staff and requested the appointment of a member of the WERC staff to arbitrate the issue. The undersigned was designated to hear the dispute and a hearing was conducted on December 21, 1999. The proceedings were not transcribed. Briefs were filed on January 24, 2000, and the Association filed a reply brief on February 3. The District elected not to file a reply brief and so notified the arbitrator on February 14.

ISSUE

The parties were unable to stipulate as to the issue, therefore, the Arbitrator frames the issue as follows:

Did the District violate the collective bargaining agreement when it reduced the hours of work of Sherry Saunders, Dorothy Cross, Stacy Hargrove and Tammy Hurt?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE VI. – SENIORITY

An employee's seniority is measured from initial date of hire by the district in any bargaining unit position. No distinction shall be made between full and part time service to the district in measuring seniority. Seniority and the employment relationship shall be broken and terminated if the employee:

A. Quits.
B. Is discharged.
C. Fails to report to work after having been recalled from layoff within 2 weeks.
D. Is retired.

Employment is not considered interrupted by approved leaves or school recess. The School Administration shall provide the President of the Association with an updated seniority list by September 1 of each year. The Association will inform the School Administration of any disagreements with the updated seniority list by October 1 of each year.

ARTICLE VIII. – LAYOFF CLAUSE

A. The Board shall determine the number of employees to be laid off or reduced and select the individual employee(s) who will be affected. The following will be used to determine who is laid off.

1. Normal attrition from employee retirement or resignations will be relied upon to reduce staff to the extent that it is administratively feasible.

2. Temporary personnel will be laid off before full-time and part-time personnel where administratively feasible.

3. The remaining employee(s) to be laid off or reduced will be determined by the seniority of all employees within the classification, commencing with the employee with the least seniority. Seniority is defined in Article VI. An

employee that is designated for layoff or reduction may bump within their classification where his/her seniority is greater than the least senior person in that classification, and where the employee is qualified for the position. If the date of hire of two employees is equal, then the Board may select the employee to be laid off or reduced in hours. Classifications are defined as follows:

Secretarial/clerical
District Receptionist
Food Service
Teachers' Aides
Maintenance/custodial
Bus Drivers

4. Notice of lay off will be given at least 30 days prior to the date of lay off.

OTHER RELEVANT LANGUAGE

ARTICLE III – MANAGEMENT RIGHTS

The Board on its own behalf and on behalf of the district, hereby retains and reserves unto itself all rights of possession, care, control and management vested in it by law, and retains the right to exercise these functions during the term of the collective bargaining agreement except to the precise extent such functions and rights are restricted by the terms of this Agreement. These rights include, but are not limited by enumeration to, the following rights:

. . .

B. To establish reasonable work loads, work rules and schedules of work;
C. To hire, promote, transfer, schedule and assign employees in positions with the school system;
D. To lay off employees from their duties for sound business reasons;
E. To maintain efficiency of school system operations;

. . .

I. To determine methods, means and personnel by which school system operations are to be conducted;

. . .

ARTICLE V. – HOURS OF WORK AND WORKLOAD

A. Hours of work

. . .

Food service workers will be required to work full-time or part-time each day students are in attendance at school and may be assigned additional hours on non-school days at the discretion of the District Administrator. Overtime hours must have prior approval of the immediate supervisor and the District Administrator.

BACKGROUND

The Necedah Area School District is integrated into one building complex, which incorporates the grade school, middle school and high school. All students utilize a common food service facility comprised of two lunchroom areas connected to a centrally located kitchen. Students from the different schools eat lunch in staggered shifts from approximately 10:30 a.m. to 12:45 p.m. daily. The food service also prepares meals which are transported to an alternative high school operated by the district at another location.

For the past several years, operation of the district's food service has been contracted out to Taher, Inc., a private corporation. Taher's contract with the district comes up for renewal in 2000. Since July 1998, the district's food service has been managed by Chelsea Gage, a Taher employe. Gage is responsible for managing the food service budget, training the staff, preparing menus, handling food purchasing and overseeing the preparation and serving of meals. The district, however, employs the six foodservice workers, five full-time and one part-time, who staff the food service. In order of greatest seniority, the employes are Joanne Ziebell, Sherry Saunders, Dorothy Cross, Stacy Hargrove, Tammy Hurt and Patricia Cook. Ziebell, Saunders, Cross, Hargrove and Hurt are full-time employes. Cook is a part-time employe. Thus, although the food service workers are employed by the district and are members of the bargaining unit, they are managed by Gage, who is not a district employe.

For the 1999-2000 school year, Taher determined that the District needed to reduce the food service by two labor hours per day in order to make the service more economically viable. Gage recommended that the District could accomplish this by reducing Saunders, Cross, Hargrove and Hurt, hereafter the Grievants, by one-half hour per day each. On July 20, 1999, the Necedah Board of Education voted to adopt the recommendation and on July 21, Pauline Roll, the District Superintendent, wrote to the food service staff notifying them of the changes. Cook did not receive a reduction.

On September 8, 1999, after implementation of the reductions, the Union filed a grievance with the District on behalf of the Grievants. The grievance was denied at each level and the matter proceeded to arbitration.

POSITIONS OF THE PARTIES

The Union

Article VIII of the collective bargaining agreement contains specific language addressing reductions and layoffs, which establishes a process and progression for reducing staff and/or hours. Article VIII, Section A, Subsection 1, states that staff reductions are to be accomplished first through normal attrition, where administratively feasible. Article VIII, Section A, Subsection 2, states that temporary personnel are to be laid off before regular full and part-time employes, again where administratively feasible. Article VIII, Section A, Subsection 3, states that layoffs of regular employes will occur within classifications, according to seniority. Significantly, Subsection 3 does not mention administrative feasibility, thus, making this language inviolable and not qualified by any contingencies or administrative discretion.

Within the food service classification there were no retirements or terminations, nor were there any temporary employes, making Subsections 1 and 2 inapplicable to the present case. Subsection 3 controls and requires that the two hours be taken from the least senior employe within the classification. The collective bargaining agreement does not permit the District to reduce the hours of four people, nor does it permit taking the hours from more senior employes instead of junior employes.

There is no merit to the District's contention that it has the latitude under the Management Rights clause to circumvent the layoff procedure for sound business reasons. The District has discretion to decide to lay off employes, but if it does so, it is bound to follow the language of Article VIII. The District failed to do this when it reduced the hours of the Grievants instead of the least senior food service employe.

Past practice supports the Association's position. On three occasions the District improperly reduced the hours of food service staff. In 1990, the District reduced the hours of Fran Wilson. When the reduction was grieved, Ms. Wilson's hours were restored by reassigning her as a part-time aide, as well as a cook. In 1996, the District attempted to reduce the most senior cooks, Joan Ziebell and Mary Peterson, by one hour per day. The reduction was grieved and the hours were restored. In 1999, the District attempted to reduce Joan Ziebell and Sherry Saunders by one hour per day. Again, the reduction was grieved and the hours restored. In each case, the District violated the layoff provision of the contract and relented only when confronted by the Association.

In contract interpretation cases, arbitrators will generally prefer applicable specific language over general language. Here, the District relies on the Management Rights clause, which generally gives the employer the right to lay off employes for sound business reasons. The clause also adds, however, that it is subject to any restrictions contained elsewhere in the agreement. The Association does not contest this general grant of authority, nor the District's right to exercise it here, although evidence suggests that the food service operations have

suffered since the reductions. There is specific language in Article VIII, however, which dictates how such layoffs are to be accomplished. In this case, the language mandates that the least senior person in the classification be the one reduced.

The District argues that it needs the services of all the staff over the lunch hour and that, therefore, it cannot reduce the hours of the least senior employe, who only works from 10:00 a.m. until 1:00 p.m. A review of the food service operation, however, belies this view. The least senior employe is stationed in the dish room over the lunch period. Students begin eating in significant numbers at 11:10 a.m., therefore, she would not be needed to wash dishes until at least 11:20. Her duties in the dish room are completed by 12:40, thus, she is only needed for one hour and twenty minutes per day and twenty of those minutes, along with any ancillary duties, could easily be distributed among the other cooks. It might be more convenient to have this employe available three hours per day, but it is not necessary. The District has impermissibly violated the collective bargaining agreement and the four Grievants should have their hours restored and be made whole.

The District

Under the collective bargaining agreement, management retains the right to schedule and determine the hours of work of the food service staff. The agreement does not establish hours of work, nor does it guarantee a certain number of hours to the employes. Rather, it provides that food service workers will be required to work while students are in attendance and at certain other times, but leaves it to management, via the Management Rights clause, to determine the actual number of hours needed and schedule accordingly. This is consistent with a long chain of arbitral precedents (citations omitted), which hold that management's right to establish the times and hours of work should be construed broadly to promote efficiency, especially where the contract does not specify a fixed number of guaranteed hours of work.

There is no contractual restriction on the scheduling of work. To the contrary, the agreement reserves to management the right to establish reasonable work loads, schedules of work and to schedule and assign employes and positions within the school system. Thus, the food service schedule is revisited every year to determine the optimum allocation of hours and resources. In the present case, food service management determined that six employes were required from 10:00 a.m. to 1:00 p.m. Nevertheless, it was determined economically necessary to eliminate two hours per day from the payroll. Because the least senior employe already works only three hours per day, it was not possible to reduce her hours and still have the necessary complement of workers during the peak hours. The only viable alternative, therefore, was to reduce the four next most senior employes by half an hour per day each.

The Union argument that the reduction violated the Layoff clause has no merit. The Layoff clause is concerned with layoffs and reductions in force, but says nothing about reductions of hours. Many arbitrators do not consider reductions in hours to constitute reductions in force or layoffs and, in fact, the hours reduction here had the opposite effect of a

reduction in force, because it resulted in all employes continuing to keep their jobs. Were the Layoff clause to be interpreted literally and in a vacuum, it would be impossible for the District to provide the food services it is obliged to do. Therefore, the unique circumstances here must be viewed from the standpoint of reasonableness and equity.

The Union also contends that there is an established past practice of reducing the hours of the least senior employe. This argument fails on two counts. First, past practice only applies in cases where the contract language is ambiguous or unclear. Such is not the case here, therefore, the contract language should be applied according to its plain meaning. Second, assuming some unclarity or ambiguity was found to exist, the conditions necessary to support a binding past practice have not been established. Such a practice would have to be 1) unequivocal; 2) clearly enunciated and acted upon; and 3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. CELANESE CORP. OF AMERICA, 24 LA 168, 172 (JUSTIN, 1954). The Union has failed to establish these criteria.

The Union presented oral evidence, with no supporting documentation, of three instances over the past several years where the District made a determination to reduce hours and the least senior employe was reduced first. It did not establish, however, that this practice was unequivocal, clearly enunciated and acted upon, or readily ascertainable over a fixed period of time as an established practice of the parties. Further, the evidence reflects that these other instances are factually distinguishable and a past practice is only effective where the underlying circumstances remain unchanged.

This case involves a unique set of circumstances whereby the District needed to reduce overall hours, but also needed all staff members to work during the peak period of 10:00 a.m. to 1:00 p.m. The Union contends that the Layoff clause requires that the two hour reduction be imposed upon the least senior employe, thereby reducing her from three hours a day to one. Were the District to do that, it would not be possible to have all six employes on duty during the three-hour peak period. Thus, to interpret the contract as the Union suggests would lead to the absurd result of having inadequate coverage during the busiest period of the day, as well as having the least senior employe working only one hour per day. Such an outcome would be clearly disfavored by arbitral precedents. (Citations omitted.) For all the reasons cited, therefore, the grievance should be dismissed.

Union Reply

The Association does not dispute management's right to schedule work, or to change work schedules, but it may not unilaterally reduce an employe's hours of work without following the layoff procedure set forth in Article VIII. The specific language of Article VIII, Paragraph A, Section 3, states, "The remaining employee(s) to be laid off or reduced will be determined by seniority..." The District equates the word "reduced" with a reduction in force,

but that is not what the language says. The word "reduced" refers to a cutback in hours, not to a cutback in staff. Thus, when the District reduced the four Grievants by one-half hour per day each, it was required to comply with Article VIII in doing so.

The District's argument that it had "sound business reasons" for its actions is also specious. UniServ Director Gerry Roethel testified as to ways in which the work could be redistributed among the food service staff in order to avoid reducing the Grievants without sacrificing quality or efficiency. Further, although the Food Service Manager, Chelsea Gage, testified on direct examination that six employes were needed between 10:00 a.m. and 1:00 p.m., on cross-examination she was unable to explain why this is so, or why other employes couldn't change their schedules and duties. Finally, the lunch period is actually much shorter than alleged by the District, making it unnecessary to have a full staff for three hours per day.

The District disputes the existence of a past practice, but the fact remains that on three occasions it sought to reduce the hours of senior employes, on each occasion the Association grieved the action and in each instance the District restored the hours to the employes. The elements of a past practice exist with respect to these incidents and they are identical to the case at hand.

The District also essentially admits a violation of the contract in its third argument by claiming that it was impossible to comply with the Layoff procedure under the circumstances. In the first place, this undercuts the District's first two arguments wherein it claims there was no violation of the contract. Either the contract was violated or it wasn't, the District can't have it both ways. Furthermore, the basis of the argument appears to be that the District may violate the contract whenever, in the District's opinion, it becomes necessary. If the District wishes to change or eliminate contract terms, it must do so at the bargaining table, not through unilateral action.

Finally, the District's contention that adopting the Association's position would lead to absurd and nonsensical results has no merit. The Association has shown how the work schedule could be restructured to reduce the least senior employe by two hours per day and still complete the work. That the District does not choose to adopt these alternatives does not make them absurd or nonsensical. The District's position, on the other hand, violates the spirit and letter of the collective bargaining agreement and is patently unfair to the employes in the bargaining unit. For these reasons, the Association maintains the grievance should be upheld.

District Reply

The District did not file a reply brief.

DISCUSSION

The record indicates that in 1999, the District, acting on a recommendation from its Food Service manager, Chelsea Gage, eliminated two labor hours per day from the Food Service staff by reducing the Grievants each by one-half hour per day. Gage, in turn, was acting on instructions from her employer, Taher, Inc., with which the District contracts to operate its Food Service, and which concluded that the reductions were economically necessary. At the hearing, it was suggested by the Union that Taher's recommendation was based on concerns over the renewal of its contract after the 1999-2000 school year, but this was not established, nor, in my opinion, is it germane to the issue because the decision to eliminate the hours and reduce the individual employes was ultimately made by the District, not Taher.

In justifying its decision, the District relies on the language of the Management Rights clause, which permits the employer to, among other things, establish reasonable work loads and schedules of work, as well as schedule and assign employes in positions with the school system. The District interprets this to mean that it may, in its discretion and without prior Union approval, determine the number of hours of work necessary and the manner in which those hours are to be scheduled. The Union does not dispute this and, in fact, concedes that management has the right to set, and thereafter alter, the work schedule. What the Union does not concede, and the crux of the issue here, is management's authority to unilaterally reduce the work hours of individual employes without reference to seniority or the provisions of the Layoff clause.

The District argues that the Layoff clause is inapplicable, because there was only a cutback of hours, not a layoff or reduction in force. I am not persuaded that this is a correct interpretation of the provision. Article VIII, Section A, states: "The Board shall determine the number of employees to be laid off or reduced and select the individual employee(s) who will be affected." Then the provision goes on to set out the process by which layoffs and reductions will be determined. Subsection 3 states: "The remaining employee(s) to be laid off or reduced will be determined by the seniority of all employees within the classification, commencing with the employee with the least seniority." The District equates the word "reduced" with reduction in force, yet it also appears to equate reduction in force with layoff. Under that reading, the word "reduced" becomes superfluous and adds no additional meaning to the clause. This would violate the basic precept that contracts should be construed, if possible, so as to give effect to all words and phrases, and that an interpretation which tends to nullify or render meaningless any provision is generally to be avoided. Even more to the point, the next to last sentence of Subsection 3 states: "If the date of hire of two employees is equal, then the Board may select the employee to be laid off or reduced in hours." (Emphasis added.) Clearly, therefore, the word "reduced," as it is used in Article VIII, Section A, refers to a reduction in hours, sometimes referred to as a partial layoff, and not a reduction in workforce. As such, it has direct application to the situation here.

The District argues, however, that there is no set guarantee of hours to the Food Service staff members under the collective bargaining agreement and, therefore, it has the flexibility under the Management Rights clause to restructure the employes schedules as it sees fit. Furthermore, it cites numerous arbitration awards in support of its position. I find the cases cited to be inapposite. In DRAKE BAKERIES, INC., 38 LA 751 (WOLF, 1962), an employer was upheld in unilaterally instituting a Sunday work schedule. In NEW JERSEY BREWERS' ASSOCIATION, 33 LA 320 (HILL, 1958), an employer was upheld in unilaterally eliminating Sunday work. In KIMBERLY-CLARK CORP., 42 LA 982 (SEMBOWER, 1964), the employer was permitted to unilaterally switch the schedule from shift to day work. In ST. REGIS PAPER CO., 51 LA 1102 (SOLOMON, 1968), the employer was permitted to unilaterally alter the summer work schedule. In each of these cases, however, there was no contrary provision in the agreement limiting management's discretion. Here, the language of Article VIII, Section A, specifically limits management's right to reduce the hours of individual employes.

Likewise, those cases cited in support of the argument that contracts that refer to a "regular" or "normal" workday or week do not provide a guarantee of hours are not on point. The issue here is not whether the District may reduce the number of hours worked in a day or week for sound business reasons. The Union has conceded as much. Rather, the issue is whether the District may unilaterally determine which employes the hours will be taken from without reference to the Layoff clause. I find that it cannot. The rights reserved in the Management Rights clause are specifically limited to the extent that they are restricted by other provisions in the collective bargaining agreement. Article VIII, Section A, Subsection 3, requires that reductions in the hours of employes be done according to seniority. Therefore, the District's ability to shorten the workday is contingent upon its doing so in accord with the Layoff provision.

The record reflects that in the past the District has also accepted this interpretation. There was evidence of three prior grievances filed on behalf of employes who had their hours reduced despite their relatively high seniority. In each case, the District settled the grievances by restoring the hours. I agree with the District's position that this, in and of itself, doesn't constitute a binding past practice. Nevertheless, where a grievance has been settled between two parties, that settlement may have precedential effect with respect to any future grievances between the parties over the same issue and, as evidence of the parties' intent regarding the meaning of the provision in question, it carries special weight. BENDIX-WESTINGHOUSE AUTOMOTIVE AIR BRAKE CO., 23 LA 706 (MATHEWS, 1954). The past settlements here indicate that the parties have understood reduction of employes' hours to be governed by seniority.

The District argues, in the alternative, that it is not possible to comply with the Layoff provision in this case because all six employes are needed between the hours of 10:00 a.m. and 1:00 p.m. and the least senior employe only works three hours per day. To reduce her by two hours per day, therefore, would leave the Food Service short-handed during its peak period. Because all the other employes work longer hours, it is easier to eliminate one-half hour each

from the Grievants. This argument is likewise, unpersuasive. The District may not breach the agreement simply because a provision becomes inconvenient or burdensome. Absent extraordinary circumstances, which do not appear in the record before me, the District must seek any desired modifications at the bargaining table.

The District also contends that adoption of the Union's position would lead to an absurd and nonsensical result, in that the least senior employe would only work one hour per day and the Food Service would have inadequate staff during the busiest part of the work day. For a variety of reasons, I disagree. In the first place, this was a calculated economic decision by the District in the middle of a contract, not a circumstance beyond the District's control. Furthermore, the cost concern was not initially raised by the District, but rather by the independent contractor, Taher. The decision to recommend the cutback was apparently based on an accounting calculation of the optimal ratio of labor hours to meals served. In fact, Taher's representative, Chelsea Gage, testified that in 1998-99 the Food Service had more employe hours and did not operate at a loss. Therefore, if the concern for a manpower shortage is great enough, the District may always elect to restore the hours to the workday and absorb the additional cost.

Secondly, it appears from the record that the District may have some additional scheduling options that would reduce the need to have the least senior employe on duty for a full three hours per day. For instance, the five senior employes currently all take their breaks together at 10:00 a.m. These could be spaced out and scheduled for times outside the peak 10:00–1:00 interval. At the same time, according to the testimony, some of the least senior employe's duties could be redistributed among the other five.

Finally, both parties appear to be arguing from the proposition that the Layoff clause, if applicable, requires that the full reduction be imposed on the least senior employe. I do not concur. Article VIII, Section A, states: "The Board shall determine the number of employees to be laid off or reduced..." (Emphasis added.) Likewise, Subsection 3 states: "The remaining employee(s) to be laid off or reduced will be determined by the seniority of all employees..." (Emphasis added.) This plainly implies that the District may spread the reduction out among several employes as long as it does so according to seniority. Thus, the District's error was not in reducing four employes by one-half hour each, but in not doing so in accordance with seniority. The violation occurred in reducing the most senior of the Grievants, Sherry Saunders, instead of the least senior employe, Patti Cook. By reducing the four least senior employes by one half hour each, the District would have been in compliance with the contract and would only have been without all six employes for one half hour per day. The adjustments mentioned above would have made the impact of the loss negligible.

Based upon the foregoing and the record as a whole, the undersigned enters the following:

AWARD

By reducing the hours of the Grievant, Sherry Saunders, the District violated Article VIII, Section A, of the collective bargaining agreement. Accordingly, the District is ordered to restore one-half hour per day to Saunders' work schedule and to pay her back pay equivalent to one-half hour per day from the date of the reduction, along with any additional benefits, or contributions to benefits, to which she may be entitled as a result of the increase. As to the remaining three Grievants, Dorothy Cross, Stacy Hargrove and Tammy Hurt, there was no violation of the contract and the grievance is, therefore, denied.

Dated at Eau Claire, Wisconsin this 11th day of May, 2000.

John R. Emery /s/
John R. Emery, Arbitrator

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