

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
JOHNSON CREEK EDUCATIONAL SUPPORT ASSOCIATION
and
JOHNSON CREEK SCHOOL DISTRICT

Case 24
No. 58452
MA-10960

Appearances:

Mr. A. Phillip Borkenhagen, Executive Director, Capital Area UniServ-North, WEAC, 4800 Ivywood Trail, McFarland, WI 53558, appearing on behalf of the Association.

Mr. Larry Steen, Attorney at Law, Larry Steen Law Office, 116 North Washington Street, Elkhorn, WI 53121-1338, appearing on behalf of the District.

ARBITRATION AWARD

The Association and the District named above are parties to a 1997-2000 collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned arbitrator to hear a dispute regarding bus drivers. The undersigned was appointed and held a hearing on April 18, 2000, in Johnson Creek, at which time the parties were given the opportunity to present their evidence and arguments. The parties filed briefs by May 16, 2000.

ISSUE

The issue in this case is:

Did the District violate the collective bargaining agreement, specifically Section 12.4, when a supervisor took an extra-curricular bus trip that had not

been offered to bargaining unit employees first, or by allowing a supervisor to be included in the rotation schedule of bus drivers available for extra-curricular bus trips? If so, what is the remedy?

CONTRACT LANGUAGE

12.4 Overtime and Extra-Curricular Bus Trips. All overtime (including cook extra work for banquets and pre & post school year) must have prior approval of the Principal/Supervisor. When assigned by the Principal/Supervisor, first rights of refusal shall be seniority based, on a rotating basis within each department. It will be paid at a rate of time and one-half for all work beyond 40 hours in a week. Time and one-half rate will be paid for all work on Sundays or holidays.

Extra-curricular bus trips shall be offered to Bus Driver Bargaining Unit Employees by rotation on a seniority basis. If a driver is not notified of his/her turn for such a trip at least 24 hours in advance of said trip, his/her normal turn shall not be forfeited by his/her refusal.

BACKGROUND

This dispute arose under a first collective bargaining agreement. The facts are not in dispute. The parties disagree on the interpretation of the above contract language.

The bargaining unit is a wall-to-wall educational support staff unit, including bus drivers. There are a total of seven drivers, six of them in the bargaining unit, and one supervisor, Dianne Degrandt. The Vice President of the Association, Charles Schick, filed the following grievance on September 24, 1999:

At the September 1st bus driver's meeting, Diane Degrandt, transportation supervisor, chose a trip to Palmyra. This is in violation of the Agreement between JCESA and the Board of Johnson Creek School District.

Article 12, Section 12.4 states, "Extra-curricular bus trips shall be offered to Bus Driver Bargaining Unit Employees by rotation on a seniority basis." There is no wording in this Agreement that allows the transportation supervisor to take a trip on a rotation by seniority basis.

In Article 14, 14.9 titled subcontracting intent, there is a variance granting faculty members to drive a school bus for their activities, but not to be a distance of more than ten miles from the Johnson Creek High School building, and it is not to replace regular employees' normal hours or positions within the bargaining unit.

To resolve this grievance, the transportation supervisor should not be allowed to take these extra-curricular trips. Bargaining Unit employees should be reimbursed for loss wages for the September 2nd trip to Palmyra.

Degradt responded to the grievance on October 5, 1999, with the following statement:

On September 27, 1999, I received and read your written grievance. After our discussion of this issue on September 15, 1999, we both agreed that a written grievance was the next step in the grievance procedure.

Your grievance states that on September 1, 1999, when I chose an extra curricular field trip to Palmyra for September 2, 1999, I violated the Agreement between JCESA & the Board of Education of the Johnson Creek School District. Your grievance is that Article 12, Section 12.4 was violated. You also state that “there is no wording in this Agreement that allows the transportation supervisor to take a trip on a rotation by a seniority basis.”

I have been in the position of transportation director since 1987. In all the years since 1987 to the present, it has always been the practice for the transportation director to be included in the seniority rotation of selection of trips and drive trips. The Classified Agreement has been effective since July 1, 1997. Since that time, the transportation director has been included in the seniority rotation and has driven many extracurricular field trips.

Article 3 of the classified agreement specifies management rights:

Article 3.1 states: The Board possesses the sole right to operate the School District and all management rights repose in it, subject only to the provisions of the contract and applicable law.

Article 3.1.10 states that these rights include . . . “To determine methods, means, and personnel by which school system operations are to be conducted and to determine the kinds and amounts of services to be performed as pertains to District operations and to determine the numbers and kinds of classifications to perform such services.”

The Board of Education has issued a contract to the transportation director which states that “throughout the term of this contract, the transportation director shall have no fewer benefits than other classified employees of the transportation department.” It further provides for “extra reimbursement for all extracurricular trips.”

Therefore, since the Board of Education possesses the sole right to operate the School District, determine the personnel to perform services, and the Board has

given a contract to the transportation director which allows for compensation for extracurricular field trips, no violation of the Agreement has been made.

The contract that Degrandt referred to above is her individual or personal contract with the District. The contract states that if her position were to be eliminated, she would be classified as a full-time driver and any seniority gained would be in effect. It further states: "Throughout the term of this contract, the Transportation Director shall have no fewer benefits than other classified employees of the Transportation Department."

Both Schick and Degrandt testified at the hearing. Also, School Board members Christine Bezoenik and Wayne Duris testified on behalf of the District. They were both on the negotiating team for the District. A retired teacher, Robert Ketelhohn, testified on behalf of the Union. He was employed by the Union to assist in contract negotiations. The parties had about 28 negotiation sessions.

Degrandt's individual contract was signed April 14, 1999. The collective bargaining agreement was ratified at the end of March, 1999, although it covered previous school years. Bezoenik testified that if there had been anything in Degrandt's contract that was in direct conflict with the collective bargaining agreement, the Board would have addressed it.

Bezoenik further testified that Board negotiators were careful about using words such as "will" or "only" so as not to limit the operations or authority of the Board. She also testified that the Board intended to include Degrandt in the rotation of extra-curricular bus trips but the Board did not propose to specifically include her in the rotation by name in the bargaining agreement. It was Board members' understanding that Degrandt's contract, which called for no fewer benefits than other classified employees, included the opportunity to get paid extra for extra-curricular trips. Duris also recalled that it was the Board's position to not damage the non-bargaining unit employees during contract talks. Duris recalled the Board's concern that if the parties used the word "only" to limit bargaining unit employees taking trips, it could not have such a trip at all if no bargaining unit employees were available.

Degrandt has been the Transportation Director since the 1987-88 school year. She is offered an individual contract each year, with the language in it being essentially the same. Degrandt read the collective bargaining agreement to see what pertained to bus drivers, and she interpreted Section 12.4 to offer trips on a seniority rotation as per past practice. Since 1987, trips were offered to drivers on a seniority rotation basis, and Degrandt was always a part of the seniority rotation.

The parties agreed to carve out an exception in Section 14.9 regarding subcontracting to allow faculty members to drive bus for class activities within ten miles.

THE PARTIES' POSITIONS

The Association

The Union asserts that the language of Section 12.4 is clear and unambiguous. Since Degrandt is not a bargaining unit employee, bus trips may not be assigned to her as part of the rotation on a seniority basis. Because the language is clear and unambiguous, the Arbitrator should apply the plain meaning of the provision without recourse to bargaining history or evidence of past practice.

Schick's testimony, confirmed by Ketelhohn, was that bus driving work was to be treated as exclusively bargaining unit work, except the Union allowed Degrandt to take bus runs when there were not enough drivers to cover the necessary routes. The rotation by seniority was reserved to the six bargaining unit members.

The Union points out that the language of Section 12.4 states that extra-curricular bus trips shall be offered to bargaining unit employees. According to *Elkouri & Elkouri*, to expressly include one or more of a class must be taken as an exclusion of all others. The collective bargaining agreement does not include the supervisor in the rotation system. Any agreement between the District and Degrandt which contravenes the bargaining agreement is null and void in terms of the application of the collective bargaining agreement. The Union notes that the District claimed that the work "only" is missing from Section 12.4, thereby allowing Degrandt to insert herself into the rotation. The language can stand on its own, and the phrase "bus driver bargaining unit employees" is dispositive.

Management negotiators did not specifically assert their desire to include Degrandt in the rotation of driving extra-curricular trips at the bargaining table, the Union states. Both Union and District witnesses agreed that her inclusion into the rotational system for such trips was never discussed during negotiations. While the District relied on its alleged intent that Degrandt was to be in the rotation cycle at her discretion, no documents relating to this intent were exchanged between the parties. The District failed to gain specific language in the bargaining agreement to support this intent. There is no nexus between the District's notes and the parties' proposals. Bezoenik could not associate the Board's intent based on her own handwritten notes with either parties' proposals at Tab 24, which dealt with overtime work in general for all employees. The "grandfathering" concept which Duris raised was not about the extra-curricular trips but was a reference to another driver, Rimmel, keeping her old regular day routes. The clear exception to allowing non-bargaining unit employees to regular perform bargaining unit work was the "Spieker clause," which is permission for teachers to drive a limited distance of ten miles for their class activities.

The labor contract clearly supersedes any handbook, rule, regulation or policy as stated in Section 1.2.3. The Board ratified the agreement in late March of 1999, and misled Degrandt into believe that she could enter the rotation cycle through her individual contract which was entered into in April of 1999. The Board is trying to gain benefits for Degrandt

through arbitration instead of at the bargaining table. Moreover, Degrandt defined benefits as related to insurance and retirement benefits, not opportunities to drive extra-curricular trips.

During negotiations, Degrandt published a bus drivers' handbook, which stated that field trips were open to all school bus drivers. However, when the bargaining agreement was negotiated, the word "all" was omitted and the agreement stated: "Extra-curricular bus trips shall be offered to Bus Driver Bargaining Unit Employees by rotation on a seniority basis." That change in language clearly eliminates Degrandt from the rotation.

In conclusion, the Union believes that a remedy can be fashioned by the Arbitrator, despite what was originally requested on the grievance. The amount of pay earned by Degrandt for the trip to Palmyra was about \$50 and it is not an issue. The paramount concern is whether the supervisor may insert herself into the regular rotation system for extra-curricular trips. The Union agrees that the supervisor is allowed to take an extra trip as a substitute or overload driver, when regular drivers are unavailable.

The District

The District asserts that the language of Section 12.4 is clear and unambiguous, and that there is no language prohibiting the Transportation Director, Degrandt, from driving extra-curricular bus trips within the seniority rotation schedule. Degrandt's contract, signed April 14, 1999, states that she shall have no fewer benefits than other classified employees of the Transportation Department. Driving extra-curricular bus trips is a benefit, as Degrandt testified at the hearing. Her contract states that she will receive extra reimbursement for all extracurricular trips.

The District notes that Degrandt testified that since 1987, she has driven extra-curricular bus trips on a seniority rotation basis together with the other bus drivers. Board members Duris and Bezoenik testified that throughout negotiations, it was the District's position not to give away any benefits presently enjoyed by non-union employees. Duris and Bezoenik testified that the currently language in Section 12.4 was drafted so as to not exclude Degrandt from driving extra-curricular bus trips on a seniority rotation basis.

The District asserts that during bargaining, the Union proposed language that would have stated: "Only Bus Driver Bargaining Unit Employees will be used for all extra-curricular trips or route subbing unless all Bus Driver Bargaining Unit Employees are being utilized." The next section proposed by the Union stated: "Extra-curricular trips shall be offered to Bus Driver Bargaining Unit Employees on a seniority basis." Significantly, the first sentences noted above were not adopted into the collective bargaining agreement. The word "only" is notably absent from the language adopted. The District would agree with the Union's position in this grievance if the word "only" were inserted into Section 12.4, to say: "Extra-curricular bus trips shall (only) be offered to Bus Driver Bargaining Unit Employees by rotation on a seniority basis."

The District further points out that Section 1.4 of the bargaining agreement, the Standards Clause, allows the Board to prepare the terms of the contract signed by Degrandt which allows her to drive the extra-curricular trips. Article 3, Management Rights, allows the Board to determine who performs what services, and its rights are limited only to the extent of the agreement. The Union is incorrect to assert that the agreement states that “only” bargaining unit employees are “exclusively” allowed to drive extra-curricular bus trips on a seniority rotation basis. Moreover, nothing in the agreement provides that Degrandt may drive extra-curricular trips in overflow situations when bargaining unit employees are not available to drive. If the Arbitrator were to agree with the Union’s position, Degrandt would be prohibited from driving any extra-curricular bus trips.

The District asks that the grievance be denied and dismissed.

DISCUSSION

This is a straightforward case with very clear and unambiguous language. When parties use the term “shall” in a collective bargaining agreement, it means they “will” do something. Even though this is a first collective bargaining agreement for the support staff, the parties were or should have been aware that the term “shall be offered” meant that the bus trips “will be offered” or “should be offered” to the bargaining unit employees. It is not necessary for the language to further state that extra-curricular trips shall be offered only to bargaining unit employees. The word “shall” provides the mandate to offer those trips to bargaining unit employees.

The collective bargaining agreement states very clearly that: “Extra-curricular bus trips shall be offered to Bus Driver Bargaining Unit Employees by rotation on a seniority basis.” The parties agree that an extra-curricular bus trip to Palmyra was not offered to a bargaining unit employee. A supervisor chose to take that trip. The supervisor is not a bargaining unit employee. Therefore, the District violated the collective bargaining agreement.

Because the language is clear and unambiguous, it is unnecessary to consider past practices or bargaining history.

The collective bargaining agreement prevails over Degrandt’s personal contract to the extent that there is a conflict between them. Board negotiators were aware that if there were a conflict, it should have been addressed.

It should be noted that this Award does not prohibit Degrandt from driving extra-curricular trips *after* they have been offered to bargaining unit employees who have turned them down. The labor contract merely requires that such trips be offered to bargaining unit employees. The Union agrees that that Degrandt may take trips after bargaining unit employees have been offered the trips but have turned them down.

The Union does not ask for a monetary award and it will not be ordered.

AWARD

The grievance is granted.

The District violated the collective bargaining agreement, specifically Section 12.4, when a supervisor took an extra-curricular bus trip that had not been offered to bargaining unit employees, and by allowing a supervisor to be included in the rotation schedule of bus drivers available for extra-curricular bus trips. The District is ordered to offer extra-curricular bus trips to bargaining unit employees before a supervisor may drive such a trip, consistent with the terms of Section 12.4.

Dated at Elkhorn, Wisconsin this 12th day of July, 2000.

Karen J. Mawhinney /s/

Karen J. Mawhinney, Arbitrator