

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WAUSAUKEE EDUCATION ASSOCIATION
c/o NORTHERN TIER UNISERV-EAST**

and

WAUSAUKEE SCHOOL DISTRICT

Case 42
No. 56866
MA-11084

(Preparation Period Grievance)

Appearances:

Ms. Carol J. Nelson, Executive Director, Northern Tier UniServ-East, on behalf of the Association.

Mr. James A. Morrison, on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, herein “Association” and “District”, are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Wausaukee, Wisconsin, on October 11, 2000. There, the parties agreed that I should retain my jurisdiction if the grievance is sustained. The hearing was transcribed and the parties filed briefs that were received by December 8, 2000.

Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUE

The parties have agreed to the following issue:

Did the District in the 1999-2000 school year violate Article XV, Section B, of the contract when it denied the elementary staff one continuous prep period of 45 minutes per day and, if so, what is the appropriate remedy?

BACKGROUND

For at least the last 20 years, the District granted a continuous time block of at least 45 minutes as a preparation period for its high school, middle school, and elementary teachers. The District in the 1999-2000 school year changed that practice by breaking up the block of prep time for its elementary teachers and by spreading out their prep time throughout the day. It also apparently failed to provide 45 minutes of preparation time for all of its elementary teachers. The block of prep time for middle school and high school teachers remained the same. Hence, this grievance only covers the change made for the elementary teachers for that school year.

Before 1994, the high school and middle school had a seven (7) period day and a fifty-two (52) minute block preparation period. The elementary teachers then also had a fifty-two minute block preparation period.

The parties in 1994 contract negotiations agreed to the following language which now constitutes Article XV, Section B, of the current contract:

“All teachers shall have at least one (1) preparation period per day equivalent to the high school/middle school single class period or its equivalent pending in the elementary school.”

Teacher Robert K. Farcus, who has served on the Association’s collective bargaining team for all but two occasions since 1983, testified about those 1994 negotiations. He said that “block scheduling had been implemented in the 94-95 school year” for the middle school and high school; that the parties then “Absolutely” agreed in negotiations to “keep a continuous time period, a block of time, and we wanted that block of time to apply to all teachers,” and that “I wanted a stipulation of the 45 minutes.” He also testified about a 1994 telephone conversation between District representative William G. Bracken and Association spokesperson Dee Simmons (who placed the call from Farcus’ home), where they discussed this issue and which led him to believe that the District had agreed to a continuous 45 minute block of time for the elementary teachers because the word “equivalent” in Article XV, Section B, meant “It would be equal to that type of period, which was a continuous period. That’s what we meant by ‘equivalent’”.

Farcus also said that the District in the 1994 negotiations never suggested that the continuous block of time for the elementary teachers be eliminated and that while he did not use the word “continuous”, he did say: “Period, class period, block period, block time, skinny time, 45-minute high school prep, but not continuous.” He also said that the Association in 1994 made the contract proposal it did because the school went from a seven-period day with 52 minutes of prep time to a 45-minute class period because block scheduling reduced the number of minutes in a period.

On cross-examination, Farcus testified that the pre-1994 contract specifically guaranteed 52 minutes of prep time; that the District in the 1994 contract negotiations refused to agree to a 45-minute preparation period for elementary teachers; that the Association in 1995 filed a grievance (Association Exhibit 4), protesting the District’s failure to provide a 45-minute continuous block of time for elementary teachers; and that in response to the grievance, the District went back to providing a continuous block of time. He added that the Association in subsequent contract negotiations twice proposed contract language expressly calling for one continuous 45-minute preparation period (District Exhibits 2 and 3); that the District never agreed to that proposal; and that the pertinent contract language has remained the same since the 1994 contract negotiations.

Former UniServ Director Simmons testified that she spoke to District representative Bracken by telephone in 1994; that she then understood that the time for elementary teachers would be a 45-minute continuous block of time; and that the term “45 minutes” was not written in the contract for elementary school teachers because: “What we agreed to put is the one prep period equivalent to the high school or middle school because at that time they were teetering with going into block scheduling. . .” She added that the details surrounding block scheduling were not certain except for the fact that “it was one prep time per day.” She also said that Bracken then agreed what “one preparation period per day equivalent meant, and he flat out said that it would mean – approximately – not approximately, it could mean 45 minutes. It would mean whatever the high school/middle school prep is. That would be the class period that high school, middle school, and elementary schools would have.”

On cross-examination, she said that Bracken spoke “of continuous prep time” and that he “would not agree with specifying 45 minutes.”

District representative Bracken testified by telephone pursuant to the agreement of the parties. He said that he could not recall his telephone discussion with Simmons; that this issue came up at the “very end” of contract negotiations; that “What we were trying to do was to make sure that the language changed to whatever the class periods became in the high school and middle school”; that the Board “couldn’t give the exact 52 minutes to the elementary. . .” because “we couldn’t give that whole thing to the elementary teachers because of the way specialists came in their rooms.” He explained that “Because of the way the time worked out,

it became physically impossible to give them the same amount” of prep time, which is why “we put the word ‘equivalent’ in there to make it clear that the elementary teachers are not going to be able to have the block of time like they did in the high school and the middle school.”

He also said that he did not recall any discussions in the 1994 contract negotiations about changing the prior practice surrounding prep time for elementary teachers; that “it was simply a problem with the 52 minutes because that wouldn’t fit the new configuration of the new schedule”; and that, “We had to do something different for the elementary because we knew we couldn’t guarantee the block of time.” Asked whether Association representative Simmons ever agreed that a specialist could break up the 45 minute block, he replied: “I just don’t recall if the word ‘continuous’ came up” and that: “We couldn’t give that guarantee of a block of time equal to one period like the middle school and high school got.”

Bracken also said that the Association in the 1997 and 1999 contract negotiations proposed contract language (District Exhibits 2 and 3), that stated: “All professional staff shall have at least one (1) continuous forty-five (45) minute preparation period per day.” He added that the Board rejected that proposal because “it was impossible to give the continuous 45-minute block of time for the elementary teachers. . .”

On cross-examination, he testified that he was unaware that elementary teachers in the past had either 45 minutes or 52 minutes of preparation time in a continuous block.

Asked whether Simmons agreed with breaking up an elementary school prep period to accommodate a specialist, Bracken replied:

“That’s correct. That’s why we put the word ‘equivalent’ in there. I mean, that’s the whole purpose behind that word ‘equivalent’, that it wasn’t going to be the same. What we were trying to do is distinguish between elementary versus the high school/middle school. We didn’t have any problem with the block of time working in those schedules. That’s just the way their schedules worked. They’re based on a period day.

But with the elementary, we would have a problem with it. That’s why we said we’ll give you an equivalent amount of time, but it’s not all at once. It could be 30 minutes here, 15 minutes here, or whatever. It was going to be broken.”

Elementary principal Charles Poches testified about the preparation time elementary teachers received in the 1999-2000 school year (District Exhibit 5). He said that all elementary teachers in the 2000-2001 school year received at least one 45-minute continuous

uninterrupted block of preparation time per day and that that was accomplished by hiring one additional teacher.

Grievance Chair Donna M. Pintarelli testified that some teachers in the 1999-2000 school year only had 30 minutes of prep time; that prep time for the last 20 years has “been the time for teachers to do grades, to contact parents, to meet with other period”; and that the time between 8:00 a.m. and 8:10 a.m. and 3:00 p.m. to 3:30 p.m. had never been included in prep time. On cross-examination, she said that teachers in the 1999-2000 school year were required to report to school no later than 8:00 a.m.; that classes started at 8:15 a.m.; and that teachers were required to be in the building until 3:40 p.m.

POSITIONS OF THE PARTIES

The Association contends that the District violated Article XV, Section B, of the contract when it deviated from past practice and failed to provide a 45-minute block of prep time to elementary teachers in the 1999-2000 school year. It therefore argues that past practice “for at least twenty years” supports its grievance, as does the bargaining history surrounding the 1994 contract negotiations. As a remedy, the Association requests back pay for the loss of all prep time and continuation of the 45-minutes of continuous prep time for all elementary teachers each day.

The District contends that it did not violate the contract because the parties in the 1994 contract negotiations never agreed to maintain a continuous 45-minute block of preparation time for elementary teachers, and because “The bargaining history. . . flatly contradicts. . .” the Association’s position. It also contends that “The plain language of the contract clearly treats elementary school teachers differently than teachers in the high school and middle school”; that the Association’s failure in the 1997 and 1999 contract negotiations to secure language guaranteeing a 45-minute block of prep time shows that it would not have made those proposals if the contract already provided for it; and that no weight can be given to the District’s settlement of the Association’s 1995 grievance because it then was only “attempting to accommodate the teachers as much as possible.”

DISCUSSION

This case turns on the application of Article XV, Section B, which as related above states:

“All teachers shall have at least one (1) preparation period per day equivalent to the high school/middle school single class period or its equivalent per day in the elementary school.”

The key word here is “period” because it is a term of art in education that connotes a single block of time. That is why we say subjects are taught at certain periods -- such as “fifth period history” -- and why we say teachers are responsible for teaching a certain number of “periods”. Indeed, the parties themselves certainly recognized that since other parts of Article XV repeatedly refer to the word “period”:

- A. An additional six hundred twenty dollars and thirty-one cents (\$620.31) shall be paid to any teacher teaching over five (5) periods per day, per semester during the school day as defined in Article XXII herein.

For the 1994-95 school year or any year employing blocked scheduling:

- * Teaching 6 class periods one day per week shall be compensated at the number of days teaching 6 periods times the RATE OF 6TH CLASS PAY DIVIDED BY 90 TIMES the length of the period divided by 51 times the number of days taught (i.e., $[(620.31/90*(45/51))*36 = \$218.93]$).
- * Teaching 3 blocked periods and 1 single period four days a week and 7 period one day a week shall be compensated at 1.58 TIMES THE RATE FOR 6TH CLASS PAY.
- * Teaching more than 3 blocked periods and 1 single period shall be voluntary and shall be compensated at 1.7 times 1.58 TIMES THE 6TH CLASS RATE PLUS THE 6TH CLASS RATE. (Emphasis added).

While the language is not perfectly clear, Article XV, Section B, therefore seems to provide for two separate, but distinct, concepts: The first concept provides for “at least one (1) preparation period per day. . .” for “All teachers. . .” (Emphasis added). The second concept relates to the length of those periods: High school/middle school teachers are to receive a preparation period that is “equivalent to the high school/middle school single class period”, while elementary teachers are entitled to a preparation period that is “equivalent” to the elementary school period which is 45 minutes.

The bargaining history surrounding this language is more opaque than the language itself. Farcus and Simmons testified in substance that the Association never agreed in the 1994 contract negotiations to anything less than a continuous block of time for the elementary teachers. District representative Bracken, on the other hand, testified that “We had to do something different for the elementary because we knew we couldn’t guarantee the block of time”, and that Simmons then agreed to break up the elementary school prep period to

accommodate a specialist. Having closely examined all this testimony, I conclude that it is simply impossible to make any clear determination as to what then transpired between the parties regarding who said what to whom.

However, Farcus testified that the District in 1994 never suggested that the continuous block of time for the elementary teachers be eliminated and Bracken agreed that he did not recall any discussions in 1994 about changing this prior practice surrounding prep time for elementary teachers. Given the long-standing past practice of always providing a continuous block of time for elementary prep, I find that said practice could only be changed by a clear agreement to that effect. See *Past Practice And The Administration of Collective Bargaining Agreements*, from Arbitration and Public Policy, Proceedings of the 14th Annual Meeting of the National Academy of Arbitrators (BNA, 1961), v. 30, pp. 48-49, wherein Arbitrator Richard Mittenthal stated:

“If a particular practice is not repudiated during negotiations, it may fairly be said that the contract was entered into upon the assumption that this practice would continue in force. By their silence, the parties have given assent to ‘existing modes of procedure.’ In this way, practices may by implication become an integral part of the contract.” (Footnote citations omitted).

Since there was no such clear agreement, and since Article XV, Section B, refers to “periods” for “All teachers”, I conclude that the well-established past practice on this issue continues and that the District violated the contract when it altered that practice in the 1999-2000 school year.

It is true of course, as the District correctly points out, that the Association twice failed in contract negotiations to obtain contract language guaranteeing 45 minutes of prep time for elementary teachers. But the matter here involves something else: whether a continuous block of time based on the length of the elementary school period must be maintained – irregardless of whether that period is 44, 45, 46 or some other minutes not specified in the contract. In other words, the case here does not center on a guaranteed prep time of 45 minutes. It centers, instead, on a guaranteed block of prep time tied to the elementary period – whatever its duration. Moreover, the Association’s past failure to obtain such contract language in any event is offset by the fact that the District in 1995 -- only one year after the parties bargained over this matter and when it was most fresh – expressly agreed to the Association’s interpretation when it backed off its attempt to eliminate the block of prep time for elementary teachers. Hence, this latter bargaining history and contrary grievance resolution represent a wash.

Based upon the above, it is my

AWARD

1. That the District violated Article XV, Section B, of the contract in the 1999-2000 school year when it failed to provide all of its elementary teachers with a continuous 45-minute block of preparation time.

2. That to rectify that contractual breach, the District immediately shall pay to each affected elementary teacher back pay for whatever loss of prep time they suffered in the 1999-2000 school year. The District in the future also shall provide all elementary teachers with a continuous block of time for preparation that is equivalent to the elementary period.

3. That to resolve any questions that may arise over application of the remedy, I shall retain my jurisdiction for at least sixty (60) days.

Dated at Madison, Wisconsin this 12th day of March, 2001.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

