BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NORTHWEST UNITED EDUCATORS

and

BARRON AREA SCHOOL DISTRICT

Case 44
No. 59352
MA-11262

Appearances:

Mr. Michael J. Burke, Executive Director, Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin 54868, appearing of behalf of NUE.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Kathryn J. Prenn,** 3624 Oakwood Hills Parkway, P. O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the District.

ARBITRATION AWARD

NUE and the District 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. NUE and the District jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned as Arbitrator to resolve a dispute as set forth below. By letter dated December 22, 2000, the Commission appointed the undersigned as Arbitrator. Hearing on the matter was held on April 10, 2001, at the School District Office, Barron, Wisconsin. The hearing was not transcribed. The parties completed their briefing schedule on July 18, 2001.

After considering the entire record, I issue the following decision and Award.

ISSUES

The parties were not able to stipulate the issues for decision. NUE poses the following issues:

> Did the District violate the collective bargaining agreement by assigning teachers to bus duty, hall duty and detention outside the teacher's contractual eight-hour workday? If so, what is the appropriate remedy?

The District frames the issues in the following manner:

1. Has the District violated the collective bargaining agreement by not paying teachers additional compensation for bus duty and detention duty when such duties are part of the teachers' regular work assignment?

2. If so, what is the appropriate remedy?

Having reviewed the entire record, the Arbitrator frames the issues as follows:

1. Did the District violate Article VI, Section B, of the collective bargaining agreement by assigning teachers to bus duty, hall duty and detention outside the teachers' contractual eight (8) hour day?

2. If so, what is the appropriate remedy?

FACTUAL BACKGROUND

General Background

The Barron Area School District, hereinafter referred to as the "District" or "Employer" and Northwest United Educators, hereinafter referred to as "NUE" or "Union" are parties to a collective bargaining agreement which sets forth the wages, hours and conditions of employment for the District's teachers. Article VI, Section B of the agreement addresses issues relating to the hours of work for teachers. It is this Section which has given rise to the instant grievance.

The hours issue for teachers has been part of bargaining in Barron since 1990. In 1990, the District proposed language for Article VI, Section B as follows: "B. The work day for teachers shall be 8:00 a.m. to 4:00 p.m. including a half (1/2) hour paid duty free lunch." In 1992, the District proposed a minimum eight hour workday in response to community concerns over some teachers coming to work late and leaving work early. The District usually dropped these proposals early in the bargain although the District pursued them much longer in later bargains.

Prior to the parties' negotiations for the 1999-2001 collective bargaining agreement, Article VI, Section B, read as follows:

> As teaching is a professional occupation, the job performance rather than the amount of hours is the criteria for satisfactory compliance with the contract. Therefore, teachers shall be on the job a sufficient number of hours as necessary to complete their work assignment.

Pursuant to these two sentences, the District had exercised its authority over the years to assign teachers to bus duty and to supervise detentions. Bus duty at the elementary school is assigned to a teacher for one week, each 6-7 weeks. The practice has been in place for at least twenty years. Only a few teachers have been assigned bus duty at the middle school. Usually, the Principal and a few volunteer teachers handle this duty. Middle school teachers are assigned to supervise detentions usually one or two times per year. Again, this practice has been going on for about twenty years. Detention impacts high school teachers approximately two or three times per year. The practice of the assignment of detention supervision at the high school has also been in place for at least twenty years. For the past three years, high school teachers have also been assigned bus duty approximately three or four times per year.

Teachers have not received extra compensation for these duties. Until the instant dispute, the duties have always been considered part of the teacher's regular job.

Facts Giving Rise to the Instant Dispute

In negotiations for the 1999-2001 contract, the District again raised the hours issue. In its initial proposals, the District proposed that Article VI, Section B, be revised to read as follows:

> As teaching is a professional occupation, the job performance rather than the amount of hours is the criterion for successful compliance with the contract. However, teachers shall be on the job from 7:45 a.m. to 3:45 p.m. and as necessary to complete their work assignment. Attendance at meetings called by the Administration may extend this time occasionally and such attendance is required.

The additional language providing for teachers to "be on the job eight (8) hours per day" was at the District's initiative and was in response to a lingering public relations problem with the former contract language containing no hours requirement. District Administrator Vita M. Sherry testified that not having required hours created a "P.R." problem for the District and that "a handful of teachers created this problem for the rest of the staff."

During the December 14, 1999, bargaining session, the Union raised the issue of additional pay for work outside of the regular eight hour day. Specifically, the Union mentioned extra pay for detention duty although it never made a formal proposal for such pay. The District researched this issue with the Principals, however, the Board decided not to support it.

At the February 22, 2000 bargaining session, the parties discussed the issue of hours in detail. At said meeting, the Union proposed an eight-hour workday with teachers electing a 7:30 or 8:00 a.m. starting time on an annual basis. The Union also proposed that the administration "may extend the workday up to 60 minutes per month (with prior notice)."

The District Board countered with an eight (8) hour day designated annually by building. The Board also countered that the eight (8) hour day could be lengthened on the front-end or back-end for up to 90 minutes per month with 24 hours notice, except in case of emergency or unforeseen circumstances. The Board added that this extension would be for staff meetings called by the Administration or committee meetings authorized by the Administration.

The Union's position at the end of the February 22nd meeting was the same as the District's except for the issue of setting hours on a building-by-building basis.

The parties ultimately settled their contract during WERC mediation on May 10, 2000. Dan McNeil, a member of the Union's bargaining team, testified that the hours issue was discussed at this meeting. He testified that this discussion took place while the parties were in separate rooms and was done through the mediator. He stated that it was very important to the Union that teachers have an individual choice regarding start of the school day. He added that ultimately the Board agreed to this and the Union accepted the above mentioned 90 minutes for Administration-called staff meetings or committee meetings authorized by the Board.

McNeil testified that at some point in the mediation session the Board added the two sentences from Article VI, Section B in the prior contract into its proposal. McNeil stated that during a Union caucus, someone asked the mediator whether this would have an impact on bus and hall duty and the mediator responded "No big deal." McNeil understood this comment to mean that the two sentences would have no impact on hours.

Bruce Stumo also was a member of the Union's bargaining team. He testified that the mediator said that because the ninety (90) minutes for administrative and committee meetings was included in Article VI, Section B the first two sentences of said contract provision were meaningless. As a result, Stumo felt secure that the "new" hours language superseded the first two sentences in paragraph B.

Kathy Duerr, local Union President the past eight years and a member of the Union's bargaining team, testified that her understanding of the disputed language in Article VI, Section B, was that the workday would be confined to eight (8) hours. She said that questions were asked of the mediator and Michael Burke, the Union's bargaining representative, regarding the impact of the Board adding the prior contract language back into its proposal, particularly, the second sentence from the prior contract. She stated that bargaining team members were told that there would be no impact. Specifically, she testified that the mediator said the added language was procedural in nature and was "nice."

Duerr added, however, that the mediator never said what the Board thought adding the second sentence meant. She also stated that there was no discussion at the joint session at the end of the mediation session or at any time material herein regarding meaning of the first two sentences of Article VI, Section B.

McNeil also testified that there was no discussion across the table regarding the meaning of the second sentence of Article VI, Section B. McNeil added that during the bargain the Board did not say it would start paying for bus duty or detention. McNeil stated that the Union never proposed receiving additional compensation for performing bus duty, hall duty or detention.

During the negotiations for the 1999-2001 contract, the Board did not say it would only assign such duties within the eight (8) hour day.

The mediator never told the Union that they would no longer have to do work outside of the eight hours.

There has never been any extra pay for bus duty, hall duty or detention. Union bargaining team members understood that the first two sentences in Article VI, Section B had provided for the teachers performing bus duty, hall duty and detention as part of their workday for no additional compensation. The first two sentences of Article VI, Section B which served as the basis for that practice were unaltered during the 1999-2001 contract negotiations.

The 1999-2001 settlement provided several benefits/improvements for the teachers, including a cash payment in lieu of insurance provision, the deletion of the limitation on how many teachers could take personal leave on any given day and an improvement in the early retirement package. Local Union President Duerr told District Administrator Sherry that the addition of the eight hour day language was sold on the basis of the removal of the personal leave limitation.

Ultimately, the parties agreed at the mediation session on May 10, 2000 to the language in Article VI, Section B, which follows in the Pertinent Contractual Provisions section of this Award.

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE VI – WORKING CONDITIONS AND PLACEMENT

. . .

B. As teaching is a professional occupation, the job performance rather than the amount of hours is the criterion for successful compliance with the contract. Therefore, teachers shall be on the job a sufficient number of hours as necessary to complete their work assignment. However, teachers shall be on the job eight (8) hours per day. On Fridays and on the day before school holidays or breaks, teachers may leave after the last bus leaves, except when otherwise required to be present. Teachers can elect a 7:30 a.m. or an 8:00 a.m. start time on an annual basis prior to the start of the work year. The Administration may lengthen the workday (at the beginning or at the end of the day) up to ninety (90) minutes per month. In such event, the Administration shall provide a 24-hour notice, except in the case of an emergency or unforeseen circumstances. Staff meetings led by the Administration or committee meetings authorized by the Administration shall count toward the ninety (90) minute limit, but not staffings.

. . .

ARTICLE XI – GRIEVANCE PROCEDURES

. . .

4. Level Four –

. . .

c. The arbitrator so selected will offer with representatives of the Board and NUE and hold hearings promptly and will issue his/her decision on a timely basis. The arbitrator's decision will be in writing and will set forth his/her findings of fact, reasoning, and conclusions of the issues submitted. The arbitrator will be without power or authority to make any decision which requires the commission of an act prohibited by law or which is violative of the terms of this Agreement. This decision of the arbitrator will be taken as binding by the Board and NUE where it pertains to items specified within this contract.

POSITIONS OF THE PARTIES

Union's Position

The Union basically argues that the District violated the collective bargaining agreement by assigning teachers to bus duty, hall duty and detention outside the teachers' "contractual eight-hour workday."

In support thereof, the Union maintains that the "recently negotiated hours provision prohibits the District from assigning teachers outside their scheduled hours" except for the additional ninety (90) minutes per month allowance for staff and certain committee meetings. The Union believes that the District's reliance on the "professional occupation" language for assigning the aforesaid duties ignores the more specific language in Article VI, Section B, noted above as well as the bargaining history that led to those revisions. In particular, the Union argues that the parties' agreement on new language in said contractual provision renders the first two sentences in Section B meaningless.

The Union also maintains that the District's interpretation of Article VI, Section B leads to potentially absurd results. The Union asks: does the language allow the District to assign teachers to Saturday morning Kiwanis breakfast as part of a community outreach program or to Saturday morning detention?

Based on the foregoing, the Union requests that the Arbitrator order the District to cease and desist any and all assignments outside of the eight (8) hour day or the ninety (90) minutes per month extension. The Union adds: if the District wants the teaching staff to continue to perform bus duty, hall duty and/or detention, then the District shall enter into negotiations with the Union on these issues.

District's Position

The District argues that the assignment of bus duty and detention is consistent with clear and unambiguous contract language. In support thereof, the District first maintains that there is no language in the agreement prohibiting the assignment of such duties even if those assignments occur outside of the teacher's regular workday. Absent such language, the District believes it retains its authority to assign such duties to teachers.

The District claims that not only is there no contract language prohibiting the assignment of duties outside of the regular workday, there is express language authorizing same. In this regard, the District states that the first two sentences of Article VI, Section B, read as follows:

> As teaching is a professional occupation, the job performance rather than the amount of hours is the criteria for satisfactory compliance with the contract. Therefore, teachers shall be on the job a sufficient number of hours as necessary to complete their work assignment. (Emphasis in the original)

The District adds that pursuant to this language teachers have been assigned bus duty and detention for over 20 years. The District believes that the language is clear: ". . . shall be on the job a sufficient number of hours as necessary to complete their work assignment." The District argues that the addition of language providing for an eight hour minimum work day did not diminish the force or effect of this language. The District urges the Arbitrator to give effect to all provisions of this section, and enforce the first two sentences of Article VI, Section B.

The District also argues that the assignment of bus duty and detention to teachers is consistent with the parties' past practice and bargaining history.

Finally, the District argues that the Arbitrator lacks the authority to grant the Union's requested remedy. In support thereof, the District argues that contract language prohibiting the District from assigning the aforesaid duties is a permissive subject of bargaining and that the Arbitrator would be exceeding his authority by requiring the District to bargain over same. In addition, the District states that the requested remedy would require the Arbitrator to add language to the contract which is beyond his authority.

For these reasons, the District requests that the grievance be denied in its entirety.

DISCUSSION

At issue is whether the District violated Article VI, Section B, of the collective bargaining agreement by assigning teachers to bus duty, hall duty and detention outside the teachers' contractual eight (8) hour day.

The Union argues for the violation while the District takes the opposite position.

Contract interpretation involves giving meaning to the words and conduct used by the parties in their collective bargaining agreement. Labor and Employment Arbitration, Volume 1, Tim Bornstein, Ann Gosline and Marc Greenbaum General Editors, Chapter 9, Contract Interpretation and Respect for Prior Proceedings by Jay E. Grenig, s. 9.01[1], 9-3 (1998). Ideally, contract interpretation results in a determination of exactly what both parties in fact had in mind or intended. This ideal is seldom attainable:

> In the first place, it is impossible to know exactly what the parties did have in mind. Moreover, even if this could be determined, it may be doubted whether very many cases would be found in which both parties did have exactly the same things in mind. The best we can do is to approximate that ideal by adopting as a goal something that is more nearly possible of attainment. That goal, must, however, be fair to both parties to the contract. 2/ Labor and Employment Arbitration, Id., and the case cited therein. (Footnote omitted)

Over the years, arbitrators have looked to the principles of contract interpretation for guidance in interpreting collective bargaining agreements. In the instant case, both parties cite various standards of contract interpretation to support their position. However, the principles of contract interpretation serve only as guides and should not be used as rigid or undeviating rules to be followed as methodically as though labor relations were an exact science. Labor and Employment Arbitration, supra, 9-3 and 9-4.

Many arbitration awards interpreting contracts focus on the intent of the parties. Labor and Employment Arbitration, supra, s. 9.01[2], 9-4. However, the parties herein differ strongly as to what they intended when they agreed to the disputed contract language. Consequently, the Arbitrator will consider the purpose of the disputed collective bargaining agreement provision as a basis for its interpretation. The purpose may be ascertained from the language of the contract as well as evidence of bargaining history and the parties' administration of the contract. Labor and Employment Arbitration, supra, 9-5.

The Arbitrator turns his attention to the language of Article VI, Section B. The parties are in agreement that prior to the instant dispute the first two sentences meant that the District had the authority to assign teachers bus duty, hall duty and detention as part of their normal workday. The Union argues, however, that the "recently negotiated hours provision prohibits the District from assigning teachers outside their scheduled hours" except for a ninety (90) minutes per month for certain meetings.

The problem with this approach is said contractual provision does not expressly provide for such a prohibition. To the contrary, if you read the first two sentences of Article VI, Section B, together with the third sentence – "However, teachers shall be on the job eight (8) hours per day." – you find that the parties in fact added an eight hour minimum workday to said contract section. Such a conclusion is consistent with the purpose of the District's proposal to add such a requirement: to respond to a lingering public relations problem with the former contract language which had no minimum hours requirement. It is also consistent with bargaining history wherein the District has repeatedly attempted to bargain a minimum workday of eight hours in order to respond to community perceptions that a minority of teachers came to school late and left early. (Testimony of District Administrator Sherry and NUE Exhibits Nos. 1 and 2).

The Union also argues that such an interpretation of Article VI, Section B leads to potentially absurd results like the District assigning teachers to a Saturday morning Kiwanis breakfast or detention. The District, however, concedes that this language is limited to monitoring duties traditionally assigned to teachers as part of their normal workday like bus duty, hall duty, detention, prom duty and homecoming. (Testimony of District Administrator Sherry). Therefore, the Arbitrator rejects this argument of the Union.

Interpretation of the disputed contract language in this manner is supported by past practice. It is undisputed that for approximately twenty (20) years the District has assigned teachers bus duty, hall duty and detention pursuant to the first two sentences of Article VI, Section B.

The Union also argues that the bargaining history that specifically led to the revised Article VI, Section B language supports its position that the District is prohibited from assigning teachers bus duty, hall duty and detention outside their eight hour workday. In support thereof, the Union cites testimony from NUE bargaining team members who participated in the May 10, 2000 WERC mediation who felt secure that the "new" hours language superseded the first two sentences in paragraph B. However, as noted above, there is no express language in the newly bargained Article VI, Section B that provides for this result. In addition, there is conflicting testimony regarding exactly what the mediator said to make the teacher bargaining team feel secure that the "new" hours language did what they say it does. In this regard, the Arbitrator points out that teacher bargaining team member Dan McNeil testified that in response to a question regarding the impact of the first two sentences in the aforesaid contract provision the mediator simply responded that "it was no big deal" and "there was no impact." Bruce Stumo testified that the mediator said because the ninety (90) minutes for administrative and committee meetings were included in Article VI, Section B, the first two sentences of said contract provision were meaningless. Kathy Duerr, local Union President, testified simply that the mediator opined that said language was procedural in nature and was "nice." She added that the mediator never said what the Board thought adding the second sentence in the section meant. It is not clear from the Union's conflicting testimony that the mediator said anything clearly that the teachers can rely on for the proposition that the first two sentences of the aforesaid article essentially mean nothing, and/or that they no longer have to perform the aforesaid duties as a part of their workday.

Nor is there any persuasive evidence in the record that the parties' professional bargaining representatives ever made any such statements to the teachers' bargaining team.

It is also undisputed that at no time during the parties' negotiations for the 1999-2001 contract did the parties discuss the impact of the addition of the eight hour day language on the District's right to assign bus duty and detention. (Emphasis in the original).

In addition, there was no discussion between the parties across the table during the 1999-2001 negotiations regarding bus duty, hall duty or detention. (Testimony of District Administrator Sherry, Board President Missling, Board Member Thompson, Teacher Committee Members McNeil, Stumo and Duerr). Nor did the Union question the Board directly about the District's insistence that the second sentence of Article VI, Section B, remain in the contract.

Finally, the District did not say it would start paying for bus duty or detention that have always been part of the teachers' duties. (Testimony of McNeil). Nor did the Board say it would only assign such duties within the regular or minimum eight hour day. (Testimony of McNeil and Stumo). Nor did the mediator ever tell the Union bargaining team that they would no longer have to do work outside of the eight hours. (Testimony of McNeil).

Based on all of the foregoing, the Arbitrator finds that the Union cannot rely on bargaining history to support its position.

The Union's argument that the inclusion of the first two sentences in Article VI, Section B, was essentially meaningless also flies in the face of the arbitral standard for interpreting contract language which states that an arbitrator must give effect to all clauses and words in a contract. Elkouri and Elkouri, How Arbitration Works, (BNA, 5th Ed., 1997), p. 493. This standard provides that if an arbitrator finds that alternative interpretations of a clause are possible, one of which would give meaning and effect to another provision of the contract, while the other would render the other provision meaningless or ineffective, the inclination will be to use the interpretation that would give effect to all provisions. Elkouri and Elkouri, Id. In the words of one arbitrator:

> It is axiomatic in contract construction that an interpretation which tends to nullify or render meaningless any part of the contract should be avoided because of the general presumption that the parties do not carefully write into a solemnly negotiated agreement words intended to have no effect. Elkouri and Elkouri, Id. (cite omitted)

Generally, all words used in an agreement should be given effect.

Interpretation of the disputed contract language in the manner advocated by the District is consistent with the above rule.

The District also argues that there is no language in the collective bargaining agreement prohibiting the assignment of bus duty and detention even if, for the sake of argument, such assignments occur outside of the teacher's regular workday. The District claims that absent

such language the Board has retained its authority to assign such duties to teachers. The District cites a number of arbitral decisions in support thereof including VACAVILLE UNIFIED SCHOOL DIST., 71 LA 1026 (1978), wherein Arbitrator C. Chester Brisco stated as follows:

> It is a well recognized arbitral principle that the Collective Bargaining Agreement imposes limitations on the employer's otherwise unfettered right to manage the enterprise. Except as expressly restricted by the Agreement, the employer retains the right of management. This is known as the Reserved Rights Doctrine; it lies at the foundation of modern arbitration practice. VACAVILLE UNIFIED SCHOOL DIST., SUPRA., at p. 1028.

The Union believes that the Doctrine of Reserved Rights should not have any bearing on this grievance because the District's right to assign is limited by the express terms of the agreement. The Union cites the language of Article VI, Section B, which provides that the District has the right to assign an additional ninety (90) minutes per month (at the beginning and end of the workday). However, as noted above, Article VI, Section B, does not expressly prohibit the District from assigning the disputed duties as part of the teacher's workday as it has always done. Nor, based on bargaining history, should these duties be included within this extended ninety (90) minutes time frame. Bargaining history is clear that these ninety (90) minutes are for administrative and certain committee meetings. Again, the Union raises the specter of abuse: "If the first two sentences in Article VI (B) allow the District to continue to assign outside the eight-hour-day (and ninety-minute extension), Barron teachers will be subject to assignment 24 and 7." The Union asks where do you draw the line?

The line is drawn. In the words of District Administrator Sherry: "Teachers shall be on the job a sufficient number of hours to complete their work assignment." In the context of the first two sentences of Article VI, Section B, this means that teachers must continue to perform certain monitoring duties traditionally assigned to teachers as part of their normal work day like bus duty, hall duty, detention, prom duty and float (homecoming). (Emphasis added). District Administrator Sherry stated: "we are not adding new things here; we are talking about things teachers have always done, past practice."

Based on all of the above, and absent any persuasive evidence or argument to the contrary, the Arbitrator finds that the answer to the issue as framed by the undersigned is NO, the District did not violate Article VI, Section B, of the collective bargaining agreement by assigning teachers to bus duty, hall duty and detention outside the teachers' contractual eight (8) hour day.

In reaching the above conclusion, the Arbitrator has addressed the major arguments of the parties. All other arguments, although not specifically discussed above, have been considered in reaching the Arbitrator's decision.

Based on all of the foregoing, it is my

AWARD

That the grievance filed in the instant matter is denied and the matter is dismissed.

Dated at Madison, Wisconsin this 18th day of September, 2001.

Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

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