BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BOSCOBEL EDUCATION ASSOCIATION

and

BOSCOBEL SCHOOL DISTRICT

Case 42
No. 60553
MA-11660

(*Partial Day Grievance*)

Appearances:

Mr. Marvin A. Shipley, Executive Director, South West Education Association, on behalf of the Association.

Davis & Kuelthau, S.C., by **Mr. Kirk D. Strang**, on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, herein "Association" and "District", are signatories to a contract providing for final and binding arbitration. Pursuant thereto, hearing was held in Boscobel, Wisconsin on May 21, 2002. The hearing was transcribed and the parties there agreed that I should retain my remedial jurisdiction if the grievance is sustained. The parties subsequently filed briefs and reply briefs that were received by October 10, 2002.

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

ISSUES

Since the parties were unable to jointly agree on the issues, I have framed them as follows:

1. Is the grievance substantively arbitrable?

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2. If so, did the District violate Articles V and/or VII of the contract when it required elementary teachers to work half a day on June 5, 2001, without any added compensation and, if so, what is the appropriate remedy?

BACKGROUND

This dispute arose after the 1997-1999 contract expired (Joint Exhibit 1), the terms of which continued via a contractual hiatus and which stated in Article VII:

CALENDAR

A. The 189-day calendar shall consist of 180 student contact days, 2 in-service days equivalent, 1 parent-teacher conference day, 3 in-room work days equivalent, and 3 paid holidays (Labor Day, Thanksgiving and Memorial Day).

B. The school calendar shall be determined by a committee of the Board and the Association. If no agreement is reached by April 15 of each year, it shall be subject to negotiations.

C. It is mutually recognized that employees have no obligation to provide services to the District on days other than those contracted for via the work schedule in the calendar.

This contract provision was negotiated within the context of Wisconsin law which mandates at 121.012(1)(f), Wis. Stats., and 115.01(10), Wis. Stats., that there be at least 180 days of instruction, 175 of which must involve so-called "face-to-face days" or "student contact days" where teachers directly interact with students. If school districts do not meet this 180-day minimum, they can lose prorated state educational aids.

The District in the 1999-2000 school year did not meet this 180-day requirement, but it on September 11, 2001, was granted a waiver by the Wisconsin Department of Public Instruction ("DPI"). The District thus knew going into the 2000-2001 school year that the agreed-upon school calendar for that year could cause a problem as to whether the District would meet the 180-days of instruction requirement.

Thereafter, the District experienced the following inclement weather days in the 2000-2001 school year (Joint Exhibit 9):

Thursday, August 31, 2000	Dismissed at 1:00 p.m. (Heat)
Friday, September 1, 2000	Dismissed at 1:00 p.m. (Heat)
Thursday, November 16, 2000	Two Hour Delay (Snow)
Monday, December 11, 2000	NO SCHOOL (Snow)
Monday, December 18, 2000	Dismissed at 12:15 p.m. (Snow)
Monday, January 29, 2001	NO SCHOOL (Ice)
Tuesday, January 30, 2001	NO SCHOOL (Ice)
Thursday, February 8, 2001	NO SCHOOL (Ice)
Friday, February 9, 2001	NO SCHOOL (Ice)
Wednesday, February 14, 2001	Two Hour Delay (Snow/Ice)
Monday, March 12, 2001	NO SCHOOL (Ice)

The hours missed by all teachers because of those inclement weather days were as follows (Joint Exhibit 10):

DATE	**REASON**	**HOURS**
08/31/00	Early Dismiss @ 1:00 PM (1:15 PM)	2.50
09/01/00	Early Dismiss @ 1:00 PM (1:15 PM)	2.50
11/16/00	2 Hour Delay	2.00
12/11/00	No School	8.00
12/18/00	Early Dismiss @ 12:15 PM (12:30 PM)	3.25
1/29/01	No School	8.00
1/30/01	No School	8.00
02/08/01	No School	8.00
02/09/01	No School	8.00
02/14/01	2 Hour Delay	2.00
03/12/01	No School	8.00
	TOTAL	**60.25**

By March 12, 2001 (unless otherwise stated, all dates herein refer to 2001), the District and Association knew that the remaining part of the school calendar would not generate the state-mandated 180 minimum school days requirement. The District tried to obtain a second waiver of this requirement from DPI by letter dated April 6 (Joint Exhibit 16), but it was rejected by DPI in a letter dated May 8 (Joint Exhibit 7). The District and the Association were then engaged in negotiations for a successor collective bargaining agreement, at which time they discussed how to adjust the calendar so that the 180-day requirement could be met. The District subsequently imposed its QEO at the end of the school year.

The parties were unable to jointly agree on how to resolve the calendar issue for elementary teachers and the District subsequently unilaterally declared that elementary teachers had to teach four hours on June 5 which was not a scheduled work day on the calendar which marked June 4 as the last day of the school year. No middle school or high school teachers were required to teach on June 5 because they had one less parent/teacher conference than the elementary teachers and they thereby had fulfilled the 180-day teaching day requirement for their students.

Ruth Bauer was on the Association's 2001 bargaining team. She testified that the Association on March 15 made two proposals to the District on the calendar issue: (1), have elementary students report for half a day on March 23, which was then scheduled for parent-teacher conferences, so that that would count as a student contact day; or (2), have elementary students report for half a day on April 2 which was then scheduled as an in-service day so that it would count as a student contact day. Bauer said that the District rejected both of those proposals which were made within the context of the parties' other proposals for a successor contract.

On cross-examination, Bauer testified that both sides in negotiations made different proposals on how to deal with the snow day problem and that those proposals were part of the overall packages made for a successor collective bargaining agreement.

Association Vice-President Michelle Imhoff testified that the elementary teachers worked from 7:45 a.m. to 11:00 a.m. on June 5 and that elementary teachers differed from other teachers because they had a one-half day of parent-teacher conferences on March 23 which did not count as a student contact day, unlike the other teachers who taught the full day, thereby qualifying for a student contact day.

On cross-examination, Imhoff said that inclement weather days caused the cancellation of six student contact days during the 2000-2001 school year; that June 4 was originally slated to be an in-service workday for all teachers; that both parties agreed that day should be converted to a half-day student contact day and a half-day in-service day for all teachers; that June 5 was added as a half-day student contact day by the District so it would qualify as a student contact day; and that elementary teachers, unlike other teachers, had two parent-teacher conferences which is why elementary teachers had one less student contact day.

Karl Houtchens served on the 2001 bargaining team. He corroborated Bauer's testimony and testified that the Association also proposed to eliminate the elementary school's second parent-teacher conference to gain an extra student contact day and that the Association was flexible on how to deal with the snow day problem if it occurred within the agreed-upon school year. He also said that the Association in prior negotiations had agreed to add an extra six minutes to the work day in order to create three extra school days that could be used to make up for three snow days.

On cross-examination, Houtchens generally agreed with Imhoff's testimony and said that the Association was "willing to change. . ." the configuration of the agreed-upon 2000-2001 school calendar so that the District did not lose DPI aid. He said that elementary teachers had 179 student contact days and two parent-teacher conferences and that the District never tried to make up all of the six snow days. He added that the Association at one point proposed that teachers be given extra pay for making up a snow day and that the District refused to make such payment on the ground that the District was already paying for that day. He further stated that the DPI did not recognize the six minutes added to the school day when computing the number of student contact days.

Teacher Barbara Havlik also participated in the 2001 negotiations. She testified that the District's "attitude" in negotiations was "You agree to our minimum QEO offer, we can do something about that language; otherwise it's your problem." She also said that the District in the earlier 1997 negotiations proposed the additional six minutes to deal with the student contact day issue and that the District has never offered to withdraw that language from the contract.

On cross-examination, Havlik testified that District Administrator Michael B. Swartz expressed the "attitude" related above and that he then said, "You got away with it last time, but you won't get away with it this time", meaning the waiver from DPI.

Administrator Swartz testified that if there were no snow days in the 2000-2001 school year, teachers would have been required to work all of the 189 days provided for in that year's school calendar. He said that the District only made up two student contact days for the elementary school and one student contact day for the middle school and the high school and that the elementary, the middle school, and the high school on June 4 made up one student contact day by changing a scheduled full in-service day to half an in-service day and half a student contact day. He also said that June 5 was added as a student contact day in the elementary school to make up for a second snow day; that the District would have lost about $25,000 in state aids if it did not make up some of the snow days; and that was the only reason why elementary teachers had to teach on June 5. Asked about Havlik's testimony regarding the District's "attitude" in negotiations, he replied: "I believe I maintained for the three years that I've been here that is our problem, the BEA and the Board." He also said that he sought a waiver from DPI in 2001 because the Association asked him to do that and that the District made its own proposals on how to deal with the snow day issue.

On cross-examination, Swartz testified that he assumed at the beginning of the 2000-2001 school year that another DPI waiver would not be forthcoming. He said that half-day student contact days could not be scheduled for March 23 or April 2 as proposed by the Association on March 21 because there was insufficient time to notify the parents, given the impending one-week spring break. He also said that parents would not have received such

information until after the end of the March 22 school day which was too short a notice to make either of those changes. When asked whether the Association made its proposal on March 15 instead of March 22, he replied: "I don't remember the March 15 date, no." Asked whether the District always presented its snow day proposals within the context of a package deal for a successor contract, he replied: "I don't recall" and he said the District agreed on a 2000-2001 calendar without it being part of a package.

District Secretary Jan White testified about the extended teacher contracts prepared by the District (District Exhibit 1) which provide for added compensation. She also testified about the snow days and make-up days that occurred over the last few years (District Exhibit 2) and she said that the District in the past had scheduled make-up snow days after the last designated school day on the school calendar.

The grievances on behalf of the elementary teachers were filed in October, 2001 (Joint Exhibits 2, 3), hence leading to the instant proceeding.

POSITIONS OF THE PARTIES

The Association claims that the District violated Articles V and VII of the contract because the District forced elementary teachers to work an extra half a day without additional compensation on June 5, which was one day after the June 4 school closing date provided for in the calendar. The Association claims that it made reasonable proposals to make up for lost student contact days when it earlier agreed to work an additional 6 minutes a day which equal three full student contact days and when it made proposals in 2001 that did not require elementary teachers to work beyond June 4. The Association maintains that the District rejected those proposals because it wanted to impose its QEO and to "humiliate the Union by forcing it to come to a voluntary agreement. . ." on its QEO and that "the District's motives is a large part of this grievance." As a remedy, the Association requests that all elementary teachers be paid 1/189th of their salary for working on June 5 because they worked half a day more than their secondary counterparts.

The District contends that "State Statutes and Department of Public Instruction regulations require that the grievance be denied" because the District was legally mandated to schedule 180 school days and because the Association's grievance is not substantively arbitrable given how it rests on an illegal calendar provision. The District also contends that it has retained the right under Article 1, the contractual management rights clause, to reschedule school days and that it did not violate either Article V, the contractual salary provision, or Article VII, the contractual calendar provision when it did so. It further claims that the Association's requested monetary remedy is not appropriate and that "declaratory relief is more compatible with the arbitrator's remedial authority. . ." if any remedy is to be ordered.

DISCUSSION

The first issue to be addressed here is whether the grievance is substantively arbitrable.

As to that, it certainly is true that the 2000-2001 school calendar had to be changed to provide the 180 days needed for full state aids. But, that does not necessarily mean that the entire calendar was illegal. It means only that some change had to be made, a point recognized by the District itself when it bargained with the Association over those changes. Hence, the parties bargained over whether all of the make-up time could be effectuated by June 4 and they ultimately agreed that could be done for the middle school and high school teachers who converted one whole in-service day on June 4 into a half-day in-service and a half-day for student contact. The Association's grievance thus contends that the District violated the contract when it required elementary teachers to work the extra half day on June 5, which was past the earlier agreed-to June 4 school ending. That is why the Association claims that the District violated Article V, entitled "Salaries", which is not illegal. Since the Association can grieve the application of Article V and the exercise of the District's management rights under Article I of the contract, its grievance is substantively arbitrable.

As for its merits, it is clear that both parties struggled over how to make up for some of the lost snow days.

The Association's proposals for adding student contact time on March 23 and April 2 and for deleting a second parent-teacher conference were certainly reasonable and they represented a good faith effort on how to resolve this problem. District Administrator Swartz testified, however, that that could not be done because the Association waited until March 21 to make those proposals and because the District did not have sufficient time to properly inform parents about such changes. His testimony is supported by a March 21 memo from Houtchens to Swartz which spells out the Association's proposals (Joint Exhibit 11).

Association negotiator Bauer testified that those proposals were made on March 15. If that were so, the District then had enough time to notify parents about the change in the school calendar. Such a chronology would bolster the Association's claim that the District was unwilling to accept the compromise because it wanted to force the Association to accept its QEO, which it subsequently implemented. If that were the District's motive, I would find that the District engaged in bad faith bargaining and I would sustain the grievance.

Based on the existing record, though, it simply is impossible to determine whether Bauer or Swartz's testimony should be credited on this issue. Hence, there is no clear proof that the District rejected the Association's proposals because it wanted the Association to accept its QEO. In addition, the District's lack of animus is shown by not making up all of the inclement weather days; by compromising with the Association over how the June 4 workday

would be configured for all teachers; by not forcing the elementary teachers to work a full day on June 5; and by asking the DPI for a second waiver per the Association's request.

Absent any mutual agreement on how the elementary teachers could make up all of the snow days by June 4, it thus was reasonable for the District to schedule elementary teachers to teach a partial student contact day on June 5 because that was the only remaining option to meet the state-mandated 180 school day requirement.

It is true, as the Association correctly points out, that the elementary teachers were required to work on June 5, unlike the secondary teachers whose last teaching day was June 4. But the elementary teachers were treated differently for a good reason: The elementary teachers did not have a student contact day on March 23, whereas the other teachers did. Hence, the elementary teachers at some point had to make up for at least part of that lost teacher contact day. Since that could not be done before June 4, it could be done on June 5 because that was the only way for the District to qualify for full state aids.

The Association claims that the District thereby violated Article V which provides:

. . .

> 2. When working beyond the contract year of one hundred eight-nine (189) days, teachers on extended contracts will be paid 1/189th of their individual salary for each day of work beyond the contract year. A separate contract for extended work will be issued by May 1. All extended contract work shall be considered voluntary. This provision does not apply for extended contract work under the extra-curricular schedule. When teachers agree to write curriculum or complete other professional tasks outside their contract year, the District shall pay a rate of fifteen dollars ($15.00) per hour.
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> 3. The length of the school year contract one-hundred eighty-nine (189) days will include all in-service meetings.

. . .

There are two major problems with this claim.

The first presupposes that the June 4 termination date is chiseled in stone and that it - alone of all the other calendar features - could not be unilaterally changed by the District. In fact, once it became clear after March 12 that the agreed-upon school calendar had to be changed to meet the state-mandated 180 school-day requirement, all parts of the remaining

calendar became open for negotiations. Indeed, the Association itself recognized that the calendar had to be changed after that date since it made proposals to add a one-half student contact day on either March 23 or April 2. Since those calendar days could be changed, it follows that all calendar days could be changed, including the last day of school for elementary teachers.

The second problem with the Association's claim is that it rests on a false assumption – i.e., that elementary teachers fulfilled all of their contractual obligations and that the District owes them extra compensation because the District improperly required them to perform extra work after they fulfilled all of those obligations.

Their obligation was spelled out in Article VII, Section A, of the contract which stated: "The 189-day calendar shall consist of 180 student contact days, 2 in-service day equivalents, 1 parent-teacher conference day, 3 in-room work day equivalents, and 3 paid holidays. . ." Well here, the elementary teachers did not work 189 days and they did not have 180 student contact days. They, instead, only had 179 student contact days, which is why the District had to schedule another student contact day. In doing so, the District therefore did not assign them added work beyond what was provided for in Article VII, Section A. Rather, it assigned them that work because all teachers had agreed to teach 180 student contact days and because the elementary teachers, through no fault of their own, had not fulfilled that crucial requirement before June 5. Since the middle school and high school teachers met that requirement before June 5, the District could treat them differently by making June 4 the last day of their school year because they were differently situated from their elementary school counterparts who had not done so by that date.

In addition, employee compensation under Article V is premised on a 189-day work schedule. Hence, teachers are entitled to added compensation only after they perform added work in excess of what is provided for in the contract. Since elementary teachers only worked about 184 days because of the snow days, their work on June 5 was not in excess of the 189-day work requirement.

The District therefore did not violate Article VII, Section C, which stated that employees "have no obligation to provide services to the District on days other than those contracted for via the work schedule in the calendar", as this proviso presupposes that the "work schedule in the calendar" did not have to be altered to meet the state's mandated 180-school day requirement. Once that presumption no longer applied because of the excessive inclement weather days, the "work schedule" could be slightly altered to meet this changed circumstance, just as it had been changed in the past (District Exhibit 2).

In light of the above, it is my

AWARD

1. That the grievance is substantively arbitrable.

2. That the District did not violate Articles V and/or VII of the contract when it required elementary teachers to work half a day on June 5, 2001, without any added compensation. The grievances are therefore dismissed.

Dated at Madison, Wisconsin, this 14th day of January, 2003.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

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