BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LUXEMBURG-CASCO EDUCATION ASSOCIATION

and

LUXEMBURG-CASCO SCHOOL DISTRICT

Case 15
No. 61527
MA-11967

Appearances:

Mr. David B. Kundin, Executive Director, Bayland UniServ, appearing on behalf of the Association.

Mr. Robert W. Burns, Davis & Kuelthau, S.C., Attorneys at Law, appearing on behalf of the District.

ARBITRATION AWARD

The Association and District named above are parties to a 2001-2003 collective bargaining agreement that provides for binding arbitration of certain grievances. The parties jointly requested the Wisconsin Employment Relations Commission to appoint the undersigned to resolve a dispute involving mileage. A hearing was held on December 11, 2002, in Luxemburg, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs on March 21, 2003.

ISSUE

The parties ask:

> Did the District violate the collective bargaining agreement when it declined a mileage request related to extra curricular functions? If so, what is the appropriate remedy?

BACKGROUND

The collective bargaining agreement for 2001-2003 provides under the salary schedule for 26 cents per mile for travel to teachers who must travel between schools. That provision has shown up as the second item in several previous bargaining agreements.

David Feldhusen, a teacher in the District for the past 12 years, filed this grievance. He also has two extracurricular assignments – senior high newspaper and 7th grade boys basketball coach. Feldhusen had the coaching assignment for about for three or four years, then he was out of it for four or five years, and has held it again for the last two years. He teaches at the high school in Luxemburg and drives to Casco for the basketball assignment. The round trip is 10 miles. There were some tournaments in Denmark, Wisconsin, that involved more miles.

Feldhusen submitted mileage requests to the Business Manager, Sue Buchholz, who denied them on February 6, 2002. Buchholz's denial stated that the District has approved a list of stipends to staff members for assuming extra curricular and/or athletic activities or positions, and that his coaching contract and payment is intended to pay him for time and personal expenses, such as traveling time and mileage. Her letter also stated that the only parties that receive mileage for athletic events are referees that officiate at games.

Feldhusen had not submitted mileage requests in the past, but he had leased a vehicle and started watching his mileage more. He recalled the mileage reimbursement statement in the labor contract and decided to see whether it applied to him. When his request was denied, he filed a grievance. In response to his grievance, Buchholz replied on February 21, 2002, that no staff member with a coaching contract has been paid mileage for travel to practices. Charles Frisk, Lee Schmiling, Dwight Will, Randy Warnek and Dawn Hanson have had coaching assignments in a different school building or location. In a later step of the grievance process, the District Administrator, Patrick Saunders noted that Feldhusen did not request mileage during eight years that he coached at the middle school. Saunders also noted that since 1999, at least five other teachers have taught and coached in combinations involving travel to or from the middle school, and neither the individuals nor the Association interpreted the mileage reference to extend to extra curricular assignments. Saunders checked with 15 other school districts that indicated no mileage was paid to coaches in the northeastern part of the State.

The parties agree that no one ever asked for mileage before in a similar circumstance. They also agree that the mileage reimbursement statement has been in successive labor contracts since at least 1993.

The collective bargaining agreement has the major extra duties on the last page of the contract, separate from the salary schedule where the mileage reimbursement appears. One of those extra duties listed under senior high is DECA/FFA/FBLA. Pat Staege is a teacher at the

high school and has an extracurricular assignment as advisor to the DECA Club. DECA is Distribute Education Clubs of America. Staege is paid mileage for going to Sam's Club to pick up concession items or going to a meeting in the summer. He has held this extracurricular assignment for 29 years and has been paid mileage all those years. Other club advisors for the FFA and FBLA also get paid mileage.

Saunders has been the District Administrator for four years. He checked with Board members who had been on the Board for several years, and none of them recalled negotiating mileage to athletic assignments at different locations. Saunders testified that Staege's role as DECA advisor is not extra curricular but it is instructional and part of his teaching assignment. A grade is given, tests and evaluations are given, and the activity is reflected on students' report cards. Saunders made a distinction between academics and athletics and stated that the extra curricular assignments that dealt with academics got mileage paid.

Article IV of the collective bargaining agreement states that teaching assignments by subject area or grade level will be specified on individual contracts, and deviation from the contract will be upon mutual consent of the teacher and administrator. Feldhusen's individual contract states that his teaching assignment is history, and his extra curricular is senior high newspaper and 7th boys basketball. Article VI states under non-teaching duties that major extra duties and extra pay for such duties as established by the Board will be indicated on the teacher's contract but not as part of the base salary.

Saunders testified that on the list of major extra duties on the back of the contract, certain duties that are tied directly to instruction are paid mileage, such as the fall musical, the spring musical, and senior band/vocal. The fall musical is part of a teaching load but takes time outside of the day to prepare and practice. Saunders stated that music is a curricular subject. Similarly, the spring musical and senior band/vocal assignments qualify for mileage. However, other curricular assignments such as the math competition and academic competition do not qualify for mileage.

THE PARTIES' POSITIONS

The Association

The Association asserts that the language in the collective bargaining agreement states that 26 cents per mile will be paid for travel to teachers who must travel between schools, and that language should apply to any staff member who has an extra duty assignment such as Feldhusen. The fact that no teacher ever asked for it before does not preclude Feldhusen from being eligible for it. The District argues that the mileage provision only applies to the salary schedule and not the extra duty schedule, but at the end of the day, it is all payment for performing services rendered to the District. Regardless of whether it is the regular assignment or part of an extra duty assignment, it is still part of the same basic teacher's contract.

During the course of the hearing, the District's position seemed to change after Staege's unrefuted testimony that he always got mileage reimbursed for travel related to his extra duty assignment as the DECA advisor. Saunders then explained that the DECA advisor extra duty assignment was academic in nature. Thus, when the extra duty assignment was academic in nature, mileage was paid but if the assignment was athletic or non-academic, then mileage was not paid. There is no language in the collective bargaining agreement that reflects that distinction.

Arbitrators are to give words their ordinary and popularly accepted meaning. Many arbitrators apply a "reasonable man standard," where the party whose understanding is most closely aligned with the ordinary meaning of that language is entitled to prevail. The plain language states that "teachers" receive the mileage benefit, and the District's interpretation cannot withstand scrutiny under a reasonable man standard. No reasonable person could read that language to prohibit one teacher from receiving a benefit afforded to a colleague merely because one teacher's extra duty assignment is academic and the other's is athletic. The language does not say that.

The Association argues that past practice does not apply or support the District's interpretation of the mileage reimbursement clause. There is nothing ambiguous about the term in dispute. The District seeks to prove that its custom and practice is not to pay teachers mileage for travel related to non-academic extra duty assignments. However, the mileage provision clearly states that teachers shall be paid mileage for travel between schools, making no distinctions between whether the travel is related to regular duties or extra duty assignments, and making no distinction between the type of extra duty assignment. If the contract language were designed to pay mileage for some extra duty assignments and not for others, those distinctions should appear in the language. Absent such distinctions, the plain meaning of the language must prevail.

The Association states that even during the hearing, the District admitted that the intent of the language did not preclude its application to some extra duty assignments. The District now would prohibit only certain types of extra duty assignments from this benefit. Such distinctions cannot exist only in the minds of the employer but must be contained in the contract. As a remedy, the Association seeks to have the District pay Feldhusen the full amount of mileage reimbursement he submitted for the 2001-2002 school year for his extra duty assignment as 7th grade basketball coach. Also, any other teacher who seeks mileage for extra duty assignments shall also receive this mileage payment regardless of the type of extra duty assignment.

The District

The District contends that the collective bargaining agreement is silent with regard to any limit on its discretion not to reimburse individuals for mileage relating to coaching activities. Under the management rights provision, the District reserves the rights, authority,

duties and responsibilities that are not specifically denied it by virtue of the provisions of the agreement or by law. The agreement thus reserves to the District the right to determine who will be reimbursed for mileage relating to the performance of extra duties, and the agreement is silent as to any limitation on that right. The Employer retains all managerial rights except as expressly restricted by agreement.

The mileage provision is at the bottom of the salary schedule and is not included in the major extra duties schedule. The extra duties schedule is silent regarding mileage. The location of the mileage reimbursement footnote on the salary schedule is critical and was put there to indicate its applicability to teaching duties alone. Had the parties intended mileage to be reimbursed for performing extra duties, they would have included such a provision at the bottom of the major extra duties schedule, but they did not. Moreover, the salary schedule and major extra duties schedule are separate documents with separate purposes. Base salaries and compensation for extra duties are distinguished under Article VI, A. The District asserts that the labor agreement must be construed as a whole.

Also, the District states, the mileage footnote refers to "teachers" and a coach is not the same as a teacher. The footnote provides those teachers who "must travel" between schools shall be reimbursed for mileage. No individual must travel between schools to perform extra duties such as coaching since participation in extra duties is voluntary. Teachers and non-teachers alike are eligible to perform coaching duties under the major extra duties schedule. Applying the footnote at the bottom of the teacher's salary schedule to the extra duties schedule would therefore lead to the nonsensical result of teachers being eligible for reimbursement and non-teachers not being eligible. Adopting the Grievant's position would give the agreement an unreasonable, illogical meaning never contemplated by the parties. To expressly include some guarantees in an agreement is to exclude others. The omission of a mileage reimbursement provision in the major extra duties schedule reveals the intent that there is no obligation to pay mileage for extra duties.

The District further argues that past practice is not admissible as the contract is clear and unambiguous. Even if the agreement were deemed to be ambiguous, it is the Association's burden to show that a past practice exists, and it has not done so. The evidence shows that mileage was paid for curricular extra duties, not extra curricular duties such as coaching. Also, the custom and practice of other school districts and the bargaining history of the parties are substantial evidence that the parties did not intend to reimburse coaches for mileage. No living Board member recalled the parties intending to pay coaches for mileage. The Grievant and the Association have acquiesced in the District's consistent exercise of discretion not to pay coaches for mileage, and thus have waived any objection to the District's denial of this grievance.

In Reply, the Association

The District first said it would not pay mileage for travel related to extra duty assignments. The after Staege testified that he was paid mileage for travel for an extra duty assignment, the District said that it paid mileage for only some extra duty assignments but not

others. Those assignments that involved academic extra duty assignments would receive mileage, but not athletic extra duty assignments, according to the District. However, that distinction does not appear in the contract itself. So now the District says it has a management right to make that distinction. The Association replies that this expansive interpretation of the management rights clause conveniently allows the District to deny this grievance and keep from having to pay all those teachers who perform extra duty assignments equally without arbitrary distinctions.

The Association notes that the District has tried to change the nature of the extra duty assignment and says that these duties are voluntary and not required as that term appears in the contract. According to the District, Feldhusen does not have to travel between schools but chooses to do so. That argument is without merit and flies in the face of logic and contract law. While a teacher may volunteer to take on an extra duty assignment, the District would not argue that the teacher has a choice of whether to travel to the site where the coaching duty is to take place. The District would not allow the teacher to decide whether or not to travel to the school where the basketball team practices, or permit the teacher to decide whether or not to attend practices or games. No interpretation of the master agreement can be made the allows such an absurd result to occur. The teaching contract establishes the contractual obligations and those are not voluntary.

The mileage provision is part of the contract and appears right after the salary schedule. The District refers to it as a footnote. But would the District argue that the Board obligation to pay up to 6.5% of the salary for State teacher retirement is a footnote that only applies to the salary schedule and not to extra duty pay? Surely not, because the District pays retirement on extra duty pay just as it does for regular salaries. The District is stuck with language that it cannot ignore and is reaching for straws to prevent its application.

While the District argues that past practice supports its refusal to pay coaches mileage for travel between schools, the fact that a provision in a contract has not been tested is not evidence of any acquiescence on the part of the Association. There is no waiver, it just means that no one before Feldhusen sought mileage.

In Reply, the District

The District objects to the Association's misstatement of the District's position when it claims that the position seemed to change. The Association's argument is fatally flawed because it fails to distinguish between the clearly distinct terms "extra duty" and "extra curricular." The District never took the position that the mileage provision applied to any extra duty assignments. Saunders did not testify that the District elected to pay mileage to curricular activities pursuant to the mileage provision on the salary schedule. The District paid mileage for curricular duties pursuant to its inherent management discretion.

The Association is correct in stating that there is no language in the collective bargaining agreement that reflects a distinction between curricular and extra curricular activities. The distinction between curricular and extra curricular activities is not based on the language in the mileage reimbursement footnote on the salary schedule or any other language in the agreement, because the distinction is purely a product of the District's management discretion.

Contrary to the Association's position, the inclusion of a footnote on the salary schedule and the exclusion of such a footnote on the major extra duty schedule is a distinction with a difference. Had the parties intended to pay mileage for major extra duties, they would have included such a provision at the bottom of the major extra duties schedule. Moreover, it is irrelevant that the footnote does not distinguish between curricular and extra curricular activities because the footnote does not apply to extra duties at all.

DISCUSSION

The language at issue here is quite clear and clearly applies to the Grievant's situation. The language at the bottom of the salary schedule simply states: ".26 per mile travel for teachers who must travel between schools." While the District has argued that this provision does not carry over to the next page which contains the major extra duties and stipends, it clearly applies to the major extra duties just as the first footnote under the salary schedule regarding retirement applies to those major extra duties. To find that the first footnote would apply to the major extra duty schedule but the second footnote would not apply would be a ridiculous interpretation of the contract. Therefore, the footnote applies to both the salary schedule and the major extra duty schedule.

Moreover, the mileage footnote applies to some of the major extra duties by the District's own admission. The District asserts that it has the managerial discretion of whether or not to pay mileage and when to pay it and to whom. That is contrary to the contract, which simply states that it pays mileage for travel between schools. The contract does not limit the mileage payment to academic subjects or curricular duties. Nor does it exclude the athletic extra duties from the mileage reimbursement. And while the District states that non-teachers may perform extra duties such as coaching, the contract applies to teachers and Feldhusen is a bargaining unit member covered by this contract. Presumably, the District can pay people outside the bargaining unit anything it wants to pay them.

The District also has landed on the words "must travel" and claims that the coaching assignment is voluntary. Arguably, all work is voluntary until one accepts the work. Once the parties agree on the assignment and make a contract for such, the work loses its voluntary nature and becomes subject to the terms and conditions of the collective bargaining agreement, including the pay and the mileage and any other terms that apply. Feldhusen was required to travel between schools as a part of his assignment, and he falls with the mileage's language of "must travel" between schools.

The custom or past practice of not paying coaches for mileage for travel between schools cannot prevail over the clear language of the contract. Although no one grieved it in the past, the language remained in the contract and is enforceable. The fact that other schools in the area also do not pay mileage to coaches is irrelevant to consideration of the terms of this collective bargaining agreement.

According, the grievance is sustained and a remedy will be so ordered. The remedy is limited to the Feldhusen grievance filed and not to all situations that have occurred in the past. The parties may work out mileage for the future, apply the terms of this Award, or resolve grievances as they occur. However, a remedy broader than this grievance is not appropriate.

AWARD

The grievance is granted. The District violated the collective bargaining agreement when it failed to pay David Feldhusen mileage that he requested for travel between schools. The District is ordered to reimburse David Feldhusen for his mileage request. The Arbitrator will retain jurisdiction until May 30, 2003, for the sole purpose of resolving any disputes over the scope and application of the remedy ordered.

Dated at Elkhorn, Wisconsin, this 8th day of April, 2003.

Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

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