BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BOWLER EDUCATION ASSOCIATION

and

BOWLER SCHOOL DISTRICT

Case 20
No. 62038
MA-12133

(Christmas Music Program Grievance)

Appearances:

Mr. Larry Holtz, UniServ Director, Central Wisconsin UniServ Council Unit #4, 370 Orbiting Drive, Mosinee, Wisconsin 54455, for the labor organization

Mr. Dean R. Dietrich and **Mr. Bryan Kleinmaier**, Ruder Ware, Attorneys at Law, 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, for the municipal employer.

ARBITRATION AWARD

Bowler Education Association and the Bowler School District are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Association made a request, in which the concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to the assignment of elementary school teachers to supervise the evening Christmas Music Program. The Commission appointed Stuart D. Levitan to serve as the impartial arbitrator. Hearing in the matter was held in Bowler, Wisconsin, on November 11, 2003. In the interest of an expedited award, the parties submitted written arguments by November 19, and waived their right to file replies.

ISSUE

The Association states the issue as:

> "Did the employer violate Article XIV of the collective bargaining agreement when it directed the elementary teachers to attend a Christmas music concert, which was held outside of the regularly scheduled school day, when the music concert was not one of the three enumerated evening events bargained into the collective bargaining agreement under Article XIV? If so, what is the appropriate remedy?"

The District states the issue as:

> "Whether the School District violated the collective bargaining agreement when it assigned teachers to supervise their classroom/students at the elementary school Christmas program. If so, what is the appropriate remedy?"

I frame the issue as:

> "Did the School District violate the collective bargaining agreement when it directed teachers to supervise their classroom/students at the 2002 elementary school Christmas program without pay? If so, what is the appropriate remedy?"

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE III – SCHOOL BOARD FUNCTIONS

A. BOARD FUNCTIONS: The Board possesses the sole right and responsibility to operate the school system and all management rights repose in it, subject to the express provisions of this Agreement. These rights include, but are not limited to the following:

. . .

7. The direction and arrangement of all the working forces in the system, including the right to hire and transfer employees.

. . .

9. The determination of the size of the working force, the allocation and assignment of work to employees, the determination of policies affecting the selection of employees.

10. The determination of the layout and the equipment to be used and the right to plan, direct and control school activities. The determination of the processes, techniques, methods and means of school organization.

. . .

ARTICLE XIV – WORK SCHEDULES

It is recognized that hours of work, including the school days and school calendar, are based on educational requirements and subject to change as educational methods, needs and techniques change.

Teachers are expected to report to their workstations by 7:30 a.m. and to remain until 3:30 p.m. except on Friday and early dismissal for inclement weather when they may leave after the buses depart. Teachers will be expected to attend any meetings called by the administrator that are held during the regularly scheduled workday, with twenty-four (24) hours notice.

There will be 180 face to face contact days and an additional ten (10) days making a total of 190 contract days of which Labor Day, Memorial Day and Thanksgiving Day will be counted as three paid holidays.

The adopted calendar shall contain the following:

X 190 paid contracted days which include:
X Two Parent Teacher Conference Days
X Three paid Holidays: Labor Day, Memorial Day and Thanksgiving Day.
X 180 pupil contact days, of which six may be late start of early release days.
X Two (2) paid convention days (CWE Convention and Common Inservice day).
X Three (3) Inservice, Staff Development Days, which should immediately precede or follow the first or last student day.
X Two (2) unpaid October Convention Days will not be counted as part of the contracted calendar.

X Three (3) early release days for the purpose of teacher report card preparation. These days shall be scheduled on the first school day after the end of each of the first three quarters.

The first student contact day will comply with Wisconsin Statutes. The ERVING calendar will be used as a guide in developing the school calendar. However, school will begin no sooner than eight (8) school days before Labor Day.

Thanksgiving break will be three days commencing on the Wednesday before Thanksgiving; however, if school starts after September 1 then Thanksgiving break will be a minimum of two days (to include Thanksgiving and the Friday after).

Winter recess shall commence no later than December 23 and not end before January 2. Spring break will be the week preceding Easter.

School Cancellation: In the event the District cancels school, the following make-up policy will apply:

X The first show day will not be made up.
X If snow days are included in the calendar, then these days will be used next.
X The District in its sole discretion shall decide if additional snow days shall be made up.
X The dates the other make up days will be held will be negotiated. If a negotiated agreement cannot be reached, the days to be made up will be added to the end of the published calendar.

The schedule for Parent-Teacher Conference Days will be two evenings from **3:30 p.m. to 7:30 p.m. A reasonable attempt will be made not to schedule Parent-Teacher Conferences twice in one week. (emphasis** in original)

The annual Elementary Open House will be scheduled on one regular school day evening, and it will end not later than 7:00 p.m. Elementary teacher attendance is required. Junior High and Senior High teachers will be required to attend one regular school day evening meeting, which will last no longer than two hours.

CURRICULUM WORK COMPENSATION

Curriculum work done outside of regular school hours will be compensated at a rate of $12.50 per hour. Hours must be mutually agreed upon in advance by the teacher and principal involved.

BACKGROUND

For at least 15 years, the largest annual program in the Bowler School District has been the Christmas Music Program, with almost universal participation by the 200 or so students in Kindergarten through the fifth grade. The program, which lasts about 90 minutes, is held in the school gymnasium, under theatrical lighting; it is the culmination of the semester's music program. Each classroom awaits its turn, then ascends a stage and performs a selection it has rehearsed with the vocal director and/or band director. The elementary school teachers with classrooms are expected to attend and supervise their students (including gathering them in a classroom, helping them into costumes and makeup, supervising their processional into the gym and seating, ensuring quiet while others perform). Over the years, an informal understanding developed whereby teachers with the need or desire to be excused conveyed that to administrators and were allowed to be absent. Teachers who worked were not paid, and teachers who did not work were not docked leave. The District considers the program integral to the music curriculum.

On October 12, 2002, the 15 elementary classroom teachers wrote elementary school principal Kathleen DeLorme as follows:

> As you know, we have always dedicated our time and efforts to support the Christmas Program and the elementary students of Bowler School. However, this year, due to the lack of respect and appreciation from our school board, none of the elementary classroom teachers, K-6, will be attending this year's program.
>
> We are giving you this notice early, so that you will have the opportunity to find adequate substitutes to dress, line up, walk and sit with the students during the program. We understand that it will be difficult to find replacements who know the routine and the students as well as your elementary staff. You might want to suggest to the school board and to Dr. Smith that they should step up and take over these voluntary responsibilities.
>
> Kathy, please do not put pressures on our support staff to take over these responsibilities, as that is also their evening and time to enjoy watching their own children perform, without the worry of supervising students.

On October 23, 2002, district administrator Steve Smith wrote to the then-BEA president, Glenda Butterfield as follows:

> As per your request dated October 23, 2002.
>
> Mrs. DeLorme represented the District Administrator's position when she articulated to the elementary staff that teacher supervision at the Christmas Concert is viewed as required. A failure by the district to respond in such manner at this time would default to the teachers on this issue. I presently view the Christmas Concert as an integral part of our school curriculum. I view the grade level participation in the concert as a classroom experience requiring the direct supervision of the classroom teacher. The teacher provides for the safety and well being of the students. Teacher presence also provides increased assurance that the lesson plan itself will succeed.
>
> I understand there are issues that need to be address and there is a history related to this event that need to be understood. Ms. (sic) DeLorme and I are each looking for solutions.

On November 6, 2002, the BEA grievance committee wrote DeLorme as follows, all emphases in original:

> On an October 23 staff meeting, you informed us that the administration directs elementary classroom teachers to attend the evening Christmas program. On October 28, we received a letter from Dr. Smith requiring elementary classroom teachers to attend the evening Christmas program. We file this grievance as to this directive for the following reasons:
>
> 1. Referring to out 2001-2003 Master Agreement, Article XIV – Work Schedules, "Teachers are expected to report to their workstations by 7:30 a.m. and to remain until 3:30 p.m. except on Fridays and early dismissal for inclement weather whey they may leave after the buses depart. Teachers will be expected to attend any meeting called by the administrator that are held during the <u>regularly scheduled workday</u>, with twenty-four (24) hours' notice.

2. Our calendar and salary is based on 190 contact days, of which Labor Day, Memorial Day and Thanksgiving Day will be counted as three paid holidays. The days we are required to be here are listed. The only evenings that we must be here beyond 3:30 p.m. are listed. They are: Parent Teacher Conference Days, and elementary open house. The Christmas Program has never been included in our Master Agreement as an evening program we must attend.

3. Our salary is based on explicit guidelines. The Christmas program is outside of our contracted school hours of 7:30 a.m. to 3:30 p.m.

4. The Christmas program has ALWAYS BEEN VOLUNTARY. NEVER HAVE TEACHERS BEEN REQUIRED TO ATTEND. Some teachers chose to be with their class that evening, and some did not. Many times, out of courtesy, the teachers simply advised the administration that they would not be attending. This has never been an issue before, and it was always a voluntary function that some teachers attended, and some did not.

The administration/school board is aware of the list of required evenings in our contract. Never has the Christmas program been listed. We feel that this directive by the administration is arbitrary and capricious. We are not required to attend, and the administration is aware of this!

To remedy this grievance, we seek a letter from the administration stating that teacher attendance at the Christmas Program is voluntary.

On November 11, 2002, elementary school principal DeLorme replied to the grievance committee as follows:

You are correct in your understanding of my statement on October 23 when I required your attendance as a classroom teacher at the children's music program. You are correct in your understanding of Dr. Smith's statement requiring attendance.

It is unfortunate to be put in this position. I was deeply concerned when I was informed that the classroom teachers would not be present to supervise what amounts to the biggest production of the year for our school. The safety of the

children is at risk here. We will have 220+ children sitting in the bleachers in a dimly lit gymnasium. What you are saying is the children can be trusted to sit there without teacher supervision. You have suggested that people other than teachers can cover the supervision of the students. You have asked that I rule out paraprofessionals as an option. Why should I take that risk with our children and hang onto the hope that every thing goes well?

These children look up to their classroom teachers in a big way and they put their hearts into this performance. They see this concert as a chance to shine and put forth their best effort for you and their families. The concert will be a memory they carry into the future and I think they are thrilled that you are part of it.

The classroom teacher has always played a role in encouraging each child to do his or her best. It has been the classroom teacher's responsibility in past performances to supervise behavior in the bleachers and to help with last minute details of appearance and costuming. I have always valued that about this staff and I have appreciated the role you play in this event and all activities in this school. Your volunteerism and dedication has been remarkable and I do appreciate it.

Requiring your attendance may sound like a snub to those of you who have seen this as your gift of time to the school. I have never seen it as anything but necessary for a classroom teacher to be with his or her students in an event like this or on a field trip. Threatened with the removal of your "gift" I feel the safety of the children is threatened. I regret that I need to take a firm stand and require it of you, when in actuality most of you would do this and have done this out of the kindness of your heart.

Sincerely,

Mrs. DeLorme

On November 13, 2002, the grievance committee took DeLorme's response to Step 2 of the grievance procedure, via a letter to Superintendent Stephen Smith which was substantially identical to its letter of November 6. On November 15, BEA President Glenda Butterfield wrote Smith as follows:

This is to notify you that the BEA is ceasing the practice of teacher supervision of the elementary Christmas program

If the District wishes further participation from the elementary staff at this event, it will have an opportunity to bargain this in the next round of contract negotiations.

On November 21, Smith replied as follows:

BEA Representatives,

In a grievance dated November 13, the BEA alleges that the administration violated the Labor Agreement based on the required service of teachers at the Winter Concert. It is the position of the Bowler School District that supervision of the concert by the classroom teacher is an inherent duty of each teacher and said supervision is a requirement under the labor agreement with the Bowler School District.

In Item 1 the BEA cites Article XIV – Work Schedules: "Teachers are expected to report to their workstations by 7:30 a.m. and to remain until 3:30 p.m. except on Fridays. . ." In item 3 the BEA refers to the hours "as contracted hours." The association position provides a strict interpretation of the sentence and views the hours as the maximum amount of time that a teacher must commit each day in order to fulfill their instructional duties and obligations to the school district. The Bowler School Board views the stated times as the minimum of time that would be expected in a workday. A teacher arriving after 7:30 would be viewed as "late for work." A teacher leaving before 3:30 would be viewed as leaving "too soon." The language provides definition for employees whose daily work habits may need supervision.

Teachers are salaried employees and there are many obligations and duties inherent in the work of a teacher that requires working beyond 3:30 and arriving before 7:30, IEP meetings, curriculum work, contacts with parents, supervision of field trips, grading student work, counseling children are some, but not all of the activities that are expected of teachers.

In Item 2 the BEA states that the "only evenings that we must be here beyond 3:30 are listed. They are Two Parent Teacher Conference Days, and elementary open house." The language of the paragraph in the Master Agreement does not use the language "the only evenings." The school board

position is that teachers are salaried employees expected to be at work on those stated days or have communicated with the district a need to be absent. Article XIV of the Master Agreement provides the language upon which the board makes the point that work schedules, "hours of work," change and are not firmly entrenched as "7:30 to 3:30."

Article XIV – Work Schedules (paragraph 1):
"It is recognized that hours of work, including the school days and school calendar, are based on educational requirements and subject to change as educational methods, needs and techniques change."

Under this language, the School Board has the right to assign duties to teachers to meet the educational needs of the district.

The School District of Bowler holds to the belief that supervision of an elementary school classroom at an evening concert is an inherent to duty of a teacher and is required under the terms of the labor agreement with the school district. A binding practice exists between the parties which clearly makes the supervision of an elementary school classroom during the concern an expected part of a teacher's duties in this district.

On December 8, the BEA grievance committee appealed Smith's response to the school board, as follows (all emphases in original):

Re: Christmas Program Grievance

We received a response from Mr. Smith on November 22, and now this is the next step in the Grievance process.

In the last sentence of the second paragraph, he refers to **Article XIV – Work Schedules,** <u>"Teachers are expected to report to their workstations by 7:30 a.m. and to remain until 3:30 p.m. except on Fridays. . ."</u> as meaning "<u>LANGUAGE PROVIDES DEFINITION FOR EMPLOYEES WHOSE DAILY WORK HABITS MAY NEED SUPERVISION."</u> Mr. Smith's response is an insult to our teachers! The Master Agreement states the hours of work required, and these hours were negotiated hours, agreed upon between the School Board and the BEA.

Mr. Smith states that these hours are the minimum hours a teacher must fulfill daily. He states that the School Board has the right to assign duties to teachers outside of the 7:30 to 3:30 school day. He refers to **Article XIV – Work Schedules (paragraph 1):**

> **"It is recognized that hours of work, including the school days and school calendar, are based on educational requirements and subject to change as educational methods, needs and techniques change."**

The Bowler Education Association takes the position that the intent of **Article XIV**, is not, and never was intended to allow administration to demand teachers to attend functions outside of the negotiated school hours. The intent of **Article XIV** is and always was, to allow the BEA and the School Board the ability to sit and **re-negotiate** school day hours and or calendar if they so desire, to met changes in educational methods, needs and techniques.

Article XIV was always interpreted the way it was intended. This article does not mean that the administration can call meetings or require teacher attendance, before school hours, after school hours, in the evenings, or during the summer. In paragraph 2, **Article XIV**, it is made clear that the administration would give teachers at least 24 hours notice, before calling any meetings **during the 7:30am to 3:30pm work day**. This clearly means that they do not have the authority to call meting outside of the7:30am to 3:30pm work day.

Our calendar and salary is based on 190 contract days, of which Labor Day, Memorial Day and Thanksgiving Day will be counted as three paid holidays. The days we are required to be here are listed. The only evenings that we must be here beyond 3:30pm are listed. They are: Two Parent Teacher Conference Days, elementary open house and one evening meeting for the high school teachers. The Christmas Program has never been included in our Master Agreement as an evening program we must attend. Teacher attendance has ALWAYS BEEN VOLUNTARY. NEVER HAVE TEACHERS BEEN REQUIRED TO ATTEND. Some teachers chose to attend that evening and some did not. Many times, out of courtesy, the teachers simply advised the administration that they would not be attending. This has never been an issue before.

The administration and the school board is aware of the list of required evenings in our contract. We feel that this directive by administration to attend the Christmas concert is arbitrary and capricious. We are not required to attend, and the administration is aware of this! We consider this directive on behalf of the administration harassment! The BEA stands firm that the School District of Bowler is in direct violation of our Master Agreement by requiring teachers to attend the Christmas Concert.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the association asserts and avers as follows:

The language of the collective bargaining agreement is clear and unambiguous, and provides for a clearly defined workday with three evening meetings. The association construes the term "meeting" to include any assembly such as but not limited to IEP, SIC, Open House, Parent Teacher conferences, mentor/mentee, holiday concern and Spring Carnival.

Arbitral principles hold that inclusion of one is the exclusion of all others. Because the contract specifically mentions 3 evening duties, its exclusion of the Christmas pageant must be intentional. The contract is also clear and unambiguous in stating the number of days worked, and their hours.

At hearing, the administrator testified the article XIV language wouldn't allow the district to unilaterally extend the calendar without bargaining; but then how can the district unilaterally extend the hours of a day? The district is changing the closely protected wages, hours and conditions of employment.

In interpreting article XIV to allow the district to compel attendance at the Christmas concert just because the teachers decided not to attend as a group rather than as individuals violates arbitral principles. The group activity does not constitute a change in educational methods, needs or techniques.

The introductory paragraph in article XIV is meant to get the parties to the table to talk about the changing needs and techniques of the district. It is not to allow the district to unilaterally change the work hours or calendar, as it seeks to do here.

The district errs in calling the program part of the curriculum; it certainly isn't for the classroom teachers, who are being forced to work for free in support of the program whose music director does get extra pay for the event.

Further, while there is a past practice, there is no binding past practice requiring attendance. The teachers here may have had an expectation of attendance, but not a requirement. Indeed, correspondence and testimony from DeLorme and Smith refer repeatedly to expectations of attendance and even volunteerism.

The district has abused its management right in clearly attempting to gain through arbitration what it didn't even attempt through collective bargaining. Attendance at the holiday music concert has always been voluntary and sporadic. The program is not mentioned in the calendar or individual contracts, and is not the subject of a binding past practice.

The district could have paid the teachers, bargained for this assignment, asked for community volunteers, assigned and paid support workers, changed the time to the regular school day, or canceled the concert. Instead the district unilaterally attempted to read a new requirement into the contract.

The grievants should be awarded back pay at their hourly rate, plus retirement contribution, and district told it cannot mandate meetings outside the school day unless currently enumerated or subsequently bargained.

In support of its position that the grievance should be denied, the district asserts and avers as follows:

The association incorrectly alleges that, for the district to have the authority to require classroom teachers to attend the program to supervise their students, the authority must be specifically stated in the agreement. Actually, the exact opposite is true, with the district having such authority unless the agreement specifically limits its authority to do so. Educational requirements dictated that the elementary classroom teachers attend the program to supervise students while they engaged in a program that was unquestionably part of their music curriculum.

Based on its inherent management rights, its rights under Article III, and its rights pursuant to the introductory sentence of Article XIV, the district possessed the authority to require elementary classroom teachers to supervise their students at the program. That the district had not used its right to so assign

teachers previously does not negate the district's use of that right at this time. It is essential that elementary classroom teachers supervise their students before, during and after the program to ensure that students remain safe and that the program, in a crowded and dimly lit gymnasium, runs smoothly.

The fact that the district had not exercised its authority previously to require teachers to attend is immaterial; this is the first year that the teachers, as a group, refused to attend the program, and consequently, this is the first time the district had to exercise this right.

The agreement does not limit the district's authority to require the elementary classroom teachers to attend the program to supervise their students. The association is purposely taking a too-broad viewpoint when it argues that adoption of the district's interpretation and application of the first paragraph of Article XIV will give the district the total authority to change school hours and the school calendar whenever it please, for any reasons. Such speculative scenarios are neither in the record nor material to this dispute; should such situations ever arise, they will be determined on their own facts. Further, the association's overbroad interpretation renders the paragraph meaningless, which is contrary to accepted principles of contract interpretation. Nor do the contractual provision regarding meetings, the Open House or the mentor program apply; the music program is not a meeting, there was no discussion regarding the music program during negotiations over the Open House, and the parties' discussion over the mentor program has absolutely no significance in this dispute. The association is desperate to find language limiting the district's authority and it is grasping at these clauses. The inclusion of these provisions certainly cannot be interpreted at limiting the district's inherent managerial right, or its rights under Articles III and XIV.

There is no past practice that prevents the district from requiring the elementary classroom teachers to attend the program in order to supervise their students. Where a contract reserve discretion to management, the manner in which management exercises its discretion does not establish a binding past practice. The district never exercised its managerial authority to require attendance in the past because it was never in a position where it had to. When all the classroom teachers informed the district they refused to attend the program, the circumstances drastically changed and the district rightfully exercised its authority. Moreover, the evidence of teachers who did not attend the program does not establish a binding past practice, in that a number of the teachers identified by the association were not elementary classroom teachers and thus

not required to attend in the first place. Further, they informed the district of their absences on an individual basis. The fact that they informed the district they couldn't attend the program doesn't prove the program was voluntary. Finally, the association's reliance on former superintendent Gardner and former principal Marentsen are misplaced; Gardner had no involvement in the program, and neither Gardner nor Marentsen were ever faced with the situation of all the teachers refusing to attend.

Pursuant to its inherent managerial rights, and its rights under articles III and XIV, the district possessed the authority to require the elementary classroom teachers to attend the Christmas music program to supervise their students. The grievance should be denied.

DISCUSSION

For many years prior to 2002, the elementary teachers and administrators in the Bowler School District had an informal understanding that, barring some conflict, teachers would supervise their classrooms at the annual Christmas music program, a two-hour evening assignment. Teachers who did not participate were not docked any leave, and teachers who did participate were not given any pay. The administration, the association, the children and their families, shared this expectation.

Former administrator Rodney Gardner testified that teacher attendance "was not mandatory, although I would have liked it to have been." He said his interpretation "of the contract and past practice was that we could not make it mandatory. But even though I couldn't require, I really encouraged them to. I would have liked to get it in the collective bargaining agreement, but the parent-teacher conference and the open house were all that were mandatory. I knew the association position was that Christmas was voluntary, so I didn't force them. I did everything to encourage them."

The district argues that I should discount Gardner's testimony. Although the district is correct that he did not have primary operational direction of the music program, as the district's former chief executive officer he must be considered a reliable witness for school activities that took place during his tenure.

Nor was Gardner the only former administrator who offered testimony or evidence in support of the association's argument. Here is how the former elementary school principal, M. Arentsen, described the situation in a June 26, 2003 email to BEA officials, in response to the association's request for a statement as to whether teacher attendance was mandatory or voluntary:

> I am amazed that attending the Christmas Concert has become such a divisive issue. They were such wonderful concerts and truly a treat for parents and staff. Some of my best memories are of the Christmas concerts and seeing the children looking so beautiful in their best clothes. I cried at every one. Yes, I believe they were voluntary. On occasion, teachers notified me they were unable to attend.

Then something happened to the parties' relationship, and a job action ensued. The association said teachers would henceforth withhold their services in this regard. The district in response issued a mandatory directive for the teachers to report and serve. The association in turn responded by filing the grievance now before me.

This grievance is one in which each party can cite record evidence and arbitral theory in support of its position. And both parties have done so, in briefs that are well-researched and well-written.

The district is correct that it retains the inherent management right to assign and direct the workforce, subject only to express limitations. The district is incorrect in denying that the parties have agreed to just such express limitations on the hours of work.

As its title indicates, Article XIV of the collective bargaining agreement sets the work schedule for teachers. I agree with the association that paragraphs 2 - 10 of art. XIV serve as an express limitation on the work schedule the district can impose on the teachers. The language is clear and comprehensive – these are the days and hours the teachers work.

What is striking is the precision with which the contract lays out the details of the work schedule, identifying two parent teacher conference days, three paid holidays, two paid convention days, three inservice (which should immediately precede or follow the first or last student day), two unpaid October convention days (not counted in the contracted calendar) and three early release days for report card preparation (the first school day after the end of the first three quarters). The contract specifies the days and dates for Thanksgiving break, Winter recess and Spring break ("the week preceding Easter.") The contract establishes a make-up policy for snow cancellations and sets a strict timetable for the parent-teacher conferences. None of this is particularly unusual; indeed, it is that such details are standard that is the greatest argument why the express limitations of this article trump the general management rights of article III.

The article's final paragraph -- requiring elementary teacher attendance at the annual Open House (to be held on one regular school day evening, ending by 7:30), and requiring junior and senior high teachers to attend one regular school day evening meeting (limited to

two hours) -- is the ultimate example of why paragraphs 2-10 so support the association's position. This paragraph instructs both as to intent and equity.

First, this paragraph shows that the parties knew how to bargain over specific and mandatory evening obligations outside the contracted work-day; if they had wanted to formalize an understanding about a mandatory obligation at the music program, they were able to do so. And I agree with the association on the principle that the inclusion of one is the exclusion of another; it is meaningful that the parties specifically included specific evening obligations and excluded the elementary school Christmas Music Program.

And as to equity, it is evident the agreement adds an equal workload to all three teaching groups. Elementary teachers have their open house, junior and senior high teachers an unspecified evening meeting of about the same length. Adding the music program would double the elementary teacher's post-workday hours, and give those employees twice supplemental duties of senior and junior high teachers.

Comparing the 1997-99, 99-01 and 01-03 contracts provides overwhelming evidence of the parties' ability and willingness to bargain collectively over article XIV. There are no fewer than three significant changes (affecting Thanksgiving, spring break and snow cancellation policy) between the first two agreements, and two more changes (both affecting the parent-teacher conference days) reflected in the agreement now under review. That's five separate and significant changes in article XIV over just two rounds of bargaining – surely, these are parties willing and able to bargain the work schedule.

Yet for all that bargaining over article XIV, no proposals were ever raised over the Christmas Music Program, by either side. "There was no discussion of Christmas during the negotiations on the Open House language," BEA president Alfinito testified, and the district concurs.

I find that paragraphs 2-10 of article XIV are clearly the kind of "express provisions" that article III sets as the only limitation on the board's rights of "direction and arrangement of all the working forces in the system." If this were how article XIV read in its entirety, my analysis would be at an end and the grievance sustained.

But the first paragraph of the article could change all that, if I agree with the district's analysis. As noted above, that paragraph reads:

> It is recognized that hours of work, including the school days and school calendar, are based on educational requirements and subject to change as educational methods, needs and techniques change.

The association contends this text "is meant to get the parties to talk at the table about the changing needs and techniques of a school district." The district contends the provision "explicitly grants the District the authority to change the work hours of teachers when educational requirements so dictate."

The association's problem is that the text reads "subject to change," not "subject to bargaining." I don't think the association's explanation is much more than a restatement of the obvious; of course the parties can, and should, bargain collectively about their respective needs. I believe it must mean much more than that – that it must mean what it says, namely that as educational methods, needs and techniques change, the work schedule itself is also "subject to change."

The association warns that relying on the broad terms of the first paragraph to supersede the detailed provisions of the following nine could lead to the district unilaterally imposing all manner of drastic changes, including sizeable extensions of the calendar. Although superintendent Smith resolutely disavowed any intent along those lines, and the district briefs dismisses such warnings as irrelevant hypotheticals, I believe the association raises a valid concern in objecting to an interpretation of this language which allow an the district to impose an increase in the number or length of contact days to implement new educational policies. I am also concerned about passing judgment on such a provision in the absence of any testimony or evidence as to its history or intent.

The district rejects the association's analysis as "purposely too broad," and its speculative scenarios as being neither in the record nor material to this dispute. This grievance only involves the application of the text to the music program, the district insists, and it would be wrong to accept the association's broad interpretation as a reason to nullify the language. Ultimately, the district is correct – it is a generally accepted principle of contract interpretation that all words and phrases have meaning, and that arbitrators should eschew interpretations that make language meaningless. The parties have included this provision in their collective bargaining agreement, and the explanation the association offers is less persuasive than the district's. Accordingly, accepting the district's disavowal of any intent to apply this paragraph beyond the instant dispute as integral to my analysis, I find that the introductory paragraph to article XIV would, under certain circumstances, authorize the district to compel attendance at the Christmas music program.

The language only matters, though, if there has been a change in the "educational methods, needs and techniques." Without such a predicate change, the work schedule is not subject to change at all.

Has there been such a change? I believe there has.

The district makes a convincing argument that the teachers provide a higher quality of supervision than any alternative. As the students' prime school-based authority figure, their presence will help ensure the students stay on their best behavior. I accept as a fact that elementary school children attending a 90-minute evening music program in a darkened gymnasium will behave better if their classroom teacher is present than they will if supervised by anyone else.

I also accept the importance of the teacher's presence for non-supervisory purposes. The district argued credibly that students will feel great disappointment if their classroom teacher is not present for the music program. Although the teachers are not responsible for the preparation of the program, they do have a close, year-long relationship with the students; it is natural for the students to want their teacher to witness their performance. For most students, the event will lose at least a little luster if their teacher isn't there.

Because elementary school children behave better, and take deeper satisfaction from their participation if their classroom teacher is with them, given the importance of the Christmas Music Program to the school curriculum and the school community, I find that the district had a legitimate educational need for the elementary classroom teachers to work the Christmas Music Program.

The question then becomes -– have the educational needs changed? Certainly the need for the teachers to be present has been a constant. But the need for the district to so direct them arose only in October 2002, when the teachers collectively announced they would withhold their services. Prior to October 2002, in the many years when the district comfortably relied on the shared expectation that teachers would participate (except when they told the principal or superintendent about a conflict), the district did not mandate participation because it did not have to. But when the expectation changed due to the association job action, the educational needs changed as well.

To the district, the music program is more than just an evening of entertainment. Superintendent Smith testified unequivocally that the Christmas program was "part of the curriculum, and fundamental to the elementary school program and to the community.It's curricular - it's tied so closely to our curriculum." He said "classroom teachers are important in the lives of the kids, and they're the best people to have there. They know the kids, know their needs. They are the best people to be in the gym" The district also argues this point emphatically in its brief: "Educational requirements dictated that the elementary classroom teachers attend the Program in order to ensure the safety of their students while they engaged in a program that *was part of their music curriculum." (emphasis* added).

Finding that the district had a legitimate educational reason for wanting the elementary classroom teachers to work the Christmas music program, and that the association job action established a changed educational need that justified the district directive for teachers to report to work does not, however, end my inquiry. Just because I find the district could make the teachers work doesn't mean I find the teachers had to work for free.

In GREENVILLE BOARD OF EDUCATION, 100 LA 565 (Ipavec, 1992), the district scheduled two two-hour child abuse prevention seminars in successive months, to comply with state legislation. The association grieved this as a violation of contractual provision for a single one-hour staff meeting per month, "except in the case of an emergency." Finding that "the work time of teachers is very specifically defined in the Agreement," including "a monthly one hour staff meeting," the arbitrator wrote:

> Except for emergencies, any meeting beyond the hour monthly staff meeting is scheduled during the teachers own free time. In the opinion of the arbitrator, when an employee is required to give up his or her own time for school business, the teacher ought to be compensated for such time. Id, at 568.

As remedy, the arbitrator proposed the teachers be compensated "at an hourly rate computed by calculating the per diem salary of the teacher, and then multiplied by one and one half times as a premium for the time in excess of the time" bargained for.

I agree with arbitrator Ipavec that employees who devote an evening of their own time for school business should be compensated. I choose, however, a slightly different remedy.

The collective bargaining agreement establishes compensation for curriculum work done outside regular school hours at $12.50 per hour. Although I know that supervision of the Christmas music program is not what the contract means by "curriculum work," that is the phrase the district repeatedly used to describe the activity. Smith and DeLorme both testified, and the district argued in its brief, that the program was tantamount to curriculum work. With the assignment taking roughly two hours, compensation for Christmas music program activity at the curriculum work rate would amount to $25 per teacher. I find further support for this figure in Appendix B to the collective bargaining agreement, which lists the range of extra-curricular activities and pay. This appendix provides that dance chaperones, ticket takers, and various support personnel at athletic events (e.g., scorers, down markers, etc.) are all paid $20 per event. Given the heartfelt, almost passionate, testimony from DeLorme and Smith on the importance of the music program and the need for the teachers, it seems that what the teachers are called upon to do is at least a little more valuable than taking tickets or keeping score.

Accordingly, on the basis of the collective bargaining agreement, record evidence and the arguments of the parties, it is my

AWARD

1. That the district violated the collective bargaining agreement when it directed the teachers to work the 2002 Christmas music program without pay. As remedy, the district shall pay each teacher who worked $25.

2. That the district may direct elementary classroom teachers to work the Christmas music program in 2003, at a rate of $25 per teacher.

3. I shall retain jurisdiction over this grievance until February 1, 2004, unless the parties jointly release me prior to that date.

Dated at Madison, Wisconsin, this 11th day of December, 2003.

Stuart Levitan /s/
Stuart Levitan, Arbitrator

SDL/gjc
6609