BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SLINGER SCHOOL DISTRICT

and

SLINGER EDUCATIONAL SUPPORT STAFF ASSOCIATION

Case 39
No. 63054
MA-12486

(Lighthizer Grievance)

Appearances:

Wisconsin Association of School Boards, by **Barry Forbes** and **Daniel Mallin**, Staff Counsels, 122 West Washington Avenue, Madison, WI 53703, appearing on behalf of the District.

Cedar Lakes United Educators, by **Sam Froiland**, Executive Director, 411 North River Road, West Bend, WI 53095, appearing on behalf of the Association.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, the Slinger Educational Staff Support Association (hereinafter referred to as the Association) and the Slinger School District (hereinafter referred to as the Employer or the District) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen of its staff to serve as arbitrator of a dispute over the assignment of a work schedule to Greg Lighthizer. The undersigned was so designated. The parties submitted a stipulation of facts, as well as written arguments and reply briefs, the last of which was received on March 25, 2004, with the understanding that the Arbitrator would provide an expedited decision on the matter.

Now, having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, and being fully advised in the premises, the undersigned makes the following Award.

ISSUE

The issue before the Arbitrator is:

Did the District violate Section 13.01 or any other provision of the collective bargaining agreement between it and the Association when it assigned Greg Lighthizer to a shift of 10:00 A.M. to 6:00 P.M.?

If so, what is the appropriate remedy?

CONTRACT LANGUAGE

ARTICLE II – MANAGEMENT RIGHTS

2.01 The Board, on its own behalf and on behalf of the District, hereby retains and reserves unto itself all managerial powers, rights, authority, duties and responsibilities conferred upon and vested in it by the statutes, case law and the Constitution of the State of Wisconsin and the Constitution of the United States of America. These rights include, but are not limited to, the following:

A. To direct all operations of the District.

B. To establish work schedule [sic] and work rules.

C. To hire, promote, transfer, schedule and assign employees to positions within the District, and to combine, modify and eliminate positions within the District.

. . .

ARTICLE XIII – HOURS OF WORK

13.01 Maintenance and Custodial

A. The normal workday for regular full-time employees shall be 8 consecutive hours unless otherwise specified in the job description, excluding a one half (1/2) hour lunch break period near the midpoint of the shift.

. . .

B. Normal Shift Schedule:

The shifts for all employees shall be as follows:

1st Shift: Starting between 6:00 & 9:00 A.M.
2nd Shift: Starting between 2:00 & 4:00 P.M.
3rd Shift: Starting between 10:00 P.M. & 12:00 midnight

Employees may be required to work an overlapping shift.

. . .

E. Summer Shift Schedule:

1st Shift: Starting between 4:00 A.M. & 9:00 A.M.
2nd Shift: Starting between 2:00 P.M. & 4:00 P.M.

Summer shift schedules will operate from the last teacher date until the first Monday in August. The district shall inform employees of the number of 1st shift and 2nd shift positions available each summer. Positions shall be voluntarily filled on the basis of seniority, or involuntarily filled (provided no qualified employee volunteers) on the basis of inverse seniority.

. . .

ARTICLE XV – WAGES

. . .

15.04 Night Shift Premium: A night shift premium shall apply to all employees for all hours scheduled to work the second and/or third shifts. Night shift premiums shall be paid within the pay period they are earned as additional pay. There will be no deduction for emergency or snow days where the employee's hours are altered for the day. The premiums shall be as follows:

Employees working on the second shift shall be paid a night shift premium of twenty (20) cents per hour for all hours scheduled to work on the second shift. The second shift shall be defined as a shift beginning at or after 2:00 P.M.

> Employees working on the third shift shall be paid a night premium of thirty (30) cents per hour for all hours scheduled to work on the third shift. The third shift shall be defined as a shift beginning at or after 10:00 P.M.
>
> . . .

RELEVANT FACTS

The parties have stipulated that the following facts are relevant to this dispute:

1. In August, 2003, the District reduced the maintenance department from four to three employees.

2. Mike Karius, the manager of building and grounds, determined that the work schedule needed to best carry out the functions of the District was to have three different shifts that would cover maintenance duties and responsibilities from 6:00 a.m. to 10:00 p.m.

3. The District established a first shift schedule from 6:00 a.m. to 2:00 p.m., another shift from 10:00 a.m. to 6:00 p.m., and a second shift schedule from 2:00 p.m. to 10:00 p.m. The District offered the three work schedules to the three remaining maintenance employees on a seniority basis. Mr. Lighthizer is the least senior of the three maintenance employee and was assigned the 10:00 a.m. to 6:00 p.m. shift when the other maintenance employees selected the other shifts.

4. Mr. Lighthizer filed a grievance over the assignment which has not been resolved to date.

5. The District was building a new Middle School during bargaining over the 1994-96 contract. The Board had made the decision to subcontract the cleaning of that new building and informed the Association of its intention to do so. The issue of subcontracting was bargained and the Board and Association reached an agreement where the Board agreed to not subcontract the cleaning of any district building in exchange for 12 other changes to the Association contract.

6. The District had assigned maintenance workers to the following shifts at Allenton Elementary School prior to the 1994-96 contract. Randy Scott was assigned to a Noon to 8:00 p.m. shift during the 1983-84 school year. Greg Lighthizer (the Grievant) was assigned to a shift of Noon to 8:00 p.m. from 1986 to 1991. The District had also assigned the following other shifts to other custodian or maintenance employees in other buildings prior to the 1994-96 contract. Ken Melius was assigned a shift of 5:00 p.m. to 1:00 a.m. at the High School in 1985-86. Brian Kienbaum was assigned a shift of Noon to 8:00 p.m. at the Main Campus from 1987 to 1991.

7. Brian Kienbaum and Greg Lighthizer both participated in the bargaining of the 1994-96 contract.

8. The District has assigned shifts starting after 9:00 a.m. but before 2:00 p.m. to six different custodial/maintenance employees on 13 different occasions since the 1994-96 bargain. The District also assigned one custodian to a shift starting after 12:00 midnight but before 6:00 a.m.

9. Six of the assignments described in paragraph 8 above were made to Jacky Wagner and Brian Kienbaum — both employees had served on the Association bargaining committees in contract negotiations subsequent to the 1994-96 bargain.

10. Joe Wikrent is District Administrator of the Slinger School District. He has held that position since 1994. Joe Wikrent was High School Principal at Slinger High School prior to his taking the District Administrator Position. Mike Karius is Building and Grounds Manager for the Slinger School District and has held that position since at least 1983. Karius supervises all maintenance and custodial employees. Karius sets the maintenance and custodian work schedules. Both Wikrent and Karius would testify that they believe that the schedules described in paragraphs 3 (the 10:00 a.m. to 6:00 p.m. shift), 6 and 8 are overlapping shifts.

ARGUMENTS OF THE PARTIES

The Position of the Union

The Association argues that the essence of the dispute between the parties is about the meaning of the word "overlapping." The Association believes that the sentence which follows the prescribed windows for shift starting times is simply intended to clarify that the District may have starting times for workers on the shifts that cause two workers on different shifts to be at work at the same time. Accepting the District's view that the term "overlapping" means any start time it wants renders the clear and mandatory language of the contract — "shifts for all employees shall be as follows" — utterly meaningless. It further makes the summer schedule provision of Section 13.01(E), which on its face allows greater flexibility for earlier starting times during specified months, meaningless. What would the point of any of this language be, if the term overlapping means the District can simply designate any shift schedule it wants? There is no evidence that the Association's bargainers ever would, or ever did, contemplate giving the District such carte blanche in setting work schedules. Instead, the Arbitrator must conclude that the mandatory language regarding starting times means just what it appears to mean.

The "overlap" language existed prior to 1994, but applied only to Allenton Elementary School. The District claims that it had assigned maintenance workers at Allenton Elementary School to its version of "overlapping shifts" in two instances prior to the 1994-96 contract.

However, there is nothing to suggest that the District or the employees involved informed the Association that these shifts had been created. Moreover, the record shows that the use of these "overlapping shifts" does not track the development of the contract language. Two employees — Ken Melius at the High School in 1985 and 1986, and Brian Kienbaum at the main campus from 1987 to 1991 — were assigned to shifts outside the contract permitted start times before the language changed in 1994. The fact that the District has four times violated the contract without the Association's knowledge does nothing to establish the meaning of Article 13.

Absent compelling evidence of past practice and/or bargaining history, and with clear language limiting shift starting times to the specified ranges in Section 13.02(B), the Arbitrator must conclude that the District violated the agreement, and must therefore grant the grievance.

The Position of the District

The District takes the position that the Association bears the burden of proof and has utterly failed to carry it. The language allowing an overlapping shift can only be read to allow a shift assignment outside of the "normal" shift starting times specified in the contract, one that overlaps the first and second shifts, for example. Otherwise it makes no sense to include it. While the Association says this strips away the meaning from the definition of normal shift starting times, the District points out that those definitions still have meaning, as they define what hours in an overlapping shift are compensable at the premium rates for the second and third shifts. Contrary to the Association's argument, it is the District's interpretation which gives meaning to all of the provisions of the contract, and the Association's interpretation which renders portions of Section 13.02 surplusage.

The District points out that the bargaining history of Section 13.02 supports its view of the language. Before 1994, the overlap language applied only to Allenton Elementary School. That restriction was removed in the 1994-96 round of bargaining. At Allenton, the Grievant himself was assigned a Noon to 8:00 p.m. shift from 1986 to 1991, and another custodian was assigned that shift for two years before that. These shifts were outside the starting times specified in the "normal" shift definitions, and must have been overlapping shifts. Since the 1994-96 contract expanded the right to use overlapping shifts, it is not reasonable to suppose that it eliminated the flexibility the District enjoyed under the old language. Indeed, there is evidence that two other custodians worked overlapping shifts outside the normal hours at schools other than Allenton before 1994. If the District expanded its right to use overlapping shifts, and had scheduled shifts outside of the normal hours before that expansion, the Association cannot argue that it no longer has the right to use such schedules. Indeed the record shows that such schedules have been assigned without objection to six different employees on 13 different occasions since the 1994 change.

The plain meaning of the language used, the history of this provision and the practice of the District under this provision, all establish that an overlapping shift is one which begins outside of the normal shift hours. There is no evidence whatsoever to establish the contrary view espoused by the Association. Accordingly, the arbitrator must deny this grievance.

DISCUSSION

Ambiguity

The role of the Arbitrator is to uphold the intent of the parties in applying contract language to any grievance. The steps in determining intent depend upon the specific language at issue. The familiar rule is that clear and unambiguous language is to be applied, since the intent of clear language is obvious, while ambiguous language is to be interpreted first, so as to determine the intent of the parties. Language is clear where it is susceptible to but one interpretation. Language may be said to be ambiguous where reasonable contentions may be made for competing interpretations.

The Association argues that the introductory language of Section 13.02 (B) — "shifts for all employees shall be as follows" — is absolutely clear. The Association is correct that this language, standing on its own, is very clear. However, the language does not stand on its own. It is one part of the overall provision. The subsequent statement in the same provision that "Employees may be required to work an overlapping shift" can equally be read as a clarification of the introductory sentence, or it can be read as a modification, depending upon whether the parties meant an "overlapping" shift to describe something distinct from a normal shift. This cannot be determined simply on the face of the language. The provision as a whole is therefore ambiguous.

Use of Language

The Association's principal argument is that interpreting the term "overlapping shift" to mean anything that is not a normal shift renders the specification of shift starting times meaningless, since the overall provision would read, in effect, that the starting times must be within the range set forth unless the District wants a different starting time. The Association argues that the special starting times for summer shifts would likewise be meaningless, for the same reason. Parties are presumed not have bargained surplusage, and interpretations which render language meaningless are strongly disfavored. This principle of contract interpretation provides strong support for the Association's argument, notwithstanding the District's ingenious counter-argument that the normal shift starting times can be rendered meaningful by interpreting them as a measuring stick for when shift premiums are due to employees on overlapping shifts. If that was the intent of the parties in specifying normal shift starting times, they would presumably have been able to say so more directly.

The surplusage argument is offset somewhat by the fact that the Association's argument that the "overlapping" shift language is merely a clarification does some damage to the meaningfulness of that language. If the reference to overlapping shifts is meant to say that shift starting times could vary within the range set in the contract, it is hard to understand why the parties felt it necessary to make such a statement, since that is obvious from the specification of a range. It is further difficult to understand why the parties originally limited the overlapping shifts to Allenton Elementary School. If the language simply clarifies the language that precedes it, and that preceding language is applicable to all District schools, the clarification should also have been applicable to all District schools.

Bargaining History and the Implementation of the Language Over Time

The strength of the Association's surplusage argument is further undercut by the evolution of this language over time. Prior to the 1994-96 round of bargaining, the normal shift starting time language contained a caveat that overlapping shifts could be used at the District's discretion at Allenton Elementary, and at other schools if both parties agreed. That formulation of the language allows the current interpretations of both parties to be accepted and to have meaning. The normal shift starting times were set within a specified range. Allenton was the exception to the rule, and the District could schedule shifts outside of those times at that one facility. Under pressure from a threat to subcontract, the Association agreed in the 1994-96 round of negotiations to expand the exception and allow overlapping shifts at all schools. The Association is correct that this reading of the bargaining history has the exception swallowing the rule, and radically transforms the "normal shift" language from a mandate to schedule only within certain hours to a mere adjunct of the shift premium language. However, where parties have a limited exception and then remove the limitations, they may be fairly presumed to have understood the consequences of their actions. If this was not what they intended, the change in the language makes very little sense.

It is still possible to interpret the term "overlapping shifts" to mean that the first shift could be scheduled so that that employee's work hours would overlap the employee on the second shift (e.g. a first shift from 9 to 5 and a second shift from 2 to 10, a three hour overlap). This is a somewhat strained interpretation, since that is already inherent in setting different ranges of possible starting times for each shift, but it is not an impossible interpretation. If that interpretation is accepted, then the Association is quite correct that the District may not assign Lighthizer a shift starting at 10 a.m. The history of scheduling in the District, though, runs solidly against this interpretation. Prior to the 19994-96 contract, when the overlapping shift language was applicable only to Allenton Elementary School, the District maintained a Noon to 8 p.m. shift. The Grievant in this case worked that shift at Allenton for five years, from 1986 to 1991. The parties have stipulated that, since the language was expanded to include all schools, the "District has assigned shifts starting after 9:00 a.m. but before 2:00 p.m. to 6 different custodial/maintenance employees on 13 different occasions." [and has] ". . . also assigned one custodian to a shift starting after 12:00 midnight but before 6:00 a.m."

The Association argues that there is no proof it knew of these scheduling practices, and that they might simply have been instances of individual employees accommodating the District. Given the stipulation that the maintenance department stood at four employees in 2003, it is virtually impossible to conclude that the membership of the Association did not know of these overlapping shifts. Nor is there any evidence to suggest that each of these occasions, averaging more than one per year since the change in the language, was a special accommodation. Instead, the District's application of the scheduling language over a nearly twenty year period persuasively demonstrates that the term "overlapping shift" means a shift that starts outside of the range of starting times for normal shifts.

Conclusion

The District's interpretation of the overlap language does serve to render the normal shift and summer shift language ineffective, and such an interpretation is disfavored. However, the history of negotiations over Article 13 and the manner in which the language was administered before and after the 1994-96 contract changes, convincingly demonstrates that the parties knowingly rendered the language ineffective by expanding the exception for overlapping shifts from one school to all schools. I therefore conclude that the District did not violate the collective bargaining agreement when it assigned the Grievant to a shift starting at 10 a.m. and ending at 6 p.m. Accordingly, the grievance is denied.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The District did not violate Section 13.01 or any other provision of the collective bargaining agreement between it and the Association when it assigned Greg Lighthizer to a shift of 10:00 a.m. to 6:00 p.m. The grievance is denied.

Dated at Racine, Wisconsin, this 16th day of April, 2004.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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