

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NORTHWEST UNITED EDUCATORS

and

TURTLE LAKE SCHOOL DISTRICT

Case 42
No. 64317
MA-12870

(Tina Becker Grievance)

Appearances:

Tim Schultz, Executive Director, Northwest United Educators, appearing on behalf of the Association.

James Ward, Attorney, Weld, Riley, Prens & Ricci, appearing on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and District, respectively, were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances arising thereunder. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was not transcribed, was held on March 2, 2005, in Turtle Lake, Wisconsin. The parties filed briefs on April 11, 2005. The record was closed on April 21, 2005, when the undersigned was notified that the parties would not be filing reply briefs. Having considered the evidence, the arguments of the parties, the applicable provisions of the agreement and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

Did the District violate the collective bargaining agreement by failing to pay the 20 cent per hour night shift premium to Tina Becker for hours she works after 3:00 p.m. on school days? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2003-2005 collective bargaining agreement contained the following pertinent provisions:

ARTICLE XXI – GENERAL PROVISIONS

...

- B. The custodial night shift premium applies to all hours worked after 3:00 p.m.

...

APPENDIX A – SALARIES

2003-04 SALARY SCHEDULE

...

Custodial Night Shift Premium: 20 cents/hour

...

2004-05 SALARY SCHEDULE

...

Custodial Night Shift Premium: 20 cents/hour

BACKGROUND

The District operates a public school system in Turtle Lake, Wisconsin. It employs various support staff employees, including custodial employees.

Prior to 2003, the District's support staff employees were unrepresented.

When the support staff employees were unrepresented, the District paid a night shift premium of 20 cents per hour to two custodial employees: Craig Hohlfeld and Heidi Horn. Hohlfeld worked from 3:00 to 11:30 p.m. and Horn, a part-time employee, worked from 2:00 to 7:00 p.m. The District's two other custodial employees, Tony Ranallo and Tina Becker, did not receive the night shift premium. Their work hours will be identified in the **FACTS** section.

In 2003, the Association became the exclusive collective bargaining representative for the District's support staff employees.

The following bargaining history is pertinent to this case. On January 26, 2004, the parties began negotiations for an initial collective bargaining agreement between them. On that day, the Association submitted its initial bargaining proposal to the District. One item which was included in that proposal dealt with the custodial night shift premium. Specifically, on page 11 of that initial bargaining proposal, which the Association denominated as Article XIX, Section E, was the following sentence: "The custodial night shift premium applies to all hours worked after 3:00 p.m." At the time the Association made this proposal, there were two custodians who received the night shift premium: Hohlfeld and Horn. The Association's bargaining proposal was subsequently discussed in bargaining, but the record does not indicate what specifically was discussed regarding the meaning of the Association's proposal or what the parties intended the language to mean. In bargaining, the District's labor negotiator, Richard Ricci, made written notations on his copy of the Association's initial bargaining proposal. On page 11 of his copy, to the right of what the Association had denominated as Article XIX, Section E, Ricci wrote the following note: "2 ees should be receiving night diff." The District subsequently accepted the Association's night shift premium proposal exactly as written. No changes to same were ever proposed by the District or jointly made. Agreement on this matter occurred early in the bargaining process. The parties later included the night shift premium language on a list of tentative agreements. While the night shift premium language was later numbered differently, its wording never changed when it was incorporated into the parties' collective bargaining agreement. Thus, the Association's proposed language dealing with the night shift premium was incorporated verbatim into the parties' first collective bargaining agreement as Article XXI, Section B. When the parties reached agreement on their first collective bargaining agreement in the fall of 2004, it was applied retroactively to July 1, 2003 and extended through June 30, 2005.

FACTS

The District's four custodial employees all work different hours on school days. Hohlfeld currently works from 3:00 to 11:30 p.m. He gets the 20 cent night shift premium for all his work hours. Horn currently works from 2:00 p.m. to 7:00 p.m. She does not get the 20 cent night shift premium for her first hour of work (i.e. from 2:00 to 3:00 p.m.), but does get the 20 cent night shift premium for all the hours worked after 3:00 p.m. Ranallo currently works from 1:00 to 9:30 p.m. He does not get the 20 cent night shift premium for the first two hours of work (i.e. from 1:00 to 3:00 p.m.), but does get the 20 cent night shift premium for all the hours worked after 3:00 p.m. Becker currently works 9:00 a.m. to 5:30 p.m. She does not get the 20 cent night shift premium for any of her work hours. Since the four custodial employees each work different hours on school days, it is apparent that there is not a distinct day shift and night shift for District custodians on school days.

On November 12, 2004, the Association filed a grievance on Becker's behalf which contended that she should be receiving the night shift premium for time worked after 3:00 p.m.

on school days. After the District denied the grievance, it was processed through the contractual grievance procedure and was ultimately appealed to arbitration.

POSITIONS OF THE PARTIES

Association

The Association's position is that Becker should be receiving the 20 cent night shift premium for work she performs after 3:00 p.m. on school days. Since the District has not been paying her that premium, the Association believes the District has violated the collective bargaining agreement. It makes the following arguments to support this contention.

First, the Association contends that the contract language involved here (i.e. Article XXI, Section B) is clear and unambiguous in providing that a custodian who works after 3:00 p.m. gets the night shift premium for those hours. In making this argument, the Association essentially asks the arbitrator to focus on the phrase "premium applies to all hours worked after 3:00 p.m." rather than the phrase "night shift". Here's why. It notes in this regard that the phrase "night shift", which the District focuses on, is not defined anywhere in the collective bargaining agreement. Additionally, it avers that that phrase was not defined in either the 2002-03 "Salary Schedule for Custodians" or the "Support Staff Handbook", which it characterizes as the two documents that defined the wages, hours and working conditions for the District's support staff employees prior to the time the parties negotiated their first collective bargaining agreement. Additionally, the Association submits that the District's four custodians all work different "shifts", so there is no clearly identified day shift or night shift. Under these circumstances, the Association views the phrase "night shift" as subjective and ambiguous. However, when that phrase is read in conjunction with the rest of the sentence which follows, the Association believes its meaning becomes clear: namely, that any custodian who works past 3:00 p.m. gets the night shift premium for those hours.

As part of its argument concerning the contract language, the Association avers that if the contract language was worded differently, then the District would have a valid reason for excluding Becker from getting the premium. The Association notes that, as an example, the contract language could say that employees who begin their shift at 3:00 p.m. or later get the shift premium. The Association submits that if that is what the language said, then Becker would not qualify for the premium because her shift does not begin after 3:00 p.m. However, the Association emphasizes that that is not what the language says; instead, the language says that the premium is paid for all hours worked after 3:00 p.m. The Association argues that the arbitrator should give effect to the language exactly as it is written. The Association believes that if that is done, Becker qualifies for the night shift premium.

Second, responding to the District's argument about the past practice, the Association notes that past practice is normally applied when the contract language is silent or ambiguous. In its view, that is not the case here. Be that as it may, the Association argues that its interpretation of the contract language is supported by the past practice. According to the

Association, the practice before the parties negotiated their first collective bargaining agreement was this: the night shift premium was paid to employees who worked past 3:00 p.m. The Association contends that when it proposed its contract language dealing with the night shift premium, that is the practice it wanted to preserve.

Third, the Association argues that the parties' bargaining history supports its position herein. In support thereof, the Association notes that when the District's negotiator made written notes about the Association's bargaining proposal, he wrote that "2 ees should be receiving" the night shift premium. The Association avers that since two custodians (Hohlfeld and Horn) were already receiving the night shift premium at the time, the arbitrator should not conclude that Ricci's note meant that only two custodians would qualify for the night shift premium under the Association's proposal. Instead, the Association believes the phrase "2 ees should" refers to Ranallo and Becker who were not receiving the night shift premium at the time (for their hours after 3:00 p.m.) The Association also cites the testimony of an Association bargaining team member who testified that the reason the Association proposed the language it did was to ensure that any custodian who worked past 3:00 p.m. got the night shift premium.

Finally, responding to the District's argument that any ambiguity in the contract language should be construed against the drafter, the Association sees this contract interpretation principle as inapplicable here because, as previously noted, it views the contract language as clear and unambiguous.

The Association therefore asks that the grievance be sustained. As a remedy for the District's contract violation, the Association asks that Becker be made whole by paying her the 20 cent night shift premium retroactive to July 1, 2003 and continuing prospectively as long as the current contract language exists.

District

The District's position is that it did not violate the collective bargaining agreement by failing to pay Becker the 20 cent per hour night shift premium for hours she works after 3:00 p.m. on school days. It makes the following arguments to support this contention.

First, with regard to the contract language, the District focuses on the phrase "night shift" which is contained at the beginning of Article XXI, Section B. According to the District, that language clearly specifies that the 20 cent per hour premium only applies to custodians who work a night shift, and then only for the hours they work after 3:00 p.m. Thus, it is the District's view that a prerequisite to getting the night shift premium is working a night shift and working after 3:00 p.m. The District avers that Becker does not work a night shift because she starts work in the morning (namely, 9:00 a.m.) and ends in the late afternoon (namely, 5:30 p.m.) As the District sees it, anyone looking at Becker's hours would say that she works a day shift. The District argues that this might be a closer case if Becker started work much later than 9:00 a.m. and worked well into the evening, or if she had previously

received premium pay for working the same hours she still works. It emphasizes however those are not the facts present here. It specifically notes that Becker has always worked a day shift and has never received premium pay for doing so.

As part of its argument concerning the contract language, the District asserts that if the contract language was worded differently and there was no express reference to the “night shift” in this language, then the outcome herein would be different. The District notes that, as an example, the contract language could say that custodians working after 3:00 p.m. get the shift premium pay. The District submits that if that is what the language said, then Becker would qualify for the premium because she does work after 3:00 p.m. However, the District emphasizes that that is not what the language says; instead, the language says that the premium is paid only to those custodians who work the night shift. Building on that interpretation of the language, the District maintains that since Becker works a day shift, she is not entitled to the night shift premium under Article XXI, Section B because she does not work a night shift.

Second, the District argues that to the extent that Article XXI, Section B, is deemed ambiguous in relation to Becker’s entitlement to the night shift premium for hours she works after 3:00 p.m., the attendant ambiguity should be resolved against the Association and Becker in this instance. In support thereof, the District cites the standard arbitral principle that when an ambiguity exists, it is resolved against the party that proposed the language in question. It notes that in this case, it was the Association that proposed the language in question. That being so, the District contends the Association bears the burden of miscommunication about the language in question.

Third, the District contends that the parties’ bargaining history buttresses its position herein that Becker is not entitled to the night shift premium for hours worked after 3:00 p.m. In support thereof, the District notes that the District’s negotiator testified that his customary practice in bargaining is to ask questions about what each proposal is supposed to mean. In this instance, next to the Association’s bargaining proposal, he wrote: “2 ees should be receiving diff.” The District infers from this notation that the Association’s negotiator must have told the District’s negotiator that the Association’s proposal affected two employees, who the District’s negotiator assumed were Hohlfeld and Horn (the two employees who then received the night shift premium). Building on the foregoing, the District’s negotiator assumed that the Association’s proposal maintained the status quo (relative to the number of employees who got the night shift premium pay). The District further argues that if the Association was really not proposing that the status quo be maintained, but was instead proposing that the night shift premium benefit be extended to the other custodians as well, that intent was never clearly communicated to the District. Instead, the Association only made reference to two employees and even then did not identify either of them by name. The District avers that if the Association’s true intent was that every custodian who works past 3:00 p.m. gets premium pay, then the Association’s negotiator should have told the District’s negotiator that all the District’s custodians would be affected by the Association’s proposal. Since that did not happen, the District believes it is a matter of fairness that the Association should bear the burden of miscommunication on this matter.

Based on the foregoing, the District asks that the grievance be denied.

DISCUSSION

At issue herein is whether Becker is contractually entitled to receive the 20 cent per hour night shift premium for the hours she works after 3:00 p.m. on school days. The District has refused to pay that shift premium to Becker on the grounds that she does not work a night shift. Since Becker works what can easily be characterized as a day shift, one would expect that the District would be correct that Becker would not qualify to receive the night shift premium. However, as will be explained in detail below, that is not the case here because of the unique contract language. It suffices to say here that this particular collective bargaining agreement contains language that gives the “night shift premium” to any custodian who works after 3:00 p.m. Becker works after 3:00 p.m., so I conclude she is contractually entitled to receive that premium.

My discussion begins with a look at the pertinent contract language: Appendix A and Article XXI, Section B. These two provisions will be addressed in the order just listed.

Appendix A is the salary schedule page. It provides in pertinent part: “Custodial Night Shift Premium: 20 cents/hr.” In the context of this case, this provision’s meaning is not disputed. It means that employees who get the “night shift premium” receive an extra 20 cents an hour on top of their existing pay rate. This premium pay for night work is for just one classification – namely, custodians. Thus, an employee who is not a custodian is not eligible to receive the “custodial night shift premium.” That said, this clause does not say who gets the “night shift premium”; only that when “the night shift premium” is paid, the amount of the premium pay is 20 cents an hour. Since the question herein is whether Becker qualifies for the “night shift premium” for certain hours that she works, the language contained in Appendix A dealing with the amount of the premium is not dispositive herein.

The other contract provision involved here (Article XXI, Section B) does address the subject of who gets the “night shift premium” pay. That clause provides as follows: “The custodial night shift premium applies to all hours worked after 3:00 p.m.” I have decided to analyze this sentence by breaking it down into two parts: one part is the phrase “night shift” and the other part is the phrase “premium applies to all hours worked after 3:00 p.m.” These phrases will be addressed in inverse order. I find the meaning of the phrase “premium applies to all hours worked after 3:00 p.m.” to be clear and unambiguous. Its meaning is this: the (pay) premium applies (meaning the custodian gets the premium) whenever they work past 3:00 p.m. Said another way, when a custodian works past 3:00 p.m., they get the premium for all the hours worked thereafter (i.e. after 3:00 p.m.). In my view, there is nothing ambiguous about this phrase. The focus now turns to the phrase “night shift”. This, of course, is the phrase that the District hangs their hat on, so to speak. The District argues that a prerequisite to getting the night shift premium is working a night shift. That certainly was the initial inference of the undersigned, also. However, upon further analysis, I find that inference lacks a contractual basis. Here’s why. There is no explicit definition in this phrase

of what a “night shift” is. That being so, I did what arbitrators routinely do when they attempt to ascertain the meaning of a word or phrase – look elsewhere in the collective bargaining agreement for a definition of same. Specifically, I looked at Article XIII (the Workday and Workweek provision) because oftentimes, such provisions specify the hours or shifts that employees work or contain some type of reference to same. For example, if that provision indicated that full-time employees work an 8:00 to 4:00 shift or a 4:00 to midnight shift, it could certainly be inferred from that language that the parties created a day shift and a night shift, and then that language could be used to determine the eligibility for the “night shift premium”. However, no such language is contained in Article XIII, or elsewhere in the collective bargaining agreement. Were I to infer that the parties intended the phrase “night shift” to refer to say, a 4:00 to midnight shift or even a shift that extended to 6:00 p.m. or later, I would be adding something to the collective bargaining agreement that presently is not there. That being the case, the only contract language which the undersigned has to resolve this contract dispute is the language previously cited and quoted from Article XXI, Section B. The focus now turns back to that language. What the District essentially asks me to do is to give the phrase “night shift” its commonly understood meaning, and then have that meaning trump the other part of the sentence (i.e. the phrase “applies to all hours worked after 3:00 p.m.”). I decline to do that. In so finding, I am not writing the phrase “night shift” out of existence. Instead, I’m finding that in the absence of an express contractual definition for the phrase “night shift”, the night work contemplated by the phrase “night shift” begins at 3:00 p.m. even though 3:00 p.m. is usually considered part of the day shift. Consequently, I read Article XXI, Section B to mean that any custodian who works past the 3:00 p.m. cutoff point qualifies for the “night shift premium.” Under this unique language, it does not matter when a custodian starts working. What matters under this unique language is whether the custodian works past 3:00 p.m. If they do work past 3:00 p.m., they qualify under that provision for the premium pay. Conversely, if they do not work past 3:00 p.m., then they do not qualify under that particular language for the premium pay.

In reaching this conclusion, I am well aware that a general rule of contract construction is that a contract ambiguity is construed against the drafting party. A key word in the previous sentence is “ambiguity”. The reason that word is a key word here is because I find no inherent ambiguity in Article XXI, Section B. As previously noted, its plain meaning is this: any custodian who works after 3:00 p.m. gets the “night shift premium” for their work hours after 3:00 p.m. Under that language, the custodian’s start time does not matter. Given that finding, I have not construed Article XXI, Section B against the Association (i.e. the party that drafted that language).

Finally, I find there is nothing in the parties’ bargaining history which requires a different result from the conclusion reached above. Here’s why. Bargaining history, of course, is a form of evidence commonly used by arbitrators to help them interpret contract language. If the bargaining history evidence showed that when the Association made its proposal it clearly and specifically told the District that Becker would not qualify (under that proposal) for the night shift premium, then it would certainly be a circumvention of the bargaining process to interpret the language so that Becker did now qualify for the night shift

premium. However, the bargaining history evidence does not show that. All it shows is this. First, while the Association's bargaining proposal was discussed in bargaining, the record does not indicate what specifically was discussed regarding the meaning of the Association's proposal, and most importantly, what the parties mutually agreed the language meant. The District points the finger of blame, so to speak, for this situation on the Association and contends the Association failed to clearly communicate to the District that the Association's proposal extended the night shift premium to employees other than Hohlfeld and Horn. Certainly it would have been better if that had happened. Be that as it may, miscommunications about the meaning of contract language occur all the time in bargaining. When disputes subsequently arise as to the meaning of that language, arbitrators usually hold that the clear and express language controls; not what a party failed to say in bargaining about that language. Application of that arbitral principle here means that the District is stuck with the clear and express language it accepted in bargaining. Second, the handwritten notation contained in Ricci's bargaining notes about this particular bargaining proposal does not prove much either because Ricci's notation about the proposal (i.e. "2 ees should be receiving night diff.") can be interpreted two ways: On the one hand, that notation could mean that an additional two employees "should be receiving" the night shift premium (in addition to the two employees who were already receiving the night shift premium – Hohlfeld and Horn). On the other hand, that notation could also mean that only two employees total (i.e. just Hohlfeld and Horn) "should be receiving" the night shift premium. In my view, it is unclear which scenario was contemplated by the notation in Ricci's notes. Given that uncertainty and inconclusiveness about which scenario was contemplated by the notation in Ricci's notes, I decline to base my decision on either the notation in Ricci's bargaining notes or the other bargaining history evidence contained in this record. Instead, my decision will be based on the contract language already reviewed and interpreted.

In conclusion then, it is held that under the unique contract language contained herein, Becker is contractually entitled to receive the night shift premium for the hours she works after 3:00 p.m. on school days. Since the District has not been paying her that premium, the District has violated Article XXI, Section B. In order to remedy that contractual violation, the District shall pay Becker the night shift premium when she works past 3:00 p.m. on school days, and make her whole.

The final remedy question is how far back Becker's backpay will go. The Association asks that Becker's backpay be retroactive to the date the parties' first collective bargaining agreement was implemented (which was July 1, 2003). When faced with backpay retroactivity questions, arbitrators usually hold that backpay runs from the date the grievance was filed. In accordance with that generally accepted view, the undersigned finds that Becker's backpay is to be retroactive to the date the grievance was filed (November 12, 2004) – not the date the parties' first collective bargaining agreement was implemented (July 1, 2003).

In light of the above, it is my

AWARD

That the District violated the collective bargaining agreement by failing to pay the 20 cent per hour night shift premium to Tina Becker for hours she works after 3:00 p.m. on school days. In order to remedy this contractual breach, the District shall pay Becker the night shift premium when she works past 3:00 p.m. on school days. Additionally, the District shall make Becker whole by paying her the 20 cent per hour night shift premium retroactive to November 12, 2004.

Dated at Madison, Wisconsin, this 7th day of July, 2005.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

