

* * * * *
IN THE MATTER OF ARBITRATION
between
Northwest United Educators
and
School District of Flambeau
* * * * *

MEDIATION-ARBITRATION
WERC Case No. 23314
MED/ARB-168
April 27, 1979
Decision No. 16676-A

RECEIVED

APPEARANCES

MAY 29 1979

For Northwest United Educators

Allan Manson, Executive Director

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

For School District of Flambeau

Stevens L. Riley, Attorney, Losby, Riley & Farr, Eau Claire, Wisconsin
Marvin Nelson, Administrator

JURISDICTION OF MEDIATOR/ARBITRATOR

The Parties after several negotiations sessions arrived at a contract settlement on October 10, 1978, for school years 1978-79 and 1979-80, except for the issue of "Fair Share." The Wisconsin Employment Relations Commission having, on November 22, 1978, issued an Order requiring that mediation-arbitration be initiated for the purpose of resolving the impasse arising in collective bargaining between the Parties. On the same date the Commission furnished the Parties with a panel of mediator-arbitrators for the purpose of selecting a single individual to resolve said impasse. The Commission, on December 1, 1978, was advised by the Parties that Richard John Miller, New Hope, Minnesota was selected as the mediator-arbitrator. The Commissioner's order was dated December 4, 1978.

On December 13, 1978, the Commission informed the undersigned that at least five (5) citizens within the jurisdiction of the School District of Flambeau requested that the first meeting with the Parties be in the form of a public hearing for the purposes noted in Section 111.70 (4) (cm) 6.b. of the Wisconsin Municipal Employment Relations Act. A hearing was held on Tuesday, January 9, 1979, at 8:00 p.m., in the Home Economics Room of the Flambeau School District, Tony Wisconsin. Subsequent to the public hearing, the Parties waived mediation and a formal arbitration hearing. Instead, the Parties filed post hearing brief's and reply briefs in support of their final positions. The last reply brief was received on April 2, 1979. The case was considered closed on the same date.

POSITIONS OF NORTHWEST UNITED EDUCATORS

Replace Article XVI, Part B of the 1976-78 collective bargaining agreement with:

FAIR SHARE AGREEMENT

1. NUE, as the exclusive representative of all the employees in the bargaining unit, will represent all such employees, NUE and non-NUE, fairly and equally, and all employees in the unit will be required to pay, as provided in this Article, their fair share of the costs of representation by the NUE. No employee shall be required to join the NUE, but membership in NUE shall be made available to all employees who apply consistent with the NUE constitution and bylaws. No employee shall be denied NUE membership because of race, creed, or sex.

2. Effective thirty (30) days after the date of initial employment of a teacher or thirty (30) days after the opening of school in the fall semester, the District shall deduct from the monthly earnings of all employees in the collective bargaining unit, except exempt employees, their fair share of the costs of representation by NUE, as provided in Section 111.70 (1) (h), Wis. Stats., and as certified to the District by NUE, and pay said amount to the treasurer of NUE on or before the end of the month following the month in which such deduction was made. The District will provide NUE with a list of employees from whom deductions are made with each monthly remittance to NUE. For purposes of this Article, exempt employees are those employees who are members of NUE and whose dues are paid to NUE in some other manner authorized by NUE. NUE shall notify the District of those employees who are exempt from the provisions of this Article by the first day of September of each year, and shall notify the District of any changes in its membership affecting the operation of the provisions of this Article thirty (30) days before the effective date of such change. NUE shall notify the District of the amount certified by NUE to be the fair share of the costs of representation by NUE, referred to above, two weeks prior to any required fair share deduction.
3. NUE agrees to certify to the District only such fair share costs as are allowed by law, and further agrees to abide by the decisions of the Wisconsin Employment Relations Commission and/or courts of competent jurisdiction in this regard. NUE agrees to inform the District of any change in the amount of such fair share costs thirty (30) days before the effective date of the change.
4. NUE shall provide employees who are not members of NUE with an internal mechanism within NUE which will allow those employees to challenge the fair share amount certified by NUE as the cost of representation and to receive, where appropriate, a rebate of any monies determined to have been improperly collected by NUE.
5. NUE and the Wisconsin Education Association Council do hereby indemnify and shall save the Flambeau School District harmless against any and all claims, demands, suits, or other forms of liability, including court costs, that shall arise out of or by reason of action taken or not taken by the District, which District action or non-action is in compliance with the provisions of this Article, and in reliance on any lists or certificates which have been furnished to the District pursuant to this Article; provided that the defense of any such claims, demands, suits or other forms of liability shall be under the control of NUE and its attorneys. However, nothing in this section shall be interpreted to preclude the District from participating in any legal proceedings challenging the application or interpretation of this Article through representatives of its own choosing and at its own expense.
6. This fair share agreement will become effective upon passage of a referendum conducted among all employees in the bargaining unit. The referendum shall be conducted by the Wisconsin Employment Relations Commission, and shall require approval of 51 percent of those eligible to vote for passage.

POSITION OF THE SCHOOL DISTRICT OF FLAMBEAU

Article XVI - Voluntary Dues Deduction and Union Security.

- A. Voluntary Dues Deduction (No change)
- B. Maintenance of Membership
(Change title to "Fair Share Contributions" and amend to read as follows:

1. The parties agree that employees who are voluntarily paying their fair share of the costs of representation by the Association on the date this Agreement is signed, as well as all employees who thereafter voluntarily agree to pay their fair share of the costs of representation by the Association, shall be required to pay, as provided in this Article, their fair share of the costs of representation by the Association. No employee shall be required to join the Association, but membership in the Association shall be available to all employees who apply, consistent with the Association's constitution and bylaws.

2. Effective thirty (30) days after the date this Agreement is signed, the Employer shall deduct from the monthly earnings of employees subject to the obligation set forth in Section 1 of this Article their fair share of the costs of representation by the Association, as provided in Section 111.70 (1) (h), Wis. Stat., and as certified to the Employer by the Association, and pay said amount to the treasurer of the Association on or before the end of the month following the month in which such deduction was made. The Employer will provide the Association with a list of employees from whom deductions are made with each monthly remittance to the Association.

3. The Association shall notify the Employer of the amount certified by the Association to be the fair share of the costs of representation by the Association, referred to above. The Association agrees to certify to the Employer only such fair share costs as are allowed by law, and further agrees to abide by the decisions of the Wisconsin Employment Relations Commission and/or courts of competent jurisdiction in this regard. The Association agrees to inform the Employer of any change in the amount of such fair share costs thirty (30) days before the effective date of the change.

4. The Association shall provide employees who are fairshared with an internal mechanism within the Association which will allow those employees to challenge the fair share amount certified by the Association as the costs of representation and to receive, where appropriate, a rebate of any monies determined to have been improperly collected by the Association.

5. The Association does hereby indemnify and shall save the Employer harmless against any and all claims, suits, or other forms of liability, including court costs, that may arise out of or by reason of action taken or not taken by the Employer, which Employer action or non-action is in compliance with the provisions of this Article, and in reliance on any list or certificates which have been furnished to the Employer pursuant to this Article; provided, that the defense of any such claims, suits or other forms of liability shall be under the exclusive control of the Association and its attorneys. However, nothing in this section shall be interpreted to preclude the Employer from participating in any legal proceedings challenging the application or interpretation of this Article through representatives of its own choosing and at its own expense.

ANALYSIS OF THE EVIDENCE

The final offer of both Parties denote some similarity. Specifically, NUE certifies the fair share costs as mandated by law and allows said costs to be scrutinized by the WERC or other judicial bodies. Furthermore, both final proposals allow an employee to refrain from being a member of NUE; but it is also the responsibility of NUE to accept all individuals who desire to adhere to its constitution and bylaws without regard to race, creed or sex. In addition, the final offers subscribe to a dues checkoff method by which the monthly monies are sent from the School District to NUE with a list of employee names.

The final offers certainly do differ in some aspects. NUE's final position

permits it to identify exempt employees, who have paid their dues in a lump sum and are not subject to the monthly dues checkoff. Another significant difference manifests in NUE's provision for a referendum vote after the collective bargaining agreement is indorsed by the Parties. The vote of eligible bargaining unit members (Wisconsin Statutes 111.70[2]) being either to accept or reject the fair share provision. The School District also under Article XVI, Section B (3) of its proposed language provides that its "Fair Share Contributions" are effective thirty (30) days after the date the Agreement is signed. The Employer's final offer, however, does not provide for a referendum vote of all eligible bargaining unit members.

The fundamental question, therefore, is whether in light of the similarities and differences, which Party has produced the best evidence in support of its case. The Arbitrator rejects any notion that the final offer of both Parties should be decided on a philosophical dissertation of the concept of fair share. To do so, would negate the expressed provisions of the factors enumerated in Section 111.70 (4) (cm) 7 of the Municipal Employment Relations Act, which provides as follows:

- a. The lawful authority of the municipal employer.
- b. Stipulations of the parties.
- c. The interests and welfare of the public and the financial ability of the unit of government to meet the costs of any proposed settlement.
- d. Comparison of wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally in public employment in the same community and in comparable communities and in private employment in the same community and in comparable communities.
- e. The average consumer prices for goods and services, commonly known as the cost-of-living.
- f. The overall compensation presently received by the municipal employees, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
- g. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
- h. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

The first criteria that must be considered is that of the lawful authority of the Employer. This consideration, however, becomes ancillary in light of NUE's proposed language in regards to the Wisconsin Supreme Court's decision in Brown, et al., v. The Milwaukee Board of School Directors, 83 Wis. 2nd 316 (1977).

The consideration involving stipulations of the parties is only relevant to the impasse issue pertaining to the evidence of the collective bargaining history and the duration of the successor contract (two [2] years).

The fact that the cost of either final proposal is nonexistent eliminates any consideration involving the interests and welfare of the public and the financial ability of the Employer to fund the final offers.

It is apparent that the aforementioned factors are not the most important considerations in this case. The comparison with similarly situated employers, however, is quite germane to the resolution of this impasse item.

The position of the Employer is that all school districts in the northwestern part of Wisconsin are true comparables, since the great majority of them are unindustrialized, basically rural and do compare with the School District of Flambeau. Furthermore, school districts in this part of the state employing more than 150 teachers are Eau Claire, Superior and Chippewa Falls, and of these, only Superior has the union security language sought by NUE. The other two school districts actually have less in the way of union security language than Flambeau presently has in its contract.

The Employer selected for its comparables the school districts located in the northwestern quadrant of the state, specifically those schools in CESA's #1, #2, #4, #5 and #6. The School District of Flambeau is situated in the middle. Moreover, there is nothing meaningful regarding CESA boundaries. They are creatures of geography only, not composed of school districts which share characteristics not common to schools in other CESA's.

NUE argues that CESA #4 school districts is the most appropriate comparability group, which includes 10 out of 13 Lakeland Athletic Conference school districts. Furthermore, CESA #4 school districts are more suitable as a comparable base, since Flambeau is the largest of the Lakeland Conference Schools. It is thus more appropriate that it be compared with a larger group of schools, including 10 of the 13 Lakeland Conference Schools, whose average size is much closer to that of Flambeau than the average Lakeland Conference schools would be.

After scrutinizing, analyzing and pondering the evidence produced by the Parties, it is concluded that the "best" comparability group are those school districts contained in CESA #4. This conclusion derives on the fact that 10 out of 13 school districts contained in the Lakeland Conference Schools are situated in CESA #4 with Flambeau being the largest. Thus, the most fair and equitable comparability group is the larger group of schools contained in the Lakeland Conference Schools whose average size is closer to Flambeau. Furthermore, CESA #4 is a better comparability group in light of Union Exhibit No. 5, where it is evinced that Flambeau is approximately at the median of 1977-78 Full-Time Employees (FTE). Flambeau, therefore, is not disproportionately situated at either the lower or higher spectrum of FTE, which tends to not distort the comparability group. It is also interesting to note that those schools that are \pm 16 FTE from Flambeau (9), all but one school district (Bruce) has fair share for the 1978-79 school year. Clearly, the school districts of relatively approximate faculty size adhere to the concept of fair share in the 1978-79 school year.

The Arbitrator rejects the Employer's comparability group as being too expansive in light of the relevancy of CESA #4. To expand beyond CESA #4 is not necessary, since the majority of these school districts are unindustrialized, basically rural and do compare favorably with Flambeau. As adduced from the record 16 of 25 CESA #4 schools (excluding Flambeau) have established fair share provisions in their collective bargaining agreements for the 1978-79 school year. (Union Exhibit No. 6).

Another further consideration under 111.70 (4) (cm) 7 is cost of living (e). This factor only applies to fair share in that the costs of union representation also increase with the rate of inflation. Thus, a disparity does exist for those who adhere to fair share and those employees who do not subscribe to the concept.

Overall compensation (111.70 [4][cm] 7f) is another factor which contributes to fair share. Specifically, fair share in a contract more equitably distributes the overall compensation of employees, inasmuch as

the cost of representation is borne equally by all employees. Those employees who do not consent to fair share normally sustain greater overall compensation compared to a fair share employee at equal points on the salary schedule.

The Parties have through the exchange of briefs and reply briefs negated the useage of any additional changes during the pendency of the arbitration proceedings. Neither Party, however, submitted additional information under the proviso of 111.70 (4) (cm) 7g.

The final statutory consideration has some relevance in this case. To award a fair share provision will not have an adverse affect on the relationship between employees. The evidence discloses that presently there are at least 55 out of 57 employees who belong to NUE. Nor, should the relationship between the NUE and the School District suffer, especially in light of their excellent repose in negotiating a two (2) year agreement for the 1978-80 school year, except for this issue. The last factor for consideration by the Arbitrator concerns other arbitral decisions involving fair share. To sustain or deny fair share on arbitral precedent is not meritorious. To do so, negates 111.70 (4) (cm) 7 of the Municipal Employment Relations Act. The evidence, however, patently reveals that numerous other arbitrators have awarded fair share. Thus,, the Arbitrator's award in this case is not setting a precedent.

AWARD

NUE's final offer is chosen as the award in this case.

Richard John Miller
Mediator/Arbitrator

Dated this 27th day of April, 1979
Minneapolis, Minnesota