WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BEFORE THE ARBITRATOR

In the Matter of the Mediation/ Arbitration of a Dispute Between	:	
SCHOOL DISTRICT OF SUPERIOR	:	
and	:	AWARD AND OPINION
SUPERIOR FEDERATION OF TEACHERS, LOCAL #202, WFT, AFT, AFL-CIO	:	**Decision No. 17988-B**
	:	

Case No.	LXIII No. 25953 MED/ARB 659
Hearing Date	January 12, 1981
Appearances:	
For the School District	Losby, Riley, Farr & Ward, S.C., Attorneys at Law, by MR. STEVENS RILEY
For the Union	MR. FRED L. SKARICH
	MR. WILLIAM KALIN, Executor Director
Arbitrator	MR. ROBERT J. MUELLER
Date of Award	March 26, 1981

JURISDICATIONAL AND BACKGROUND FACTS

The District's brief concisely sets forth the background and jurisdictional facts as follows:

> "The first issue before the Arbitrator has as its genesis the parties' negotiations in early 1979 concerning the terms and provisions of the collective bargaining agreement for the period from July 1, 1979 to June 30, 1980. During those negotiations, the District informed the Union, inter alia, of its intention to return the senior high school schedule to a 'single shift' for students for the 1980-81 school year, necessitating a change in the contract language regarding the senior high school day.
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> "Following the appointment of Joseph B. Kerkman as Mediator-Arbitrator, the parties were able to resolve all of their collective bargaining differences with the exception of the senior high school day and the school calendars for 1979-80 and 1980-81. These issues, pursuant to the Consent Award issued by Mr. Kerkman (see Joint Exhibit #4), were to be the subject of further negotiations. If the negotiations did not culminate in an agreement, the issues were to be submitted to binding arbitration (Joint Exhibit #4, page 2).

"Negotiations on the open issues proved unsuccessful, and they were submitted to Richard John Miller, Mediator-Arbitrator, for a determination. Mr. Miller's Consent Award (Joint Exhibit #5), resolved the calendar issues in favor of the Union and the senior high school day issue in favor of the District. (It should be noted that the senior high school day to which the parties consented in Joint Exhibit #5 ((Attachment C)) is the same as that set forth in District's Exhibit #2, received in the instant case). In his Consent Order, Mr. Miller included the following language:

> Additional compensation for additional work performed by bargaining unit members due to the change in the senior high school day shall be exclusive of all other aspects of negotiations for the 1980-81 contract, except that in the case of other unresolved issues it shall be included as one of the issues for consideration before the Mediator-Arbitrator. (Emphasis Added)

"When the parties commenced negotiations over the collective bargaining agreement for the 1980-81 school year, one of the Union's proposals was entitled 'Remuneration Proposal for the Senior High School Day.' and it was specifically identified with Mr. Miller's Consent Award language regarding additional compensation. (Joint Exhibit #3).

. . .

"The second issue was raised by one of the District's proposals for changes in the parties 1980-81 collective bargaining agreement, and involves a request that the senior high school teachers' student conference period be changed, for one semester of the school year only, to a supervision period.

"When the parties reached impasse over the negotiation of the 1980-81 collective bargaining agreement, there were several unresolved issues remaining, all of which were submitted to Mediator-Arbitrator James L. Stern. On October 29, 1980, Dr. Stern issued a Consent Order resolving all but two of the parties' unresolved issues, specifically (1) the Union's request for 'remuneration for the senior high school day' and (2) the District's request for a change in the senior high school teachers' scheduled student conference period. These two issues were referred by Dr. Stern (with the consent of the parties) to a subsequent arbitrator, who the Union insisted be someone other than Dr. Stern. Robert J. Mueller was selected from a list submitted by the W.E.R.C. (See Joint Exhibit #2, pages 4 and 5....

"The first issue, raised by the Union, involves a request for additional pay for all employees in the bargaining unit as a result of a change in the senior high school teachers' lunch hour which it was agreed in 1979 would become effective at the start of the 1980-81 school year.

"The second issue, raised by the District, involves a change the District proposes to make in the senior high school, requiring each teacher to take one semester of supervision in lieu of the present student conference period."

In the Consent Award issued by Arbitrator Stern, it was

specified that the two issues are to be considered as a package proposal, thus the undersigned must select one or the other of the two issues as a single proposal of each.

THE FINAL OFFERS

UNION OFFER:

Issue #1:

> "The Federation demands financial remuneration for the impact of the schedule change based upon the formula outlined as Attachment A. The remuneration as calculated by the formula on Attachment A shall be applied to every 'call' on the salary schedule and paid to every bargaining unit member covered by the salary schedule effective July 1, 1980.
>
> "Remuneration for hourly employees shall be calculated by the formula on Attachment B, and applied equally to all hourly employees in the bargaining unit."

At the hearing the parties stipulated that the proper amounts as reflected by the referred to formula of Attachment A would be an annual amount of $155.00 and that the amount reflected by the formula referred to as Attachment B would be 11 cents per hour.

Issue #2:

> The Union proposes that the current contract language remain unchanged.

DISTRICT OFFER:

Issue No. 1:

> The District proposes that no additional remuneration be given.

Issue No. 2:

> The District proposes the following amendment to the present contract provision, being Article V, Section 5, paragraph 1, sub-paragraph c, as follows:
>
> > "Commencing with the 1980-81 school year, the senior high school day shall be established at 8 periods. These shall include one homeroom period, 5 teaching periods, 1 semester supervision period per teacher, 1 semester conference period per teacher and 1 preparation period per teacher per day. The lunch period is a part of the fourth class period. Full time teachers in the senior high shall post a daily schedule of office hours in a prominent place within his or her work area. Part time teachers shall provide a number of office hours appropriate to their daily schedule. Teachers with preparation periods the last hour of the day are required to be on duty 10 (ten) minutes after their last assigned class."

FACTS

The Superior Senior High School officially opened in 1965. At that time the school operated on a single shift with the teachers work day being from 8:00 A.M. to 3:45 P.M. whereby they were assigned 5 periods of teaching/supervision, 1 preparation period and a 30 minute lunch period. The class periods were of 55 minute duration. At the end of the 1968-69 school year, a local parochial high school closed and approximately 400 additional high school students then had to be accommodated in the Superior Senior High School in the fall of the 1969-70 school year. The option chosen to accommodate the additional students was that of a split shift for students and teachers. The schedules for the first two school years were as described in a letter from Louis J. Thompson, Acting Superintendent, as follows:

> "During 1969-70 and 1970-71 a portion of the students and teachers started school at 7:30 a.m. and finished at 2:10 p.m. Another group of students and teachers began the day at 9:40 a.m. and completed it at 4:20 p.m.

Beginning with the 1971-72 school year and continuing up to the reversion back to the single shift for the 1980-81 school year, the split shift operation was as described in the District brief as follows:

> "1. The school day for students ran from 7:45 a.m. to 3:09 p.m.
>
> a. The normal day for students bussed in from outside the city, commenced at 7:45 a.m. and ended at 12:30 p.m., unless the students elected to stay longer (until either 2:16 p.m. or 3:09 p.m.). City students could elect to start at 7:45 a.m. as well, with the same options available regarding the end of their school day.
>
> b. The normal day for City students began at 9:36 a.m. and ended at 3:09 p.m.
>
> c. The homeroom period occurred at 9:36 a.m., because at this time all students, regardless of their shift, were in school.
>
> d. The length of each class period was decreased from 55 minutes to 48 minutes, and additional periods were added.
>
> "2. The school day for teachers commenced at 7:35 a.m. and ended at 3:19 p.m., with the following schedule in effect:
>
> 5 periods of teaching/supervision, 1 preparation period, 1 student/teacher conference period and a 48 minutes lunch period. The additional 18 minutes in the lunch period was necessary for the system to work; it could not be avoided."

The subject disputed issue thereupon arose when the District proposed to return to a single shift school operation and eventually came to hearing in this arbitration.

UNION POSITION

The Union brief addresses the issues, excerpts thereof are as follows:

"...the parties stipulated agreement to the employer's calculations using the union's final offer formula. The amounts are $155 annually for full time salaried employees and 11¢ per hour for hourly employees. Both figures, the union maintains, should be added to the salary schedules.

"The request for additional compensation spread across the salary schedule is based upon additional work at the high school. The calculation is based upon an additional 17 minutes having been added to the teacher's schedules. (See Union Exhibit #1).

"The arbitrator should realize that the 17 minutes was not the only change, but it is the only change for which the union is seeking compensation. In addition to the 17 minute extension of the day, teachers are also teaching class periods five minutes longer in length than the 1979-80 class periods. Consequently, teachers are teaching 25 minutes more per day, or 75 hours more in 1980-81 than they taught in 1979-80. (Teachers have 5 classes per day, and there are 180 teaching days in a year.)

"The high school day has also been extended in another way. Article V, Section G, 1 of the 1979-80 agreement allowed teachers with a preparation period during the first period to arrive ten minutes before the first assigned class. Article V, Section G, 1c allowed teachers to leave ten minutes after their last assigned class, if the teacher had a last hour preparation period.

"Ms. Connie Salveson testified that during the 1979-80 school year, all but two or three high school teachers had a preparation period during the first or last hour of the day. More than eighty teachers, therefore, were able to arrive later or leave earlier as a result of a first or last period preparation.

"The same provisions of delayed arrival or early exit apply in 1980-81, but the schedule change has drastically reduced the number of teachers who can take advantage of the provisions. In 1980-81 only seven or eight high school teachers, according to Ms. Salveson, have a first or last period preparation period.

"The drastic change was a result of two factors: a home room period preceding the first period during which nearly all teachers are assigned, and one less period into which to schedule students. As a result of th shifted preparation times, teachers are required to be in the school for about 144 hours per year (48 minutes per day x 180 days during which they were free to leave in the prior year.

"The union's final offer, based only upon a 17 minute increase is all the more reasonable in light of the foregoing.

"Employer's exhibit #5 presumably was entered to demonstrate how the current high school day compares with other

high school days. The comparison is not relevant to the instant matter,however, for two reasons. First, the union and the school district negotiated a salary schedule based upon maintenance of the previous teaching schedule. It is clear from the consent orders discussed above that the additional compensation for the additional time remained to be negotiated. Secondly, the employer failed to compare total compesation and benefits in the 'comparable schools.' The Employer's inspection of one aspect of wages, hours and conditions of employment without comparing other aspects of employment is not only invalid but suspect as well.

. . .

"A collective bargaining agreement constitutes a totality. Wages and hours are interlocked. The appropriate comparables in this case are internal.

"Rebuttal of Employer's Final Offer

"The employer wants to add one semester of supervision to every teacher at the high school. Ms. Salveson testified that 5 assignments is and has been the maximum number of assignments, including supervision, in thel8 years since she has been at the high school. The board's proposal would raise the number of assignments to 6 for one semester of every year. The stated reasons for wanting to do so is to better control inappropriate student activities and other disruptive activities within the school.

. . .

"Even if one were to assume that six adult supervisors would make a difference, the district should not expect teachers to provide the time. As Mr.Beglinger testified, the school had a police liaison officer last year. The school does not have one this year. Last year the school had two deans, this year it has only one. A few years ago, the school had three paraprofessionals to supervise students. Today it has only one.

. . .

"It is preposterous for the district to simultaneously change rules so as to increase the workload, decrease the number of non-bargaining unit employees who are responsible for discipline, decrease the number of teachers, and expect teachers to pick up all the work at no extra pay.

"Comparison of Final Offers

"The union final offer is a demand for compensation due and owing. The school district's final offer ignores the debt and demands an even greater work effort. Such a demand cannot even be considered until the first debt is paid."

DISTRICT POSITION

Excerpts of the District's brief address the issues as follows:

"1. The extra minutes added to the Senior High School teachers' lunch period in 1969 constituted a temporary, unbargained for benefit, and the teache s affected thereby are not entitled to any remuneration because the schedule reverted to its original form.

"2. Even if the Senior High School teachers should be found to be entitled to some remuneration, the formula selected by the Union is fatally inequitable because it rewards the great majority of the bargaining unit who were completely unaffected by the temporary change. The Union, even if it should be found to be entitled to a remedy, has selected the wrong one.

"...the Union is seeking additional compensation not just for the few teachers (89, or 24 of the bargaining unit) affected by the Senior High School changeover, but for all 376 members of the bargaining unit, 76% of whom are not and never have been involved at all. It is of added significance that, although it had the opportunity to do so, the Union has offered neither justification nor a rationale for this approach."

With respect to the District's proposal on the second issue, the District contends that budgetary constraints have eliminated several positions and employees that had been utilized for supervision in prior years.

The District presented testimony describing the problems that existed and the need for greater supervision primarily in study halls, school hallways and lunch rooms. They estimate that the requested schedule change would provide an additional six teachers per period for such supervisory duties. They describe what they view as the impact of such change in their brief as follows:

"What will be the effect of the loss of one semester of student conference time? Very minimal, according to Mr. Beglinger. Much of the present student conference time is not even utilized for that purpose. It remains strictly unstructured as far as many teachers are concerned. In addition, teachers assigned to smaller study halls will be able to use some of this time for conferring with students. All in all, when the entire record is reviewed, any detrimental effect resulting from the change would be more than offset by the advantages inherent in the additional supervisory time which would become available.

"Of the several statutory factors to be given weight by mediator/arbitrators (Wis. Stats. 111.70(4)(cm) 7), only two remain relevant to the questions present here (the District having dropped the third -- ability to pay -- when it appeared that to rely upon it would cause great delay in obtaining a decision): (1) the interests and welfare of the public and (2) comparables. There can be no doubt that the interests and welfare of the public are best served by the substitution of a one semester period of supervision for a student conference period. This factor is clearly on the District's side of the ledger in this case.

The District also presented an exhibit of what they described as 14 comparable schools and described their comparative analysis as follows:

"With respect to comparables, the Mediator/Arbitrator's attention is directed to District Exhibit #5. The District selected 14 comparable school districts, using as its criteria for selection location in Superior's geographic area and student enrollment figures. The following becomes apparent from an examination of this document.

"1. 10 schools have a longer school day for teachers (8 Hours) than Superior Senior High School (less than 7½ Hours);

"2. All schools have a 30 minute lunch period for teachers;

"3. 8 schools (including Superior have a single preparation period;

"4. All schools have at least 5 assigned teaching periods; and

"5. 9 schools (not including Superior) have at least as much supervisory time, in excess of the 5 assigned teaching periods, as Superior is requesting here.

"When comparables are considered, the great majority of school districts comparable to Superior now enjoy the additional supervision which the District requests in this case."

The District summarized its argument as follows:

"The solution proposed by the District is in the best interests of the public and clearly in line with the conditions existing in comparable school districts."

DISCUSSION

This case is unique and different from the usual interest arbitration arising under Section 111.70(4)(cm) of the Wisconsin Statutes. The position and argument of the Union as taken in this case, is what makes it unique. The Union contends that the issue before the arbitrator concerns the change in the school schedule, which change directly affects a portion of the bargaining unit, namely high school teachers. They therefore contend that because a Collective Bargaining Agreement constitutes a totality and that wages and hours are interlocked, that the appropriate comparables are therefore internal comparables between employees within the same bargaining unit.

In its brief, the Employer contended that determination and consideration of this case by the arbitrator calls for consideration of only two of the statutory factors of Section 111.70(4)(cm) 7, namely,

"c. The interest and welfare of the public..."

and comparables, which have reference to statutory factors d, f and h. At the hearing, the Employer specifically withdrew from consideration of the arbitrator, a portion of that sub paragraph c factor which makes reference to the ability to pay of the Employer.

The Union's position and argument raises an interesting question concerning the construction and application of the statutory factors. In the usual case, the comparisons engaged in by arbitrators in applying such statutory factors, have normally been made between the level of wages, hours and conditions of employment of the bargaining unit as a whole, by comparison to other bargaining unit groups of groups of employees in similar or comparable employment. It is further fairly common in interest arbitrations, for issues to be raised concerning comparability of a portion of a total bargaining unit or one or more specific classifications within a bargaining unit relative to their particular comparability as compared to similar type employees or classifications employed by other public or private employers. This is the first case that has come before this arbitrator whereby the comparability argument has been made for comparison between one group of employees within the bargaining unit to be made with another group of employees within the same bargaining unit.

If one were to strictly read the provisions of sub paragraph d of the Wisconsin Statutes under the factors to be considered, it is possible to reach a conclusion that such type of comparison is not therein provided by virtue of the phraseology of such section and the reference to "other employees." In the considered judgment of the undersigned, however, it would appear that sub paragraph h of the statutory factors therein provided, would afford a basis for such type comparison by virtue of its reference to such other factors which are normally or traditionally taken into consideration in the determination of wages, hours, and conditions of employment through voluntary collective bargaining. Such type of comparison as is herein sought and argued by the Union, is a type that is frequently raised in negotiations and negotiated by parties in determining the relative relationship of one classification to another within a bargaining unit. The undersigned will therefore give full consideration to such contention and argument as advanced by the Union.

The Union stated in its brief that the Union and the School District negotiated a salary schedule based upon maintenance of the previous teaching schedule. The clear message which the Union is thus attempting to convey in this case, is that because the split shift resulted in longer lunch periods and first or last period preparation periods being subject to the teachers' use as their own time, that the bargaining unit modified or tempered their bargaining demands in subsequent contract years and therefore settled for lesser increases than they otherwise would have had the schedules remained as initially constituted.

The Employer contends that the additional lunch time allowed to teachers and the freedom of use of preparation periods at the beginning or end of a school day, constituted merely a unilaterally

granted additional benefit to teachers and was one that was not negotiated between the parties. The Employer contends that they did not receive quid pro quo consideration therefor. The District contends that the subject issue involves only 24% of the teachers in the bargaining unit and that it was only such group which did receive the additional lunch period time and the more favorable opportunity to utilize their preparation periods as a result of the change to a two shift system. If one accepts the Union's contention that the bargaining unit did modify its monetary demands and levels at which it settled subsequent contracts in recognition of the shorter school day on behalf of such 24% of the work force it, in essence, means that the majority of the work force or 76% of the bargaining unit agreed to take less or settle for a lower settlement in subsequent years despite the fact that such change to split shifts did not factually reduce their work load in any respect. Recognizing the practicalities of collective bargaining and the fact that contracts are generally negotiated so as to most benefit the majority of employees represented, it does not seem likely nor logical that the majority of employees would agree to a lesser settlement for a majority simply in recognition of a reduced work load to a minority of the unit.

Neither party presented any specific bargaining negotiation evidence to indicate that the parties either did or did not during any subsequent contract negotiations, cost out or predicate their wage demands or proposals and make comparisons to other comparables by converting such shorter type school days enjoyed by high school teachers to a comparison formula which took such change into account.

If in fact such more favorable and/or shorter work day for high school teachers had been factored into the negotiation process during any of the subsequent years, it seems to the undersigned that the Union, in particular, would have presented specific evidence of such fact in order to substantiate and support its inferred allegation that it in fact was recognized and served to temper their negotiated levels of settlement. Where the record evidence does not contain such specific type evidence, the arbitrator is more inclined to subscribe to the more usual conclusion that it was not specifically factored into the negotiations of the parties and that the level of settlement was determined by a determination by the majority of the bargaining unit as to what should be the most appropriate level as compared to other schools to which comparisons were made and without distinguishing the comparisons by factoring in the minority impact considerations.

Had the change in the schedule which resulted in a longer lunch period and personal use of preparation period time factually effected a majority of the bargaining unit rather than a minority, there would be a much stronger presumption favoring the Union's allegation.

The undersigned is of the judgment that it would not be the normal or expected action for 76% of a bargaining unit to temper their bargaining demands and settle for less than what they deemed comparable and appropriate for the level of work which they were rendering, so that 24% of the bargaining unit could receive and enjoy more favorable treatment. In the absence of there being some specific supportive evidence to establish that such other than normal type situation did in fact occur, the arbitrator is inclined to conclude that the normal reaction is the one that is the more likely one which prevailed.

The arbitrator would therefore conclude that the more favorable lengthy lunch period and the more favorable schedule which

allowed a more frequent personal utilization of preparation time, was in fact a unilateral action on the part of the Employer required by the double shift and that the return to the single shift schedule constituted a change which merely returned the high school teachers to the status quo and placed them on a more comparable level with the majority of teachers.

With respect to the second issue concerning the Employer's proposal to substitute one semester of supervision in lieu of student/teacher conferences, the arbitrator finds that while the actual impact on teachers may be viewed as undesirable from the teacher's viewpoint, the fact remains that teacher conference periods are in fact periods of time that the teacher owes to the District to be utilized by the District for purposes that are in the best interest of the District. Supervision simply constitutes a substitute of the type of useage which the District deems in its best interests by which to utilize each teacher's time.

On the evidence presented in this case, there is no doubt but that the District has made out a fairly strong case for the need of greater supervision in a number of areas, which supervision in turn would presumably make supervision by those who otherwise are performing supervisory tasks somewhat easier by virtue of the greater numbers that will thus be involved at any given time period.

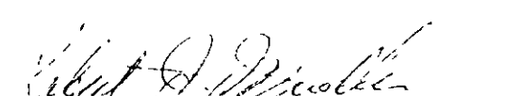
On the basis of the above facts and discussion thereon, and consideration of the statutory factors applicable hereto, it is the considered judgment of the undersigned that the final offer of the District is supported to the greater extent by the record evidence

The undersigned thereby awards as follows:

AWARD

That the final offer of the District is granted and it is hereby directed that it be incorporated into the Collective Bargaining Agreement as provided by the Wisconsin Statutes.

Dated at Madison, Wisconsin this 26th day of March, 1981.



Robert J. Mueller
Arbitrator