

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 HOWARD-SUAMICO SCHOOL DISTRICT :
 :
 : Case 44
 : No. 46351
 and : MA-6951
 :
 HOWARD-SUAMICO BOARD OF EDUCATION :
 EMPLOYEES UNION, :
 LOCAL 3055 AND LOCAL 3055-D, :
 AFSCME, AFL-CIO :
 :

Appearances:

Mr. James W. Miller, Staff Representative, Wisconsin Council 40, AFSCME,
Mr. Robert W. Burns, Esq., Godfrey & Kahn, S.C., 333 North Main Street,

AFL-CIO
 Suite

ARBITRATION AWARD

According to the terms of the 1989-1991 collective bargaining agreement between the District and Local 3055-D and the 1990-92 collective bargaining agreement between the Local 3055 and the District, the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as an impartial arbitrator to hear and resolve two grievances which involved the identical dispute between them concerning the District's installation of a time clock for use by certain bargaining unit employes during the 1991-92 school year. The undersigned made full written disclosures to which no objections were raised. Hearing was held at Suamico, Wisconsin, on January 9, 1992. A stenographic transcript of the proceedings was made and received by January 21, 1992. The parties submitted their post-hearing briefs by April 20, 1992 and those were thereafter exchanged by the undersigned.

ISSUES:

The parties were unable to stipulate to the issues for determination but they agreed to allow the undersigned to frame the issues in this case. The Union suggested that the issues be framed as follows:

Did the Employer violate the collective bargaining agreement by instituting the use of a time clock? If so, what is the appropriate remedy?

The District suggested that the issues be framed as follows:

Did the Employer violate Article I of the collective bargaining agreement by instituting the use of a time clock? If so, what is the appropriate remedy?

Based upon the relevant evidence and argument in this case, I find that the issues to be decided here should be framed as follows:

Did the District violate the collective bargaining agreement by instituting the use of time clocks?

If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

ARTICLE I

RECOGNITION AND UNIT REPRESENTATION

The Employer recognizes the Union as the exclusive collective bargaining representative for the purpose of conferences and negotiations with the Employer, or its lawfully authorized representatives, on questions of wages, hours, and conditions of employment for the unit of representation consisting of all employees of the Employer employed as follows:

1. All custodial employees of the Board of Education, Howard-Suamico School District, excluding professional teachers, supervisors, craft employees, elected or appointed officials, cooks, clerical employees, confidential employees and all other employees.

The Employer agrees not to discharge nor discriminate against any employee because of membership in the Union or because of Union activities.

ARTICLE II

MANAGEMENT RIGHTS

The Board possesses the sole right to operate the school system and all management rights repose in it. These rights include, but are not limited to, the following:

- A. To direct all operations of the school system;
- B. To establish reasonable work rules and schedules of work;
- C. To create, combine, modify and eliminate positions within the school system;
- D. To hire, promote, transfer, schedule and assign employees in positions within the school system;
- E. to suspend, demote, discharge and take other disciplinary action against employees with reasonable cause;
- F. To relieve employees from their duties;
- G. To maintain efficiency of school system operation;
- H. To take whatever action is necessary to comply with State or Federal law;
- I. To introduce new or improved methods or facilities;
- J. To change existing methods or facilities;
- K. To determine the kinds and amounts of services to be performed as pertain to school system operations; and the number and kind of classifications to perform such services;
- L. To contract out for goods and services not within the scope of employee job

- descriptions;
- M. To determine the methods, means and personnel by which school system operations are to be conducted.
 - N. To take whatever action is necessary to carry out the functions of the school system in situations of emergency.

The exercise of management rights in the above shall be done in accordance with the specific terms of this Agreement and shall not be interpreted so as to deny the employee's right of appeal.

ARTICLE III

RULES AND REGULATIONS

The Employer shall adopt and publish rules which may be amended from time to time. The effect of rules and regulations that affect wages, hours and conditions of employment shall be first submitted to the Union prior to the effective date.

The rules shall become effective on the day following the seventh (7th) day of submission to the Union.

In the event of a dispute as to such rules or regulations, the dispute shall be referred to the grievance procedure for settlement and shall be initiated at the level of its origin.

LOCAL 3055-D CONTRACT:

ARTICLE I

RECOGNITION AND UNIT REPRESENTATION

The Employer recognizes the Union as the exclusive collective bargaining representative for the purpose of conferences and negotiations with the Employer, or its lawfully authorized representatives, on questions of wages, hours and conditions of employment for the unit consisting of all employees of the Employer employed as follows:

1. All regular full-time and regular part-time housekeeping employees of the Howard-Suamico School District, excluding supervisory, managerial, confidential and all other employees.

The Employer agrees not to discharge nor discriminate against any employee because of membership in the Union or because of Union activities.

ARTICLE II

MANAGEMENT RIGHTS

The Board possesses the sole right to operate

the school system and all management rights repose in it. These rights include, but are not limited to, the following:

- A. To direct all operations of the school system;
- B. To establish reasonable work rules and schedules of work;
- C. To create, combine, modify and eliminate positions within the school system;
- D. To hire, promote, transfer, schedule and assign employees in positions within the school system;
- E. To suspend, demote, discharge and take other disciplinary action against employees subject to Article VII of this contract;
- F. To relieve employees from their duties;
- G. To maintain efficiency of school system operation;
- H. To take whatever action is necessary to comply with State or Federal law;
- I. To introduce new or improved methods or facilities;
- J. To change existing methods or facilities;
- K. To determine the kinds and amounts of services to be performed as pertain to school system operations; and the number and kind of classifications to perform such services;
- L. To determine the methods, means and personnel by which school system operations are to be conducted;
- M. To take whatever action is necessary to carry out the functions of the school system in situations of emergency.

The exercise of the foregoing powers by the Board, the adoption of policies, rules, regulations and practices and furtherance thereof, and the use of judgment and discretion in connection therewith, shall be limited only by the specific and express terms of this Agreement.

ARTICLE III

RULES AND REGULATIONS

The Employer shall adopt and publish rules which may be amended from time to time. The effect of the rules and regulations that affect wages, hours and conditions of employment shall be first submitted to the Union prior to the effective date.

The rules shall become effective on the day following the seventh (7th) day of submission to the Union, unless, in the opinion of the District, safety or other immediate concerns require implementation prior to the seventh (7th) day.

Within ten (10) days after implementation the Employer and Union will commence bargaining over the impact on wages, hours and conditions of employment.

BACKGROUND:

The District provides its educational program to students residing in the District, out of six buildings at various locations. The District employs custodians, housekeepers, and janitors at each of its six buildings. These employes have varying work hours: some employes work from 6:30 a.m. to 3:00 p.m. or from 7:00 a.m. to 3:30 p.m.; other employes start work at 3 or 4 p.m., and quit at 10:30 or 11:30 p.m. During the two school years prior to the instant hearing (1989-90, 1990-91), the District has had some employes in the above classifications who worked shifts ending at 12:30 or 1:00 a.m. Over the years, the District has periodically assigned such employes to work varying shifts covering the entire 24 hours of each day.

James Wenzel, Building and Grounds Supervisor for the past 25 years, testified without contradiction that for the approximately 25 years prior to the 1991-92 school year, some District employes represented by Locals 3055 and 3055-D were issued cards upon which they were expected to record their actual work hours (including overtime hours) in their own handwriting. The employes who traditionally filled out time cards were in the housekeeper, janitor and custodian classifications. The employes were issued new cards biweekly, to be completed by the 15th and 30th of each month. District clerical employes at each school building then apparently collected the cards and sent them through the school mail to the District's bookkeeper so that the bookkeeper could prepare biweekly payroll checks. Employes often carried their cards with them, left them in their cars or their employe lockers located at each building.

Mr. Wenzel also stated that he was never involved in the process of collecting employe written time cards except for a very few occasions when an employe lost or misplaced his/her time card. Wenzel stated that in these situations, he has sent employes home to get their misplaced (handwritten) time cards or he has instructed employes to make out a new card from memory so that they could receive a paycheck for the pay period.

The District has never disciplined any unit employe for tardiness and it has never had any written work rules or submitted any work rules to the Unions regarding District policies concerning handwritten employe time cards or their use. There has never been a grievance submitted by the Union alleging that the District violated Article III (or any other contractual provision) by requiring employes to fill out handwritten time cards or the institution of the use of such cards. The policies described above regarding the use of handwritten employe time cards are based upon undisputed evidence of past practice as it existed prior to the 1991-92 school year.

FACTS:

For at least two years prior to the start of the 1991-92 school year, District managers Wenzel and Director of Business Services John Keller had discussed the need/advisability of installing time clocks in all six of the District's buildings. According to Mr. Wenzel and District Business Services Director Keller, Wenzel could not insure the accuracy of employe work hours because of the varying starting and quitting times of the janitorial, custodial and housekeeping employes who were working in the District's six buildings. In addition, Supervisor Wenzel stated that he often could not be present at the starting and quitting times of all employes, because he worked regular District business hours. Wenzel stated that it has become more and more important to the District that employes come to work on time and leave on time. However, Business Services Director Keller admitted that he did not believe that employes had been "stealing time" from the District prior to the installation of the time clocks, although that may have happened in the past. Keller stated he felt that the time clocks would be a good management tool to insure employe hours would be accurate.

Some time during the Spring of 1991 at one or more regular Union-Management monthly meetings, Local 3055 representatives DeBauche and Caelwarts were present along with Keller and Wenzel. 1/ Keller and Wenzel indicated that they were going to request that funds be placed in the 1991-92 budget so that the District could purchase and install time clocks at each of the District's six buildings during the 1991-92 school year. Keller and Wenzel indicated they were not certain that the District would approve the funds for the time clocks for the 1991-92 school year. The Local 3055 officials did not file a grievance at this time or seek any further discussions with the District on the subject of the possible installation of time clocks.

District managers never met with Local 3055-D officials and never otherwise notified that Union of its intention to install time clocks. The District relied upon word-of-mouth to inform Local 3055-D members that time clocks might be installed during the 1991-92 school year.

Without giving any written or oral notice to the Unions in advance, on or about August 27, 1991, the District installed one time clock in each of its six buildings. The Unions filed the instant grievances on August 27, 1991, which stated that Article I of each labor agreement had been violated and sought that the District "bargain in time clocks or have everybody or hourly people punch clocks". Local 3055 representatives Caelwarts and DeBauche also told Keller during the processing of the grievances that they felt the clocks were discriminatory and that all hourly unit employes should be required to use them. During the processing of the grievances the Union also made it clear that it felt Article III of the labor agreement had been violated. The District, by Business Manager Keller, answered the grievances on their merits. The District did not raise any objections to the form or content of the grievances until it did so at the instant hearing.

There were apparently no meetings and no rules promulgated by the District regarding the use of the new time clocks. The following instructions regarding the clocks were conveyed to employes by word-of-mouth. Only housekeeping, janitorial and custodial employes were to use the clocks; they were to punch in whenever they started work and to punch out whenever they completed their regular work hours. Employes were not to punch out for lunch. If employes worked overtime, they were to punch out after their regular work hours and punch back in at the start of their overtime hours, making a note on

1/ No representatives of Local 3055-D were present at this meeting.

the card to show overtime had been worked. Employees were also told that if they worked on weekends they were expected to punch in and punch out appropriately.

At the instant hearing, District witnesses admitted that although each time clock had a rack next to it where employees were expected to keep their time cards, there were at least two employees who traveled between buildings and therefore were known to carry their time clock cards with them. Wenzel stated that time clock cards are "supposed" to be in the racks but that he did not know if there would be a penalty for employees who did not store their time clock cards in the racks at the buildings or whose cards could not be found there at collection time. Wenzel admitted that no District representative has told employees that they must store their cards in the racks next to the clocks.

Wenzel stated that it was possible, although it had not happened to date that an employe whose time clock card was not found in the rack would not be paid on time for the pay period. 2/

Wenzel stated that he did not know if any District representative had told employes that if they worked more than 8 minutes past their regular quitting time that they would automatically be paid for 15 minutes of overtime work. 3/ To the date of the instant hearing, no employe has been docked pay for punching in up to 8 minutes late. Under past practice, employes were never docked pay for writing down that they were 7 or 8 minutes late under the handwritten time card procedures. The District has no rules relating to employe tardiness. Director Keller stated that he did not believe that employes being a couple of minutes late should be acted upon. Keller stated that the time clocks would merely give the District a better idea if it had a pervasive problem with hours worked and tardiness than did the handwritten time card procedure.

POSITIONS OF THE PARTIES:

Initial Briefs:

Unions:

At the hearing, the Unions agreed that the District has the right to put in time clocks but that the District's installation of the clocks amounted to a change of the District's Article III rules and regulations, which had been set over the years by past practice. The Union argued that Article III requires the District to notify the Union of a change in the rules, seven days prior to the changes being made. In the Union's view, the fact that the District instructed employes that they were required to punch the clocks where no such requirement had previously existed, implied that there would be some penalty meted out against employes who refused to punch the clocks. Therefore, the Union asserted, the undisputed facts demonstrated that the District changed its rules in violation of Article III by installing the time clocks and instructing employes to use them. The Union resisted the District's argument that it is limited to an Article I remedy in this case by stating that it clarified the remedy it sought early on in the grievance procedure and the District therefore knew what the Union would argue and claim, so that the District cannot now claim unfair surprise.

2/ This had been the case in prior years when employes made out handwritten time cards.

3/ This was also true and had been the District's practice when employes made out handwritten time cards.

In its brief, the Union argued that the District's directing employes to punch a time clock and to keep the cards in the rack next to the clocks constituted work rules which necessarily affect wages, hours and conditions of employment. The Union noted that Supervisor Wenzel testified to the real possibilities regarding what might happen if employes did not punch in, if they lost or misplaced their clock cards, and how overtime and tardiness might be treated in the future. The Union pointed to the second sentence of Article III and urged that the District's installation of the time clocks must affect wages, hours and conditions of employment so that any rules regarding the clocks should have been submitted to the Union prior to the effective date of those rules. Therefore, the Union sought an order that the District cease and desist from using the time clocks until the District has submitted its "rules" regarding the clocks and their use to the Union pursuant to Article III of the agreement, and that any affected employes be made whole for any losses. 4/

District:

At the hearing, the District urged that it merely changed the means by which it chose to determine hours worked by employes, which is a right specifically reserved to the District by Article II of both labor agreements. The District noted that its change from handwritten cards to time clock cards was similar to an employer changing its method of making copies, from using carbon paper while typing to photocopying original documents. The District further asserted that it had a rational and reasonable basis for installing the time clocks because: Time clocks are a more reliable and accurate means of recording work hours than are handwritten time cards. The District also contended that the employes received adequate advance notice that the clocks would be installed and that the Unions' grievances and the remedies sought therein, should be limited by the Union's reference to Article I in the grievances.

In its brief, the District contended that it had retained the management right to install time clocks because no specific or express terms of the Unions' labor agreements limited the District's right to determine (or change) the methods or means by which the District conducts its operations (Article II (L)). The District noted that its decision to install time clocks was specifically allowed by Article II of the labor agreements. For example, Articles II (G), Article II (I), and Article II (J) allowed the District to do what it did in this case.

The District urged that the instant case must be distinguished from Village of Sturtevant, Dec. No. 19543-A (WERC, 2/83) and cases like it. There, the employer implemented a time clock where employes had never previously been required to record their time. Here, the District urged, the employes have always been required to record their work time and that the time clocks would merely provide a different means of accomplishing this task, mechanical rather than handwritten. The District cited several cases which it urged were on point and supported its contentions. 5/

Even if the installation of the time clocks could be considered to

4/ There was no evidence submitted here that any employes had suffered any losses due to the installation of the time clocks as of the instant hearing.

5/ Carrier Corp., 38 LA 5 (1962); City of Waterbury, 52 LA 963 (1969); Western Airlines, Inc., 67 LA 1118 (1976); Entex, Inc., 73 LA 330 (1979).

involve "rules or regulations," as the Union had argued, the District urged that the old requirements of Article III were met by Wenzel and Keller's having informed employes that time clocks would be installed, many months before the installation actually occurred. After the District gave employes this notice, the District admitted, it had an obligation to bargain the impact of the clocks if requested, but that the Union never made a request to bargain the potential impact. Indeed, the District urged, no evidence was proffered to show that there was any actual impact on employes due to the District's change to the time clock method of operation.

In all the circumstances, the District asserted no violation of the labor agreements has occurred here and it sought denial and dismissal of the grievance in its entirety.

Reply Briefs

Union:

In its reply brief, the Union emphasized that the Employer had created various rules regarding the use and maintenance of time clock cards. The Union observed that if the employes would only be paid if they properly clocked in and out and only if they kept their cards in the proper place, then the Employer must have made new rules and regulations in violation of Article III of the labor agreement. The Union noted that it never took the position that the Employer could not implement the time clocks, only that the Employer had to abide by Article III of the agreement. The Union sought that the grievance be sustained on the facts of this case.

Employer:

The District emphasized that its decision to change from a handwritten method of timekeeping to a mechanical method of timekeeping constituted only a change in method/means of timekeeping, in a situation where timekeeping had always been required of employes. The District further asserted that even if putting in time clocks could be construed as constituting a work rule, the labor contracts do not prohibit making rules (e.g. putting in clocks). Rather, the District contended the contracts merely require impact bargaining over the imposition of the rules. Here, the District asserted, the Union failed to prove that there was any impact on wages, hours or conditions of employment occasioned by the installation of the time clocks. The District referred the undersigned to the cases cited in its initial brief and again urged denial and dismissal of the grievance.

DISCUSSION:

The District argued that the Local Unions should be bound and their remedy should be limited by the Unions' reference in the original grievances to Article I. The documents in evidence show that the original grievances herein stated the Unions' complaint as, "Time clock installed." The remedy sought in the grievances was to "[b]argain in time clocks or have everybody or hourly people punch clocks." I note that the labor agreements do not prescribe the proper form or content of grievances. I find that the Unions' description of their reason for complaining and their statement regarding the remedy they sought are sufficiently clear so that the District was properly notified and understood why the grievance had been filed and what remedial action would satisfy the Unions.

I note that Article I contains general language prohibiting the District from discriminating against bargaining unit employes "because of membership in the Union or because of Union activities." The facts in evidence show that up

to the date of hearing, only housekeeping and custodial employees were required to punch clocks, thus exempting other District employees such as office/clerical employees not covered by the labor agreements in this case. Therefore, the allegation in the grievances that Article I violations had occurred was arguably appropriate. The Union also clarified its position early in the grievance procedure to include its contention that the District's installation of the time clocks also violated Article III of both labor agreements. The District responded to the Union on the merits of the grievances throughout the grievance procedure, raising for the first time at the instant hearing, its objections to the content of the grievances. In the circumstances of this case, I find that the District's objections to the content of the grievance forms are insufficient grounds upon which to dismiss the grievances out-of-hand. 6/

I turn now to the merits of these grievances. The first issue which must be determined is whether requiring employees to punch a time clock, in itself, constitutes a condition of employment. I note in this regard that the employees involved here have been required to complete handwritten time cards for at least the 24 years prior to the 1991-92 school year. The employees' task appears from the documentary evidence to have included writing down each date, their job title, putting a starting and quitting time, and dating and signing the time card. The amount of time consumed must have been minimal and time card preparation could not be said to have constituted a substantial portion of the employees' jobs. Under the time clock system, on the other hand, the employees are required to spend even less time and effort keeping track of their work hours: They simply take their time cards from the racks next to the clocks, insert their cards in the clock machine for mechanical stamping of the date and time and replace the cards in the racks. Thus, under the new time clock system, no appreciable additional burden was placed on employees by requiring them to clock in and out.

Significantly, the Union proffered no evidence to show that the content of employees' jobs has been materially changed by the installation of the time clocks. Furthermore, there was no evidence put on the record that the hours of work or the pay received by employees have changed due to the installation of time clocks by the District. Although the Union here sought a make-whole remedy, it offered absolutely no evidence to demonstrate that any employees have been injured by the installation of the time clocks. In addition, there is no reference to the use of manually prepared time cards or to any other method of timekeeping in the effective labor agreements. The District has no work rules or policies regarding the use of handwritten time cards for the recording of work time. Indeed, the District does not have any policy or work rule relating to tardiness. Furthermore, the District has never disciplined any employee in these bargaining units for being tardy and no grievance has ever been filed regarding the former requirement to fill out time cards by hand. The District's practice regarding when overtime should be paid to employees has also remained the same for approximately the past 25 years. In the circumstances of this case, not only does the evidence fail to show that the District's change of its time keeping method (from manual to mechanical) amounted to a change in a condition of employment, but also the Union failed to prove that the wages or hours of work of employees have been affected by the installation of the clocks.

6/ It is significant as well that Article II of the Local 3055 labor agreement states that "The exercise of management rights. . . shall not be interpreted so as to deny the employee's right of appeal." The District has argued that Article II in both agreements allows it to do as it did here.

The time clock method of recording work time is also more accurate and reliable than the handwritten method previously used, as virtually all potential for human error is removed by the use of the time clocks, including the loss or misplacement of time cards formerly carried by employes due to the installation of time card racks next to the clocks. Furthermore, the undisputed evidence showed that Supervisor Wenzel's hours of work have not in the past and do not now allow him to be present at all employe starting and quitting times. 7/ This evidence tends to support the District's argument that it installed the clocks to insure a more efficient and accurate method of timekeeping for employes with varying work hours. Indeed, the Union proffered no evidence that the District had intended to discriminate against employes in these bargaining units by installing the time clocks.

A secondary issue exists in this case. That is, whether Article III of both labor agreements limits the District's Article II management rights. The answer must be that under the facts of this case Article III does not limit the District's management right to change its timekeeping method from a manual to a mechanical one. Article II of the labor agreements contains broad management rights language which vests in the District, inter alia, the rights to manage its business, to determine and change the methods and means of operation, to direct employes and maintain efficiency. The statements of reserved rights in the effective labor agreements support the District's arguments in this case. Juxtaposed against these management rights is the language of Article III in each agreement. That language requires that when the District adopts and publishes or amends rules and regulations that affect wages, hours and conditions of employment, it must first submit the effect of these rules and regulations to the Union prior to the effective date of the rules and regulations. 8/

The record in this case shows that the District has not adopted or published any rules and regulations regarding time clocks. Indeed, the record demonstrates that the District and its supervisors have not contemplated and in part are confused regarding what if any potential affect the installation of time clocks may have on employes in the future. Specifically, District witnesses indicated the District has no rules regarding the installation or the use of the time clocks, that employes have merely been told informally when and how to punch in and out and where to keep their cards. These instructions to employes were neither adopted nor published by the District and I do not believe they rise to the level of rules and regulations pursuant to the labor agreements. Therefore, in the circumstances of this case, and in light of the fact that no employes have been disciplined due to the use of the clocks and no employes have been docked pay for being tardy, I find that Article III is not applicable. 9/

7/ I note specifically that Business Manager Keller stated that he did not believe any employes had been stealing time from the District under the handwritten time card method of recordkeeping although that may have occurred in the past.

8/ I note that Article III of both agreements uses the directory language "shall."

9/ I specifically do not address the issue what ruling would be appropriate in a case where the District had disciplined an employe or otherwise affected the employment of an employe based upon his/her punching of the time clock.

I find that the evidence failed to show that any policy, rule or contractual provision has been contravened by the District's installation of the time clocks and there was no evidence to show that the Union ever requested that the District bargain regarding the affect of the installation of the time clocks. Based upon the relevant evidence and argument 10/ in this case, I therefore issue the following

10/ Village of Sturtevant, Dec. No. 19543-A (WERC, 2/83) cited by the District is factually distinguishable from the instant case. The other cases cited by the District were on point and instructive.

AWARD

The District did not violate the collective bargaining agreements by instituting the use of time clocks.

The grievances are therefore denied and dismissed in their entirety.

Dated at Madison, Wisconsin this 28th day of May, 1992.

By _____
Sharon Gallagher Dobish, Arbitrator