

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 : Case 9
 WAUNAKEE SCHOOL DISTRICT : No. 46802
 : MA-7073
 and :
 :
 WAUNAKEE TEACHERS ASSOCIATION :
 :

Appearances:

Ms. Alice O'Mahar, Director, Capital Area UniServ-North, 4800 Ivywood
Mr. Michael J. Westcott, Esq., Axley, Byrnelson, Attorneys at Law,
 Two East Mifflin Street, P.O. Box 1767, Madison, Wisconsin 53701-
 1767, appeared on behalf of the District.

Trail,

ARBITRATION AWARD

On January 3, 1992, the Waunakee School District and the Waunakee Teachers Association filed an arbitration request with the Wisconsin Employment Relations Commission, asking the Commission to appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. A hearing was conducted on May 7, 1992 in Waunakee, Wisconsin. The proceedings were not transcribed. Post-hearing briefs were filed and were exchanged by June 11, 1992.

This Award addresses the right of the School District to rotate middle school bus duty in a way that avoids additional compensation to teachers performing that task.

BACKGROUND AND FACTS:

The facts underlying this dispute are not meaningfully in question. During the course of the hearing the parties entered into the following stipulation: "For the last several years, teachers have been assigned after-school bus supervision in lieu of a one-half study hall". It appears that since the early 1980's at least two middle school teachers have been given bus duty supervision in lieu of a one-half study hall. Given this method of assignment bus duty has been tacitly if not overtly recognized as a supervisory assignment. Bus supervision required the assigned teacher, on a daily basis, to wait outside of the middle school from 3:20 p.m. until such time as the buses depart. Typically, this is no later than 3:45 p.m., and most commonly is earlier. The purpose of the assignment is to maintain order among the students.

During the negotiations leading to a 1991-93 collective bargaining agreement, the parties changed the language applicable to this dispute. The changes were made during the spring of 1991 and are set forth below in their entirety.

On or about August 15, 1991, middle school Principal Dick Hagen advised his staff that bus supervision would be performed on a rotational basis during the coming year. Hagen issued the following memo:

WAUNAKEE COMMUNITY MIDDLE SCHOOL
 MEMO

TO: Middle School Staff

FROM: Dick Hagen, Principal

RE: PM Bus Supervision for 1991-92

DATE: August 15, 1991

Bus supervision this year will be on a rotational basis (just like hall supervision) with all available teaching, administrative, and guidance staff assigned. Two staff members will be assigned with the following duties.

North end of South Street ... 3:23 P.M. until the first 4 buses leave:

Be at the North driveway entrance on South Street supervising students waiting for buses and students on bikes leaving school grounds. Students waiting in line must be kept orderly and behind the yellow lines until the bus comes to a complete stop before loading.

Bikers must stop at the exit and wait for traffic and the buses as they are loading.

South end of Buses on South Street ... 3:23 P.M. until the last bus leaves:

Supervise the waiting and loading of buses for the last four bus lines. Keep students orderly and behind the yellow lines until the bus comes to a complete stop for loading.

As often as possible, I will be out at the buses to supervise the loading.

Thank you for your help and assistance in this supervisory assignment.

ATTACHED: PM Bus Supervision Assignment Sheet (green)

The effect of the memorandum was to alter the system of bus supervision from the prior system where two individuals did all of the supervision and received a study hall offset, to one where all faculty members were required to rotate through bus supervision, and none of them received an offset of any sort. The rotation results in an individual teacher being required to perform the duty 10 or 11 times per year. Each teacher is required to attend to bus duty until the last bus leaves. 1/ It is a fair summary of all testimony that the buses rarely leave after 3:45 p.m. and that the duty typically takes somewhere between five and 15 minutes dependent upon the promptness of the buses. It was Hagen's testimony that he is available to cover for a teacher in the event that teacher needs to absent him or herself for unforeseen reasons.

Hagen's memo, and its concomitant change, prompted a response from David Chalgren, the Association's grievance committee representative. Mr. Chalgren's memo is set forth in its entirety:

Aug. 30, 1991

1/ The contractual work day ends at 3:45 p.m.

To: Mr. Hagen

From: David Chalgren, grievance committee representative.

Dick, as you can see I've added a new responsibility this year by serving on the grievance committee. In regards to this position I will be looking at a possible grievance concerning the scheduling of bus duty.

Many of my colleagues have expressed frustration and concern with this added duty. Much of the discussion has centered around the fact that this has always been a paid duty and in the past several of us have assumed this duty in lieu of other class room assignments.

Another aspect of this duty is that it will cut into our teaching obligations like: meeting with students after school, committee meetings, prep time, and many other emergency student needs that should be dealt with (sic) immediately after school.

The very fact that bus duty might even extend our day over contractual agreement, ie. buses that arrive after 3:45, has many teachers upset.

Our Middle School teachers have always responded to administrative requests in the past, like taking detention duty, but, we feel we are being put into a difficult situation with this new duty. If we complain, it sounds like we don't care, and yet it (sic) we simply accept this duty we are vulnerable for other duties that may pop-up resulting in even less prep time.

I would like this meeting to be on an informal basis for discussion purposes only and give you an opportunity to respond to these concerns.

Could you please set a date at your convenience. I would prefer to meet after school.

Thanks for your concern in this matter.

Sincerely,

David Chalgren

The matter was not resolved and the Association proceeded to file a grievance.

Hagen investigated the Association grievance and provided the following Step 2 response:

TO: David Chalgren
David Lucey

FROM: Richard Hagen, Middle School Principal

DATE: Oct. 7, 1991

RE: Grievance No. 91-1 - Bus Duty

After further investigation, this is my written reply to your grievance submitted to me, in writing, on September 30, 1991. This is to indicate that this grievance is being denied at level 2 for the reasons indicated below. These are as follows:

1. Bus duty is a 5 to 15 minute duty that is comparable to morning hall duty and should not be linked with a regularly scheduled and assigned 45 minute study hall or a 35 minute lunch supervision. As such bus duty at the middle school only occurs once every 17 school days or ten or eleven times a year for each staff member on the rotational schedule.
2. Page 26, article A, section 2 groups (study hall or supervision) together with commas and does not indicate all the other administrative or non-teaching activities. This indicates to me that the supervision, for work load purposes, should be comparable. A rotational bus duty or an occasional morning hall duty should not be linked with study hall in this instance. I don't believe that this was the intention of those parties that agreed to this wording by intentionally linking supervision with study hall and their use of commas.
3. Bus duty is not considered a supervisory assignment as part of the normal teaching load in the district. At the elementary center teachers are assigned after school duties of crossing guard, bike duty and the loading of buses without regard to work load. Summer school teachers of all grade levels share this duty during the summer school without additional compensation. In the past, guidance counselors and administrators have been assigned this duty at the middle school and the high school. It has not always been a paid position.
4. Page 3, article C - Management Rights - number 5 indicates the management right "to determine class schedules, hours of instruction and the duties and responsibilities and assignments of teachers and other employees with respect there to, and with respect to administrative and non-teaching activities and the terms and conditions of employment." This gives management the right to assign morning hall supervision and bus supervision as duties within the contracted school day.
5. The bus duty supervision is within the 7:45 a.m.

to 3:45 p.m. grade 6-12 teachers' school day described on page 27, article B, section 2.

Distribution: Building Principal's Grievance File
Grievants
District Administrator

The denial was appealed to the Superintendent of Schools, Eugene J. Hamele. Mr. Hamele considered the grievance and denied it. His denial included the following explanation:

Bus duty, hallway duty, and/or playground duty are duties which have been assigned to staff in this district on a rotating basis as a practice for many years. They have not been and are not defined or considered "a supervisory duty" in the language of Article A, Section 2 on Page 26. They are simply shared responsibilities that are rotated regularly among staff.

"Supervisory duties" in Article A, Section 2 includes study hall, permanent (semester or year long) lunch supervision duty or other duty in lieu of a study hall or a teaching assignment and would be for a period of time similar to a regular class period.

Therefore, your grievance is denied.

The Association grievance committee was not satisfied with Mr. Hamele's response. That committee submitted the following letter to the Waunakee Board of Education, in an attempt to explain their objection to the new method of bus duty:

Nov. 11, 1991

To: Board of Education

From: Grievance committee, David Lucey, John Webber, Don Jarvis, Bill Blobner, Randy Enge, Lori Meyer, David Chalgren, representative

Re: Bus duty grievance 91-1

Middle school teachers have expressed frustration and concern this year because of the added duty of bus supervision. After many complaints were raised, and after a meeting with Mr. Hagen did not produce a satisfying solution, the grievance committee decided to file a grievance on behalf of middle school teachers.

We believe that bus supervision violates the 1991-93 Educational Agreement under Article A, sections 2, and 5 page 26 and Article B, Section 2, page 27.

The grievance centers around 3 issues:

1. In the past, two to three middle school staff members have accepted bus supervision in lieu of a study hall or a classroom assignment. I have included three letters testifying to that condition from Pete

O'Neil, Randy Enge, and Bill Blobner.

The 89-90 Middle school schedule also support this fact. It shows:

Bill Blobner with 5 classes, a T.A., and bus supervision.

Pete O'Neil with 5 classes, a T.A., and bus supervision.

(normal load is 5 and 1/2 classes, plus a T.A.)

The 85-86 Middle School schedule shows:

Randy Enge with 5 classes, a T.A. and P.M. Bus supervision

Pete O'Neil with 5 classes, a T.A. and P.M. Bus supervision.

2. Bus supervision can extend beyond the normal working day, ie., past 3:45 pm. It is unreasonable to suppose that the bus supervisory will simply "go off duty" at this time or find an administrator to act as a replacement. This duty after school interferes with other teaching responsibilities like preparation time, committee meetings and working on immediate student needs.

3. A genuine concern for student's safety was expressed by many staff members based on several conditions:

The inconsistency of staff members to determine proper safety precautions and procedures. Even now, after written instructions have been received, inconsistency remains a concern.

Some staff members are not able to leave their classes promptly at 3:21 to get to the bus lines. Some staff members have completely forgotten about their assignment because they became involved in student matters that needed immediate attention.

Our solution/remedy to this grievance is as follows:

1. No Middle School staff member with a full load be assigned bus supervision.

2. Next year we return to the past practice of assigning bus supervision in lieu of study hall or another class.

Thank-you for your attention in this matter.

Sincerely,

David Chalgren, grievance committee representative

The grievance was denied by the Board, ultimately leading to this arbitration.

Middle school teachers have other rotational assignments. There is a

morning hall supervision rotated among faculty members. That supervision, conducted from 8 to 8:20 a.m. each morning is assigned each teacher at the middle school approximately 7 or 8 times per year. The practice of assigning teachers in this fashion is long-standing, and has never been the subject of a grievance. Additionally, detention supervision is assigned members of the middle school faculty on a rotational basis. Such detention occurs from 3:20 to 4:00 (running as late as 4:10 p.m.) once per week. Each teacher is assigned such supervisory responsibility a few times per year. This task was formerly a compensated task but sometime in the early 1980's compensation was withdrawn and teachers were placed in non-pay status while performing the work.

David Lucey, a member of the bargaining unit who participated on the negotiations team and was twice the chief negotiator for the Association, provided some background on the history of the detention supervision. According to Mr. Lucey, detention supervision was paid at one time. For a number of years a man by the name of O'Neil was paid to perform such duty. There arose what Lucey describes as a financial crunch, and the Principal was advised that he was to save money. One method by which the Principal intended to save money was to cease paying for detention supervision. Teachers were told that they would handle detentions in their own room and that central detention would be eliminated. The staff protested the move. According to Lucey it was the universal belief of the faculty that the children are kept under much better control in a central after-school setting than in an individual room setting. In an effort to maintain the centralized after-school detention teachers volunteered to do it at no charge rather than have it done in their rooms. It was made clear to the District that their willingness to do this would last only until the budget was restored. Time passed, and the budget was never restored. Staff continued to perform the work without additional compensation for approximately a decade. According to Mr. Lucey the staff decision to perform the work was one made in the best interest of the system. Individuals knew they were performing work they were not required to do and never grieved. Lucey indicated it may have been a mistake not to grieve.

ISSUE:

The parties stipulated to the following issue:

Did the District violate Part V, Article A(2) (page 26) of the collective bargaining agreement by assigning after-school bus supervision on an uncompensated rotating basis among all available middle-school staff, when it formerly assigned such duty to two (2) individuals on an on-going basis, each of whom performed the work in lieu of a one-half (1/2) study hall?

RELEVANT PROVISIONS OF THE 1989-1991 AGREEMENT:

. . . .

J. Normal Teaching Load:

- 1) A normal elementary (K-5) teaching load (per day) shall consist of 360 minutes of instructional teaching averaged per week, plus a duty free lunch period of 30 minutes and 30 minutes of preparation time per teaching day averaged per week. Maximum class load per teacher is

according to Board Policy IEC - Class Size.

- 2) A normal middle school (6-8) teaching load shall be based on an 8 period day and shall consist of 5.0 classes of instruction, one preparation period, one teacher/advisor group and .5 study hall. If a teacher so accepts having 6 classes of instruction the entire school year and a preparation period, they shall be compensated 8.15% of their base salary upon completion of the semester assignment with payment on or by 6/15/87. The principal shall be responsible for scheduling and assigning classes.

The following departments are excluded in 6-8 normal teaching load: Guidance and Counseling and Library Services.

. . .

RELEVANT PROVISIONS OF THE 1991-1993 AGREEMENT:

Part XIV, Article A, Section 1.

. . .

5. Decision of the Arbitrator: The decision of the arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely on interpretation of the contract in the area where the alleged breach occurred. Any modification and addition to or deletion from the strict terms of this Agreement by the arbitrator shall be considered a per se violation of Sec. 298.10 of Wis. Stats.

. . .

Part III, Grievance Procedure, Article F

. . .

2. A normal middle school (6-8) teaching load shall be six class periods to include classroom instruction, study hall or supervision, or teacher-advisor class. There shall be no less than eight periods in the normal day. If a teacher so accepts having an additional assignment in a semester, he/she shall be compensated 8.15% of his/her base salary upon completion of the semester assignment with payment on or by 6/15. The principal shall be responsible for scheduling and assigning classes. Study hall ratio of students to teacher is not to exceed 50 to 1. Teacher-advisor classes must average 20 students or less per section.

. . .

4. The following departments are excluded in the normal teaching load outlined above: library services, guidance and counseling, and teachers of exceptional needs students.
5. In order to facilitate flexibility in scheduling classes, teachers may accept teaching assignments outside of the normal workday or structure in lieu of the normal assignment, or for additional compensation at the per diem hourly rate, as agreed upon by the Board and individual teachers. The WTA will be consulted on such agreements.

. . .

Article B - Workday

1. K-5 Teachers' school day will be 7:30 a.m. to 3:30 p.m. Teachers may leave at 3:15 p.m. on Fridays and days preceding a holiday.
2. 6-12 Teachers' school day will be 7:45 a.m. to 3:45 p.m. or those teaching "zero hour" will be 7:15 a.m. to 3:15 p.m. Teachers may leave at 3:30 p.m. or 3:00 p.m. on Fridays and days preceding a holiday.

. . .

PART XIV - EDUCATIONAL AGREEMENT

Article A - Entire Memorandum of Agreement

1. This Agreement supersedes and cancels all previous agreements, verbal or written or based on alleged past practices, between the School District and the Association and constitutes the entire agreement between the parties. Any amendment or agreement supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto.
2. The parties further acknowledge that during the negotiations which resulted in this Agreement each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the are (sic) of collective bargaining and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this agreement. Waiver of any breach of this agreement by either party shall not constitute a waiver of any future breach of this Agreement.

POSITIONS OF THE PARTIES:

The Association contends that Article A(2) defines the workload. Bus duty is an assignment, and as such teachers have the option to decline. Here, teachers were directed to perform the work, they did so, and filed a grievance. Their redress is available in the 8.15% overload pay which should be paid and/or prorated as is appropriate. The Association contends that the District's view that only certain types of assignments qualify invites mischief. For instance, lunch duty could become rotational and unpaid under the District theory. According to the Association, the District would be free to rotate certain class assignments and therefore avoid paying. The Association contends that neither of these potential outcomes nor the bus assignment rotation promulgated by the District were anticipated by the parties during their negotiations.

The Association contends that the history of the clause supports its position. Prior to adding "or supervision" to the workload language the practice was that bus duty was considered a part of workload in lieu of study hall. During negotiations leading to the change in language, bus duty was never discussed. With the change, the District assured the Association negotiators that no change was contemplated. The Association offered evidence that the parties had an exchange at the bargaining table that resulted in District assurances that no change in interpretation was intended by the change in the clause.

The Association contends that this arbitrator is not free to disregard the practice in favor of the zipper clause. The District referred to and relied upon the practice throughout the processing of the grievance and is not free now to raise the zipper clause as a shield. Both parties have relied upon the practice, and the District is not free to repudiate it. The Association believes the history of the use of the duty supports its position. It regards after-school detention as an exception, one which was well-meaning and should not now come back to haunt the Association.

The District points to the entire memorandum of agreement provision and describes it as a common clause with a clear purpose. That purpose, argues the District is to wipe out prior practices. The District notes that practices in preceding years are of little probative value anyway since they occurred under different contract language. The current contract added the words "supervision" and "additional assignment". Those terms change the substantive meaning of the provision to which they were added. The existing language has been in effect for approximately 9 months. During that term, all rotational assignments have been uncompensated (i.e. hall and detention). To the extent this arbitrator is inclined to look at any interpretative practice, the appropriate practice, argues the District is the nine-month term of the agreement in which the language under consideration has been interpreted. Neither the hall supervision nor the detention supervision have ever been grieved.

Even a consideration of the practice leads to a conclusion that there has been no violation of the collective bargaining agreement. Hall supervision has existed and has historically been unpaid. Detention was at one point paid and then pay was removed. The District argues that even the previous agreement, the 1989 through 1991 agreement, would not have been violated by its actions in this regard. That agreement only provided for additional compensation where the teacher took on an additional class of instruction. That is not the case here and would not warrant additional compensation even under the prior agreement. In the District's view, a teaching load is not the equivalent of working load.

It is the District's view that teachers are paid to work from 7:45 a.m. to 3:45 p.m. The work in question is already paid for.

The District contends that it is not the job of this arbitrator to decide what is right or equitable, but rather to interpret the contract so as to determine whether or not there has been a breach. In this case, there has been no breach argues the District.

The District contends that Article A, Section 2 is straightforward. Normal teaching load is 6 class (emphasis by the District) periods. Class periods are then defined. The only reasonable construction is that an assignment must be akin to the defined class periods. That language cannot be construed as the Union would, especially in the face of morning hall supervision and detention. Teachers are entitled to 8.15% only upon completion of a semester assignment. This language reflects the value of an additional class period for an entire semester. Rotating bus duty does not begin to rise to that level of commitment.

DISCUSSION:

Among the changes negotiated into the 1991-93 collective bargaining agreement include a provision in Article F, paragraph 2 providing that "study hall ratio of students to teachers is not to exceed 50 to 1." According to the testimony of Principal Hagen, this provision caused the District to seek out additional study hall teachers. In an effort to honor this provision with existing resources, the District determined to rotate bus supervision and eliminate the exemption for study hall, thus creating more study hall teachers.

There is little dispute that prior to 1991 bus duty was treated as a supervision. There is also little dispute, or there can be little dispute that effective with the 1991-92 school year, rotated bus duty was not treated as a supervision. The question presented here is whether or not the District had the contractual ability to rotate bus duty and eliminate it as a supervision.

Article F, paragraph 2 does not, on its face, preclude the District from rotating bus duty. I agree with the Union's contention that the first two sentences define the workload of employes covered by the Agreement. That workload, according to the first sentence "includes classroom instruction, study hall, supervision, teacher/advisor class". Read together, the first and second sentences assure teachers that the day will have no fewer than eight periods, no more than six of which will be assigned to perform the included work. On its face, the clause appears to me to outline the basic workload performed by members of the bargaining unit. As such, the references in Article F(2) to assignments and supervisions can only make sense where they refer to ongoing, daily periods as that term is used in the Article. It is difficult to read these words to include a ten to 20-minute assignment performed a dozen or so times a year. This construction is confirmed by the third sentence which provides additional compensation for "an additional assignment in a semester". If "additional assignment in a semester" refers to episodic and brief work assignments, the 8.15% of base is indeed generous compensation. On the other hand, if the "additional assignment in a semester" language refers to daily class periods, the 8.15% is perfectly logical as a percentage of the salary normally earned by the teacher. There is nothing in this clause that addresses pro rata compensation.

The Union is concerned that should the Board's construction of Article F(2) be sustained, it provides an opening for mischief. This mischief is described as the possibility of the District including lunchroom supervision as a rotating assignment and possibly even including classroom instruction on a rotating, unpaid basis. Those are matters not before me, and I would offer no speculation as to what the Board might do should it prevail in this matter. I would only note, that the reverse is equally true. Should the Association prevail in this matter, there appears to be no end to mischief that it or its

members might bring by claiming compensation for any and all ministerial tasks surrounding and a part of, the workday. I would also point out that Hagen's October 7 grievance draws a distinction between the relatively brief bus duty periods and the lengthier study hall and lunch supervisions.

The District contends that part 14, Article A, Entire Memorandum of Agreement, precludes consideration of whatever practice may have existed between the parties. I agree. The "zipper" clause specifically "supercedes and cancels all previous agreements, verbal or written, or based on alleged past practices. . ." The parties have specifically agreed to cancel all past practices. They could not have done so more clearly. I am not free to ignore this provision of the Agreement. The Union has in essence argued that the District has waived its right to invoke the "zipper clause". The Union contends that an examination of the practice and the history of the parties with respect to their grievances precludes the District from raising the "zipper". The Union notes that the answers to the grievance comment upon the practice between the parties. According to the Association, the "zipper clause" is void and/or unenforceable. I disagree. The "zipper clause" is a part of the collective bargaining agreement itself. The Union points to collateral documents (i.e., bargaining history, the grievance procedure answers, and the actions of the parties in conducting their business) as forming the basis to remove the contractual provision. Ironically, the contractual provision is one which has as its fundamental purpose, the elimination of all of these extra contractual measures from arbitral consideration. That is, the purpose of the "zipper clause" is to preclude my examination of the grievance history, the past practice of the parties, and other matters which led to the formation of this agreement.

The Union has urged an examination of the parties' practice and of their bargaining table conduct relative to interpreting the language. As noted, I regard the "zipper clause" as precluding meaningful examination of either the practice or the bargaining history. The District has encouraged an examination of the practice in such a way that excludes prior years and includes the current year. Changed language notwithstanding, I don't believe such a distinction is appropriately drawn. It appears to me that for whatever the reason, hall supervision and detention have been performed by bargaining unit members on an unpaid basis for a considerable period of time. The District has treated bus duty differently. However, I see no meaningful distinction, contractual or otherwise, between hall supervision, bus duty and detention. If anything, detention could be singled out on the basis that it exceeds the normally-scheduled workday. From all the testimony it appears to me that bus duty rarely, if ever, extends beyond 3:45, the end of the workday for Middle School teachers.

In summary, it is my reading of the collective bargaining agreement that it does not specifically bar the rotation of bus duty. The "zipper clause" in my view meaningfully excludes consideration of extra-contractual practices and bargaining table conduct. Should the practice as I understand it to exist be considered, in my view it would tend to lend more support to the District's construction of the language than it would to that of the Association.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 10th day of September, 1992.

By William C. Houlihan /s/
William C. Houlihan, Arbitrator

