

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

GREEN BAY BOARD OF EDUCATION
(FOOD SERVICE) EMPLOYEES UNION,
LOCAL 3055A, AFSCME, AFL-CIO

and

BOARD OF EDUCATION, GREEN BAY
AREA PUBLIC SCHOOL DISTRICT

Case 157
No. 51261
MA-8547

Appearances:

Mr. James E. Miller, Staff Representative, Wisconsin Council 40, 936 Pilgrim Way #6, Green Bay, Wisconsin 54304, appearing on behalf of Green Bay Board of Education (Food Service) Employees Union, Local 3055A, AFSCME, AFL-CIO.

Mr. John D. McKay, Attorney at Law, McKay Law Offices, S.C., 414 East Walnut Street, Suite 240, Green Bay, Wisconsin 54301, appearing on behalf of Board of Education, Green Bay Area Public School District.

ARBITRATION AWARD

Green Bay Board of Education (Food Service) Employees Union, Local 3055A, AFSCME, AFL-CIO (Union), and Board of Education, Green Bay Area Public School District (District or Employer) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for arbitration of unresolved grievances by an arbitrator appointed by the Wisconsin Employment Relations Commission (Commission) from its staff. On July 5, 1994, the Union filed a request with the Commission to initiate grievance arbitration in this matter. The District concurred in said request. The Commission appointed James W. Engmann, a member of its staff, as the impartial arbitrator in this matter. Hearing was held on October 5, 1994, in Green Bay, Wisconsin, at which time both parties were afforded the opportunity to call witnesses, present other evidence and to make arguments as they wished. Said hearing was transcribed, a copy of which was received on October 11, 1994. The parties filed briefs and reply briefs, the last of which was received on December 22, 1994. Full consideration has been given the evidence and arguments of the parties in reaching this decision.

STATEMENT OF FACTS

From at least 1982 through 1992, food service employees were informed of and paid for attending meetings where bumping of positions would take place. As an example, the memorandum for the January 23, 1992 bumping meeting reads in part as follows:

TO: All Foodservice Personnel

FROM: Sue Baier
Foodservice Specialist

RE: Bumping Meeting of January 23, 1992

DATE: January 9, 1992

This is to inform you that a bumping meeting will be held Thursday(,) January 23, 1992 at 6:15 p.m. at Preble High School Cafeteria. Enclosed please find copies of **Current Positions, Position Changes and a Seniority List.** Please bring these enclosed copies with you to the meeting.

1. All positions with an increase in hours are treated as a posting. They will be bid first. All successful bidders have a 7 day trial period.
2. All positions with a decrease in hours, a change in time schedule, or a job opening will be involved in the bumping process. There is no trial period with a bump.
3. There is no time limit on the meeting. During your bid you may stop the meeting to discuss options and think before making your decision.
4. When bidding, please stand up, state your name and current position, then state your bid.
5. All bids will be listed and read periodically throughout the meeting or listed on a chalk board.
6. District-wide changes begin on Friday, January 24, 1992.
7. **ALL FOODSERVICE EMPLOYEES SHOULD BE PREPARED WITH A PLAN OF ACTION. HAVE MORE THAN 1 JOB CHOICE IN MIND.**

If you have any questions, please feel free to contact me (448-2112) or one of the Union officers.

In 1993, the memo specifically stated that the meeting to be held was a posting meeting, not a bumping meeting. The memo also specifically stated that this was a volunteer meeting and that employees would not be paid for attendance.

It reads in part as follows:

TO: ALL FOOD SERVICE EMPLOYEES

FROM: SUE BAIER, INTERIM DIRECTOR

DATE: JUNE 3, 1993

RE: POSTING MEETING

A meeting will be held on Wednesday, June 9, 1993, at 4:00 p.m. in the BCO Gym (1st Floor).

The purpose of the meeting is to post any time changes, additions in time due to the use of orange trays, and job openings.

This is not a Bumping Meeting!

1. Enclosed is a packet of information needed for the meeting. Please study it so you are prepared. Bring it to the meeting.
2. The Seniority List will be used for Bidding (sic) on jobs. We will read down the list starting with the most senior person.
3. When your name is called from the Seniority List, do the following:
 - A. Stand and state current position.
 - B. If you want to remain at your current position, state: stay.
 - C. If you wish to Bid in a posted position, state the Bid Number as listed on the bid sheet.
 - D. All changes will begin on your first scheduled day of work for the 1993-94 school year.

4. This is a volunteer meeting. You will not be paid for attendance. The meeting should take approximately thirty minutes.

The Union did not grieve the fact that employees were not paid for attending this meeting.

In 1994, another memo was sent to employees. It read in part as follows:

TO: ALL FOOD SERVICE EMPLOYEES
FROM: SUE BAIER, FOOD SERVICE DIRECTOR
DATE: MAY 13, 1994
RE: POSTING/BUMPING MEETING

Please be advised that there will be a posting/bumping meeting on Tuesday, May 24, 1994 at 2:45 p.m. in Room 248 A & B, BCO.

This is a non-paid meeting. It is not mandatory, however it might be in your best interest to be there!

You will be receiving the list of changes by May 20, 1994. Please bring it with you to the meeting.

The meeting took approximately 45 minutes. Employees who attended were not paid for the time. The Union filed a grievance. Said grievance was not resolved through the parties' grievance procedure and is properly before this arbitrator.

PERTINENT CONTRACT LANGUAGE

ARTICLE IV

PRACTICES

All existing practices pertaining to hours, working conditions, rules and regulations not specifically mentioned in this Agreement shall continue in force as at present until they are adjusted by mutual agreement between the Employer and the Union.

The Employer further agrees to maintain all existing benefits not contained in this Agreement.

ISSUE

The parties stipulated that the arbitrator would frame the issue in the Award.

The Union would frame the Issue as follows:

Did the Employer violate the contract, including past practice, when it did not pay employees for attending a bumping meeting held on May 24th, 1994? If so, what is the remedy?

The District would frame the Issue as follows:

Did the District violate the collective bargaining agreement by not paying food service workers for attendance at a voluntary posting meeting? If so, what is the remedy?

I frame the Issue as follows:

Did the District violate the collective bargaining agreement by not paying food service workers for attendance at a posting/bumping meeting held on May 24, 1994? If so, what is the remedy?

POSITIONS OF THE PARTIES

Union

On brief, the Union argues that there is a clear past practice going back to the early 1980's of paying employees for the time spent attending meetings where bumping of positions took place; that meeting notices for said meetings never stated whether attendance was mandatory; that the Union did not grieve the fact that employees were not paid for the 1993 meeting because said meeting was different in that it only involved posting for unfilled position and did not cause any involuntary displacement of food service employees through bumping; and that the past practice involved here does not focus on mandatory attendance at these meetings but whether said meetings include a bumping process .

The Union requests that this grievance be sustained and the members attending the May 24, 1994, meeting should be paid for the 45 minutes at their individual rates of pay.

On reply brief, the Union argues that the past practice of paying employees of the Food Service Department for attending bumping meetings is both long standing and unwritten, that by its recurring nature there is an implied acceptance on the part of management, and that the

evidence presented at hearing showed that the payment for bumping meetings was a fixed and established practice.

District

On brief, the District argues that the meeting of May 24, 1994, was scheduled and planned as a non-paid, non-mandatory meeting; that when the meeting was first discussed on April 19, 1994, the District made it clear that the meeting would be non-paid; that the District got no response from the Union; that a memo was sent to the food service employees which specifically stated that the May 24, 1994, meeting would be non-paid and not mandatory; that this was confirmed at a meeting with the Union on May 17, 1994; that the District was prepared to conduct the meeting in a different fashion if pay was to be an issue; that this was intended to be consistent with the 1993 meeting which was unpaid; that prior to 1993, posting/bumping meetings have been mandatory and food service employees received pay for the time attended; that in 1993 and 1994, the meetings were not mandatory and the food service workers were not paid by the District; that whatever practices have existed have been consistent: mandatory meetings were paid and non-mandatory meetings were not paid; that the evidence does not establish a practice which would entitle these employees to payment; that the evidence in this case does not support the Union's contention that its members are entitled to be paid for the meeting on May 24, 1994; and that, therefore, the grievance should be denied and dismissed.

On reply brief, the District asserts that it does not dispute the fact that prior to 1993, employees were paid for attending meetings where bumping took place; that the District concedes that fact when it is coupled with the fact that attendance at the meetings prior to 1993 was mandatory; that in 1993, the nature of the meeting changed; that the meeting was posted as a non-bumping meeting; that it was a non-paid meeting; that in 1994 the meeting was non-mandatory and unpaid; that no past practice of paying for mandatory meetings affects those facts; and that no past practice applies in this case.

DISCUSSION

It is not in dispute that, from 1982 through 1992, food service employees received compensation for attending bumping meetings. I believe the parties agree that this record rises to the level of being a binding past practice; in any case, I so find. The questions before me is what, specifically, is the past practice and did the meeting of 1993, in which employees were not paid and the Union did not grieve, eliminate the binding past practice.

The Union's view of the past practice is that it relates to the fact that the meeting involved the bumping of employees. I would surmise that the Union's position would be that a mandatory meeting for posting would also be covered by this past practice. Thus, the Union's position would be that if a meeting involved either bumping or mandatory attendance, than past practice would require that employees be paid for attending.

The District's view of the past practice is that it relates only to the mandatory nature of the meeting; that if the District required the employees to attend, they would be paid regardless of whether the meeting involved bumping, posting or both; and that they would not be paid for a bumping, posting or bumping/posting meeting if attendance was not mandatory.

Both parties point to the 1993 meeting to support their position. Since the meeting was not mandatory, the District asserts that it was not required to pay employees for attending. Since the meeting did not involve bumping, the Union asserts that the District was not required to pay employees who voluntarily attended.

From 1982 through 1992, employees attended the "Bumping Meeting". Notices of said meeting never stated whether attendance at said meeting was mandatory, nor did it state that employees would be paid for attending. But from 1982 through 1992, employees were indeed paid for attending the bumping meeting.

But the 1993 meeting was a "Posting Meeting". The memo specifically said, "This is not a Bumping Meeting!" (underlining in original). The memo also put employees on notice that this was a volunteer meeting and that they would not be paid for attendance.

There is an important difference between posting and bumping. In posting, an employee can use seniority to bid into a vacant positions. In bumping, an employee can use seniority to bid into an occupied position. Thus, in posting, no employee is adversely affected, whereas in bumping a less senior employee can be involuntarily displaced.

The Union did not grieve the fact that employees were not paid for attending the 1993 meeting for it was neither a bumping meeting nor a mandatory meeting. Therefore, no employee did not face any adverse affects by not attending since the position they occupied was not in jeopardy.

The meeting in 1994 was not mandatory, but it was described as a "Posting/Bumping Meeting". Thus, employees did face the possibility of being adversely affected by the results of that meeting. The Union did grieve the fact that employees were not compensated for attending this meeting.

I find that the past practice is that food service employees are paid for attending meetings in which bumping may occur. This past practice is binding on the parties as it is unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.

The 1993 meeting does not affect this past practice as it was not a bumping meeting. The fact that employees were not paid to attend that meeting does not change in any way the past

practice, in existence since 1982, of paying employes for attending bumping meetings.

Therefore, for these reasons stated above, the Arbitrator issues the following

AWARD

1. That the District violated the collective bargaining agreement by not paying food service workers for attendance at a posting/bumping meeting held on May 24, 1994.

2. That the District make the employes whole who attended said meeting.

Dated at Madison, Wisconsin this 8th day of June, 1995.

By James W. Engmann /s/
James W. Engmann, Arbitrator