#460

IN THE MATTER OF ARBITRATION

BETWEEN

OHIO DEPARTMENT OF YOUTH SERVICES

AND

STATE COUNCIL OF PROFESSIONAL EDUCATORS

ARBITRATION AWARD

CASE NUMBER: #35-16-(88-08-19)000-06-10 -revisited
ARBITRATOR: John E. Drotning

I. HEARING

The parties asked the Arbitrator to rule on two issues resulting from a prior Award between the Office of Collective Bargaining and the State Council of Professional Educations submitted to the parties on December 5, 1989. No hearings were held on these two issues. The parties submitted briefs on or about May 18, 1990.

II. ISSUE

The parties jointly asked the following questions:

1. Must the Employer rescind the additional sixth instruction period pending negotiations?

2. If there is no agreement between the parties, can Management implement the sixth period instruction?

III. ARGUMENTS OF THE PARTIES

A. UNION

The Union argues that the Ohio Supreme Court held in the Lorain City Board of Education v. State Employment Relations Board, [40 Ohio St. 3d 257 (1988)] that if the employer implements a decision which affects wages, hours, and/or other terms and conditions of employment, the employer must cease using the non-bargaining unit personnel involved and bargain the change. The Union notes that even the dissenter in the Lorain case stated that management can implement the change but the parties must bargain the effects of the change.

The Union goes on to argue that the Lorain decision requires that the sixth period be rescinded pending collective bargaining. It asserts that the language of 4117.08(C) requires the employer to bargain on subjects which affect wages, hours, and other terms and conditions of employment.

Essentially, the Union claims that when the employer implements a decision which affects wages, hours, etc. without bargaining that decision, the Courts require a return to the status quo and collective bargaining. In support of this argument, the Union cites Perrysburg Board of Education and Bedford Heights. In Bedford Heights, the city's decision to implement a 10-14 schedule was abolished and it was required to reinstitute the 24 on and 48 off and also bargain in good faith.

Therefore, the Union argues that the Employer cannot add a sixth period before it goes through the processes of mediation [see 4117.14(C)(2)], fact-finding [4117.14(C)(3)], and a strike [see 4116.14(D)(2)].

The Union also argues that Article 39.04 of the 1989-92 Collective Bargaining Agreement states that bargaining while the Contract is in effect is only by mutual agreement. It goes on to say that the conditions of the Agreement are frozen and cannot be unilaterally changed during the life of the Contract.

B. EMPLOYER

The Employer claims that it does not have to rescind the sixth period during bargaining as cited in the Union's statement of the issue where it asked that the Employer negotiate the affect of the change. In short, the State argues that it has a right to make the change and the parties must then bargain and presumably, if there is no agreement, the Employer can implement the sixth period. The Employer argues that to require the parties to bargain is superfluous since the sixth period has already been implemented.

The State cites Fiberboard Paper Products, a case decided by the U.S. Supreme Court in 1964, in which the Court held that the effects of sub-contracting had to be discussed and if the parties failed to agree, the employer could implement the decision to contract out work. The Employer also cited First National Maintenance to support its position.

The Employer also notes the requirement that the parties bargain does not require that an agreement be reached and it cites H.K. Porter Company v. NLRB decided in 1970 wherein the Supreme Court reversed the NLRB and Court of Appeals decisions which compelled an agreement between the parties.

The Employer also cites Ohio Revised Code 4117.01(G) which, in part, says that:

> An obligation to bargain collectively does not mean that either party is compelled to agree....

Thus, the Employer argues that after good faith bargaining and an impasse, the Employer can implement the sixth period day.

IV. DISCUSSION AND AWARD

In the previous companion case, the parties had not agreed on the issue. The Union asked whether the Employer failed to negotiate the affects of the change. The Employer asked if the change in schedule was consistent with Articles 3 and 23.04 of the 1986-1989 Agreement. It was ruled that the parties bargain the "affects". The parties are currently asking the Arbitrator whether this remedy should be accompanied by a ruling that the implementation of the sixth period be in abeyance until bargaining is completed. They also ask that if there is no agreement concerning the affects of the change, can management implement the sixth period?

Previously, it was concluded that the addition of a sixth period added to the work load of teachers and, therefore, affected wages, hours, and other terms and conditions of employment. The Employer cannot unilaterally implement a change which "affects" the hours, wages, and working conditions. It must bargain with the Union. The parties negotiated the 1986-1989 Collective Bargaining Agreement with certain existing "givens" - one being the long standing past practice that teacher assignments comprised five teaching periods and one duty period. Granted, this was not part of the contractual agreement, but it was part of the "playing field" on which the terms of the 1986-89 Contract, particularly wages, hours, and working conditions were negotiated. The playing field cannot be changed by the Employer

during the life of the Contract without giving the Union an opportunity to bargain over the "affects" of such a change.

Implicit in the ruling that the parties must bargain the "affects" is the presumption that the Employer has the ultimate right to add a sixth teaching period. But, if the past practice of assigning five teaching periods is to be altered, the timing and manner of implementing the change is important.

What the Employer can do with teaching periods at the end of the Contract is different than what he can do between the beginning and end of a collective bargaining agreement. In the absence of bargaining, the Employer cannot unilaterally implement a sixth class in the last year of the 1986-89 Contract when that change affects wages, hours and terms and conditions of employment. However, if during negotiations for a new collective bargaining agreement, a proposed change in the past practice of assigning five teaching periods were discussed, presumably the affects on wages, hours, terms and conditions of employment would have been bargained and the Employer can implement six period teaching assignments.

In the Lorain decision, the Ohio Supreme Court held that the employer must bargain changes affecting working conditions. The Court also stated that the requirement:

> ...to bargain does not require that an agreement be reached. [Lorain Board of Education v. SERB 40 Ohio St. 3d 257 (1988)]

The above reasoning is consistent with the NLRB v. Wooster Division of Borg Warner (1958) in which the U.S. Supreme Court held that the parties must bargain in good faith over issues, but there was no requirement that they agree. But, it was clear that the disagreement in Borg Warner occurred during negotiations for a new contract and in that case the Court also defined mandatory, permissive, and illegal subjects of bargaining.

In Fiberboard, the Court in 1964 held that subcontracting was a statutory subject of collective bargaining and the company's failure to bargain the subcontracting maintenance work led to the Court's reinstatement of the laid off maintenance employees. Again, the Fiberboard case involved using outside contractors to take over work formerly done by bargaining unit personnel. In this case, no employees were laid off; rather, the employer increased the work load of existing employees.

Moreover, H.K. Porter and 417.01(6) of the ORC talk about obligations to bargain contract language and what is compelling is that once a contract is settled, one cannot make moves which affect the Contract and/or any long standing past practice which has not been discussed in the negotiations process leading to a collective agreement.

The remedies in these and other court and SERB cases submitted with the briefs included "immediately cease the use of non-bargaining unit personnel", "reinstate the former schedule", "immediately abolish the present 10/14 hour work schedule", and other cease and desist type orders.

In this case, the Employer unilaterally implemented six periods for the 1988-89 school year during the life of the 1986-89 Contract without bargaining with the Union, but there are many reasons why a cease and desist type remedy is inappropriate.

For one thing, this is an arbitral forum wherein conclusions drawn from legal cases do not always fit the particular situation at hand. An arbitrator deals with contractual issues and in this case the Employer changed a long standing past practice which had risen to contractual status. As noted earlier, the Employer has an ultimate right to make such a change, but it erred in that it made the change during the existence of the 1986-89 Contract and did not bargain the "affects" on wages, hours, terms and conditions of employment with the Union. The initial ruling was that the parties bargain the affects of the change. The problem does not involve erosion of the bargaining unit or giving bargaining unit work to non-unit members which disparately harms individual bargaining unit members. It is a change in a past practice which increases the work load and changes the conditions of work for all teachers. A cease and desist remedy in late 1989 or 1990 for a violative action in August of 1988 seems untimely and purposeless when correction can be accomplished through other means.

The Employer in its brief was persuasive in arguing that the ability to bargain the affects is not hampered by keeping the implementation of the sixth teaching period in place. When Union and Management bargain the "affects" of the change, the impact on

wages and conditions of employment can be bargained retroactively as well as proactively. A cease and desist requirement or a ruling that the sixth period be rescinded is not necessary.

Whether Management can implement the sixth period if there is no agreement between the parties is moot since the bargaining is over the affects of the change on wages, hours, terms and conditions of employment and not over the change itself. And if the parties cannot agree on the affects and impasse is reached, the Union has recourse since it can litigate, raise an unfair labor charge, strike, and/or do some hard negotiating for succeeding contracts.

There is, in fact, some indication that bargaining the "affects" of changing the past practice may have been considered when determining the wages, hours, terms and conditions of employment set forth in the new 1989-92 Contract. There is no testimony regarding whether the negotiations for the 1989-92 Agreement specifically included bargaining regarding the "affects" of being assigned six teaching periods rather than five, but the new Contract contained additions to Article 23, specifically 23.13 which limits student contact time for teachers to be no more than six hours per day. Perhaps, these negotiations also included consideration of the increased work load of the sixth period when determining wages. A ruling that the Employer must go back to five teaching periods and one duty period is not appropriate given that the change had been implemented for at least a year (although erroneously) before the negotiations for the 1989-1992 Collective Bargaining Agreement.

Thus, it seems reasonable to find that both parties presumably had an opportunity to discuss the sixth teaching period in the negotiations over the current agreement.

It is concluded that the Employer does not have to rescind the sixth period pending bargaining over the "affects" of six teaching periods, primarily as a result of the intervening negotiations for the 1989-92 Contract.

The Employer is responsible for the affects of implementing the sixth teaching period during the existence of the 1986-89 Contract. But, the Employer is not responsible for sixth period affects of the 1989-92 Agreement, since it seems likely that the parties must have discussed the sixth period issue in the negotiations leading to the current Agreement. The Employer continued the sixth period class and there is no reason to find that it must be rescinded.

John E. Drotning
Arbitrator

Cuyahoga County, Ohio
July 13, 1990