

**IN THE MATTER OF GRIEVANCE ARBITRATION BETWEEN**

Education Minnesota, Local 2007

and

**BMS Case No. 13 PA 0415**

Independent School District 38, Red Lake

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**NAME OF ARBITRATOR:** George Latimer

**DATE AND PLACE OF HEARING:** April 18, 2013  
Red Lake, MN

**DATE OF AWARD:** June 19, 2013

**BRIEFS RECEIVED & RECORD CLOSED:** May 24, 2013

**APPEARANCES**

**FOR THE UNION:** Nicole M. Blissenbach, Attorney  
Heather Forseen, Early Learning Literacy Intervention  
Dave B. Evenson, Health Teacher  
William Lyle Goins, Assistant Principal  
Colleen Ketelsen, Special Education Teacher  
Jean Whitefeather, Substitute Teacher/Music Teacher

**FOR THE EMPLOYER:** Maggie R. Wallner, Attorney  
William Larson, Business Manager, Red Lake Schools  
Brent Appleton, Field Staff, Education Minnesota

## **INTRODUCTION**

This is a grievance arbitration between Education Minnesota Local 2007 (Union) and Independent School District 38, Red Lake (Employer or District). The parties are signatories to collective bargaining agreements (CBAs) dated July 1 2009 to June 30 2011 and July 1 2011 to June 30 2013. The arbitration hearing was held at the Red Lake School District offices in Red Lake, Minnesota on April 18, 2013. The parties agreed the matter was properly before the Arbitrator and there were no jurisdictional disputes. Both parties had full opportunity to submit evidence and examine witnesses. Post hearing briefs were received by the Arbitrator on May 24 2013 and the record was closed.

## **STATEMENT OF THE ISSUE**

Did the Employer violate Article XII Section 1 or Section 2B of the Collective Bargaining Agreement when it changed the ‘basic day’ for teachers from 8:10 am to 3:25 p.m, to 7:45 to 3:30? If so, what is the remedy?

## **RELEVANT CONTRACT LANGUAGE**

### **Article XII Hours of Service**

Section 1 Basic Day: Teachers shall be in their classroom or assigned locations for a total of a continuous 7 hours and 15 minutes per day between the hours of 7:45 A.M. to 4:00.

Section 2B Duty-Free Lunch: Teachers will have a thirty (30) minute duty free lunch at midday.

### **Article V School District’s Rights**

Section 2 Management Responsibilities: The Exclusive Representative recognizes the right and obligation of the School District to efficiently manage and conduct the operation of the School District within its legal limitations and with its primary obligation to provide educational opportunity for the students of the School District.

Section 4 Reservation of Managerial Rights: The foregoing enumeration of rights and duties shall not be deemed to exclude other inherent management rights and management functions not expressly reserved herein and all management rights and management functions not expressly delegated in this Agreement are reserved to the School District.

## UNION POSITION

The Union position is that starting fall 2012 the School District unilaterally added an extra half hour to the teachers' work day. This violates both the clear language of Article XII, and longstanding practice concerning how this language is administered.

The Union argues first that the plain language in Article XII supports its position:

“Article 12, Section 1 of the Teachers' Master Agreement (“Contract”) states as follows: “Basic Day: Teachers shall be in their classrooms or assigned locations for a total of a **continuous 7 hours and 15 minutes per day** between the hours of 7:45 A.M. to 4:00.” (Jt. Ex. 2 at 17). The arbitrator need look no further than the words “continuous 7 hours and 15 minutes per day” to resolve this issue. This language is not susceptible to an interpretation that requires an interrupted day....Article 12, Section 2B of the contract states that “Teachers will have a thirty minute duty-free lunch **at midday**.” (Jt. Ex. 2 at 17). The only way to read these provisions and give meaning to every word, is include the midday lunch in the continuous 7 hour and 15 minute day. If, as the School District argues, the lunch is excluded from the continuous 7 hour and 15 minute day, the lunch could not occur at midday. And, if lunch occurs at midday, it is impossible to have a continuous 7 hour and 15 minute day exclusive of the lunch.” (Union brief, emphasis added in the original).

The Union asserts that in addition to the language being clear, it has been consistently administered. The 7 hour and 15 minute regular teacher day has always included the half-hour duty-free lunch. This was testified to by current and former teachers whose service spanned the last 34 years. (Testimony of Heather Forseen, Dave B Evenson, and Colleen Ketelsen). Union witnesses who had served the District as administrators also confirmed this understanding of

how the teacher work day was handled. (Testimony of Jean Whitefeather and William L. Goins).

The Union buttresses its argument with evidence of bargaining history concerning this section of the contract. Basic day language has been in the CBA since 1972. While there were small language changes made to this section in several rounds of bargaining, none of these modifications changed the basic teacher work day from 7 hours and 15 minutes. (See further analysis in discussion section below).

The Union further asserts that during negotiations for the 2011-2013 agreement the Employer proposed increasing the basic day to 7 hours and 45 minutes. This proposal was not agreed to, and the contract was settled with the original language intact. The Union asserts the Employer withdrew the proposal in exchange for the Union's agreement to extend the work year by five additional days. This reinforces the Union's interpretation of the current language. If the current language allowed the Employer to increase the basic day to 7 hours and 45 minutes, the District would not have proposed changing the language. The Union argues the District is seeking to win in arbitration what it failed to achieve at the bargaining table.

### **EMPLOYER POSITION**

The District position is that it was within its managerial right to assign when it changed the policy regarding teacher basic day. Article XII Section 1 does not prohibit requiring teachers to work a 7 hour and 45 minute work day, with 30 minutes of that time used for the duty free lunch provided for in Section 2B.

The Employer points out that the language in Section 1: "Teachers shall be in their classroom or assigned locations for a total of a continuous 7 hours and 15 minutes per day" does

not make sense when read along with Section 2B, which requires a 30 minute duty free lunch ‘midday.’ If in fact the lunch occurs midday, the 7 hours 15 minutes could not be ‘continuous’ as called for in Section 1. And in fact adopting the Union’s interpretation would imply that the Employer had the right to confine teachers to the classroom or another location during their lunch break.

Although the District agrees that Section 1 has been administered in such a way to include the duty free lunch within the duty day, it is not obliged to administer it this way. In 2012, the District gave notice that it intended to enforce the language, and was within its right to do so.

“The only reasonable interpretation of Article XII, Section 1 is that teachers may be required to work in their classrooms or other assigned locations for no more than a total of 7 hours and 15 minutes per day... Teachers are relieved of any assignments or duties during their 30 minute duty-free lunch; therefore, that period of time does not count in the limitation on hours of service.” (Employer brief).

The Employer further argues that although the basic day had been administered to include lunch with the 7 hours 15 minutes, there was never a meeting of the minds between the Union and Employer that this was required. It points to the fact there were occasions when this was in dispute and led to grievances. (Testimony of William Larson).

Regarding Union arguments about the District’s proposal to change the language in question during negotiations, the District argues the parties were not in agreement about what the language meant. In the context of that disagreement, the Employer proposed the change it did. The proposal was ultimately withdrawn, but not in exchange for lengthening the school year, for which the teachers received extra compensation.

Finally it argues the fact that Union representatives did not sign the 2011-13 agreement until after the basic day change in policy was announced, means the Union was aware of the District's intention to change its policy.

In the event the Union prevails in this case, the Employer makes a number of arguments concerning remedy. It argues that as exempt professional employees under the Fair Labor Standards Act, teachers' compensation is based on an annual salary not an hourly wage. Employer witness William Larson testified that time paid for purposes such as sick time is paid by full or half days rather than hours. The District argues the only provision for hourly pay is that specified in Article VIII and Section E (for duties such as homebound instruction and drivers training). Therefore all other work performed by teachers is included in their annual salary. The Employer argues a monetary remedy in this case would be pay for time not worked. (Employer argument and brief).

### **MEMORANDUM AND DISCUSSION**

The threshold issue is, weather the language of Article XII prohibits the Employer from requiring teachers to be on duty for seven hours and 15 minutes, plus a half hour duty free lunch in the middle of the day, for a total of seven hours and 45 minutes work day.

The Arbitrator's aim in examining disputed contract language is to understand the parties' intent. To that end, individual phrases of contract language cannot be read in isolation but must be read in context. Assigning the usually understood meaning to the words 'duty free', 'midday', and 'continuous' reveals a contradiction. The reasonable conclusion is that the language does not cleanly say what either party wishes it to say. This conclusion is reinforced by testimony elicited by the District concerning whether the Employer has the right to confine employees to a particular location during lunch. The sum of the testimony is that the words

“Teachers shall be in their classroom or assigned locations for a total of a continuous 7 hours and 15 minutes per day” is not understood by the parties to mean that teachers are confined to a particular ‘location’ during their duty free lunch.

Given the contradiction inherent in the language the Arbitrator finds the language to be ambiguous. This ambiguity compels an examination of evidence other than the language itself if we are to determine the parties’ true intent.

One of the relevant pieces of evidence is what the bargaining history shows concerning the evolution of this language. Union witness Dave Evenson is Co-President of Local 2007. He testified that the first appearance of ‘Hours of Service’ language was in the 1972-74 CBA, which specified the hours of service were 8:15 a.m. to 3:30 p.m. Language requiring a duty free lunch appeared in the 1981-83 agreement, and in 1991 the words ‘30 minute’ were added to the duty free lunch language. In bargaining the 1995-97 agreements the parties agreed to change this language:

Section 1. Basic Day: Teachers shall be in their classrooms or assigned locations by 8:15 a.m. and shall remain there until 3:30 p.m.

to the following:

Section 1. Basic Day: Teachers shall be in their classroom or assigned locations for a total of a continuous 7 hours and 15 minutes per day between the hours of 7:45 A.M. to 4:00 P.M., as determined by the Superintendent.

Union witness Colleen Ketelsen testified about the bargaining which led to this change. She stated the Employer sought the change because of a need to modify school bus schedules, to allow younger students to be transported at different times than older students. She had a clear recollection that the Union confirmed during bargaining that this language change did not allow a longer work day for teachers, but only for flexibility in what the start and end times would be.

“And I can very, very clearly remember sitting around this table with Roy Nelson sitting right there, one of our School Board members. And we wanted to make absolutely positively sure that the intent was not to increase the length of our day, that it was strictly to give the Board more flexibility to start a few minutes earlier in one building and a few minutes later in another building. And we were absolutely assured that it was not—the intent was not to lengthen the teachers’ basic day.”

Ms. Ketelsen went on to testify the word ‘continuous’ was inserted to make clear the Employer would not be permitted to split teachers work day into two parts:

“Because there was discussion about if our day was 7 hours and 15 minutes long, could—did that mean that we could work three hours, and then we could take an hour-and-a-half break off in the middle of the day, and then we could work 4 hours and 15 minutes or whatever at the end of the day? So we were adamant that it should be a continuous period of time.” (transcript at pp 186-87)

The Employer argues in its brief ‘The Arbitrator is justified in not giving ‘continuous’ its literal meaning in order to prevent harsh and absurd results’ citing *Evening News Association, 50 LA 239 (Platt, 1968)*:

**Not infrequently, words or phrases are unthinkingly included** which, if construed according to their literal meaning would produce results in opposition to the main purpose and object of a provision... (Emphasis added)

But in this case the word “continuous” was not added ‘unthinkingly’, but in specific and intended response by the Union in 1995-97 negotiations. Ms. Ketelsen’s testimony was credible and unrebutted, compelling the conclusion that the parties’ intent and practice relative to the basic day was unchanged by the addition of the word “continuous”. Neither party submitted evidence of any other significant language changes in these sections. With respect to the dispute at issue here, the language has not varied in the past three decades. (Testimony of Evenson and Ketelsen, Union Ex. 7-12).

There was extensive evidence submitted concerning what the practice has been with regard to this language. Ms. Ketelsen testified that for 34 years the language in question has

been interpreted to mean the duty free lunch is included in the 7 hours and 15 minutes. During the time she served in administrator jobs this was also how she administered the language. Both Jean Whitefeather and William Goins, who served as administrators many of the last 34 years testified they had consistently understood and administered the language to mean duty free lunch is included in the 7 hour 15 minute work day.

In 2006, the Union grieved on behalf of two teachers who had been required to teach during prep and lunch periods. The parties settled this grievance by compensating the teachers for the time in question. (Union Ex. 14).

In July 2011, in the planning process for the upcoming school year, the District proposed scheduling Professional Learning Team (PLT) meetings to start a half hour earlier than the regular basic day. It proposed compensating teachers for that half hour. (Union Ex. 6 and 13). Mr. Evenson testified this proposed schedule was never put in place, because of the additional compensation cost and the Employer's belief that it could not compel attendance prior to the regular basic day.

It is essentially undisputed that the Employer's practice in administering this language has been consistent and long standing. The District acknowledges the language had been administered to include duty free lunch within the seven hour and 15 minute day, but only by custom not because the language required it. It argues the District has never explicitly conceded the Union's interpretation of the language. There had been some conflicts between the parties about this language over the years, which shows there had not been a meeting of the minds regarding whether Section 1 requires duty free lunch to be included or excluded from the seven hours and 15 minutes. (District argument and testimony of Larson). Therefore the District argues the mutuality element of past practice is absent:

“In summary, the length of a practice alone cannot establish a binding past practice. In this case, there was not joint determination or mutuality sufficient to eliminate the School District’s managerial prerogative to establish hours of service within the confines of the language...the School District did so to serve its ‘primary obligation to provide educational opportunity for the students of the School District’...The ‘mere non-use of a right does not entail a loss of it.’” (Employer brief).

Mutuality is an essential ingredient in binding past practice. This was well defined by Justice Peterson:

*For a “past practice” to exist, two basic elements are required: 1) a prior course of conduct; and 2) and understanding by the parties that such conduct is the proper response to the circumstances. (citing authorities) Not only must it be demonstrated that clear and consistent conduct has been developed over a period of time, but it must also be shown that the conduct was known and mutually accepted by the parties. This requirement of mutuality is a crucial standard since past practice should prevail only if the proof indicates that there was mutual agreement.” (Dissenting opinion by Justice Peterson, Ramsey County v AFSCME Council 91, Local 8 309 NW 2<sup>nd</sup> 784,797)*

Mr. Larson testified the District had never conceded that language in Sections 1 and 2B required lunch be included in the seven hour and 15 minutes. He believes the contract requires seven hours and 15 minutes of work time, exclusive of lunch. He testified that in 2004, there had been discussion during bargaining “that the teachers actually need to be working 7 hours and 15 minutes and then have a duty-free lunch of 30 minutes, so that they have to be in the District a total of 7 hours and 45 minutes.” (District Ex 2).

Retired administrator Jean Whitefeather testified that including duty-free lunch in the seven hours and 15 minutes was the way it had been done in all her years of experience. However she testified that when she heard the 3<sup>rd</sup> step of the grievance process, she denied the grievance because she did not believe it was clear the District had violated the contract: ‘I didn’t believe there was enough at that point to say that’.

As to the negotiations of 2011-13, the District asserts that standing alone an unsuccessful attempt to clarify the CBA language in the course of negotiations does not necessitate the conclusion that the basis for the attempt was wrong. District witness William Larson testified the District proposed the change because there had been issues over the years about whether the seven hours and fifteen minutes included lunch, and “we wanted to clarify that portion of it”. Quoting another arbitrator the District argues “if, in fact, the parties were in dispute on the proper interpretation of a contract clause and one of them unsuccessfully sought in collective bargaining to obtain clarification, it would not necessarily follow that the interpretation sought by the unsuccessful party was wrong.” (Employer brief). The District ultimately dropped its proposal to change the Section 1 language, but Mr. Larson testified it was not in exchange for the five extra duty days.

Mr. Larson gave credible testimony about the negotiation and mediation process which led to the District withdrawing its proposed language change:

“When you negotiate and have mediations, things come off the table. You know, you’re doing that to try to finish up the negotiations. This was the end of the day, and I think everyone was ready to be done. And when the Union said that they would do the five days with compensation, they got their daily rate for each of those five days that we added in. We said fine. You know, we will not pursue the issue of the hour...we’ll just remove from the table the hours of service issue, and then we were done...”.

The Arbitrator is persuaded the five extra days in the school year was not quid pro quo for the Employer withdrawing this particular proposal. More significant however is the fact that the Employer made the proposal in the first place. The Employer provided no evidence that it communicated to the Union an assertion that the current language permitted it to schedule teachers with a seven hour 45 minute day, inclusive of lunch. Lacking such evidence, it is

reasonable to conclude the Employer did not believe it had the ability to do so, and was seeking that ability in altered language.

The above testimony demonstrates a close question on the issue of mutuality. Discerning whether minds were truly 'meeting' over a period of decades is not possible. The closest one can come is to examine the actions of the parties. In this case, the actions include a decision based on the apparent belief on the District's part that it could not require attendance at PLT meetings beginning at 7:40 rather than 8:10, and would be obliged to provide extra compensation for attendance.

Also relevant is the absence of any administrator testimony that prior to 2012, s/he administered this language as the Employer is arguing it should be interpreted. Both Ms. Whitefeather and Mr. Goins testified to consciously making sure that teacher basic days of 7 hours and 15 minutes included a half hour duty free lunch.

Combined with its attempt to bargain a change in 2011-13 bargaining, the weight of the evidence supports the Union's argument that both parties understood this language to mean 7 hours 15 minutes, inclusive of the duty free lunch. Therefore the Arbitrator finds a binding past practice did exist in this case.

The Employer argues that even in the event that a binding past practice exists, it notified the Union of its intent to discontinue that practice and instead enforce the language as interpreted by the District. The next question to be addressed by the Arbitrator is whether the Employer properly notified the Union of its intent to terminate the practice.

The Employer argues the School Board approved the work day change on July 26 2012 and the administration implemented it following that meeting. This was prior to the Union representatives signing the 2011-13 CBA on August 24, 2012. Therefore the Union was aware

of the policy change prior to ratification. (Employer argument and brief, Dist Ex 3 and Joint Ex 2).

The Union membership's ratification of the negotiated CBA occurred in May 2012, according to the testimony of Union Officer Heather Forseen. She and Union Officer Dave Evenson testified they did not first receive notice of the District's intention until the Principal's letter of July 30. The Union grieved this policy change August 14 (Joint Ex 3a, Union Ex 4). The District's announcement of the new schedule was two months after the membership ratified the 2011-13 agreement. The District knew or should have known the ratification vote would have been affected by notice of its intent to end the practice.

The concept of a binding past practice is that such a practice is substantially equivalent to contract language. Even assuming the Employer could properly terminate that practice, formal notice to the Union would be required. No such formal notice was in evidence. Therefore the Arbitrator concludes the District did not properly notify the Union of its intention.

With respect to the question of remedy, the Union argues that if it prevails on the merits of the dispute, its members should be compensated "at their hourly rate of pay for time worked beyond the 7 hour and 15 minute Basic Day" and that the 7 hour and 15 minute basic day be reinstated. The Employer argues if the Union prevails on the merits, a monetary award is inappropriate for several reasons: first that the Union did not request compensation in its written grievance of this matter; second that under the Federal Fair Labor Standards Act teachers are exempt and therefore paid as salaried professionals who cannot be compensated by an hourly method; and that there is no provision in the CBA for hourly pay, outside of specified situations outlined in Article VIII.

While the Arbitrator does not find the Employer argument regarding the FLSA to be persuasive, he declines to award monetary damages. While the FLSA does not control how a remedy could be fashioned in a labor arbitration award, the fact that these teachers are fulltime professional employees is relevant, for the following reason. While the language in Article XII Section 1 controls when teachers are required to be at the workplace, it is surely assumed that work performed by a fulltime professional employee would normally exceed 33.75 hours of work per week (the current 'Basic Day' language); and would in fact exceed 36.25 hours of work per week (what the District proposed in 2011-13 bargaining); although this work would not necessarily be performed in the workplace. Therefore it is not proper to award extra salary for time well within a fulltime work week. The facts in some disputes relating to work day limitations may call for monetary remedy. Given all the facts of this particular case, to remedy this as an hourly wage violation would be a disproportionate penalty.

**DECISION:** The grievance is sustained.

**AWARD:** The Employer will revert to a teacher basic day of 7 hours and 15 minutes, inclusive of a 30 minute duty free lunch, until such time that the parties bargain a change in the language of Article XII.

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George Latimer, Arbitrator

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Date