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KENNETH BILLICK

Docket No. 35-86-370-3

ROBERT DUVAL

Docket No. 35-86-371-3

CHARLES HEWITT

Docket No. 35-86-372-3

v.

OHIO COUNTY BOARD OF EDUCATION

**DECISION**

Grievants, Kenneth Billick, Robert Duvall and Charles Hewitt are all employed by the Ohio County Board of Education as full-time bus operators. On September 8, 1986 each filed a grievance alleging an impropriety by school officials when supplemental kindergarten bus runs assigned to them August 28, 1986 on the basis of their seniority were abruptly rescinded on September 3, 1986. The grievance was denied at the lower administrative levels and after some difficulty in scheduling, a level four hearing was conducted April 9, 1987.<sup>1</sup> Counsel for the board and grievants' WVSSPA counsel submitted proposed findings, the last of which was received June 11, 1987.

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<sup>1</sup>The grievances herein were previously consolidated at level two for hearing and decisional purposes.

This grievance is one of several concurrent level four grievances involving the allocation of supplemental bus runs among Ohio County School bus operators. In Jalietta Moore v. Ohio County Board of Education, Docket No. 35-87-027-3, it was determined that bus operators had a contractual entitlement to extra compensation for driving supplemental runs. However, on the basis of a circuit court decision, the operators conceded that if they bid upon and accepted a supplemental run, any part of the assignment may be used to reach their 6 hour workday. The Moore decision also recognized the operators' option to enter into an unwritten, informal agreement with school officials that scheduling matters for drivers could be deferred until just prior to the onset of the school year for the mutual benefit of both employer and employee.<sup>2</sup> While the Moore decision clarified some aspects of the controversy regarding the supplemental runs, the specific issue of the instant grievance differs somewhat from that of the Moore grievance.

The facts giving rise to this particular dispute are basically uncontested. Due to other occupational interests, grievants Hewitt and Billick worked only half-day runs prior to the 1986-87 school year. Grievant Duvall, a 23-year board employee who also had outside interests, was satisfied with a 5 hour run and, of his

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<sup>2</sup>The deviation from statutory requirements governing the dispensation of work assignments was deemed to be permissible in light of the provisions of W.Va. Code, 18A-4-8b(b) empowering employees to agree upon procedures for the assignment of extra-duty work and the provisions of W.Va. Code, 18A-4-16 permitting negotiation between employer and employee regarding extra-curricular assignments.

own volition, had previously waived his rights to full-time wages by annually signing a written agreement to accept five hours wages for five hours work (the board has set a 6 hour workday).<sup>3</sup>

In early 1986 grievants were considering cessation of their outside interests and, desiring more driving time, consulted with the transportation director regarding the possibility of full-time work and additional assignment to a supplemental run for the 1986-87 school year. Based on the director's assurances that due to their seniority each would have no problem getting full-time work and supplemental runs, grievants terminated their outside occupational endeavors. All were assigned a supplemental kindergarten run in late August, 1986 but the assignments were rescinded a week later, in early September, before the driving began. Grievant Duvall was ultimately given an alternative kindergarten run but not the one of his choice.<sup>4</sup>

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<sup>3</sup>It is noted that a 1982 decision rendered by the state superintendent of schools admonished the respondent board for its written policy at that time which stated that bus operators whose driving time totaled less than 6 hours must agree to have their wages adjusted accordingly, or alternatively, accumulate the deficient hours for future driving time "owed" to the board. The decision, Nancy Carroll v. Ohio County Board of Education, July 22, 1982, was also discussed in relation to the Moore decision, supra.

<sup>4</sup>Duvall testified that the alternative run required that he spend an inordinate amount of "dead" time on the road driving to and from his pickup site, certainly not an efficient or economical use of his time or bus. The board's position is that Duvall was assigned a "vacant" run but, in fact, the assignment of the supplemental run was made by the transportation director to "fill" grievant's schedule to 6 hours, a practice deemed unlawful by the Moore decision.

The grievants insist that by virtue of past practice, available supplemental runs are "open" for assignment on a year to year basis and that seniority prevails for allocation purposes. Therefore, they maintain, they are entitled to the runs that were awarded to them in August, 1986.

Grievant Hewitt requests reinstatement to the run he had been awarded plus back wages. Grievant Duvall wishes to select the run of his choice, the run originally awarded to him. However, grievant Billick stated that he was dissatisfied with how the board gave supplemental runs to newly hired or less senior drivers to fill their schedules when their total driving time (and wages) thereby exceeded his by an hour or more. Mr. Billick said he would forsake any rights to back wages for the supplemental run taken from him if he could have that supplemental run in the upcoming school year, but of compelling importance to him was that the supplemental run situation be clarified in all respects.

The respondent contends that the runs were assigned to grievants in good faith and later developments prompted the abrupt withdrawal. Apparently, two of the runs had previously been assigned to two other drivers less senior than grievants during the years they (the grievants) had declined the runs. Although it is not entirely clear from the testimony, it appears that those drivers faced with the loss of their runs, Jules Kerekes and Nancy Carroll, either threatened to file a grievance if the

grievants herein were permitted to keep the runs, or simply brought the "1983 law" to the attention of school officials.<sup>5</sup> What is perfectly clear from the record of this and the companion bus driver cases is that the practice of "bumping" in and out of supplemental runs by senior drivers had occurred in the past and even after the passage of the law insuring employee retention of current work assignments and seemingly prohibiting bumping.<sup>6</sup>

Notwithstanding error or confusion that may have occurred in the past in relation to bumping, the respondent argues that it had no alternative but to comply with the legal requirements now made known to it. It contends that Kerekes and Carroll had to retain the runs, as the runs were not vacant for grievants to fill. The record in the case makes abundantly clear that the bus driving situation in the Ohio County Schools was also confusing to others, notably in the state superintendent's office as well as the offices of WVSSPA when the grievants herein asked for counsel on the matter but were given contradictory opinions.

Finally, it becomes overwhelmingly clear that a component of the problem concerning supplemental bus runs, and of this grievance in particular, is the failure of all of the drivers

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<sup>5</sup>"The county board of education may not prohibit a service employee from retaining or continuing in his employment in any position or jobs held prior to... (1983) and thereafter." W.Va. Code, 18A-4-8b(b).

<sup>6</sup>Contributing to this situation was the wrongful practice of the transportation directors to assign supplemental runs to fill the schedule of newly hired or junior drivers. On at least one occasion, this was accomplished by taking a supplemental run from a more senior operator. Reference is again made to the Moore case, supra.

to reach an agreement among themselves whether or not they want seniority to prevail in the allocation of the supplementary runs, a choice that seems to be theirs to make according to the decision-making practices they already exercise on the matter.

In addition to the foregoing factual recitation the following specific findings of fact are included.

#### FINDINGS OF FACT

1. Grievants are all bus operators whose years of employment place them near the top of the seniority list. Prior to the 1986-87 school year they had other occupational interests and did not indicate a desire for a supplemental bus run.

2. For mutual benefit, bus operators and school administrators have made agreements regarding route adjustments and assignments to supplemental runs which allows scheduling flexibility just prior to school reopening.

3. In early 1986 the grievants considered abandoning their outside interests and indicated to the transportation director that they would like supplemental runs for the 1986-87 school year. The director assured them that, based on their seniority, they would receive a supplemental run. In reliance of the director's assurances, grievants did give up their outside interests.

4. On August 28, 1986 grievants were all given a supplemental run, but on September 3, 1986 all the assignments were rescinded. Grievant Duvall was given another supplemental run to fill his driving time to the 6 hour workday. Duvall's present run requires considerable "dead" time driving to a site not convenient to his regular run thus incurring a waste of his actual time as well as added expense for the transport of the bus.

5. The runs originally given to grievants were not "vacant" assignments, but were taken from less senior drivers. School administrators restored the runs to the junior drivers upon being told that existing law prohibited the board from taking the assignments they held.

6. Except for the wrongful assignments of supplementary runs to ineligible drivers whose seniority does not warrant the award, the board adheres to an agreed upon practice that scheduling adjustments and assignment of supplemental runs is finalized on a year to year basis before school reopens.

7. The bus operators of Ohio County Schools have not considered or agreed upon whether they will abide by statutory requirements regarding retention of work assignments or whether strict seniority prevails for assignment to a supplementary run.

8. The issue posed by the grievants herein is not a legal matter to be determined by the West Virginia Education Employees Grievance Board but is one which must be determined by all of the bus drivers.

#### CONCLUSIONS OF LAW

1. County boards of education have substantial discretion in matters relating to the assignment of school personnel but such discretion must be reasonably exercised and not in an arbitrary and capricious manner. Dillon v. Wymoning County Board of Education, 351 S.E.2d 58 (W.Va. 1986); Gary Nelson v. Lincoln County Board of Education, Docket No. 22-86-116.

2. School law permits that a service employee may negotiate terms and conditions as well as agree upon procedures for dispensation of extra employment for duties and assignments in addition to their regularly contracted assignment. W.Va. Code, 18A-4-8b(b); W.Va. Code, 18A-4-16.

3. The Ohio County Board of Education has chosen to award compensation to bus operators who drive supplemental runs and, absent the employees' agreement to the contrary, are bound by applicable school law in the dispensation, remuneration, retention and/or cessation of all work assignments. Boyd Mayle, et al., v. Barbour County Board of Education, Docket No. 01-86-173-2.



4. Unwritten oral agreements between bus operators and Ohio County school officials to deviate from statutory requirements regulating certain work assignments, specifically the allocation of supplemental bus runs, are deemed permissible, valid and enforceable under existing relevant law. W.Va. Code, 18A-4-8b(b); W.Va. Code, 18A-4-16.

5. Absent a showing by grievants of an agreement by bus drivers to the contrary, the school board did not err in following the mandates of W.Va. Code, 18A-4-8b(b) regarding the retention of supplemental bus runs by drivers who were originally and rightfully awarded the runs.

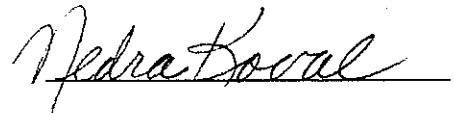
6. The grievants have failed to prove violation of W.Va. Code, 18A-4-8b(b) on the part of the school board when it returned supplemental bus runs to drivers already holding the run and have failed to prove the essential elements of their grievance as a matter of law.

Accordingly, this grievance is **DENIED** as to grievants' present claim to the supplemental runs previously awarded them on August 28, 1986. As to Grievant Billick's request for clarification of the supplementary run situation, he is referred to Jalietta Moore v. Ohio County Board of Education, Docket No. 35-87-027-3 and Randy Creighton v. Ohio County Board of Education, Docket No. 35-86-373-3.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Ohio County and such appeal must be filed within thirty (30) days of receipt of this decision. (W.Va. Code, 18-29-7). Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the court.

DATED

June 30, 1987

A handwritten signature in cursive script, reading "Nedra Koval", written over a horizontal line.

NEDRA KOVAL  
Hearing Examiner