In the Matter of An Arbitration Between:

Assiniboine South School Division No. 3

and

The Assiniboine South Teachers' Association
No. 3 of the Manitoba Teachers' Society

Interest Arbitration Award

On March 1, 1993 the Manitoba Teachers' Society (MTS) per Staff Officer Ralf Kyritz advised the Minister of Education and Training that the conciliation officer appointed by her had failed to bring about a renewed collective agreement between the above-captioned parties and, in the result, the MTS was requesting the establishment of a Board of Arbitration.

Subsequently the Assiniboine South Teachers' Association No. 3 of the MTS (hereinafter the "Association") and the Assiniboine South Board of Trustees for School District No. 3 (hereinafter the "Board") advised the Minister that their respective appointees to the Board of Arbitration, David Shrom and Herbert Liffmann, were unable to agree on a Chairperson. In accordance with sec. 123(8) of the *Public Schools Act* the Minister asked the Honourable Richard J. Scott, Chief Justice of Manitoba, to recommend a Chairperson. On June 14, 1993 the Chief Justice recommended Roland Penner Q.C. and on July 6, 1993 the Minister appointed him as the Chair of the Board of Arbitration. On July 20, 1993 Mr. Penner accepted the appointment and filed with the Minister his duly sworn Oath of Office.

Efforts to find hearing dates suitable to the members of the Board and the parties proved difficult but finally the hearing was set for three days, January 10, 11 and 12, 1994, the parties however advising Mr. Penner that more time would likely be required. As it turned out further hearings

were required and were held on March 9, 10 and 21. The arbitrators then met in Committee on June 10, 1994 (an earlier date, May 20, having been postponed by the Chairperson) and all issues were then actively discussed.

Prior to the first hearing on January 10, 1994 the Manitoba Association of School Trustees (MAST) advised the Chair that, on behalf of the Board, it had, on November 22, 1993 requested the Minister to refer the matters apparently still in dispute to the Collective Agreement Board on the basis that in law an alleged agreement in Committee reached by the parties on January 25, 1993 constituted a binding Collective Agreement and that, therefore, there was nothing left to arbitrate. The Minister had not replied to MAST's request by January 5, 1994 and for that reason the Division through MAST asked the Chairperson to adjourn the proceedings set to begin at long last on the morning of January 10. This request was vigorously opposed by the Association which pointed out that a reference to the Collective Agreement Board by the Minister was discretionary and that, quite apparently, the Minister had not made the reference, and that even if she had made such a reference there was abundant legal authority to the effect that the hearing could continue pending a decision by the Collective Agreement Board. On January 5, 1994 at the suggestion of Mr. Liffmann the Chair phoned the office of the Minister and was then advised that the Minister would not be referring the matter to the Collective Agreement Board.

Without detailing the rather convoluted and, in our view, unfortunate history which led up to the decision by the Board to assert the existence of an Agreement and to seek an adjournment, suffice it to set forth here for the record the Chair's written response to MAST concerning the requested adjournment:

> This will acknowledge receipt of your fax of January 5, 1994 requesting an adjournment of the proceedings until the request of the Division to the Minister of Education has been dealt with.
>
> After carefully considering the matter and its background, it seems to me that the best course is to proceed with the arbitration as scheduled. If, at the outset of the arbitration, the Division wishes to present arguments for an

adjournment, the Arbitration Board will listen to such argument and deal with it then.

> It appears from the record that this matter has been pending for over two years. It seems to me highly desirable that, if at all possible, this matter be moved to a conclusion. In view of the length of time already taken, in view of the difficulty in arranging dates for an arbitration and in view of the desirability that harmonious relations be maintained between the parties, I would urge both parties to consider whether or not it is the best resolution of the intricate web which seems to have been woven to let the Arbitration Board, now properly constituted, hear the arguments with respect to substantive matters still unresolved and to make its award, unless, of course, there is a legal impediment to the Board of Arbitration doing that.

At the opening of the first session the Board through its MAST staff representative Joe Trubyk asked that its jurisdictional objection be noted and, accordingly, we have done so.

We should note here that the issue of the effect or admissibility of matters discussed in Committee arose again during the course of the hearings. At one point the Board sought to bring to the attention of the Board of Arbitration positions allegedly taken by the Association at Committee stage. The Chair ruled that on grounds analogous to the "without prejudice" exception in the law of evidence that it would be contrary both to principle and to sound public policy to admit statements made in Committee in an effort to reach an agreement over the objection of one of the parties, because to do so would seriously inhibit the kind of full and frank discussion without which *bona fide* attempts to reach agreement in Committee would flounder and ultimately fail.

Throughout the hearings the parties were represented as follows: The Board by Joe Trubyk and Craig Wallis of MAST (assisted by members of the Board staff and by Wendy Moroz, Chair of the Board of Trustees for the Division) and the Association by Ralf Kyritz and Tom Paci of the Manitoba Teachers' Society assisted by several members of the Association. We cannot commend too highly the highly professional and skilful way in which the representatives of the parties presented the arguments to the Board. Documentation was more than ample, precedents

duly noted, and responses to questions by the members of the Board were courteous and informed.

Because of the late date upon which this Award is being made, in fact less than six months prior to its proposed termination date, the Award itself will be relatively brief. Many of the issues we must deal with have been the subject of other arbitration awards and there is, we think, sufficient arbitral jurisprudence without us adding to it except on the few issues where we might depart from previous awards to some extent. We do however wish to note again the exceptionally late date upon which this matter is being concluded, some part of the responsibility for which, admittedly, is that of the Arbitrators. Some of the delay is inherent in the process itself which tends to lead to delay and substantial cost, and some in the actions of the parties who, we think, should be strongly urged to move as expeditiously as possible in negotiating a new agreement for 1995 and onwards. We think it might be helpful in this respect if we deal directly with as many of the outstanding issues as we can in this award in the hope that, by doing so, it reduces the range of issues in the next round of collective bargaining. We may, we hope, be excused for expressing some surprise that in a Division as well managed as this one by its Board and Superintendent, with a teaching staff as dedicated as clearly this one is and, especially, with the mutual respect each party has shown for the other, the resolution of outstanding issues should have taken so long and be so fraught with procedural complexity and, ultimately, great cost. The old legal maxim that justice delayed is justice denied applies as much here as elsewhere.

There is a particular context to this matter which clearly affected both the material filed, the arguments presented to us, our own deliberations and, ultimately, this award. The first and perhaps the most important of these contextual matters is the increasing difficulties faced by teachers in this and, we suspect, in most if not all divisions in Manitoba in carrying out their responsibilities. Although much of the evidence is impressionistic and anecdotal there can scarcely be any doubt that such matters as violence in the classrooms and schools, large class sizes, the mainstreaming of special needs children (which we applaud), the demands on teachers'

"after hours" time whether for preparation or marking or supervising extracurricular activities, the increasing presence of abused children and children from broken or breaking-up families who need special attention and often on-the-spot counselling - - all of these factors and more have substantially increased both workload and stress. "Schools," one witness called by the Association said, "have become schools for all reasons" and the heaviest burden of that fact has fallen on the shoulders of the teachers who are called upon, another witness stated, to be teachers, parents, counsellors, entertainers and police.

This part of the context became the background for the Association's forceful presentation on "workload" issues and their demand not necessarily for substantial workload reduction at a time when fiscal resources are scarce and shrinking, but for some mechanism which would provide for their input in controlling workload increases.

The second contextual matter was, and is, of course the reality of fiscal constraint. In this Division ratepayers are expected to provide about 40% of the total cost of their public school system's operating costs out of already burdensome real property taxes. Chronic underfunding of the public school system by provincial governments has been compounded currently by actual cuts in the funding provided, year over year, and by the intervention of the Provincial Government in the public workplace generally through Bill 22, which allows Divisions to order up to ten (10) unpaid forced "holidays" per year. The use in this Division of three such days in 1993 has provided, we were told, $340,000 in 1993 to the Board to assist it in managing the system. But we cannot lose sight of the fact that this is money taken, in effect, from the pockets of the teachers. This Division, it would appear from evidence filed with us, has a better property taxation base than many other Divisions and, with good management, the Board has an accumulated surplus of just over $3 million dollars. We have not, as an Arbitration Board, taken a cavalier attitude towards this surplus, recognizing that it must be carefully managed in the not unlikely event that in future years the financing of the public school system becomes even more difficult. But the existence of the surplus and the use by the Board of the unpaid days provision does allow us to address the workload issue while ensuring that, at the least, teachers in the Division keep pace with other teachers in the Province in terms of salaries.

We now address those outstanding issues which were not withdrawn during the hearings and we do so in sequence:

PARTICULARS OF THE AWARD

NOTE: This is an unanimous award subject to Mr. Liffmann, nominee of the Board dissenting in part. His dissent will be circulated shortly.

ARTICLE I: PURPOSE

The Board originally proposed the addition of three sections to Article I but subsequently presented a revised proposal pursuant to which only one proposed new Clause (which was to have been numbered 1.02) would state as follows:

> . . . where any provision of this Agreement conflicts with the provision of the *Public Schools* Act or the *Education Administration Act* or in the regulations made under either of those Acts the latter shall prevail.

This proposal is substantially redundant because it is covered by Article XIII of the existing Agreement. Accordingly we decline to make the award requested by the Board.

ARTICLE II: EFFECTIVE PERIOD. It was recognized by both Parties that at this late date, two and a half years from the expiry date of the existing Agreement (December 31, 1991), a three year agreement covering 1992, 1993 and 1994 and ending on December 31, 1994 was required.

Accordingly we award as follows on this aspect of Article II:

2.01 This Agreement shall come into force and take effect from the first (1st) day of January 1992 and shall remain in force and be in effect for three (3) years from that date, and shall automatically renew itself following this period, except as provided in Section 2.02.

2.02 Either party wishing to amend this Agreement shall notify the other party to this effect, such notice to be given by registered mail not later than the fifteenth (15th) day of October, 1994. Following such notice, the parties agree to meet in order to commence collective bargaining not later than the 1st day of November 1994.

The Board proposed the addition of two new clauses as follows:

2.03 Any amendment to this agreement shall be effective from the first day of January following the giving of notice to amend or terminate unless some other effective date is agreed to by both parties.

2.04 In the event a teacher's individual contract (Form 2) is terminated for cause or in the event a teacher and the school division mutually agreed to terminate the Form 2 contract, said teacher shall not be eligible for retroactive pay or benefits if there is no signed collective agreement in effect on the date the individual contract is terminated.

With respect to 2.03 it seems to us that common sense dictates that when any amendment is negotiated the Parties will then determine its effective date, a date which may vary depending on the nature of the amendment.

Accordingly we decline to award the Board's proposed 2.03.

Proposal 2.04 would, in our view, constitute a drastic and inequitable change both in the existing Agreement and to commonly accepted practice in labour relations and is, at least arguably, contrary to the explicit provision of Manitoba's *Payment of Wages Act* which deems that wages "due or accruing due" are held in trust for employees. It is our view that a retroactive salary

increase falls into the category of wages "accruing due" to all employees of record from the very first day of the retroactive period including those who at the date of this award have left the Division's employment no matter when or for what reason they left employment. Accordingly we make no award with respect to the Board's proposed 2.04 and direct that retroactive pay in accordance with the proposed scale increases shall be paid to all Division teachers including those who left the Division for whatever reason at any time after January 1, 1992, but prior to the date of this Award. Where a teacher has left the Division such retroactive pay is to be calculated and paid only to the date upon which that teacher's employment by the Division ended.

ARTICLE III: SALARY PAYMENTS

Not surprisingly the bulk of the material presented to the Board concerned this Article although, as previously noted, the Association, particularly through its several witnesses, placed at least equal emphasis on workload issues. Material presented also included excerpts from various arbitration awards dealing with the basis upon which increases to salary scales should be determined.

On this issue we are content without extended discussion to adopt the position articulated in the Seine River School Division award (1993) (Bowman):

> In the final analysis, in our view, the comparison with other school divisions in the province remains the best guide.

Assiniboine South is a division with both a surplus and, on a comparative basis, a favourable Market Value Assessment Per Pupil (MAPP). As previously noted, we do not take a cavalier attitude to these factors but mention them in the hope that they will enable the Board not to extend the use of the provisions of Bill 22. Teachers ought not to pay for their increases from their own pockets, creating a sort of fiscal shell game.

Taking all of these factors into account we award the following scale increases to each step on the scale for each of the three years covered by this Award:

1992	2% scale increase on all steps
1993	2% scale increase on all steps
1994	2.3% scale increase on all steps

The increases shall be applied exactly to all administrative and similar allowances presently covered by the Agreement in force as described in Articles 3.05; 3.06; 3.07; 3.08; 3.09 and, as well, with respect to Part-Time Teachers (3.10).

PRINCIPALS' ADMINISTRATIVE ALLOWANCE

We note that the Association proposed an amendment to 3.05 (b) so that the Principals' administrative allowance be calculated on an enlarged base to include an additional allowance for "each full time or part-time teacher assistant". We see no justification for this at this time.

This Association proposal is denied and no award made.

3.13 Due Process for Teachers in Administrative Positions.

The Association originally proposed and the Board rejected a proposed new clause which would have the effect of defining as a difference between the parties under Article XII of the Agreement "Settlement of Differences" the demotion, transfer or reassignment of a Principal or Vice-Principal which is challenged as being without "just and reasonable cause".

(Just precisely why its proposed as an addition here and not to Article XII was never satisfactorily explained.)

We are mindful of the danger inherent in potentially putting too much of what should be substantially the Board and its Superintendent's discretion within the scope of the grievance/arbitration procedure which we think would have a marked tendency to delay the decision-making process. For that reason we would have rejected the proposal insofar as it deals with transferring or reassignment, particularly in a relatively compact Division where a person's place of residence has little relevance to their place of work. However the Association did amend its proposal to confine it to the issue of demotion.

Demotion is quite something else. It not only carries with it some loss of salary benefits but, even worse, has the potential for stigmatizing the person to be demoted. It seems to us that ordinary principles of administrative fairness should give a person who feels that he or she is being unfairly or wrongly demoted, i.e. demoted "without just and reasonable cause" the opportunity to access appropriate grievance procedures and, ultimately if required, the opportunity to present the case to a Board of Arbitration in an open hearing.

Accordingly we award the Association's proposed clause 3.13 as **amended** to remove all references to transfer and reassignment so that it concerns itself with demotion only.

We recommend, but do not award, that the clause form part of Article XII.

ARTICLE IV: LEAVE OF ABSENCE

4:02 Leave for Executive Duties

The Association withdrew its original proposal to remove the cap on the number of teaching days an individual teacher could take for MTS Executive Duties.

The Board proposed a revision to the method of calculating the way in which the Division should be reimbursed for the hiring cost of a substitute where a teacher is off on

Executive Duty Leave. We reject this proposed change as being both cumbersome and unfair, thus leaving current 4.02 as is.

4.03 Maternity Leave

The Current Agreement provides for unpaid maternity leave for female teachers for a period of time of at least eleven (11) weeks prior to the expected date of delivery and at least six (6) weeks after the actual delivery.

(The issue of Sick Leave coverage for pregnant teachers for some or all of this period is dealt with separately under Sick Leave.)

The only proposal for change to the existing Article was made by the Association in Clause (g) dealing with the reinstatement of a teacher at the termination of her maternity leave. This Association proposal would require the Board to reinstate the teacher in a comparable teaching position if it was unable to reinstate the teacher in exactly the same position. (As things now are the Board can place the teacher in any teaching position if the same position is no longer available as long as the teacher receives the same wages and benefits.)

It seems to us that care has to be taken not to fetter unduly the Board's administrative options. It seems likely that a good administrator would want to reinstate a teacher to the same or a comparable position if it possibly could, particularly if the comparability is substantially defined in terms of subject speciality. It seems to us that unless there is some concern that the Board might not act in good faith in certain circumstances and, in fact, might act punitively, we should leave the matter open for subsequent negotiations during which an option for the Parties to explore might be to define as a grievable/arbitrable difference a reinstatement not in the same or a comparable position which is alleged to be "unjust or unreasonable".

Accordingly no award is made with respect to the Association's proposal for 4.03(g).

ARTICLE VI: SICK LEAVE

This provision presented a number of difficult issues for consideration. We consider them in order.

6.01 (b) We were advised by both parties that because of certain provisions in the *Unemployment Insurance Act and Regulations* this section of the current Agreement has to be deleted. And we so order.

The Board proposed a replacement section for 6.01 (b) which, as it was presented to us at the hearings proposed seven (7) exceptions to sick leave eligibility. We do not accept these proposals either because the proposals lack a realistic context (the proposed war and riot exception in 6.01 (b) (ii), or lack practicality (the committing of a criminal offence exception in 6.01 (b) (iii); or are so loosely worded as to create the likelihood not of resolving but rather of creating difficulties (the proposed "self-inflicted" injury exception in 6.01 (b) (i) and the convoluted drug or alcohol "continued treatment" exception in proposed 6.01 (b) (v).

Board proposal 6.01 (b) (vi) would except from sick leave entitlement recipients of benefits under "a provincial insurance plan". We think this is something which the Parties may wish to negotiate at a later date in view of the possible effect of the new no-fault Autopac scheme in Manitoba which does not appear to have been considered by the Parties, particularly since it is the Manitoba legislation which would apply in the vast majority of applicable cases. Under the new Manitoba legislation a recipient of Part II benefits is entitled to receive such benefits even if covered by some other insurance scheme or plan. This may not prevent the insurer or payor under the other plan which duplicates Part II benefits in whole or in part, from deducting Part II benefits from its payment scheme. Clearly however this is much too important an issue to be resolved in this current round of bargaining without the Parties having had an opportunity to consider the new legislation which took effect on March 1, 1994, to negotiate and, only if

necessary, to refer the matter to some subsequent Arbitration where full argument can be presented.

Accordingly Board Proposal 6.01 (b) (vii) is rejected.

Maternity Leave and Sick Leave

As noted above the Maternity Leave provision, Article 4.03 allows a period of 17 or more weeks of unpaid leave. The issue we confront here arises from sources within the Agreement and current proposals:

(a) The fact, as noted above, that maternity leave as such is totally unpaid by the employer.

(b) The effect of 6.01 (a) which reads as follows:

> It is agreed by the parties that sick leave entitlement shall only be granted by the Division where an employee is unable to be at work and perform his/her regular duties as a result of illness or injury (Emphasis added)

which has been, as this section is applied, to exclude pregnant teachers from sick leave benefits while on maternity leave, the assumption being that their absence is due to the leave and not for any health-related reason

(c) The Association's revised proposal for a new section 6:01 (b) as follows:

> The Board shall provide full sick leave entitlement to a pregnant teacher who, as a result of her condition either before or after delivery, is unable to be at work and perform her regular duties for a valid health-related reason(s). The pregnant teacher shall follow current proof of claim procedures for sick leave entitlement as may be required by the Board.

> the effect of which would be to qualify pregnant teachers for sick leave benefits if there are valid health-related reasons which arise during the currency of both the pregnancy and the maternity leave which may both pre-date and ante-date the actual date of delivery.

It is commonly recognized that, generally, maternity leave (usually about 17 weeks in duration, calculated as 10 weeks prior to the expected date of confinement, the week of delivery and 6 weeks *post partum*) is a combination of non health-related needs (e.g. simply getting everything ready for the new arrival) and health-related reasons. Surprisingly, it seems to us, the current agreement as it is applied fails to recognize the health-related component in a maternity leave.

We say "surprisingly" for three reasons: One is simple common sense: Since a pregnant teacher not on maternity leave continues her entitlement to sick leave benefits, the current agreement either encourages or, even worse, pressures a pregnant teacher to stay on the job longer than she should or might want to. Secondly, aside from what the law itself might now require, it seems to us simply inequitable in this day and age that what is clearly gender discrimination should continue. Only women can become pregnant and being pregnant requires some reasonable absence from work; and, yet in the current state of affairs, pregnant women on maternity leave are deprived if the need arises of a benefit available to all other employees.

Thirdly, and perhaps most decisively, is the state of the law following the momentous decision of the Supreme Court of Canada in a case arising in Manitoba: *Susan Brooks and Others vs Canada Safeway Limited* (1989) 59 D.L.R. 4th 321 (hereinafter *Brooks*). In *Brooks* a Collective Agreement between Canada Safeway in Manitoba and its union was the basis for a sick leave plan which had the effect of denying benefits to a pregnant employee which were available to all others. Susan Brooks challenged this provision as being unlawful discrimination on account of sex contrary to the *Manitoba Human Rights Act* and, after having lost her case before an Human Rights Adjudicator and lost it again on appeal first to the Manitoba Court of Queen's Bench and then to the Manitoba Court of Appeal, took the issue to the Supreme Court of Canada, which court unanimously found in favour of Susan Brooks!

The wider proposition enunciated in *Brooks* which we should both be mindful of and take pride in states, in part, as follows (referring to a 1979 decision of the Supreme Court of Canada, as it was then constituted, denying a claim similar to the *Brooks* claim):

> Over ten years have elapsed since the decision in *Bliss*. During that time there have been profound changes in women's labour force participation. With the benefit of a decade of hindsight and ten years of experience with claims of human rights discrimination and jurisprudence arising therefrom, I am prepared to say that *Bliss* was wrongly decided or, in any event, that *Bliss* would not be decided now as it was decided then. Combining paid work with motherhood and accommodating the child-bearing needs of working women are ever-increasing imperatives. That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious. It is only women who bear children; no man can become pregnant. As I argued earlier, it is unfair to impose all of the costs of pregnancy upon one half of the population. It is difficult to conceive that distinctions of discrimination based upon pregnancy could ever be regarded as other than discrimination based upon sex, or that restrictive statutory conditions applicable only to pregnant women did not discriminate against them as women.

The Supreme Court went on to say:

> It seems indisputable that in our society pregnancy is a valid health-related reason for being absent from work. It is to state the obvious to say that pregnancy is of fundamental importance in our society. Indeed, its importance makes description difficult. . . . If the medical condition associated with procreation does not provide a legitimate reason for absence from the workplace, it is hard to imagine what would provide such a reason. Viewed in its social context, pregnancy provides a perfectly legitimate health-related reason for not working and as such it should be compensated by the Safeway plan. In terms of the economic consequences to the employee resulting from the inability to perform employment duties, pregnancy is no different from any other health-related reason for absence from the workplace.

In the light of all of these considerations we award the Association's proposed 6.01 (b) which, for greater certainty, we restate here.

> The Board shall provide full sick leave entitlement to a pregnant teacher who, as a result of her condition either before or after delivery, is unable to be at work and perform her regular duties for a valid health-related reason(s). The pregnant teacher shall follow current proof of claim procedures for sick leave entitlement as may be required by the Board.

No doubt there will be some cost associated with the implementation of this provision. We urge the Parties to consider negotiating what is sometimes referred to as an Unemployment Insurance SUB Plan. Such a plan, as we understand it, gives some relief to employers whose plans cover maternity benefits. SUB plans allow an employer to remain as second payers of maternity benefits, merely topping up to the Plan level the Unemployment Insurance payments to the employee, without the recipients suffering any reduction in the Unemployment Insurance payment. There may be some complications in the elaboration, approval, and implementation of a SUB plan; but they are not insoluble. It is not within our mandate to elaborate a SUB plan here: we simply draw this to the attention of the Parties who may wish to minimize the cost of this Award as a reasonable option for doing so.

SICK LEAVE ACCUMULATION

6.01 (d) of the Sick Leave Article of the current agreement sets out the way in which unused sick leave may be accumulated. It allows, generously enough we think, accumulation up to a maximum of 120 days in the sixth year. This compares very favorably with most agreements. We see no need to adopt the Association's proposal for additional accumulation. Accordingly we reject the Association's revised proposal.

6.01 (g) The Board proposed an amendment to current 6.01 (g) which would have had the effect of depriving the Association of a role in the selection of a medical practitioner from whom to obtain a written opinion concerning the eligibility of a teacher for sick leave benefits. We think this would be a retrograde step in a Division in which, clearly, everything should be done to maximize working together. Accordingly we reject the Board's proposal.

ARTICLE XII: SETTLEMENT OF DIFFERENCES

The only issue before us here arises from the Board's proposal to substitute "the Chief Justice Court of Appeal of the Province of Manitoba" for the "Minister of Education of the Province of Manitoba" as the person to choose a chairperson for a Board of Arbitration being established to resolve a dispute under an existing agreement when the two nominees cannot agree. Quite rightly the Association takes no objection to this proposal and we award accordingly but would use the proper designation. Thus the description of the office in the Article should read "the Chief Justice of Manitoba".

ARTICLE XIII: WORKING CONDITIONS

The current agreement contains no provision relating to workload and because of some of the factors previously referred to which now seriously and stressfully affect this issue, the Association initially proposed a multi-faceted new article dealing with a number of workload issues including contact time, a defined noon hour lunch break, and control over extracurricular duties. We are of course concerned both with costs and the need to retain some management flexibility, as well as with some measure of control which the teachers can exercise on the growth in and the distribution of their workload.

Without a full elaboration of all of the arguments advanced we would award as follows:

CONTACT TIME Following the example of an increasing number of Agreements we would go no further than putting a cap on the growth in the number of required contact hours as follows: (The wording chosen is designed to give the Board some flexibility with respect to a teacher who may be light-loaded, based on Division-wide averages.)

> Beginning on September 1, 1994 the student contact time assigned in any school year to any full-time teacher, whether such time is in a teaching, consultative or supervisory role, shall not without the consent of the Association, be greater than 5% above the average

student contact time assigned to full-time teachers by the Division during the school year of September 1993 to June 1994.

We reject however the Association's more detailed workload definition clauses 13.01 (a); 13.01 (b); 13.01 (d); 1301 (e), both because of cost implications and their effect on managerial flexibility.

EXTRA-CURRICULAR ACTIVITIES We are satisfied that if as proposed by the Association the Agreement stipulates that a teacher's participation in extracurricular activities is voluntary it will not diminish the over-all teacher participation in leading, organizing and supervising such activities, but will, without substantial cost to the Division, give individual teachers some measure of control over their own unpaid time.

Accordingly we award the Association's proposed 13.01 (g):

> Participation in extracurricular activities by teachers is voluntary.

However we reject the Association's proposed 13.01 (h) (compensation for participation in extracurricular activity) as being unnecessary in light of our award of 13.01 (g) concerning the voluntary nature of a teacher's participation in extracurricular activity.

Class Size The Association prepared a detailed set of limits on class size. This we feel is both unrealistic in terms of cost (the Board estimates the cost to be over $2,760,000) and unmanageable and we reject this Association proposal.

Noon Hour We can see no merit in not providing for an uninterrupted lunch hour of 60 minutes for the Division's teachers. A break of this kind has been increasingly recognized as an important human need and, indeed, a stress reliever. It is said and not seriously disputed that there is a cost factor here, perhaps as much as $58,900; but only time will tell the exact amount. The Board urged that if we award the Association's proposal here we ought to deduct the

suggested cost from our salary scale increase (a deduction probably in the vicinity of .5%). We decline to do so. The teachers in this or for that matter in any Division ought not, we think, to be put in the position of purchasing what should be considered an entitlement. Accordingly we award as follows:

13.01 - An uninterrupted lunch period of 60 consecutive minutes shall be provided each teacher in the Division between the hours of 11:00 a.m. and 2:00 p.m.

13:03 Freedom From Violence We share the Board and Association's concern about the apparent increase in youth violence, some part of which, and perhaps a growing part of which occurs in schools. Reacting to this apparent increase many Divisions have included a provision in their Agreement which, in part, declares a joint concern about such violence, but also provides a mechanism for the teachers and the Board pooling their efforts to do something about it.

In order to facilitate a joint effort by the Association and the Board without interfering with the Board's statutory and management responsibilities and obligations to discipline unruly students, we are awarding a new Clause, 13.03, using the language of the 1994 Birdtail River Award (Scurfield) as follows:

13.03 (i) The parties recognize the principle that all teachers should have a working environment free from physical violence, verbal abuse or the threat of physical assault and both parties shall make reasonable efforts to maintain this goal.

13.03 (ii) This section is subject to *The Public Schools Act* and regulations thereto and is not intended to abrogate any management rights with respect to the student disciplinary process.

13.03 (iii) Teachers shall not have the right to grieve individual student disciplinary decisions made by the school administration.

Substitutes

The Association proposes a new Article, XIV, which would have the effect of folding substitutes into the collective bargaining mandate of the Association. While we are not convinced by the Board's argument that such a move is precluded by the wording of the *Public Schools Act*, we are not prepared to award it at this time, preferring to leave it as an item for further collective bargaining between the Parties. We do note that virtually all of Manitoba's school division agreements recognize its MTS Association as the bargaining agent for substitute teachers. However most of these are the result of the bargaining rather than the arbitral process and we prefer, for now, to leave it to the Parties to see if in some subsequent year they can come to some agreement on this issue.

Proposed New Article XV: Early Retirement Incentive Plan

Reasoning from what, by now, is a wealth of anecdotal evidence, and looking at the matter logically it would appear that in the long haul the cost of benefits paid to teachers taking early retirement under an incentive plan are rather quickly recaptured (after which the Division has a net reduction in its salary costs). There is, no doubt, merit to the Board's argument that in the short range such a plan is not cost neutral. Quite frankly there is insufficient statistical and actuarial data before us to allow us to make an award at this time on the assumption that there is a cost benefit to the Division as well as to teachers. Here again, while declining to make an award we would urge the Parties to work closely together to see if a such a plan can be evaluated fiscally and be drafted in mutually beneficial terms in time for the next bargaining round. Accordingly we make no award on this item.

Proposed New Article XVII: Layoffs

The Association proposed and, at least initially, the Board rejected an Article dealing with layoffs, a clause which, in this day and age one would have thought essential for both Parties. Indeed, we were advised that this Division remains the only one in Metro without such a provision. However the discussion revealed that it was not so much a question of the principle of dealing with layoffs in an orderly way, if required, but some Board concerns about certain aspects of the specific proposal. In the main it appears that the Board does not want to be unduly restricted by a straight seniority provision and is worried that the Association's proposal (which is not in fact a straight seniority provision) failed to leave enough flexibility with the Division to ensure that ability played some role in mitigating the effect of a seniority based layoff provision. The Association recognized this concern and suggested that we should consider awarding Article 24 of the 1992-94 Fort Garry School Division Collective Agreement which would appear to meet at least some of the Division's concerns. We are satisfied that the Fort Garry Article is indeed a good one and should meet the needs of all concerned. (We were concerned about some ambiguities and redundancies in the Fort Garry article and, accordingly, have amended it slightly.) Accordingly we award as follows:

New Article - Reduction in Professional Teaching Staff Work Force

(1) Where it is determined by the Board that a layoff is necessary and where natural attrition, transfers, sabbaticals and leaves of absence do not affect the necessary reduction in staff, the Board shall give first consideration to retaining teachers having the greatest length of service with the Board.

(2) Notwithstanding the foregoing, the Board shall have the right to disregard the length of service of any teacher which it proposes to lay off if such teacher does not have the necessary training, academic qualifications, experience and ability, for a specific teaching assignment within the Division which the Board reasonably requires be filled.

(3) **Definitions**

(a) **Training:** Instruction received as preparation for the profession of teaching, which instruction leads to the development of a particular skill or proficiency with respect to a particular subject or subjects.

(b) **Academic Qualifications:** Refers to the classification in which a teacher is placed by the Administration and Teachers' Certification Branch of Manitoba Education.

(c) **Experience:** The practical application of the training over a period of time with respect to the particular subject or subjects.

(d) **Ability:** A teacher's demonstrated skill and competence to perform a particular teaching assignment satisfactorily and proficiently.

(e) **Length of Teaching Service:** The teacher's length of continuous employment with the Board commencing with the first teaching day after his/her most recent day of hiring with the Board. Approved leaves of absence shall not constitute a break in continuity of service.

(f) **Specific Term Contract:** A contract, either verbal or written whereby a teacher is hired to teach a specific subject or subjects for a specific term during all or part of a school year.

(g) **School Year:** The period of time from the commencement of a school term on or about the first day of September of a particular year to the end of the term in the month of the June next following.

(4) (a) In the event of an impending layoff, the Board shall meet with the Executive of the Association to discuss the implications of the layoff and shall provide the Association with a list of teachers to be laid off. The meeting shall be held no later than the 15th day of April in any school year.

(b) The Board shall maintain a seniority list showing the date upon which each teacher's service commenced and the total length of service for the purpose of determining seniority.

(5) Length of teaching service shall be determined on the basis of the following:

(a) The teacher's length of continuous employment with the Board commencing with the first teaching day after one's most recent day of hiring with the Board.

(b) Where the teachers have the same length of continuous employment with the Board, the length of teaching service shall be determined on the basis of total teaching experience in the Division.

(c) Where teachers have the same length of service as in (b) the length of teaching experience shall be determined on the basis of total recognized teaching experience.

(d) Where teachers have the same length of service as in (c), the length of teaching service shall be determined on the basis of total recognized teaching experience in Manitoba.

(e) If the length of teaching service, as in (d) is equal, the teacher to be laid off shall be determined as per signature date of respective contracts.

(6) Notice of any layoff shall be given to the teachers no later than the 15th day of May.

(7) If, after layoffs have occurred for a period of two (2) calendar years after the 30th of September following the date of layoff, positions become available, teachers who have been laid off and have given written notice that they wish to be recalled, shall be offered the positions first, providing such teachers have the necessary training, qualifications, experience and ability for the position available. Length of service with the Board will be used to determine the order in which laid off teachers are offered the available positions, provided that the said teachers have the necessary training, qualifications, experience and ability for the available position.

(8) Teachers shall keep the Board informed as to their current address.

(9) Teachers shall be recalled by registered mail and must reply by registered mail within fourteen (14) days of receiving the letters of recall. Failure to contact the Board shall result in the loss of all recall rights. If a teacher refuses a position for which that teacher is qualified, such teacher shall lose all rights to recall.

(10) If a teacher is recalled as provided in (7) above, the following will not be affected:

(a) accumulated sick leave gained prior to being laid off, but sick leave shall not be accrued for the period of time of the layoff;

(b) seniority gained prior to being laid off, but seniority shall not be accrued for the period of time of the layoff.

(11) A teacher shall lose seniority for any of the following reasons:

(a) The teacher resigns.

(b) The teacher becomes employed by another school board except in the case of employment under a limited term contract.

(c) The teacher fails to return to work after the termination of any leave granted by the Board.

(d) The teacher is not re-employed within two (2) calendar years after September 30th following the date of layoff.

(e) The teacher's contract is terminated for cause.

(f) Any teacher on the re-employment list who refuses to accept a position for which the teacher has the necessary training, academic qualifications and ability to perform the work in the offered position, shall forfeit all rights of seniority and re-employment.

(12) Notwithstanding any other provisions of this article, the foregoing layoff provision shall not apply to a teacher continuously employed by the Board under an approved form of agreement for a full school year or less, or to a teacher employed on a limited term contract not to exceed one (1) school year, where during that limited term, the teacher is employed on the express written understanding that the teacher's employment with the Board will cease at the end of such term, provided however, no teacher shall be laid off who has been employed by the Board under an approved form of agreement for more than one (1) full school year, where a teacher with a full school year or less of employment under an approved form of agreement or a limited term contract not to exceed one (1) school year has not been laid off, having regard to the necessary training, academic qualifications and ability required of such teacher employed under a limited term contract or a teacher continuously employed by the Board under an approved form of agreement for a full school year or less for a specific teaching assignment.

SUMMARY

NOTE: THIS SUMMARY IS FOR CONVENIENCE ONLY AND CANNOT BE USED TO ADD TO OR DEROGATE FROM THE FOREGOING AWARD.

PROPOSAL		**DISPOSITION**
BOARD:	NEW 1.02	REJECTED

PROPOSAL		DISPOSITION
BOTH:	ARTICLE II EFFECTIVE PERIOD	3-YEAR TERM JAN. 1/92 - DEC. 31/94
BOARD:	NEW 2.03 - AMENDMENT DATES	REJECTED
BOARD:	NEW 2.04 - RETROACTIVE PAY	REJECTED
ASSOCIATION:	ARTICLE III SALARY 1992) 2.0 1993)- 2.0 1994) 2.3	AWARDED AND APPLIED TO 3.05; 3.06; 3.07; 3.08; 3.09; 3.10
ASSOCIATION:	3.05 (b) PRINCIPAL'S ADMINISTRATIVE ALLOWANCE	REJECTED
ASSOCIATION:	3.13 DUE PROCESS FOR TEACHERS IN ADMINISTRATIVE POSITIONS	AWARDED IN AMENDED FORM
BOARD:	4.02 CALCULATING EXECUTIVE DUTY REIMBURSEMENT	REJECTED
ASSOCIATION:	4.03(g) RETURN TO COMPARABLE POSITION	REJECTED
BOTH:	SICK LEAVE CURRENT 6.01 (b)	REMOVED
BOARD:	NEW 6.01 (b)	REJECTED
ASSOCIATION:	NEW 6.01 (b) SICK LEAVE BENEFITS FOR PREGNANT TEACHERS	AWARDED

PROPOSAL		DISPOSITION
ASSOCIATION:	6.01 (d) EXTRA SICK LEAVE ACCUMULATION	REJECTED
BOARD:	6.01 (g) SELECTING MEDICAL PRACTITIONER	REJECTED
BOARD:	XII SETTLEMENT OF DIFFERENCES (APPOINTMENT OF CHAIR BY CHIEF JUSTICE)	AWARDED
ASSOCIATION:	XIII WORKING CONDITIONS	
	NEW 13.01 (a) MAXIMUM LENGTH OF TEACHING WEEK	REJECTED
	13.01 (b) NON-CONTACT TIME	REJECTED
	13.01 (c) CONTACT TIME (CAP ON INCREASE)	AWARDED
	13.01 (d) JUNIOR HIGH WORKLOAD	REJECTED
	13.01 (e) HIGH SCHOOL WORKLOAD	REJECTED
	13.01 (f) UNINTERRUPTED NOON HOUR	AWARDED
	13.01 (g) EXTRACURRICULAR ACTIVITIES VOLUNTARY	AWARDED
	13.01 (h) COMPENSATORY TIME	REJECTED
ASSOCIATION:	NEW 13.02 CLASS SIZE LIMITATIONS	REJECTED
ASSOCIATION:	13.03 FREEDOM FROM VIOLENCE	AWARDED

PROPOSAL		DISPOSITION
ASSOCIATION:	NEW ARTICLE XIV SUBSTITUTES	REJECTED
ASSOCIATION:	NEW ARTICLE XV EARLY RETIREMENT INCENTIVE PLAN	REJECTED
ASSOCIATION:	NEW ARTICLE XVII LAYOFFS	AWARDED

Although Mr. Liffmann, nominee of the Board, has signed this award to express his ~~overall~~ concurrence with ~~the bulk~~ A PORTION of the majority award, he will be issuing, separately, in due course, a dissent with respect to certain matters and will be expressing some qualifications with respect to others.

In accordance with the terms of the *Public Schools Act*, the parties will each pay one-half of the total fees and disbursements of the Arbitration Board dated at the City of Winnipeg, Manitoba, June 22, 1994.

Roland Penner
CHAIR

J. D. Shaw
Association Nominee

Board Nominee