IN THE MATTER OF AN ARBITRATION

UNDER THE PROVISIONS OF THE PUBLIC SCHOOLS ACT

BETWEEN

THE ASSINIBOINE SOUTH SCHOOL DIVISION NO. 3

AND

THE ASSINIBOINE SOUTH TEACHERS' ASSOCIATION NO. 3

OF THE MANITOBA TEACHERS' SOCIETY

AWARD OF ARBITRATION BOARD

May 24, 1985

ARBITRATION AWARD

This Award is made pursuant to the provisions of The Public Schools Act of Manitoba. The Assiniboine South School Division No. 3 (the "Division") and The Assiniboine South Teachers' Association No. 3 of The Manitoba Teachers' Society (the "Association") were unable to settle all terms of their collective agreement (the "Agreement") for the calendar year 1984. As a consequence this Board was duly appointed by the Minister of Education of Manitoba. The Board conducted its hearings on January 21, February 25, February 27 and April 3, 1985.

Both parties agreed that the Board was duly constituted and had jurisdiction (subject to certain items mentioned below) to determine all matters in dispute. It was further agreed that the time within which the Board was obliged to make its Award would be extended to 60 days from the conclusion of the hearings.

A number of issues were in dispute between the parties. Regarding four of these issues the Division raised objections as to arbitrability. We shall deal with these four issues as the last items in this Award.

1. EFFECTIVE PERIOD

As mentioned in the introduction to this Award this Board was appointed because the parties were unable to settle all terms of the Agreement for the 1984 calendar year. However, in its statement of the matters in dispute which was submitted to the Minister of Education and which was transmitted to this Board, the Association requested that the terms of the Award extend (with variations) over the

1985 calendar year, as well. After some consideration the Division agreed with this suggestion. Since both parties concur that the Agreement being constituted by virtue of this Award shall cover both the 1984 calendar year and the 1985 calendar year, the Board so awards.

2. BASIC SALARY SCHEDULE

Teachers in the Division are paid according to a salary grid which takes into account both their years of experience and their educational qualifications. For the calendar year 1983 the salaries of teachers in the Division ranged from a low of $15,120 (the entry level in Class 1) to a high of $42,693 (the maximum level in Class 7). In 1983 there were approximately 355 teachers employed by the Division. The average salary of those teachers was $34,723.

As is usual in arbitrations of this kind, both parties presented a considerable amount of evidence, statistical and otherwise, in support of their respective positions regarding the salary schedule. Before this Board the Association requested that the Board award a 4% increase at all pay points for 1984, and a similar 4% increase for 1985. The Division requested that the Board award a $700 flat across the board increase for 1984, and award no increase for 1985.

Among the facts which were submitted by one or both parties, the following appear to this Board to be relevant:

1. Approximately 59% of the teachers in the Division are at the maximum of their respective classifications. This is, therefore, a division with a substantial percentage of highly experienced teachers. The evidence also suggests there is not a great deal of difficulty with retaining teachers in the Division.

2. 96.2% of the teachers have Class 4 or greater classification. This is the highest percentage in the Province of Manitoba, and, relatively speaking, therefore, this is the division with the most qualified teachers in the Province.

3. At the commencement of the 1983 year over 79% of the teachers in the Division were in Classes 4 and 5. 35.8% were in Class 4 and 43.4% were in Class 5. Within these two groups approximately 146 teachers were at maximum.

Considerable argument was presented by both parties relating to the situations in other school divisions in Manitoba, and in other public sector areas in Manitoba. It was argued, based on the well known and generally accepted criteria laid down in the Metro Toronto Board of Education award in 1976 (Mr. Justice Dubin) that these (among other matters) were relevant for this Board to consider. Among the criteria referred to in the Metro Toronto Board of Education award were such matters as the wages, hours and conditions of employment of public sector and private sector employees, the wages, hours and conditions of employment of other persons performing similar services, the cost of living, the economic climate of the day, the continuity and stability of employment, the interest and welfare of the public and the financial ability to pay of the employer.

In support of its request that this Board award a 4% increase to all pay points in 1984 and again in 1985, the Association placed considerable emphasis on increases in the cost of living since 1983. Reference was made to the Consumer Price Index ("C.P.I.") which indicated, for example, that the rate of increase in the C.P.I. in 1983

over 1982, in Winnipeg, was 6.7% and that the rate of increase in 1984 over 1983 was 3.65%. It was argued that teachers' salaries are settled with retrospective concern; i.e., that the 1984 salary should take into account the rate of increase in the C.P.I. in 1983 and that the 1985 salary should take into account the rate of increase in the C.P.I. in 1984.

We were advised that Assiniboine South is the only School Division in Manitoba where there is no contract settled for 1984. On the other hand, there are very few contracts settled for 1985. This Board has the benefit, regarding 1984, of knowing the salary settlements in all other school divisions, and also is aware that this award for 1985 will be examined by some other groups during their discussions for 1985.

In 1984 other Greater Winnipeg school division salary settlements included a 2.5% increase (in St. James-Assiniboia, St. Boniface, Fort Garry, Seven Oaks and Lord Selkirk), an $881 increase (in Winnipeg), an $885 increase (in Norwood), a $940 increase (in Transcona-Springfield), a $1,055 increase (in River East) and a 1% plus a $520 increase (in St. Vital). While settlements in school divisions outside Greater Winnipeg may not be as relevant as those within Winnipeg, having regard to local circumstances which influence and affect both the employer and the employee, the settlements described above do not seem to be untypical of those throughout Manitoba, except that it should be observed that only a few settlements reached $1,000 and very few seemed to be below $800.

In 1984, 30 settlements were on a flat dollar basis, 18 settlements were on a percentage basis and 9 settlements were a mixture. Of those settlements receiving a flat dollar increase the median amount was $852. Of those settlements receiving a percentage increase the median percentage was 2.65%.

The Association compared the salaries of its teachers with those of other teachers in the Greater Winnipeg area. As was stated by the Association, any such comparison is a complex matter. One of the comparisons made by the Association was to calculate, for the teacher population of each division, the payrolls which would be generated by each salary scale in the Province, and a ranking thereof was calculated. The Division's teacher population was taken and the payroll was determine on the assumption that the teachers were paid on each salary scale of each division in the Province. These were then ranked so that one could determine the order of salary scales within the Province. On this basis the Assiniboine South Teachers ranked 26th within the Province for Classes 1 through 6 and 22nd within the Province for Classes 1 through 7.

The Division argued that such a comparison was not meaningful and that it would be more appropriate to compare the average salaries within the Greater Winnipeg School area. As mentioned above, the average salary within the Division in 1983 was $34,723. The weighted average Greater Winnipeg salary (ie. weighted according to the number of teachers in each division) was $34,601. For 1983 the teachers in the Division were about .35% above the Greater Winnipeg average. They were 3.8% above the weighted provincial average of $33,461. There were three divisions in Winnipeg with higher average salaries and 6 divisions in Winnipeg with lower average salaries.

The Division argued that in the period from 1979 through 1983 the C.P.I. in Winnipeg increased in the aggregate 41.7% whereas the average salary of teachers in the Division increased in the aggregate 67.1%. On this basis the Division argued that these teachers had not suffered by inflation in the five year period mentioned and C.P.I. increases should not be considered a factor.

The Division stated that the cost to it of the Association's 1984 proposal, including costs attributable to increments, reclassifications and staff changes (which should not properly be "charged" to the Association's proposal) would be about $788,000. We estimate that, when the additional costs referred to are excluded from the calculation, the cost to the Division of the Association's salary proposal of a 4% increase for 1984 would be in the range of $500,000. The cost to the Division of its own 1984 proposal, including the aforesaid additional costs, would be about $535,000. We estimate that the cost to the Division of its proposal, exclusive of the said additional costs, would be in the range of $250,000.

We were given information about salary settlements in other public sector areas, for 1984. An arbitration board fixed the salary increases for Winnipeg Firefighters for 1984 at a 3% increase. The Winnipeg Police, in a two year agreement, obtained a 3% increase for 1984. The Winnipeg Transit Workers, in a two year agreement, obtained a 3% increase. The Canadian Union of Public Employees, in its negotiations with the City of Winnipeg, realized a 3% increase for 1984, in a two year agreement. The senior police officers for the City of Winnipeg also achieved a 3% increase in 1984.

Both parties agree that an increase is appropriate for 1984, although the Division argues for a flat dollar increase and the Association argues for a percentage increase. In the opinion of this Board, having regard to all factors submitted to us, it is best to award a salary increase which is of greater overall benefit to those in the lower salary brackets than to those in the higher salary brackets. One of the most important, if not the most important, justifications for any salary increase in the public sector is the reality that the costs incurred by employees in their daily lives rise due to matters beyond their control. It is axiomatic that these costs impact more adversely, in absolute terms, on those at the lower end of the scale rather than those at the higher end of the scale. Leaving aside other factors, such as productivity, increases in salary warranted by cost of living increases must take this reality into account.

We consider it appropriate to award an increase on a flat dollar basis.

Taking into account all factors raised by both parties we have concluded that an increase of $900 at each pay point would be appropriate for 1984. We estimate that this translates into an increase of 2.6% on the average salary in the Division.

For 1985 the Association requested the same 4% increase which it had requested in 1984. As mentioned above, few settlements for 1985 have been realized. At an early date in our hearings we were told that only two settlements existed for 1985. We do not know, at the date of this Award, how many more settlements have been made. Those two 1985 settlements were in Thompson and Pine Falls. The

Thompson settlement was made in October, 1983 as part of a two year agreement commencing January 1, 1984. In 1985 the Thompson salaries will be increased by the C.P.I. Winnipeg monthly average rate of increase for 1984. In Pine Falls, by an agreement reached in December, 1984, salaries will increase in 1985 by 4%. We do not consider these two settlements particularly pertinent in connection with the situation of the teachers in the Assiniboine South Division.

There are some public sector settlements for 1985 which were presented to us. The Winnipeg Firefighters will receive a 3.5% increase as at January 1 and a further .5% increase as of July 1. The Winnipeg Police, Transit Workers, C.U.P.E. employees and senior police officers will all receive a 3% increase in 1985.

The Association also argued that all those factors which militated in favour of a 4% increase in 1984 were equally applicable in 1985. However, it must be recognised that the cost of living increase in 1984 appears to be less than that in 1983.

The Division urged that no increase should be awarded for 1985. It provided information relating to its tax base and the cost to it of the proposal made by the Association. It also drew to our attention the fact that, for the period September 28, 1984, to September 28, 1985 the Manitoba Government Employees' Association had negotiated an agreement (the first year of a three year agreement) with the Government of Manitoba providing for no salary increase. That agreement, however, does contain a variety of other provisions which will both benefit the employees (such as an extra week's vacation) and which may have a cost impact to the employer.

We have considered the Division's argument that no salary increase should be awarded for 1985, but have concluded that it would be inconsistent with our duty to settle the 1985 contract on a basis fair to both parties, and that we would be ignoring the criteria which we have said are relevant, if we were not to award any salary increase. Costs incurred by the employees in their living expenses have risen and undoubtedly will continue to rise, although the rate of increase is never known in advance. Some productivity gains may have occurred, although this is difficult to measure with any degree of precision. Unusual situations (such as those relating to the M.G.E.A. contract) must be considered with a great deal of caution, as special circumstances almost always apply in such situations.

We have considered the Division's ability to pay an increase. We have examined its budget for 1985 and its funding sources. As with most public sector employees it is not replete with abundant discretionary income. However, among its top priorities must be the payment of a fair wage to its teachers. If an increase is warranted, the resources will be made available, even if other expenditures must, therefore, be reduced, or other economies applied.

While the Division has only a limited amount of extra funding coming from the Province, its employed teachers are nevertheless entitled to receive an appropriate wage for the services they provide. We do not think the "ability to pay" factor can be relied upon to justify a zero salary increase for this Division, in 1985.

We have concluded that the facts require an increase for 1985. The C.P.I. for 1984 rose 3.65% and there is no reason to think teachers' living expenses have not increased. These particular teachers are not over-paid, but without

somewhat of an increase they may be underpaid. We think that the increase for 1985 should be precisely the same increase as that awarded in 1984; i.e. a $900 increase on an across the board basis. On the assumption that our 1984 award increases the average salary to $35,623 (this may not be precisely correct because of changes in numbers of teachers and perhaps other factors) a 1985 increase of $900 would translate into a percentage increase of approximately 2.5%. Having regard to the economic times, the circumstances of the employer, the rights and responsibilities of the employees, and all other relevant factors, we award an increase of $900 at each pay point, for 1985.

3. FORMER EMPLOYEES

The Division requested that the Agreement stipulate certain special provisions relating to the entitlement to salary increases of employees who had been in the employ of the Division as of the effective date of the Agreement, but who had subsequently resigned before the date of signing of the Agreement. The Division wanted, in essence, that such retroactive pay increases that might be awarded would be paid only to those employees described who made written requests for the increase. Such a provision is apparently found in the M.G.E.A. collective agreement. It would lead, said the Division, to administrative convenience.

The Board finds no justification for making such an award, which could deny the availability of the increases in salary to employees who are legally entitled to such increases. They have earned the money, it is payable to them and the Board declines to award as requested by the Division.

4. REDUCTION OF ENTRY LEVEL STEP

The Division proposed that a new entry level step be created in a separate salary schedule for teachers hired, effective on and after September, 1985, for classes 3 through 7. The Division requested that this Board establish a second salary grid for newly hired teachers. The Division proposed that the entry level step in classes 3 through 7 be reduced by $1,500 below the amount otherwise payable, effective September, 1985. It was argued that there is a glut of available teachers on the market and that the laws of supply and demand should produce a lower salary scale for newly hired teachers. It was also suggested that the Division receives far more applications for its few available positions than it can possibly accommodate. It was also suggested that the establishment of a second salary grid would provide an incentive for the Division to hire a larger number of entry level teachers at lower salaries, thus reducing unemployment.

It does not seem to this Board at all appropriate that teachers in the Division be paid according to two different salary grids, depending entirely upon when they were hired. Their qualifications and experience are weighted according to a salary grid which, apart from the different salary numbers, is replicated substantially throughout the Province. To establish a second scale for newly hired teachers adds a degree of distinction and, it could be argued, discrimination, among the teachers within the Division which could have far reaching implications. Were it economically justified, the proposal's novelty would not deter this Board from awarding as requested by the Division. However, the Board sees no economic justification for the proposal. We do not think that the Division will alter its hiring practices in any material way if the requested provision was awarded. The possible disadvantages

of such a provision far outweigh the possible, minimal advantages to be realized by the Division. The Board declines to award as requested by the Division.

5. ALLOWANCE FOR ADDITIONAL QUALIFICATIONS

The Division requested a change in the provisions of the Agreement relating to the situation where an employed teacher improves his academic qualifications and thereby moves from one classification to a higher classification. At the present time a teacher who improves his academic qualifications will move into the next classification at the same point on the salary scale in terms of years of experience as he was at in his prior classification, plus one year if applicable. For example, a teacher at the maximum level in Class 3 who upgraded to Class 4 would move either to maximum level in Class 4 if he had the requisite number of years experience, or to that level in Class 4 matching his then years of experience. The Division gave some examples where such an increase in academic qualifications could yield a salary increase in one year of over 33%.

The Division argued that this was completely unwarranted because the increase in qualifications might have occurred, and we gather probably in most cases will have occurred, as a result of a unilateral decision of the teacher. That is to say, the Division hires an employee at a particular classification. Subsequently, and without consultation with or the consent of the employer, the employee upgrades his qualifications and thereby moves into a higher classification. The Division argued that such additional qualifications may have no bearing on the tasks being performed, and that a re-structuring of the compensation should be effected.

The proposal of the Division would see a teacher who upgraded himself moving to the next highest classification on the salary grid at the next step nearest to but not less than his prior rate of pay. Accordingly, a teacher would receive an increase in salary, but would be lower on the salary scale (for these purposes only) in terms of his years of experience. It would take him longer to reach the maximum in his new classification.

This proposal was strenuously resisted by the Association. It was argued that it might act as a damper on teachers increasing their qualifications. It was also stated that this kind of provision does not exist anywhere else in Canada, although the Division submitted a negotiated clause in the Transcona-Springfield Division which has some similarities to that proposed here.

The Division agreed that its proposal could be limited to Classes 4, 5, 6, and 7. This would eliminate any so called "damper" effect on upgrading from Classes 1, 2, and 3. No information was given to this Board as to the numbers of teachers who have upgraded their qualifications within Classes 4 and up.

The Division's proposal also would apply to teachers entering the Division from teaching positions elsewhere.

This is a difficult issue to determine. On the one hand the Board does not want to impose artificial barriers to the increase of qualifications of teachers which would (presumably) be an intrinsically desirable object to achieve. On the other hand the Division hires a teacher, expecting to pay that teacher a certain salary based on the classification of the teacher, and expects increases according to a reasonably well known and anticipated salary grid. The teacher in a summer may then unilaterally upgrade

his qualifications, and the Division will have a teacher in the fall of a particular year with substantially greater salary obligations regarding him than it had in the spring of that year. The teacher's duties may be precisely the same, and his increased qualifications may not warrant what could be a very large step-up in salary.

Increased qualifications will always produce an increased salary, according to the Division's proposal, so there should still be an incentive to upgrade. The Board finds considerable merit in the proposal and awards as requested by the Division (limited to Classes 4 and above). Our award on this particular issue is not to take effect until September 1, 1985.

6. ADMINISTRATIVE ALLOWANCES

The Agreement provides that teachers in administrative positions will receive a special administrative allowance. Article 3.05 of the Agreement provides that principals receive an allowance which is the greater of a flat dollar amount or an amount calculated in relation to the number of teachers in the school. Other parts of the Article contain provisions relating to various aspects of these administrative allowances, some of which also apply to vice-principals.

The Association requested a number of changes to the Article and the Board proposed no change at all.

After considering all the arguments submitted by the parties, the Board awards as follows, regarding Article 3.05 of the Agreement:

(a) no change;

(b) the amount referred to in clause (i) of subparagraph (b), namely, $5,375, shall be increased by 2% for 1984 and the resulting amount shall be

increased by 2% for 1985; and the amount referred to in clause (ii) of subparagraph (b) shall be increased in each case by 2% for 1984, and the resulting amount shall be increased, in each case, by 2% for 1985;

(c) the provisions of subparagraph (c) which refer to principal and in certain cases principal and/or vice-principal, shall in each case be changed to read "administrator", which shall include both principals and vice-principals, with the effect that such a person as is referred to in the mentioned subparagraph shall retain his allowance at the time of transfer provided that he elects, at or before the time of his reassignment, retirement by the age of 60 and enters into the agreement referred to in the subparagraph;

(d) subparagraph (d) shall be changed as requested by the Association so that it applies both to principals and vice-principals, on the basis that the new assignment is in an administrative position and that subparagraph (c) is inapplicable;

(e) subparagraph (e) shall be changed so that the vice-principal's allowance is 50% of the principal's allowance;

(f) there shall be no change in subparagraph (f) or (g);

(g) the Association's requested change regarding a new subparagraph (h) shall not be awarded.

In summary, the Board considers that the administrative allowances should be increased, but by a lesser amount and percentage than the increases in the overall salary scale.

To the extent that the allowances represent a salary component, they deserve to be increased. However, simply because the cost of living has gone up and because other factors suggest there should be a salary increase does not mean that there has been a parallel increase in the duties or responsibilities of administrators. A blend of these two approaches yields the 2% increase referred to herein.

7. SUPERVISORY ALLOWANCES

We award an increase in the amount stipulated in Article 3.06 of the current agreement of 2% for 1984 and a further increase over the resulting figure of 2% for 1985.

8. COORDINATORS' ALLOWANCES

We award an increase in the allowance paid the Coordinator of Library Services and in the allowances paid to Subject Area Co-ordinators of 2% for 1984 and a further increase over the resulting figure of 2% for 1985.

The Division proposed that where a person is appointed coordinator on less than a full time basis the allowance should be paid, but on a basis proportional to the time expended. While we recognize there may be difficulties in determining at all times the precise amount of time required to be spent, the principle proposed by the Division, while having an apparent logic to it, nevertheless ignores the reality that the duty and responsibility of coordinator cannot be measured simply by the time spent fulfilling the work. The allowance paid to a coordinator is paid in recognition of the duty and responsibility of being the coordinator. The fact that the time assignment may be less than full time does not detract from the duty and responsibility assumed by the incumbent and to be discharged by him. We do not think the Division's proposal should be accepted and we decline to award as requested by it.

9. DEPARTMENT HEAD ALLOWANCES

The amounts referred to in the present agreement shall be increased by 2% for 1984 and the resulting amounts shall be increased by 2% for 1985.

10. PAYMENT OF SALARY

At present teachers in the Division are paid one-twelth of their salary at the end of each month during the period September to May. At the end of June teachers receive the balance of their yearly salary (i.e., three-twelths thereof). The Association proposed a "ten pay" system whereby teachers would be paid one-tenth of their yearly salary in each month from September to June. This could only be effective as at September, 1985, if the Board agreed with the Association's request.

The basis of the request by the Association is that teachers' actual services are performed in the period September through June and their receipt of pay should be based on an equal amortization formula. That is to say, in the month of September, teachers perform approximately one-tenth of their services and so they should receive one-tenth of their salary in that month.

The Division objected strenuously to this proposal, largely on the basis of its cost. Implementation of the ten pay system would result in an increase in budgeted expenditure of close to $900,000. This would be a one time cost only, attributable strictly to timing, but it would never be "recovered" by the Division (unless it went out of existence). There would be an actual cost of financing the early pay arrangements of about $13,000 in interest charges.

A number of divisions in the Province operate on the ten pay basis and a number operate on a twelve pay basis. Assiniboine South operates on a twelve pay basis with a variation that at the end of the teaching year the balance of the salary is paid. There are a few other variations in force in Manitoba.

We think the present system has merit. The teachers are employed on a contract which covers a twelve month term. Arguably a twelve month pay system could be justified on the basis of the duration of the contract. The parties have, however, agreed that there shall be a modified twelve pay system which represents, in the Board's view, recognition of the combined term of the contract and the actual duration of the performance of services. We award no change in this Article.

11. INTEREST ON RETROACTIVE PAY

At present retroactive pay increases carry interest from April 1 to the date of the signing of the agreement in question. The Association proposed that interest should be paid from the date when the salary amounts in question were normally payable, rather than the fixed date of April 1. The Division proposed that interest should be paid only if the parties were unable to settle their agreement by collective bargaining, and if an arbitration board was appointed, and then interest would be payable as of the date when the chairperson of the arbitration board was appointed by the Minister of Education. The Division also proposed a decrease in the minimum interest rate from the present 10.5% to 9%.

It appears to be accepted that interest on back pay awards or settlements is not a penalty to the employer nor is it a bonus to the employee. Nor, properly structured, should it in any way influence either party to accept a settlement otherwise unacceptable, or to delay accepting a settlement otherwise acceptable. Interest payment is simply an acknowledgement of the fact that the employees have provided services but have not received their full compensation, and the employer has had the benefit thereof. In circumstances when there is no right to strike, the payment of interest on back pay awards is fair and reasonable.

There are many interest payment arrangements in force in the various school divisions in Manitoba. The arrangement that strikes this Board as the most logical is that which sees interest running from the date when, had the retroactive pay increase actually been paid at the applicable time, there would have been no necessity to pay interest at all. We award that interest will be paid, as set out in the present Agreement, but that it shall be calculated as of the respective dates when the additional salary would have been paid, had this Award been in force on January 1, 1984, and January 1, 1985, respectively, to the date of actual payment. We do not think there is any basis for reducing the 10.5% factor in the present Agreement to 9% and make no change in that regard.

12. TEACHERS' RETIREMENT AGE

The Association proposed that this Board award an Early Retirement Incentive Plan. One such plan, proposed as a model, now exists in the Lord Selkirk School Division. The effect of this proposal would be to delete the retirement age provision of 65, and to create, by the imposition of

the Early Retirement Incentive Plan, a scheme whereby early retirement would be rewarded. This plan would have some tax advantages for some teachers and would be available to those who are at least 55 years old and had ten years employment.

There is a developing body of jurisprudence in relation to mandatory retirement. Moreover, other statutory and constitutional provisions may now have a considerable impact on such question.

There is presently in force a pension plan for teachers which provides for retirement at age 60 without penalty. Some of the evidence provided by the Division suggests that there is some inclination towards "early" retirement among some teachers at present.

We have considered the Association's request but we are not persuaded that this Board should award an Early Retirement Incentive Plan, and we decline to do so.

13. MATERNITY LEAVE

Under the current Agreement every female teacher is entitled to maternity leave. The Division proposed that this entitlement should be conditioned upon the female teacher having completed twelve months of employment under her contract. The purpose of this proposal was to ensure that the female teacher did not pass through her probationary period of twelve months, thereby acquiring tenure, if part of that first twelve month period of service was interrupted by a lengthy maternity leave. The Division argued that, in order for it fairly to assess the teacher's performance, she must have been in the school room actually teaching. An extended maternity leave would reduce the period of time for a proper evaluation to take place. The present Employment Standards Act does require a

year of actual paid service prior to entitlement to maternity leave. The Public Schools Act permits the parties to negotiate a more improved maternity leave arrangement, which they have done in this case. The Division now wishes to alter that, as described.

This proposal seems to the Board to be fair and reasonable. It does not in any way detract from the obvious importance of an entitlement to maternity leave, to say that the provisions of the Employment Standards Act are sensible, and that teachers, like other employees, should be on the job twelve months before becoming entitled to maternity leave. In the case of teachers, there is a special argument, which we think has validity, that maternity leave taken during the first year could result in the Division having an inadequate opportunity to assess performance.

Seeing merit in the Divisions' proposal we award as it requests.

14. GROUP LIFE INSURANCE

The Association proposed an increase in the basic group life coverage, to be paid by the Division, and also an increase in the available additional coverage, to be paid by the teacher. The Division did not object to the proposals, except to the request that it pay the cost of the extra basic coverage.

The present contract provides that each teacher receives $50,000 basic coverage, and has the opportunity to acquire, at his own cost, up to three additional units of coverage of $50,000 each. The Association proposed that the basic coverage be doubled, and that up to four additional units could be acquired. The Division pays the entire cost of basic coverage and contributes towards the cost of additional units of coverage.

It is estimated that the cost of this proposal to the Division would be about $17,000. The Division does not object to the change requested; the argument is as to absorption of cost. We think that in all the circumstances of this Award it is fair and reasonable that the Division pay the costs of this increased basic coverage, and we so award.

15. SICK LEAVE

The Association proposed one change in the sick leave arrangements, whereby unused sick leave could be carried forward and accumulated beyond the 80 days now provided in the 4th and subsequent years, to 100 days in the 5th year and 120 days in the 6th and subsequent years. For its part the Division proposed a number of changes:

1. A form of definition of sick leave was proposed;

2. A restriction on the ability to obtain sick leave was proposed;

3. A restriction on the right to accumulate sick leave was proposed;

4. A further restriction on the application of sick leave was proposed.

Sick leave has been the subject of considerable discussion among these parties, and also in other divisions, and has been the subject of some court cases.

Both parties seem to be in agreement that if there were costs associated with any of the proposals, it would be very difficult to calculate them.

There will be, hopefully, few teachers who would need to benefit by the accumulation of sick leave to 100 days in the 5th year and 120 days in the 6th and subsequent years. For those few, however, the right to accumulate sick leave to the longer periods of time would be an extremely important right. We do not think that this request would impose a serious burden on the Division and we award as requested by the Association.

The Division proposed that sick leave should apply only where an employee is unable to be at work and perform his regular duties as a result of illness or injury and that sick leave would not be payable for any injury received while gainfully employed at another job. These proposals both define and restrict the application of the sick leave provisions. The proposals of the Division are reasonable and the Board awards accordingly, as set forth in the Division's proposals regarding Articles 7.01 and 7.02.

The Division's next proposal relating to sick leave stipulated that sick leave is accumulated at the rate of one day of sick leave for every nine days of actual teaching service to a maximum of 20 days per year and a further maximum of 80 days accumulative. We have already dealt with extending the accumulative maximum. There is no disagreement among the parties as to the 20 days maximum in any school year. The disagreement is whether sick leave is "earned" on the basis of one day for every nine days of teaching, or whether it is a vested right or benefit, such as insurance, the full benefit of which is obtained on the very first day of teaching. The simplest example of this situation is where a teacher becomes ill or is injured on the first day of teaching. Does that teacher then have 20 days of sick leave, or none?

The Division argued that the practice of the parties is consistent with the Division's suggestion. It said that its proposal would simply clarify and confirm the existing practice.

After considering the argument of the Division the Board is not prepared to agree with it. The applicable provisions for sick leave in the Agreement are reasonable, and this Board does not think it ought to interfere with the present situation, as expressed in the written contract.

Four issues raised by the Association were met by an objection from the Division on the basis of lack of arbitrability. As to the arbitrability of three of these issues, we agree with the Association, and as to the arbitrability of one of them, we agree with the Division.

16, 17, 18. LENGTH OF SCHOOL DAY, INSTRUCTIONAL LOAD, COMPENSATION

The Association proposed that the Agreement contain a provision that the length of the school day would be no longer than 5 1/2 hours and that there be a minimum of one hour for lunch. The Division objected that such a provision could not properly be the subject of an award by this Board on the basis that it was not arbitrable. On the arbitrability of this and the following three issues the parties presented their arguments through counsel.

The Division argued that the Association's requests regarding the length of the school day, instructional load, and related compensation were all within the exclusive

domain of the Division by virtue of The Public Schools Act, The Education Administration Act and the regulations thereunder.

These issues, together with the last issue relating to substitutes, were raised in the material referred to this Board by the Minister of Education. However, both counsel agreed that such inclusion does not render arbitrable an issue which is otherwise not arbitrable. Under The Public Schools Act, the duty of a board of arbitration such as this is to "make an award, setting out its decision as to the manner in which all matters in dispute between the parties shall be settled ...". We must find our jurisdiction (both counsel agreed on this point) within the definition of "dispute" in Part VIII of The Public Schools Act. Section 97(1)(g), in Part VIII, defines "dispute" as follows:

> "(g) "dispute" means a controversy or difference or apprehended controversy or difference between a school board and one or more of the teachers employed by it or a bargaining agent acting on behalf of those teachers, as to matters or things affecting or relating to terms or conditions of employment or work done or to be done by the employer or by the teacher or teachers, or as to privileges, rights and duties of the school board, or the teacher or teachers that are not specifically set out in this Act or The Education Administration Act or in the regulations made under either of those Acts; ..."

It was argued by the Division that the issues of length of school day, instructional load and related compensation were "matters or things affecting or relating to terms or conditions of employment or work done or to be done ... by the teachers" that <u>are</u> specifically set out in the regulations made under The Education Administration Act, and, therefore, are issues outside the scope of a "dispute". Some authorities were presented by the Division in support of this proposition, and authorities were

presented by the Association to counter that proposition. Among the authorities submitted by the Division was the arbitration award in Re Assiniboine South School Division No. 3 and Assiniboine South Teachers Association No. 3 (unreported) of December, 1978, where that board, in connection with sick leave, said that:

> "The Public Schools Act provides a minimum entitlement and by so doing takes this matter out of the realm of collective bargaining"; and that "...any precise discretionary power granted to a Board of Trustees ... cannot be usurped through the mechanism of an arbitration award unless the statutory authority clearly entitles the arbitration board to do so".

The Division also relied on the judgment of the Manitoba Court of Queen's Bench in Rolling River School Division No. 39 and the Rolling River Division Association No. 39 of Manitoba Teachers' Society (1980) 2 WWR 187. In that judgment Mr. Justice Wright observed that arbitrators cannot make an award in an area prohibited by the Act or in conflict with legislation which deals specifically with a matter. Reliance was also placed on the judgment of Mr. Justice Hamilton in The Swan Valley School Division No. 35 and The Swan Valley Division Association No. 35 of the Manitoba Teachers' Society (unreported, 1980) and the judgment of Mr. Justice Wilson (affirmed by the Court of Appeal of Manitoba) in Portage la Prairie School Division Association No. 24 and Evergreen Teachers' Association No. 22 v. Portage la Prairie School Division No. 24 and Evergreen School Division No. 22 (14 Manitoba Reports (2nd) 233). In the Evergreen case Mr. Justice Wilson referred to Section 97(1)(g) of The Public Schools Act and generally took the view that where a division has the privilege to accept or reject a particular matter, arbitrators do not have the authority to impose such matter.

In the judgment in Alberta Teachers' Association and Hawco et al (unreported, 1980) the Court of Appeal of Alberta was dealing with a question related to whether a teachers' association could require a school board to negotiate the number of days of school operation. The relevant statutory provision stated that "a board shall specify the number and the days of school operation". Another statutory provision stipulated that, unless a teacher agreed, a board could not require a teacher to instruct pupils for more than 330 minutes during a day or for less than 190 or more than 200 days in a school year.

The Court of Appeal concluded that the school board's obligation to specify the number of days of school operations (within the limits described) was not a matter which it was free to negotiate. On that basis the Court concluded that the right of the school board to make the ultimate decision was not arbitrable.

Relying on these authorities the Division argued that the proposals of the Association referred to were all provided for, directly or necessarily inferentially, in the Act, The Education Administration Act or the regulations thereunder. Reference was made to a number of sections in the Act, such as Section 41 and Section 48. Reference was made to contracts signed by teachers, and it was argued that these proposals contradicted the contractual provisions.

Manitoba regulation 4/81 under The Public Schools Act provides, among other matters:

> "1. Unless the Minister gives specific written approval of other arrangements, the instructional day

shall be not less than 5 1/2 hours including recesses but excluding the mid-day intermission.";

2. "Subject to Section 1, any school board may, by resolution duly recorded in its minutes, determine the hours of opening and closing as well as the time and duration of the mid-day intermission."

Manitoba regulation 250/80 under The Education Administration Act and The Public Schools Act contains provisions, inter alia, to the effect that every teacher is to be on duty in the school at least ten minutes before the opening of the morning session and at least five minutes before the opening of the afternoon session and contains provisions clearly vesting authority for the supervision of pupils, buildings and grounds during school hours in the school principal.

In reference to regulation 4/81, the Division argued that any school division has, by virtue of such regulation, the authority to fix the instructional day at greater than, but clearly at not less than, 5 1/2 hours. The Division said that since this is a discretion granted to a board, and exercisable by the board alone, it is not a matter to be negotiated or arbitrated. It was argued that to place the matter in negotiation, or to make it the subject of an arbitration award, was to take away the discretion granted by the regulation to a school board.

The Association raised a number of arguments on arbitrability. Reference was made to the judgment of the Manitoba Court of Appeal in Dauphin Ochre School Area No. 1 v. Dauphin Ochre Division Association No. 33 of Manitoba Teachers' Society et al (1971) 4 WWR 138, and the judgment of the Court of Queen's Bench in Winnipeg Teachers' Association and Manitoba Teachers' Society of the Winnipeg

School Division No. 1 (1972) 3 WWR 274. In the case before us the Division agreed that the matters placed in issue by the Association did constitute terms and conditions of employment, which was essentially the basis of the latter judgment.

The Association referred, as had the Division, to the judgment of Mr. Justice Wright in the Rolling River case. In that judgment the Court made reference to a distinction between the general statutory powers given a division which contain no mandatory direction, and express obligations which a division must perform or specfic legislation dealing with terms and conditions of employment. The Court said, in the course of its judgment:

> "... if a provision in the statute can be interpreted properly to mean that the legislature has chosen to deal fully with the terms or conditions of employment of teachers in a specific area, then it is not open to the parties to engage in the collective bargaining process in that area. But if that interpretation cannot be made then there should be no impediment to collective bargaining so long as the negotiations do relate to terms and conditions of employment of teachers"

It was agreed, as mentioned, that the matters before us do relate to terms or conditions of employment. Can it be said that the statutory provisions, referred to, which include the regulatory provisions represent a full and complete dealing by the legislature with the particular matters? The answer to this question is found in the compelling judgment of the Supreme Court of Canada in Durham Regional Police Association v. Durham Regional Board of Commissioners of

Police (1982) 140 DLR 3rd 1. This judgment adopted, as part of its own reasons, the dissenting reasons for judgment of Mr. Justice Zuber in the Ontario Court of Appeal judgment in the same matter (reported at 108 DLR 3rd 629).

In the Durham case an arbitrator prescibed a particular article as one of the terms of an agreement. The article so prescribed stipulated that where a member of the police force was charged with a particular offence, under certain conditions the member "shall" be reimbursed for reasonable legal expenses incurred. The Police Act contained a provision to the effect that the council of a municipality "may", in certain cases, pay damages or costs awarded against a police force member. It was argued that by the statute the council had the discretion to pay or to withhold payment of costs and accordingly for an arbitrator to prescribe the term mentioned was to interfere with the exercise by the board of its discretion, which included a discretion not to reimburse legal expenses.

Mr. Justice Zuber referred to the provision in the Police Act as permissive and one which provides one method by which police officers may be paid their legal expenses. He said that there is nothing in that section which would restrict the subject of legal expenses within its bounds.

In the Supreme Court, there was reference to the argument of the municipal authority that the statutory provision for indemnification constituted that matter one for the sole discretion of the municipality. Chief Justice Laskin said:

> "I find it a long leap forward to hold that permissive power to indemnify must be construed to exclude bargaining on the issue."

He went on to say:

> "... the unfettered discretion reposed in Section 24 (6) does not prescribe exclusivity that would preclude establishment of a collective bargaining regime. Section 24(6) is an empowering provision only and its suggested exclusivity is not found in its provisions."

With respect, the judgment in the Evergreen case must now be read as subject to the views of the Supreme Court in the Durham case.

Having considered the authorities we have concluded that the legislature has not dealt with the matters raised by the Association under the headings of Length of School Day, Instructional Load and Compensation, in such fashion so that they are no longer negotiable or arbitrable. The issues raised are matters affecting or relating to terms or conditions of employment or work done or to be done, but are matters or things not specifically set out in the Acts or regulations referred to. The matters are, indeed, referred to therein, but are not dealt with sufficiently fully or exhaustively so as to take them outside the scope of negotiation. For example, regulation 4/81 clearly prevents a school board from reducing the length of a school day below 5 1/2 hours. It does not prevent the school board from agreeing that the length of the school day will not exceed 5 1/2 hours. In this sense the regulation is an "empowering" provision only. If the board may agree to it, the matter is negotiable and therefore arbitrable.

It cannot be forgotten that, by statute, teachers are deprived of the right to strike (and divisions may not lock

out). In the context of that fact, "dispute" in Section 97(1)(g)should be interpreted as broadly as is reasonably possible, so that issues raised by one party or the other may be negotiated or, if necessary, arbitrated. Of course, the legislature may easily deprive the parties of the right to negotiate a particular matter; that has not happened here. These issues seem to us to fall within that range of issues which are "referred to", but which are not "specifically set out", leaving the subject matters negotiable, and arbitrable.

We therefore agree with the Association that the three issues are negotiable, and arbitrable.

Whether the Board supports the Association's position on the merits is an entirely different question.

In support of its argument regarding the length of the school day the Association reviewed changes that had been made in the high school teaching structure in 1983 - 84 and in 1984 - 85. The changes in 1983 - 84 resulted in the average contact time (student-teacher) increasing in that year from 225 minutes per day (in the prior year) to 238 minutes per day. In the subsequent year the average contact time was changed again, down to 228 minutes per day. These changes were accomplished by changing the length of the periods and altering the number of periods. It was argued on behalf of the Association that the changes were made after the collective agreement was settled, and such changes constituted unfair alterations of important terms and conditions of employment.

Implementation of the Association's proposal could conceivably require the hiring of additional teachers.

The instructional load proposal is to the effect that a teacher's instructional load level shall not exceed six courses/sections in one school year. The Association argued that, following an agreement being reached on compensation, the Division unilaterally changed the instructional load and the teachers had no redress. If a course was added (even if no further contact time resulted) the work load is inevitably increased, argued the Association. Even though it is not more contact time it results in more work.

The compensation proposal is to the effect that if a teacher does agree to work beyond 5 1/2 hours he is compensated with time off proportionate to the amount of time worked. In other words, by agreement, teachers could work beyond the maximum they are now seeking but would require compensation in the form of time off.

It was agreed by the Association that, if the Board were to award the requested provisions, they could not take effect until September, 1985.

The Division resisted these proposals. The Superintendent of Schools explained the background of the changes made and why they were made.

The Board has considered the position of the parties and is of the view that the changes made by the Division were not abusive or unreasonable. The Division should have some degree of flexibility in structuring and arranging the school program, and in discharging its responsibilities imposed on it under the statutes by which it functions. Evidence was given of some discussion that had occurred

in the fall of 1983 regarding the proposed changes for that year. Evidence was also given which satisfies the Board that reasonable consideration has been given to teachers' time-tabling requirements and break periods.

This Board considers that the Association's proposals would unreasonably restrict the ability of the Division in discharging its statutory duties. There is no basis for real concern on the part of the Association that its' rights will not be regarded. The Board is not impressed with the modest increase of 13 minutes per day in 1983 - 84 of student contact time, followed by a similarly modest decrease of 10 minutes per day in the next year. Over the two year period the contact time increased from 225 minutes per day to 228 minutes per day. The Division has not acted unreasonably in this regard.

The Board declines to award as the Association requests. It might be added, gratuitously, that if the evidence were different and the Board believed that there was some legitimate basis for considering that the Division was abusing or would abuse its discretionary powers after a contract was signed, the Board might have reacted differently to the Association's requests.

19. SUBSTITUTES

The Association requested that a pay scale for substitutes be included in the Agreement. The Division resisted this request and argued that this Board had no jurisdiction to deal with such matter. On this issue we agree with the Division's arguments on arbitrability, and we will decline to rule on the merits of the issue.

As has been observed elsewhere, substitutes are in an anomolous position under The Public Schools Act. This matter was canvassed in (among other awards) the award in the grievance of Winifred Havelock and the policy grievance of the Winnipeg Teachers Association No. 1 of the Manitoba Teachers Society (April, 1983), unreported. The Havelock award was sought to be quashed but certiorari was declined by Mr. Justice Kroft in August, 1983.

The anomolous position of teachers who substitute is that for some purposes of The Public Schools Act they are "teachers" (as defined) and for other purposes they are not. For the purposes of collective bargaining, Part VIII of the Act governs and for the purposes of that part "teacher" means a person who, among other conditions, is employed by a school board under a written contract in Form 2 of Schedule D or in any other form approved by the Minister of Education. It is agreed that substitutes employed by the Division are not employed under a written contract in any form. This may not be surprising (see the reasons in Havelock). In Section 97(1)(g) of the Act, the "dispute" leading to negotiations and ultimately arbitration is a dispute relating to the school board and one or more of the "teachers" employed by it or a bargaining agent acting on behalf of those "teachers". For the purposes of Part VIII it is not possible to say that substitutes, who are not "teachers" within the definition of the word in Part VIII, can be included in the scope of negotiation or arbitration if either party objects thereto.

A number of contracts in school divisions in Manitoba do contain provisions relating to substitutes. There is nothing to prevent the parties from agreeing, should they wish to do so, to include such provisions. However, where

one party, such as here, objects on the basis of lack of jursidiction that party cannot be forced to have included in the contract a pay scale for substitute teachers.

Accordingly, the Board declines to accept jurisdiction on the matter of substitute teachers.

We award as set out hereinbefore, and we reserve our jurisdiction to settle any questions of wording, should the parties be unable to agree thereupon.

The Board wishes to thank the representatives of the parties for their very thorough and helpful submissions in this arbitration.

DATED at Winnipeg, Manitoba this 24 day of May, 1985.

Martin H. Freedman - Chairman

See attached Award
David Shrom

See attached Award
Harold Piercy

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE ASSINIBOINE SOUTH SCHOOL DIVISION NO. 3

- and -

THE ASSINIBOINE SOUTH TEACHERS' ASSOCIATION NO. 3
OF THE MANITOBA TEACHERS' SOCIETY

DISSENT AND COMMENTS OF
HAROLD G. PIERCY

The undersigned arbitrator concurs with many of the findings contained in the main award. There are however certain matters on which I dissent and my reasons therefore are set forth in this my report.

1. EFFECTIVE PERIOD

I agree with the decision set forth in the main award.

2. BASIC SALARY SCHEDULE

Given the current socio/economic factors of the day I agree that it is preferrable to adjust the salary scale by a fixed dollar amount at all points on the salary scale rather than adjusting the salary scale by a common

percentage amount at all points on the scale. It is axiomatic to say, as Mr. Justice Dubin said in Re Metropolitan Toronto Teacher Arbitration 1976, that when applying a percentage increase:

> "those in higher salary brackets receive more than those in lower salary brackets. In my opinion, it is an inaccurate reflection of the cost of living to apply it in this way. The impact of the increase cost of living is felt most by those who earn less".

I must confess that I do not yet fully understand why the Association so strongly resisted the fixed dollar concept which had been proposed by the Division. My experience is that representatives of employees during periods of economic restraint do particularly attempt to protect those workers on the lower end of the earnings scale who are most affected by any erosion in the purchasing power of their income.

As to quantum for the year 1984, I concur with the findings in the main award and likewise would award an increase of $900.00 on an across the board basis. As to 1985 I would not have been as generous. I would have awarded an increase of $715.00 at each pay point. Expressed in percentage terms such an increase would translate into a percentage increase of approximately 2%.

In criteria developed by Justice Dubin for the aforementioned 1976 arbitration the learned Justice set forth seven (7) criteria which he felt ought to influence arbitrators when establishing compensation for public service employees. That criteria is found at page #14 of the Division's brief. I might add that it has been my experience, at least during the past 7 or 8 years, that both the Manitoba Association of School

Trustees and the Manitoba Teachers' Society at arbitration have argued that the Dubin criteria is fair and equitable criteria and should be applied.

The Dubin criteria in my view attempts to create a balance as between the economic needs of the public servant on the one hand and the ability of the tax paying public to pay on the other hand. The economic climate of the day, the interests and welfare of the public and the financial ability of those who are called upon to pay the cost of the services being rendered are but 2 of those stated criteria. For myself a $900.00 increase for 1985 does not give sufficient weight to this particular criteria.

This school division like other school divisions in this Province relies heavily on Provincial Government funding for the majority of its operating and capital funds. For 1985 the Province will increase its funding to this school division by $240,781.00 for operating purposes. This represents an increase in operating funds of approximately 1.64% which represents less new revenue than the cost associated with the award I would make for 1985 and a good deal less new Provincial revenue than the cost associated with the main award. In addition to salary scale increases, teachers who are not at the maximum of their class enjoy incremental increase. These costs it would appear will have to be absorbed through local levy taxation as well as the extra costs associated with the scale increase.

3 FORMER EMPLOYEES

I agree with the decision set forth in the main award.

4. REDUCTION OF ENTRY LEVEL STEP

This proposal may be novel in Teacher Association/Division negotiations but the concept is a form of red-circling and is by no means foreign to collective bargaining in the private sector.

The special appeal this proposal has from my perspective is the recognition that market place influences do change, and thus lesser starting salaries may be warranted, but at the same time it protects those teachers who were first employed on the basis of what may be said to be the old salary schedule.

It has been demonstrated to us, that there is a substantial over-supply of teachers in Manitoba. It seems to me that these market-place influences such as supply and demand ought to have a direct bearing on salaries generally, particularly starting salaries. Having made these observations I am not satisfied that the Division's proposal has been sufficiently refined to satisfy me, for I believe that at some point on the scales (classes 3 through 7) that the two scales ought to blend or in some fashion be integrated. It is for that reason, and in these particular circumstances that I too would decline to award as requested by the Division.

5. ALLOWANCE FOR ADDITIONAL QUALIFICATIONS

I too find considerable merit in the proposal and accordingly I agree with the decision set forth in the main award.

6. ADMINISTRATIVE ALLOWANCES

The award I would make in respect of the various changes sought by the Association to Article 3.05 of the agreement is as follows:

(a) no change; therefore I agree with the decision set forth in the main award.

(b) I agree with the decision set forth in the main award.

(c) I agree that the reference to principal and/or vice-principal ought to be changed to administrator, but so as to avoid any semblance of ambiguity it is only a principal and/or vice-principal who would be considered an administrator for the purpose of Article 3.05(c). I concur in this change simply because under the current language a person accumulates credit for this entitlement while employed for 12 years as either a principal or vice-principal but unless he or she is a principal at age 55 the entitlement is lost in its entirety. For example, a person could be a principal for the 11 years immediately preceeding age 54, and at that point in time, perhaps for example because of a necessary school re-organization the person would be required to take a vice-principalship. The effect, it seems to me under the agreement would be a loss of the total entitlement otherwise available under Article 3.05(c).

(d) I agree with the decision set forth in the main award for essentially the same reasons as in (c) herein and for the reasons contained in the main award.

(e) I do not agree with the decision set forth in the main award. The Board heard no evidence that the duties of the vice-principals had changed in any respect, nor did we hear any evidence that the duties of the vice-principals at Assiniboine South School Division were the same or similar duties as the duties of vice-principals in certain other school divisions who do receive an allowance based on 50% of the principal's allowance. To have persuaded me to adopt its proposal the Association would have had to demonstrate increased new responsibility or have demonstrated that the functions performed by the vice-principals in this school division were the same or similar functions as undertaken by their counter-parts in other divisions. Comparison was made with job titles and not the substantive elements of the job functions.

(f) I agree with the decision set forth in the main award.

(g) I agree with the decision set forth in the main award.

7. SUPERVISORY ALLOWANCES

I agree with the decision set forth in the main award.

8. COORDINATORS' ALLOWANCES

I agree with the decision set forth in the main award only to the extent that the allowance paid the co-ordinator of Library Services is to be increased as set forth in the main award.

As to the allowances paid to subject area co-ordinators I am persuaded by the Division's position when it argues that if and when the subject area co-ordinators are not functioning as full time co-ordinators that they ought not to be paid as if they were functioning full time in that capacity.

The problem with the current provision is that a teacher who would perhaps spend 20% of his or her time co-ordinating subjects, is to be paid the same allowance as a teacher who may spend 75 or 100% of time co-ordinating. The effect of maintaining this is (in my view) an inequitable provision in that the Division will probably err on the side of not appointing subject area co-ordinators unless it can be demonstrated that a substantial part of their time would involve co-ordinating. In essence the current provision creates a disincentive. I would award the proposal sought by the School Division.

9. DEPARTMENT HEAD ALLOWANCES

I agree with the decision set forth in the main award.

10. PAYMENT OF SALARY

I agree with the decision set forth in the main award.

11. INTEREST ON RETROACTIVE PAY

In an arbitration decision involving these very same parties in 1978 the Chairman of that Board, Mr. W.S. Martin, Q.C., with this arbitrator concurring wrote as follows:

> "Collective bargaining is a dynamic process. Effective incentives should be given to the parties concerned to resolve their dispute purely within the form of free collective bargaining. A deterrent in terms of impetus that exists within the arena of public school wage netotiations, at the teachers' level, is prescribed through compulsory arbitration as the terminal dispute solving device instead of strikes and lockouts. This by itself has to be of lethargic influence in the dynamics of collective bargaining. It is felt that it is in the best interest of free collective bargaining to keep both parties in a position whereby they cannot have the preconceived assurance that retroactive pay will or will not be forthcoming. It is felt that in preference to crystalizing this issue, by incorporation a clause providing for interest on retroactive pay, that it is a proper matter for an arbitration board to consider by virtue of its mandate in light of the circumstances that may exist at the time of the Board's adjudication. In other words, we would find it repugnant to think that a Division or Association could unreasonably delay negotiations with the Association knowing that they would get retroactive pay, as a matter of right, and that the Division would know that they would not have to pay retroactive pay as a matter right. Thus in order to assist the collective bargaining process, it is felt that a matter of this nature should be of concern to an arbitration board.
>
> In the instant case there is no evidence indicating that the Association has in any way delayed or impeded the resolution of a collective bargaining dispute, and therefore under these circumstances it is felt that the wage increase, as hereinbefore adjudicated, should from the date of the application to the Minister for the appointment of this Board, namely May 17, 1978, bear interest at the same borrowing rate that the Division has to pay for its money at the Division's chartered bank, and the board so orders."

Those comments are as appropriate now as they were then and they are particularly appropriate in these circumstances. Based on the evidence before this board of arbitration the Association and/or its representatives did nothing to resolve this dispute at any early date. In fact, its action or more properly stated, its lack of action played a significant part in the delays in concluding a new collective agreement.

The delay started on September 22, 1983 at which time the Association's negotiations chairman wrote the Division asking that the requirement to meet for negotiating purposes within 14 days after the notice was served, be waived. The relevant notice date was September 22, 1983.

Then we have before us a letter to the Association's negotiations chairman dated December 14, 1983 from Mrs. Myrtle Zimmerman, the Division's negotiations chairperson who refers to the Association's request that negotiations commence in the month of February in order to allow the Association sufficient time to develop all its proposals. At that time Mrs. Zimmerman put the Association's negotiating committee on clear notice that because of this delay, interest on retroactive pay would be an issue. Her letter is as follows:

'December 14, 1983

Mr. Alan Mason,
Chairperson,
Negotiations Committee,
Assiniboine South Teachers' Association
550 Dieppe Road
Winnipeg, Manitoba
R3R 1C4

Dear Mr. Mason

In recent years, it has been customary for negotiations for a revised Collective Agreement to commence

in the middle or latter part of November or at least in early December. This year you have requested that negotiations commence in the month of February in order to allow the Association sufficient time to develop all of its proposals. In view of this request, it is the Board's view that there should be mutual agreement as to the potential application of Article 3.10 of the current Collective Agreement.

You are aware that this article provides for the payment by the Division of interest on retroactive salary adjustments, said interest to be calculated from April 1st to the date of signing of the revised Collective Agreement. Because of the proposed starting date for this year's negotiations, the Board is convinced that interest should only be calculated from July 1, 1984 onward to the date of signing after this date.

Your response to this proposal would be greatly appreciated.

Yours truly,

Mrs. Myrtle Zimmerman,
Chairperson,
Negotiations Committee.

cc: Mr. Bill Thiry,
Co-Chairperson."

The committees met on February 2 and 15, 1984 to receive and respond to each others proposals but it was not until February 21, 1984 that they met to engage in intensive bargaining. For myself, it is not good enough that the Association's proposals be not ready until February, 1984, when in fact the parties were legally required to commence negotiations not later than the first (1st) day of November, 1983.

Following their meetings in February, 1984, there were party to party negotiations and conciliation proceedings all of which were

unsuccessful in the result on July 3, 1984 the Manitoba Teachers' Society sought arbitration. On that date our Associate on this Board, Mr. David Shrom, was proposed as the Association's Nominee and on July 20, 1984 this arbitrator was proposed as the Division's Nominee.

There was a further delay in getting the dispute to arbitration. The various letters contained in the Division's brief explain the reasons for the further delay.

It is my opinion that the Association has unreasonably and unnecessarily delayed negotiations, and as a consequence have created the circumstances where interest on retroactive pay would be an issue. It has been written that the awarding of interest is not intended to be, nor is it a penalty to the employer but is simply a recognition of the fact that for the time employees did not have the use of additional money they have incurred a cost for which they ought to be compensated. That balanced view of the interest question is not on its face an unreasonable view, but surely it assumes the parties have made a reasonable effort to conclude an agreement within a reasonable time period. In negotiations where the right to strike or lock-out is not available there are precious few pressures to be brought to bear in order to persuade one side or the other to cease protracting the process and get on with concluding an agreement. The interest factor is one such pressure, therefore to ensure interest will be paid in the face of unnecessary and unreasonable delays (as in this case) is to say there is no risk associated with such conduct.

A view may be advanced that the individual teachers ought not to suffer as a result of the action or inaction of its elected negotiating committee. A contrary position can likewise be taken that if in the circumstances the individual teachers are denied some or all the interest from January 31, 1984 then their negotiating committee in the future would discharge their duties and responsibilities with a good deal more vigilence and vigor. For myself I take that position.

In these circumstances I would award interest at 9% as and from July 1, 1984. Negotiations were delayed initially by over 3 months by the Association's negotiating committee. The 6 month period represents the unnecessary 3 month delay and a further 3 months which would have allowed for party to party negotiations and conciliation proceedings. If the Association's negotiating committee had prepared itself to attend at negotiations not later than November 1, 1983 as prescribed by the Collective Agreement; with meaningful negotiations conducted by negotiators who had prepared themselves for negotiations, there would have been ample time to have concluded an agreement by January 31, 1984. Accordingly, the interest factor may not have come into play at all.

12. TEACHERS' RETIREMENT AGE

I agree with the decision set forth in the main award. Teachers presumably enjoy a very favourable retirement plan which is a good deal superior to retirement plans available to a large majority of employees working in the private sector of the economy. The Teachers plan does contain early retirement provisions. What the Association is asking for is a bonus for an experienced teacher to retire early.

On the one hand the Association argues and properly so, that a teacher who gains experience must, by virtue of the automatic incremental arrangement be paid higher than the teacher with lesser experience. That is so because the combination of added experience and education makes for a better teacher. Then the Association puts forward an early retirement plan proposal which if accepted would create an enticement for the experienced teachers to withdraw from teaching.

13. MATERNITY LEAVE

I agree with the decision set forth in the main award and I agree with the reasons the Chairman has given for awarding as proposed by the Division.

14. GROUP LIFE INSURANCE

I do not agree with the decision set forth in the main award. I would have increased the amount of coverage but I would have required the teachers pay 50% of the premium costs.

15. SICK LEAVE

As to the increase in sick leave arrangements which would extend the maximum days available to 120 days; I disagree. The compensation and benefit packages available to Manitoba teachers, coupled with the job security

and general working conditions they enjoy are in fact not available to workers generally in the Province. Workers generally through various forms of taxation, including the special level tax for education, must bear their share of the cost associated with providing these benefits to teachers. I believe care must be taken to ensure as far as it is reasonably possible to do, that the tax paying public generally is not required to provide income and income related benefits to teachers and other public servants significantly greater than the income and income related benefits available to the public generally.

As to Article 7.01 and 7.02 I agree with the decision set forth in the main award.

As to whether sick leave is or ought to be an earned benefit or as the main award refers to it, as a vested right or benefit, I would award that it is or ought to be an earned benefit. I do not believe that a teacher should be able to start work at the Division on the basis that without any contribution whatsoever to education in the Division that the teacher has an un-earned bank of sick leave credits available to him or her. While the current language of the agreement may favour an interpretation that sick leave is a form of un-earned benefit, the parties (based on the information before us) have in the past treated the sick leave provisions as an earned benefit and the Division is seeking to continue administering the same as in the past.

The Manitoba Legislature last addressed the matter of sick leave in 1982. The legislature continued to treat sick leave entitlement as an

accumulated entitlement. Section 93(1) of The Public Schools Act fixed the entitlement at a rate of one (1) day of sick leave with pay for each nine (9) days of actual teaching service.

> "Accumulation of sick leave.
>
> 93(1) Each teacher who is continuously employed by a school board shall accumulate entitlement for sick leave at the rate of 1 day of sick leave with pay for every 9 days of actual teaching service, or fraction thereof, unless a collective agreement governing the working conditions of the teacher provides for another manner of accumulating sick leave."

The legislation does empower the parties, and by extension, this Board to provide for another manner of accumulating sick leave. As the whole of the section contemplates sick leave being accumulated, it is my opinion that the parties and again by extension this Board are precluded from providing an un-earned sick leave benefit, simply because the words accumulated entitlement not only contemplate, but in fact mean an earned benefit. Accordingly, as by public policy, expressed in Section 93(1) of the Public Schools Act sick leave to teachers is to be provided on an accumulated entitlement basis, it is not within the jurisdiction of this Board to award sick leave on an un-earned basis.

16, 17 and 18. LENGTH OF SCHOOL DAY, INSTRUCTIONAL LOAD, COMPENSATION

I am of the opinion that the legislature has dealt with the matters raised by the Association to such an extent that these issues are no longer negotiable or arbitrable.

In the main award my associates on the Board have held that "dispute" in Section 97(1)(g) should be interpreted as broadly as is reasonably possible, so that issues raised by one party or the other may be negotiated or if necessary, arbitrated. That preference, however, ought not be extended to the extent that the parties and by extension this Board are negotiating education. There is little doubt that the subject matters raised by the Association have some relationship to working conditions, but it is difficult to image any matter affecting the classroom and education and teachers which to some degree does not touch working conditions.

For myself, I would take the view that "dispute" ought to very carefully be interpreted so as to ensure that the responsibility of the elected trustees of a School Board to provide quality education is not deluted by placing the Association in a position where it can force negotiations on matters which very significantly affect the quality of education and education costs. Because a particular issue may touch working conditions is not in my opinion sufficient to have the matter negotiable.

Manitoba Regulation 4/81 made under the Public Schools Act provides (in part) as follows:

1. Unless the Minister gives specific written approval of other arrangements, the instructional day shall be not less than five and one-half hours including recesses but excluding the midday intermission.

2. Subject to section 1, any school board may, by resolution duly recorded in its minutes, determine the hours of opening and closing, as well as the time and duration of the midday intermission.

> 12. Notwithstanding any other provision of this regulation, the school board may, with the consent of the Minister, and subject to any conditions the Minister may impose, operate one or more schools in the division or district, or offer courses in any school in the division or district during the year, or during portions of the year, and in varying terms and hours.

These parts of Regulation 4/81 deal directly with the matters before us. These parts deal inter alia with the length of the instructional day, the hours of opening and closing of schools and the right of the school board to operate schools in varying terms and hours. The Minister of Education has reserved to himself or herself the unfettered right to determine the instructional day. It would in my opinion be an extremely narrow interpretation to say that the Minister may determine the length of the instructional day but teachers may not be required to be on duty during the instructional day. Such a narrow interpretation in my respectful view is not contemplated by the Regulations, and if applied, could indirectly seriously impair the Minister's power to fix the instructional day.

Then as a further aide as to whether the legislature by the Act and/or Regulations has taken the matters out of the meaning of "dispute", there is Manitoba Regulation 250/80. As an aide to determining the issue there are the following parts:

> 29. Subject to The Public Schools Act, this regulation, the instructions of the school board, the principal is in charge of the school in respect of all matters of organization, management, discipline and instruction.
>
> 35. The principal is responsible for the supervision of pupils, buildings, and grounds during school hours.

40. The principal shall exercise disciplinary authority over the conduct of each pupil of his school from the time of the pupil's arrival at school until his departure for the day, except during any period when the pupil is absent from the school premises at the request of his parent or guardian.

41. (1) The principal has disciplinary authority over all pupils of his school in their conduct towards one another on their way to and from school, and, in divisions or districts which provide transporation, the principal has disciplinary authority over the conduct of the pupils while they are in the conveyance.

The principal, who is a member of the bargaining unit, is amongst other things in charge of instruction and he is responsible for the supervision of pupils during school hours. Consistent with the view I take of Regulation 4/81 it is axiomatic to say that these Regulations contemplated teachers (specifically principals) in the case of Regulation 250/80 to be on duty during the school hours prescribed by the Minister and/or the Board of Trustees.

The test as Mr. Justice Wright said in Rolling River and which is referred to in the main award is:

> "... if a provision in the statute can be interpreted properly to mean that the legislature has chosen to deal fully with the terms or conditions of employment of teachers in a specific area, then it is not open to the parties to engage in the collective bargaining process in that area. But if that interpreation cannot be made then there should be no impediment to collective bargaining so long as the negotiations do relate to terms and conditions of employment of teachers".

The Public Schools Act and these Regulations can be interpreted to mean that there is an impediment to collective bargaining on these issues. In my respectful view it is the preferrable interpretation. I find that this Board is without jurisdiction on these issues, however since the majority of the Board have in fact held as it has, I too concur in the main award and reject the Association's proposals.

19. SUBSTITUTES

I agree with the decision set forth in the main award.

DATED at Winnipeg, this 22nd day of May, 1985.

Harold G. Piercy
Nominee of the School Division.

IN THE MATTER OF AN ARBITRATION

UNDER THE PROVISIONS OF THE PUBLIC SCHOOLS ACT

BETWEEN:

THE ASSINIBOINE SOUTH SCHOOL DIVISION NO. 3

AND

THE ASSINIBOINE SOUTH TEACHERS' ASSOCIATION NO. 3
OF THE MANITOBA TEACHERS' SOCIETY

AWARD OF DAVID M. SHROM

I have read the Award of the Chairman of the Board of Arbitration and have determined that it would be most appropriate for my Award to be separated into the following three categories:

Category #1 - being comprised of those matters upon which I concur with the Award of the Chairman;

Category #2 - being comprised of those matters upon which I concur with the Award of the Chairman (specifically for the purpose of ensuring that there is a majority award on a particular issue); but upon which I am putting forward additional or other comments; and

Category #3 - being comprised of those matters upon which I dissent from the decision of the Chairman.

CATEGORY #1 - CONCURRENCE

I concur with the Award of the Chairman of the Board of

Arbitration in regard to the following items:

- Item #1 - Effective Period (Article 2.01 & 2.02);
- Item #3 - Former Employees (Article 2.03);
- Item #4 - Reduction of Entry Level Step (Article 3.02);
- Item #11 - Interest on Retroactive Pay (Article 3.10);
- Item #14 - Group Life Insurance (Article 6.01).

CATEGORY #2 - CONCURRENCE WITH COMMENTS

I concur with the Award of the Chairman of the Board of Arbitration in regard to the following articles but wish to express certain views and make additional comments as follows:

Item #2 - Basic Salary Schedule (Article 3.02)

I concur with the Chairman's Award re: the basic salary scale (i.e. an increase of $900.00 at each pay point for 1984, and an increase of $900.00 again at each pay point for 1985), however, I wish to make certain additional comments.

Making an award on the salary item in an interest arbitration is always difficult. The determination is, of course, shaped by due consideration of various criteria, most of which are referred to in the Chairman's Award. But a particular reason why the task is difficult is that it involves the Arbitrators making a fair and reasonable assessment of the value or "worth" of an individual's services. I make these observations in light of the School Division's argument touching upon the supply of teachers in Manitoba. It seemed that the School Division's argument amounted to a submission that the school boards should be entitled to pay teachers in Manitoba much less than would otherwise be the case considering the normal criteria of decision in interest arbitrations

because of the supply situation of teachers in Manitoba. As noted earlier, a paramount consideration in determining the salary level in an interest arbitration should be an assessment of the "worth" of the individual's services.

The Chairman's Award makes reference to the Division's "ability to pay" argument. I think a more accurate characterization would be the School Division's "willingness to pay" argument. This is so, particularly in light of the Board's review of a document put forward in evidence entitled "Assiniboine South School Division No. 3 Budget Projections/Comparisons 1983 to 1987". This document was insightful not only as to the "surplus" the Division has had and has, but the document disclosed that there were monies available and budgeted for 1985.

In certain jurisdictions where ability to pay is a legislated criteria, arbitrators have indicated that employers seeking to rely upon this factor must make a very compelling case. The Division's submission in this case fell well short of this mark.

Considering the information re: the Consumer Price Index for 1984 and considering the information as to increases already negotiated for various other public sector employees in the City of Winnipeg for 1985, an increase for the teachers employed by Assiniboine South School Division for 1985 is warranted.

While I have concurred with the Chairman's Award, I would have preferred the Award in respect of the second year (i.e. for 1985) to have been higher and awarded as a percentage amount rather than a flat dollar amount. Specifically, I would have preferred the increase for the second year to be 3% applied at each step in the salary scale. I think that such an Award would have been reasonable and responsible in light of the material before the Board of Arbitration. I am clearly of the view that in the long run it does not benefit the teachers to have a flat dollar amount as the increase to be applied to the salary scale. Furthermore, I think that it is up to the local associations to put forward the position of the teachers on this issue and it is not up to the school boards to do same.

The School Division in this Arbitration was purporting to argue the case for teachers saying that teachers at the lower end of the scale should benefit the most and therefore a flat dollar amount should be awarded. It is my view that the real reason the School Division was arguing for a flat dollar increase related to the issue of costs. At the very least, for the second year of the contract I would have preferred a split between a percentage increase and a flat dollar increase. In any event, I have concurred with the Chairman's Award in regard to this Article.

Item #6 - Administrative Allowances (Article 3.05)

Although I have concurred with the Award of the Chairman in regard to this Article, I was persuaded by the Association's argument that an administrator's salary is his/her regular salary plus the administrative allowance. Accordingly if one component is to be increased by a certain percentage then the other component should be increased by the same percentage. I do not therefore adopt the reasoning that there should be a lesser amount and percentage awarded for administrative allowances than increases in the overall salary scale. Further, I do not necessarily adopt the reasoning that the administrative allowance should only increase if there is a demonstrable increase in the duties or responsibilities of administrators.

The Association proposed that when a new position was created by the Division, one not covered by the Agreement, that there be consultation between the School Division and Association regarding the allowance to be paid and other terms of the appointment. I was convinced of the reasonableness of this proposal and would have awarded same. Once a collective bargaining agreement has been negotiated/arbitrated, if the employer introduces a new position then it would only be just and reasonable for the Association to have input at the time of the introduction of the new position (as opposed to waiting for the next round of negotiations/arbitration) as to the allowance to be paid and as to other terms of the appointment.

Items #7, #8 and #9 - Supervisory Allowances (Article 3.06); Co-ordinators' Allowances (Article 3.07); and Department Head Allowances (Article 3.08)

I have concurred with the Award of the Chairman in regard to these Articles. However, my comments under Item #6 - Administrative Allowances, regarding the amount of the increase to the allowance are equally applicable to these Articles.

Items #16, #17 and #18 - Length of School Day (Article 12); Instructional Load (Article 14); and Compensation (Article 16)

I have chosen, as the Chairman has chosen, to deal with the three above-noted Articles together.

I agree with the Chairman's Award in relation to the jurisdictional objection to this Arbitration Board's power to award these clauses. However, on the merits I would have gone further and awarded the various Articles sought by the Association, or alternatively I would, at least, have made an award imposing some restriction on management's unilateral right to change working conditions once a collective bargaining agreement is settled.

Having read and re-read the various case law authorities filed by counsel relating to the jurisdictional objection, I am firmly of the view that there is no impediment whatsoever to this Board making an award in respect of these Articles. Clearly, the subject matters covered by the Association's proposals fall within the definition of "dispute" in Section 97(1)(g) of The Public Schools Act. In my view, only when it can be said that the Legislature has dealt fully, completely, and exhaustively with a particular subject matter can it be said that the matter is specifically set out in the Act, and therefore that there is no room to negotiate and/or arbitrate the matter. (I am supported in this view by the Manitoba Court of Queen's Bench decision in Rolling River School Division No. 39 v. Rolling River Division Association No. 39 of The Manitoba Teachers' Society (1980) 2 W.W.R. 187). The issue of the length of the school day or the instructional load for teachers clearly is not fully and completely dealt with

by the Legislature and in fact may not have been dealt with at all. Accordingly, this Board of Arbitration has jurisdiction to make an Award. Collective bargaining (specifically as provided for in The Public Schools Act) is in the public interest and as such an arbitration board must be certain before it rules that it has no jurisdiction to deal with a particular matter. As noted by the Chairman, it must not be forgotten that teachers do not have the right to strike and therefore I completely adopt the Chairman's view that the term "dispute" in Section 97(1)(g) of The Public Schools Act should be interpreted as broadly as is reasonably possible so that issues raised by one party or the other may be negotiated or, if necessary, arbitrated.

Having found in favour of the Association on the jurisdictional issue I would have gone further and made an award on the merits. I was convinced that the Teacher's proposals were reasonable and would have awarded same, or, at the very least, in light of the submissions made, I would have awarded a clause recognizing the Teacher's concerns.

The Chairman indicated several times in his Award that the changes made by the Division relating to working conditions were not necessarily abusive or unreasonable. The Teachers however, were attempting to demonstrate a principle rather than contest whether the changes made in the past could be characterized as reasonable or unreasonable. The principle established by the Association was that the Employer had the unilateral right to and did exercise the unilateral right to change working conditions after a collective bargaining agreement had been negotiated and settled. The mere exercise of this unilateral right, regardless of how it manifests itself, might be characterized as unfair or unreasonable. Once parties negotiate in good faith and reach a collective bargaining agreement, it seems inherently unfair that one party to the agreement can make unilateral changes thereafter. Parties enter into a collective bargaining agreement with certain understandings and once an agreement is consummated with those understandings in mind, then there should be a restriction on one party changing fundamental conditions. Accordingly, I would have included a clause restricting the Employer's unilateral right to change the hours of work. Again, I stress that although the evidence

before this Board of Arbitration may have indicated that the changes made in the past were not significant in quantum, they do indicate the principle that the School Division is seemingly unrestricted in its right to change the hours of work. There is no guarantee that any changes to working conditions in the future will fall within the same characterization as the Chairman has used for the changes in the past. As such, a clause should be included in the agreement restricting management's unilateral right to make these changes. Whether the clause amounts to a complete bar to the Division making changes or whether the clause amounts to a restriction, calling for meaningful and adequate consultation and dialogue before such changes are made, I think that the need exists.

Given the award of jurisdiction on this matter, perhaps the parties will now sit down and negotiate the clauses that are appropriate in light of particular details and facts in each Division respecting working conditions.

CATEGORY #3 - DISSENT

I wish to dissent from the Award of the Chairman of the Board of Arbitration in regard to the following matters:

Item #5 - Allowance for Additional Qualifications (Article 3.04)

Having read the Chairman's Award in regard to the School Division's proposal re: an allowance for additional qualifications, I feel compelled not only to dissent but to express in strong terms my views and explain why such a clause, in my opinion, should not be granted. I, of course, do this with the utmost respect to the Chairman.

The effect of granting the School Division's proposal is to tinker in a substantial way with the preparation scale that exists in this Division, and in all other teacher agreements in the Province of Manitoba. Further, the effect of this proposal is to create an anomalous situation which strikes at this Arbitrator's fundamental perception of the notion of fairness. The result of the acceptance of this proposal is that a teacher in the Assiniboine South School Division could be teaching in a classroom side by

side with another teacher, with the same qualifications, and with the same number of years of experience as a teacher, and yet one teacher may receive a different salary. This is a very real possibility and a situation which in my mind should not be allowed to take place as a result of this proposal. Further, the Chairman's rationale for rejecting the School Division's proposal regarding a reduction of the entry level step seems to support my view as to why the School Division's proposal regarding this Article should be rejected as well. The Chairman indicates that it would be unfair and perhaps discriminatory to have teachers in the same Division being paid according to two different salary grids depending entirely upon when they were hired. While I agree with the Chairman's comments, I think that they are equally applicable to the Division's proposal under this Article. I think that the effect of the School Division's proposal in this matter would be that teachers in the same Division who have the same number of years of experience and the same qualifications might well be paid differently based entirely upon when they improved their qualifications. Once again I think that this is substantially unfair.

Considering that a clause similar to the Division's proposal re: this Article does not exist in any other teacher collective bargaining agreements in Manitoba (and I say this cognizant of the Chairman's view of the clause in the Transcona-Springfield Division - which in my view is a clause dealing with an entirely different situation), another effect of the granting of this proposal would be to discourage teachers from moving to the Assiniboine South School Division, or to encourage teachers who are employed by the Assiniboine South School Division and who have improved their qualifications to leave the Division and seek employment in other Divisions in Manitoba. Notwithstanding the submissions made regarding the supply of teachers in Manitoba at this time - to award such a clause - with the aforesaid consequences (viz. - an adverse effect on attracting and retaining qualified teachers) is inappropriate in my view.

The School Divisions in Manitoba have for a number of years been making this proposal to Boards of Arbitration and for a number of years Boards of Arbitration have rejected same. It seems that Boards of Arbitration have recognized the inequities created by the acceptance of

this proposal and have decided that it is best for the parties to deal with amendments to the preparation scale, if same are necessary.

One of the arguments put forward by the School Division to justify its proposal was that the preparation scale had well served its purpose as 96% of the teachers in the Assiniboine South School Division were already in Classes 4 to 7. It was argued that there was no longer a need to encourage teachers to improve their qualifications. In response, it was asked why the remaining 4% of the teachers in Assiniboine South, who were not in Classes 4 to 7, should be penalized and not allowed the same opportunity to improve their qualifications with the benefits of the preparation scale. As well, it is to be noted that in Manitoba at this time the minimum provincial standard is a Class 4 and accordingly the incentive should be in place at least for Classes 1, 2 and 3. During the course of the Arbitration hearing, reference was made to the Division's proposal applying only vis-a-vis Classes 4 to 7 and it is encouraging that the Chairman has accepted this limitation and awarded that the Division's proposal only apply to Classes 4 and above.

Further, I note with approval and accept another necessary limitation included in the Chairman's Award regarding this item. If the School Division's proposal is to be accepted in any way, the effective date of the clause should not be January 1st, 1984, but rather September 1st, 1985, so as not to prejudicially affect "vested rights" of any individuals caught between January 1st, 1984, and the present time.

The School Division's ostensible reason for making this proposal related to its concern that a school teacher could unilaterally improve his or her qualifications in an area that may or may not have anything to do with the subject matter being taught by the teacher. However, in examining the proposal and its effect, it is clear that the proposal put forward by the Division does not at all address the School Division's purported concern. In fact all the School Division's proposal does is delay the payment to a teacher for improving his or her qualifications. It is, at best a stop gap measure.

Very simply, the preparation scale was designed to allow teachers to improve their qualifications and integral to the system is recognition of the fact that qualifications are separate and apart from years of experience. A teacher moves up the scale based upon qualifications and as well moves up the scale based upon years of experience. The Chairman in his Award under basic salary schedule seems to recognize this concept. That is, that the teacher's salary grid takes into account both years of experience and educational qualifications. However, years of experience as a school teacher are very simply years of experience as a school teacher. The fact that a teacher improves his or her qualifications and hence moves to a different classification should not and does not affect the number of years of experience a teacher has. The School Division's proposal results in placing a teacher on a notional slot on the grid which is not truly reflective of the years of experience that the teacher may have. Although the parties did not point out any incidental effects of this notional placement on the grid, it seems inappropriate to this Arbitrator.

If the time has come for changes to be made to the preparation scale, then perhaps it would have been appropriate for the Chairman simply to make comments suggesting same. Accepting the Division's proposal in this regard creates inequities - inequities which should not be countenanced. Perhaps the granting of this clause will be the catalyst for the parties to address a more fundamental and substantial revision to the preparation scale, if same is necessary.

Item #10 - Payment of Salary (Article 3.09)

I have not concurred with the Chairman's Award in regard to this Article, however, I am not putting forward lengthy dissenting comments. Simply, there does not seem to be a supportable rationale for the holdback in salaries experienced by teachers under the present system. If the Chairman's reluctance to award this clause at this time related to the one time implementation cost, then perhaps a way to alleviate the cost would be to have awarded a clause similar to that found in the Morris-McDonald Division which calls for a ten or twelve pay system at the option of the teachers. Perhaps not all teachers would request the ten pay system and

as such the implementation cost would be reduced.

Item #12 - Teachers Retirement Age/Early Retirement Incentive Plan (Article 4)

I do not concur with the Chairman's Award rejecting the Teacher's proposal for an early retirement incentive plan. However, I have chosen not to put forward dissenting comments other than to say I favour the concept of having an early retirement incentive plan. Furthermore, given some of the arguments put forward by the School Division in this particular Arbitration, I find it somewhat inconsistent that the School Division would have opposed the Association's proposal in this regard. The School Division in its argument made reference to the large and increasing number of young unemployed teachers and argued that proposals should be accepted which may have the effect of reducing unemployment amongst young graduates. And yet, the Division was opposed to an early retirement incentive plan.

Item #13 - Maternity Leave (Article 5.03)

The School Division proposed a change to Article 5.03 respecting Maternity Leave. Specifically, the School Division proposed that teachers not be entitled to maternity leave until after completing 12 months of employment under a Form 2 teacher's contract. The Division's rationale for same was two-fold. First, it was attempting to change the existing contract to provide a service requirement before a teacher is entitled to maternity leave. In support of this position reference was made to such a requirement in The Employment Standards Act of Manitoba. Secondly, the School Division's rationale for the proposed change had to do with changes made to The Public Schools Act respecting how and when tenure is acquired. The Division was concerned that as a result of changes in the Act respecting tenure, that a school division would not be given a fair and proper period of time in which to evaluate teachers.

Having considered the arguments advanced, it is my view that the existing agreement should remain as is. It was not shown that there had

been any problem regarding this clause nor did the School Division indicate convincingly or otherwise that there could be any problem with this clause.

Dealing first with the issue of a service requirement it should be noted that the existing Agreement does not contain any such requirement. Accordingly, putting in a service requirement seems, to this Arbitrator, to be a step backwards. As well, there was material before the Board of Arbitration to indicate that the trend, at least Federally (and possibly in Manitoba) is to reduce the period of service requirement re: maternity leave. As of March 1st, 1985, under the Canada Labour Code the service requirement is 6 months, changed from a previous 12 month requirement. If other jurisdictions are reducing the service requirement, it seems inconsistent to increase (in fact to create) a service requirement in this collective bargaining agreement.

As far as the question of the effect of the maternity leave on the attainment of tenure, I am not convinced that the School Division has proven any problem. Just how long does it take for a school board to fairly and properly assess an individual teacher. In any event, the attainment of tenure is not so restrictive of the School Division's rights. It simply entitles an individual teacher to due process.

In summary, I would leave the provisions of the current collective bargaining agreement as is relating to Maternity Leave.

Item #15 - Sick Leave (Article 7)

Given the Chairman's Award in regard to this item, there was some question in my mind as to the most appropriate place to deal with this matter in my Award. My preference overall was to leave the existing Article in the collective bargaining agreement entirely as is. In any event, the Chairman has made certain decisions and accordingly I wish to put forward certain comments.

I of course concur with the Award of the Chairman whereby he

grants the Association's proposal to increase the maximum accumulated sick leave to 100 days in the 5th year and 120 days in the 6th and subsequent years. As well, I concur with the Chairman's Award rejecting the School Division's proposed amendments contained in the proposed Article 7.03(a) and (b). The School Division was proposing that the existing collective bargaining agreement be changed to clearly specify that sick leave is an earned benefit as opposed to a vested right. It is this Arbitrator's view that the current wording of the Agreement provides for sick leave as a vested right, and that same should not be changed.

In light of my view that sick leave is to be considered as an insurance scheme, I do not concur with the Award of the Chairman granting the School Division's proposals contained in Article 7.01 and 7.02. It is inconsistent to have a restriction in the collective agreement precluding an employee from availing himself of sick leave entitlements for injuries obtained while gainfully employed elsewhere if sick leave provisions are considered as an insurance scheme (i.e. a vested right). If such is the case, then it should make no difference where and how the injury arose.

Item #19 - Substitute Teachers (Article 3.02(d))

The Association proposed that there be a new clause included in the collective agreement regarding the pay scales for substitute teachers. The specific wording of the clause sought to be included in the agreement was provided and it was indicated by the Association that in its view the clause reflected the Division's current practice regarding the payment of substitutes. As well, besides the inclusion of the clause in the agreement, the Association proposed that the actual pay scales be increased by the same percentages to be applied to the basic salary scale.

The School Division however raised a preliminary objection to the Board's jurisdiction to include the clause, or any clause, sought by the Association re: this matter. Specifically, the Division took the position that this Board of Arbitration had no jurisdiction to award a clause respecting substitute teachers as the Local Association did not, in the

Division's opinion, have the authority to bargain on behalf of the substitute teachers. Even more specifically, the Division's position was that substitute teachers were not "teachers" within the meaning of that term in Part VIII of The Public Schools Act. Accordingly, the Division argued that the Board of Arbitration had no jurisdiction to include a clause respecting pay scales for substitute teachers.

In the context of this Arbitration, the end result of the School Division's position is that substitute teachers would not have the benefit of collective bargaining under The Public Schools Act and would not have any one to bargain on their behalf. This would leave the School Division with the unilateral right to set their rates of pay. To advocate this position seems somewhat strange given the Division's evidence before this Board of Arbitration on another matter which indicated that a growing number of young graduates are engaging in substitute teaching. This young and growing group of individuals who are substituting are certainly individuals that need some collective bargaining protection.

Simply stated, the Division's objection to the Board's jurisdiction is based upon the definition of "teacher" found in Part VIII of The Public Schools Act, specifically in Section 97(1)(j). Part VIII of The Public Schools Act is entitled "Collective Bargaining" and it defines "teacher" as:

> "A person who holds a teacher's certificate or a limited teaching permit issued under the Education Administration Act and who is employed by a School Board under a written contract in Form 2 of Schedule D or in any other form approved by the Minister under Section 92, but does not include a Superintendent, an Assistant Superintendent, or a Deputy Assistant Superintendent employed by a School Board."

The Division points out that as substitute teachers do not have a written contract in Form 2 of Schedule D or in any other form approved by the Minister under Section 92, that they are not teachers within the meaning of that term in Part VIII of The Public Schools Act and that therefore the Board of Arbitration has no jurisdiction to make an award in respect to substitutes.

In my opinion, this specious argument amounts to putting form over substance. The Division does acknowledge that Section 92(1) of The Public Schools Act (contained in Part VII of The Public Schools Act) provides:

> "Every agreement between a School Board and a teacher shall be in writing signed by the parties thereto and sealed with the seal of the School Board and except in the case of a School Board authorized to use another form of contract approved by the Minister shall be in Form 2 of Schedule D."

The definition of a "teacher" for the purposes of Part VII, and in fact for the purposes of Parts I to VII inclusive of The Public Schools Act is contained in Section 1(22) and is as follows:

> "A person who holds a valid and subsisting teacher's certificate or a limited teaching permit issued under the Education Administration Act, or who is authorized by the Minister to teach in a school."

Thus, The Public Schools Act contains two definitions of a teacher. In Section 1(22) there is a definition of a teacher for the purposes of Parts I to VII. For the purposes of Part VIII of The Public Schools Act dealing with collective bargaining, there is a slightly different definition of a teacher. In my opinion, the only intended difference between the different definitions of a "teacher" relates to the question of employment. That is, Part VIII of The Public Schools Act which deals with collective bargaining is only intended to apply to teachers who are employed by a school division. Only incidentally does the definition of a teacher in Part VIII refer to a written contract of employment because of the earlier provision in the Act (Section 92(1)) which requires all teachers (as defined in Section 1(22)) to have a written contract. The Division does acknowledge the existence of Section 92(1) of The Public Schools Act which requires that every agreement between a school board and a teacher shall be in writing. The Division, notwithstanding this requirement of the Act, goes on to argue that because substitute teachers do not have a written form of contract that they are not teachers within the meaning of that term in Part VIII of The Public Schools Act. This seems to be a situation of

the Division benefiting from its own non-compliance with Section 92(1) of The Public Schools Act.

As noted earlier, it is my view that the only real intended difference between the definitions of "teacher" in Parts I to VII and Part VIII of The Public Schools Act relates to the question of employment. Teachers who are employed by a school division are the ones that should be subject to collective bargaining.

It could not have been the intention of the Legislature to have excluded substitute teachers from collective bargaining under The Public Schools Act. In fact, if it was the intention, it could have been done expressly, and there is no such provision in The Public Schools Act.

A consequence of ruling that substitute teachers are not entitled to collective bargaining under Part VIII of The Public Schools Act is undue fragmentation. Certain teachers employed by the Assiniboine South School Division would be subject to collective bargaining under The Public Schools Act and subject to the arbitration provisions of the Act. However, certain other teachers, substitute teachers, who do the same work for the same School Division albeit on a casual basis, would not be governed by the collective bargaining provisions of The Public Schools Act, and presumably might well be covered by the collective bargaining provisions of The Labour Relations Act of Manitoba. Once again, it could not have been the intention of the Legislature to have created this situation.

It was brought to the Board's attention that in 1981 there was a unanimous Award by a Board of Arbitration in the Portage la Prairie School Division No. 24. One of the matters dealt with in that Arbitration Award had to do with including a clause respecting the pay scales for substitute teachers employed by the Portage la Prairie School Division. The Board of Arbitration unanimously included a clause governing substitutes as aforesaid. It was pointed out that in the Portage la Prairie Arbitration Award the scope clause of the collective bargaining agreement was amended as well and that this somehow explained the reason for the inclusion of the clause respecting substitute teachers. In my opinion this

just begs the question - that is, whether the Teacher's Society had the jurisdiction to represent substitute teachers and if the Board of Arbitration had jurisdiction to award a clause. It was pointed out that the Portage Arbitration decision awarding the clause respecting substitute teachers was unanimous and was not challenged in Court subsequently.

There was material placed before us that indicated that some 54 out of 59 Divisions in Manitoba already recognize the Teacher's Society as the bargaining agent for substitute teachers and that clauses are included in the various collective bargaining agreements. Although most of these are as a result of the School Division's having voluntarily recognized the Association to bargain re: substitute teachers, if there is no impediment in the legislation prohibiting the Association from bargaining for substitute teachers in these circumstances, then there should be no impediment to a Board of Arbitration making an Award. Accordingly, for all of the foregoing reasons it is my view that this Board of Arbitration does have jurisdiction to make an Award and include a clause of the type sought by the Association respecting substitute teachers.

I would have made the Award and included the clause sought by the Association. However, at the very least, given the particular objections of the Division, I would have awarded a clause that said that substitute teachers who have entered into written agreements with the School Division shall be paid the following rates and then set out the appropriate rates as sought by the Association.

DATED at Winnipeg, in Manitoba, this 15th day of May, 1985.

David M. Shrom

David M. Shrom
Nominee of the Association

I HEREBY CERTIFY that attached hereto is a true copy of the arbitration award made on May 24 , 1985 in connection with the dispute between The Assiniboine South School Division No. 3 and The Assiniboine South Teachers' Association No. 3 of The Manitoba Teachers' Society.

Chairman

May 24 , 1985