

IN THE MATTER OF: ) AN ARBITRATION BETWEEN:  
) )  
) ) THE BIRDTAIL RIVER SCHOOL DIVISION  
) ) NO. 38  
) )  
) ) (hereinafter called the "*Division*")  
) )  
) ) - and -  
) )  
) ) THE BIRDTAIL RIVER TEACHERS' ASSOCIATION  
) ) NO. 38 OF THE MANITOBA TEACHERS' SOCIETY  
) )  
) ) (hereinafter called the "*Association*")

ARBITRATION AWARD

On May 30, 1996, the Honourable Linda G. McIntosh, the Minister of Education and Training, confirmed the members of the Arbitration Board appointed to resolve the terms of a Collective Agreement between the parties. Mr. Don Little, Q.C. of Brandon is the Nominee of the Division, Mr. David Shrom, Barrister, of Winnipeg, is the Nominee of the Association and Jack M. Chapman, Q.C. was appointed to act as Chairperson. After consultation with the parties it was agreed that the hearings would take place in Brandon, Manitoba on October 21 and 22, 1996. The members of the Arbitration Board have completed the required Oath of Office.

At the commencement of the hearings the parties confirmed that the Arbitration Board had been properly appointed and had jurisdiction to deal with the matters in dispute.

Mr. Terry Cooper, Mr. George Coupland, and Ms. Cindy Hluzak represented the Division. Additionally, some senior officers of the Division and a number of trustees also attended.

The Association was represented by Mr. John K. Collins, Mr. Tom Paci and Mr. Saul Leibl. A number of officers and members of the Association were also in attendance.

At the time the Arbitration Board was constituted, the Minister of Education provided a list of the outstanding items. At the commencement of the hearings the parties advised that the list had been substantially reduced as a number of matters had been resolved by the parties. The issue relating to the effective period of the Agreement had been settled and the parties had agreed upon a two-year agreement from January 1, 1995 to December 31, 1996. It was also stipulated the parties had agreed that the salary schedule was no longer in dispute and the salary schedule of the previous agreement would be extended for the term of the new agreement.

The remaining items which we are to resolve are as follows:

- |     |              |                                   |
|-----|--------------|-----------------------------------|
| 1.  | Article 3.01 | Classification                    |
| 2.  | Article 3.03 | Allowance for Previous Experience |
| 3.  | Article 3.04 | Increments                        |
| 4.  | Article 3.05 | Change in Classification          |
| 5.  | Article 3.06 | Staff Placement                   |
| 6.  | Article 3.10 | Moving Expense                    |
| 7.  | Article 3.12 | Payment of Salary Interest        |
| 8.  | Article 6.05 | Maternity Leave                   |
| 9.  | Article 6.06 | Sick Leave                        |
| 10. | Article 8    | Lay-off                           |
| 11. | Article 9    | Settlement of Differences         |
| 12. | Article 13   | Noon Hour                         |
| 13. | New Article  | Non-Contact Time                  |
| 14. | New Article  | Birth/Adoptive Leave              |
| 15. | New Article  | Early Retirement Incentive Plan   |

The meetings took place over a two day period and the board has subsequently met to review all the matters. As usual, both parties filed very comprehensive briefs respecting each issue. All of the issues were thoroughly canvassed in argument and discussed.

The Board particularly wishes to thank all the members of the Association who made submissions. The Board appreciates the information they provided and the forthright manner in which they made their presentations.

#### GENERAL COMMENTS

The Birdtail River School Division No. 38 is a rural division located in the western part of Manitoba. Other than the Brandon Division, all of the surrounding divisions are primarily "rural." There are approximately 84 teachers on staff, of which all but 4 are in Class 4, or above. There are approximately 1300 students, and there are 10 schools. Other than in Hamiota, where there are 2 schools, i.e., K to 6, and 7 to 12, each of the other schools is located in a separate community.

The emphasis on teacher/interest arbitrations in the past, primarily, but certainly not solely, had been directed to the salary schedule. In the most recent years, that emphasis has changed substantially. Certainly the fact that the parties agreed on extending the current salary schedule for a further period of two years establishes that salary considerations are not the primary objective of the teachers. In simple terms, the thrust and objective of the Association is to improve working conditions with considerable emphasis on job security.

We do not believe that it is necessary for us to recite, again, the principles which an Interest Arbitration Board should consider. These, especially with respect to salaries, have been stated and restated on many occasions and are well known to the parties as many of the comments of arbitrators and text writers have been set out in the briefs filed. Although we are not concerned with salary increases, nevertheless, many interest arbitration principles apply. We are referring, for example, to comparability which may well be applicable in the case of benefits and working conditions.

There is no doubt that teaching is a stressful occupation. It undoubtedly is one of the most rewarding professions which an individual can embark upon, but the pressures of modern society have certainly created a multitude of stressors. The alleviation of those factors is not something which can be decided by either of the parties unilaterally, or by any arbitration board. They are considerations which affect society at large. However, we are satisfied that both the Division and the Association are desirous of establishing and maintaining good working conditions which, as far as reasonably possible, alleviate some of those stress factors and lead to harmonious relations between the Administration and the Staff. In coming to our conclusion, the Board can assure the parties that all of the material submitted has been carefully studied, thoroughly discussed and analyzed. Although all of the issues are important, the Board, as will be seen, has focused its attention on what it considers to be the most significant of the outstanding issues.

We fully acknowledge that, at the time of the Hearings, and even continuing to the present time, public education, and in particular collective bargaining between Divisions and their Associations, is in a state of flux. New legislation was proposed and enacted which will undoubtedly affect collective bargaining in the future. However, we must deal with the legislation in place at the time of the appointment of the Arbitration Board and the hearings. Additionally, the agreement, which we are establishing will only be effective to December 31st, 1996.

We hold with respect to each of the items in dispute as follows:

**Item 1 - Article 3.01 - Classification**

The provisions of the Agreement expiring December 31st, 1994 shall be incorporated into the new Collective Agreement.

**Item 2 - Article 3.03- Allowance for Previous Experience**

The provisions of the Agreement expiring December 31st, 1994 shall be incorporated into the new Collective Agreement.

**Item 3 - Article 3.04 - Increments**

The provisions of the Agreement expiring December 31st, 1994 shall be incorporated into the new Collective Agreement.

**Item 4 - Article 3.05 - Change in Classification**

The provisions of the Agreement expiring December 31st, 1994 shall be incorporated in the new Collective Agreement.

**Item 5 - Article 3.06 - Staff Placement**

The provisions of the Agreement expiring December 31st, 1994 shall be incorporated in the new Collective Agreement.

**Item 6 - Article 3.10 - Moving Expense**

The wording of the present Agreement reads as follows:

" Teachers who are transferred from community to community within the Division, shall have their reasonable moving expenses paid, provided prior approval of costs is given by the Division."

The above wording is perhaps amongst the most succinct statements in any of the wordings from collective agreements provided to us. The Association's proposal, although recognizing the right of the Division to assign teachers to different schools, proposes that there be a mileage allowance paid when a teacher must travel a distance in excess of 15 kilometres; that there shall be consultation, that the most reasonable notice possible will be given, that the matter be arbitrable, and that the Division's right to initiate transfer shall be exercised fairly and reasonably.

In considering the very full submissions made by each of the parties respecting this issue, we have borne in mind that the student enrollment within the Division is declining and, as stated above, there is only one community within the Division that has more than one school. Obviously, the transfer of teachers has been common and presumably always will be a necessity in a Division of this type.

We note that this Article is entitled Moving Expense. Article 12 of the Collective Agreement, which is not before us as being in dispute, relates to Hiring and Transfers. Possibly the request of the Association might have been directed to that Article. However, we direct that Article 3.10 be deleted and the following substituted:

- 3.10 a) Teachers who are transferred from community to community within the Division, shall have their reasonable moving expenses paid, provided prior approval of costs is given by the Division.
- b) The Association recognizes the right of the Division to transfer teachers employed by the Division to schools under the jurisdiction of the Division.
- c) The Division shall exercise its discretion to transfer in a manner which is fair and reasonable. The Division shall, wherever possible, consult with Teachers who are being involuntarily transferred prior to making a final decision.
- d) In making transfer decisions the Division shall consider the educational needs of the students, the administrative needs of the Division and those concerns raised by the teacher prior to making a decision. However, the Division shall be guided by the educational needs of the students and the administrative needs of the Division.
- e) In the case of any teacher who is given notice of transfer following May 31st and wishes to resign before June 30th of that year, the Division agrees to accept the resignation, provided it is offered in writing within 7 days of the notice of transfer.

**Item 7 - Article 3.12 - Payment of Salary Interest**

The provisions of the Agreement expiring December 31st, 1994 shall be incorporated into the new Collective Agreement.

**Item 8 - Article 6.05 - Maternity Leave**

It may suffice to say that much of the argument of the Association related to what is called a SUB plan to supplement the employment (or unemployment) insurance benefits received by workers for temporary unemployment caused by maternity. In effect, there would be an additional payment. We studied the comments of the Arbitrators who have previously considered this issue and, although the comments are certainly instructive, and support such a plan, we are supportive of the views of Dean London as stated in the Interlake arbitration award in 1994 where it was said:

"In our view it would be preferable if issues relating to parental leave had been addressed to appropriate provincial legislation or standards, in conjunction with federal programs and standards, which could mandate requirements for paid leave throughout the employed economy. The right to paid leave should not only be the privilege of the few, but the right of all."

We note that there is a modified plan in the Transcona-Springfield School Division and that Dean Penner, in the Assiniboine South arbitration award, 1994, awarded some modification to the maternity benefits, but had, in effect, concluded that it was up to the parties to make the necessary arrangements.



We also concur with the comments of Arbitrator Teskey in the 1994 Lord Selkirk award wherein he noted that the request of the Association might have merit, but that Board was not prepared, at that time, to make such an Award.

Under the conditions prevailing at this time, this Board declines to grant the request of the Association.

#### **Item 9 - Article 6.06- Sick Leave**

At the present time teachers in the Division can accumulate Sick Leave up to a total of 85 teaching days in the fifth year. The Association initially requested 200 days, and then modified its proposal to 110 days. The Association also requested other changes relating to additional costs incurred by the Teachers as a result of on the job injury. We have previously noted that we have considered the principle of " comparability." The three largest adjoining School Divisions are Pelly Trail, Rolling River and Fort La Bosse. Brandon is adjacent to the Division, but is not a rural division to the same extent as the others. In each of Pelly Trail, Rolling River and Fort La Bosse, teachers are entitled to accumulate 100 days of sick leave. Accordingly, we have concluded that the Collective Agreement should be amended to reflect that change.

#### **Item 10 - Article 8- Layoffs**

In the past, salaries were perhaps the most contentious issue between the parties. The issue of layoffs has been, and is, practically equally contentious. Over a number of years, the

parties and numerous arbitration Boards have addressed that issue and a number of layoff articles have evolved. Unfortunately, due to the declining enrollment, the issue continues to be contentious.

We do not propose to revisit the right of a Division to layoff teachers or the right of the teachers to be protected when there is a downsizing of staff. There are a plethora of arbitral awards and judicial decisions and the vast majority of those have been filed before us in the briefs or have been referred to in argument.

The last Agreement between the parties contained a very extensive layoff article containing 18 clauses. It was perhaps the most comprehensive article in the collective agreement. Although the teachers initially submitted very comprehensive amendments, their proposal was substantially changed.

Article 8.02 of the current agreement reads:

"Notwithstanding the foregoing, the Board shall have the right to disregard the seniority of any teacher in the event of a layoff, if such teacher does not have the necessary training, academic qualifications, and experience for a specific teaching assignment after taking into account the special subject, program and administrative needs of the Board.

The revised proposal of the teachers was simply to amend Article 8.02 to read as follows:

"Notwithstanding the foregoing, the Board shall have the right to disregard the seniority of any teacher in the event of a layoff, if such teacher does not have the necessary training, academic qualifications, and experience for a specific teaching assignment."

The effect of the revised proposal was to delete the phrase:

"after taking into account the special subject, program and administrative needs of the Board."

The Association, at pages 200 to 204 of its brief, filed seniority lists of all teachers relating to their date of hire as well as seniority lists of the teachers after the Board exercised its discretion in taking into account the special subjects, programs, and administrative needs. Slightly less than 40% of the teachers on that latter list have been identified as being required to "protect" the identified areas which, at the time of the hearings were:

1. French with minor and/or immersion course
2. Resource/guidance with certificate in special education
3. Technology/computer science
4. Business education certificate.

It should be noted that there had been other programs, special subjects and administrative needs identified by the Board over a period of time in such areas as administration, music/band, specialists in early, middle and senior education, and guidance teachers. These have periodically changed. A review of the list shows that one teacher in one protected area, who had less than

one year of experience with the Division, would have more job protection than all of the other staff, except for two teachers with less seniority than the aforementioned teacher.

The Division pointed out that the article in the current collective agreement had been negotiated between the parties and was not imposed by an Arbitration Board. The Association, on the other hand, said that the Board's interpretation and application of the article truncated the seniority rights of many of the teachers.

Mr. Collins pointed out that the issue of layoffs was no longer a moot point. In this Division a school had closed and teachers were facing layoff. Every effort should be made to protect their rights to employment. He did not dispute that the Division was entitled to set its curriculum (within the guidelines determined by the appropriate Provincial authorities) and to determine which programs would be offered. The Association had no problem in recognizing that certain teachers had qualifications in certain subjects and others did not. The Division, not surprisingly, argued that it was entitled to determine the curriculum and the special subjects and programs it would offer and to consider its administrative needs.

The Awards cited and the arguments made by the representatives of the parties dealt at great length with the significance of seniority. This Board does not in any way believe that those principles should be lessened. Consideration must be given to the needs of the Division and to the concerns of the teachers. Obviously, the Division must be able to consider the special subjects and programs which it wishes to include as part of the curriculum. The administrative

needs of the Division are significant. However, administrative problems should be resolved without any negative impact on the teachers.

The parties have not filed all of the various collective agreements which have layoff clauses. Although this Board has familiarity with many of them, it is difficult to analyze each without reference to the actual collective agreement. It is clear, however, that there are important distinctions in the wording. In its brief, the Association referred to the decision of this Chairperson (but with different nominees) relating to the interpretation of the layoff article in the St. James-Assiniboia School Division #2 and its Teachers' Association Collective Agreement. The article (as it was in 1979) referred to in that arbitration award reads:

"the special subject and program needs of the Board."

It made no reference to administrative requirements or needs.

According to a Schedule referred to in the Division's brief at pages 167 to 171, some divisions have a clause which only relates to the special needs of the Division, some are related to the ability factor, some are based on pure seniority, some are based on the special programs, and some refer to staff reduction being based only on divisional seniority if all other considerations are equal.

We have attempted to revise the layoff article so as to provide for recognition of the problems and issues raised by both parties. It is not sufficient to only revise Article 8.02. The changes we have made necessitate certain other amendments to Articles 8.12, 8.15 and 8.17.

We accordingly hold that Article 8.02 be amended as follows:

8.02 Notwithstanding the foregoing, the Board shall have the right to disregard the seniority of any teacher in the event of a layoff if such teacher does not have the necessary training and/or academic qualifications and/or experience and/or ability for a specific teaching assignment.

**Article 8.12** shall be amended to read as follows:

8.12 Definitions

- (i) *Training:* Instruction received as preparation for the profession of teaching, which instruction leads to the development of a particular skill or proficiency with respect to a particular subject, subjects or program.
- (ii) *Academic Qualifications:* Refers to the classification in which a teacher is placed by the Professional Section of the Administration and Professional Certification Branch of Manitoba Education.
- (iii) *Experience:* The practical application of the training over a reasonably current period of time with respect to the particular subjects (including special subjects) or programs as may from time to time be approved and offered by the Division.

- (iv) *Ability:* A teachers demonstrated skill and competence to satisfactorily and proficiently perform a particular assignment after having acquired the necessary training and academic qualifications and reasonably current experience.

**Article 8.15** shall be amended by changing the last line of the first paragraph to read:

"academic qualifications, **experience and ability.**"

and by changing the fourth line of the first paragraph to read:

"qualifications, **experience and ability** for the position available.

Seniority with the Board will be used to determine the order in..."

The balance of Article 8.15 shall be included in the new Collective Agreement.

**Article 8.17** shall be amended by changing the ninth line thereof to read:

"academic qualifications, **experience and ability** required for specific teaching assignment of such teacher employed under a..."

The balance of Article 8.17 shall be included in the new Collective Agreement.

It is extremely difficult to articulate exactly and comprehensively what might constitute the "administrative needs" of a Division. As we have noted earlier those problems should be solved by the Division without any detrimental affect on the teachers. Obviously any principal and/or vice-principal has an administrative component in their duties and responsibilities. Their positions should not be affected by the amendments we have made.

#### **Item II - Article 9 - Settlement of Differences**

The existing agreement provides that if there is any dispute which is not settled within 10 days of the Association taking the matter up with the Board, or if the Board notifies the

Association of its desire to have a difference negotiated, the matter is to be submitted to arbitration. The Division is concerned that there is no time limit from the date of the event occurring to when the matter may be referred for further steps. In the proposal made by the Division, it is requested that notification shall be given within fourteen calendar days of the event giving rise, or, fourteen calendar days from when the party became aware of the event giving rise to the alleged violation. The existing agreement also provides that any difference between the parties or individuals, concerning the "content", meaning, application or violation may be referred to the party opposite. We believe that there is some merit in the positions advanced by each of the parties and, accordingly, we direct that the first paragraph be amended by adding the following words:

Where a violation to this agreement is alleged by a party to, or persons bound by this agreement, or on whose behalf it was entered into, the party or person shall, within 45 teaching days of the event giving rise to the alleged violation, or within 45 teaching days from the date on which the person or party became aware of the event giving rise to the alleged violation, notify the other party in writing stating the alleged violation and the solution sought.

The Board further directs that a new paragraph be added to Article 9 as follows:

If a party to this Agreement claims that any time limit imposed under the Agreement has not be complied with, the parties shall



proceed to appoint the arbitration board and, if the arbitration board is satisfied that the irregularity with respect to the time limit has not prejudiced the parties to the arbitration and will not affect the merits of the matter submitted to the arbitration board, it may, on application of any party to the arbitration, declare that the irregularity does not affect the validity of the decision of the arbitration board; and the declaration is binding on the parties to the arbitration and on any person affected by the decision of the arbitration board.

The balance of existing Article 9 shall be incorporated into the new Collective Agreement.

**Item 12 - Article 13 - Noon Hour**

The provisions of the Agreement expiring December 31st, 1994 shall be incorporated into the new Collective Agreement.

**Item 13 - New Article - Non-contact Time**

During recent years, the Associations, in a number of Divisions, have submitted comprehensive briefs and evidence relating to the workload of teachers. The submissions in this arbitration carried on that tradition. Evidence was received from a number of teachers as to the increased workload on teachers brought about by increased class sizes and other stressors in today's society. Initially the Association requested that each teacher be assigned a minimum of 40 minutes of non-contact time within each 5.5 hour instructional day for the purposes of preparation. This proposal was subsequently amended to include a number of alternatives as set out on page 26 of the Association's brief. We do not propose to repeat those. In effect, the revised proposals reflected the decisions in a number of arbitration awards which provided some restriction on the contact time. In particular, these were the decisions of Arbitrator Freedman

in the Transcona-Springfield award for 1989; the award of this arbitrator in the Winnipeg #1 award in 1990; the decision of Arbitrator Bowman, in the Seine River award for 1993; the decision of Arbitrator Teskey in the Lord Selkirk Division award for 1994; the award of Arbitrator Penner in the Assiniboine South Division award for 1994; the award of this arbitrator in the St. James-Assiniboia award for 1994 and the decisions of Arbitrator Scurfield in the Birdtail River award for 1993 and the River East arbitration award for 1996.

It should be noted that Arbitrator Scurfield, in the award relating to this particular Division, recommended that a committee be formed to examine the problem and to determine an ideal plan. The information we have received is that the committee never met. We do not attribute blame to either the Division or the Association, but the fact remains that it appears that the parties will not resolve the matter by mutual consent. Each of the cited awards reflect slightly different considerations. We recommend that the committee should endeavour to initiate meetings and perhaps come to a more equitable solution than we are suggesting.

Of all of the awards we have considered, we are of the view that the award of Arbitrator Teskey in the 1994 Lord Selkirk Division award would be the most reasonable. We have made certain minor adaptations to it and direct that a new article be inserted in the Collective Agreement entitled **Contact Time** and that it read as follows:

The parties agree that, as a general principle, mandatory student contact time performed by the teachers within the Division, whether such time is in a teaching, consultation or supervisory role, shall not be increased during the term of this Agreement. The Division shall make all reasonable efforts to assign contact time such that it shall generally be in keeping with the Divisional average for the appropriate level and shall make such assignments as equal and/or equitable as possible and/or practicable among teachers within the applicable levels and functions. However, the parties

also agree that the student contact time assigned in any particular school year to any individual teacher in any particular school may be greater or lesser than was the case during the previous school year. Any issue as to the reasonableness of particular assignments of contact time shall be subject to the grievance and arbitration provisions of this Agreement."

**Item 14 - New Article - Birth/Adoptive Leave**

In view of the submissions of both parties, it is evident that a substantial number of divisions have made some provision for the father, in the case of the birth, being able to attend at the birth, and also, that upon the adoption of a child, the parents be allowed some time to receive the child. Accordingly, the Board has determined that the following article should be inserted into the collective agreement:

- a) Should the birth of a child occur upon a teaching day, the father of such child shall be allowed one day of leave with the cost of a substitute, if any, deducted from his pay.
- b) Upon the adoption of a child, the teacher/ parent shall be allowed one day of leave with the cost of a substitute , if any, to be deducted from his or her pay.

**Item 15 - New Article - Early Retirement Incentive Plan**

This request of the Association is denied.

We have considered each of the issues before us and have tried to achieve an Award which is fair and equitable to all. We are particularly grateful to the individuals who came forward and clearly expressed the problems which confront them. We wish to emphasize that they are unselfish in their demands and are seeking to improve the education of their students and the community in which they reside. We commend the efforts of members of the Association and of the Division who continue to make extraordinary efforts to educate students

who, in due course, will become active members of the Community. No Arbitration Board can correct the myriad of problems which affect society and the field of education in particular. We are cognizant of the factors which have, perhaps detrimentally, affected school divisions and teachers. We certainly do not have the wisdom to solve all of those problems but, as stated earlier, we hope that we have alleviated some of them.

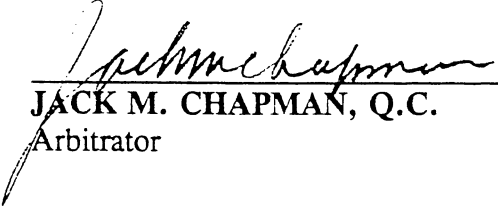
We wish to thank those individuals who presented those briefs and arguments on behalf of the Division and Association. They submitted a considerable amount of material to us, all of which has been considered. It was most helpful and their summaries were of particular assistance.

This chairperson would be remiss if he did not pay tribute to the Nominees who were of great assistance in reviewing and analyzing the substantial material submitted.

This Arbitration decision was not finalized as quickly as the parties and the nominees desired. However, all the material had to be reviewed, compared, and analyzed. There has been considerable discussion of the issues by the Arbitration Board. The chairman apologizes and accepts the responsibility for the delay.

In accordance with the terms of the collective agreement and the legislation, the parties will jointly share the costs of this arbitration.

DATED at the City of Winnipeg, this 9th day of April, 1997.

  
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JACK M. CHAPMAN, Q.C.  
Arbitrator