IN THE MATTER OF AN ARBITRATION
AND IN THE MATTER OF A GRIEVANCE FILED BY
B. ROBERTSON ON NOVEMBER 30, 2015 AND AN ASSOCIATION
GRIEVANCE FILED ON DECEMBER 2, 2015

BETWEEN:

PARK WEST SCHOOL DIVISION

- and -

THE PARK WEST TEACHERS' ASSOCIATION
OF THE MANITOBA TEACHERS' SOCIETY

****

AWARD

****

WILLIAM D. HAMILTON.....CHAIRPERSON
GRANT MITCHELL, Q.C.....DIVISION NOMINEE
DAVID SHROM.....ASSOCIATION NOMINEE

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(hereinafter referred to as "the Division")

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OF THE MANITOBA TEACHERS' SOCIETY
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AWARD

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(I) GENERAL COMMENTS AND IDENTIFICATION OF ISSUE(S)

An individual grievance, filed on behalf of Ms. Brittany Robertson (the "Grievor"), and an Association grievance (the "Association") came before the arbitration board (the "Board") under the provisions of the July 1, 2010 - June 30, 2014 collective agreement (as extended) between the Division and the Association (the "Agreement") (Ex.1).

The hearing was held in Winnipeg, Manitoba, on October 11, 2016.

At the outset, the parties were advised that all members of the Board had taken their required Oaths of Office.

The parties agreed that the Board was properly constituted under the terms of the Agreement and had jurisdiction to determine the matters in dispute. As the hearing proceeded on the basis of a Statement of Agreed Facts (the "Agreed Facts") (Ex.5) there was no need to order exclusion of witnesses.

The Grievor filed an Individual Grievance dated November 30, 2015 (the "Grievance") (Ex.2) as follows:

"Brittney Robertson (the "Grievor") grieves that there is a difference between her and The Park West School Division (the "Division") in relation to the interpretation and application of the Collective Agreement between the Division and The Park West Teachers' Association of the Manitoba Teachers' Society, including article 3.08(c) of the Collective Agreement.

The Grievor is employed by the Division as a teacher on a .75EFT basis and, during the 2014/2015 school year, normally worked from 10:30 AM until 3.30 PM, Monday to Friday. On numerous occasions, on dates which are known to the Division, the Grievor was called in to work prior to her 10:30 AM start time in order to substitute teach.

The Collective Agreement provides that substitutes called into work will be paid a minimum of one half day at the appropriate rate of pay. Notwithstanding, the Grievor was not paid a full half day at the appropriate rate of pay for these dates that she substitute taught.

The Grievor therefore requests:

1. A declaration that the Division has misinterpreted, misapplied and/or violated the provisions of the Collective Agreement;

2. An order that the Division fully compensate and make Brittney Robertson whole, in accordance with the Collective Agreement;

3. Any other remedies that are just and reasonable in the circumstances."

On December 2, 2015, the Association filed the Association Grievance (the "Association Grievance") (Ex.3), the substance of which was identical to the individual Grievance filed by the Grievor.

On December 10, 2015, the Division filed its Reply to both Grievances (Ex.4), as follows:

> "The Park West School Division has reviewed the grievances and upon consideration believes that the Division has applied the relevant articles of the collective agreement consistently and correctly. Therefore we are denying the grievance."

The provision which is the focus of this dispute is Article 3.08(c) of the Agreement which states as follows:

> "Substitutes called in to work will be paid a minimum of one-half (½) day at the appropriate rate of pay. Substitute teachers called in for greater than one-half day or a Substitute Teacher whose assignment has been extended shall be paid on a pro-rated basis for the entire assignment." (emphasis added)

This provision is part of Article 3.08 which, in its entirety, addresses not only the manner in which substitute teachers are to be paid for work performed but it also addresses the specific provisions in the Agreement which apply to substitute teachers.

There is no dispute that, during the 2014/2015 school year, the Grievor was a substitute teacher pursuant to the standard form of contract prescribed for substitute teachers in Schedule "E" of the **FORM OF AGREEMENT (SCHOOL BOARDS AND TEACHERS) REGULATION (NO.218/2004)** (the "Regulation") enacted under the authority of *The Public Schools Act (the "Act".* Section 2 of the Regulation prescribes:

> "An agreement between the School Division and a Substitute Teacher must be in the form set out in Schedule "E"."

Although the actual signed Schedule "E" Agreement between the Division and the Grievor was not filed with the Board, it is common ground that the Grievor would have signed such a prescribed agreement for the 2014/2015 school year. Under Clause 4 of the Substitute Teacher Agreement, the Division agreed to pay the Grievor in accordance with the Agreement. In this regard, there no dispute that the Grievor was a Certified Substitute Teacher

The Grievor was also employed by the Division as a part-time teacher for the 2014/2015 school year under a Limited Term Teacher Agreement (the "LTTA"), as prescribed by Schedule "B" to the Regulation.

The focus of this dispute relates to the 37 occasions during the 2014/2015 school year when the Grievor was asked to and did substitute teach. On each of these occasions she taught for the first two periods of the day at the Rossburn Elementary School, this being the same school where she also performed her part-time teaching duties. On each of these 37 occasions, all of which were worked between September 8, 2014 and June 12, 2015, (see Ex.5 – App.3), the Grievor was paid .25 (¼) of the daily rate of pay prescribed for Certified Substitute Teachers under Article 3.08 of the Agreement). As the full daily rate for a Certified Substitute Teacher during this time period was $141.22, the Grievor was paid $35.31 for the two substitute periods worked (see Ex.5/App.4).

Under her pro-rated LTTA as a part-time teacher the Grievor received 75% of the daily rate paid to a full-time teacher (at her classification level). As the daily rate for a full-time teacher at the relevant time was $275.75, the daily rate paid to the Grievor was $206.81. So, on the days when the Grievor substituted for two classes (in addition to the six classes she taught under her part-time contract), she received $206.81 plus $35.31, for a total of $242.12.

The Association's position is that payment of $242,12 is incorrect. Under the plain and ordinary meaning to be attributed to the first sentence of Article 3.08(c) of the Agreement, the Association submits the Grievor ought to have received the sum of $70.72 as a minimum guarantee pursuant to Article 3.08(c) for a total payment on each day of $277.43. Accordingly, damages are capable of precise calculation in that the Grievor (according to the Association) ought to have received an additional 25% of the $141.22 daily amount for each of the 37 days. This totals $1,306.29 (gross), from which usual statutory deductions ought to be made.

For its part, the Division asserts that it properly paid the Grievor on these 37 occasions during the 2014/2015 school year. In this regard, the Division says that the minimum guarantee of 4 hours under Article 3.08(c) does not apply to the Grievor's circumstances (or any other substitute teacher) where the substitute teacher's hours are contiguous with her normally assigned hours as a part-time term teacher. The Division asserts that the provisions of Article 3.08(c) are not clear and unambiguous on their face in that it was not of the intent of this provision to pay a substitute teacher the half-day guaranteed minimum where the teacher was already working for greater than one half day. Where the two assignments are contiguous, it cannot be said that the substitute teacher (here, the Grievor) was "...called in...to work" within the meaning of Article 3.08(c). The Division asserts that to adopt the Association's interpretation would

lead to an anomaly or an absurdity in that the Grievor, for the 37 days in question, would be paid a greater daily rate than that payable to a full-time teacher of similar classification and experience (the difference being $1.67).

The Division further asserts that if the Board does not find the disputed provision to be patently ambiguous then it is certainly "latently" ambiguous. Regardless of what form of ambiguity is found the Board is entitled to consider the past practice of the parties in order to resolve the ambiguity under accepted arbitral principles. In these circumstances, the past practice reveals (assuming an ambiguity is found) that the manner in which the Division paid the Grievor is consistent with a long standing past practice which has survived a number of collective agreements. The Division maintains that the pre-requisites for a past practice have been satisfied in this case (to be discussed *infra*). The Division also relied on the common law of presumption against pyramiding of benefits.

In the alternative, the Division argues that if the Board determines there is no ambiguity then the doctrine of estoppel ought to be applied to the Grievor's claim, at least from January of 2015 when this issue was first brought to the Division's attention by the Association. As the Grievances were not filed until November 30 or December 2 of 2015, an estoppel should be applied at least until the date of filing these Grievances, meaning that the Grievor is not entitled to any monetary relief.

In response to the Division's submissions, the Association disputes the "contiguous" assumption made of the Division. The Association maintained its core position that there is no ambiguity, either latent or patent, in Article 3.08(c), meaning that recourse to an alleged past practice is not available to the Division as an aid to

interpretation. In any event, argues the Association, the doctrine of past practice is not available because there is no evidence of knowledge/acquiescence by the Association to the alleged practice.

It is common ground that the parties have negotiated a new collective agreement to replace the Agreement. While there was some discussion on Article 3.08(c) during these negotiations, no changes were made to Article 3.08(c) at all and the parties agreed to abide by the decision of the Board on the interpretation to be given to Article 3.08(c) and that they will be bound by the Board's decision on a "go forward" basis. The Association submits that this makes the Division's reliance on any purported estoppel irrelevant.

(II) THE EVIDENCE

As noted, *supra*, the parties filed the Agreed Facts, which, in their entirety, state as follows:

"1. The applicable Collective Agreement is between the Division and the Association, for the term of July 1, 2010 to June 30, 2014, which Agreement was in force at all material times.

2. Ms. Robertson was employed by the Division as a teacher under a Limited Term Teacher Contract for the 2014/2015 school year. She was employed on a.75 EFT basis and worked, under her contract, from 20:30 AM until 3:35 pm daily as a teacher at Rossburn Elementary School. A copy of Ms. Robertson's Limited Term Teacher Contract is attached as Appendix 1. A copy of Ms. Robertson's timetable is attached as Appendix 2.

3. For the 2014/15 school year, the full-time salary for a teacher of Ms. Robertson's class and experience under the Collective Agreement was $54,323 or $275.75 per teaching day (based on 197 days in the 2014/15 school year). Ms. Robertson was paid 75% of that amount (less certain insurance premiums).

4. Substitute teachers are paid less than teachers under contract with the Division pursuant to the Collective Agreement. During the 2014/15 school year, the daily rate of pay for a certified substitute teacher was $141.22.

5. As the timetable illustrates, the school day at Rossburn begins at 9:00 AM. After two periods there is a 15 minute recess from 10:15 AM until 10:30 AM. There are a total of eight classes throughout the school day. In accordance with her contract, Ms. Robertson was assigned teaching duties or preparation time in six of those eight classes.

6. On 37 occasions during the 2014/15 school year Ms. Robertson was asked to and did substitute teach. See Appendix 3 attached (Division Payroll System). In each case she substitute taught for the first two periods of the day, from 9 AM until 10:15 AM. She then began her normal day at 10:30 AM.

7. According to Appendix 3, there was a variety of reasons, contained in a column titled "Description" that three other teachers at Rossburn were absent on those 37 occasions, giving rise to the request of Ms. Robertson to substitute teach.

8. On each of the 37 occasions when she substitute taught, Ms. Robertson was paid by the Division for one quarter (1/4) of the daily rate of pay for certified substitute teachers. By way of example, a Statement of Earnings and Deductions attached as Appendix 4, shows payment to Ms. Robertson of $35.31, being .25 of the substitute teacher daily rate of $141.22. Ms. Robertson received a similar Statement of Earnings and Deductions from the Division for every month in which she substitute taught which provided particulars on the amounts paid for substitute teaching and how same was calculated.

9. The manner in which Ms. Robertson was paid for substitute teaching was consistent with the manner in which the Division paid other part-time teachers who substitute taught from time to time. Whether the part-time teacher substitute taught before their normal start time or substitute taught after their normal end time, the teacher was paid the pro-rated daily rate for certified substitute teachers for the time spent substitute teaching. Copies of Division Payroll System documents relating to part-time teachers who substitute taught before or after their normal part-time assignment during the 2010/11, 2011/12, 2012/13, 2013/14 and 2014/15 are attached as Appendix 5. Where there is an "A" under the heading "Sub.Units", that means "morning" and the person substitute taught before the start of their normal day. Where there is a "P" under the heading "Sub.Units", that means "afternoon" and the person substitute taught after the end of their normal day.

10. The previous Collective Agreement for the period of July 1, 2007 to June 30, 2010, contained identical language to the applicable Collective Agreement in Article 3.08(c). Collective Agreements going back to July 1, 2002 (the first Collective Agreement for the new Park West School Division following the amalgamation of Pelly Trail School Division and Birdtail River School Division), contained the identical first sentence of Article 3.08(c) of the applicable Collective Agreement.

11. The Division's electronic payroll system has been in place since January, 2011. Prior to January, 2011, information regarding what days of the month a part-time teacher substitute taught, the length of time the teacher substitute taught and whether the substitute teaching occurred in the morning or in the afternoon was recorded in "Request for Leave" documents. The Division's document retention policy is to keep "Request for Leave" documents for seven (7) years.

12. The Association first raised an issue regarding how the Division was paying part-time teachers for doing additional substitute teaching in or around early January, 2015."

In order to complete the evidentiary context, some comments on the Appendices attached to the Agreed Facts are in order. In this regard:

(i) The Grievor's LTTA for the 2014/2015 school year is attached as Appendix 1 to the Agreed Facts. It reveals that she was engaged on a part-time basis for .75 FTE and, for this work, she was to be paid in accordance with the salary scale applicable to full time teachers. This scale is found in Article 3.02 of the Agreement where the 7 classifications for teachers and the accompanying increment structure is outlined (unnecessary to recite here). In essence, the Grievor was employed on a term contract which expired on June 30, 2015;

(ii) The Grievor's part-time teaching assignments for the school year in question are contained in Appendix 2 to the Agreed Facts. It shows her precise teaching assignments at the Rossburn Elementary School (together with the courses actually taught) for the 2014/2015 school year. Of the 8 teaching periods

comprising a standard school day she taught 6 of those periods commencing at 10:30 a.m. on each day;

(iii) Appendix 3 provides details of the 37 substitute assignments worked by the Grievor. It reveals the precise dates when these substitute assignments were worked, for which regular or full time teacher the Grievor was substituting and the reason for the assignment (e.g. sickness, team meetings, professional development, personal leave and others). The Grievor's substitute assignments were in the morning, prior to her commencing her part-time duties at 10:30 a.m. on each of the days in question. This Appendix reveals that the Grievor performed substitute teaching duties on 12 occasions prior to the Association first raising this issue in early January, 2015 (see Para.12 of the Agreed Facts). The remaining substitute assignments were completed by June 12, 2015;

(iv) Appendix 4 to Ex.5 gives an example of the manner in which the Grievor was paid as a substitute teacher. For each month, a substitute teacher (like the Grievor here) receives a statement of earnings and deductions (similar to Ex.4). This statement shows the teacher's daily rate (in the Grievor's case, $141.22), and that she was paid .2500 units for $35.81. A year-to-date total is then given; and

(v) Appendix 5 to Ex.5 contains (see Para.9 of the Agreed Facts) copies of the Division's payroll system documents for those part-time teachers (by name) who received payments for the time period referred to in Para.9 of the Agreed Facts. This appendix reveals that the Division paid these teachers on the same *pro rata* basis as the Grievor had been paid for her 37 occasions in 2014/2015. As Mr. McNicol pointed out during his submission, this Appendix reveals that there were 147 occasions where different part-time teachers were paid on a pro rated basis rather than the 4 half-day minimum prescribed by Article 3.08(c). Of these 147

occasions, there were 52 occasions where the part-time teacher worked prior to his/her normal start time; 88 occasions where the substitute duties were performed immediately following the part-time teachers' assignments for the day and there were 7 occasions where the factual circumstances are unclear.

III. OTHER PROVISIONS OF THE AGREEMENT

At this time, it is useful to outline some other provisions in the Agreement.

As noted, *supra*, the basic yearly salary schedule for a regular teacher (whether full or part-time) is found in Article 3.02. The manner in which increments are paid are set forth in Article 3.03.

In view of the fact that the Grievor was a part-time teacher for the 2014/2015 school year, we reproduce the provisions of Article 3.06 which states as follows:

"3.06 <u>Part-Time Teachers</u>

Teachers employed under contract on a part-time basis shall:

a) be paid according to their classification and years of experience as established in Article 3.01 and Article 3.02.

b) be paid on a rate based on the fraction of the time employed

c) Increments – the service of a part time teacher shall be accumulated in the proportion of actual percentage of time employed in each school year. Whenever a part-time teacher's accumulated service equals the equivalent of one full year or more, that teacher shall be reclassified to the next higher step of the schedule, on September 1st or January 1st next, whichever occurs first.

d) Part-time teachers shall participate in activities during the regular school day when requested by the employer. Part-time teachers shall receive a pro-rata portion of the per diem rate for the time spent over and above their regularly scheduled teachi9ng time during the school day."

Article 3.08 deals with substitute teachers. As noted, *supra*, the Grievor was a Certified Substitute Teacher, the other classification being Uncertified. Various provisions [aside from Article 3.08(c)] address the manner in which a substitute teacher is to be compensated, particularly when a substitute teacher is employed for consecutive days greater than 5 or 20 scheduled teaching days. Article 3.08 also provides that a substitute teacher is entitled to some sick leave but only in well defined circumstances [sub-Article (g)]. The provisions of Article 3.08 (in their totality) reflect what may be characterized as a "mini code" for substitute teachers. This is revealed in sub-Articles (h), (i), and (j) which provide as follows:

"h) The following clauses in the collective agreement apply to substitute teachers covered under Article 3.08:

Article 1:	Purpose
Article 2:	Effective Period
Article 3.01:	Classification (when a Substitute teacher is eligible under 3:08a))
Article 3.02:	Basic Schedule (For informational purposes only)
Article 3.03:	Anniversary Dates for Increments
Article 3.04:	Changes of Classification
Article 7:	Noon Hour
Article 8:	Freedom from Violence
Article 10:	Settlement of Disputes
Article 15:	Sexual Harassment
Article 16:	Interpretation

i) The provisions of the Collective Agreement do not apply to substitute teachers except as expressly provided for in Article 3.08 – Substitute Teachers.

j) The only matters which may be grieved under Article 10 – Settlement of Disputes by a substitute teacher or the Association on behalf of a substitute teacher are the provisions of this Article, and the substantive rights and obligations of

employment-related and human rights statutes to the extent that they are incorporated into this collective agreement."

IV. THE LEGISLATIVE CONTEXT UNDER *THE PUBLIC SCHOOLS ACT*

In view of the fact that the Association relies on various provisions of the *Act* and the *Regulation*, a brief overview of these provisions is warranted. Section 41(1)(g) of the *Act* prescribes that every school board shall:

"(g) ...subject as otherwise provided in this *Act,* employ teachers and such other personnel as may be required by the school division or school district."

Section 92(1) of the *Act* states:

"...an agreement between a school board and a teacher must

(a) be in writing and be in the form contain the content prescribed by the Minister; and

(b) be signed by the Board and the teacher, and sealed with the seal of the Board."

Section 92(1.1) prescribes that the Minister may make regulations prescribing the form and content of an agreement under sub-section (1).

The Regulation was passed pursuant to the authority contained in Section 92(1.1) of the *Act*.

Section 1 of the Regulation prescribes that an agreement between the teacher and a school division – other than Winnipeg School Division – must be in the form set out in Schedule "A" or "B". Schedules "C" and "D" prescribe the form of agreements which must be entered into between the Winnipeg School Division and a teacher. These latter Schedules are not relevant to this case. And then Section 2 of the Regulation states that "...an agreement between any school division and a substitute teacher must be in the form set out in Schedule "E"."

In this case, the Grievor signed the Schedule "B" Agreement – a LTTA contract - which is used when a teacher is employed for a fixed term, either on a full-time or part-time basis.

As the Board accepts that the Grievor signed a Schedule "E" Substitute Teacher Agreement, for the 2014/2015 school year, we accept that her agreement conformed to Section 1 of Schedule "E" which states:

> "...The School Board agrees to employ the teacher, and the teacher agrees to accept employment with the School Board, to teach in place of another teacher as a substitute:
>
> (a) on the specific day or days agreed to by the parties in advance; and
>
> (b) on any other days requested by the School Board or its designate, subject to the teacher being available;
>
> During the following school year: _____"

Clause (c) of Schedule "E" states that the Division must pay the teacher in accordance with the relevant collective agreement which, in this case, would be Article 3.08 of the Agreement. Not surprisingly, the termination provisions contained in Schedule "E"

differ from the termination provisions contained in the Schedule "A" and "B" Standard Form Agreements, given the different nature of the assignments and the commitments made by both parties.

V. POSITIONS OF THE PARTIES

(a) *The Association*

After reviewing the legislative scheme under the *Act* and the relevant terms of the Agreement, including Article 3.08(c), Mr. Smorang summarized what is disclosed in the Agreed Facts. In doing so, he distilled the relevant numerical calculations which arise in this particular dispute. There is no need to review these calculations here as the Board has already addressed them in Part I of the Award. He emphasized that, under Para.12 of the Agreed Facts, the Association first raised the manner of paying part-time teachers in early January of 2015 which was in the middle of the school year. Nevertheless, the Division continued to pay the Grievor in the same pro-rated manner until the school year ended in June of 2015.

Mr. Smorang addressed the principles of interpretation which ought to govern the Board's task. He referred to the following:

(a) Para.4:2100 of ***Brown and Beatty, Canadian Labour Arbitration*** *("Brown and Beatty")* which emphasizes the well accepted principle that when interpreting collective agreements, the intention of the parties must be gleaned from the wording used. The words used by the parties "...must be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its objects and the intention of the parties";

(b) Para.4:2110 of ***Brown and Beatty,*** which summarizes the "...normal and ordinary meaning" approach to interpreting collective agreements;

(c) Para.23:2400 of ***Brown and Beatty***, which addresses the onus or burden of proof in the following terms:

> "The question of onus of proof arises only where a conflict respecting facts as found has occurred; it has no bearing in situations involving questions of law, which includes the interpretation of a term in the collective agreement. Rather, in resolving such issues, arbitrators must determine the true meaning intended by the parties to the agreement, using generally accepted canons of construction."

(d) ***Parkland Regional Health Authority and Manitoba Nurses' Union (Grievance of T. Peterson) [2001] MGAD No.60 (Hamilton)***, *("Parkland")*, where, at Paras.210-222, that board distilled what it characterized as an overview of governing legal principles which apply to an arbitrator's interpretive task. Paras.210-222 of *Parkland* are attached as Appendix "A" to this Award. In this excerpt, the *Parkland* board addressed when arbitrators may resort to extrinsic evidence (in the form of past practice) as an aid to interpretation. This pre-supposes, of course, a finding is made that the wording in dispute is "ambiguous". The well known ***John Bertram*** tests are recorded in Para.222. We will refer to salient principles from Appendix "A", as may be required, because, in his submission, Mr. Nichol candidly stated that he took no issue with the general principles of interpretation outlined in Mr. Smorang's authorities, including *Parkland*. However, where he did part company with Mr. Smorang was on the question whether (or not) the language used in

Article 3.08(c) discloses an ambiguity, thereby allowing recourse to past practice;

(e) ***Dalhousie (Town) and CUPE, Local 1888 (Kiss), 1992, Carswell N.B.656 (Robichaud)***, *("Dalhousie")*, where a dispute arose over whether a police constable was entitled to claim for four call backs and be paid time-and-a-half from 3:00 to 7:00 a.m. In the factual circumstances prevailing in *Dalhousie*, the employer paid for 7 hours at time-and-a-half but the Grievor sought an additional 11½ hours. One of the issues addressed in *Dalhousie* was how can an employee be called into work when he is already at work? The relevant clause in question read:

> "...an employee who is called in to work outside his normal working hours shall be paid for a minimum of 4 hours and shall be paid from the time he leaves his home to report for duty until the time he arrives back upon proceeding directly from work for any one assignment."

The employer argued that once an employee is in at work then that employee may be assigned to different jobs as long as he does not return home in between each assignment. This is to be considered one call in. The union argued that a call back is to be paid a minimum of 4 hours for each assignment. The majority of the *Dalhousie* board rejected the employer's argument. At Para.19(b) the board states:

> "The employer needs a particular employee for a specific function, the assignment may last 30 minutes or may last 30 hours but by this article, the employee is guaranteed a minimum of 4 hours."

The board was satisfied that the language used in the article under review was sufficiently clear on its face, meaning that extrinsic evidence of past

practice and negotiating history need not be considered. On the facts prevailing, the majority found that the constable was entitled to 3 call backs and was to be paid for each of those call backs at time-and-a-half for 4 hours.

Mr. Smorang's main submission may be distilled as follows:

1. When the Grievor was performing duties under the .75 EFT LTTA and under the Substitute Agreement, she was working under two separate contracts, as mandated by the *Act*.

2. The Agreement prescribes different rates and/or rules for different categories of teachers, namely, full-time, part-time, and substitute teachers.

3. When the Division requires a substitute teacher then it can access a substitute as it sees fit. When it does so it has covenanted to pay the substitute teacher a minimum of one-half day. This minimum guarantee would clearly apply where the substitute teacher is not party to any other contract. So, another teacher called in to work the 9:00 a.m. to 10:15 classes at Rossburn Elementary School would receive 4 hours pay. Why, asked Mr. Smorang, should the Grievor only be paid for a quarter of a day for the same amount of substitute work? This, said Mr. Smorang, constitutes an absurdity.

4. The wording used in Article 3.08(c) is clear and unambiguous. The normal, plain and ordinary meaning to be given to the language used by the parties is that a substitute teacher is to receive a guarantee of one-half day's pay. It is only where time worked is greater than one-half day or where an assignment has

been extended that the substitute teacher is to be paid on a pro rated basis for the entire assignment. Article 3.08(c) is clear on its face.

5. Article 3.08(c) is not ambiguous, as that term is understood in the arbitral jurisprudence, meaning that the information contained in the Agreed Facts regarding what was paid/done in previous years and the manner of payment made at those times is irrelevant to our task. Further, the Association is not claiming retroactive relief for any one other than the Grievor. Mr. Smorang pointed out that the Agreement contains no express time limit for the filing of a Grievance (see Article 10).

The Grievances are to be resolved on the clear wording of Article 3.08(c) and the Board ought to grant the declaratory relief sought by the Association. Further, we ought to order that the Grievor received a gross sum of $1,306.29 less usual deductions.

(b) *The Division*

Mr. McNicol stated that the issue is whether the minimum guarantee of 4 hours applies in circumstances where the substitute hours are contiguous with the substitute teacher's normal hours as a part-time term teacher.

Mr. McNicol submitted that the wording in Article 3.08(c) is not clear and unambiguous. He submitted that it was not the intent of this provision to authorize payment to a substitute teacher of the minimum half day's pay where the substitute teacher is already working for more than half a day. This potential result makes the

clause patently ambiguous. In his view, the expression "...called in to work" is ambiguous and should be assessed in the context of the Agreement as a whole. If a part-time teacher is already at work or is scheduled to attend at work on a contiguous basis then it cannot be said that this teacher has been called in to work.

Mr. McNicol referred to Para.8:3410 of ***Brown and Beatty,*** which addresses general principles relating to the purpose of call in pay:

> "...arbitrators are generally agreed that their underlying premise is twofold: to compensate employees for the inconvenience, disruption and expense that is caused to them by having to come to work; and, accordingly, to ensure that employers will not require their employees to report for work unless there is sufficient work available to justify the cost implicit in the payment of call in guarantee."

Brown and Beatty go on to state that, for many arbitrators, the logic of this underlying rationale means that entitlement to call in pay should turn simply on whether or not an employee is required to make an extra trip to and from work. In some cases, where an employee has been called in prior to his/her regular starting time or was asked to commence work when he/she had reported for work some time prior following his/her regular work day then the employee was not entitled to call in pay.

Yet, ***Brown and Beatty*** also note that not all arbitrators have accepted the "2-trip" principle, i.e. that call in pay depends upon an employee having to make an additional trip to work. In the view of these arbitrators, it is the lack of notice and emergency nature of the assignment that distinguishes call in pay from overtime and which justifies the minimum guarantee. ***Brown and Beatty*** further state:

> "For example, one arbitrator has broadly defined call in work as all unscheduled, emergency, overtime work that is not contiguous to an employee's regular shift." (Mr. McNicol's emphasis)

Brown and Beatty end with the observation that in most cases "...it is the language of the agreement, not differences of opinion among arbitrators, which determines the outcome of a case".

Here, an ambiguity arises, argues the Division, because Article 3.08(c) does not address the circumstance where a part-time employee is entitled to a minimum call in where they are regularly scheduled to work on that same day.

Reference was made to the decision of the Alberta Court of Appeal in ***United Nurses of Alberta, Local 85 v. Capital Health Authority, 2001 ABCA 247*** *("Capital")*. This case involved the judicial review of an arbitration board's award which found that various nurses were entitled to a minimum call in guarantee when they were called in before the start of their regular shifts. The Court noted that the collective agreement in question did not expressly state whether a separate trip to work is required or not. It ultimately determined that the wording of the clause in question was ambiguous. The matter was remitted back to the arbitration board for the purpose of admitting intrinsic evidence as an aid to interpretation. Mr. McNicol argued that the same is true of Article 3.08(c) in the Agreement.

It was noted that the Association's interpretation would result in the Grievor being paid more than a full-time teacher who worked a full teaching day. This is an anomalous result and renders the clause ambiguous.

If we accept that Article 3.08(c) is patently ambiguous then we are entitled to refer to extrinsic evidence as an aid to interpretation. Mr. McNicol referred to two doctrines.

First, he submitted that the common law presumption against pyramiding of benefits would apply. This presumption would apply because the Agreement is silent on the issue of pyramiding. The Grievor would be paid as a substitute teacher for the hours of 10:30 to 11:45 a.m. on each of the 37 days in question when, at the same time, she was being paid as a part-time teacher for those same hours. The key issue is whether there would be different purposes to the payments. Mr. McNicol stated that he could accept payment of the minimum guarantee in circumstances where a substitute teacher was called in to a different school, but that is not the Grievor's situation. Mr. McNicol relied on the general discussion of pyramiding contained in ***Winnipeg Airports Authority Inc. v. Public Service Alliance of Canada (2015) MGAD 85***, where the Manitoba Court of Appeal was asked to judicially review an arbitration award which had determined that payment of a shift premium and a weekend premium for the same hours did not constitute pyramiding because they addressed different purposes. While the court upheld the arbitration award, its discussion of pyramiding is found at Paras.17-20 of the decision.

Second, it was submitted that an ambiguity exists and reference to the Division's past practice will clarify the ambiguity. It was noted that the equivalent of Article 3.08(c) has been in the Agreement since 2002. It is an Agreed Fact that the payments paid to the Grievor, on a pro rata basis, for the 37 occasions, was consistent with the manner in which payments have been made to other part-time teachers in similar circumstances [see Para.9 of the Agreed Facts and Appendix 5 to the Agreed Facts]. This pro-rata manner of payment has been made for "contiguous work" both

prior to and following a normal part-time shift. The information before the Board clearly reveals that payments have been made in this pro-rated manner since December 20, 2010. The documentation shows that from 2010/2011 school year to the end of 2015, 14 different part-time teachers who substituted either immediately prior to or immediately following their part-time hours (on 147 occasions) were, in fact, paid on a pro rata basis and were not paid the minimum guarantee of 4 hours if the time involved was less than a one-half day. This applied to situations where the work was done prior to a normal starting time on 52 occasions and on 88 occasions when it occurred after normal quitting times. Therefore, the Division submitted there is a clear and long standing practice of paying on a pro rata basis for time actually spent at substitute duties. This practice has been open and transparent. The Association must have known or must constructively be taken to have been aware of this practice. The part-time employees would have received payroll stubs similar to Appendix 4 of Ex.5 and these stubs show the basis of how these substitute hours were paid. There was no evidence that either the Grievor or the Association was "unaware" of this practice. Further, the Association raised this issue in early January of 2015. In all of the circumstances it was submitted that this past practice constitutes the best evidence of the meaning to be attributed to Article 3.08(c).

In the alternative, if the Board determines that Article 3.08(c) is not patently ambiguous, then it ought to find the wording to be latently ambiguous. It was submitted that the latent ambiguity arises in the context of the past practice itself. In this regard, Mr. McNicol referred to the following:

(a) ***Ipsco Inc. v. B.S.O.I.W., Local 805 (2004) 124 LAC 4th (403) (Warren)*** *("Ipsco")* where the arbitrator found that the term "continuous service" in the disputed language was not ambiguous as to its meaning. Nonetheless, he found that evidence of past practice and negotiating

history was admissible to reveal the existence of an ambiguity between the written words used in the collective agreement and the practice of the parties.

(b) ***Sanderson-Harold Co. and Carpenters District Council of Ontario (2016) 267 LAC (4th) 101 (White)***, particularly the following principle at Para.37:

> "It was the position of the Union that extrinsic evidence should not be relied on in this case as the language in the Collective Agreement was clear and unambiguous. I note, however, that the current law does allow the admission of extrinsic evidence and in order to establish context for the interpretation of contracts, including collective agreements, even where no ambiguity appears to exist..."
>
> *Board's Note: That Sanderson board ultimately agreed with the Union's submission that the evidence of past practice, as admitted, was insufficient to support the employer's position and did not override being an ordinary meaning to be given to the words used by the parties – see Para.38.*

As to onus of proof, Mr. McNicol submitted that there was indeed an onus on the Association and the Grievor to establish that the monetary benefit claimed was sustainable and payable. Reliance was placed on the well known case of ***Re Wire Rope Industries Ltd. and United Steelworkers, Local 3910 (1982) 4 LAC (3rd) 323 (Chertkow),*** *("Wire Rope")*, particularly the principles found at p.18-20. See also Paras.34-36 of ***Regional Health Authority and Health Sciences Centre Nurses Local 10 (Moat) (2003) MGAD No.83 (Chapman)***, *("Moat")* where the *Wire Rope* principles were applied.

If the Board accepts that Article 3.08(c) is ambiguous, either patently or latently, then the admissible extrinsic evidence of past practice leads to the conclusion that the Grievances ought to be dismissed.

In the further alternative, it was submitted that if the Board does not find there is an ambiguity, then the doctrine of estoppel should be applied. In the factual circumstances prevailing, the Association (and the Grievor) should be estopped from claiming any compensation until at least the time the Grievances were filed on November 30 and December 2 of 2015. This means that the Grievor is not entitled to any monetary relief. On the issue of estoppel reference was made to the following authorities:

- ***MAHCP v. NorMan Regional Health Authority Inc. (2011) SCC 59,*** where the Supreme Court, on judicial review, found that the arbitrator's reliance on the doctrine of estoppel was not unreasonable in the circumstances prevailing in that case; and

- ***The Agassiz Teachers' Association of The Manitoba Teachers' Association v. The Agassiz School Division No.15, September 17, 1997 (Graham)****("Agassiz")*, where, on the facts prevailing in that case, the arbitration board found that the union was estopped from relying on what was found to be an unambiguous provision regarding certain administrative allowances payable to principals. A practice (inconsistent with the clear wording of the disputed provision) had been in existence for some 25 years and had never been challenged by the union. The board found that the employer had administered this provision consistently and openly throughout this lengthy period of time and that many principals and vice-principals who received administrative allowances calculated in the disputed manner regularly received statements or other

information from the employer that would have enabled them to readily determine the basis for payment of the allowances. The employer argued that the union must be taken to have known of the division's practice and that its silence from 1972 to 1995 constituted a representation that they were satisfied with the employer's method of paying these administrative allowances. The board was satisfied that, on the evidence before it, the union was aware of the method of calculating the allowances in dispute. The arbitration board found:

"I have concluded that the Association by its silence has conducted itself for an extended period in a way that entitled the Division to conclude that the Association has knowingly accepted that the administrative allowances will be paid on the basis of full-time equivalents. Therefore, the first two elements of estoppel, namely a promise of assurance through words or conduct, which has the effect of altering the legal relations, between the parties, are present in this case."

Further, the arbitrator ruled that the union had "constructive notice" of the employer's practice and its acquiescence in that practice had the effect of altering the legal relations between the parties. Having made that finding, the board had no difficulty in ruling that detrimental reliance had occurred because the employer was denied the opportunity to renegotiate the relevant language over a lengthy period of time.

In the circumstances before us, said Mr. McNicol, there were 147 occasions where part-time teachers who substituted in circumstances similar to those of the Grievor here were paid on a pro rata basis. Knowledge must be imputed to the Association of this manner of payment.

For all of the foregoing reasons, the Grievances ought to be dismissed.

(c) *Reply of Association*

Mr. Smorang stated the assumption being made by the Division is that the work performed by the Grievor was contiguous with the work she performed as a part-time teacher. This assumption is wrong and cannot be accepted because the Grievor was performing two different jobs under two different agreements (a Schedule "B" Agreement and a Schedule "E" Agreement). So, the work was not contiguous under one agreement and neither was it contiguous in terms of time. The substitute assignment on each of the 37 days ended at 10:15 a.m., followed by a 15 minute recess, and then the assumption of regular but different part-time duties commenced at 10:30 a.m. The work is not the same. As a substitute teacher, the Grievor was called in to work in a different classroom, teach a different grade level, and to teach different subject matters as compared to her normal part-time assignment. There was nothing contiguous in the nature of the work.

The minimum guarantee under Article 3.08(c) is not "time" based. Rather, it is "assignment" based. This is corroborated by the separate pay stub (e.g. Ex.5 – App.4). Substitute work is paid separately. The requirement to come in to do substitute work can be on little or no notice to perform duties. This differs from one's normal teaching assignment. This may be an inconvenience in and of itself.

As to the reliance of the Division on past practice, it was submitted that the evidence did not disclose any ambiguity in Article 3.08(c), either latent or patent. There is no evidence of acquiescence by the Association nor can any such inference be made. There is no evidence that the Union was aware of the practice. For example,

there was no evidence that the Association receives copies of pay stubs given to individual substitute teachers.

Given that the parties have negotiated a new collective agreement without amending Article 3.08(c) and given their agreement that the decision of the Board will govern interpretation of Article 3.08(c) on a go-forward basis, there is no basis to consider the doctrine of estoppel.

VI. DECISION

The rules which govern our interpretive task are distilled in the excerpts from ***Brown and Beatty*** and *Parkland* (Appendix "A"). There is no dispute on the applicable principles.

Where the parties differ is on whether or not Article 3.08(c) of the Agreement contains an ambiguity, either patent or latent. Only if such a finding is made can we have recourse to the evidence of "past practice" relied upon by the Division. Under the *Bertram tests,* an ambiguity arises when there is no clear preponderance in favour of one meaning, stemming from the words and structure of the Agreement, as seen in the labour relations context. The authorities also reveal that arguability of different constructions, standing alone, does not constitute an ambiguity because if that were the case then there would be extrinsic evidence admissible in every case where there is a disagreement over the construction of a provision in a collective agreement.

As a matter of interpretation, we find the language used in Article 3.08(c) of the Agreement is clear and unambiguous. This is particularly true of the first sentence. When construed in accordance with its ordinary and plain meaning, Article

3.08(c) states that any substitute teacher called in to work is to be paid a minimum of one -half (½) day at the appropriate rate of pay. It is a minimum guarantee based upon the substitute teacher's acceptance of an assignment of work which may be less than one-half a day. This obligation is clear on its face and is capable of a rational construction on its own. It follows that we have determined that there is no "patent" ambiguity evident on the face of the disputed article. Nor do we find that there is any "latent" ambiguity such that extrinsic evidence ought to be allowed in order to disclose that an ambiguity exists. In our view, the interpretation advanced by the Association is to be preferred. The material and overlapping reasons for our conclusion follow.

First, in coming to our conclusion we have relied on the well accepted principle (see *Parkland*) that the provisions of the Agreement are to be construed as a whole and that words and provisions are to be determined "in context". The context is important. Article 3.08, in its entirety, constitutes a "mini code" for substitute teachers, particularly in respect of the manner in which they are to be remunerated for tasks undertaken. This is made clear by sub-articles (h), (i) and (j) (quoted *supra* at p.12) and that aside from the specifically identified provisions, the Agreement as a whole does not apply to substitute teachers. Substitute teachers are paid at a different (and lesser) daily rate than regular or part-time teachers. Further, Article 3.08(c) does contemplate paying substitute teachers on a "pro rated" basis but only where an assignment either exceeds one-half a day or where an assignment has been extended for more than one-half a day. The first sentence of Article 3.08(c) does not contemplate either expressly or by implication, that a pro-ration may be done where a substitute assignment is for less than one-half a day. Mr. Smorang is correct when he says "...it is the nature of the assignment which governs". Contrary to many call ins/call out provisions in other collective agreements the minimum payment is not time based.

Second, the legislative scheme relating to the form of contracts also provides a relevant context. The Grievor was employed under two contracts. She was

a part-time teacher (.75 EFT) having signed a LTTA in the prescribed form for the 2014/2015 school year. Under that agreement she undertook to teach at Rossburn Elementary School from 10:30 a.m. to 3:35 p.m. with responsibility, on a continuous and ongoing basis for the term of her contract, 6 classes with different subject matter as identified in Ex.5 – Appendix 2. For this work, the Grievor was to be paid in accordance with the principles set forth in Article 3.06 of the Agreement. She was to be paid a salary which reflected her classification level and years of experience pursuant to Articles 3.01 and 3.02. A full-time employee is also entitled to increments based on sub-clause (c) of Article 3.06. None of these indicia are features of the remuneration for a substitute teacher. The latter have no increments, and they are to be paid a fixed daily rate based upon their being Certified or Uncertified.

Third, under the Substitute Teacher Agreement (Schedule "E") the essence of a substitute teacher's assignment is materially different. This is disclosed in Clause 1 of Schedule "E". The critical point is that the substitute teacher is to "...teach in place of another teacher as a substitute" either on a specific day or days as agreed to in advance or on any other days requested by the Division subject to availability. In accepting the 37 substitute assignments she did, the Grievor undertook to substitute for three other teachers who were unavailable to work their normal assignments for various reasons [Ex.5, App.3]. The Grievor's acceptance of these assignments [and given the covenant in Clause 3 of Schedule "E")] means that she was to receive a minimum payment contemplated by the first sentence of Article 3.08(c). As Mr. Smorang noted, the Grievor undertook to substitute teach for other teachers who were not available and she undertook to teach different classes and subject matter from her normal and regular assignment under her LTTA. In our view, these are not contiguous assignments in the sense that the Grievor was continuing to perform duties under her LTTA. On these occasions the Division needed a substitute and approached the Grievor, who agreed to work these assignments. If the assignment is less than half a day then the minimum to

be paid is one-half day. This is clear. In our view, to so find does not create an absurdity or repugnancy. It may, in the eyes of some, be viewed as an anomaly but only from the perspective that the Grievor received, for these two distinct assignments under separate contracts, $1.67 more than what a full-time teacher would make under a Schedule "B" contract. This can hardly be characterized as a hardship or the undertaking of an excessive cost. Rather, it simply flows from the nature of the distinct obligations the parties have agreed to in the Agreement itself. In that case, the minimum guarantee under Article 3.08(c) would be triggered.

Fourth, the fact that the two distinct assignments involve the same school is not a relevant factor. Indeed, Mr. McNicol, when questioned by a member of the Board, candidly stated that different considerations would apply if the two assignments involved different schools where, after completing the substitute assignment at school A a teacher travels to school B to complete and teach her regular part-time assignment. In that case, the minimum guarantee under Article 3.08(c) would be triggered.

Fifth, as to the line of arbitral authority which adopts the rationale that call in/call out pay is paid for the inconvenience or dislocation of an "extra trip", we do not find that rationale to be a persuasive interpretive principle in these circumstances. In fact, there may be some dislocation or inconvenience to the Grievor (or another substitute teacher) in accepting the assignment. This we do not know because there is no evidentiary base to make such a finding. Nevertheless, most arbitral decisions where the "extra trip" rationale have been used is where an employee is called in to work on the same job as his/her regular job. Given the legislative scheme and the structure of the Agreement itself, a substitute assignment cannot be characterized as the same work. As ***Brown and Beatty*** aptly note – "...in most cases, however, it is the language of the agreement, not differences of opinion among arbitrators, which

determines the outcome of a case". In our view, the discrete and separate provisions applicable to substitute teachers, inclusive of the clear obligation enunciated in Article 3.08(c), determines the outcome here.

Sixth, the clear obligation under Article 3.08(c) is a stand alone provision. To add or incorporate the qualifying or limiting conditions advanced by the Division would be to amend Article 3.08(c). In essence, we are being asked to add a proviso to the effect that a part-time limited term teacher who undertakes a substitute assignment under a separate agreement can never earn more than what a full-time teacher at the same classification and increment level would earn. This, of course, would require that reference be made two different wage rates in making this calculation, namely, those in Article 3.01 and those in Article 3.08(c). In our view, the reference to "...the appropriate rate of pay" in sub-clause (c) must be interpreted to refer only to the Certified or Uncertified rate in Article 3.08.

Seventh, the Division's reliance on the common law presumption against "pyramiding" benefits is not applicable in these circumstances. The prescription against pyramiding generally arises where an employee is claiming payment (or benefits) under two or more provisions of a collective agreement relating to the same hours of work. That was clearly the case in the arbitration award which was reviewed by the Manitoba Court of Appeal in the *Winnipeg Airports Authority* case where employees were claiming both a shift premium and a weekend premium for the same hours worked. Yet, a consistent principle applied by arbitrators is that there is "...no pyramiding" of benefits where the two benefits serves different purposes. On either of the foregoing principles, there is no pyramiding here. There is no overlap of hours actually worked and the payments made to the Grievor for the 37 days in question served two different

"purposes" under separate teaching agreements and separate provisions of the Agreement.

For all of the foregoing reasons, we re-affirm our conclusion that the interpretation advanced by the Association is the interpretation which is not only consistent within the normal and ordinary meaning of the words used in Article 3.08(c) but it is also consistent and in harmony with the other relevant provisions in the Agreement and the legislative scheme which forms part of this employment relationship. We have no difficulty interpreting the words used. There is no patent ambiguity and there is no basis to find a latent ambiguity.

Having made the foregoing determination, we do not have to address past practice as an aid to interpretation.

However, some commentary on the alternative argument of "estoppel" is warranted. Estoppel does not depend on a finding that an ambiguity exists. If the requisite elements for the application of this doctrine are present then a party (here, the Association) may be prevented from relying on its strict legal rights under the Agreement. However, if an estoppel is found to exist, then arbitrators must determine the appropriate duration of an estoppel. An estoppel typically (not always) runs to the end of the current collective agreement on the rationale that the parties will then be in a position to address the issue in negotiations. What is rather unique in this case is that the parties agreed, during the last set of negotiations following the expiry of the Agreement, to leave Article 3.08(c) as it is currently worded and be bound by this Board's interpretation of Article 3.08(c) on a "go-forward" basis. That, of course, is for the parties to decide but the existence of this agreement is rather inconsistent with asking the Board to apply the estoppel principles. We might add that the Board was not advised when the new collective agreement became effective or when it was consummated. The Agreement expired on June 30, 2014 but, given the provisions of

the Agreement and the *Act*, the terms of the Agreement would have been extended until a new agreement was reached either through bilateral negotiations or arbitration. The 37 times when the Grievor undertook substitute teaching assignments likely took place during the period of time when the Agreement would have been extended. However, there is no need to pursue this analysis here because, in our view, the constituent elements required to establish an estoppel are not present in this case.

What we do know is that (i) the Association first raised an issue regarding how the Division was paying part-time teachers for doing additional substitute teaching in early January of 2015 (Para.12 of Agreed Facts) and (ii) that the two Grievances were not filed until November or early December of that year. After being put on notice by the Association, the Division continued to pay in accordance with its pro rated method of calculation. That is the extent of the evidence we have before us. It is obvious that something came to the Association's attention in January of 2015 when it first raised the issue.

Having put the Division on notice that it disagreed with the Division's manner of payment to substitute teachers, it cannot be said the Association was acquiescing to the Division's method of payment and thereby represented that it was accepting the Division's administration of Article 3.08(c). Under Article 10 of the Agreement, the Association has the right to proceed to arbitration if a dispute concerning the meaning, application or violation of the Agreement is not settled within twenty teaching days from the date when the dispute was first raised. No other time limits are specified.

Further, based on the evidence before us, there is no basis to find that the Association knew or ought to have known of the Division's practice before January, 2015 and the onus is on the Division to establish the factual basis for the estoppel which it alleges existed. The fact that some substitute teachers were paid on a pro-rata basis

and received individual pay stubs does not provide a sufficient nexus for us to attribute actual knowledge or constructive notice to the Association. In our view, these circumstances are materially different from the 25-year practice which existed in *Agassiz* where principals and vice-principals were to receive significant administrative allowances based on the number of teachers they supervised.

In the result, the Grievor is entitled to be paid the gross sum of $1,306.29, less usual deductions. Mr. Smorang clarified that such retroactive relief was only being claimed on behalf of the individual Grievor.

Our analysis has been based on the Grievor's individual circumstances which involved her undertaking a substitute teaching assignment prior to commencement of her regular part-time duties at Rossburn Elementary School on the days in question. It does not address, because the issue was not before us on the Grievor's facts, the pay obligations of the Division when substitute teaching occurs after completion of regular part-time duties.

One further comment. The parties did not advise the Board what precise date they jointly had in mind when they agreed that they would be bound by the Board's interpretation of Article 3.08(c) on a "go-forward" basis. It is not for us to speculate on what this date may be and we simply leave that with the parties.

VII. SUMMARY AND CONCLUSIONS

For all of the foregoing reasons:

1. WE DECLARE that the first sentence of Article 3.08(c) of the Agreement requires the Division to pay any substitute teacher called in to work on a teaching day be paid a minimum of one-half day at the appropriate rate of pay regardless of

whether or not the substitute teacher works later on that day as a part-time teacher under a Limited Term Contract, on a contiguous basis to his/her part-time assignment, either at the same school or a different school.

2. WE FURTHER DECLARE that the manner in which the Division paid the Grievor on a pro rated basis (i.e. to a maximum of what be earned for a full-time day by a teacher in the same classification and increment level) was in breach of Article 3.08(c) of the Agreement;

3. The Board FURTHER AFFIRMS that the Board's interpretation of the Division's obligation under Article 3.08(c) will govern the parties on a "go-forward" basis, as that term is jointly understood by the parties themselves; and

4. The Grievor is entitled to be paid the gross sum of $1,306.29 less the usual deductions;

In the result, the Grievances are allowed in accordance with the foregoing Declarations and Rulings.

We express our sincere appreciation to counsel for the manner in which this case was distilled, presented and argued. We are particularly indebted to them for the Agreed Facts.

Dated at Winnipeg, Manitoba, this 2nd day of December, 2016.

W J Hamilton
Chairperson

I Agree
David Shrom
Nominee for the Association

I Agree
Grant Mitchell
Grant Mitchell, Q.C.
Nominee for the Division

210 The primary position of both parties is that the meaning of the word "day" in Article 1602 is clear and unambiguous and supports their respective interpretations. If this Board can answer the question remitted to it as a matter of interpretation then recourse to "past practice" as an aid to interpretation is neither required nor mandated. The Union also relies on the doctrine of "estoppel" which raises somewhat different considerations because estoppel does not depend on a finding that an ambiguity exists. By advancing this alternative position, the Union is really asserting that the Employer cannot rely on what otherwise might be its strict legal rights under Article 1602 because the Employer, by its conduct (i.e. again, past practice) has interpreted the provision in a different way and the Union has relied on this practice to its detriment. The invitation to apply the estoppel doctrine (through negotiating history) is dependent on our finding that there was a past practice consistent with the Union's interpretation (i.e. the 24 hour clock). The foundation for the alleged estoppel is the Employer's unconditional withdrawal of its "calendar day" proposal which the Union asserts constituted a "representation" that there will be a return to the previous practice. So, the "entry point" for applying the estoppel doctrine is the same "past practice" that we are invited to apply as an aid to interpretation.

211 Given the differences between the manner in which "past practice" can be utilized, either as an aid to interpret an ambiguous provision or as a foundation for estoppel, we reaffirm our previous comment that we are required to address the evidence relating to both past practice and negotiating history in any event.

212 Some preliminary remarks on the principles which govern our interpretive tasks are in order because they will provide the relevant benchmarks for assessing the terms of the Agreement. The predominant reference point for arbitrators must be the language used in the Agreement because it is primarily from the written word that the common intention of the parties is to be ascertained. In this regard, language is to be construed in accordance with its ordinary and plain meaning unless adopting this approach would lead to an absurdity or a repugnancy but, in these latter situations, arbitrators will interpret the words used in a manner so as to avoid such results. However, it must be remembered that these are principles of interpretation to be used in the context of the written Agreement itself. A counterbalancing principle is that anomalies or ill considered results are not sufficient to cause the alteration of the plain meaning of words. Neither is the fact that one interpretation of the collective agreement may result in a (perceived) hardship to one party. In the seminal case of Massey-Harris (1953) 4 L.A.C. 1579 (Gale) at p. 1580:

> "...we must ascertain the meaning of what is written into a clause and to give effect to the intention to the signatories to the agreement as so expressed. If, on its face, the clause is logical and is unambiguous, we are required to apply its language in the apparent sense in which it is used notwithstanding that the result may be obnoxious to one side or the other. In those circumstances it would be wrong for us to guess that some effect other than that indicated by the language therein contained was contemplated or add words to accomplish a different result."

213 Support for this approach is found in Re International Nickel Co. of Canada Ltd. and U.S.W. (1974) 5 L.A.C. (2d) 331 (Weatherill) at p. 333 - 334:

> "It may be that the provisions of the collective agreement here in issue pose a problem of construction, so that they may be said to be of "doubtful meaning" in

> that very general sense. In our view, however, the adoption of the notion of 'latent ambiguity' to include generally 'all cases of doubtful meaning or application'... should not be and was not intended to be taken so far as to open the door to the admission of extrinsic evidence wherever a disagreement as to the construction of a document arises. If that were allowed, the strength of a document such as a collective agreement would be greatly reduced and the well established rules respecting the admission of extrinsic evidence would be meaningless."

214 In Re Canadian National Railway Company (Telecommunications Dept.) and Canadian Telecommunications Union (1975) 8 L.A.C. (2d) 256 (Brown) at p. 259:

> "...it is unquestionable that unless an ambiguity either latent or patent is found, extrinsic evidence even though admitted cannot be used to interpret the contract. While there may be differences of opinion on the application to be given to the terms of the collective agreement that is a matter for argument and if the words used, as we have found here, are clear in themselves then arguability as to construction does not involve ambiguity." (our emphasis)

215 We also note the observations in Re Puretex Knitting Co. Ltd. and C.T.C.U., Local 560 (1975) 8 L.A.C. (2d) 371 (Dunn) at p. 373:

> "In order to preserve integrity to a contract that parties have taken care to reduce to writing, we must look to its words to establish intent, and not to what the parties, post contractu, may wish to say was their intent, albeit with honesty and sincerity.
>
> ...
>
> The intention of the parties must be construed objectively."

216 It is not our task to interpret the Agreement based upon considerations of fairness in order to ensure that the Grievor was adequately compensated (at least in the eyes of some). This cautionary caveat equally applies to the Employer's assertion that we must be cognizant of the costs which might be incurred by the Employer. Neither of these contentions is relevant to our primary interpretive task and both of these contentions are answered by the quotation from the Massey-Harris case, supra.

217 The foregoing principles are reinforced by the prescription in Article 1306 of the Agreement in that we are not "...authorized to make any decisions inconsistent with the provisions in this collective Agreement."

218 Both counsel relied on the well accepted principle that the provisions of the Agreement are to be construed as a whole and that words and provisions are to be interpreted "in context". We accept this approach to interpretation. See Palmer, Collective Agreement Arbitration in Canada (3d ed) p. 123, para. 4.141 and the seminal case of International Union of United Automobile, Aircraft and Agricultural Implement Workers of America, Local 439 and Massey-Harris Company Ltd. (1947) 1 L.A.C. 68 (Roach) at p. 69:

> "It is a well recognized rule of construction that words in a document are to be given their ordinary grammatical meaning unless to do so results in an inconsistency or repugnancy. It is also a well recognized rule of construction that where part of a document permits of two interpretations, that meaning is to be attached which best harmonizes with the whole of the document. That latter rule has been expressed thus, namely, that the tribunal charged with the responsibility of interpreting the document must attempt to construe it so that it will be a harmonious whole and effect given to every part of it." (our emphasis)

219 A third basic principle that there is a general presumption against redundancy (see Palmer, supra, at p. 126). Put another way, it is to be initially assumed that the parties have not agreed to superfluous or unnecessary wording in crafting their agreement.

220 If we determine that the word "day" is ambiguous then we may have recourse to a past practice as an aid to interpretation. As noted, supra, an ambiguity is not established by the mere advancement of different interpretations. Arbitrators have wrestled with what constitutes an "ambiguity" in the arbitral sense. In our view, an "ambiguity" essentially reflects an inability to derive any clear meaning from language which, on its face, is susceptible of at least two rational constructions. But, if the language is capable of being understood and interpreted, within the structure of the Agreement itself, and there are no references in the Agreement which render comprehension difficult, then the issue is to be resolved as a matter of interpretation.

221 If an ambiguity is found, thereby allowing recourse to past practice as an aid to interpretation, then the past practice must disclose that the disputed wording (here, Article 1602) has been consistently administered and/or applied to the knowledge of both parties, without objection, in accordance with one party's interpretation, thereby allowing us to reach the conclusion that the practice itself reveals the common intention of the parties (i.e. the actual meaning of the wording itself). An ambiguity can be either "patent" or "latent" (i.e. an "ambiguity of reference" where the ambiguity must be established by evidence when the wording itself does not disclose how it is to be applied to a particular fact situation).

222 It is important to bear in mind the characteristics of a past practice as distilled in the seminal case of Re International Association of Machinists, Local 1740 and John Bertram and Sons Co. Ltd. (1967) 18 L.A.C. 362 (P. Weiler) at p. 368 (hereinafter sometimes referred to as the "Bertram tests"). After noting that the doctrine of past practice should be carefully employed, Arbitrator Weiler stated:

> "...there should be (1) no clear preponderance in favour of one meaning, stemming from the words and structure of the collective agreement as seen in their labour relations context (Each party relies on this principle in support of its interpretation of Article 1602); (2) conduct by one party which unambiguously is based on one meaning attributed to the relevant provision; (3) acquiescence in the conduct which is either quite clearly expressed or which can be inferred from the continuance of the practice for a long period without objection; (4) evidence that members of the union and management hierarchy who have some real responsibility for the meaning of the agreement have acquiesced in the practice." (our italics)