IN THE MATTER OF AN ARBITRATION:

B E T W E E N:

THE RED RIVER VALLEY SCHOOL DIVISION ("Division")

Employer

-and-

THE RED RIVER VALLEY TEACHERS' ASSOCIATION
of the MANITOBA TEACHERS' SOCIETY ("Association")

Union

RE: ADMINISTRATIVE ALLOWANCE GRIEVANCE

AWARD

BEFORE:	MICHAEL D. WERIER
APPEARANCES:	ROBERT A. SIMPSON, Counsel for the Employer GERALD D. PARKINSON, Nominee of the Employer ELLIOT H. LEVEN, Counsel for the Union BRUCE BUCKLEY, Nominee of the Union
DATE OF ARBITRATION:	FEBRUARY 22, 2006
LOCATION OF ARBITRATION:	WINNIPEG, MANITOBA

INTRODUCTION

This matter came before me pursuant to the terms of the Collective Agreement ("Agreement") between the parties for the period 2002 - 2005. There were no preliminary matters raised, nor any issue as to my jurisdiction to determine the matters in dispute.

The Association and 17 individuals filed grievances which were identical save for the name of the party.

The Association grievance stated:

> The Red River Valley Teachers' Association of the Manitoba Teachers' Society ("the Association") grieves that there is a difference between the Association and the Red River Valley School Division ("the Division"), in respect of a collective agreement ("the Agreement") between the Association and the Division. The Association grieves that, on an ongoing basis, the Division is incorrectly calculating the administrative allowances of administrators in the Division, by basing these calculations on the number of Full Time Equivalent ("FTE") students in each school, rather than the actual number of students in each school. In doing so, the Division is violating Article 3.09 of the Morris-Macdonald School Division collective agreement, Article 3.05 of the Red River School Division collective agreement, all other relevant articles, and section 80 of the Labour Relations Act ("the Act").
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> The Association requests:
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> 1. A declaration that the Division is violating the Agreement and the Act;
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> 2. An order that the Division cease and desist from violating the Agreement and the Act;
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> 3. Full compensation, including interest, for all losses arising out of the Division's violations of the Agreement and the Act, retroactive to July 1, 2000; and

4. All other remedies that may be fair and reasonable.

The parties at the outset agreed that the issue in dispute was the method to be used in calculating the administrative allowance paid to administrators in the Division. The Association's position is that it should be calculated on the basis of actual students, and the Division's position is that it should be calculated on the basis of full-time equivalent students.

The parties also agreed that in the event of a finding that compensation is payable, I should remain seized of the matter on the issue of quantum.

RELEVANT PROVISION OF THE AGREEMENT

The applicable provision of the Agreement is Article 10 A which states:

> Principals shall be paid a base salary of one thousand one hundred and fourteen dollars and fifty-eight cents ($1,114.58) per annum and administrative allowance of thirty-four dollars and eighty-one cents ($34.81) per student for the first two hundred and eighty (280) students plus seventeen dollars and forty-one ($17.41) per student for the remaining number of students.
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> Effective September 1st, 2003, the above amounts are increased to:
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> | | |
> |---|---|
> | Base: | $1,148.02 |
> | Per Student up to 280: | $35.85 |
> | Per Student over 280: | $17.93 |
>
> Effective September 1st, 2004, the above amounts are increased to:
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> | | |
> |---|---|
> | Base: | $1,182.46 |
> | Per Student up to 280: | $36.93 |
> | Per Student over 280: | $18.47 |

OPENING STATEMENT OF THE ASSOCIATION

Mr. Leven, on behalf of the Association, outlined the issue in dispute. He allowed that there is no dispute that the Division has used the Full Time Equivalent ("FTE") method of calculation for years.

However, it is the Association's position as set out in the Agreed Facts (reproduced below) that the method of calculation is not being made according to the wording in the Agreement, and therefore compensation is payable.

Mr. Leven referred to the collective agreements in the Evergreen, Lord Selkirk and Louis Riel School Divisions, where specific reference is made to FTE. If the parties intended to refer to FTE, they could have used the same language as the aforementioned divisions.

OPENING STATEMENT OF THE DIVISION

Mr. Simpson, on behalf of the Division, pointed out that in the Morris MacDonald School Division ("MMSD"), which amalgamated with the Red River School Division ("RRSD") to form the Red River Valley School Division ("RRVSD"), the student count for administrative allowance purposes had been based on FTE since 1976.

Furthermore, since 1976 each and every month the principals in the Division received a pay cheque stub which separated out salary and allowance. Funding by the

Province, funding for individual schools and payment to administrators all flows from the FTE calculation.

Mr. Simpson anticipated that the Association may argue that FTE and the ability for administrators to know may be limited to kindergarten students. That is why paragraph 12 was included in the Agreed Facts (cited below). All satellite students were registered through the school, and for funding purposes the allowances were calculated based on FTE (six courses). Mr. Simpson stated that there can be no doubt that administrators were fully aware of the method of calculating the allowance.

THE EVIDENCE

As mentioned earlier, the parties tendered a statement of Agreed Facts which is reproduced here in its entirety:

> 1. In July 2002, the Morris MacDonald School Division (MMSD) and the Red River School Division (RRSD) were amalgamated to form the Red River Valley School Division (RRVSD) or "the Division"). At the time, the enrolment in the MMSD was approximately 1,800 students, and the enrolment in the RRSD was approximately 400 students. The MMSD had approximately 110 teaching staff and the RRSD had approximately 30 teaching staff.
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> 2. The Morris MacDonald Teachers' Association and the Red River Teachers' Association became the Red River Valley Teachers' Association ("the Association").
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> 3. For a period of time, the RRVSD has been consistently calculating Administrative Allowances ("Allowances") based on the Full Time Equivalent (FTE) method. This method involves calculating the number of "students" based on the number of FTE students (e.g. two students each attending half days equals one "student"). In some years in some schools, kindergarten students attend school for alternate days, and the Division counts each

kindergarten student as .5 FTE. In some years in some schools, kindergarten students attend school every day for half a day, and are counted as .5 FTE.

4. The Association takes the position that Allowances should be calculated on the basis of actual students, regardless of whether each student attends school for a full day, a half day, or some other fraction of a day (e.g. two students each attending half days equals two "students").

5. On or about October 16, 2003, the Association verbally advised the Division that it disagreed with the Division's practice, and that it expected the Division to immediately cease using the FTE method. The Division did not agree with the Association, and continued using the FTE method.

6. Neither the Division nor the Association can produce any correspondence prior to September 23, 2004, whereby the Division or its predecessor school divisions formally advised the Association or its predecessor teachers' associations that the Division was using the FTE method.

7. The Association and the Division have not yet concluded a new collective agreement to replace the agreement which expired on June 30, 2005.

8. At all material times, the 17 individual grievors were employees of the Division who received Allowances.

9. The payroll vouchers tendered as Agreed Document #8 are typical of payroll vouchers used by the Division and its predecessor school divisions as far back as available records show.

10. The block and categorical grants which the Division receives from the Province of Manitoba are calculated on the basis of FTE enrolment, which recognizes zero for each nursery student, and .5 (one half) for each kindergarten student.

11. The Division provides funding to its schools for various purposes, based on a FTE formula, counting each kindergarten student at .5 (one half).

12. In the MMSD, during the 1998-1999, 1999-2000 and 2000-2001 school years, the MMSD enrolled a significant number of students in its adult education program, with respect to which the administrative allowance was paid on the basis of the FTE method. For example, in 2000-2001, the total enrolment in the adult education programs was 6,409, whereas the FTE enrolment was 3,854.9.

The parties, also by agreement, tendered thirteen agreed documents.

The Association did not call any additional evidence.

The Division called Alma Mitchell, Secretary Treasurer of RRVSD, and Marnie Erb, a Trustee in RRVSD.

EVIDENCE OF THE DIVISION

Alma Mitchell ("Mitchell") testified. She is currently Secretary-Treasurer of the RRVSD and has been so since amalgamation in July, 2002. Prior to that she served in the accounting department of the RRSD since 1998, and prior to that worked for the Norwood School Division from 1994 - 1998.

Mitchell explained the process by which the Province funds school divisions. She identified certain documents in which the Province sets out how divisions are required to report enrolment. Funding is provided for students on a full time basis from grade 1 to S4, and on a half time basis for kindergarten students irrespective of the number of courses taken.

As of September 30th, schools report enrolment by giving a figure to their division and then that is reported to the Provincial Government and grants are made accordingly. The Province compares enrolment at schools to ensure that students are not counted twice. In January provincial funding is announced as per the audit that has been completed.

For the period 1998 - 2001 the adult education program was reported on the basis of FTE. Up to six courses constituted an FTE. Reports to the Province are made on the basis of FTE. Once monies are received by the Division from the Province, the basis for funding the schools is on FTE, including for staffing formulas and also for various categorical grants. Mitchell identified enrolment figures for the Morris School which were prepared by the school division and indicated a FTE figure. This information was then submitted to the Province.

She was also referred to exhibits 11(a) and (b) which were the enrolment figures for both RRVSD and MMSD for the period 2002 - 2003. Mitchell confirmed for all the schools outlined on those exhibits, FTE was used as a basis for funding all matters that follow. The documents were jointly prepared by the school divisions and the various schools.

Mitchell stated that this process for determining provincial grants and allotments being based on FTE has been in place for as long as they could determine. Someone in the Division verified that it went back at least thirty years.

FTE enrolment is also used for billing other school divisions when children come and enroll from those divisions. It is also used with the school of choice program. The use of FTE is not unique to this Division, and in Mitchell's experience every school division calculates enrolment in the same way.

Mitchell confirmed that the adult education program was highly publicized and that part

of the furor over the program was the allowance paid to administrators. It was based on a FTE calculation. Mitchell confirmed that the Teachers' Association in MMSD was involved in the discussions and the furor over the allowances. Mitchell confirmed that in the MMSD for the year 2000 - 2001, the total enrolment for the education programs was 6,409, whereas the FTE enrolment was 3,854.9. If the number of students was used for the calculation of grants, it would have been in excess of $40,000.00 difference by calculating based on the number of students.

Allowances paid to administrators are based on the calculation as of September 30th enrolment figures. There are no adjustments made throughout the year. Mitchell confirmed that the current Agreement does not refer to a September 30th date or how to calculate it. The methodology of using the September 30th figure was in effect when she came onboard in 2002. Based on investigations, the Division found records dating back as far as 1991 that confirmed that methodology. Mitchell confirmed that people in the Division indicated that it was always done using FTE enrolments albeit it may have been on different dates. The RRSD has calculated based on FTE enrolments as of September 30th, which has continued until the present time since 2001.

Mitchell identified exhibit 8 which was a typical payroll stub for payment to an administrator. Salaries are paid to principals monthly. A principal could look down the deductions and know what the administrative allowance is and determine on what figure it was calculated. The method of reporting these figures on the pay cheque has been in place at least as far back as 1994 based on computer programs, and inquiries

revealed that it has always been separated in this fashion when reports were made to principals.

Mitchell was also referred to exhibit 9 which was a two page document indicating how calculations for allowances would have been based on FTE and how they would be calculated based on number of bodies. The major difference between the two related to the calculation for kindergarten students, and that that would constitute a significance difference.

On cross-examination, Mitchell was queried with respect to her evidence concerning the adult education program and the fact that the Teachers' Association was involved in the furor and discussions at the time. She confirmed that there was a lot of discussion regarding the payment of administrative allowances to administrators because there was no maximum in place. Mitchell confirmed that this is what she understood to be the situation, but that she was not personally involved in the discussions.

Mitchell was questioned with respect to her basis for her knowledge of the practice prior to 1991. She confirmed that she spoke to a former principal, and that a former principal as well spoke to a former superintendent. The principal indicated that for as long as she worked for the Division and in excess of thirty years and as a school principal, the basis of payment was made on FTE. She was not provided with any documents to confirm same. On re-examination, Mitchell confirmed that the prior

superintendent, who is now a principal and is one of the grievors, was Mr. Dave Schmidt.

Marnie Erb ("Erb") is currently a Trustee in the RRVSD. She was appointed in 2002 at the time of the amalgamation. She has been a teacher for 40 years, and the last 32 years she was a teaching principal in the MMSD. She was referred to exhibit 6 which is the collective agreement in place in 1976. She confirmed that the first time administrative allowances were based on student counts for the year. It was her understanding the student count was always based on FTE and kindergarten based on 50%, that is how the funding and grants were calculated and she was aware of that being in existence in 1976. She confirmed that that practice continued until 2002, and that she always understood that is was FTE. She was involved in negotiations and spent time on the executive of the Association. The issue never came up as it being anything for discussion, but the fact that student count referred to FTE.

On cross-examination, she confirmed that she had been on the executive of the Teachers' Association. It was suggested to her that the issue of student count was never discussed at all by the executive. She indicated that people in the Association were aware that enrolment was based on FTE, and that when they discussed students, it was always on the basis of FTE. She confirmed that the Teachers' Association never challenged the methodology and that all were aware of the basis of the calculation, although a specific discussion of salary may not have come up.

EVIDENCE OF THE ASSOCIATION

Mr. Leven opened by indicating that he anticipated the Division would argue that an estoppel existed, and if so, he would deal with the Division's submissions in reply argument. He confirmed that there was very little in dispute with respect to the facts of this case. The main issue is how one interprets "student" in Article 10 of the Agreement. The Association's position is that the bodies method should be used, and the Division's position is that FTE be utilized. That was the essence of the dispute. When one looks at old collective agreements, different methods were used for calculating student enrolment.

In MMSD for the timeframe 1959 - 1965, it was based on classroom or teacher grants. There was no reference to student count. The word "students" made its first appearance in 1976 in Article 5.01 of the MMSD collective agreement. It was noted that there was a reference to industrial arts in that agreement, and it was to be counted as $1/12^{th}$ of a student. That reference establishes that when the parties wished to count students other than as a body, they used specific language to so delineate. This specific wording remained in the agreement until the 1992 - 1995. In the 1995 - 1998 agreement, the parties continued to refer to students, but there was no language regarding industrial arts. None of the past agreements used the term "FTE", nor does the present Agreement.

In the RRSD the chronology is different. In 1961 - 1967/68, the term "classroom" was used as a basis. From 1968/69 - 1998/2000, the word "teachers" was used but there

was no mention of students. In 2000/2002, the term "student" first appears in Article 3.05(b)(1).

It is interesting to note that in the current Lord Selkirk, Louis Riel, and Evergreen School Division collective agreements, a different methodology is used to describe students for purposes of calculation of administrative allowances. They use the term "FTE", so when the parties wanted to talk about full time and kindergarten constituting half time they said so. It is important to note that the parties did not choose to so describe student count in the relevant agreements.

Mr. Leven pointed out that the general principle of collective agreement interpretation is that words are to be given their ordinary meaning. In that regard he referred to Arbitrator F. M. Steele's (as she was then known) decision in *Re Manitoba* [1991] M.G.A.D. No. 36. Specific reference was made to paragraph 24 of the decision which states:

> It is a principle of interpretation that words be given their normal ordinary meaning and that each word be given some meaning if possible, unless that would lead to some absurdity or inconsistency with the rest of the collective agreement or unless the context reveals that the words were used in some other sense. "It is accepted that in construing a collective agreement, it should be presumed that all of the words used were intended to have some meaning" (Brown & Beatty, p. 4-27). Adopting the above interpretation would explain the use of the word "first". The employer's argument that I read the phrase to mean the first three hours worked would be to add to the ordinary meaning of the phrase.

By analogy, Mr. Leven stated that the word "student" in the Agreement refers to one human being. He anticipated that the Division would argue that there is some logic to

the utilization of FTE as the Province uses FTE for funding. If this is a good thing to do, then the parties should so bargain that in clear and ordinary language as other parties have elected to do. Mr. Leven also referred to the Manitoba decision of *Re Agassiz School Division No. 13* [1997] M.G.A.D. No. 61, Chairperson A. B. Graham. In that case, the issue was the proper interpretation to be placed on the word "teacher". There had been a 25 year practice of interpreting "teacher" on the basis of a full time teaching position. The Teachers' Association in that case learned about the method of calculation in 1995. Arbitrator Graham determined that the use of the word "teacher" in the applicable article refers to the number of actual teachers supervised, not the number of full time equivalents. This reasoning should be applied to the present case.

With respect to the whole issue of funding, while it is acknowledged that the Province funds on an FTE basis, it was submitted that there is no relationship between the funding system and the way administrators are to be paid pursuant to the Agreement. There was no connection between the two.

SUBMISSION OF THE DIVISION

Mr. Simpson indicated that the starting point for the analysis of the issue in this case is Article 10 of the Agreement. He submitted that it is impossible to calculate the administrative allowance payable to any principal in the Division based on the wording. The Article gives you a number of specific numbers in terms of that position related to entitlement, but one cannot calculate the final entitlement without further information.

One can multiply $34.81 per student, but one does not know the number of students, where they are, and what time the calculation should be made. If one assumes that it is referring to per school that gets you over one hurdle, but then the question is when the payment is to be made and whether it is to be adjusted every month. It follows therefore at the outset that the Article on its face it patently ambiguous and cannot be applied without more information being accessed. While the Association has alleged that the wording of the Article is clear on its face, they do not put forth any method as to how it can be applied. The Division simply states that the word "student" means "body", but leaves open the question as to when you calculate the number of bodies. In terms of the application of the Article one must therefore have reference to the practice of the parties to know exactly what they intended. In this case there is evidence of past practice, and it is uncontradicted that the method of payment has been per full time student enrolled as of September 30th of the school year.

Mr. Simpson noted that Association counsel had reviewed the history since 1976. But it was submitted that even in 1976 it said students in a particular school as of September and January. There was therefore more information in those clauses, but the evidence at that time was that the student count was based on FTE.

A review of the agreements over time indicates that many words were dropped and simplified. The only conclusion the Division submitted as to the meaning of the word "student" is that which was the subject of past practice over the years.

Aside from there being a patent ambiguity, it is apparent there may be a latent

ambiguity when you consider the past practice. The Division submitted that the word "student" was clearly intended to refer to full time student. Therefore, more than just past practice can serve as an aid to interpretation. It was submitted there is a clear custom and usage that has developed at least in this Division with respect to the word "student". It was argued that it is certainly not limited to this Division where this meaning was accepted however.

The Division also stated that for the Association to suggest there is no connection between funding of schools and the payments of salaries is ludicrous. It was pointed out that for as long as one can remember funding of schools has been based on FTE students. Examples of this are kindergarten students, adult education students, and enrolment was based on full time equivalent. The Division is funded by the Province, the Division funds the schools, and it is all based on full time enrolment. It was submitted that everything flows from a calculation based on full time enrolment, including staffing, special needs and textbooks. Full time is the benchmark that the parties have been talking about with regards to the administration of these schools. The administrators are involved in the funding determination and the establishment of the FTE figure. It was submitted that there can be no doubt that principals in these schools were well aware of how schools were funded based on a FTE calculation. It was argued that this is not a new phenomena, and in MMSD funding has been based this way for as long as witness Erb was involved.

It was asked whether it is a stretch to say that if staffing is based on FTE, that administrative allowances should be based on the same method of calculation. It was

also noted that in any event the evidence is clear that since 1976 when the student counts became the means of payment for academic allowances, the student count was based on FTE.

The Division also argued that there is uncontradicted evidence each month that the principals receive a record of payment which isolates the administrative allowance and absolutely allows principals to determine, if they are so inclined to do so, the basis of the calculation of their administrative allowance.

It was noted that there is also witness Erb's evidence that she was well aware, and that everyone was aware, as to how principals were paid an allowance based on FTE. It was also pointed out by the Division that no one has come forward and said that they did not know the basis for how they were being paid.

In summary, there is 30 years of consistent practice whereby to the knowledge of the principals and the Association administrative allowances have been paid on the basis of FTE enrolment. In assessing the meaning of the clause, the Division submitted that one can and must have regard to the longstanding consistent practice in order to properly ascertain the intention of the parties. Firstly, this has to be done to give the clause any meaning, and secondly, because the evidence of that practice and how it was utilized in the Division establishes the custom and usage which gives meaning to the clause in question.

The Division relied on the following authorities for the principles and excerpts cited below:

1. *Canadian Labour Arbitration, Brown & Beatty, 3rd Ed.* at 3-97 where the authors referred to portions of the seminal case of *John Bertram & Sons Co.* (1967), 18 L.A.C. 362 (Weiler) dealing with past practice:

> If a provision in an agreement, as applied to a labour relations problem is ambiguous in its requirements, the arbitrator may utilize the conduct of the parties as an aid to clarifying the ambiguity. The theory requires that there be conduct of either one of the parties, as an aid to clarifying the ambiguity. The theory requires that there be conduct of either one of the parties, which explicitly involves the interpretation of the agreement according to one meaning, and that this conduct (and, inferentially, this interpretation) be acquiesced in by the other party. If these facts obtain, the arbitrator is justified in attributing this particular meaning to the ambiguous provision. The principal reason for this is that the best evidence of the meaning most consistent with the agreement is that mutually accepted by the parties. Such a doctrine, while useful, should be quite carefully employed. Indiscriminate recourse to past practice has been said to rigidify industrial relations at the plant level, or in the lower reaches of the grievance process.

Reference was also made to portions of the text relating to the use of extrinsic evidence at p. 4-58 where the authors stated:

> In some jurisdictions, an arbitrator is restricted in construing a collective agreement to the agreement itself, and cannot resort to extrinsic evidence to assist in this task unless the agreement is ambiguous. However, this general proposition must be qualified in two respects. First, where the context of the agreement or subject-matter referred to is sought to be established, extrinsic evidence may be received for that purpose. In addition, where the word or phrase in issue is alleged to have been used in a trade sense or to have a special technical meaning, evidence of the trade, custom or special meaning may be adduced.

2. *Re Ipsco Inc. and B.S.O.I.W., Loc.* 805, 124 L.A.C. (4th) 403 (W.J. Warren) where the issue concerned the meaning of the words "continuous service" and extrinsic evidence was admitted in the form of past practice to give meaning to a word. Similarly, the word "student" can have more than one meaning.

3. *Re St. John's Shipping Association Ltd. and International Longshoremen's Association, Local 1593*, 3 L.A.C. (2d) 316 (L. Harris) where there was a dispute over the meaning of the words "conventional vessel" and "sideport vessel" and the arbitrator applied the meaning as per the particular custom of the industry.

4. *Re General Truck Drivers Union, Local 938, and Charlton Transport Ltd.*, 19 L.A.C. 311 (D. G. Pyle) where the meaning of "day" and "calendar day" was ascertained by reference to trade usage.

5. *Re Int'l Chemical Workers, Local 159, and Canadian Kodak Co. Ltd.*, 19 L.A.C. 100 (J. F. W. Weatherill et al) where the Board discussed the issue of ambiguities in an agreement as follows:

> It is, in our opinion, essential to distinguish between "ambiguity" in a collective agreement - - or indeed in any document - - and the arguability of different constructions of that document. If this were not so, then any disagreement as to the construction of a document would open the door to the admission of extrinsic evidence. The interpretation of documents, however, is a matter for argument, rather than evidence, except in certain special circumstances. The "ambiguity" in a document which would permit the reception of evidence may perhaps be designated "ambiguity of reference". The cases to which both counsel have referred the board are illustrative of this. In these cases, questions have arisen

> relating to the identification of individuals or objects, and evidence has properly been received on such questions of fact. Such ambiguities may be "patent", in which case the requirement of evidence in order to apply the provisions in question is obvious, or "latent", in which case the ambiguity itself must be established by evidence. For example, a term may have a special meaning in a particular trade or business: extrinsic evidence may be admitted in effect to translate such language.

It was noted that in the present case, there is a patent ambiguity in terms of application and a latent ambiguity in terms of the words used.

6. *Re Ontario Jockey Club and S.E.I.U., Local 528* (McNeil), 87 L.A.C. (4th) 283 (S. R. Ellis) in which the Board applied the principles set out in *Canadian Kodak* (cited above).

7. *Re South Alberta School Authorities Assoc. and Alberta Teachers' Assoc.*, 11 L.A.C. (2d) 227 (D. B. Mason et al) where the Arbitration Board was dealing with whether extrinsic evidence was admissible to assist in the interpretation of words with technical or special meanings. Reference was made to the following portions of the decision which would justify receipt of extrinsic evidence in this case:

> The trustees applied to the board to be allowed to introduce extrinsic evidence to establish their proposition that the word "semester" had a special or technical meaning, and that it referred not only to a period of time, but, in this context to the type or quality of teaching. They submitted that this would be borne out when viewed within the historical relationship between the parties and their legal predecessors during bargaining on the prior collective agreements, and as well through the system established in the school districts, where the "semestered system" of teaching had been introduced. The board adjourned to consider this request.

> The determining factor in construing the terms of any written agreement is to ascertain the intention of the parties from the words used by them, by ascribing to those words their plain, or general meaning. This does not always mean their dictionary meaning, for regard must be had as to how the words are generally understood taking into consideration the parties, the subject-matter, an their respective backgrounds. See *Anson's Law of Contracts*, 22nd ed. (1964), pp. 138-9.
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> If a special or technical usage of a word appears necessary to its interpretation, then extrinsic evidence is ordinarily admissible. This is sometimes classed as a "patent ambiguity" in some legal parlance, as opposed to a "latent ambiguity", where the use of the word in its ordinary sense does not make ordinary sense of the matter to be interpreted: see *Re International Nickel Co. of Canada Ltd. and U.S.W.* (1974), 5 L.A.C. (2d) 331 at p. 331 (Weatherill). Sometimes it is necessary to allow the introduction of extrinsic evidence when certain words are capable of two or more meanings having regard to the subject-matter dealt with and the use of those words within the grammatical structure of the clause or sentence to be interpreted: see *Re International Molders & Allied Workers and Maxwell Ltd.* (1963), 39 D.L.R. (2d) 232 2 O.R. 280.
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> The board decided to hear extrinsic evidence in this matter for two reasons. First, because the field of education is a special and sometimes technical subject. It was felt that the word "semester" might very well have a technical or special meaning. Secondly, the use of the term "semester" in cl. 4.5 and the equating of that word to a credit of "one-half year of teaching experience" on the face of it does appear to make the clause ambiguous, unless one knows precisely what the parties meant by the word "semester".

8. *The Kamloops Daily Sentinel et al*, British Columbia Labour Relations Board, No. 160/84, April 17, 1984 (unreported) which applies the *Re South Alberta School et al* (cited above).

9. *Re Winnipeg School Division No. 1*, [1991] M.G.A.D. No. 20 (P. W. Schulman et al) where the Board was dealing with the meaning of the phrase "teaching days" and determined that the phrase had a special meaning in the education scheme and referred to days prescribed by the Minister of Education for the school year.

It was submitted that this was an example of an arbitrator receiving evidence in order to determine the context in which the words were used because of a particular specialized setting.

10. *Re Canadian Canners Ltd. and International Association of Machinists, Lodge 863*, 24 L.A.C. (2d) 297 (H. D. Brown et al) where the Board was dealing with the meaning of "cost of living allowance" and extrinsic evidence was required to explain how the clause was to be applied so as to ascertain the intentions of the parties.

Mr. Simpson submitted that all of the above cases support the admission and consideration of extrinsic evidence to assist in determining the intention of the parties, both because of an ambiguity and because of the custom and usage of the word. This was the approach taken by Arbitrator G. Parkinson in *Re Agassiz School Division No. 13* (cited above).

By way of alternate argument, the Division submitted that an estoppel exists against the Association in that they knowingly accepted "student" to mean FTE student.

In that regard, reference was made to Arbitrator Blair Graham's majority decision in *Re Agassiz School Division No. 13* where an estoppel was found to exist against the Association with respect to the term "per teacher supervised". In that case it was determined that principals had been paid on the basis of full time equivalents and they

knew or ought to have known that. It was submitted that the knowledge attributed to the principals in the present case is much stronger than that found in *Agassiz*.

In *Agassiz*, the Board also found that the division has foregone opportunities to renegotiate the wording of the relevant article. Likewise, in the present case, both parties were aware of the issue which remained unresolved for a number of years.

It was submitted that the Division was entitled to assume that its position and application of the Article for over thirty years truly reflected the intention of the parties.

Regarding the issue of duration of the estoppel, Arbitrator Graham found that the estoppel should continue until the commencement of a new collective agreement or January 1, 1998 (which was approximately four months from the date of the decision). It was argued that the estoppel should continue until the collective agreement is actually changed.

In conclusion, it was argued that it would be fair and equitable to give the parties the opportunity to consider their position in negotiations which are underway, and further that unless the Association is able to negotiate a change in the Agreement, that the Association should be bound to accept that application.

SUBMISSION OF THE ASSOCIATION

In reply to the Division's submission on the applicability of an estoppel, the Association

referred to the following authorities:

1. *Re Lennox & Addington Community Health Services and S.E.I.U., Local 663*, 51 L.A.C. (4th) 28 (G. T. Surdykowski) where an estoppel was not found to apply when individual employees had knowledge, but the Union did not.

2. *Re Portage la Prairie and C.U.P.E., Local 1002*, [1993] M.G.A.D. No. 65 (P. S. Teskey et al) where, as well, an estoppel did not apply where the individual employees had knowledge of the application of the agreement in question, but the Union did not.

3. *Re Victorian Order of Nurses (Algoma Branch) and O.N.A.*, 56 L.A.C. (4th) 235 (W. Low) where the Union was found not to be aware of the employer's method of interpreting the agreement because of a review of the documentation on its face would not alert a reader to the method of calculation.

4. *Re Bullmoose Operating Corp. and C.E.P., Local 443*, 103 L.A.C. (4th) 385 (M. Jackson) where the Union was found not to be aware of the method calculating call back premiums.

5. *Re Colonial Cookies and U.F.C.W., Local 617P*, 37 L.A.C. (4th) 69 (P. Haefling) where the arbitrator determined that the estoppel terminated on the date of the arbitration.

6. *Pacific Western Airlines and International Association of Machinists and Aerospace Workers, Lodge 1681*, 22 L.A.C. (3d) 111 (P. G. Owen) where the arbitrator found that there was an estoppel which terminated thirty days after the date of the arbitration.

The Association, in reply, also drew attention to Article 11 of the Agreement which specifically refers to the term FTE in reference to allowances paid to teachers. There is no ambiguity in the use of the word "student". Article 10 does not use the words "FTE". The fact that the date of calculation is not included in Article 10 does not mean the word "student" is ambiguous.

With respect to the Division's argument on estoppel, it was pointed out that at least one employee in one of the two predecessor school divisions had knowledge of the practice. But it should not be forgotten that there are two divisions involved. Even if there was a practice in MMSD, there was no such longstanding practice in RRSD.

It was noted that the Division bears the onus to prove the existence of an estoppel and there was no correspondence to establish the estoppel.

If there is an estoppel, it should terminate either on the date the grievance was filed or the date of the award or thirty days later. At the very worst, it should terminate on the first day of the school term.

REPLY SUBMISSION OF THE DIVISION ON ESTOPPEL

Mr. Simpson stated that the cases relied upon by the Association regarding lack of knowledge on the part of the Association were irrelevant because the evidence was clear that the Association was aware of the practice and no one testified that they were not aware.

The Division stated that Article 11 is not relevant as it refers to teachers, not students. As well, while there is no correspondence in existence whereby the Division formally notified the Association as to its method of calculating the number of students, that does not impact on the existence of knowledge on the part of the Association.

Lastly, with respect to the date of the termination of the estoppel, the practice should not be altered until the Association is able to negotiate a change.

DECISION

The main issue in this arbitration is the proper interpretation of the word "student" in Article 10 of the Agreement. Are administrative allowances to be calculated on the basis of the number of students, regardless of whether they are full or part time or whether it is based on the FTE number of students?

Related to this main issue is whether extrinsic evidence such as past practice or custom and usage should be admitted to assist in determining the meaning of the word "student".

In the event the Association's interpretation is accepted, there still remains an issue as to whether the Association should be estopped from challenging the Division's method of calculation and, if so, for what period of time.

Dealing with the first issue, the parties' positions are clearly defined. To the Association, a "student" means a body. They say the language is clear and unambiguous. The word "student" is to be given its usual and ordinary meaning. An arbitrator is to assume the language is used in its ordinary and usual manner.

The Division says that the entire clause leaves certain matters unaddressed. "Student" is used in a technical way in that the custom and usage in the educational field is that "student" means a FTE. The Division points to the fact that FTE is the basis for the funding model of schools in the province. Everything flows from that principle; a principle that was well known and understood by the administrators.

In *Agassiz* (cited above), Arbitrator Graham in dealing with a somewhat similar issue determined that the words "per teacher supervised" were clear and unambiguous and thus found that the division had been incorrectly calculating administrative allowance for twenty-five years. I note that the evidence in that case was that the Association

would not have been aware of the practice until 1995, many years after the method of payment originated. I find this case not to be a finding precedent for that reason.

For the reasons that follow I find the Division's argument to be persuasive. The wording in Article 10 is not clear and unambiguous. I believe the Article on its face is patently and latently ambiguous. As a result, extrinsic evidence is properly admissible to determine the intent of the parties. Furthermore, the custom and usage with respect to the word "student" may be adduced to properly explain the meaning of "student" as used in the educational field.

I will deal with both issues:

Is there an ambiguity?

The clause in question is ambiguous. It does not address a number of issues such as which students are covered, when are the payments to be made, and are they to be adjusted during the year. The only way to ultimately determine these ambiguities is to utilize the conduct of the parties. I am satisfied on the balance of the evidence that the past practice of the parties is the best evidence of the meaning of the article in question, and that "student" was intended to refer to full time student. The calculation has been on the basis of full-time student since 1976.

Further, based on the evidence, I have no doubt that school principals in question were well aware of this methodology, and further, were well aware of how the

administrative allowance was paid. Erb's evidence on this point was compelling. Further, while there is ample jurisprudence on the importance of both parties acquiescing in a practice with full knowledge, no one came forward from the Association to say they had a lack of knowledge. The absence of any evidence from any principals that they were not aware of the practice is telling.

Lastly, kindergarten students attend school half-time. One would obtain an anomalous result if these students were counted twice.

Can custom and usage re student be admitted?

For the reasons stated above, I am satisfied there was a custom and usage with respect to the word "student" which was essential to the meaning of Article 10. That custom and usage was (as per the uncontradicted evidence) that the term "student" in the educational field was in reality a FTE student.

It is not sufficient to simply say that a student is a "body" and that the word should be given its ordinary meaning. Many simple words have different meanings when used in different contexts as was stated in *Corbin on Contracts*:

> If there is in fact a 'plain, ordinary, and popular' meaning of words used by the parties, that fact is evidential that the parties used them with that meaning. It is fully overcome, however, as soon as the court is convinced that one of the parties used and understood the words in a different sense and that the other party had reason to know it.
>
> There are, indeed, a good many cases holding that the words of a writing are

> too 'plain and clear' to justify the admission of parol evidence as to their interpretation. In other cases, it is said that such testimony is admissible only when the words of the writing are themselves 'ambiguous'. Such statements assume a uniformity and certainly in the meaning of language that do not in fact exist; they should be subjected to constant attack and disapproval.

There is ample jurisprudence that Courts will consider extrinsic evidence to determine the meaning of a word, especially to determine context or a custom or special meaning. The learned academic and author S. A. Waddams in his text *The Law of Contracts* stated the issue as follows:

> No one can doubt that there are cases where evidence of prior negotiations is properly excluded. Where the parties after negotiations have deliberately agreed to reduce their agreement to written form and have freely signed a document with the intention that it should comprise their whole agreement, there is a strong case for giving effect to their intention. In such a case, as Lord Wilberforce said in *Prenn v. Simmonds*, evidence of prior negotiations is excluded simply because it is irrelevant. A concession given at an earlier stage in the negotiations may have been withdrawn later. People often have to be content with less than they want and may agree to take a risk on some matter rather than cause a breakdown of negotiations by insisting on assent to their wishes. Subsequent events frequently cause a party to regret such agreement but that in itself is no ground for relief. There is nothing improper about a free agreement that a contract shall be reduced to writing. It serves a useful purpose to the parties and to society and enforcement of it is fully in accord with the purposes of contract law.
>
> Even in such a case, however, there remains the question of interpretation of the true meaning of the words used. Courts often suggest that the "true" meaning of words can be determined simply by perusing a document and that outside evidence is not admissible or only admissible in a case of "ambiguity". But words do not have immutable or absolute meanings; they take their meaning from their context: "the meaning of words varies according to the circumstances with respect to which they were used". As the Supreme Court of Canada said in *Eli Lilly & Co. v. Novopharm Ltd.*: "The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, *possibly read in light of the surrounding circumstances which were prevalent at the time.*" In that case evidence of the subjective intention of the parties was excluded, but the concluding words just quoted indicate that evidence of the surrounding circumstances is admissible.

Therefore, it is only appropriate in these circumstances by application of the above jurisprudence to utilize the very convincing extrinsic evidence to determine that the use of the word "student" was intended to refer to FTE.

A further issue warrants comment. The Association argued that if the parties intended to mean FTE student they could have so stated as others have done in other agreements. While this might have been preferable from a drafting point of view, it does not take away from what I believe to have been the clear practice of the parties.

Is there an estoppel?

Based on my above finding, it is not really necessary to rule on this issue. If I were to have found an estoppel because of the length of time the parties have operated under a certain understanding, I would have ordered that the estoppel prevail until the parties have a chance to bargain.

I wish to thank the parties for their submissions.

DATED at the City of Winnipeg, in Manitoba, this 23 day of June, 2006.

MICHAEL D. WERIER,
Arbitrator

I, concur with the above Award.

GERALD D. PARKINSON,
Nominee for the Division

I dissent to the above Award.
(Reasons to follow)

BRUCE BUCKLEY,
Nominee for the Association