COPY

IN THE MATTER OF: An Arbitration

BETWEEN:

SNOW LAKE TEACHERS' ASSOCIATION
NO. 45-4 OF THE MANITOBA TEACHERS' SOCIETY.

-and-

THE SNOW LAKE SCHOOL DISTRICT NO. 2309.

BOARD

JOHN M. SCURFIELD
GERALD PARKINSON
DAVID SHROM

COUNSEL:

MEL MYERS, for the Teachers
ROBERT SIMPSON, for the School District

AWARD

THE EVIDENCE

In the month of June, 1985 the Snow Lake Teachers' Association No. 45-4 of the Manitoba Teachers' Society (hereinafter referred to as the "Teachers") filed a grievance against the School District of Snow Lake No. 2309, (hereinafter referred to as the "District") wherein they submitted that there was no legal obligation under the provisions of the current collective agreement to provide supervision to the students in the School District during

the noon hour intermission. The grievance is in the following form:

> The Association hereby requests:
>
> 1) That the School District acknowledge that there is no legal obligation for teachers employed in the School District to provide supervision to students in the School District during noon hour;
>
> 2) An undertaking by the School District to cease and desist from requiring teachers employed by the School District to provide supervision to students in the School District during noon hour.

The evidence introduced before the Arbitration Board on May 23rd, 1986 was relatively straightforward. Much of the evidence, in fact, was before the Board by way of agreement.

One witness was called on behalf of the Teachers. That witness was the President of the Association who had been employed as a teacher in the District since September of 1981. That witness, Mr. Moncaster, testified that when he commenced employment in September, 1981 he signed a Form 2 agreement pursuant to the regulations under **The Public Schools Act**, C.C.S.M. 1986, Cap. P250. He stated that his agreement contained no specific obligation to provide noon hour supervision to students. He further advised that to his knowledge no other teacher has a noon hour supervision clause in their agreement with the District. It is common ground as between the parties that Form 2 agreements are in effect with all of the Teachers in the District and that no specific clause in those agreements relates directly to noon hour supervision. No collateral verbal or written agreements were alleged or proven.

Mr. Moncaster testified as to the requirements, practice and procedure relating to noon hour supervision in the District subsequent to his becoming employed at the school in September, 1981. He also gave evidence with respect to what he understood to be the practice in regard to noon hour supervision prior to 1981. The evidence of prior history was based on conversations he had had with teachers employed by the District prior to 1981. This evidence of prior practice was received by the Board over objections of counsel for the District on the grounds of relevance and hearsay. After hearing the evidence of Mr. Moncaster in regard to the pre-1981 position, an opportunity was extended to the Teachers and to the District to call additional direct evidence as to the pre-1981 procedure since the parties could not reach an agreement as to the pre-1981 position. Suffice it to say that neither counsel took advantage of the opportunity to call direct evidence in this regard, although it was indicated to both counsel that this evidence might be of some significance in the arbitration.

Mr. Moncaster gave evidence that he had been told that there was no noon hour supervision required prior to 1981. Nevertheless the Board should place little weight on that type of evidence unless it is agreed to or corroborated. Mr. Suchar, the Principal of the Snow Lake School, was called as a witness by the District. His evidence confirmed the evidence of Mr. Moncaster in most material particulars, including some aspects of the pre-1981 position.

The evidence established that as of 1986 the Snow Lake School is a Kindergarten to Grade 12 school with 29 teachers, 450 students and two administrators, being a Principal and a Vice-Principal. There are also

approximately six adult teacher aides. There is only one school in the District. The instructional day is presently from 9:00 a.m. to 11:45 a.m. and from 1:00 p.m. to 3:45 p.m. with the period from 11:45 a.m. to 1:00 p.m. fixed as the noon hour intermission. The lunch period inside the school is from 11:45 a.m. to 12:10 p.m. and the outside period of the intermission is from 12:10 p.m. to 12:50 p.m. with the balance of the time being taken up by leaving and returning to classrooms.

Prior to the 1979-1980 school year the issue of noon hour supervision was of little consequence in the District since no more than 15 students required lunch hour accommodation. Apparently, in the school year 1979-80 a new sub-division in the Town of Snow Lake opened up and that sub-division began to house families with school-age children who were then located a substantial distance from the school. This eventually created the need for significant lunch hour supervision and led ultimately to the grievance before us.

In October, 1980 the School Board, acting on behalf of the District, passed a resolution relating to the increased number of students now spending their noon hours at the school. The resolution stated that two or more teachers should be on duty during the period of November to April when the largest number of students elected to have their lunch at school. The Teachers approached the School Board at this time and offered, as an alternative, to arrange volunteer adult supervision from the parents in the community. Apparently, the parents who initially volunteered were to be supervised by one teacher who would be on call during the lunch hour. This system continued until later in the 1980-81 season when the attendance of

volunteers dropped off to the extent that other arrangements had to be made.

The School Board took the position that the responsibility for noon hour supervision should remain with the Teachers and when the plan to use volunteers failed the Teachers were advised through the Principal that they were to provide supervision. It is common ground that when the volunteer parents alternative failed, the School Board hired senior students to assist teacher supervisors during the noon hours. The District took the position that the Teachers were still responsible for assisting with the noon hour supervision on a rotating basis at this point in time.

The evidence of Mr. Moncaster, which is confirmed by the evidence of the Principal, Mr. Suchar, was to the effect that during the 1981-82 year, one teacher supervisor remained on duty on a rotating basis to supervise four different lunch rooms and senior student aides were hired to assist with the individual lunch rooms. The period of supervision in the school was from approximately 11:45 a.m. to 12:10 p.m. and thereafter a teacher was also required to supervise the outside playing field of the school for approximately a further 40 minutes. This system was maintained until the fall of 1983. At that time a Trustee attended at the school and was not satisfied by the lunch hour supervision in place.

A School Board meeting was held during the early part of the year 1984. According to Exhibit No. 9, on February 20th, 1984, the Board passed a resolution ordering that there be a supervising teacher in each lunch room. This would have required the active involvement of four teachers instead of one teacher. Apparently at this point in time the Principal met

with the Teachers and they advanced an alternative proposal to the Board some two weeks later to the effect that the number of lunch rooms be reduced to two so as to only require two supervising teachers inside the school during lunch hour. A single teacher was all that was required outside the school. This alternative proposal was approved some two weeks later at a subsequent Board Meeting.

This supervisory arrangement was maintained uneventfully until the time of the grievance with the exception of the fact that during the fall of the 1984-85 school year, as a result of space problems, the lunch rooms were changed to the Home Economics room and a hall located in the school. For a brief period of time an attempt was made concurrent with this location change to manage the supervision with one teacher and the student aides. This was judged to be unsatisfactory. Within two weeks there was a return to the practice of requiring two teachers to supervise inside the school at noon hours. There remained the practice of having one paid student aide in each lunch room and one paid student aide outside.

It should be noted that at all material times the supervision requirement was in effect interpreted as supervision by two staff members and not two classroom teachers. That is to say, both the Principal, the Vice-principal and the Teacher aides took part in the supervisory rotation at noon hour. The District appears to have accepted this policy.

A short history of the formal evolution of the grievance is as follows. By virtue of a letter dated December 14th, 1984, the Teachers gave formal notice that noon hour supervision was viewed as a voluntary service

by them. The District responded that they viewed this duty as an obligation of the Teachers in a letter dated January 15th, 1985. In June of 1985 the grievance was filed. In December of 1985 a new collective agreement, Exhibit No. 1, was signed as between the parties. No specific reference to the issue of noon hour supervision was contained in Exhibit No. 1. This collective agreement is, of course, collateral to the Form 2 Agreement which all teachers must enter into. Whenever the term "collective agreement" is used hereafter, it should be understood that this term encompasses both Exhibit 1 and the Form 2 Agreement unless there is a specific reference to either of them. The collective agreement itself may, of course, be extended or restricted by valid statutory provisions and regulations. The collective agreement referred to in the letters filed as Exhibits herein is in all material respects the same as the current collective agreement renewed on December 31st, 1985.

LEGAL ISSUES RAISED BY THIS GRIEVANCE

Estoppal

A preliminary issue was raised by the District with respect to an argument of estoppal. It was submitted that the past practice of the Teachers has included the provision of noon hour supervisory services. On this basis, it was argued that the Teachers are precluded from now taking the position that these services were provided voluntarily. Thus, it was submitted they are estopped, presumably forever, from arguing that these services are voluntary and may be withdrawn by them.

In my opinion, the question of whether or not these services are voluntary falls to be determined upon an interpretation of the collective agreement in the context of the applicable statute and regulations and not on the past practice. Clearly, by the filing of this grievance and the earlier notice given to the District, the Teachers have indicated that they do not intend to continue to provide noon hour supervision on a voluntary basis if indeed this is found to be a voluntary service. I am satisfied that past practice does not create a permanent form of estoppal. Both law and logic support the fact that in the course of an employment relationship either the employer or the employee may provide additional services or benefits on a voluntary basis. Neither party should be permanently bound to continue the provision of these services on a permanent basis unless they are legislatively bound to do so. Re: Canadian Industries Limited and United Steel Workers Local

6350 (1974), 7 L.A.C. (2d) 110).

In this case the notice of withdrawing the service is given on a prospective basis. Therefore, it cannot be said that there is a detriment resulting from any reliance on the voluntary provision of these services. Finally, the degree to which they should be estopped is unclear since it appears that the amount of supervision has varied significantly over time. Furthermore, the limited evidence does not satisfy me that there is a long standing practice which is clear and unequivocal so as to found an argument of estoppal. Even a long standing error in the interpretation of a collective agreement may be corrected once it is discovered by one of the parties. It appears that the evidence in this case falls far short of the demanding standards of estoppal: **Re: Corporation of the City of Victoria and Canadian Union of Public Employees, Local 50** (1974), 7 L.A.C. (2d) 239. Furthermore, the words of Philp, J.A. in the unreported decision of **University of Manitoba and The University of Manitoba Faculty Association** decision, May 28th, 1985, confirm that:

> "Past practice can hardly be controlling on the face of express terms of a collective agreement which do not support the practice".

For these reasons, we are of the view that this Board has the jurisdiction to consider the larger issue as to whether or not the provision of noon hour supervision by the Teachers is a voluntary or mandatory service in accordance with the express or necessarily implied terms of the collective agreement.

It seems logical to approach this central question on the premise that no employee should be compelled to perform work without compensation. The collective agreement does not directly address the issue of responsibility or compensation for noon hour supervision. It is nevertheless helpful to determine whether or not it can be fairly said that the Teachers' current compensation package includes compensation for noon hour supervision. Alternatively put, this analysis can be approached from the perspective of whether or not the contract between the District and the Teachers creates a responsibility for noon hour supervision so as to imply directly or by necessary inference that part of the compensation paid to teachers may be dedicated towards the provision of that service.

In the case of the collective agreement between the Teachers and the District, we are dealing with Exhibit I and with a statutory contract known as a Form 2 contract set out in Form 2 of Schedule D of the regulations to **The Public Schools Act**, C.C.S.M. 1986 Cap. P250 as prescribed by Section 92(1) of that Act. It is necessary to examine the statutory form of contract carefully and to review the Act itself as well as the accompanying regulations in order to arrive at a clear picture of the full scope of the relations between the parties. In this sense, it is fair to say that the contract itself is extended, amplified or defined by the Act and regulations.

Paragraph 4 of the Form 2 contract states as follows:

> "The teacher agrees with the School Board to teach diligently and faithfully and to conduct the work assigned by and under the authority of the said School Board during the period of his employment, according to the law and regulations in that behalf in effect in the Province of Manitoba, and to perform such duties and to teach such

> and to perform such duties and to teach such subjects as may from time to time be assigned in accordance with the statutes and regulations of the Department of Education of the said province."

In the course of argument, it was conceded by counsel for the Teachers that this paragraph confers on the teacher a broader scope of obligations than merely classroom teaching. However, it was the position of the Teachers that the primary focus of the teacher is to teach and that any additional duties must be necessarily related to that teaching function. This logic has much to commend itself. Clearly, Paragraph 4 cannot be interpreted in such a fashion as to encompass the teacher being assigned janitorial functions. Thus, the scope of our inquiry is narrowed. Is the work being assigned to the Teachers necessarily related to their teaching function or at least does it have a reasonable relationship to that professional function? If not, then unless there are express terms in the contract, or in the statute or regulations adding that unrelated function to their duties, in our view it would be inappropriate to find that these functions are mandatory.

Statutory Extensions of the Contract

The Form 2 agreement specifically incorporates Sections 41, 48 and 96 of **The Public Schools Act**, hereinafter referred to in part.

Section 41(1) reads as follows:

> "Every 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:

(i) subject to this Act and the regulations, prescribe the duties that teachers and other personnel are to perform:

Section 48 (1) defines the general powers of School Boards but does not have a significant impact on the issue of supervision.

Section 96 reads:

"Duties of teacher

Every teacher shall

(a) teach diligently and faithfully according to the terms of his agreement with the School Board and according to this Act and the regulations:

(c) maintain order and discipline in the school."

With respect to Section 41, it should be noted that the School Board has a duty to provide adequate school accommodation for the resident persons who have the right to attend school under Section 41(1)(a). In my view the Board's responsibilities are not an issue. Clearly, the District (Board) has an obligation to provide lunchhour facilities for certain students. The question remains who, if anyone is obliged to supervise those students during the noon hours?

The balance of Section 41 is in my opinion not determinative of the issue. Subsection (g) clearly gives the District the authority to hire "other personnel" as well as teachers in order to properly discharge their obligations. The evidence reveals that teacher aides, in fact, have been hired

by the District. These individuals need not be qualified as teachers but are responsible adults who may assist teachers. The Board has according to the evidence delegated to teachers' aides from time to time the responsibility of providing lunch hour supervision. Therefore, the Board has indicated that they are capable of providing other personnel to discharge the function in question.

Section 91(2) empowers the School Board "subject to the Act and Regulations" to authorize the Principal to leave pupils in the care of a teacher's aide or other designated responsible person without having a teacher present. Nevertheless, this does not resolve the ultimate issue as to whether or not the School Board is in a position to oblige the Teachers to provide this supervision. Section 41(1)(i) allows the School Board to "prescribe the duties that teachers and other personnel have to perform". Do these sections directly or by necessary implication confer upon the Board the right to demand noon hour supervision of its teachers? In our view these sections must be construed in a manner consistent with what are known to be the functions of a teacher. As was previously stated, these sections could not have contemplated a teacher being assigned janitorial functions. Therefore, the obligation created by this section must be limited to prescribing teachers duties in the classroom or with respect to functions directly related to their teaching capacity. In so saying, I am not limiting the teaching capacity to classroom instruction, as was conceded in argument by counsel for the Teachers. There may be many extra-curricular functions in the field of culture or physical education which in a proper case could be related to the teaching function. Nevertheless, unless the balance of the Act or regulations clearly specify that the act of supervising students while they consume their lunch

is a teaching function, this section does not in and of itself confer the authority to make such activity mandatory since it clearly could also be performed by other personel who are less highly trained and, indeed, less highly paid.

Regulations Which Extend the Contract

Reference was also made to the regulations under **The Public Schools Act** and under **The Education and Administration Act**. Regulation No. 250/80 has some significance.

Section 29, states that the principal is "in charge of the school in respect of all matters of organization, management, discipline and instruction". Section 35 states that "the principal is responsible for the supervision of pupils, buildings and grounds during school hours." Section 37 states that "every teacher shall be on duty in the school at least ten minutes before the opening of the forenoon session or at least five minutes before the opening of the afternoon session unless prevented from so doing by exceptional circumstances."

The most reasonable interpretation of Sections 29 and 35 is that the principal has the responsibility to ensure that the pupils are supervised during the noon hour recess if we accept the District's argument that the lunch period is during school hours. This still does not answer the question as to whether or not that supervision must be provided by teachers as opposed to other personnel.

Section 37 is once again not particularly helpful since it prescribes only a minimum responsibility for each teacher. While it is clear that the meaning of the phrase "at least ten minutes before the opening of the forenoon session and at least five minutes before the opening of the afternoon session" sets only a minimum standard it seems to me that it is not logical to conclude that the regulation by fixing a minimal standard of duty thereby establishes the converse proposition argued by the District, namely, an open-ended mandatory obligation to perform duties beyond that regulated standard. With the greatest of respect, it is our view that the plain words of that section lead only to the conclusion that a competent teacher may on a voluntary basis wish to provide greater services than are required by regulation. Furthermore, in any event, the section does not in plain words create the converse obligation, namely, to perform during the lunch hour period a substantially different, additional, form of work.

Manitoba Regulation 4/81 as amended by Manitoba Regulation 29/83, under **The Public Schools Act** contains the following relevant sections:

> "(1) Unless the Minister gives specific written approval of other arrangements the instructional day shall be not less than 5½ hours, including recesses, but excluding the midday intermission".
>
> "(2) Subject to sub-section (1) any School Board may by resolution duly recorded in its minutes determine the hours of opening and closing as well as the time and duration of the midday intermission."
>
> "(3) At the grades I to VI levels, both grades

> inclusive, there shall be a recess of not less than 10 and not more than 15 minutes each forenoon and afternoon, and of not less than one hour or more than 1½ hours during the middle of the school day and every child in those levels shall be given those recesses."

The balance of Regulation 4/81 fixes the holiday and vacation periods and provides a formula for determining the number of teaching days.

This regulation establishes the length of the instructional day and the number of instructional days which a teacher is obliged to provide. We donot think it can be fairly argued on behalf of the Teachers that the instructional day defines the limits of the teacher's responsibilities. Nor do wethink that it is fair to say that their counsel advanced this argument. His argument remains that the instructional day is merely a guide to the central obligation of the Teachers. There may be other ancilliary obligations related to their teaching function. However, supervising children while they eat their lunch is not an obligation which should be inferred.

A clear distinction exists in the regulation between the morning or afternoon recess and the noon hour recess. All teachers are required to be on the premises during these brief morning and afternoon recesses since they are part of the instructional day. On the other hand, Section 1 specifically excludes the noon hour recess from the instructional day. While not determinative it is significant that the instructional day was not simply extended by the Regulation to include provision for the noon hour intermission.

In accordance with Section 3 the midday intermission may at

the option of the School Board, be fixed at any time between one hour and one and a half hours. This discretion is vested solely and unilaterally in the School Board. Therefore, clear language should be required to allow the mandatory workday of the teacher to be extended unilaterally in such a substantial fashion. On a purely arithmetic basis it is clear that the addition of one half hour to the lunch recess could add in excess of two weeks of mandated duty time to the Teachers' contract. Normal rules of statutory interpretation would seem to indicate that this result should not be implied from vague terminology. Furthermore, the evidence established through the principal that if a teacher is not required for noon hour supervision, it is understood that the Teachers' noon hours are free time as they would be with any other employee on a lunch break.

Counsel for the District referred to Manitoba Regulation 6/81 and, in particular Sections 2, 3 and 5, which state that

Section 2 reads:

"a person having care and charge of pupils

(a) shall be a responsible adult person; and

(b) shall subject to the Public Schools Act, the regulations, and the instruction of the school board, come under the direct supervision of a teacher designated by the principal of the school to which he is assigned.

Section 3 reads:

"A para-professional shall perform such duties as are assigned to him by the principal, subject

to the instructions of the school board and the superintendent: but those duties shall not include

(a) the organization and management of the classroom;

(b) the planning of teaching strategies: and

(c) the direction of learning experiences of pupils, including

(i) the assessment of individual needs of the pupils;

(ii) the selection of materials to meet pupil needs; and

(iii) the evaluation of pupil progress."

Section 5 reads:

(1) In the absence of a teacher, a para-professional shall not assume or be assigned duties reserved for teachers, as set out in clauses (a), (b), and (c) of Section 3.

(2) A para-professional shall not function in a classroom role if a certified teacher is not available for direction and guidance.

Sections 3 and 5 make it clear that para-professionals shall not be assigned duties reserved for teachers, and in specific, duties related to the classroom or learning experience without the supervision of a teacher. However, by necessary implication, a para-professional can be assigned functions not directly related to the classroom without the need for teacher supervision. Therefore, Paragraph 2 must be interpreted as meaning that where assigned a teaching function the teacher shall act as the para-professional's supervisor.

Furthermore, logic demands that the interpretation of these sections be consistent with the practice of employing teachers' aides to relieve School Divisions of the need to employ teachers for less demanding tasks. It would seem absurd to require an adult teacher aide to supervise a lunchroom and require a teacher to stand beside the aide. Any responsible adult could perform this task. Similarly, there are no doubt other functions which teacher aides can perform outside of the teaching area that do not require the professional expertise of the teacher. The teacher purports to be no more than an expert in the area of teaching. Therefore, it seems logical to assume that the most reasonable interpretation of this section is that when duties are performed within the sphere of teaching those duties shall be performed by the teacher or by some person who is directly supervised by the teacher. In areas not directly related to the teaching function it is reasonable to assume that Section 3 contemplates a para-professional having an independent function.

Counsel for the District argued that the statute and regulations require discipline be maintained in the school during noon hour intermissions. With respect, this argument merely raises the question of who shall provide the supervision. It has been argued that only the Teachers are available to discharge the responsibility for supervision. However, the evidence in this case establishes that other personnel exist or could be hired to perform this role.

It must be kept in mind that the regulations we have reviewed are intended to apply and do apply to school districts and in particular schools where no students require noon hour supervision. Indeed, in some school divisions in Manitoba it was agreed that there are schools where noon hour

supervision is required and other schools where no students stay for lunch. Furthermore, the supervision requirements may vary greatly from year to year as was the case historically in the Snow Lake District. All teachers in Manitoba share substantially the same Form 2 contract. Only Winnipeg School Division No. 1 and Mystery Lake School Division employ a variation of the standard form. These regulations have been passed to apply to all teachers within the province. Therefore, it is difficult to imply an obligation greater than the specific duties created by the clear wording of the agreement, Act or Regulations. Statutory obligations to provide personal services should not be constructed from ambiguous terminology.

In conclusion, after reviewing the evidence, the Act and the regulations, we are not persuaded that the plain meaning of the collective agreement between the Teachers and the District requires teachers to provide noon hour supervision on a mandatory basis unless our reading of the Act, regulations and collective agreement is altered by a review of previously decided cases.

Review of Authorities

It has been submitted that the issue of whether or not noon hour supervision is mandatory has already been determined by the highest authority. The case of **Winnipeg Teachers Association No. 1 and The Manitoba Teachers' Society vs. Winnipeg School Division No. 1** (1975) 75 C.L.L.C. 15-372 (S.C.C.) and (1973) 36 D.L.R. (3d) 736 (Man. C.A.) must be considered very carefully as it does relate to the issue before us. Counsel for the School

District very ably urged that the Board should be bound by the ruling in that decision or at least find it highly persuasive since the facts before the court were almost identical to the facts in this case.

Let me say from the outset that I agree that the facts considered by the courts were similar to the facts presented to this Arbitration Board. On the other hand, they are not identical. Therefore, it is necessary to determine if those differences form distinctions of substance.

The Supreme Court unanimously endorsed the judgment of the Court of Appeal by upholding the finding that the Winnipeg Teachers' Association was obliged under their contract to provide noon hour supervision to the students. It may be important to note that the essential question of that appeal as put by Mr. Justice Hall and adopted by Mr. Justice Martland was held at Page 15,374 to be

> "whether school teachers of the Winnipeg School Division No. 1 are under a duty, arising from contractual obligations, to provide noon hour supervision at secondary schools for students under the direction of school principals."

Chief Justice Laskin and Mr. Justice Martland are in agreement that this is the central issue. With respect to the reasons and disposition of this issue the court unanimously adopts the reasons of the Chief Justice. The focal point of their reasoning was the effect of the Code of Rules and Regulations of the Division. This Code was specifically adopted in the collective agreement between the parties to the appeal. No such Code of Rules and Regulations exists in the collective agreement before us. Therefore, the

collective agreement in that appeal is not strictly speaking identical to the collective agreement in the case before the Board. Nevertheless, it remains to be determined whether the difference is a distinction of substance.

Chief Justice Laskin was assisted in his interpretation of the Winnipeg School Division No. I contract by the fact that noon hour supervision requirements had been a specific part of previous individual contracts with the Teachers. This specific requirement was deleted from the body of the contract when the parties accepted the Code of Rules and Regulations. This posed the question of whether or not the obligation was removed or merely transferred into a different form.

The Chief Justice embarked upon a close scrutiny of the impact of the Code in order to determine whether both of the parties must be found to have intended that this obligation remained part of their collective agreement. The most significant portion of these reasons commences at the bottom of Page 15,378 and concludes on the following page. These reasons are of such significance to the matter before this Board that despite their length we wish to quote directly from them:

> "The Court of Appeal founded itself on this point on article 10 of the collective agreement which, in its relevant part, reads as follows:
>
> '10. APPLICABILITY OF REGULATIONS, BY-LAWS AND CODE OF RULES'
>
> This agreement is made subject to the provisions of **The Public Schools Act**, **The School Attendance Act** and the regulations made under **The Education Department Act**. Except as hereinafter provided, the regulations, By-laws and Code of Rules shall remain in force during the term of

> this agreement and it is understood and agreed that no changes shall be made in the forms of such agreements or in the said Regulations or By-laws or in the code of Rules of the Division which affect the terms or conditions of employment of teachers by the Division except by agreement of the parties hereto and subject to the approval of the Minister under **The Public Schools Act**, if such approval is required.'

The reference in this article to the Code of Rule and Regulations took the Court of Appeal to s. 3.1 thereof dealing with the "Duties of Principals", and the Court referred, inter alia, to items 1 and 6 of the foregoing section. These provisions (including the general specification of the duties of a principal) are as follows:

> '3.1 - Duties of Principals
>
> The principal shall be responsible to the superintendent for administering the general policies and programs of the Division, and for keeping his staff informed about such policies and programs. Subject to the provisions of **"The Public Schools Act"**, the **"Regulations of the Department of Education"**, this **"Code of Rules"**, and the directives contained in the **"Administrative Manual"**, the principal shall be responsible for the detailed organization of the shcool, and for the supervision of all personnel working in the school.
>
> In carrying out the above, the principal's powers and duties shall include responsibility for the following:
>
> 1. the assignment and supervision of teachers, and the supervision of the instructional program.
>
> ...
>
> 6. the organization of the supervision of pupil activities in school buildings and on school grounds. He shall make provision for the supervision of the school during the noon recess and before assembling in the morning and immediately after dismissal in the afternoon.' ...

Section 3.4 of the Code, heading Duties of Teachers

(and I have earlier quoted item 2) opens with the following words:

> 'Teachers shall carry out their duties in accordance with the regulations of the Department of Education and of the school system under the direction of the principal.'

Item 1 of this provision reads as follows:

> '1. Teachers shall be responsible for taking all reasonable precautions to safeguard the health and general well-being of pupils in their charge and for any or all pupils of the school as assigned by the principal of the school. They shall enforce the rules governing the conduct of pupils as such rules may be prescribed by the Department of Education, the School Board, the superintendent, or the principal. They shall establish conditions and practices in their classrooms that will contribute to the physical and mental health of the pupils and they shall report promptly to the principal any serious accident or illness affecting pupils in their charge.'

Implied contractual obligation

> As I read the reasons of the Court of Appeal, the foregoing provisions were those mainly relied upon to support a finding of an implied contractual obligation upon the Teachers to provide noon-hour supervision under a rota system."

Based on the foregoing passages, it is clear that the decision of the Court of Appeal as interpreted by the Supreme Court turned entirely on its own facts and in particular turned on the specific provisions of the Code of Rules.

The Chief Justice further states at Page 15.379:

> "I am satisfied that there is nothing in the collective agreement nor in any of the documents or legislation which are made part thereof or to which it is

> subject that expressly puts upon the Teachers a duty of noon hour supervision".

This analysis is in accord with our earlier analysis of the collective agreement, statute and regulations in the matter before us. Furthermore, the Chief Justice goes on to emphasize the factual nature of his finding and the importance of the Code to his conclusion still at page 15,379 where he concludes by saying:

> "What is however evident to me under the collective agreement relations between the parties here, is that the agreement as extended by the referential documents, contemplates the assignment of duties to carry out the principle objects of the enterprise in which the parties are engaged and which they have agreed to promote under terms both general and specific."

The phrase "referential documents" clearly refers to the Code of Rules present in that case.

It is therefore of great significance that no code of rules forms part of the grievance before this Board. The duty to provide noon hour supervision in that case was founded upon the Code. While certain parts of that Code merely duplicate parts of the Act and Regulations before us, significant parts of that Code are unique.

In, particular, item 1 of Section 3.4 is significantly absent from the agreement, Act or Regulations before us. Item 1 clearly confers an obligation upon the teacher to safeguard

> "the health and general well-being of the pupils in their charge and for any and all pupils of the school as assigned by the principal of the school." (my emphasis)

Section 3.1 of that Code is also absent from the present collective agreement, Act and Regulations. This section enabled the Court to find that the Teachers agreed specifically to accept such supervisory assignments as the principal sees fit to give under the power the Teachers conferred upon him by agreeing to section 3.1 of the code. Item 6 specifically contemplates noon hour supervision. When read together and in light of the specific sections of the prior agreement which the Code replaced these sections lead to the conclusion that an obligation to provide noon hour supervision existed.

An analysis of the Court of Appeal decision is also instructive since that decision was affirmed albeit with somewhat different reasons in the Supreme Court. Where the reasons for affirmation differ we must be guided by the Supreme Court's decision. Nevertheless, the decision and analysis of the reasons of Hall, J.A. writing for he court confirms the view that this appeal turned on the special facts of the collective agreement as one would expect whenever the issue was in essence the interpretation of a particular contractual obgligation. At Page 740 of his decision, Hall J. A. recites a larger portion of Section 3.4 of the Code of Ethics then does the Supreme Court and I find it to be of some significance that he notes that the Code of Rules contained an additional special provision under sub-section 13 as follows:

> "Under the direction of the principal it shall be the duty of the Teachers of each school to maintain regular supervision of the playground."

This provision when coupled with the balance of the provisions of Section 3.4 noted by the Supreme Court further supports the conclusion of an obligation to provide noon hour supervision. Clearly, the Teachers in that appeal agreed to accept assignments to safeguard the health and general well-being of the pupils and to "maintain regular supervision" in the playground. They agreed to accept directions of the principal in this regard and provisions for the supervision of the school during noon recess were specifically contemplated.

Analysis of these parts of the code of ethics led Hall, J.A. to conclude, at Page 741:

> "The code of rules and regulations of the division expressly provides that it is the duty of principals and they are empowered to make provisions for supervision of the school during the noon recess, and as well before assembly in the morning and immediately after dismissal in the afternoon. It is also the responsibility of the principal to assign teachers and to control the instructional program. These duties clearly contemplate that they will be discharged by him and the teaching staff under his direction."

The logic of the Supreme Court's analysis is as persuasive as is the high authority from which it comes. It is clear from the outset that the Teachers may always agree to provide noon hour supervision. The issue before us is whether or not in the particular facts of this agreement they have obligated themselves to do so. In our view they have not. The absence of the provisions which created the basis for implying the contractual obligation in the **Winnipeg Teachers Association** case, supra, is a distinction of substance.

In essence, this grievance turns on the terms of the collective agreement and not on the law. Having reached this conclusion, it is of no consequence that the noon hour supervision required is minimal or governed by reasonable standards. It was not seriously argued before us that the rota system developed by the principal in conjunction with the directions of the School Board was unreasonable. Nor do we so find. Nevertheless, it is our view that that issue only arises in the event that there is a basis upon which the obligation can be implied.

Our conclusion is supported by the fact that no where in the existing collective agreement, statute or regulations does it specifically say that teachers shall be liable for the provision of noon hour supervision of students where required. It is a truism that in most contracts of employment, the hours of employment are strictly defined since this is a basic part of the employment contract. It would be easy to have so defined the Teachers' obligations if it were intended by the contract or the Act and regulations to include this service as part of the Teachers' obligations. In our view, we should be very careful about implying such obligations from statutes and regulations which have universal applicability to differing fact circumstances unless there is no other reasonable inference.

For these reasons, we do not find on the facts of this particular agreement that there is an obligation on the Teachers to provide noon hour supervision. We therefore find that the District does not have the right to require teachers employed by them to provide supervision to students of the School District during the noon hour under the terms of the current collective agreement. This issue is, of course, a matter which could, and no doubt should, form part of the negotiation process for the next collective agreement.

Finally, we wish to commend counsel for both the Teachers and the District for their able presentations of the respective arguments arising from this complex problem. Their efforts have greatly assisted us in the identification of the issues which we were compelled to resolve in order to come to our final conclusion.

DATED this 3rd day of July, A.D. 1986.

JOHN M. SCURFIELD, Chairman

Dated July 4/86
I concur.

DAVID SHROM

IN THE MATTER OF: AN ARBITRATION

BETWEEN:

SNOW LAKE TEACHERS' ASSOCIATION
NO. 45-4 OF THE MANITOBA
TEACHERS' SOCIETY,

- and -

THE SNOW LAKE SCHOOL DISTRICT
NO. 2309.

BOARD

JOHN M. SCURFIELD
GERALD PARKINSON
DAVID SHROM

COUNSEL

MEL MYERS, for the Teachers
ROBERT SIMPSON, for the School District

DISSENT

I have had the advantage of reading the Majority Award and with respect I cannot concur.

The reasons for my decision that I would dismiss the grievance are simple.

Firstly, as the majority finds, there is no suggestion that the Collective Bargaining Agreement has been breached in

any way and there is no suggestion that the Collective Bargaining Agreement incorporates the rights of teachers or the Board of Trustees as they may be found in other statutes and regulations. Accordingly enforcement of The Public Schools Act and regulations thereunder must be left for another body. We are simply an arbitration panel constituted under the Collective Agreement in respect of an alleged violation of the Agreement. As the majority has clearly decided, a violation of the Collective Agreement has not taken place and in fact none has been alleged. The Collective Agreement is completely silent on these topics which are clearly specifically covered by statute and regulation.

Secondly, we have the advantage of the reasoning of the Supreme Court of Canada and the Manitoba Court of Appeal on this exact same topic. The Supreme Court of Canada through the dissent of Laskin indicated that the matter before it in the case of Winnipeg Teachers' Association No. 1 of Manitoba Teachers' Society v. Winnipeg School Division No. 1 (1976) 1 W.W.R. 403, should have been the subject of the grievance and arbitration procedure rather than a civil law suit. The reasoning of the Court in that case was that the Collective Bargaining Agreement at issue incorporated by reference the code of rules of the Division. The code of rules of the Division, as is clearly set out in the Court decisions, covers the same topics as the statute and regulations in the instant case. Accordingly, the dispute before the Courts in the Winnipeg School Division No. 1 case would properly have been the subject matter of an allegation of a breach of the Collective Bargaining Agreement. In the case before us there is no allegation

that the Collective Bargaining Agreement has been breached and there is no incorporation of the statute and regulations by reference or otherwise.

Thirdly, we have once again the advantage of the reasoning of the Supreme Court of Canada and the Court of Appeal of Manitoba in the instant case where those Courts interpreted provisions of the code of rules which are for all intents and purposes exactly the same as the provisions of the Act and regulations applicable to the teachers at Snow Lake. In view of the provisions of the code of rules in the Winnipeg No. 1 case, the Court of Appeal and Supreme Court of Canada clearly held that teachers could not refuse to provide noon hour supervision. Those provisions of the code of rules have been interpreted by the highest authorities in the land. Now, I am of the opinion that the majority of the Board in this case is interpreting the equivalent provisions of the Act and regulations to mean that the provision of supervision of students in the schools is voluntary on the part of teachers. I find that a traumatizing disregard for precedent and regardless of precedent a conclusion that cannot be supported. If we are to allow teachers to turn their backs on the supervision of students during periods of time where it is necessary for them to be in the school, what are we really telling the teachers that their contract consists of?

Let us start with the Form 2 contract. The majority of the Board ignores the true content of paragraph 4 of that

statutory contract. In that paragraph the teacher covenants "...to teach diligently and faithfully and to conduct the work assigned by and under the authority of the said School Board during the period of this employment according to the law and regulations in that behalf in effect in the Province of Manitoba, and to perform such duties and to teach such subjects as may from time to time be assigned in accordance with the statutes and regulations of the Department of Education of the said Province."

Next, the majority of the Board does not give effect to Section 96 of The Public Schools Act with respect to duties of the teacher and specifically does not deal with 96(c) "Maintain order and discipline in the school;". The Board does not give effect to Section 35 of Manitoba Regulation 250/80 which speaks of a teacher, a principal who is covered by the Collective Bargaining Agreement in the following manner: "The Principal is responsible for the supervision of pupils, buildings and grounds during school hours." Section 40 of the same regulation clearly requires that teacher to work as follows: "The Principal shall exercise disciplinary authority over the conduct of each pupil of his school from the time of the pupil's arrival at school until his departure for the day, except during any period when the pupil is absent from the school premises at the request of his parent or guardian." I return to the Manitoba Court of Appeal decision to show that the provisions of the code of rules relied upon by the Courts are now reflected entirely by the Act and regulations. The majority of the Court of Appeal cited item No. 6 from the code of rules:

"The organization of the supervision of pupil activities in school buildings and on school grounds. He shall make provision for the supervision of the school during the noon recess and before assembling in the morning and immediately after dismissal in the afternoon. In elementary schools this shall be intended to include active supervision of the playground 15 minues before commencement of classes in the morning and 10 minutes before commencement of classes in the afternoon on days when children are playing outside."

To reflect this provision one need only have reference to items No. 35 and 40 in Manitoba Regulation 250/80.

Next, the Manitoba Court of Appeal emphasized Item 3.4 from the code of rules: "Teachers shall carry out their duties in accordance with the regulations of the Department of Education and of the School System under the direction of the principal."

One need only have reference to paragraph No. 4 of the Form 2 contract, Section 96 of The Public Schools Act and Section 29 of Manitoba Regulation 250/80 to see that this provision of the code of rules is a matter of statute, statutory contract and regulation.

Next, the Court relied upon Item No. 2 of the code of rules as follows:

"Teachers shall register in person in their respective buildings and be on duty at least 15 minutes before the opening hour in the morning and 5 minutes before the opening hour in the afternoon." This is reflected in Section No. 37 of Manitoba Regulation 250/80: "Every teacher shall be on duty in the school at least 10 minutes before the opening of the forenoon session and at least 5 minutes before the opening of the afternoon session, unless prevented from so doing by exceptional circumstances.

Next, the Court emphasized Item No. 13 of the code: "Under the direction of the principal, it shall be the duty of the teachers of each school to maintain regular supervision of the playground." Once again, it is only necessary to read Items 35, 40 and 29 of the Regulation 250/80 to see that this matter is once again a matter of law at the present time.

I would be remiss in leaving this topic without pointing out that the Collective Agreement provides for an annual salary and does not impose within itself any obligation on teachers to teach one hour a day, 5 hours a day, or whatever. It is inconceivable that the teachers would be permitted to divide out duties through the device of this grievance under a Collective Agreement which is silent as to the topic being grieved.

The majority of the Board seems to have proceeded under the assumption that all teachers are providing 5½ hours of

instruction per day. We had no such evidence before us. I would be astonished if anybody maintained that that were a fact.

Following what I assume to be a misapprehension of the effect of the regulation as to the amount of teaching an individual teacher does, the majority of the Board goes on to find: "Therefore, clear language should be required to allow the mandatory work day of the teacher to be extended unilaterally in such a substantial fashion." We had no evidence that there was anything mandatory in any situation whereby a teacher had to teach 5½ hours a day and in fact did so without fail. If the Board is making such a finding of fact and using such a fact to buttress its interpretation, the parties should have at least been permitted the opportunity to comment in evidence on the topic. The Board then goes on to say: "On a purely arithmetic basis, it is clear that the addition of one-half hour to the lunch recess could add in excess of two weeks of mandated duty time to the teachers' contract." Nobody was given an opportunity to comment on that finding through evidence. I don't understand how that finding could have been made. I understood the evidence to be that each teacher might have to provide the supervision once every two months. Even if the Board was correct in the assumptions it made as to the evidence which might have been put before it, I am not overly distressed to find that a teacher might actually have to work 5½ hours per day for 190 days and therefore put in a work year of 1,045 hours, approximately one half of the work

year all other employees in the province are required to put in. Why the majority of the Board would be distraught to find that a teacher had to put in an extra 2 or 3 hours per year in order to earn an annual salary of over $40,000.00 for a little over 1,000 hours' work is beyond me.

In sum, I would have no difficulty in dismissing the grievance for the reasons given.

All of which is respectfully submitted.

DATED at Winnipeg, this 2 day of July, A.D. 1986.

G.D. Parkinson,
Board Member