

BEFORE THE ARBITRATOR

 :
 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 MENOMINEE INDIAN SCHOOL DISTRICT : Case 30
 : No. 44975
 and : MA-6471
 :
 UNITED NORTHEAST EDUCATORS :
 :

Appearances:

Mr. James Blank, Executive Director, United Northeast Educators on behalf
 of the Local Union.
Mr. Robert Burns, Godfrey & Kahn, S.C., on behalf of the District.

ARBITRATION AWARD

According to the terms of the 1989-91 collective bargaining agreement between the parties, the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as an impartial arbitrator to hear and resolve a dispute between them involving the District's alleged failure and refusal to pay elementary teachers substitution pay for remaining in their classrooms and instructing in special areas such as Menominee language, art, music, physical education, guidance and library when the special area teachers are absent. The undersigned was designated arbitrator and made full written disclosures to which there were no objections raised. Hearing was originally scheduled for February 28, and April 17, 1991, but it was held in abeyance at the parties' request pending possible settlement; the hearing was then rescheduled for and held on May 22, 1991 when settlement efforts failed. The hearing was held on May 22nd at Keshena, Wisconsin and a stenographic transcript thereof was made and received on May 31, 1991. The parties submitted their initial briefs by August 2, 1991 and their post-hearing reply briefs by September 10, 1991 and those were exchanged by the undersigned.

ISSUES:

The parties were unable to stipulate to the issues herein but they stipulated to allow the undersigned to frame the issues herein. The Union proposed the following issues for consideration:

Did the District violate Article X (J) of the collective bargaining agreement when it refused to pay and continues to refuse to pay pro-rata pay of no less than one hour to all elementary school teachers who substitute for Menominee language, guidance, library, art, music and physical education teachers who are absent? If so, what is the appropriate remedy?

The District proposed the following issues for consideration:

Did the District violate Article IX of the collective bargaining agreement by directing the grievants to remain in their classrooms during the subject areas addressed by the grievance? If so, what is the appropriate remedy?

Based upon the relevant evidence and argument herein, I conclude that the issues herein shall be as follows:

- 1) Did the District violate the collective bargaining agreement and/or past practice when it ceased paying elementary school teachers pro-rata pay when they replace absent special area teachers in their own classrooms during Menominee language, guidance, library, art, music and physical education class time?
- 2) If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

ARTICLE II
Management Rights

Management retains all rights of possession, care, control and management that it has by law, and retains the right to exercise these functions during the term of the collective bargaining agreement except to the precise extent such functions and rights are explicitly, clearly, and unequivocally restricted by the express terms of the Agreement. These rights include, but are not limited by enumeration to the following rights:

1. To establish and require observance of reasonable work rules and schedules of work;
2. To hire, promote, transfer, schedule, and assign employees to positions with the school system;
3. To establish quality standards and evaluate employee performance in accordance with (sic) evaluation procedure set forth in this contract;
4. To maintain efficiency of school system operations;
5. To take whatever action is necessary to comply with State or Federal laws;
6. To determine the methods, means and personnel by which school system operations are to be conducted;
7. To determine the educational policies of the school district;
8. To determine the means and methods of

instruction, the selection of textbooks and other teaching material, and the use of teaching aids;

9. Nothing in this agreement shall limit the district's contracting or subcontracting of work or shall require the district to continue in existence any of its present programs in its (sic) present form and/or location or on any other basis.

ARTICLE IX
Class Hours and Assignments

- A. The normal work day and week shall be eight (8) hours per day, forty hours per week, including the thirty (30) minutes duty-free lunch. The teachers will be dismissed at 3:30 p.m. on the days that the open house is held in the evening.
- B. The normal work load for junior/senior high school teachers shall be six assignments, one preparation period, one study hall, and one lunch period per day.
- C. Attendance at staff meetings may be required, however, such meetings shall not extend beyond 4:00 p.m. except in unusual circumstances.
- D. Realizing that teachers have personal commitments, teachers will be notified, whenever possible, at least one month in advance for specific after school activities such as Christmas programs.
- E. Teachers are expected to attend school or community functions beyond their regular working day at least four (4) times per year.
- F. Elementary music and all district art teachers will receive \$100 per event after the first two (2) events in which they direct or supervise the students when requested by their principal.
- G. Teachers who teach seven periods requiring daily preparation will receive additional pay at the amount of 1/7th the base salary. Teachers who have five (5) or more period preparations will receive 2% of the base salary per semester for each extra prep. This does not include special education teachers.
- H. Teachers who teach seven periods requiring daily preparation, but less than five (5) days per week will be prorated as follows:
 1. Four (4) days per week, 80% of base salary.
 2. Three (3) days per week, 60% of base salary.

3. Two (2) days per week, 40% of base salary.
- I. Total elementary instruction time (classroom and recess time) shall not exceed minimum included in DPI Standard F. Elementary teachers shall be guaranteed 45 minutes of prep time per day. The balance of the work day (contact and prep time excluded) shall be as per administrative direction.
 - J. Teachers who work at more than one (1) work site shall not travel and "set up" time deducted from their preparation time and will be allowed five minutes on both ends of the driving to "set up" and "clean-up".
 - K. All teachers will be notified one (1) week before the end of school of their tentative class assignment(s) and schedules for the following year. Adjustments may be made up until two (2) weeks after the start of the next school year.
 - L. Teachers who are taking classes at an accredited college or university will be released by 3:15 p.m. to arrive at class on time. Proof of a need for early release and of attendance will be required.
 - M. The Board will continue to keep elementary class sizes at approximately (20). The Junior High/High School Principal will be directed to make every effort to balance classes with the opportunity for staff input.
 - N. Teachers requested to attend seminars, workshops and extra meetings, including curriculum development, outside of the normal work day will be compensated pro rata of their salary. Teachers may not be forced to attend.

ARTICLE X
Professional Compensation

. . .

- E. Payment for extra duty schedule will not become part of the teachers general contract and payment will be made after completion of the assignment. All extracurricular responsibilities and curricular duties outside of the individual contract will be arranged by a separate, supplemental agreement signed by teacher and school board, and will not be subject to Wisconsin Statute 111.70.
- F. The salary schedule is based upon the regular school calendar as set forth in Article X and the normal teaching assignment as defined in

this Agreement.

The teacher's pro rata hourly/daily rate shall be determined in the following manner:

1. Teacher's Scheduled
Annually Salary = Pro rata
Number of Contracted Days = Pro rata
(sic)
2. Pro rata salary = Pro rata
Maximum teaching hours (8) per day

G. The Board will pay the 6% teacher's share of payments to the Wisconsin Retirement System.

H. If it is necessary to deduct any wages from a teacher's salary due to absence, the rate used shall be determined as follows:

1. Teacher's Scheduled
Annually Salary = Pro rata
Number of Contracted Days = Daily rate
2. Pro rata salary = Pro rata
Maximum teaching hours (8) per day

This shall not apply to absence to attend meetings, inservice programs, workshops, visitations or any other absence authorized by the Board or its agents.

. . .

J. Teachers who substitute shall be paid their hourly pro rata rate. No less than one (1) hour shall be paid for substituting.

. . .

ARTICLE XVIII
Term of Agreement

. . .

B. This Agreement reached as a result of the collective bargaining represents the full and complete agreement between the parties and supersedes all previous agreements between the parties. It is agreed that any matter relating to this current contract term, whether or not referred to in this Agreement, shall not be open for negotiations except as the parties may specifically agree thereto. All terms and conditions of employment not covered by this Agreement, which are not mandatory items for negotiation, shall continue to be subject to the Board's direction and control. No verbal agreements or past practices shall alter the written Agreement between the parties.

BACKGROUND

During negotiations for the 1989-91 contract, the parties negotiated the language shown above contained in Article X (J), eliminating the following language which had previously appeared in Article X (J):

- J. Teachers who substitute shall be paid twelve dollar (sic) and fifty cents (12.50) per period when substituting during their preparation period. Elementary teachers must perform specific activity (sic) to receive the twelve dollars and fifty cents (\$12.50) compensation.

Other changes were made in Article X J. which are not at issue here. 1/

The parties also changed the language of Article IX during their negotiations for the 1989-91 agreement, deleting the following:

- I. Teachers who have five (5) or more daily preparations will receive 1/8th of the base salary.
- J. Teachers who are assigned six (6) periods requiring different daily period preparations shall be relieved of a study hall or receive \$750.00 per semester.

The parties then renumbered the former Article IX (K) as Article IX (I), changing the content of the language therein slightly, by referring therein to DPI Standard F, as shown above in the Relevant Contract Language Section. The old language was as follows:

- K. Total elementary instruction time (classroom and recess time) shall not exceed D.P.I. minimum guidelines. Elementary teachers shall be guaranteed 45 minutes of prep time per day. The balance of the work day (contact and prep time excluded) shall be as per administrative direction.

The parties stipulated that for the 1987 through 1990 school years, the District made payments to elementary school teachers pursuant to their submission of "substitute teaching" forms for their having taught in the areas of Menominee language, art, music, physical education, guidance and library when teachers in those special areas were absent. District Administrator Kenneth Bond was not employed by the District and was not a member of the Board's negotiating team which negotiated the 1989-91 agreement. Mr. Bond began his employment with the District following the 1989-90 school year.

Facts:

1/ For example, the parties deleted an Article X (I) which had stated that teachers would be paid 21 cents per mile for District travel, replacing that section with the Article X (I), shown above. Also, Article X (B) paragraph 2 was added to the 1989-91 agreement. The remainder of Article X was unchanged from the 1987-89 agreement.

Union witness and bargaining committee member Nancy Jensen testified that during the negotiations for the 1989-91 contract, the parties agreed to delete all references in Article X to \$12.50 per hour and to use a pro rata rate instead. Jensen stated that there had been a general decision or tentative agreement to change from the flat rate of \$12.50 per hour to a pro rata rate in all instances where the flat rate had previously been used. There was no discussion at bargaining regarding any District intention to cease paying substitution pay at the Article X rate as it had previously been paid, due to the changes in the language of Article X. At bargaining, the District never mentioned or discussed any administrative decisions or directions it might later give to elementary school teachers.

District bargaining team and Board of Education member, Mr. Matt Otradovec stated that neither the definition of substitution nor what types of work would qualify for substitution pay were ever discussed during negotiations for the 1989-91 agreement. Mr. Otradovec also stated that he had no idea that the District had been paying elementary school teachers for substituting for absent special area teachers and he confirmed that this topic was not discussed at bargaining. Mr. Otradovec stated that the discussion at bargaining of substitution had revolved around substituting at the high school level. Not until the instant grievance was filed did Mr. Otradovec become aware of the District's prior payments to elementary teachers when teaching in these special areas.

In contrast, the former Keshena Primary Building Principal (from 1985 through 1989), Mr. Jesse Stratton, stated that during his tenure as Building Principal he regularly approved substitution forms for elementary classroom teachers in the situations in dispute here. In addition, as an elementary classroom teacher, Stratton stated that he had consistently been paid substitution pay for teaching in special areas prior to the 1990 school year. It is also clear from Union witnesses' uncontradicted testimony that in the past, elementary teachers left their classrooms if they wished while specialty teachers held class.

The effective labor agreement had been in place for approximately one year when Mr. Bond became District Administrator sometime in 1990. Mr. Bond discovered that the District had been paying elementary classroom teachers substitution pay when they replaced absent specialty teachers in the teachers' own classrooms. Mr. Bond believed that this was inappropriate. Mr. Bond stated that he felt that the classroom teacher should remain in the classroom while a specialty area teacher was instructing to assist in the instruction of his/her classroom students; and that the classroom teacher should not use this time as break time while the specialty teacher was instructing students. Therefore, in Mr. Bond's view, the classroom teacher could not "substitute" for an absent specialty teacher because the classroom teacher was responsible to be present and was already being paid by the District to be present in the classroom as a classroom teacher. Mr. Bond stated that in his opinion, Article X (J) would apply and substitution pay would be payable only in situations where a teacher gives up his/her preparation time or his/her free time to substitute teach.

Mr. Bond, relying upon Article IX (I), then directed elementary teachers to remain in their classrooms during all specialty area classes. Thus, if a specialty teacher was absent, the classroom teacher would automatically be responsible to instruct the specialty if a substitute teacher could not be found. Mr. Bond also instructed Building Principals not to distribute any further substitution forms to elementary classroom teachers seeking substitution pay in the situations covered by the instant grievance.

It is undisputed that no elementary teacher has been deprived of their

guaranteed 45 minutes preparation time due to Mr. Bond's directives. It is also clear that Mr. Bond did not notify the Association of his intention to cease paying elementary teachers substitution pay for replacing absent specialty teachers prior to his issuing the directives described above.

POSITIONS OF THE PARTIES:

Union:

The Union argued that the clear language of Article X (J) of the effective collective bargaining agreement requires that the District pay elementary teachers (who are not specialty teachers) substitution pay when they teach specialties in the absence of a specialty teacher. In addition, the Union asserted that the testamentary and documentary evidence submitted unequivocally demonstrates that the District's long-standing past practice until 1990 had been to pay substitution pay in these circumstances. Newly-hired Superintendent Kenneth Bond changed all of this when he unilaterally decided to cease paying substitution pay in the circumstances in issue here, based upon his interpretation of the language of Article IX (I) and of amended Article X (J), the Union asserted. The Union noted that Mr. Bond had not been present at negotiations for the effective agreement and that he had not been employed by the District during the many years that the practice existed.

Furthermore, in the Union's view, the fact that the parties agreed to change the language of Article X (J) as it appears in the 1989-91 agreement requires that the grievance be sustained: The past practice was reaffirmed by the bargaining history regarding Article X (J). In this regard, the Union pointed out that the evidence clearly showed that no mention was made at bargaining of eliminating substitution pay for elementary teachers, that no definition of substitution was discussed, and that the parties never discussed the categories of work covered, or not covered, by the amended language. As District Administrator Bond was not present at these negotiations, the Union contended, the District cannot successfully argue that its interpretation of Article X (J) is based upon bargaining history.

The Union pointed out that the amendment to Article X (J) made significant changes in that clause, removing any special reference to elementary teachers, removing references to paying teachers for substituting during their prep time, and eliminating the requirement that elementary teachers perform a specific activity in order to receive substitution pay. The amendment also removed the limitation in the old clause, regarding rate of pay (substituting a pro-rata rate for an hourly one). All of these amendments demonstrate that the Union's interpretation of the clause here should be sustained. To allow District Administrator Bond to implement his interpretation of what should constitute substituting in the face of contrary bargaining history, and contrary contract language and past practice, would make a mockery of the bargaining process, the Union contended.

The District's argument that Articles II and IX (I) give it the discretion to order elementary teachers to stay in their classrooms and teach specialties, the Union contended is without any merit. In this regard, the Union stated that these Articles do not give the District the right to require teaching beyond the elementary teacher's contractual responsibility. Further, were the arbitrator to rule in favor of the District based upon these arguments, the District would then have no incentive to find and employ qualified specialty teachers. The Union asserted that elementary teachers who teach in the place of absent specialty teachers cannot be substituting for themselves because they are not assigned or hired to teach these specialties. Indeed, the Union pointed out that with the exception of Menominee language teachers, all other specialty teachers are certified teachers with full

teaching loads and assignments at the District. The Union also urged that no matter what definition of "substitute" is used here, elementary teachers are in fact substituting and should be paid in accordance with Article X (J) requirements.

District:

The District asserted that the time for which the Union seeks extra compensation is within employes' normal work day and is therefore already compensated and subject to complete administrative control. This assertion, the District pointed out, is supported by the clear language of Article IX (I), which allows the District the discretion to direct work time. The District urged that because elementary teachers were already present, being paid and guaranteed their 45 minute preparation period during alleged substitution times, if teachers were to receive "sub pay" in addition to their regular pay, this would amount to "double-dipping". In addition, the District pointed out that beyond the clear language of Article IX (I), which it asserted supports its view of this case, Article II, Management Rights also supports the District's view here. Finally, since the contract contains general language extinguishing past practices in Article XVIII, this provision also would militate against a finding for the Union, the District contended.

The District noted that were the undersigned to rule in favor of the Union here, this would result in employes being paid their regular rate plus one hour's pro rata pay for doing 15 minutes worth of work (teaching Menominee language). This the District asserted, is an absurd result. The annual cost of the "substitution" claimed, the District Administrator stated would amount to approximately \$10,000. Such a relatively large benefit, the District urged, should be the subject of negotiations, not the subject of grievance arbitration. The District also asserted that past practice is not relevant here because this case does not concern conflicting interpretations of a single contract clause. Rather, the District asserted that it chose to use one clear clause of the agreement (Article IX) to support its denial of "sub" pay in the situations here and past practice cannot be placed in issue. Because the District's actions here did not violate Article IX, in the District's view, the grievance should be denied and dismissed.

Reply Briefs:

The parties filed reply briefs with the undersigned by September 10, 1991 by mutual agreement and the undersigned thereafter exchanged these.

Union:

The Union pointed out that the issue here is not whether the District can direct the work of elementary teachers but whether the District's direction of those teachers results in the classroom teacher substituting for absent specialty teachers originally assigned to teach the class. The Union asserted that the evidence clearly demonstrated that elementary school classroom teachers are substituting in these circumstances. The Union also pointed out that to find in favor of the District would require the undersigned to ignore bargaining history, past practice and the clear language of Article X (J), and to give effect to the general language of Articles II and IX over the specific language of Article X (J). All limitations on the payment of sub pay having been removed from the 1989-91, the Union urged, this supports the Union's view of this case. If the District's argument that elementary teachers should not be paid to sub during their normal workday were to prevail, the District would never have to pay sub pay because all substitution occurs during the normal school day, the Union noted. In sum, the Union urged that even if the result it seeks here may appear harsh, the District must be charged with understanding the clear language of Article X (J) negotiated by the parties. If the District believes it should only have to pay elementary teachers sub pay when they teach classes during their prep time, then the District should attempt to negotiate this into the contract. This however is not what the specific contract clause relevant here provides for, in the Union's view.

District:

In its reply brief, the District asserted that the Union's argument that the language of Article X (J) is clear assumes that substitution is occurring when it is not. In this case, the District contended that its directive that teachers remain in their classrooms during specialty class periods was within its management rights. In addition, the District argued, because this time was already paid by the District, no substitution could or did occur. In addition, the District contended that bargaining history is not relevant here because substitution is not occurring and Article X (J) is not in issue. The fact that District Administrator Bond was not present at bargaining does not detract from his proper interpretation of Articles II and IX to allow the District to do as he ordered here, in the District's view. Finally, the District disputed the Union's distinction between teaching and assisting during specialty periods, asserting that the District has the discretion to assign this part of each teacher's day as it sees fit pursuant to Articles II and IX.

DISCUSSION:

Based upon the record here, it is evident that the language of amended Article X (J) is clear. However, nowhere in that Article (or otherwise in the labor agreement) do the parties define what "substitution" is. On this point, arbitral principles would indicate that past practice should fill in the ambiguity. In this regard, I note that in order to decide this case, I need not decide whether elementary teachers must remain in their classrooms when a specialty teacher is teaching class. This issue was not placed squarely before me here and I shall not decide it.

The 1987-89 labor agreement contained language in Article XVIII, Term of Agreement: "No verbal agreements or past practices shall alter the written agreement between the parties." This language is present in the effective agreement. Given this language, a past practice could not legitimately be created to alter the terms of Article X(J). However, beginning in 1987, despite the prohibition contained in Article XVIII and without regard to the language then contained in Article X(J), elementary school classroom teachers were paid substitution pay whenever they taught specialty classes in the

absence of specialty teachers. These payments were apparently made without exception and without regard to whether elementary classroom teachers actually taught "during their preparation period" as required by Article X (J) of the 1987-1989 agreement. The evidence also showed that beginning in 1987, it became customary for elementary teachers to leave their classrooms, if they wished, while specialty teachers taught in their classrooms. During the time these actions were becoming customary, members of the Board of Education, including Mr. Otradovec, had no idea that the District was allowing these actions to be taken on a regular basis.

During negotiations for the 1989-91 labor agreement, the language of Article X (J) was changed. It is significant that no discussion occurred during bargaining for the effective agreement regarding substitution pay for elementary classroom teachers either in the circumstances in issue here or in any other circumstances. Rather, as Board member Otradovec stated (and Union witness Ms. Nancy Jensen corroborated), the parties only discussed substitution pay in the context of High School teachers receiving this pay. Nor was any discussion had regarding what would constitute substituting under the contract.

However, during the entire 1989-90 school year, elementary school classroom teachers were paid substitution pay whenever specialty teachers were absent and the classroom teacher taught the specialty class. In these circumstances, the evidence showed that elementary teachers were paid according to the terms of the amended Article X (J) -- the teacher's pro rata hourly rate for no less than one hour for each substitution. Thus, the activities that had become customary beginning in 1987 survived the changes made in Article X (J) and the District continued to condone these activities and to authorize and to pay elementary school teachers for teaching specialty classes in their classrooms whenever specialty teachers were absent after 1989. 2/

The District's major argument that classroom teachers cannot substitute for themselves begs the question. On this point, I note that from 1987 to the date of the instant hearing, the District has contracted directly with specialty teachers to teach their specialties that the District has paid these teachers pursuant to their contracts; that none of the elementary classroom teachers has served as a specialty teacher unless they were substituting for an absent specialty teacher. Therefore, elementary classroom teachers could not be said to be "substituting for themselves" when replacing an absent specialty teacher. These classroom teachers have not entered into any contracts to provide specialty classes. Rather, they have contracted to provide only classroom teaching at an elementary level. To require elementary classroom teachers to teach specialties not addressed in the labor agreement or their individual employment contracts amounts to requiring them to take on an extra duty without pay. Such a result would be unfair in the context of the facts of this case.

2/ In this regard, I note that from 1987 through the 1989-90 school year, the District printed, maintained and made substitution pay forms available so that elementary teachers could request substitution pay. Elementary school building principal Jesse Stratton not only knew of elementary teachers' actions regarding substitution but he was also paid sub pay while employed by the District as a teacher. Stratton also made substitution forms available to his teachers while employed as a building principal and he regularly authorized substitute pay for elementary classroom teachers (upon receipt of their completed substitution forms). In order to receive payment, District management at the highest level must have authorized payment by the District's payroll agents and elementary teachers then received sub pay.

In this regard, I note that the District would have to pay both the specialty teacher as well as the elementary classroom teacher for the same time if both teachers completely performed their separate, contracted-for assignments. 3/

Furthermore, the District's interpretation of Article IX (I) would require one to read out the parenthetical exclusion of contact time from the Article. This is not a preferred outcome in arbitral determinations. In addition, Article IX does not address itself to substitution or substitution pay. Rather, as the Union noted, it is a preferred arbitral policy to give affect to the specific (Article X (J)) over the general (Article IX (I)).

None of this is meant to imply that the District cannot ultimately do as it attempted to do here. However, the District must properly notify the Union, upon the expiration of the 1989-91 agreement, that it wishes to repudiate the practice of paying sub pay in the situations here whenever a specialty class is scheduled and the specialty teacher is absent. At this point, it will be the Union's burden to codify the past practice in its entirety in a successor agreement through the process of collective bargaining or the practice will be extinguished. Based upon the above analysis of the relevant evidence here, I issue the following

AWARD

The District violated the collective bargaining agreement and past practice when it ceased paying elementary school teachers pro rata pay when they replace absent specialty teachers in their own classrooms during Menominee language, guidance, library, art, music and physical education class time.

The District shall make all elementary school classroom teachers whole for any loss of substitution pay and any benefits which are due owing because of the District's refusal to pay substitution pay in the circumstances involved in this case, from the date of Mr. Bond's directive (to cease paying such substitution pay) forward. The District shall also immediately make substitution pay forms available to elementary school classroom teachers and it shall in the future authorize and pay substitution pay to teachers who teach

3/ Were the District to prevail on its arguments here, it could do away with substitutions entirely, expect classroom teachers to teach all specialties, avoid attempting to recruit qualified specialists and therefore avoid any payments to specialty teachers. This would give the District more than it bargained for. The fact that the District has in the past paid more dearly for classroom teachers who substitute for Menominee language specialty teachers than for other substitutions is not relevant here. The past practice here was effective during the 1989-90 school year without regard to its costs, which I must presume were known to District managers who authorized sub pay prior to the 1990 school year.

the specialties involved here in their classrooms whenever specialty teachers are absent.

I shall retain jurisdiction of this case pending the Union's notice to me that the District has satisfactorily complied with the Award.

Dated at Madison, Wisconsin this 11th day of October, 1991.

By _____
Sharon Gallagher Dobish, Arbitrator