BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

TREVOR STATE GRADED SCHOOL,
SALEM DISTRICT #7

and

TREVOR EDUCATION ASSOCIATION

Case 16
No. 48578
MA-7645

Appearances:

Wisconsin Association of School Boards, Inc., 122 West Washington Avenue, Madison, WI 53703 by Mr. Barry Forbes, Attorney at Law, appearing on behalf of the Salem School District #7.

Southern Lakes United Educators, Council 26, 124 South Dodge Street, Burlington, WI 53105 by Mr. Dennis Eisenberg, UniServ Director appearing on behalf of the Trevor Education Association.

ARBITRATION AWARD

Pursuant to the grievance procedure contained in their collective bargaining agreement, the Trevor Education Association (hereinafter referred to as the Association) and the Trevor State Graded School, Salem District #7 (hereinafter referred to as the District) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute concerning the amount of preparation time made available to teachers during the school year. The undersigned was designated and a hearing was held on March 5, 1993 at Trevor, Wisconsin at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The parties submitted post-hearing briefs. and the record was closed on May, 3, 1993. Now, having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned makes the following Award.

ISSUE

The parties agreed that the following issues were to be determined herein:

"Did the District violate the collective bargaining agreement, past practice, or

board policy when the District:

a) decreased the teachers' preparation time due to increased student recess supervision responsibilities in the 1992-9.') school year;

b) decreased the teachers' preparation time due to increased contact time resulting from lengthening the student day in the 1992-93 school year;

and, if so, what shall be the remedy?

Two other issues were initially presented, one dealing with the scheduling of detention on days prior to non-contact days, and the other dealing with duty free lunch time. The former was resolved at the hearing and the latter was remanded to the parties for resolution, with the arbitrator retaining jurisdiction. The parties stipulated that, if the District is found to be liable for the change in working conditions, the District will reimburse the affected employees at their per them hourly rate, and return working conditions back to the conditions existing at the end of the 1991-92 school year. The dispute in the area of remedy, if a remedy is ordered, lies with the Association's request for interest on any sums found to be owing to teachers.

RELEVANT CONTRACT PROVISIONS (FROM THE EXPIRED 1988-91 CONTRACT)

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ARTICLE 11 - BOARD FUNCTIONS

A. The right of the Board to operate and manage the school system is recognized, including the determination and direction of the teaching force; the right to plan, direct and control school activities, establish curriculum, a system of promotion and graduation; to schedule classes and assign work load; to determine teaching methods and subjects to be taught; to determine and maintain the effectiveness of the school system; to determine teacher complement: to establish and require observance and adherence to approved Board policy, administrative rules and regulations; to select and terminate teachers; and to discipline and discharge teachers for cause.

B. The foregoing enumeration of the functions of the Board shall not be deemed to exclude other functions of the Board not specifically set forth herein, with the Board retaining all management and Statutory obligations, responsibilities and functions not otherwise specifically nullified by this Agreement.

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ARTICLE X - TEACHER WORKDAY

A. Teacher Hours

All teachers must be at school from 8:00 a.m. to 3:45 p.m. except on Fridays and days before holidays .N,hen teachers ma), leave only after student buses have left the playground. Teachers will from time to time, as necessary, participate in M-Teams, IEP meetings, and supervised detentions which will extend beyond the normal teacher day. If a teacher is attending classes or has a legitimate reason, the Administrator/Principal should be so informed and may grant permission to leave early.

B. Lunch Period

A duty free lunch period of thirty (30) consecutive minutes will be provided each day (Wis. Statute 118.235). The Administrator/Principal shall assign lunch and duty periods equitably to provide appropriate supervision of students in the halls, classrooms and playground during the noon recess.

C. Staff Meetings

All teachers will be expected to attend regular pre-session and post-session meetings. They shall also be required to attend one faculty meeting per month as deemed necessary by the Administrator/Principal, or at the request of the teaching staff. The Administrator/Principal shall schedule such meetings to commence prior to or after the student da), and normal), not extend beyond 5:00 p.m. A written notice of such faculty meetings shall be posted in the teacher's lounge at least one calendar week before the meeting.

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ARTICLE XXII - GRIEVANCE PROCEDURE

A. Purpose: The purpose of this procedure is to provide an orderly method for resolving differences arising during the term of this Agreement. A determined effort shall be made to settle any differences through the use of the grievance procedure, and there shall be no suspension of work or interference with the operations during the term of the Agreement.

B. Definition: A grievance shall be defined as any problem involving a teacher's wages, hours, or conditions of employment or the interpretation, meaning or application of provisions of this Agreement, Board Policies and Administrative Rules, but only as they (the Policies) may relate to a teacher's wages, hours, or conditions of employment.

C. Procedure: Grievance(s) shall be processed in accordance with the following:

. . .

Step. 3 When not settled in Step 2, to the satisfaction of the grievant, either the grievant and the Association, or the Board, or both in concert, may within ten (10) days of receipt of the decision of the Board, submit the grievance to binding arbitration. The arbitrator shall be appointed by the Wisconsin Employment Relations Commission. The cost of the arbitrator and the transcript shall be borne equally by the parties.

. . .

ARTICLE XXIII - STANDARDS CLAUSE

All conditions of employment shall be maintained at not less than the highest minimum standards in effect in the District at the time this Agreement is signed, provided that such conditions shall be improved for the benefit of teachers as required by the express provisions of this Agreement.

This agreement shall not be interpreted or applied to deprive teachers of professional advantages heretofore enjoyed unless expressly stated herein.

BACKGROUND

The District is a grade school district providing general educational services to the people of Trevor, in southeastern Wisconsin. The Association is the exclusive bargaining representative for all regular, non-supervisory certified teaching personnel in the District's employ.

Prior to the 1992-93 school year, the student day was scheduled from 8:30 a.m. to 3:3O p.m. Students in kindergarten through 5th grade took a 15 minute recess at the same time each morning. Supervision of the children was rotated among the six teachers for those grades, with each teacher supervising recess every sixth day. Those teachers not supervising the recess used the time for preparation work, meetings with other teachers and, occasionally, meetings with the principal. On days when the weather did not allow an outside recess. teachers would supervise their own students inside. If a student was kept inside during recess for disciplinary reasons, that student's teacher would stay in the room and monitor the student.

An agent for the District's insurer suggested that the ratio of students to teachers during recess was unreasonably high, and recommended a ratio of approximately 25 students to one teacher. This recommendation was repeated at a meeting of the Parent-Teacher Association's recess committee. Ms. Edna Zimny, the principal, recommended a split recess to the Board of Education, as a way of reducing the student-teacher ratio during recess, and the Board adopted the idea for the 1992-93 school year.

During the 1991-92 school year the District experienced difficulties with its bus company. Three buses were used to transport students, and were scheduled to arrive at 3:30 p.m. each day. One of these buses would first transport area high school students, and was frequently late in picking up the grade school students. The District contacted the bus company to correct this problem. They were told that it would cost them $42,000 to guarantee that all three buses would arrive at 3:30 p.m., but that a 3:35 p.m. arrival could be guaranteed for $22,000 per year.

The District had also been advised by the Department of Public Instruction that its scheduling for students in the 7th and 8th grades was too close to the minimum of 1137 hours per year, and that it should boost its contact time for those students. The lower grades were all in compliance with the minimums for instruction time. Because of the cost savings in scheduling buses five minutes later, and in order to boost contact time in the 7th and 8th grade, the District decided to add five minutes to the student day in 1992-93.

At the in-service meeting before the 1992-93 school year, a schedule was handed out to teachers showing a split afternoon recess for grades K-5, with the kindergarten, first and second grades taking recess from 1:30 to 1:45 p.m. and the third, fourth and fifth grades taking recess from 2:00 to 2:15 p.m. This had the effect of doubling the amount of recess supervision required of the K-5 teachers, adding seven and a half hours of supervision time during the school year. The schedule also showed a five minute increase in the length of the student school day, from 3:30 to 3:35 p.m. This had the effect of increasing contact time for all faculty members by fifteen hours per year. Ms. Zimny advised the teachers that there were changes in the schedule, and asked for their comments and suggestions. No schedule of recess supervisions was presented, and teachers were told to work out a rotation among themselves. As it sorted out, the teachers took about forty-five minutes to complete the scheduling at the in-service. At the suggestion of the teaching staff, the recess for grades 3-5 was moved to the morning. Teachers Jackie Rittmer and Jeaneen Acklam thereafter spent about twenty minutes per month assembling and distributing revised schedules for the recess supervision.

A grievance was filed, asserting that the changes reduced the amount of preparation time available to teachers and increasing the amount of work that had to be performed outside of the normal work day. The grievance also challenged the right of the District to have teachers rather than administrators do the scheduling work for recess rotations. The grievances alleged that the district's actions violated the Standards Clause of the contract. The matter was not resolved in the grievance procedure and was referred to arbitration. Additional facts, as necessary, will be set forth below.

POSITIONS OF THE PARTIES

The Position of the Association

The Association takes the position that the District has violated the contract by unilaterally

altering the content of the work day, increasing the time that teachers are supervising students and thus decreasing the amount of time available for preparation. This has the effect of forcing teachers to take more work home with them. The contract requires that the District maintain conditions of employment at "not less than the highest minimum standards in effect in the District" when the contract was signed. In this case, the assignment of administrative scheduling tasks to teachers Acklam and Rittmer and the assignment of extra duties during the work day clearly breached the Standards Clause. The loss of fifteen hours of preparation time each year for faculty members (and twenty two and a half hours for teachers in grades K-5) is an obvious reduction in the standards enjoyed under the previous schedule. The Association dismisses District arguments that the time was not prep time because it was never formally designated as such. The time was historically put to that use, and the Association argues that the reality of the practice must control over the entirely speculative possibility that the time could have been used for other purposes. In either event, the Association argues, if the time was not prep time, it was then break time within the workday, which would indisputably be an employee benefit subject to the Standards Clause.

The Association asserts that interest should be awarded on the backpay owed to the aggrieved teachers. The law of Wisconsin is that interest should be awarded where there is an ascertainable amount of liquidated damages, and the WERC allows interest in complaint cases. The Association acknowledges that arbitrators have been slow to change their policy of not awarding interest, but cites a scholarly article suggesting that the prevailing view of interest as "punitive" is inaccurate and out of step with today's legal and economic climate. The Association notes that services were rendered in this case under the "work now, grieve later" principle, and that a failure to award interest allows the employer to profit from its contract violation. A wide range of legal theories are available to justify the award of interest, including an avoidance of unjust enrichment for the district; provision of an incentive for early settlement by the parties; the parallel functions of arbitration and courts of law, in which interest is available; and the doctrine of quantum meruit. The recent decision by Arbitrator Kessler in River Falls, M-92-74 (5/92) awarding interest to a teacher made it clear that interest is not a penalty, but simply part and parcel of the remedy needed to make a person whole where monies have been improperly withheld. For these reasons, the association requests an award of monetary damages with interest.

The Position of the District

The District takes the position that there has been no contract violation and that the grievance should be denied. The District argues that the Association has completely failed to prove the existence of a "standard" related to preparation time. There is no designation of any portion of the work day as prep time in any Board policy nor is prep time referred to in the contract. No agent of the Board has ever promised teachers a given amount of prep time during the school day, and a variety of tasks have been assigned to idle teachers during recess in the past, including meetings with the principal and supervision of students, either because weather did not permit them to go outside or because they were detained for disciplinary reasons. The teacher handbook from the 1991-92 school year mentions the use of time before and after the student day

for preparation and planning, but also refers to such uses for the time as individual tutoring, conference with parents and committee work. Since the time at issue in this case has been used for purposes other than preparation, there can not have been a standard established reserving it exclusively for preparation. The supervision and instruction required during the modestly expanded student day is essentially the same character of work as is currently required. There is no evidence that there was ever any agreement between the parties to devote this time exclusively to preparation, and thus there is no contract violation.

Article II of the contract reserves to management the right to schedule classes and assign work load. This provision would clearly encompass the decision to assign recess supervision and extend the pupil day. The District stresses that the teacher work day has not been extended in any way in this case, and cites the decision of Arbitrator Grenig in Waterford Grade School District holding that an increase in the student day without any increase in the teacher day does not constitute a contract violation. The Standards Clause of this contract allows for reductions in standards where allowed by the contract:

> This agreement shall not be interpreted or applied to deprive teachers of professional advantages heretofore enjoyed *unless expressly stated herein*.

Article H expressly allows for the changes made in this case, and thus the Standards Clause is inapplicable by its very terms. For these reasons, the District asks that the grievance be denied.

DISCUSSION

There are three alleged violations of the Standards Clause:

1. The assignment of responsibility for scheduling recess coverage to teachers Acklam and Rittmer;

2. The doubling of recess supervisions for teachers in grades K-5;

3. The extension of the student day by five minutes.

The basic complaint in all three instances is that the amount of prep time during the work day has been reduced, thus causing more work to be performed outside of normal work hours. The initial question, then, is whether the preservation of preparation time during the school day is a recognizable standard under the contract. If it is, the question becomes whether these District actions constituted a lessening of that standard.

Prep Time as a Standard

Article XXIII of the contract establishes a broad presumption in favor of the status quo in

virtually every area of working conditions:

> All conditions of employment shall be maintained at not less than the highest minimum standards in effect in the District at the time this Agreement is signed, provided that such conditions shall be improved for the benefit of teachers as required by the express provisions of this Agreement.
>
> This agreement shall not be interpreted or applied to deprive teachers of professional advantages heretofore enjoyed unless expressly stated herein.

The usual presumption is in favor of unilateral management control of work day content. In a school setting, however, there is a substantial impact on working conditions and hours from a decision to reallocate time to student contact. This is because, unlike a factory worker or a street department employee, a teacher's work load is not defined by the hours of the work day. There is a certain amount of work to be performed in addition to direct student contact, and if student contact hours are increased the teacher does not have the option of simply not preparing his or her classes. The increase in contact time without some corresponding relief from other duties necessarily increases the amount of work time for the teacher. An uncompensated increase in the time required to perform a job is rather obviously a change in work place standards since it has a significant effect on both hours of work and real wages.

The two primary arguments of the District are that no minimum standard has been established in the area of prep time, and that the management rights clause expressly reserves to management the right to schedule and thus falls under the exception contained in the second paragraph of Article XXIII.

It is true, as the District argues, that no formal policy appears to have ever been articulated on the content or use of unassigned time during the work day. It is also true that teachers have used recess periods and time at the end of the day for purposes other than prep time. However, the District goes too far in concluding that the freedom to use this time for necessary work that would otherwise be performed at home is not therefore an identifiable working condition. It is perfectly clear from the record that K-5 teachers who were not supervising recess were free to use their time for whatever work-related tasks they chose except on the relatively rare occasions when a student was detained, or weather precluded sending students outside, or the principal wished to have a conversation. The testimony at the hearing was that weather prevented recess on approximately 9 of the 180 school days each year (5%), and that meetings with the principal were brief and infrequent. There was no estimate given on the frequency of a student serving a detention during recess, but assuming that detentions have not changed substantially in the past thirty years, having a student sit silently at his desk would not prevent the teacher from doing prep work during recess. Likewise, while all teachers may have performed a variety of work related duties during the period from 3:30 to 3:35 p.m. at the end of the day, they had the freedom to use this time for prep work. The testimony of teacher Bonnie Ketterhagen was that teachers did, in

fact, generally use this unassigned time for prep work.

The evidence showed that the teachers used the time during recess and after school for a variety of necessary tasks that could not be performed during contact time, and that prep time was prominent among these uses. The District's disavowal of any formal standard for prep time ignores the reality of the workplace. The principal can hardly argue that she believed unassigned time was being used for purely personal purposes, and her years of experience in education must reasonably have led her to understand that prep time was the usual activity for these periods of the day. While I agree that the practice in the District did not set some absolute minimum for minutes available for prep time each day, the evidence is overwhelming that unassigned time was generally available for this use. This is an imprecise standard, but it accurately reflects the actual conditions in the District prior to the 1992-93 school year.

The District also argues that the Management Rights clause contained in Article II of the contract expressly authorizes the School Board to reduce unassigned time by reserving to it the right to "schedule classes and assign work load…" Thus, the District argues that this change falls under the exception in the second paragraph of the Standards Clause: "This agreement shall not be interpreted or applied to deprive teachers of professional advantages heretofore enjoyed *unless expressly stated herein."* This argument, if accepted, would swallow the Standards Clause whole. The Management Rights clause in Salem #7 contains the traditional recitation of powers reserved to management, in very general language:

> The right of the Board to operate and manage the school system is recognized, including the determination and direction of the teaching force; the right to plan, direct and control school activities, establish curriculum, a system of promotion and graduation; to schedule classes and assign work load; to determine teaching methods and subjects to be taught; to determine and maintain the effectiveness of the school system; to determine teacher complement; to establish and require observance and adherence to approved Board policy, administrative rules and regulations; to select and terminate teachers; and to discipline and discharge teachers for cause.

If each of these broad statements of management concern is treated as an express exception to the Standards Clause, Article XXIII would become mere surplusage. It is difficult to to imagine what changes in the school system would not fall under the heading of planning, directing and controlling school activities, or determining and maintaining the effectiveness of the system. Certainly the decision to end the student day five minutes later is within the Board's right to schedule classes, and does not violate the Standards Clause, so long as it is accomplished by extending a period of unassigned time elsewhere in the school day. Similarly, an increase in recess supervision duties, with an offsetting increase in unassigned time elsewhere, would be a legitimate exercise of management rights. These approaches would give meaning and effect to both Article II and Article XXIII. The approach proposed by the Board does violence to the

phrase "expressly stated" as used in Article XXII and fails to give effect to that provision of the

contract. For that reason, I find that the general enumeration of rights in Article II does not constitute an express exception to the maintenance of standards guaranteed in Article XXIII. 1/

On the basis of the foregoing analysis, I have concluded that the availability of prep time during the work day, in an amount consistent with the past practices of the parties, constitutes an enforceable standard under Article XXIII. It remains to be determined whether the District's specific actions in this case violated that standard.

Violation of the Standard

The District reduced the amount of unassigned time available to all faculty members by five minutes per day by extending the student day to 3:35 p.m. This amounts to 15 hours per year per faculty member. The standard discussed above is necessarily vague, being drawn from the actual activities of day to day school life, rather than from some abstract policy document. In judging whether such a standard has been violated, it is not possible to draw a bright line at a minute a day, for example, and say that 60 seconds of extra assigned time is permissible and 61 seconds is not. No bright line test is feasible, and none is necessary to resolve this case. The five minute increment at the end of the day represents one-third of the unassigned time at the end of the day, and a fairly significant portion of the overall unassigned time available to teachers each day. The permanent withdrawal of this time has a regular, substantial and detrimental effect on the working conditions of the teaching staff. As such it deprives teachers of professional advantages previously enjoyed, in violation of Article XXIII. For these same reasons, I have concluded that the additional seven and a half hours of recess supervision reduces the professional advantages of the K-5 teaching staff. It deprives them of a useful and

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1/ Although the argument is not expressly stated as such, the District also suggests that the extension of the school day for five minutes was required to comply with state minimums for student contact. I would note that the evidence showed that the problem, if any, existed only at the upper grade levels and would not justify the reduction in unassigned time for other grades. The evidence on this point was rather vague. The District acknowledged that the Department of Public Instruction had not actually cited them, but had warned them that they were scheduled too tightly, ie that they were close to the minimum but had not fallen below it. Although the contract does not appear to contain the usual Savings Clause, the restriction on student contact time flows from an interpretation of the general language of the Standards Clause. If the interpretation of that clause actually required the District to violate the state laws regarding minimum contact minutes, the general principle that a contract must not be interpreted so as to require an illegal result would presumably come into play. The record evidence does not, however, bring that principle to bear on this grievance.

substantial increment of time on a regular basis, amounting to an additional work day per year. 2/

The grievance also complains that the assignment of scheduling duties to Rittmer and Acklam. Here the Association simply goes too far. First, it is not at all clear that these two teachers were ever assigned this duty. The principal left it to the teachers to work out a fair rotation for recess supervision, and there is some evidence that the teachers asked for this flexibility. The two teachers either volunteered to do this task or were selected by their colleagues. The delegation of this task to teachers was a response to past criticisms and amendments of schedules unilaterally set by the administration. It appears, in short, that this was intended as a courtesy to the K-5 teachers rather than a shifting of work to these two teachers. Moreover, unassigned time has always involved the performance of some tasks other than class preparation. Unlike the recess supervision and the extension of the work day, the loss of prep time for scheduling work is intermittent, irregular, scheduled at the discretion of the teachers involved, and of brief duration. Absent some formal standard, Article XXIII cannot reasonably be read to guarantee that every minute of unassigned time in the school year will be safeguarded against the necessary demands of school life. The essence of this claim is that Article XXIII prohibits the District from seeking teacher input into decision making unless it pays them for the privilege. Given the de minimis impact of the scheduling work, I believe that finding a violation in this instance would require a perverse misconstruction of the contract.

Remedy

As previously noted, the parties stipulated that, if the District is found to be liable for the change in working conditions, the District would reimburse the affected employees at their per them hourly rate, and return working conditions back to the conditions existing at the end of the 1991-92 school year. An order to that effect is entered with respect to the extension of the school day and the doubling of the recess supervision. The Association asks that interest be awarded on these sums, citing a variety of legal authorities for the proposition that an award of interest is part and parcel of making an injured party whole.

I agree with the Association that failure to assess pre-judgment interest on monies awarded results in less than a make-whole remedy in most cases. Having said that, I will not include interest on the sums awarded in this case.

2/ The District offered compelling reasons for wanting to increase the number of recess periods, and I do not mean to question the legitimacy of their desire to reduce the student-teacher ratio on the playground. The more appropriate route, assuming that the District is not able to schedule offsetting unassigned time for affected teachers, would have been to approach the Association about resolving the problem, rather than presenting teachers with a fait accompli at the beginning of the school year.

The Association acknowledges that interest is not customarily made part of the relief in arbitration cases, and there is no evidence that it has been used as a remedy in this relationship. The arbitrator is a creature of the contract. His authority is drawn from the agreement and is delineated by the language of the arbitration clause. In most instances, the contract is silent as to the remedial authority of the arbitrator. As in any case of contractual silence, the intent of the parties, if any, must be discerned from whatever secondary evidence is available. The only secondary evidence of intent in this bargaining relationship is negative -- the absence of any past practice of awarding interest. There is, however, a fairly clear industry standard for the remedial authority of the arbitrator. Aside from the one award by Arbitrator Kessler (River Falls, M-92-74, 5/4/92), the Association has not identified any Wisconsin schools case in which an arbitrator has awarded interest as a standard part of a grievance remedy. Experience suggests that there is a good reason for the lack of citations. The overwhelming majority of arbitrators do not treat interest as a normal remedy, awarding it only where some peculiarity of the case suggests that an unusual remedy is required.

Arbitrators have great discretion in crafting remedies. However, the normal presumption in the field of arbitration is against the awarding of interest. Granting that the Association's arguments for awarding interest are sensible and even compelling from an economic standpoint, the fact remains that there is absolutely no evidence that this remedy fell within the reasonable expectations of the parties when the bargained for final and binding arbitration. 3/ Arbitration is not designed to be an innovative process. By its very nature, it is concerned with enforcing existing understandings, even if they fall short of perfect economic rationality. If the scope of normal remedies under the contract is to be expanded, that expansion is properly accomplished at the bargaining table.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The District violated the collective bargaining agreement when the District:

a) decreased the teachers' preparation time due to increased student recess supervision responsibilities in the 1992-93 school year;

b) decreased the teachers' preparation time due to increased contact time resulting from lengthening the student day in the 1992-93 school year;

3/ There is a certain irony in asking that the normal standards for arbitral remedies be ignored in a case arising under a maintenance of standards clause.

However, the District did not violate the contract by having teachers prepare a rotation for recess supervision in the 1992-93 school year.

The appropriate remedy is for the District to compensate affected members of the teaching staff at their per them hourly rate, and return working conditions back to the conditions existing at the end of the 1991-92 school year.

I will retain jurisdiction over this case for thirty days for the sole purpose of resolving, if necessary, the outstanding issue over duty free lunch hours, which was remanded to the parties at the time of the hearing for further efforts at a negotiated settlement. The parties are directed to notify me within thirty days of the status of their settlement efforts.

Signed this 24th day of June, 1993 at Racine, Wisconsin:

By Daniel Nielsen /s/
Daniel Nielsen, Arbitrator