BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between OCONTO EDUCATION ASSOCIATION and OCONTO UNIFIED SCHOOL DISTRICT	Grievance dated 2-23-96 regarding make-up of third inclement weather day Case 19 No. 54075 MA-9541

Appearances:

Mr. James Blank, Executive Director, United Northeast Educators, 1136 North Military Avenue, Green Bay, Wisconsin 54303, appearing on behalf of the Union.

Mr. Dennis W. Rader, Godfrey & Kahn, S.C., Attorneys at Law, Suite 600, 333 Main Street, Green Bay, Wisconsin 54307, appearing on behalf of the District.

ARBITRATION AWARD

The Association requested that the Wisconsin Employment Relations Commission designate an arbitrator to hear and decide a dispute concerning the above-noted grievance, arising under the parties' 1995-96 Master Agreement (Agreement). The Commission designated the undersigned Marshall L. Gratz as the Arbitrator.

The grievance was heard by the Arbitrator at the District High School in Oconto, Wisconsin, on June 11, 1996. After the hearing transcript was distributed, the parties filed briefs and reply briefs. Briefing was completed on September 17, 1996, marking the close of the hearing.

ISSUES

At the hearing, the parties authorized the Arbitrator to decide the following issues:

1. Did the District violate the Agreement when it scheduled teachers for a student make-up day because of the occurrence of a third inclement weather day?

2. If so, what is the appropriate remedy?

The parties further stipulated that if the Arbitrator's answer to ISSUE 1, above is yes, then the Arbitrator would retain jurisdiction to permit the parties to attempt to reach an agreement on that subject between themselves first. (tr.4).

PORTIONS OF THE AGREEMENT

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ARTICLE IV. MANAGEMENT RIGHTS

1. It is recognized that the Board has and will continue to retain the rights and responsibilities to operate and manage the school system and its programs, facilities, properties and activities of its employes.

. . .

4. The foregoing enumerations of the functions of the Board shall not be considered to exclude other functions of the board not specifically set forth; the Board retaining all functions and rights to act not specifically nullified by this Agreement.

. . .

ARTICLE VI. GRIEVANCE PROCEDURE

. . .

The sole function of the arbitrator shall be to determine whether or not the rights of a teacher have been violated by the school district contrary to an express provision of this agreement. The arbitrator shall have no authority to add to, subtract from, or modify this agreement in any way. The arbitrator shall have no authority to impose liability upon the school district arising out of facts occurring before the effective date of this agreement or after the settlement of a new agreement.

. . .

ARTICLE XX. CALENDAR

1. Negotiations shall begin in December and if a mutually agreeable settlement is not reached by the March meeting of the School Board, the Board has the right to set the calendar.

2. The negotiating team shall consist of two representatives of the Board and two representatives of the Association, with the Superintendent serving as a consultant.

3. The calendar will be 180 school days and 190 contract days.

4. The first two inclement weather days must be made up. Student days may be made up on inservice days. Teachers may be required to attend on inclement weather days. These days will be used as professional work days.

5. Inclement weather days may be made up during spring vacation.

. . .

ARTICLE XXXVII. TERMS OF AGREEMENT

1. This Agreement shall be effective as of August 24, 1995, shall be binding upon the Board, the Oconto Education Association, and the teachers, and shall remain in full force and effect through June 30, 1997.

2. The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. That, the Board and the Association, for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter, even though such subjects or matters may not have been within the knowledge or contemplation of either or both parties at the time that they negotiated or signed this Agreement. All terms and conditions of employment not covered by this Agreement shall continue to be subject to the Board's direction and control.

. . .

BACKGROUND

The District operates a K-12 public school system. The Association represents a bargaining unit of certain professional employes of the District. The District and Association have been parties to a series of collective bargaining agreements, including the Agreement which, by its terms, was effective August 24, 1995 through June 30, 1997.

A school calendar for the 1995-96 school year was created and issued in the manner prescribed in Agreement Article XX. It provided for inservice days on August 23-25, 1995 and January 15, March 18 and April 26, 1996. That calendar identified June 3, 1996 as the last contracted day of work. On one of the school days listed in that calendar, schools were closed to

students due to inclement weather, but the teachers reported for a professional work day. The student day lost due to that closing was made up on January 15, 1996, in place of the previously scheduled inservice day.

Thereafter, the schools were closed to students on two additional days due to inclement weather. On the earlier of those two, the teachers reported for a professional work day. The District chose not to have the teachers report to work on the later of those two days.

On February 21, 1996, District Superintendent Jeffrey P. Dickert, sent all District staff a memorandum that reads as follows:

> To: All Staff
> From: Jeffrey P. Dickert, Superintendent
> RE: 1996-97 School Calendar
> Snow Days Make-Up
> Date: February 21, 1996
>
> Included with this memo is the 1996-97 School Year Calendar. It was approved at the February School Board Meeting. It was changed from the original calendar approved a year ago to coincide with the new interactive television network consortium.
>
> Also included is the revised 1995-96 calendar to reflect the last two snow days. The School Board passed this at their February meeting. The first snow day will be made up on March 18th. The second snow day will be made up on April 26th. The 8 hours of inservice time will be moved to June 4th. That will help meet the 190 days contracted. If there are any other snow days, they will be added on by making school up on June 3rd and moving the last two inservice days to June 4th and June 5th, and so on and so forth until they are all made up. Teachers are reminded that they do not have to report when school is canceled on snow days past the first two. We will not take days from the Easter Vacation. Hopefully this information will help you solidify your Easter vacation plans and let you know that the week of June 3rd will be used for make-up.

On February 23, 1996, the Association initiated the instant grievance, asserting that the District had violated specified portions of Agreement Arts. XXXVII and XX. The grievance reads in pertinent part as follows:

> [facts and issues upon which the grievance is based:] The Board improperly altered a negotiated calendar by changing an established

> teacher in-service day (April 26, 1996) to a day taught and adding an unscheduled teacher in-service day to the end of the school year (June 4, 1996). The Board also violated Article XX by forcing the make-up of a third inclement weather day when the Master Agreement specifies that only "the first two inclement weather days must be made up."
>
> [remedy sought:] The Association seeks the Board's pledge to live up to the terms of the agreement, specifically those of Articles XX and XXXVII, and that the extra in-service day of June 4th be removed from the calendar. If settlement of this grievance is rendered after June 4, 1996, the Association is seeking an additional day's pay for each of its members, or the elimination of a scheduled in-service day in the 1996-97 calendar year, of the Association's choosing, with such day being a paid day off.

The matter remained unresolved, and the District implemented the calendar changes referenced in the Superintendent's memorandum above. As a result, the third inclement weather day of the school year was made up with students on April 26, 1996, and teachers were required to report to work on June 4, 1996 for an inservice day.

By all accounts this was the first time the District had experienced a third inclement weather day, at least since the Agreement language came to address the subject of inclement weather day make up in the 1979-82 master agreement.

The grievance was denied at of the all pre-arbitral steps for arbitration as noted above. At the hearing, the Association presented testimony of bargaining unit members and former/current Association negotiators Karl Ballstad and James Hornblad, and the District presented testimony of District Superintendent Dickert. Additional background is noted in the summaries of the parties' positions and in the discussion, below.

POSITION OF THE ASSOCIATION

The District violated sections 3 and 4 of Article XX and the negotiated school calendar both by requiring the bargaining unit to make up a third inclement weather day and by unilaterally rescheduling an inservice day on an additional work day outside the negotiated calendar.

The clear and unambiguous meaning of "The first two inclement weather days must be made up" in Article XX.4. is that the parties intended that the first two inclement weather days would be made up and that any others would not be made up. This is a perfect example of the well-known contract construction principle which states that expressing one thing excludes another, or, expressio unius exclusio alterius.

The parties' undisputed bargaining history requires the same interpretation. Prior to the

1979-82 master agreement, the contract was silent regarding inclement day make up, but the uniform practice and mutual understanding was that all inclement weather days were made up. In 1979-82, the Association proposed that no inclement weather days be made up, the District initially resisted any change, but the parties ultimately agreed that "In the 1980-81 and 1981-82 school years the first two inclement weather days must be made up." The school calendar for 1981-82 negotiated by the parties' representatives pursuant to that master agreement set forth in detail both the applicable master agreement language regarding inclement weather day make up and specific implementations of that language. In that calendar, the first two and any beyond the sixth and one-half were made up, but the third, fourth, fifth and sixth one half inclement weather day were not made up. Then in the 1983-84 negotiations the Association proposed that no inclement weather days be made up, the District proposed that "The first two inclement weather days must be made up" be deleted from the master agreement, and the parties ultimately agreed to leave the master agreement language on the subject unchanged. Thus, in the 1979-82 master agreement the District gave up the right to require the third and subsequent inclement weather days to be made up, and in 1983-84 the District tried without success to regain that right. The District cannot be permitted to obtain through arbitration what it failed to obtain at the table in 1983-84. For the Arbitrator to do otherwise would be to modify the Agreement contrary to the limitations on arbitral authority contained in Article VI.

The District does not have the right to unilaterally add a day to the bilaterally negotiated contract as it did in this case. The parties' master agreements since 1976-79 have expressly recognized that the school calendar is a negotiable item and have expressly set forth the process by which the parties would negotiate the school calendar. Even though they have not been attached to the master agreements, the school calendars negotiated by the parties have been and remain part of the agreement in effect between the parties and, as such, are enforceable through the grievance procedure. It is illogical that the District would have the right to unilaterally deviate from the school calendar that the Agreement expressly provides is to be negotiated between the parties' representatives.

The District had the right under Art. XX.4. to require the teachers to work on the third inclement weather day, but it chose not to do so. The District did not, however, have the right to make up the third inclement weather day or to add an additional day to the negotiated calendar in order to do so. Under both the contract and the statutes requiring 180 school days per school year, the third inclement weather day counted as a school day and a contract day even though the District chose not to have the teachers work on that day. The District Superintendent's memorandum confuses the District's right to require teachers to work on a day when schools are closed to students due to inclement weather with a right (which the Agreement does not grant the District) to make up inclement days beyond the first two in a school year.

For all of the foregoing reasons, the Arbitrator should sustain the grievance in its entirety and order that the teachers be compensated for the additional day worked on June 4, 1996.

POSITION OF THE DISTRICT

The management rights reserved to the District in Articles XX and XXXVII include the rights to determine whether a third or subsequent inclement weather day will be made up and, if so, when such day(s) will be made up. The Agreement nowhere provides otherwise, and the Arbitrator is precluded by Article VI from adding provisions to the Agreement where the parties have not done so.

While Article XX.4 provides that the first two inclement weather days in a school year must be made up, it does not refer to or therefore apply to inclement weather days beyond the second. If the parties intended that only the first two inclement weather days would be made up, they would have stated that "only" the first two must be made up, but they did not. The

District has always taken the position that it has the right under the Agreement to choose whether to make up inclement weather days after the second. By contrast, the Association has unsuccessfully proposed contract language that would preclude the District from making up any inclement weather days. The Arbitrator must not allow the Association to obtain through arbitration what it sought and failed to obtain at the bargaining table.

While Article XX also contains language stating when inclement weather days "may" be made up, it does not provide or mean that they may only be made up at those times. Rather, that language provides the District discretion regarding both whether to make up inclement weather days beyond the second and when to make up inclement weather days. The Agreement is unlike the 1979-82 master agreement which specifically required that inclement weather days be made up on available inservice days, if any, and otherwise on spring vacation days. Under the comparatively non-restrictive language of the Agreement, the District therefore retains the right to schedule make up days whenever it chooses so long as it acts reasonably in the exercise of that right.

While Article XX.3 also provides that there will be 190 contract days, the District did not cause the calendar to exceed that number of contract days in 1995-96 because the teachers were not required to perform any services for the District on the third inclement weather day.

While Article XX.3 also provides that there will be 180 school days in the calendar, the District did not cause the calendar to exceed that number of school days in the 1995-96 school year. The Agreement does not expressly incorporate the statutory definition of school day. Moreover, while Sec. 115.01(10)(l) of the Wisconsin Statutes permits the District to count as many as five un-made-up inclement weather days and parent teacher conference days toward the legally-required 180 school days, neither the statutes nor the Agreement requires the District to do so.

While the 1981-82 school calendar specifically stated that certain inclement weather days after the second would not be made up, that calendar cannot properly be used as a guide to the meaning of the Agreement. The parties' negotiations about the contents of school calendars have always been separate from their master agreement negotiations. Calendar negotiations have involved a different negotiating committee. The resultant calendars have been applicable only to the specific years to which each has referred. The calendars have never been physically

appended to or otherwise made a part of the parties' master agreements. Moreover, if the parties intended to preclude the District from making up inclement weather days beyond the second, their calendar negotiators would have continued to include calendar language to that effect paralleling that in the 1979-82 calendar, but they have not done so.

Accordingly, the District was acting within its reserved Agreement rights both when it chose to make up the third inclement weather day of the 1996-97 school year and when it reasonably chose to keep the spring vacation intact by making up the third inclement weather day on April 26, 1996, and rescheduling the April 26 in-service on June 4, 1996.

The grievance should therefore be denied.

DISCUSSION

Agreement Article XX.4 contains language specifically dealing with whether inclement weather days will be made up. That language provides, "The first two inclement weather days must be made up." If that language reflects the parties' intentions about how inclement weather days other than the first two are to be handled, then it governs as against the more general management rights provisions cited by the District.

The Arbitrator finds that sentence, properly interpreted, does provide guidance regarding status of a third inclement weather day. It is therefore controlling in this case as against the more general management rights provisions.

On its face, the quoted sentence is ambiguous -- it could reasonably support two meanings: either that the teachers must make up the first two inclement weather days but need not make up any others, on the principle that to express one thing is to exclude another; or that the District must make up the first two inclement weather days and is free to choose whether to make up any others, on the basis of the residual rights reserved to the District in the absence of Agreement provisions to the contrary.

The bargaining history evidence concerning the initial inclusion of that language persuasively establishes that only the first of those alternatives could have been intended by the parties. It is undisputed that the quoted sentence was first included in the 1979-82 master agreement. Prior to that, the District had been requiring the teachers to make up all inclement weather days, and the master agreement contained no language specifically addressing inclement weather day make up. In the 1979-82 master agreement bargaining, the Association initially proposed that no such days be made up in the future, and the District initially proposed that the status quo be maintained. The parties ultimately agreed to add language including the words in the disputed sentence quoted above.

In that context, the fact that the disputed language on the subject of inclement weather make up days was added firmly supports the Association's contention that a change in the status quo was mutually intended by the parties at that time. The Association was seeking language that would have eliminated the District's right to require the teachers to make up all inclement weather days, and the District sought to retain that right unchanged. The parties agreed to what clearly appears to have been a compromise between those two positions to the effect that the first two such days would continue to be made up, but -- by clear implication -- the District would no longer have the right to make up such days beyond the second in a school year.

The 1981-82 calendar confirms that that was the understanding of the Association and District negotiators appointed pursuant to the 1979-82 master agreement to develop a calendar expressly recognized by the parties as a negotiable item. It is undisputed that the 1981-82 calendar was reduced to writing in a document prepared by the Superintendent's secretary and issued as an official District document. While that calendar was not physically made a part of the contract nor expressly incorporated by reference as part of the contract, it is, at a minimum, evidence that reliably indicates what the District and Association thought the master agreement language here in

dispute meant.

The 1981-82 calendar unequivocally shows that the parties thought the disputed quoted sentence above meant that the first two inclement weather days would be made up and that, among others, the third inclement weather day would not be made up.

No other mutual expression by representatives of the parties indicates that the parties shared a contrary understanding about the meaning of that language at that time or any subsequent point in time.

The 1983-84 bargaining history does not undercut the significance of the 1979-82 master agreement negotiations or of the 1981-82 negotiated school calendar, though it is of only limited value in assessing the parties' mutual intent about the make up of inclement weather days. The Association's unsuccessful proposals to eliminate all make-up of inclement weather days can reasonably be viewed as an unsuccessful effort to eliminate the make up of the remaining first two such days. The significance of the District's unsuccessful proposal to eliminate the first sentence of Article XX.4. is reduced somewhat by the fact that the District's negotiators claimed that the sentence in question had been included in the previous master agreement in error and that it did not belong in the agreement because the District has always intended to continue to make up all inclement weather days. (tr.43).

Because the parties have not had a third inclement weather day since the disputed sentence was added to the 1979-82 master agreement, there has been no occasion to test the disputed language in practice. Thus, the Arbitrator finds that the 1979-82 master agreement bargaining history as confirmed by the language of the negotiated 1981-82 school calendar persuasively resolves the above-noted ambiguity in favor of the Association's contention that Article XX.4 prohibits the District from requiring the teachers to make up the third inclement weather day.

The Article XX.3 requirements that the calendar will be 180 school days and 190 contract days are not inconsistent with that interpretation of Article XX.4. Neither party's position in this case would require the District to make up inclement weather days after the second if it chose not to do so; hence, it must be that neither party views the 180 school days provision as an affirmative requirement that all inclement weather days be made up. The language of both the 1979-82 master agreement and the 1981-82 negotiated school calendar reflect that the parties developed those agreements in ways that would conform to and comply with the applicable 180 day legal requirement. It seems logical that the language carried forward in the Agreement was intended to permit counting an inclement weather day not made up toward the 180 school days requirement of Article XX.3 where, as here, doing so does not cause the District to fall short of the 180 days required by law. Thus, the general 180 day language of Article XX.3 does not require deviating from the interpretation above of Article XX.4 language specifically dealing with inclement weather day make up.

With regard to the 190 contract day requirement, it is important to note that Article XX.4 expressly authorizes the District to require the teachers to report to school on inclement weather days. For that reason, and because teachers would not know an inclement weather day was

declared until on or shortly before the day involved, it is quite plausible that the parties intended that a third inclement weather day that is not made up would count as a contract day, even where, as here, the District chooses not to require the teachers to come to work on that day. Significantly, the only reason the teachers did not perform services for the District on that day was because the District chose not to exercise its right to require them to do so.

For those reasons, the Arbitrator concludes that the District violated Art. XX.4 of the Agreement by requiring the teachers to make up the third inclement weather day.

Because that conclusion alone fully answers ISSUE 1 as it was framed by the parties, the Arbitrator need not and does address the additional ways in which the Association has argued that the District violated the Agreement in this case.

As agreed by the parties at the hearing, the Arbitrator has retained jurisdiction to resolve ISSUE 2 if the parties are unable to agree on that issue between themselves.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole, it is the decision and award of the Arbitrator on the STIPULATED ISSUES noted above that

> 1. The District violated the Agreement when it scheduled teachers for a student make-up day because of the occurrence of a third inclement weather day.
>
> 2. By agreement of the parties, the Arbitrator retains jurisdiction to resolve ISSUE 2 in the event that the parties are unable to resolve the remedy question between themselves.

Dated at Shorewood, Wisconsin this 17th day of March, 1997.

By Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator