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 Supplemental Award Regarding Remedy

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.

SUPPLEMENTAL 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 initially heard by the Arbitrator at the District High School in Oconto, Wisconsin, on June 11, 1996. Briefing was completed on September 17, 1996, and the Arbitrator issued an award in the matter on March 17, 1997, as follows:

> 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.

The parties subsequently advised the Arbitrator that they were unable to agree between

themselves on the remedy appropriate for the specific violation found in the March 17, 1997 award. Accordingly, the issue remaining in dispute can be restated as the following

ISSUE:

> What is the appropriate remedy for the District's having scheduled a student make-up day because of the occurrence of a third inclement weather day in school year 1995-96?

By agreement of the parties, a hearing on that remaining ISSUE was convened by telephone conference on May 13, 1997. Participating on behalf of the Association were UNE Executive Director James Blank and bargaining unit members James Hornblad and Russell Young. Participating on behalf of the District were Attorney Dennis Rader and District Superintendent of Schools Jeffrey Dickert.

During the telephone conference, the parties presented and explained their respective positions on the ISSUE and provided information related to the ISSUE in an informal manner. Both parties' representatives were given full opportunity to present arguments and evidence, and to comment upon or question information provided by the other party's representatives.

At the conclusion of the telephone conference, the Arbitrator advised the parties of his decision. This Supplemental Award confirms that decision and summarizes the parties' positions and the Arbitrator's rationale.

PORTIONS OF THE AGREEMENT

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> ARTICLE IV. MANAGEMENT RIGHTS
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> 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.
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> . . .
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> 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.
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> ARTICLE VI. GRIEVANCE PROCEDURE
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> . . .
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> 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.
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> . . .

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 all of the pre-arbitral steps and submitted to arbitration, leading to the Arbitrator's issuance of the March 17, 1997, award excerpted above.

POSITION OF THE DISTRICT

The Arbitrator should remedy the violation found, by ordering the District to relieve the affected teachers from work on the inservice day scheduled for May 31, 1997. The District is willing to have the Arbitrator further order that it pay the two affected teachers who are no longer employed by the District one day's pay at their 1995-96 rate.

The grievance as filed by the Association in this case expressly requested "elimination of a scheduled in-service day in the 1996-97 calendar year, of the Association's choosing" as an acceptable alternative to back pay for the day in question. Because of the passage of time before issuance of the initial Award in this case, the only remaining 1996-97 inservice day is May 31, 1997. Therefore, to relieve the affected teachers remaining in the District's employ of attendance at the May 31, 1997 inservice day would comply with one of the alternative forms of relief requested by the Association in the grievance. Relief in that form should therefore be appropriate and sufficient.

Granting the Association's current request that the affected employes be relieved of duty on the inservice day scheduled for February 2, 1998, would lend support to the notion that some kinds of inservice days are more important than others. The District rejects that notion and urges the Arbitrator not to fashion a remedy that would lend any support to it.

If the District's proposed remedy is not adopted, the District stands ready to implement whatever other remedy the Arbitrator finds appropriate in the circumstances. The District asserts, however, that whatever relief is granted should be definite, certain and unconditional so as to avoid any additional delay in fully resolving the dispute.

POSITION OF THE ASSOCIATION

The violation can be effectively remedied only by back pay for all affected employes or by a combination of back pay for those who have left the District and relieving the other affected employes from duty on February 2, 1997, which is the only currently-scheduled inservice day involving activities the employes would not otherwise find it necessary to perform on their own time.

Throughout the processing of this case, the Association has always identified back pay for all affected employes either as one of its proposed remedial alternatives or as its sole proposed

alternative (citing pages 7-8 of the June 11, 1996 hearing transcript).

The District's proposal to eliminate the May 31, 1997, inservice day does not effectively remedy the violation. That is the last work day of the school year. If relieved of that work day, teachers would find it necessary to spend their own time performing work they would be doing on that day, because that work is essential to completion of their work for the year.

For basically the same reason, eliminating the inservice days at the beginning or end of the 1997-98 school year would also be ineffective in remedying the violation.

Ordering the District to relieve the affected employes of one of the inservice days scheduled for the third last and second last day of school could be rendered ineffective as a remedy if both of those turn out to be needed for snow day makeup. The Association prefers that the remedy ordered in this case provide an outcome that is definite, certain and unconditional when issued, rather than one that will vary depending on subsequent events.

DISCUSSION

At issue is the appropriate remedy for the violation found in the March 17, 1997 Award.

The District relies heavily on the time-off alternative specified in the grievance. However, that aspect of the Association's remedy request appears premised on the assumption that the Association would be choosing from among more than one inservice day. The March 17, 1997 issuance of the initial Award in this case, coupled with the District's snow day and snow day make up experience during 1996-97, have resulted in the Association having no such choice. For that reason, the District's proposed remedy is not the same in all material respects as the time-off alternative specified by the Association in the grievance. In any event, it is ultimately for the Arbitrator and not for the Association in its grievance to determine what remedy is appropriate for the violation found by the Arbitrator in this case.

The conventional and appropriate remedy in a case of this kind is one that makes whole the employes who were required to work a day during 1995-96 that the District had no right to require them to work. Back pay at their 1995-96 rate is the appropriate form of relief for those of the affected employes who have left the District's employ. However, the balance of the affected employes could be made whole either by requiring the District to relieve them of a day they would otherwise be required to work, or by requiring the District to pay them at their 1995-96 contract rate for the additional day improperly required of them.

Based on the information provided during the telephone conference, the Arbitrator is persuaded that significant segments of the affected employe group would not be made whole for the violation by being relieved of the inservice scheduled on May 31, 1997. Especially so at the high school, where, for the first time this school year, no final examinations were administered until May 30. The District's plans for the May 31 inservice appear designed, in part, to afford teachers a portion of the day for necessary year-end activities. Relieving them of May 31 as a work day will not, as a practical matter, relieve them of the necessary year-end work involved and

hence will not fully make them whole for the additional day they were improperly required to work during the 1995-96 school year.

By the same reasoning, relieving those employes of the inservice day at the beginning or end of the 1997-98 school year would not fully make them whole for the violation, either.

Another remedial approach could involve an order leaving it to the District to decide whether to relieve those employes of duty on one of the three remaining 1997-98 inservice days (scheduled for February 2, 1998 and for the third last and second last days of the school year) or to pay them back pay if it has not relieved them of work on one of those days by the end of the 1997-98 school year. That approach would avoid some of the problems with the time-off remedies discussed above, but it would deprive the parties of the sort of definite, certain and unconditional resolution of the dispute that both expressly prefer.

An award of back pay for all affected employes effectively makes whole all affected employes in a definite, certain and unconditional manner. However, in light of the statutory revenue caps and the nature of the budgeting process, a general back pay order would force the District to reallocate funds earmarked by this time for other purposes. Comments during the telephone conference by Association representatives indicate their recognition that such a reallocation may directly or indirectly impact the education that the District and the teachers provide to the students and the community. On the other hand, relieving substantial numbers of District employes of the carefully-structured inservice training program to which the District is committed for February 2, 1998, also may directly or indirectly impact that education.

The relative importance of year-start and year-end activities as compared with the activities planned by the District for February 2, 1998, are policy matters not well suited to determination by the Arbitrator. For that reason, and given the demonstrated inadequacy of the District's proposed remedy and the unquestionably effective, definite, certain and unconditional nature of a general back pay order, the Arbitrator has found the latter type of remedy to be the appropriate one in this case.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole, it was and is the supplemental decision and award of the Arbitrator on the remaining ISSUE in this case that

> 1. As previously determined, the District violated the Agreement during school year 1995-96 when it scheduled teachers for a student make-up day because of the occurrence of a third inclement weather day in that school year.
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> 2. By way of remedy for that violation, the District, its officers and agents, shall immediately make whole the employes and former employes affected by that violation by paying to each of them, without interest, an amount of money equal to one day's pay at his

or her 1995-96 rate.

Dated at Shorewood, Wisconsin this 19th day of May, 1997.

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