BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

HOWARD-SUAMICO EDUCATION ASSOCIATION

and

SCHOOL DISTRICT OF HOWARD-SUAMICO

Case 72
No. 57454
MA-10630

Appearances:

Ms. Karen D. Alexander, Executive Director, United Northeast Educators, on behalf of the Howard-Suamico Education Association.

Godfrey & Kahn, S.C., Attorneys at Law, by **Mr. Dennis W. Rader**, on behalf of the School District of Howard-Suamico.

ARBITRATION AWARD

The Howard-Suamico Education Association, hereinafter the Association, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Association and the School District of Howard-Suamico, hereinafter the District, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The District subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on May 27, 1999, in Howard, Wisconsin. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs in the matter by August 17, 1999. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there are no procedural issues, but were unable to agree on a statement of the substantive issues and agreed the Arbitrator will frame the issues within the parameters of the parties' statements.

The Association would frame the issues as follows:

Did the District violate the Collective Bargaining Agreement when it failed to pay Karen Ries $15 per class hour when she was asked to serve as a substitute? If so, what shall be the appropriate remedy?

The District states the issues as being:

Did the District violate the contract by not paying Karen Ries substitute pay when she was assigned the class, which was not her regular assignment, instead of performing her regular teaching duties as a physical education teacher? If so, what is the appropriate remedy?

The following are the issues to be decided:

Did the District violate the parties' Collective Bargaining Agreement when it did not pay the Grievant, Karen Ries, the $15 per class hour substitute pay when she was assigned a class, which was not her regular assignment, instead of performing her regular teaching duties as a physical education teacher during that class period? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' Agreement are cited:

ARTICLE II – MANAGEMENT RIGHTS

A. The Board hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and the Constitution of the State of Wisconsin, and of the United States, including, but without limiting the generality of the foregoing, the right:

. . .

5) To determine class schedules, the hours of instruction, and the duties, responsibilities, and assignments of teachers and other employees with respect thereto, and with respect to administrative and extra duty activities, and the terms and conditions of employment.

. . .

ARTICLE VI – SALARY

. . .

I. **Substitution** – Teachers will be paid $15.00 per class hour in the event they are asked to serve as a substitute. Substitution shall include supervising a class in addition to their own, an additional class in a study hall or an additional class in the library. Substitution shall be assigned by an administrator.

BACKGROUND

The Grievant, Karen Ries, is a physical education teacher at the District's Meadowlark Elementary School. On January 26, 1999, Ries was assigned to supervise another teacher's Fifth Grade class from 8:20 A.M. to 9:50 A.M. and told to cancel her physical education classes. Ries' preparation time is scheduled to be from 8:20 A.M. to 8:50 A.M. and she normally has physical education classes from 8:50 A.M. to 9:50 A.M. Another physical education teacher was assigned to substitute for Ries' 9:20 A.M. class during his preparation period and was paid substitute pay for that 30 minute period.

Ries was paid substitute pay only for the 30 minute preparation period (8:20 A.M. – 8:50 A.M.) that she missed. Ries requested substitute pay for the 8:50 A.M. – 9:50 A.M. period during which she otherwise would have been teaching her physical education classes, but the request was denied. Ries then filed a grievance over the denial of substitute pay for the 8:50 A.M. – 9:50 A.M. period. The grievance was processed through the parties' contractual grievance procedure, and the parties being unable to resolve their dispute, proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

Association

The Association takes the position that Article VI, Section I, requires that a teacher be paid in-house substitution pay anytime he/she substitutes for another teacher whether during his/her preparation time or other work time. The language of that provision is clear and unequivocal and the language describing payment for substitution is "inclusive". There is no narrow definition of the term "substitution" and no requirement that payment only be made for missed preparation time. The language provides a very specific payment for time spent

serving as a substitute and it goes on to define less common forms of substitution in addition to that which was initially, to the parties, obvious. It is a basic tenet of contract interpretation that where there is clear and unambiguous language covering a dispute, that language decides the outcome.

The District's interpretation of the provision attempts to add meaning to the term "substitution" that is not contained in the Agreement and which in fact conflicts with the actual meaning bargained by the parties. In the Board's denial of the grievance, the District Administrator stated: "Secondly, as per line 188, the teacher will be paid for prep time lost while substituting." Line 188 in the Agreement states: "Teachers will be paid $15.00 per class hour in the event they are asked to serve as a substitute." While that language includes situations where preparation time is lost, it does not limit payment to such times and it was bargained specifically to cover those situations where an employe was taken away from his/her regular duties to substitute for an absent teacher. The Association's negotiator when the language in question was negotiated into the agreement, Ben Roloff, testified that there were problems back in the 1970's where the library was literally shut down when classes from absent teachers were placed in the library, and the Librarian was not able to complete her assigned tasks. A similar situation exists today, i.e., for whatever reason, the District is again having difficulty finding per diem substitute teachers, and pulls an employe who is not a regular classroom teacher from his/her regular job to substitute for an absent employe. In the 1990's, it is the "special teachers", such as the elementary physical education teacher, who are forced to cancel their classes in order to substitute for absent teachers. The remedy is the same now as was bargained in the 1970's, i.e., payment is to be provided to the teacher who substitutes for another for all time spent substituting. Roloff testified that

> A. ". . .Substitution. . . – from the get-go was considered anytime that somebody supervised students of another – of another faculty staff member. . .whether that be in the classroom or whether it be in the gymnasium by combining gym classes or whether it is students sent to the library or whether they be sent to the study hall. You know, there's a lot of different ways of substituting including combining classes, and it was the intent that they would all be compensated."

Incredibly, the District would assert that the definition of substitution under the contract does not include situations "where a teacher is assigned to an absent teacher's class." If that does not define substitution, what could?

Even if the language of Article VI, Section I of the Agreement is found to be ambiguous, the bargaining history makes it clear that teachers were to be paid for any substitution, regardless of when it occurs during the workday. The wording contained in the

1971-72 Agreement is only different in two respects from the current language, i.e., compensation has been increased, and the proviso that substitute pay was only paid after substituting more than twice during the school year, has been eliminated. The original language did not contain any further definition of the term "substitute", thus, establishing that the term has its meaning under the contract apart from the later language. As Roloff testified, it applies any time a teacher supervises students in place of their regular teacher. Roloff also testified that due to continuing problems with in-house substitution, the language was added in the 1972-73 Agreement to include taking a class at the same time as one's own, "substitution shall include supervising a class in addition to their own, an additional class and a study hall, or an additional class in the library. . ." (Emphasis added). That additional language does not define substitution, rather, it was added to the original language to clarify that substitution also included those situations, and was not meant to exclude everything else. Further, the language added may not be read to provide an exclusive definition, as to do so would also eliminate payment for substitution performed during preparation times, as it is not performed while teaching one's own students, a result not intended by either party. The new language in 1972-73 also required that the administration make the in-house substitute assignments, rather than requiring teachers to make such arrangements themselves. That, along with the amount of compensation and the deletion of the requirement to only pay substitute pay after substituting twice during a school year are the only substantive changes in the language.

Contrary to the District's claim that application of the Association's interpretation yields an untenable result, that result was intended by the parties and only occurs if the District chooses to assign substitute duties to staff instead of their own class load. Roloff testified that there was a twofold purpose to the language in question. First, substitution during preparation time required class preparations be done on the teacher's personal time and extra compensation was appropriate. Second, and primary, was the intent to create a compensation system that made it as, or more, costly to use in-house substitutes than to hire per diem substitutes from outside in order to discourage the use of in-house substitutes. That is consistent with the Association's position two years ago in discussing options with the District. Association President Schadewald, in his memo to the District Administrator, indicated that utilization of in-house substitutes would not be "financially prudent", since the District would have to pay both the "special teacher" for the substitution and the regular education teachers who were substituting for the "special teacher" by keeping their own students during the special class, making it more economically efficient to hire a per diem substitute. Rather than being an untenable result, it is instead the historic and reasoned position of the parties. The District is now simply attempting to expand the use of in-house substitutes without having to pay the premium the parties negotiated for its use. Further, the District has the option, rather than shutting down a special teacher's entire class for the day, of utilizing other teachers during their preparation time to substitute or doubling classes; both possibilities that are contemplated in the Agreement and which would involve in-house substitute pay to only one teacher, or one teacher per class hour.

The Association considers it an untenable result to require additional work from teachers without additional compensation. Under the District's interpretation, a teacher would be required to drop his or her class load, substitute for another teacher, and then adjust and adapt and catch up the lessons that his/her own class has missed. Much of the work would have to be done on the teacher's personal time and the District would impose this additional work without any additional compensation. That is not what the Association agreed to with this language.

Finally, there is no "past practice" that applies to this issue. As to whether a so-called "practice" was unequivocal, the record is not particularly instructive. Of the examples offered by the District, it is not known whether those teachers requested compensation for a time other than when they had a preparation period, and it is not known if other teachers also performed in-house substitution and simply did not request any compensation. However, it is known that four teachers, beginning in November of 1998, did perform in-house substitution and were denied payment for that additional work and those incidents were also grieved, although they were not pursued due to timeliness problems. Since payment is dependent upon application being made by each individual, it is impossible to know whether in the past individual teachers have even asked for payment, and were denied it. Secondly, the practice was not clearly enunciated and acted upon. To the contrary, the Association made known its position that in-house substitution requires payment in its memo to the administration in 1997, and that position was never disputed by the District. The first time the Association knew of the alleged "practice" was when its members were denied the payment they had earned and requested. Finally, the practice was not readily ascertainable over time as a fixed and established practice accepted by both parties. In the 28 year history of the language, there is no record of any denial of payment until the instant grievance.

In its reply brief, the Association first asserts that the District has continually misstated the contract language. The language in question states that payment is due when a teacher is asked to "serve as a substitute". While this is clearly the case when a teacher teaches a class which is not his/her own, the District asserts that it is only required to pay when a class is taught "in addition to their own class." That language, however, is not stated as a definition of substitution, but rather is given as an example of what is included. The contract does not say "limited to", but says "includes". Listing the examples does not exclude all other situations. What the District characterizes as Schadewald's "tautological definition" was merely part of an explanation of the common perceptions of the membership. The definition came from Roloff, and embodies the consistent, commonsense definition of "substitution". The District, however, would have the Arbitrator believe that it is not substitution when a teacher steps in and takes the class of an absent teacher.

The language of both the 1971-72 contract and the present-day language is clear. In the 1971-72 contract, payment was required for substitution any time one member substituted for another (after two occasions per school year). Roloff testified that in spite of that language, the District was using librarians to "substitute" for other teacher's classes by sending the classes to the library for supervision and was not considering that to be substitution. Thus, in the 1973 contract, the Association added language which clarified that substitution also includes the latter circumstance. The language was not added to narrow the definition, but to expand it. The language was inserted as an add-on to the existing language in order to correct what was believed to be an abusive practice on the part of the District, using librarians as substitutes during the time they were scheduled for the regular classes. Had the parties intended to limit the payment of additional compensation to only those times when a teacher had a preparation period, they would have so stated that in the Agreement, but they did not. While the District claims that asking a teacher to substitute for an absent teacher during the former's regular assigned classes is not substitution, it is so clearly substitution that the District referred to it as such in its own brief.

The District asserts that "double pay" would result under the Association's interpretation. That was the intent of the parties, as it was to be a disincentive to taking teachers out of their own classes to substitute. However, the District has complete control over whether or not it will exercise its right to take a teacher away from his/her scheduled class to substitute. It also has the option to assign a teacher to substitute during his/her preparation time or to hire a per diem substitute from the outside. Here, the District chose neither of the latter two options, but instead elected to take a teacher from her assigned classroom duties to have her substitute for an absent teacher, the highest cost option of the three. That is for a good reason, as it is disruptive and difficult for the teacher involved. That is why it became the Association's number one priority in the 1970's to negotiate a disincentive to utilizing it as an option. The Association was successful, and prior to this time the District has not attempted to exercise its right to assign teachers to substitute when they already have a class. Thus, far from being the "absurd result", it is the intended result of mutually-agreed upon language. The assertion that such payment constitutes a "freebie" and is pay for work not performed, ignores the testimony regarding the additional work and disruption that such substitution requires. The reason the Association has not provided evidence showing the teachers who were pulled off their current assignments to substitute were paid for doing so, is because until now the disincentive has worked and the District has not utilized that option. If the District desires or needs to change the contract language, it should negotiate the change.

The Association asserts that the "mutual understanding" regarding in-house substitution exists in the Agreement. While the District attempts to make much of the fact that the Association has not grieved the way the District has utilized in-house substitutes in the past, the fact is there have not been similar circumstances to the knowledge of the Association, due

to the negotiated disincentive in the Agreement. The District's plan for utilizing teachers during their regular classes was stated in the "morning memo" of Principal Kathy Hoppe at just one building. The implementation of that plan was not a problem until the current situation, since the previous teachers on the rotation were not assigned to take an entire class, but only a few of the children. The argument that the Association did not propose a change in the language to address this issue ignores the fact that, from the Association's point of view, it was already covered in the Agreement. It is the District's responsibility to propose a change in the language to address the issue if it has a problem with how it pays in-house substitutes.

Finally, the claim that the Association's interpretation conflicts with management's rights is absurd. While the Association's interpretation makes this option a more expensive way to provide substitutes, it does not in any way limit the District's right to utilize this method. The District can always utilize the lower-cost option of asking a teacher who has a preparation period to take the class instead, or assign it to an administrator.

As a remedy, the Association requests that Ries be paid the substitution pay for the hour she was denied on January 26, 1999.

District

The District takes the position that the contractual language defining substitution is clear and excludes the situation in which teachers are assigned to teach other teachers' classes instead of their own. The definition given by Schadewald that "substitution is substitution. . ." is tautological and means nothing. The contract clearly defines when teachers are to receive substitution pay and requires that the District pay teachers only when they supervise a class in addition to their own class. Where contract language is clear and unequivocal, it generally is not given a meaning other than that expressed and may not be ignored.

Article VI, Salary, subsection "I" states:

> **Substitution** – Teachers will be paid $15.00 per class hour in the event they are asked to serve as a substitute. Substitution shall include supervising a class in addition to their own, an additional class in a study hall or an additional class in the library. Substitution shall be assigned by an administrator. (Emphasis added)

Thus, teachers are only paid when they supervise a class in addition to their own. Here, during the first hour, Ries was supervising the fifth grade class in addition to her preparation period and was compensated accordingly. However, she was not supervising her physical education class in addition to the fifth grade class during the remaining period of time, and is not entitled to additional compensation for that period.

In the absence of a mutual understanding between the parties, the usual and ordinary definition of a term, as defined by a reliable dictionary, should govern. Elkouri and Elkouri, *How Arbitration Works*, Fifth Edition, 1997. The term "substitute" is defined as "a person or thing acting or serving in place of another." *Random House College Dictionary* (Revised Edition, 1975). The word "addition" is defined in that same dictionary as "something that is added". During the first hour the Grievant was serving in place of the fifth grade teacher and was required to supervise his class in addition to her preparation period, for which she received substitute pay. Although she served in place of that teacher during the remaining period of time, she was not supervising her class in addition to his class. Thus, the clear language supports the District's interpretation.

The history of the language of the provision substantiates the District's interpretation. Association witness Roloff testified that the issue arose due to the repeated placement of students in the library and study halls when no substitute was available. The earliest substitution language dates back to the 1971-72 Agreement and reads:

> Substitution – Teachers will be paid $5.00 per class hour in the event they are asked to serve as a substitute. This policy will go into effect when a teacher is asked to substitute more than two times within a school year. (Association Exhibit 1)

That language is vague and can be interpreted in many ways. Roloff believes the language included every possibility that arises out of situations where teachers supervise another teacher's class. However, if that belief has any merit, why did not the Association present any evidence showing the teachers received substitution pay every time they were requested to take another teacher's class, regardless of the situation? The answer is no such information exists, and that interpretation must be questioned given that lack of written documentation to support it.

Even if teachers received substitution pay each time they took another teacher's class under that language, the language was changed in the 1972-73 Agreement, nullifying any practice. The language was changed as indicated by the bold letters below:

> Substitution – Teachers will be paid $5.00 per class hour in the event they are asked to serve as a substitute. This policy will go into effect when a teacher is asked to substitute more than two times within a school year. **Substitution shall include each class that is sent to a study hall or the library or supervising a class in addition to your own. Substitution shall be assigned by an administrator.** (Emphasis supplied) (Association Exhibit 1)

That language completely changed the conditions upon which substitution pay would be granted. Teachers were now to be compensated when a class was sent to a study hall or library, or when they were asked to supervise a class in addition to their own. There is no support for the notion that teachers are to receive substitute pay each time they are asked to take another teacher's class.

> In the 1985-86 contract, the language was again changed in the following manner: Substitution – Teachers will be paid $11.00 per class hour in the event they are asked to serve as a substitute. Substitution shall include **supervising a class in addition to their own, an additional class in a study hall or an additional class in the library.** ~~each class that is sent to a study hall or the library or supervising a class in addition to your own~~. Substitution shall be assigned by an administrator. (Association Exhibit 1)

This change further narrowed the conditions to be met for a teacher to receive substitute pay. The words "in addition to" and "an additional class" were inserted in every situation, making that the norm. Thus, the history of the substitution language supports the District's interpretation.

The Association's interpretation would result in the District having to pay double substitute pay. In this case, the District has already paid the physical education teacher who supervised Ries' class during his preparation time, while she was covering the fifth grade class. The other teacher was properly paid for substituting for Ries because he was teaching her class in addition to his preparation period. Ries was not entitled to the substitution pay during the remaining hour for which she did not supervise the fifth grade class in addition to her own class.

Fred Stieg has been the District Administrator since 1985 and he testified that it has been the practice of the District to compensate teachers only when they are required to supervise a class in addition to their own. Stieg testified that the extra duty documents in District Exhibit 2 are those times when teachers had to either take their own class or someone else's class during their preparation time. None of those extra duty documents indicate that a teacher was paid when taking another class instead of his/her own. Stieg also testified that he did not know of any situations in which other teachers who taught a class of an absent teacher instead of their own ever received substitution pay. Principal Hoppe also testified that she has always only compensated teachers who supervised another class in addition to their own. The Association has not submitted any evidence to the contrary. Arbitrators have held that the failure to object to the other party's interpretation may be held to constitute acceptance of that interpretation such as to make it mutual. Citing, DAYTON PRESS, INC., 76 LA 1253 (1981). If the contract language is found to be ambiguous, past practice will assist the Arbitrator in understanding how the language has been consistently applied.

The Association's interpretation would also require the District to pay for work that was not performed, i.e, the District would be required to pay double substitute pay in that the teacher who supervised Ries' class during his preparation period would have received substitute pay and Ries would receive substitute pay for taking another teacher's class instead of her own. That interpretation is unreasonable. Where an interpretation of ambiguous language leads to harsh or absurd results, while another interpretation, equally consistent, leads to a reasonable result, the latter interpretation will prevail. Elkouri and Elkouri, *How Arbitration Works*, Id. The claim that Ries should be paid even though another teacher supervised her class is illogical and is an attempt to obtain an unwarranted "freebie".

The Association was well aware of the District's interpretation and administration of the substitution language and never filed a grievance over it or proposed a change in the language. District Exhibit 1, a "morning memo" that Hoppe puts out to all the teachers in her building each morning, stated on page two, "If the vacancy is for a special area teacher or specialist, the classes are cancelled. If the vacancy is for a regular education teacher, the following staff members are on a rotating assignment:. . ." Hoppe testified that the three teachers who were picked in the rotation in 1997-98 were specialists, and did not have a regular classroom assignment, so they were told to cancel their classes. District Exhibit 6 is a "morning memo" from the Forest Glen Elementary Principal in January of 1997, reminding teachers that if a physical education teacher is absent and there is no substitute available, teachers who teach their own physical education class in addition to supervising the replacement teacher's class are reminded to complete a substitute form for compensation. Thus, the Association's members were aware of the District's position on paying substitute pay as early as January of 1997. Further, the District exhibits of minutes of the District Administrative Advisory Council indicated that the District's problems with obtaining substitutes was discussed on various occasions in 1998. If the procedure by which the District was paying teachers to substitute was a problem, the Association did not bring it to the District's attention through those various committees and memos. It was not until the instant grievance was filed in February of 1999 that the Association disputed the manner in which the District paid substitute teachers. Prior to that time, teachers never asked to be paid when they were assigned to supervise another teacher's class instead of their own and no grievances were filed in that regard. It is implausible to believe that this was the first time a teacher did not receive substitute pay because they did not supervise a class in addition to their own. In fact, the District has paid teachers in that manner and teachers have only claimed substitute pay when they have supervised a class in addition to their own. Thus, there clearly exists a mutual understanding between the parties.

While the record establishes that substitution was an issue, it also establishes that the Association never addressed the issue in negotiations except to propose an increase in substitute pay.

The Association's interpretation of the substitute language also conflicts with the District's rights to assign under Article II - Management Rights, paragraph 5. If every change in assignment were to be considered a substitution, that would restrict the District's freedom to assign duties to teachers, as the District should not be required to pay substitution rate each time an assignment is made.

The Association also did not produce documentation that explained the discussions between Stieg and Association President Schadewald regarding possible options dealing with the problem of obtaining substitutes. In February of 1997, Stieg e-mailed Schadewald regarding a new concept that had been developed by teachers and the principal at Forest Glen Elementary of dividing the students in the absent teacher's room by the number of teachers remaining at that grade level and placing the students in those classrooms for the remainder of the day, allowing the regular schoolday schedule to remain constant with the "special" classes continuing instead of being cancelled. The substitute teacher pay would then be divided equally among the teachers who took the students. Schadewald responded that he disagreed with the concept, claiming it would be disruptive of the educational progress of the students and that it would violate the contract. Stieg asked Schadewald to identify the portion of the contract that the Association felt would be violated. Schadewald identified Article VI, Section I, Substitution, stating that "the violation of the master agreement occurs in the second part of your proposal, to divide their pay by three." Schadewald stated that the Association also discussed the option of moving "specials" to another school, but that there was a concern with the "liability of regular education teachers teaching in specialized areas with their specialized equipment. . .etc. as well as the loss of preparation time for the affected teachers." There is no mention of a contract violation with the option of moving specials to another school, only a concern regarding liability. Although he says the option would not be financially prudent, he mentions only one payment of $15.00 and not the two payments this grievance is requesting. While Stieg responded to Schadewald's memo by indicating that substitution includes supervising a class in addition to one's own and that the first option was only taking a portion of a class for the day, the District never exercised that option. Instead, it took the option to which Schadewald had only objected on the basis of liability.

In its reply brief, the District asserts that the Association interprets the word "include" in the definition of substitution in a fashion that is totally contrary to its contractual meaning. The Association inserts the word "also", asserting that language means "also includes" and does not exclude everything else. The word "also" is not in the contractual language and cannot be arbitrarily inferred from the existing language without distorting the meaning of the provision. Secondly, in other parts of the contract where the word "include" is used refer to a list of conditions or items, the intent is clearly to exclude items or conditions not listed. Article IV – Grievance Procedure, Sec. E; Article VII – Insurance, Sec. C; Article VIII – Absences, Sec. B. In the two instances where the word is used in the contract where it is not meant to be exclusive or limiting, there is modifying language, i.e., Article II – Management

Rights, paragraph A, states: "including, but without limiting, the generality of the foregoing. . ." and Article VIII – Absences, Section D, states "includes, but is not limited to. . ." If the Association wanted substitution to include more than what is listed, it should have negotiated that open-ended language contained in the above-cited instances.

The Association's interpretation is also contrary to the accepted principles of contract interpretation. The alleged expansive meaning of the term "includes" is contrary to the widely-held principle of *expresio unius, exclusio alterius* (to express one thing is to exclude another.) Arbitrators also follow the general maxim that a written contract is presumed to embody the whole agreement of the parties and the terms and obligations the parties did not include should be deemed to be deliberately excluded. When a list of items is specifically enumerated and there is no general language to show that other items of that class are to be included, it can reasonably be inferred that the items not specifically mentioned were intended to be excluded. WPIX, INC., 49 LA 155, 158 (Turkus, 1967). The Association's position is also contrary to the proposition that the same words used in different parts of the contract should be interpreted in the same fashion. Here, wherever the word "include" is used in the context of listing certain subjects or items, the context clearly indicates that inclusion of the listed items or circumstances excludes other non-listed items or circumstances. The Association's position that the term "substitution" has meaning under this contract apart from the later language also creates a situation where the sentence "substitution shall include. . .", becomes surplussage. Arbitrators presume the contract should be interpreted in a manner that gives meaning to all contractual provisions, and does not render one provision meaningless or ineffective. JOHN DEERE TRACTOR CO., 5 LA 631, 632 (Updegraff, 1946).

Next, the District disputes the Association's version of the bargaining history of Article VI, Section I. The Association posits that the original language has meaning apart from the later language, and that it applies any time a teacher supervises students in place of their regular teacher. As already asserted, if the "stand-alone" definition of substitution applies, the additional language negotiated over the years would be superfluous. While Roloff testified that the Association's proposal in the early 1970's was all inclusive, he had no idea of whether the proposed language ended up in the Agreement. Where there is a disputed interpretation, the presumption is against the author of the language, if it is unclear. Also, Roloff concedes that the Association proposed more than what it received in bargaining. If a party attempts, but fails, in negotiations to include a specific provision in the Agreement, arbitrators will hesitate to read such a provision into the agreement. What counts is the language obtained in bargaining, not the language proposed, but not obtained. The Association's argument that the language added subsequent to the 1971-72 contract was to further define what constituted "substitution" because the librarian and the rest of the membership were unhappy with the library being closed, contradicts the assertion that the

original language was "all inclusive". Further, the 1972-73 language did not say "shall include, but not limited to" or "shall include as examples". The Association cannot have it both ways. The fact that the matter was referenced in the subsequent contract leads to the unmistakable conclusion that the library and study hall issues were not included in the original definition or were later listed as exclusive items. While the Association correctly argues that the 1972-73 contract additions to the definition of "substitution" clarified that it was to include "each class that is sent to the study hall or the library", the Association fails to note that "taking a class" requires that it be "in addition to its own". While Roloff's testimony that the 1972-73 language was meant to include substituting in study hall or in the library, "whenever" was correct, his testimony that the language included "anytime that somebody supervised students of another faculty staff member. . .", is directly contradicted by the very language negotiated into the 1972-73 Agreement which states that "substitution shall include. . . supervising a class in addition to your own."

The Association also incorrectly alleges that the current language, remains unchanged from the 1972-73 contract. An extremely important language change took place in the 1985-86 contract when the words "additional" were added to the study hall and the library language and the categories of substitutes rearranged. This is important because the language in this case, "a class in addition to their own" never changed, but other portions of the provisions were changed to conform all categories to the "in addition to" requirement. The 1985-86 change clearly states that the District must pay substitute pay when teachers supervise a class in addition to their own and take an "additional class" in the study hall and an "additional class" in the library and that language has remained unchanged since.

The Association's witnesses interpolate their present intentions on language and situations from years ago in which today's issue was never considered. Roloff's testimony on the original intent of the language sounds more like what the Association wants now, rather than what it meant then. He characterized the reason for the Association's language as an attempt to alleviate librarians' and study hall teachers' concerns over students being dumped in the library and study hall, and never mentioned teachers being asked to give up preparation periods to substitute as being on the same level of importance in 1972-73. The original intent was to make the administration pay teachers for in-house substituting, since they previously were required to substitute during prep periods without compensation. The Association attempts to distort Roloff's testimony to mean that in the 1970's, the Association intended to have the District pay for two substitutes. That was not his testimony, and there is not one incident in the past 27 years that the Association can point to to support its position. If that were truly the intent from the earliest days of the contract, there would be at least some instances that could be produced to show that the language had been interpreted as claimed. In fact, Roloff articulated the true meaning of the language in his testimony when he testified that the purpose of putting the language in was to compensate teachers for the time being taken

from their normal preparation period to substitute and moving that preparation time to after work hours. (Tr. p. 26). That is precisely the District's position.

Schadewald's testimony regarding intent is contradicted by his notes and inaction in 1997. In 1997, when Stieg and Schadewald discussed the District's options with regard to obtaining substitutes, Schadewald never indicated that the option of moving specials to another school was a contract violation, rather he expressed concerns regarding liability of regular education teachers teaching specialized areas. The Association attempts to rewrite Schadewald's statement after the fact. Similarly, Schadewald's testimony attempts to embellish his February, 1997 memo to say what he now wants it to say. It is also strange that it was only after Schadewald filed the Ries grievance that other teachers "remembered" that they also were not paid according to the contract. This is clear proof that those teachers never knew of Schadewald's interpretation until this grievance arose. The filing of this grievance is the first time the Association has ever interpreted the language in question in that manner in the history of the Agreement.

The District requests that the grievance be denied.

DISCUSSION

The parties have done a thorough job of arguing for their respective positions. Contrary to both parties' assertions, however, there is some ambiguity in the wording of Article VI, Section I. That being the case, it is the Arbitrator's role, as much as is possible, to ascertain the parties' intent.

The Association makes a valid point in noting that the District's interpretation that teachers are not entitled to substitute pay when they are assigned to cover an absent teacher's class instead of their own fails to recognize the disruption and extra work by that teacher to make up the missed classes. On the other hand, the District's interpretation of the provision is more consistent with the principles of contract construction and the history of the provision.

The Association's interpretation that one is substituting within the meaning of Article VI, Section I, any time the teacher is taking a class of an absent teacher, regardless of whether it is instead of or in addition to his/her own class for that period of time, is so all encompassing as to make the wording after the first sentence of that provision unnecessary. As the District points out, it is generally held that the parties will be deemed to have intended that all words they place into their agreement have meaning. Further, if alternative interpretations of a clause are possible, the interpretation which gives meaning and effect to all provisions is preferable. Stated another way, the agreement should be construed so as to give effect to all of its parts. Elkouri and Elkouri, *How Arbitration Works* (Third Edition), p. 308.

The additions to the wording of the substitution provision in the 1972-1973 and 1985-1986 agreements also cut against the all-inclusive interpretation the Association would give to the first sentence. Seemingly, the parties would not have felt the need to add those situations if they had intended that the first sentence cover any time a teacher took an absent teacher's class. Rather, it appears the latter wording was intended to further clarify and define what situations were meant to be covered by the term "substitute". This interpretation is consistent with the often followed principle that "to expressly include one or more of a class. . . must be taken as an exclusion of all others." Elkouri and Elkouri, *How Arbitration Works*, (Third Edition), p. 310.

Association witness Roloff, who negotiated on behalf of the Association from its beginning, testified as to the intent in negotiating the original "substitution" provision:

> The purpose of putting the – it was two-fold. One is to compensate teachers for time that was taken from their normal preparation period which was now being taken to teach, and this was happening on such a regular basis, and, therefore, moving that preparation time into after work compensated hours to be added onto the endless other duties which one needed to adequately teach, and that was one of the things, but the primary – the primary focus or goal was to – if compensation was required to pay existing staff that was equal to or greater than the cost of a substitute, that there would be some remunerative incentive for the administration to actually make the effort of finding substitutes for people who were not at the job on that particular day.
>
> (Tr. p. 26).

It appears from this testimony that teachers were being asked to give up their own preparation time to take the class of an absent teacher for that period, and that the intent was to not only compensate teachers for having to do their class preparation after the work day, but also to provide an incentive for the administration to obtain outside substitutes, rather than utilizing teachers during their preparation periods. While Roloff also testified that the Association desired that any time a teacher was assigned to cover an absent teacher's class would entitle that teacher to substitute pay, he could not recall how much of the Association's proposal was agreed to by the parties, nor does his above-cited testimony denote such a broad intent. There is also no evidence provided that would demonstrate that the substitution provision had ever been administered in that manner. Presumably, had the parties intended the provision to have such a broad application, there would be instances the Association could cite where teachers had been paid substitute pay when they had been assigned to cover an absent teacher's class instead of their own. The absence of such examples again cuts against the Association's assertion that the provision was from its inception intended to apply to all cases of teachers covering an absent teacher's class. While Schadewald's February 17, 1997 memo

to Stieg references paying "each regular education teacher $15.00 per special taught", it did not state the special teacher would also receive substitute pay, and is too vague in that regard to place the District on notice that it interpreted Section I to cover the instant situation.

There is also the testimony of Stieg that as long as he has been in the District (1985), the substitution provision has not been construed to require that teachers who cover an absent teacher's class in lieu of their own class receive substitute pay, and that to his knowledge there have been no grievances filed in that regard until this instance. While this does not necessarily establish a "practice", it does indicate that the substitution provision has not been administered in the manner the Association is advocating.

For the foregoing reasons, it is concluded that the District did not violate the parties' Agreement when it did not pay the Grievant, Karen Ries, substitute pay when she was assigned to cover the class of an absent Fifth Grade teacher instead of performing her regular teaching duties in her own class during that class period.

Based on the above and foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 4th day of November, 1999.

David E. Shaw /s/
David E. Shaw, Arbitrator

DES/gjc
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