BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MUSKEGO AREA PUBLIC EMPLOYEES UNION, LOCAL 2414, AFSCME, AFL-CIO

and

MUSKEGO-NORWAY SCHOOL DISTRICT

Case 63
No. 58028
MA-10819

(10-Month Secretaries Grievance dated 6-24-99)

Appearances:

Mr. John P. Maglio, Staff Representative, Wisconsin Council 40, P.O. Box 624, Racine, WI 53401-0624, appearing on behalf of the Union.

Quarles & Brady LLP, by **Mr. Robert H. Duffy** and **Mr. Michael J. Fischer**, 411 East Wisconsin Avenue, Milwaukee, WI 53202, appearing on behalf of the District.

ARBITRATION AWARD

At the joint request of the parties, the Wisconsin Employment Relations Commission designated the undersigned, Marshall L. Gratz, as Arbitrator to hear and decide a dispute concerning the above-noted grievance under the parties' July 1997-June 2000 collective bargaining agreement (Agreement).

Pursuant to notice, the grievance dispute was heard at the District's office in Muskego, Wisconsin, on December 7, 1999. After a transcript was produced, the parties' post-hearing briefs were exchanged on February 1, 2000, marking the close of the hearing.

ISSUES

At the hearing, the parties authorized the Arbitrator to frame a statement of the issues in dispute. The Union proposed framing the issues as follows:

> Did the District violate the collective bargaining agreement when it issued its directive (Exhibit 7) dated June 9, 1999? If so, what is the appropriate remedy?

The District proposed framing the issues as follows:

> Did the District violate the collective bargaining agreement when it scheduled 10-month secretaries for 211 paid days in school year 1999-2000? If so, what is the appropriate remedy?

The Arbitrator finds it appropriate to frame the issue for determination as follows:

> Are contractual paid holidays to be counted toward the "210 days per school calendar year" that Agreement Sec. 7.02 defines 10-month employes as "hired to work"?

PORTIONS OF THE AGREEMENT

ARTICLE V. GRIEVANCE PROCEDURE

5.03 Steps in Procedure
Grievances shall be processed in accordance with the following procedure:

5.031 Step 1. An earnest effort shall first be made to settle the matter informally between the employee and the administrator within thirty (30) calendar days after the facts upon which the grievance is based first occur or first become known.

5.0311 If the matter is not resolved, the grievance shall be presented in writing to the administrator within thirty (30) calendar days after the facts upon which the grievance is based first occur or first become known, or within five (5) work days after the conference in 5.031. The unit administrator shall meet with the aggrieved employee, accompanied by a representative of the Union if the employee so chooses, within five (5) work days of the submission of the written grievance and shall respond in writing to the aggrieved employee and the Union within five (5) work days of such meeting.

5.032 Step 2. If not settled in 5.0311 above, the grievance may, within five (5) work days, be appealed in writing by the employee to the Superintendent of Schools. The Superintendent shall meet with the aggrieved employee, accompanied by a representative of the Union if the employee so chooses, within five (5) work days of the submission of the appeal and shall respond in writing to the aggrieved employee and the Union within five (5) work days of such meeting.

5.033 Step 3. If not settled in 5.032 above, the grievance may, within ten (10) work days, be appealed in writing by the employee to the School Board. The Board shall meet with the aggrieved employee, accompanied by a representative of the Union if the employee so chooses, within fifteen (15) work days of the appeal and shall respond in writing to the aggrieved employee and the Union within five (5) work days of such meeting.

. . .

5.11 Extension of Time Limits
Time limits contained in this Article shall be extended for an additional time up to ten (10) work days to accommodate reasonable handling in the event one or more of the parties to the grievance is absent because of sick leave, vacation or approved leave of absence.

ARTICLE VI. BINDING ARBITRATION

6.01 Requirements
In order to process a grievance to Binding Arbitration, the following must be complied with:

6.011 Written notice of a request for such arbitration shall be given to the Board within ten (10) work days of the receipt of the Board's last answer.

. . .

6.03 Selection of Arbitrator
If the parties are unable to agree upon an Arbitrator within ten (10) work days, after such written notice of submission to arbitration, either party may request the Wisconsin Employment Relations Commission to appoint a member of its staff to serve as impartial Arbitrator.

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ARTICLE VII. DEFINITION OF EMPLOYEES

7.01 12 Month Full-Time
A 12 Month Full-time Employee is hereby defined as an employee hired to fill a full-time (thirty-seven and one-half [37-1/2] hours per week) position on a twelve (12) month basis.

7.02 10 Month Full-Time
A 10 Month Full-time Employee is hereby defined as an employee hired to work (thirty-seven and one-half [37-1/2] hours per week) for 210 days per school calendar year.

7.03 School Year Employees
A school year employee is hereby defined as an employee hired to work seven and one-half (7-1/2) hours per day for 180 days per calendar year.

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ARTICLE XII. HOURS OF WORK

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12.05 Notification of Report to Work
All ten (10) month and school year employees shall be given written notice at the time their final pay check of the current school year is issued concerning the date that said employees are to return to work for the following school year, if such information is known. In any event, all employees shall receive written notification of the date on which they are to return to work no later than August 20.

12.06 Work Year
Elementary secretaries will have a minimum of five days after the last teacher day for clerical tasks relating to the closing of the school year.

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ARTICLE XIII. OVERTIME AND HOLIDAY PAY

. . .

13.02 Computation
For the purposes of computing overtime, all hours paid shall be considered hours worked.

13.03 Holiday Premium
One and one-half (1-1/2) times the employee's regular rate of pay shall be paid for all work performed on a holiday, in addition to holiday pay.

. . .

ARTICLE XX. HOLIDAYS

20.02 Days Granted: 10 Month Full-Time & 10 Month Part-Time
All ten (10) month full-time and ten (10) month part-time employees covered by this Agreement shall be granted the following paid holidays each year. Holiday

pay for ten (10) month part-time employees shall be pro-rated as compared to those hours paid to a ten (10) month full-time employee.

1. New Year's Day
2. Good Friday
3. Memorial Day
4. Labor Day
5. Thanksgiving Day
6. The day after Thanksgiving
7. December 24
8. Christmas Day
9. December 31

. . .

20.07 Eligibility
In order to qualify for holiday pay, the employee must work the workday previous and the workday following such holiday. If a personal day is used before or after a holiday, the employee shall forfeit that holiday pay.

20.08 School offices will be closed during the Christmas Holidays. The exceptions will be the District Office, the High School Administrative Office, and the Middle School Office where twelve month, full-time secretaries are employed. Ten month full-time employees may request to work this holiday period; and if work is available, they will be assigned by the Director of Human Resources to one of the offices which will be open. The available secretaries will be assigned on a strict seniority basis from a list comprised of those ten month employees who desire work during the Christmas Holiday vacation period.

. . .

ARTICLE XXII. SICK LEAVE

22.01 Purposes
All twelve (12) month full-time, ten month full-time, school year and regular part-time employees covered by this Agreement shall be entitled to use earned sick leave without loss of pay when absence from work is required because of personal illness or injury or diagnostic services, including emergency medical and emergency dental appointments during working hours. So long as it is authorized by the Wisconsin and/or Federal Family and Medical Leave Act, sick leave may be used for a serious illness of any member of the employee's immediate family.

Serious illness of family members in the immediate household will be considered a valid use of sick leave.

22.02 Accumulation - Full Time Employees
Sick leave for twelve (12) month full-time, ten (10) month full-time and school year employees shall accumulate at the rate of one (1) day per month of employment . . . .

. . .

22.04 Holiday During Sick Leave
In the event that a paid holiday falls within a period when an employee is on sick leave, it shall be charged as a paid holiday and not be deducted from the employee's earned sick leave.

ARTICLE XXIII. WORKER'S COMPENSATION

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23.02 Period of Full Pay
Any employee who is absent due to injury or illness caused during the course of his/her duties will receive a maximum of three (3) months full pay on condition that compensation checks for said period be endorsed and turned over to the Business Office in lieu of full pay. Any compensation insurance received after the above three (3) months will be retained by the employee until such time as he/she returns to work. There shall be no deductions from the employee's sick leave accumulation when an employee is absent due to a compensable injury or illness.

ARTICLE XXIV. BEREAVEMENT LEAVE

24.01 Leave
All employees covered by this Agreement shall be eligible for Bereavement Leave, with pay, under the following conditions:

23.011 [24.011??] Purpose and Definition
Such leave will be granted only for attendance at the funeral of immediate family . . .

All secretaries and teacher aides shall be granted bereavement leave for such time as they are unable to perform their normal duties. Said days over and above the time set forth in the Article shall be deducted from the employee's accumulated sick leave.

. . .

BACKGROUND

The District operates a K-12 public school system serving communities located southwest of Milwaukee, Wisconsin. The Union represents the District's non-supervisory clerical and teacher-aide employes. The District and Union have been parties to a series of collective bargaining agreements including a 1994-97 agreement nominally expiring on June 30, 1997, and the Agreement nominally covering July 1, 1997 through June 30, 2000. It is undisputed that the Agreement was signed by the District on September 8, 1998, and by the Union on October 15, 1998.

In pertinent part, the June 14, 1999 class action grievance giving rise to this arbitration, asserts that the District violated Sec. 7.02 of the Agreement by issuing a memorandum dated June 9, 1999, scheduling 10-month secretaries for a school year 1999-2000 work year consisting of 211 paid days inclusive of 9 paid holidays, i.e., 202 days not inclusive of paid holidays. The grievance asserts that work year thereby established by the District is "8 work days" short of the "210 days per school calendar year" required by the Sec. 7.02 definition of a 10-month employe. By way of remedy, the grievance requests that the schedule be revised to include eight additional days, or, alternatively, that the District pay the affected employes eight days of backpay if the grievance is not settled in a timely manner.

In its grievance procedure responses to the grievance, the District denied the grievance, asserting that Sec. 7.02 requires only that the employes involved be scheduled for 210 paid days inclusive of the 9 contractual paid holidays, and that they were, in fact, scheduled for one day more than that.

The parties ultimately agreed, on a non-precedential basis for the 1999-2000 school year, to schedule 10-month secretaries for 210 paid days in addition to the 9 contractual paid holidays.

The underlying dispute remained unresolved in the grievance procedure and was ultimately submitted for arbitration as noted above.

At the hearing, the Union presented testimony by bargaining unit member Margaret Koopmeiners. The District presented testimony by its Director of Human Services, Jean Henneberry and by its Director of Business Services, A. George Haynes.

Additional factual background is set forth in the positions of the parties and in the discussion, below.

POSITIONS OF THE PARTIES

The Union

The newly revised language of Agreement Sec. 7.02 clearly and unambiguously means that 10-month full-time employes are hired to work 210 days per school year, not inclusive of paid holidays.

The Union has, in recent years, attempted to obtain a clearer contractual definition of the work year for 10-month secretarial employes. The District's work year schedules for 10-month employes have varied over the years, prompting a May 6, 1996 grievance asserting that the District violated a past practice by scheduling 10-month elementary secretaries for only six work days prior to the return of school term employes rather than the customary ten. That grievance was settled on a non-precedential basis by adding work days for the elementary secretaries, returning their schedule to what had become a pattern of about 219 days per year consisting of 210 days of work plus 9 paid holidays.

In the next round of bargaining, that leading up to the Agreement, the Union sought to codify that settlement into the Agreement. The 1994-97 agreement language on the subject was somewhat ambiguous and incomplete. It consisted of then Sec. 7.02, which defined a 10-month full-time employe "as an employee hired to fill a full-time (thirty seven and one-half [37 - 1/2] hours per week) position on a school year basis," and of Sec. 12.06 which provided then as now, "[e]lementary secretaries will have a minimum of five days after the last teacher day for clerical tasks relating to the closing of the school year." That 1994-97 language failed to identify how many days of work per year the employes were entitled to and extended the five day assurance in Sec. 12.06 only to elementary secretaries while remaining silent regarding 10-month staff working in the high school, middle schools and central office.

The Union, therefore, proposed modifying the Agreement in various respects. Eventually the parties agreed to the District's proposal to modify Sec. 7.02 to define a 10-month full-time employe as "an employe hired to work (thirty seven and one-half [37 - 1/2] hours per week) for 210 days per school calendar year." (Union's emphasis.) Nowhere does that language state that the 210 days includes paid holidays. Elsewhere in the Agreement, the grievance procedure in Article V establishes time limits measured in numbers of "work days." The District admits that "work days" as used in that context would not include paid holidays. The Union, therefore, had every reason to understand the District's proposal to redefine 10-month employes in Sec. 7.02 by reference to "work . . . 210 days" as similarly not including paid holidays.

The Union would never have agreed to changing Sec. 7.02 if the end result would be a reduction in work days for 10-month staff. Throughout the bargaining leading to the Agreement, the Union made it clear that it was seeking to increase the work year of its 10-month members. District Exhibit 12 — which the Union contends understates actual paid days worked by the 10-month secretaries over the years — shows that in all school years from 1993-94 through 1998-99, except for the first year, the average number of paid days for 10-month secretaries always exceeded the 210 paid days including holidays that the District would have the Arbitrator believe constituted the status quo. The number of paid days that the District's exhibit claims it granted to the employes averaged 219.1 in 1997-98 and 218.8 in 1996-97, confirming the Union bargainers' reasonable belief that the District's proposal basically maintained the status quo of 210 work days plus 9 holidays.

The Union, nonetheless, viewed the District's proposal as an improvement over the status quo because it established a clearly defined number of days rather than requiring the Union to pursue another grievance based on Union assertions about what the practice had been.

No weight should be given in this dispute to District work year memorandums issued prior to the one concerning the 1999-2000 school year. The Agreement modifying Sec. 7.02 was not signed until after the District's 1998-99 work year memorandum had already been issued. Thus, the June 9, 1999 memorandum regarding the 1999-2000 work year was the first such memorandum issued after the Agreement was signed. In any event, District Exhibit 12 shows that the days actually paid to 10-month employes exceeded those indicated on the corresponding District work year memorandums.

Nor should any weight be given to the contents of the District's costing sheets. The record shows that the Union and District never jointly costed the proposals made by either party, and the actual paid days granted to 10-month secretaries often exceeded the number of days budgeted by administration and approved by the School Board.

The District's reliance on the Agreement provisions regarding bereavement pay, sick leave and Worker's Compensation is misplaced. Unlike the Agreement holidays Article language and Sec. 7.02, each of those three provisions expressly defines the benefit as a substitution for paid work time.

Therefore, if the District intended to include paid holidays in the 210 work days identified in Sec. 7.02, it was incumbent on the District to have done so. Had the District done so, the Union would have rejected the proposal as regressive. Instead, the Union analyzed the District's language on its face and appropriately concluded that it granted 10-month secretaries 210 work days per year.

Only in Sec. 13.02 does the Agreement provide that holidays (along with all other paid hours) would be treated as hours worked. However, Sec. 13.02 expressly so provides only "[f]or purposes of computing overtime." The District did not propose, and the parties did not agree in Sec. 7.02 to include a similar provision for purposes of computing the 10-month employes' work year.

For the foregoing reasons, the District violated Agreement Sec. 7.02 when it issued its June 9, 1999 memo. The grievance should be granted and the Arbitrator should require the District to schedule 10-month secretaries to work 210 days per year, not inclusive of holidays.

The District

Relying on new Agreement language in the definition of ten-month employes, the Union incorrectly contends that the District must pay its 10-month secretaries for 219 days

rather than the 210 paid days actually prescribed by the new language. The Union calculates this figure of 219 by adding the ten-month secretaries' 9 paid holidays to the 210 paid days referred to in Sec. 7.02 of the Agreement.

The record shows that the District's proposed changes in Sec. 7.02 — which were presented as part of the District's initial proposals — were intended only to clarify and quantify the definition of 10 month employes to substitute a specific "210 days" for a circular "ten months"; to affirm the practice whereby individual District building administrators were occasionally scheduling 10-month secretaries to work on days falling outside of the "ten months" period; and to enable the District to continue to budget for 10-month secretaries in the future as it had in the past, i.e., at a total of 210 paid days including holidays and all other contractual paid time off benefits.

In contrast, the Union's efforts in the 1997 negotiations as it had been in 1994, were to expand the 10-month secretaries total number of paid work days. In 1994, the Union unsuccessfully sought to transform 10-month employes into 12-month secretaries. In 1997, the Union tried to make elementary secretaries into 11-month secretaries by proposing to change Sec. 12.06 so elementary secretaries would begin working on August 1, rather than the usual Monday closest to August 15. The Union also proposed changes in Sec. 20.08 that would officially close District offices during Spring Break while providing all 10-month secretaries with requisite seniority an opportunity to work during Spring Break on an as-needed basis and requiring that all elementary secretaries work during Spring Break.

In the parties' second and third bargaining sessions, the District told the Union it was not interested in adding days but rather in restructuring when 10-month secretaries could work. During the third session (held in November of 1997 and the first with WERC Mediator Dan Nielsen present), the Union's chief negotiator acknowledged in the opening joint session that 10-month secretaries were currently paid for the 210 days reflected in the District's Sec. 7.02 proposal, but he insisted that those secretaries needed more days. That acknowledgement was reflected in Henneberry's bargaining note which read, "hours of wk - add days to elem secs — start 8/1 now get 210 days — normally start mid Aug. off at [xmas] & 5 days after [teachers complete their work for the school year] elem secy's need more days." Later in that meeting, the District told Mediator Nielsen that it was not willing to expand those secretaries' number of paid days. The Union counterproposed adding to the District's Sec. 7.02 proposal the words, "except that a 10-month elementary school secretary shall work on a 215 days per school calendar year basis" and by offering to drop a vacation proposal if the District accepted the Union 7.02 counter, but the District did not agree.

In March of 1998, the parties reached an overall tentative agreement which incorporated only the District's proposed Sec. 7.02 revisions. The Union abandoned both its indirect effort to expand 10-month secretaries' number of paid working days by guaranteeing some of them work during Spring Break and its more direct efforts to expand 10-month secretaries paid working days through its proposed changes in Secs. 7.02 and 12.06.

The District's intention that its Sec. 7.02 proposal would clarify that 10-month secretaries would be paid for 210 days inclusive of contractual holidays is reflected in other Agreement language as well as in the District's efforts to cost the new agreement and in District scheduling decisions. The Union might have a point if Sec. 7.02 defined a 10-month employe as "hired to work . . . 210 work days per school calendar year." But that is not what it says. Rather, as written, it stands in stark contrast to the "work days" language in Sec. 5.03. The Union acknowledges that sick leave, Worker's Compensation leave and funeral leave benefits were included within the 210 paid days contemplated by Sec. 7.02, but it is inexplicably unwilling to make a parallel acknowledgement regarding paid holidays. Furthermore, the District's costing data, which it showed to the mediator, was consistently based on 10-month secretaries being paid for 210 days, inclusive of paid holidays. Also, the District's 1998-99 school calendar distributed to secretaries in early July, 1998, identified 10-month secretaries with the notation concerning 10-month secretaries: "(201 + 9h) August 10 - June 15 (213 days)," reflecting the fact that they were budgeted for 210 days (201 work days plus 9 holidays), but were scheduled for 213 days inclusive of holidays. Similarly, the 1999-2000 calendar sent to all 10-month secretaries by the District was accompanied by a cover letter in which Henneberry indicated that 10-month secretaries had been budgeted at 210 paid days. While the District, in fact scheduled the employes for more than the 210 days inclusive of holidays that they budgeted for (213 paid days in 1997-98 and 1998-99 and 211 for 1999-2000), and while the employes often wound up being assigned additional days so that they were paid for even more days than they were scheduled for, the District's budget provided a cushion to accommodate those developments. Notably, the Union did not grieve the District's 1998-99 calendar and scheduling memorandum which, like the disputed one in 1999-2000, was expressly premised on inclusion of 10-month secretaries' paid holidays within the 210 days for which they were budgeted.

The Union's interpretation of the Agreement cannot overcome the overwhelming evidence demonstrating that it is incorrect. The Union cannot be permitted to obtain in arbitration what it was unable to obtain at the bargaining table.

For the foregoing reasons the Arbitrator should deny the grievance in all respects.

DISCUSSION

Either of the parties' proposed statements of the issues would permit the necessary analysis of the ultimate contract interpretation issue in this case: whether paid contractual holidays are to be counted toward the "210 days per school calendar year" that the newly agreed-upon Sec. 7.02 defines 10-month employes as "hired to work." The Arbitrator has merely framed the issue to squarely address the only aspect of the June 9, 1999 memorandum that is in dispute in this case.

Both parties have appropriately argued that Agreement Sec. 7.02 should be interpreted in the context of the Agreement as a whole.

The Union would have the Arbitrator interpret the words "hired to work . . . 210 days" in Sec. 7.02 to have the same meaning as would the words "hired to work . . . 210 work days" with "work days" given its undisputed Article V meaning of not including paid holidays.

The District would have the Arbitrator avoid the Union's interpretation because the parties used the term "days" rather than "work days" in their revision of Sec. 7.02.

A review of the balance of the Agreement raises serious doubts about the propriety of the Union's interpretation.

For, in Sec. 20.07, the parties agreed that "to qualify for holiday pay, an employe must work the workday previous and the workday following such holiday." (Arbitrator's Emphasis.) The Arbitrator interprets "work day" in Article V and "workday" in Sec. 20.07 as being effectively the same term.

Thus, the parties referred to employe "work" in relation to a "workday" in Sec. 20.07, but they referred to employe "work" in relation to "days" in Sec. 7.02. The parties' use of that differing terminology strongly suggests that the parties intended "days" in Sec. 7.02 to mean something different than "workday" in Sec. 20.02 and "work days" in Article V. Otherwise, the parties would presumably have defined 10-month employes as "hired to work . . . 210 workdays" or as "hired to work . . . 210 work days."

Therefore, unless the record evidence beyond the Agreement language persuasively indicates that the parties mutually intended those different sets of words to have the same meaning, the Union's interpretation ought not be adopted.

Apart from what the Union has unpersuasively argued were its reasonable inferences from the language of District's Sec. 7.02 proposal in the context of the Agreement as a whole, there is no contention or showing that the District's conduct during bargaining indicated to the Union that the District intended its Sec. 7.02 proposal to have the same meaning as if it read "work . . . 210 work days." Similarly, nothing in the Union's bargaining table conduct would have put the District on notice that the Union, by agreeing to that proposal, nevertheless intended "work . . . 210 days" to have the same meaning as if it read "work . . . 210 work days." While the Union had clearly expressed and demonstrated its interest in a longer work year, especially for elementary secretaries, it wound up settling without those of its proposals that would have achieved that objective. Instead, the Union ultimately accepted the District's Sec. 7.02 initial proposal on the subject without ever stating that it understood that proposal to mean that 10-month secretaries would "work . . . 210 work days" or would continue to be assigned at least as many work days as the employes had been averaging in recent years. The District, on the other hand, resisted those various Union proposals and obtained Union agreement to the District's initial Sec. 7.02 proposal which, when read in the context of the Agreement as a whole, strongly suggests that it does not mean "work . . . 210 work days."

Therefore, whatever the Union's uncommunicated intentions or understandings may have been, the record evidence does not indicate that the Union communicated in bargaining that it understood either that "work . . . 210 days" would mean "work . . . 210 work days," or that the "210 days" referred to in Sec. 7.02 would be in addition to the contractual paid holidays.

In sum, to redefine the number of days for which 10-month employes were being hired to work, the District proposed and the Union ultimately agreed to language which used "days" terminology materially different than the "workday" and "work day" terms used elsewhere in the Agreement. The District's use of that different terminology in its proposal was an indication that the District did not intend its proposal to mean that 10-month employes would "work . . . 210 work days." The Union has not persuasively shown that the parties nevertheless mutually intended either that "work . . . 210 days" would mean "work . . . 210 work days," or that the "210 days" referred to in Sec. 7.02 would be in addition to the contractual paid holidays.

The Arbitrator, therefore, rejects the Union's proposed interpretation of Sec. 7.02 and adopts, instead, the District's which is more consistent with the Agreement read as a whole.

On that basis, the grievance is denied.

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 issue submitted that:

1. Yes. Paid contractual holidays are to be counted toward the "210 days per school calendar year" that Agreement Sec. 7.02 defines 10-month employes as "hired to work."

2. Accordingly, the grievance is denied.

Dated at Shorewood, Wisconsin, this 18th day of February, 2000.

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

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