BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CLINTONVILLE EDUCATION ASSOCIATION

and

BOARD OF EDUCATION OF THE
CLINTONVILLE PUBLIC SCHOOL DISTRICT

Case 40
No. 60163
MA-11543

Appearances:

Mr. David A. Campshure, UniServ Director, United Northeast Educators, 1136 North Military Avenue, Green Bay, Wisconsin 54303-4414, appearing on behalf of Clintonville Education Association, referred to below as the Association.

Mr. Robert W. Burns, Davis & Kuelthau, S.C., Attorneys at Law, 200 South Washington Street, Suite 401, P.O. 1534, Green Bay, Wisconsin 54305-1534, appearing on behalf of the Board of Education of the Clintonville Public School District, referred to below as the Board or as the District.

ARBITRATION AWARD

The Association and the Board are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Association and the Board jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, to serve as Arbitrator for two grievances filed on behalf of Gerald Smith. The parties agreed to combine the two grievances for arbitration. Hearing was held on May 9, 2002, in Clintonville, Wisconsin. Deborah Duquaine prepared a transcript of the hearing and filed it with the Commission on June 4, 2002. The parties filed briefs and reply briefs by October 1, 2002.

ISSUES

The parties did not stipulate the issues for decision. I have determined the record poses the following issues:

> Did the District violate the collective bargaining agreement by assigning the Grievant a weekly schedule of roughly 1,280 minutes in the 2000-01 school year and 1,300 minutes in the 2001-02 school year?
>
> If so, what is the appropriate remedy?

{PRIVATE }RELEVANT CONTRACT PROVISIONS

ARTICLE II – MANAGEMENT RIGHTS

2.1 Management Recognition

The Association recognizes the Board of Education, on its own behalf, and on behalf of the electors of the District, hereby retains and reserves unto itself, 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:

. . .

E. To determine class schedules, hours of instruction, assignments of teachers, and use of paraprofessionals after consideration is given to any recommendation which may be volunteered by a teacher or teachers involved.

F. To designate duties, responsibilities and extra and/or cocurricular assignments with the total program.

. . .

2.2 Limitation of Rights

The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations, and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this Agreement, and then only to the extent such specific

and express terms hereof are in conformance with the Constitution and laws of the State of Wisconsin, and the Constitution and laws of the United States.

• • •

ARTICLE V - GRIEVANCE PROCEDURE

. . .

E. LEVEL FIVE - Binding Arbitration:

. . .

4. It is understood that the function of this arbitrator shall be to provide a decision as to the interpretation and application of specific terms of this Agreement. This arbitrator shall have no power to advise on salary adjustments, except the improper application thereof, nor to issue any decisions advising the parties to add to, subtract from, modify or amend any terms of this Agreement.

. . .

ARTICLE VII – COMPENSATION

. . .

7.3 Extended Contracts

Teachers offered extended contracts (contracts in addition to the 188-day contract), shall received the following compensation:

A. 100% of prorated daily salary if working with students
B. 75% of prorated daily salary if not working with students
C. Band directors, when leading a marching band for a Memorial Day parade and/or Christmas parade, shall be compensated as provided in 7.3A; however, each are limited to a maximum of five (5) hours.

. . .

7.11 Sixth Class Reimbursement

. . .

B. The acceptance of a 6th instructional assignment position on the part of a teacher is voluntary; however, if no staff member has agreed to accept it, the District may then assign the least senior person certified to teach the vacancy.

. . .

E. If more than one teacher in the District, who is certified for the position, desires to accept the 6th instructional assignment, the teacher with the most seniority shall be given the first opportunity for the 6th instructional assignment.

F. The District will initiate requests for teachers to accept a 6th instructional assignment vacancy.

G. The District shall seek revisions in teaching schedules to accommodate a teacher who is accepting the 6th instructional assignment, if all parties affected by the changes agree and, if in the District's opinion, the changes do not disrupt student schedules.

H. The teacher accepting the 6th instructional assignment with no supervision assignment shall be compensated at a rate of 16% of his or her current placement on the salary schedule (20% if a 6th class and supervision are assigned). The teacher may decline the supervision assignment. The salary rate will be prorated depending on length of assignment. . . .

ARTICLE XIV - EMPLOYMENT CONDITIONS

. . .

14.3 Teacher Day

The normal teaching day for a full-time equivalent teacher is to consist of approximately an eight- (8-) hour period. . . .

14.5 Elementary Part-time Contracts

A. Part-time teachers who have teaching assignments in elementary (PK-5), music, art, and physical education may be assigned classes based on a weekly schedule of 1300 minutes of instructional time. This 1300-minute standard does not apply and will not be applied to any elementary teacher who is currently on a full-time continuing teacher contract under Sec. 118.22.

B. The parties also agree that the 1300 minutes of instructional time shall be used as the base for determining the percentage of a teaching contract that a part-time teacher referenced in #1 will receive and be compensated for when rounded to the nearest percent.

. . .

ARTICLE XXII - TERM OF AGREEMENT

. . .

22.3 Complete Agreement

This Agreement represents the full and complete agreement as a result of negotiations between the parties. It is agreed that any matters relating to the current contract terms, whether or not referred to in this Agreement, shall not be open for negotiations except as the parties may specifically agree thereto.

{PRIVATE }BACKGROUND

The combined grievances concern the Grievant's teaching schedules for the 2000-01 and the 2001-02 school years. The Grievant is a full-time elementary school art teacher, who has been employed by the District for twenty-four years. Lynne Kessler, the Association's Teacher Rights Chair, summarized the first grievance in a letter to Building Principal Sigrid Shaw, dated May 30, 2001, which states:

> . . . It has been established through past practice that elementary specials teachers work 1200 minutes weekly. Mr. Smith's current load is 1280 minutes per week, 80 minutes over his limit as a full time elementary specials teacher. . . . Our resolution would be to change the breakfast duty minutes so that Mr. Smith's total minutes would equal 1200 rather than 1280. . . .

Kessler summarized the second grievance and the appropriate remedy in a Level IV memorandum dated October 10, 2001, which states:

. . .

> The District has based Jerry Smith's elementary teaching contract for the 2001-02 school year on a 1300-minute standard. The collective bargaining agreement and longstanding past practice provide that elementary "specials" contracts are based on a 1200-minute standard. It appears that the administration has chosen to assign a teaching schedule based on 1300 weekly minute instructional schedule. It should be noted that all other elementary "special" contracts are based on the 1200-minute standard.

. . .

> Modify Mr. Smith's teaching contract to comply with the contract and past practice which bases a full-time elementary contract on the 1200-minute weekly standard . . . (or) Mr. Smith should be compensated using either the extended contract provision (7.3) or the sixth class provision (7.11), and any other just and proper relief.

The parties refer to the subjects of art, music and physical education, at the elementary level, as "specials." The evidence adduced at hearing covered past practice and bargaining history, and is best set forth as an overview of witness testimony.

Donald Primmer

Primmer has served the District as an elementary teacher since the 1972-73 school year. For roughly three years, when Reed Newton was an elementary principal, Primmer, with the assistance of the affected teachers, prepared work schedules for specials. He submitted the schedules to Newton for approval. While doing so, Primmer used 1200 minutes per week as the standard for a full-time schedule. There was no contractual provision or Board policy stating this standard, but it was the standard that Primmer understood to be that used by Newton and other administrators. Primmer has served as the Association's President, and on its grievance committee. He served during the settlement of a grievance filed on behalf of David Eichhorn, an art instructor. During the processing of that matter, Milo Fossen, the Junior High School Principal, issued a letter, dated October 3, 1983, that denied Eichhorn's grievance and stated:

> . . . a full time teacher in our school district teaches a minimum of 1200 minutes a week (five classes per day of instruction, 48 minutes in length, five days per week).
> . . .

The grievance, processed in 1983, concerned seniority rights in a layoff situation.

Lynne Kessler

Kessler has served the District for twelve years, as a K-8 music teacher. In that capacity she has always split her time between elementary and middle schools. She noted that the middle and high schools construct schedules based on class periods. Five classes per day five days per week define a full-time position. At the start of the 1997-98 school year, the middle school principal, Richard King, informed her that she had a "10% deficit of instructional time" which King stated as "a 78 minute shortage per week." To address this, King assigned her to two first grade classes. She met with those classes thirty minutes per day, two times per week. She noted this totaled one-hundred twenty minutes or 10% of a 1200-minute weekly schedule.

Kessler processed the grievances posed here, and surveyed the schedules of specials instructors from the 1989-90 school year through the 2001-02 school year. She stated that her survey did not discover teaching loads, not including volunteered for duties, exceeding 1300 minutes per week. She did not include travel time in her tabulation of teaching minutes. She stated her interpretation of her survey thus during cross-examination:

Q Now . . . you are not asserting that there is a hard-and-fast rule of 1,200; am I correct in that?

A Only to the extent I know that over the years there's been a lot of talk. We have nothing that is in writing. That's the unfortunate thing, but I have heard the 1,200 minute standard since I started here.

. . .

A I believe our standard at this point as far as starting a grievance is when we got to 1,280 last year. That's the first time that we started a grievance on this issue. (Transcript, [Tr.] at 36-37)

. . .

Q So what this grievance amounts to is that there's a line between 1,200 and 1,300 that the association feels the district crossed, but you can't really tell us exactly where that line is; can you?

A As far as an absolute number –

Q Right.

A -- where the line was crossed?

Q Right.

A No. (Tr. At 45).

Gerald Smith

Smith noted that during the 1999-00 school year, he taught a 1350-minute weekly schedule. He believed the schedule included a breakfast duty that he volunteered for, and for which he received comp time. He believed the building principal at the time was Bob Spence. Kristine Strauman replaced Spence, and did not extend comp time for this duty. In the 2000-01 school year, Smith's weekly schedule was originally set at 1,155 minutes. Strauman added a breakfast duty that brought his weekly schedule to 1280 minutes.

Karen Petermann

Petermann has served the District as a physical education teacher since 1987. At the time of the arbitration hearing Petermann served in a job-share position with Tracy Sternweis. Petermann teaches 55% of the position, which she calculated as 650 minutes. In the 1992-93 school year, Petermann taught in a part-time position, set at 40% of a full-time-equivalent position. Newton was then a principal, and asked her to accept a 500 minute schedule so that the District did not have to split the instruction of a kindergarten class. Spence succeeded Newton, and raised her teaching minutes to 510, then increased it again the following year. This prompted a grievance that the parties eventually resolved through the creation of a memorandum of understanding that expired by its terms on June 30, 1997. The parties extended the memorandum through the 1998-99 school year, then incorporated it in the labor agreement as Section 14.5.

Edward Johnson

Johnson has served as an elementary instructor for the District for twenty-five years. He has held a variety of positions for the Association, and has processed a number of grievances, including that of a music teacher, Adrienne Davis, during the 1994-95 school year. That grievance prompted the following settlement agreement, dated February 28, 1995:

. . .

> Let this go on record, that this agreement sets no precedent and that completion of other unresolved grievances pertaining to staff minutes, may/may not alter or impact the agreement herein.
>
> A revised schedule from Miss Davis will again be necessary for instructional information and should be based on 1200 minutes. Being that Miss Davis is contracted 65% at the middle school, her scheduled contact time will be 780 minutes. The administration would request that continued group lessons with St. Mary's and St. Rose be scheduled 30 minutes each as they currently are, full

> band rehearsal three times per week be continued and three lunch supervision's per week remain in her schedule. The aforementioned garners 294 contact minutes leaving 486 un-scheduled time of which Miss Davis needs to fulfill.
>
> . . .

Johnson also serves as a member of the Association's bargaining team. He noted that in proposals for the 2001-03 agreement, the Board proposed to alter Section 14.5 to include a provision setting 1610 minutes per week of instructional time as a full-time load. The proposal stated seven forty-six-minute periods on five days per week was the basis for the weekly standard. The Board later revised the proposal to set a weekly standard of 1450 minutes. The Board's proposal altered Section 14.5 to address full and part-time elementary contracts.

Johnson viewed Newton's scheduling practices as the reflection of a clear understanding by which teaching contracts would come as close to 1200 minutes as possible. Some variance above and below this standard was possible to address scheduling needs, but did not affect the full-time status of a teacher if it fell below 1,200 minutes, nor demand overload compensation if it exceeded that standard. This understanding traces back into the 1980's, and was discussed as a practice at that time, when the Association proposed to incorporate the understanding into the terms of the labor agreement. Johnson stated that the District acknowledged the practice, and stated it was unnecessary to add verbiage to the labor agreement that would do no more than codify an existing system.

Kristine Strauman

Strauman has served the District as an elementary principal since July of 1997. Newton was filling that position on an interim basis when the District hired her. Newton left her a packet of material to assist her in preparing work schedules. She understood Newton's practice to be that specials schedules should fall into a range of from 1200 to 1400 minutes per week. She further understood that this was an administrative practice, rather than a contractual requirement. Strauman and Shaw surveyed the schedules of regular full-time elementary (K-5) teachers, not including specials. They found schedules exceeding 1200 minutes, including schedules that range from 1335 to 1595 minutes per week. The variance, in Strauman's view, reflects that she structures elementary schedules to assure six hours of instructional time, but permits the individual teacher latitude in setting up the actual schedule.

Strauman noted that she includes travel time in preparing work schedules for specials instructors. She understood that to be Newton's practice. She added that travel time has been used to bring a specials instructor to full-time status. When preparing work schedules for teachers who perform duties at the elementary and at the high school, she treats the work at the

elementary level at part-time and pro-rates the number of elementary minutes using the 1300 minute standard set in Section 14.5.

Strauman completed a survey comparable to that undertaken by Kessler. She did not think the data showed a consistent pattern, but schedules ranging from 1100 to 1465 minutes per week.

When Strauman assigned the Grievant's 2000-01 schedule, he originally had roughly 1,150 minutes. She approached him and he agreed to assume a breakfast duty to bring his schedule to not less than 1,200 minutes per week.

Sigrid Shaw

Shaw has been an elementary principal for three years. She taught for the District prior to becoming a principal, and has been a District employee for more than thirty years. While a teacher, she served the Association in a variety of positions, including president and chief negotiator. She schedules specials for a work schedule between 1200 and 1400 minutes per week. She based this practice on advice from Strauman.

Tom O'Toole

O'Toole has served as the District's Superintendent since July of 2001. The Board has never informed him of any policy that governs the establishment of the weekly schedules of full-time instructors of elementary specials.

Further facts will be set forth in the **DISCUSSION** section below.

{PRIVATE }THE PARTIES' POSITIONS
{tc "THE PARTIES' POSITIONS"}

{PRIVATE }The Association's Initial Brief
{tc "The County's Initial Brief"}

The Association states the issues for decision thus:

> Did the District violate the parties' collective bargaining agreement, Article 14.5 in particular, when it assigned Jerry Smith a weekly instructional schedule of 1280 minutes for the 2000-01 school year and 1300 minutes for the 2001-02 school year?
>
> If so, what is the appropriate remedy?

The Association contends that Section 14.5 of the labor agreement unambiguously "states that a 1300-minute standard does not apply, and will not be applied, to any full-time elementary music, art and physical education teacher." The Board essentially contends that "1200 minutes is merely a minimum for full-time status" and that it is "free to assign elementary teachers any schedule over 1200-minutes, without additional compensation."

The Board's contention, however, is not well supported by the evidence. Even if principals have assigned schedules ranging anywhere from 1200 to 1400 minutes, this reflects no more than an accommodation of "the needs of the District and students." To conclude this permits the Board to use a 1,300 minute standard and deny additional compensation is "irrational." That the Board has proposed to create a specific standard during bargaining underscores the weakness of its arbitration position. That it did not assign schedules greater than 1200 minutes during the two school years covered by the grievance underscores the weakness of its arbitration position. Since that position renders Section 14.5 meaningless, it should not be accepted.

The evidence establishes that "weekly teaching schedules of 1200 minutes for Elementary Specials has been the practice in the District." A review of the evidence establishes that "it is clear the recognized practice in the District has been that 1200 minutes – the equivalent of five classes – is the relative threshold for full-time elementary teachers." Assignments above that threshold warrant additional compensation, and the Board should not be permitted to make any assignment without affording some type of overload compensation.

The Board's attempt to use 1200 minutes as an assignment minimum "is illogical and incongruous with Article 7.11 of the Agreement." That section is not limited to middle and high school teachers, and there is no agreement provision "that prohibits elementary teachers from receiving such compensation." Against this background, elementary teachers "should receive 16% for each class they are assigned over five, or for each 48 minutes they are assigned over 1200 – or a prorated amount based on those figures." Smith, under this standard, should have received no less than a 16% increase for the 2000-01 school year, and no less than a 32% increase for the 2001-02 school year. The Board's attempt to afford no compensation "is not only inequitable and biased, but absurd."

The Union concludes by requesting that the grievance be sustained; that the Board be ordered to cease and desist from assigning "weekly teaching schedules in excess of 1200 minutes" and that Smith be compensated "for assigned minutes in excess of 1200 in accordance with Article 7.11 of the Agreement."

{PRIVATE }The Board's Initial Brief{tc "The Union's Initial Brief"}

The Board states the issues for decision thus:

> Did the District violate the collective bargaining agreement by assigning the Grievant, a full-time elementary specials teacher, 1,280 minutes of instructional time per week in 2000-01 and 1,300 minutes of instructional time per week in 2001-02? If so, is Grievant entitled to reimbursement under Article 7.11 of the collective bargaining agreement for instructional time exceeding 1,200 minutes?

After a review of the evidence, the Board asserts that the labor agreement "has no provision limiting the District in assigning full-time elementary specials teachers to 1,200 minutes of instructional time each week." Beyond this, the agreement "has no express provision . . . requiring the District to provide extra compensation to full-time specials teachers" assigned to more than 1200 minutes of instructional time. Articles II and V reserve management rights to the Board, and demand that those rights be limited only by express contractual language. Arbitration precedent underscores the significance of these provisions and demands that the grievance be denied.

Section 14.5 establishes that "(w)here the parties have established a standard number of instructional minutes for elementary specials teachers, the Agreement expressly reflects this." Section 14.3 sets the normal teaching day at roughly eight hours. Arbitration precedent underscores that the agreement's silence on "a standard number of instructional minutes for full-time teachers" must be given meaning in arbitration. The 1300-minute standard of Section 14.5 is not designed as a standard to determine extra compensation, but as a protection to prevent certain full-time teachers from becoming part-time. To accept the Association's view would produce the absurd result that "part-time teachers would have a higher standard of instructional minutes than full-time employees."

Since the labor agreement clearly and unambiguously governs the grievance, past practice is not applicable. Even if it was, the Association "has failed to establish the existence of any past practice." Arbitration precedent makes it the Association's burden to establish an unequivocal, clearly acted upon and readily ascertainable pattern of conduct that was fixed over a reasonable period of time and is accepted by both parties. Testimony establishes that the Board has, for some time, scheduled specials teachers at between 1200 and 1400 minutes per week. Association witnesses conceded that the 1200 minute standard is no more than "a bench mark minimum." The Board has scheduled a number of specials teachers for more than 1200 minutes without generating any grievances. There is no binding practice, and the Association has waived any right to claim the remedy it seeks here.

Nor has the Association been able to produce evidence of a past practice providing extra compensation to full-time elementary specials teachers who are assigned more than 1200 minutes. The Board produced testimony that no such compensation has been paid in the past. Section 7.11 is, in any event, "inapplicable on its face." Arbitration precedent confirms the persuasive force of the Board's position. The Board concludes "that the grievance (should) be denied in all respects."

{PRIVATE }The Association's Reply Brief{tc "The County's Reply Brief"}

Contrary to the Board's contention, the agreement does provide extra compensation for additional teaching assignments. That provision is Section 7.11, and no agreement provision restricts it to middle and high school teachers. Thus, the Association seeks no remedy that demands any alteration of the labor agreement. To ignore that provision flies in the face of arbitration precedent, including that cited by the Board.

The agreement demands that full-time teachers teach five forty-eight minute classes five days per week. Section 7.11 provides the basis of compensation for addressing loads beyond five classes per day. Nor does the Association seek an absurd remedy. Section 14.5 does no more than make 1300 minutes per week the base "for calculating a part-time teacher's percentage for their individual contract, compensation and benefits." That standard was reached as a means to settle a grievance, and it is not inconceivable that the parties would agree to pro-rate part-time teachers using a base higher than the standard used for full-time teachers. Agreements like that are reached all the time. It is not unusual for labor agreements to use 35 or 37.5 hours as a full time schedule, but use 40 hours per week as the base for pro-rating benefits for part-time employees.

The Association's evidence meets arbitration criteria for establishing a past practice. With few exceptions, "all of the full-time elementary specials teachers had schedules of less than 104% of 1200 minutes, or 1248 minutes." Testimony from Board and Association witnesses establishes that the 1200-minute standard was clearly enunciated over a considerable period of time and accepted by both parties. Nor will the evidence support a conclusion that the Association waived any right to challenge Board scheduling of specials teachers. Arbitration precedent demands that the relinquishment of a contractual right be clearly made by someone empowered to act on a party's behalf. The evidence in this matter falls far short of that standard.

The Association concludes that the grievance should be sustained and the Grievant should be made whole by compensation for "assigned minutes in excess of 1200 in accordance with Article 7.11 of the Agreement." The Association adds that "the Arbitrator (should) retain jurisdiction for a specified period of time to ensure compliance with the ordered remedy."

The Board's Reply Brief

The Board and Association agree that Section 14.5 "does not establish 1,300 minutes as the standard for full-time elementary specials teachers." Unlike the Association, however, the Board recognizes that the labor agreement stops there. That the agreement does not establish a standard for full-time specials teachers thus does not sustain the grievance. Rather, it establishes the grievance's lack of merit.

A careful review of current bargaining fails to support any assertion that the Board has acted in a manner inconsistent with the result it seeks here. Rather, the Board has acted to clarify and to codify its scheduling procedures. Beyond this, neither bargaining history nor past practice is relevant unless an agreement is unclear. Here, Article II "affirms the District's inherent right to determine the assignments and schedules of full-time elementary specials teachers."

Detailed examination of the testimony will not support finding the past practice the Association asserts. Beyond this, Association documentation of the asserted practice inexplicably fails to account for travel time. The Board has used travel time to permit specials teachers to achieve full-time status. The evidence establishes that a number of teachers other than the Grievant "have been assigned more and less than 1,200 minutes." There is "no evidence of the Grievant being subject to disparate treatment."

Section 7.11 has no bearing on the grievance. It applies only "to teachers assigned to teach a sixth class" and the Grievant has no such assignment. Nor does the provision provide an overload payment such as that sought by the Association, which seeks a result unfounded in the language of the agreement. Nor can a sixth class assignment be analogized to an assigned duty that does not demand preparation. Examination of the Association's position establishes its inconsistency with the salary schedule set by Section 14.3. To provide compensation beyond 1200 minutes in a week "effectively reduces the workweek to 2.5 days." This absurd result cannot be achieved in grievance arbitration.

The Board concludes that the grievance must "be denied in all respects."

DISCUSSION{tc "DISCUSSION"}

The parties did not stipulate the issue for decision, and I have phrased the issue broadly enough to incorporate the arguments of each. The "roughly" reference reflects that one exhibit states the Grievant's 2000-01 schedule at 1275 minutes. The difference is of no significance to the result stated below, but the parties' disagreement over calculating minutes is a point worthy of at least some note.

The grievance poses an amalgam of contract language and past practice. The Association contends that Section 14.5 will not permit a 1300-minute standard to define the full-time load of a specials teacher. Past practice sets the standard at 1200 minutes. The Grievant's schedules in the 2000-01 and 2001-02 school years stray beyond that standard and thus demand overload payment guided by the principles of Section 7.11. The Board asserts its authority to schedule under Section 2.1, and contends that the Sections 2.2 and 22.3 preclude giving the force to past practice argued by the Association. Beyond this, the Board contends that the evidence fails to establish any past practice.

The evidence establishes a rough understanding of the parties regarding the scheduling of specials instructors. To grant the grievance, however, demands more clarity regarding that rough understanding than the evidence will bear.

As preface, it is appropriate to highlight what is not in dispute. Section 14.5 applies by its terms to part-time teachers and has no direct bearing on the grievance. The evidence, as reflected by the parties' arguments, underscores this. That a 1200-minute standard roughly sets a minimum for full-time status for a specials instructor is established by the evidence. Each testifying witness acknowledged this. The Fossen letter of October 3, 1983 highlights this understanding, as do the King letters of February 28, 1995 and September 5, 1997.

The understanding this reflects, however, is rough. The parties' arguments acknowledge the difficulty of precisely limiting the creation of an instructional schedule for specials at 1200 minutes. By the Association's calculation, the Grievant instructed the following schedules: 1235 minutes in the 1993-94 school year; 1260 minutes in 1994-95; 1260 in 1995-96; 1170 in 1996-97; 1200 minutes in 1999-00; 1280 minutes in 2000-01 and 1300 minutes in 2001-02. The Association contends that the roughness of this understanding reflects no more than that the parties understand that there can be a 4% variance from the 1200-minute standard. Under its view, there has been only one ungrieved occurrence of a specials instructor working outside of that 4% variance.

The evidence is, however, rougher on this point than the Association acknowledges. The variance noted by the Association looks only at schedules exceeding 1200 minutes. Under the Association's calculation, there are schedules that fall below a 1200-minute standard by more than 4%: Jungwirth and Huber in 2001-02; Huber in 1999-00; Kessler and Huber in 1998-99; Kessler in 1996-97; Kessler in 1995-96; and Kessler in 1989-90. The parties acknowledge that each of these assignments was full-time. Beyond this, the 4% variance presumes the accuracy of the Association's calculations. The District's calculation of the same assignments varies from the Association's. This includes, at a minimum, a difference regarding the inclusion of travel time, as well as the use of minutes or percentage weights for non-elementary class assignments. Neither the contract nor the evidence affords clear guidance on how to resolve these differences.

Arbitrators have stated in varying ways what constitutes evidence sufficient to establish a binding practice. At root, the evidence must be sufficient to warrant inferring agreement, since the binding force of past practice is traceable to the agreement manifested by the parties' conduct. Arbitrator Jules Justin stated the appropriate standard of proof thus:

> In the absence of a written agreement, 'past practice,' to be binding on both parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties." CELANESE CORP. OF AMERICA, 24 LA 168, 172 (JUSTIN, 1954).

This standard highlights the difficulty posed by the grievance. The parties' rough understanding on the use of a 1200-minute standard to define a full-time assignment is established, but the evidence fails to provide sufficient clarity to find a practice binding overload payment for the Grievant in the school years at issue.

At root, the Association urges that an assignment somewhere between 1200 and 1300 minutes should trigger overload payment. In its closing argument, the Association asserts a standard set at 4% above 1200 minutes. As noted above, there is no demonstrated understanding on how to total minutes within the assignment. Nor is it clear that the parties' conduct supports such a standard. By the Association's calculation, the Grievant taught a 1260-minute schedule in the 1994-95 and 1995-96 school years, yet did not seek compensation. Nor is it evident that the parties ever manifested agreement on the logical implications of the purported practice. If minutes taught above 1200 or 1248 warrant an overload, are minutes below 1200 or 1152 an underload? Do such schedules demand a conclusion that the instructor should be considered less than full-time?

At a minimum, the evidence underlying the asserted practice is equivocal. It is not evident what level of minutes triggers an overload. Beyond this, the evidence underlying the asserted practice is neither clearly enunciated nor acted upon. Prior to this grievance, there has been no Board offer of, and no Association demand for, overload payment for schedules exceeding 1200 or 1248 minutes. Board scheduling practices are as readily explained by Strauman's assertion of a standard varying between 1200 and 1400 minutes as by the Association's assertion of a clearly understood standard of 1200 minutes, plus or minus 4%.

In sum, the evidence will not support finding the binding past practice the Association asserts. This conclusion makes it impossible to grant the grievance. The Association's contention that Section 7.11 affords the basis for a remedy presumes the existence of an overload that presumes the binding force of the past practice the Association asserts. There is no dispute that specials schedules are set by minutes, not classes. Section 7.11 addresses class assignments. Even if Section 7.11 is referred to by analogy, there is no established

equivalence between five classes and 1200 minutes. The asserted 4% variance highlights the difficulty of using Section 7.11 even by analogy. The conclusion that the evidence will not support a binding past practice demands the denial of the grievance. Before closing, however, it is appropriate to tie this conclusion more closely to the parties' arguments.

Section 14.5 B specifies a 1300-minute standard to define the "base for determining the percentage of a teaching contract," and the Association argues this sets a limit to a full-time load. Section 14.5 A, however, affords less than compelling support for this argument, since it denies applying the "1300-minute standard" to "any elementary teacher who is currently on a full-time teaching contract." Subsection A makes it possible for a specials teacher with an assignment of less than 1300 minutes to be considered full-time. For it to set a maximum load, however, stretches the language of the subsection. Whether the language should be stretched that far is not posed on the facts of the grievances. The Association's view of the Grievant's teaching load over the school years in question does not place him over 1,300 minutes. In the absence of a binding practice, Section 14.5 fails to establish a clear definition of a full-time maximum assignment for specials instructors that would correspond to the provisions of Section 7.11.

It does not follow from this that the Board has proven that there is a range of 1200 to 1400 minutes to define a full-time assignment. The agreement sets no such standard. Strauman's assertion of the standard rests on the validity of her understanding of Newton's scheduling practices. Shaw's testimony presumes the accuracy of Strauman's view. Without regard to the accuracy of Strauman's view, the evidence shows no Association agreement to this range, and thus no evident basis to find a binding practice including such a wide range. The teaching schedules submitted by both parties afford little, if any, support for a conclusion that the Board sets specials assignments at the upper end of that range. Those schedules, even given the disagreement on how to precisely calculate the total load, cluster in the 1200 to 1300 minute range.

It is theoretically possible, under the Association's view, for a part-time teacher to work more minutes than a full-time teacher. This possibility affords no persuasive basis to draw any conclusions regarding this grievance. The facts posed here do not pose the issue, which appears speculative at best. In the same vein, it is theoretically possible, under the Board's view, for a full-time teacher to be assigned a schedule exceeding the total minutes in a day or a week. This consideration affords no persuasive guidance for resolving the grievance. The testimony of Board witnesses presumes an upper limit to the authority to assign.

That the Board proposed in the current round of collective bargaining to alter Section 14.5 to extend to all elementary teachers and to set a higher minute-standard has no bearing on this grievance. The evidence shows that there is a gap in the parties' agreement on the issues posed by the grievance. An attempt to clarify through collective bargaining how to

address the gap affords no persuasive guidance in the resolution of this grievance. It is evident the parties have a rough understanding on the outer limits of the assignments for specials instructors. That rough understanding must be further specified through collective bargaining to become enforceable through grievance arbitration. The weakness of the grievance is that it seeks a level of specificity that has yet to be reached in collective bargaining.

The evidence establishes that the parties have a rough understanding that specials instructors will teach a full-time load with a minimum of 1200 minutes, and will not exceed an undefined upper limit. The minimum is not inflexible, and there is no reliable evidence that the parties have a clear understanding on the precise limit to a full-time assignment, or of how to compensate a teacher who exceeds that limit. The authority of a grievance arbitrator presumes that the parties have reached an enforceable agreement. Here, the rough understanding noted above is insufficient to create an enforceable obligation to afford the Grievant overload compensation for his weekly assignment in the 2000-01 or 2001-02 school years. The evidence fails to support the practice asserted by the Association, and does not pose an issue regarding the abuse of the Board's authority to assign an instructional load.

{PRIVATE }AWARD

The District did not violate the collective bargaining agreement by assigning the Grievant a weekly schedule of roughly 1,280 minutes in the 2000-01 school year and 1,300 minutes in the 2001-02 school year.

The grievance is, therefore, denied.

{tc "AWARD"}

Dated at Madison, Wisconsin, this 14th day of November, 2002.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

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