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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

In the Matter of
Arbitration Between
BURLINGTON SUBSTITUTE TEACHERS
EDUCATION ASSOCIATION
and
BURLINGTON AREA SCHOOL DISTRICT

WERC CASE XII
No. 23919
MED/ARB -288
Decision No. 17135-A

I. HEARING. A hearing on the above entitled matter was held on September 25, 1979 at the Burlington School District Offices at 320 West Chestnut Street, Burlington, Wisconsin.

II. APPEARANCES.

For the Association:

James T. Guckenberg, Uni Serv Director,
Southern Lakes United Educators -
Council 26 NEA-WEAC

For the Employer:

Micheel L. Roshar, Attorney, MULCAHY & WHERRY, S.C.

III. NATURE OF PROCEEDINGS. This is a matter of final and binding final offer arbitration pursuant to Section 111.70 of the Municipal Employment Relations Act which calls for mediation of issues between the parties, and if this does not result in a resolution of an impasse, to proceed to a final and binding award. Frank P. Zeidler of Milwaukee, Wisconsin was appointed mediator-arbitrator by the Wisconsin Employment Relations Commission on

August 7, 1979, on the advice of the parties. Mediation took place on September 25, 1979, and the impasse was not resolved. The parties went to hearing on the same date. Testimony was taken, and briefs were subsequently submitted.

IV. THE FINAL OFFERS.

A. Final Offer of the Association
(see page 2a)

B. Final Offer of the Board
(see page 2b)

FINAL OFFER
(Modified)
Southern Lakes United Educators - Council 26 NEA-WEAC
Burlington Substitute Teachers Education Association

May 18, 1979

1. All tentative agreements (Appendix A).
2. All salary and benefits shall be retroactive to July 1, 1978.
3. Fair Share (1979-80)
 - a. The Association, as the exclusive representative of all the employees in the bargaining unit, will represent all such employees, Association and non-Association, fairly and equally, and all employees in the unit will be required to pay, as provided in this article, their fair share of the costs of representation by the Association. No employee shall be required to join the Association, but membership in the Association shall be made available to all employees who apply consistent with the Association constitution and bylaws. No employee shall be denied Association membership because of race, color, creed or sex.
 - b. The employer agrees that it will deduct from the paychecks of all employees in the collective bargaining unit an amount of 4.5% of salary to a maximum of the amount certified by the Association to be the cost of representation. The Association agrees to certify only such costs as are allowed by law and to inform the employer of any change in the certified costs of representation of non-association members required by law. The Board will provide the Association with a list of employees from whom deductions are made with each remittance to the Association.
 - c. The Association shall provide employees who are not members of the Association with an internal mechanism with the Association which allows those employees to challenge the fair share amount certified by the Association as the cost of representation and receive, where appropriate, a rebate of any moneys determined to have been improperly collected by the Association pursuant to this section.
 - d. Save Harmless - The Association does hereby indemnify and shall save the Board harmless against any and all claims, demand, suits, or other forms of liability, including court costs that shall arise out of or by reason of action taken or not taken by the Board, which action or non-action is in compliance with the provisions of this article and in reliance on any list or certificates which have

2a cont'd

Burlington Substitute Teachers Education Association

4. Salary: 1979-1980

Short term limited - \$36.00 per day

Short term unlimited - \$42.00 per day

Long term limited - \$41.00 per day

Long term unlimited - \$43.00 per day

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FINAL OFFER OF
THE BURLINGTON AREA SCHOOL DISTRICT

Case XII No. 23919 Med/Arb-288

A SCOTTISH EMPLOYERS
RELATIONS COMMISSION

May 15, 1979

Voluntary Dues Deduction: Upon receipt of written authorization signed by the substitute teacher, the Board will deduct an amount to provide monthly payment of dues for membership in the Burlington Substitute Teachers' Association affiliated with the Southern Lakes United Educators Council 26 NEA-WEAC, from the regular salary check of such substitute teacher and the amount so deducted pursuant to such authorization of the teacher shall be promptly remitted to the Burlington Substitute Teachers' Association. Such authorization for deduction of dues shall continue in full force and effect with the District unless the substitute teacher withdraws such authorization in writing to both the Burlington Substitute Teachers' Association and the Board.

Changes in the amount of dues to be deducted shall be certified by the Association thirty (30) days before the effective date of the change. No more than one (1) such change request need be honored by the employer during any given school year.

The collective bargaining representative shall indemnify and save the employer harmless against any and all claims, demands, suits, orders, judgments, or other forms of liability against the employer that arise out of the employer's compliance with this Agreement.

Salary: 1979-1980

Short term limited - \$36.00 per day

Short term unlimited - \$42.00 per day

Long term limited - \$41.00 per day

Long term unlimited - \$43.00 per day

A comparison of the offers shows that there is just one issue: Fair Share (1979-1980).

V. FACTORS CONSIDERED IN THIS AWARD.

Section 111.70 (4)(cm)7 of the Statutes is as follows:

- "7. 'Factors considered.' In making any decision under the arbitration procedures authorized by this subsection, the mediator-arbitrator shall give weight to the following factors:
- a. The lawful authority of the municipal employer.
 - b. Stipulations of the parties.
 - c. The interests and welfare of the public and the financial ability of the unit of government to meet the costs of any proposed settlement.
 - d. Comparison of wages, hours, and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally in public employment in the same community and in comparable communities, and in private employment in the same community and in comparable communities.
 - e. The average consumer prices for goods and services, commonly known as the cost-of-living.
 - f. The overall compensation presently received by the municipal employees, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
 - g. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
 - h. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

VI. ISSUES NOT INVOLVED OR CONTESTED.

The following factors are not involved in this matter.

- a. Cost of living
- b. Changes during the pendency of the proceedings.
- c. Financial ability of the public to pay.

VII. THE LAWFUL AUTHORITY OF THE EMPLOYER. Although there is no issue here on the lawful authority of the Employer to operate under a Fair Share clause, the Association makes several arguments which ought to be mentioned.

The Association notes that the District has the lawful authority to grant the Association's offer of fair share. The offer itself limits the deductions to those limited by law. It has a save harmless clause, and it has a clause which permits employees to challenge the amount of deductions, and a rebate if funds are improperly collected.

VIII. THE INTERESTS AND WELFARE OF THE PUBLIC. The Board presented some evidence, testimony and arguments that it was not in the interest of the Board and the Public to accept the Union's offer. This requires consideration of the types of substitutes available.

There are short term substitutes of two types. Short term substitutes are teachers employed for less than 20 consecutive days in the same teaching assignment. They may put limits on when they can or will come. Long term substitutes are those who are employed for 20 or more consecutive days in the same teaching assignment, and may also be limited as to when they might be willing to be called, or may be unlimited. (Board Exhibit 8)

In 1977-78 50 substitutes worked 1133.5 days. In 1978-79 41 substitutes worked 414 days. The following infor-

mation is derived from Board Exhibit 7.

TABLE 1
Distribution of Substitute Hours

<u>Days Worked</u>	<u>1977-78</u>		<u>1978-79</u>	
	<u>Teachers</u>	<u>%</u>	<u>Teachers</u>	<u>%</u>
0-5	10	20	10	24
6-10	12	24	3	7
11-15	5	10	7	17
16-20	7	14	4	10
21-30	5	10	7	17
More than 31	<u>11</u>	22	<u>10</u>	25
Total	50		Total	41

Board Exhibit 4 listed 69 persons who were employed as substitute teachers who worked only in 1977-78, or only in 1978-79, or worked both years. Of these, 20 teachers worked in both years.

Association Exhibit, pages 43-45, listed 62 persons who were employed in 1977-78, or in 1979-80, or in both of these terms. Forty(40) persons were employed in 1977-78, and 32 in 1979-80. Ten(10) were employed in both years. Of the 32 employed in 1979-80, 9 were dues paying members of the Association. The Association listed 7 unlimited substitutes for 1979-80 and 25 limited substitutes. (Association Exhibit, pp. 46-49)

The Association noted in its Exhibit (p.52) the impact of its offer. Its 1979-80 dues are \$32.50. The rate of deduction is 4.5% of salary. The per diem deduction for a salary of \$36.00 would be \$1.62. It would take 21 days of teaching to get to the maximum deduction.

The Association sent out a survey to substitute teachers with a list of what the teachers believed were the most serious detriments to accepting a substitute assignment. The teachers were to give these a "1-4" rating, "1" being the most critical. The Association summarized its report. It also submitted as exhibits the copies of the individual responses. (Association Exhibit, pp. 54-74) The summary is given herewith:

SURVEY
DETRIMENTS TO ACCEPTING A SUBSTITUTE ASSIGNMENT
SUMMARY

Number of Substitute Teachers	<u>32</u>
Number of Substitutes Surveyed	<u>32</u>
Number of Surveys Returned	<u>26</u>
Number of Returned Surveys not Usable	<u>5</u>
Number of Returned Surveys in Study	<u>21</u>

Item	Number of Responses	% of Usable Responses	% of Total Substitutes
Discipline Prob.	17	81	53
Last Minute Requests to Substitutes	4	19	13
Lack of Seating Charts	4	19	13
Low Pay	16	76	50
Poor cooperation from Principals	7	33	22
Lack of Lesson Plans	7	33	22
Required to Teach Outside Certified Area	6	29	19
Fair Share	2	10	6
Not Being Able to Leave when Students Leave	9	42	28
Materials not Available	6	29	19
Required Recess Duty	5	24	16
Poor Cooperation from Teachers	1	5	3

SOURCE: SLUE/Council 26
JTG/jh 9/24/79

Board Exhibit 6 was a list of 32 school districts with 50 different schools which it claimed offered potential employment opportunities for Burlington area substitute teachers.

At the hearing the Board presented as a witness, Margaret M. Anderson, who served as a substitute teacher for one year. She said she was not in favor of Fair Share, and would not continue to teach if it were present.

Carol DeMarco, a three year substitute, said she would not remain in the Burlington system if Fair Share prevailed. Adele Davis, also a three year substitute, said she would not remain in the system if there were to be Fair Share. Dr. Richard Sorensen, Superintendent, said that four people in addition to these three told him they would not substitute under Fair Share. He said that there are 35 substitutes on the list, 6 or 7 a day are needed in Fall and more in Winter. The District cannot get all the substitutes it wants at all times and cannot fill certified areas. The District advertised for substitutes in the Fall and got only a mediocre response.

Board Exhibit 8 was a proposed rule of the Department of Instruction which would permit short-term substitutes as licensed teachers to teach any subject at any grade level, to help school districts meet the problem of getting substitutes when a particular type of substitute certified in a given area is not available.

Jolene Lodle, a five year substitute teacher, Secretary-Treasurer of the Association, and member of the bargaining unit circulated the survey and contacted the substitutes about Fair Share. She said that she told the substitutes she was for Fair Share. She said that some agreed to it.

Paul Petrie, a substitute for 16 years after teaching full time for 8 years, said he also contacted substitutes. He said he did not argue with the substitutes about Fair Share, and did not press the issue. He said that the substitutes said they would pay if there was Fair Share.

The Association's Position. The Association says that the concept and practice of a Fair Share arrangement is familiar to District in the regular teachers' and secretaries agreements. The District never claimed the provisions adversely affected the interest and welfare of the public. The agreements were voluntarily reached.

The Association says its proposal is reasonable in that it will represent all employees fairly, agrees not to discriminate, and has a reasonable rate of deduction. If the Association proposal had been in effect in 1977-78, and 1978-79, a majority of the substitutes would not have had to pay Fair Share with only 16 substitutes working enough days in 1977-78 and 17 in 1978-79.

The Association says that according to its survey, a majority of the substitutes did not find Fair Share to be a serious detriment to accepting a substitute assignment. Some employees, though, will object however reasonable the proposal is. Fair Share, like taxes for public services, provides a system of sharing costs to achieve benefits.

The Association also says that the Wisconsin Statute 111.70 provides for a referendum for Fair Share in case 30% of the employees desire termination of Fair Share. Substitutes, who are part of the bargaining unit on the first day of assignment can petition for a referendum if they find Fair Share adverse to their or the public's interest.

The Association holds that the stability of the Association is in the interest and welfare of the public. The shortage which the Board claims exists is due to a turnover of substitutes rather than a lack of applicants. The Association says it is unreasonable to blame a provision for shortages when the provision does not even exist. Shortages come from problems in existence now. The problems of low pay, and discipline were most frequently checked, and other problems ranked higher than Fair Share. Fair Share would further attract applicants and retain current employees.

The Association notes that it exists because it has the purpose of improving salaries, benefits and conditions of employment. The Association has obtained a \$7.00 per day or 24.2% increase over a two year period. A

B.

number of new conditions also have come about as a result of the organization. The Association has as its interest the recruiting of new members. New substitutes are a source of such members. A stable Association can then carry out its functions of representation and recruiting more efficiently. The Fair Share provision will provide this stability.

The Association says that it has done an admirable job with respect to potential membership. Only 10 of the substitutes employed in 1977-78 are current employees, yet the Association has 9 members. Considering the instability of the work force and lack of employee contact with each other, it would take a considerable time to increase membership beyond 90% of the continuing substitutes without Fair Share. Fair Share serves to notify new employees of the Association and of the availability of Association membership.

The Association holds that the voluntary dues deduction provision of the Board is not in the interest and welfare of the Public. It notes that a voluntary dues deduction provision will not provide stability for the Association. If all the substitutes had been members of the Association in 1977-78, the Association by 1978-79 would have lost 75% of its members. The recruitment would have depended on the willingness of ten survivors. Continuing membership is dependent upon the catalyst of continuing relationship of employees. This cannot develop where 75% of the employees turn over.

The obligation to represent all employees in the unit has the same cost regardless of how many pay voluntary dues. The per capita rate set by the Association is based on all substitutes paying. The rate is reasonable. Under a voluntary provision, the Association would be forced to substantially increase its dues causing a small number to be unfairly taxed to support the entire unit. In the case of substitute teaching under a voluntary provision, the choice is either a few paying an unfair share or no representation.

Because of the small number of members that result from a voluntary provision, the Association is forced to collect its dues in full at time of enrollment. Even then, and with dues doubled or substantially increased, the Association could not function effectively. The Employer's

provision does not meet the needs of the special public which is the Association, and therefore is not in the interest of the whole public.

The Association also notes that the residents of the District have not shown an interest in the issue. No public hearing was held, no citizens attended the hearing, nor did any member of the District Board. The issue is not of interest to the public except for that section of the public most directly affected.

The Association also says that there is no evidence that the existing Fair Share provisions have an adverse effect on the public interest and welfare either in the Burlington District or among substitute teachers units in the state.

The Board's Position. The Board says that the continued availability of substitute teachers is of the highest concern to the district. The core of the District's objection to mandatory Fair Share does not lie in a philosophical opposition, but rather it is based upon what the Board considers a distinct likelihood, that substitute teachers will refuse employment in the district for employment where Fair Share does not obtain. The Board notes that per diem short term substitutes have a relatively short involvement in the district. The Board must obtain willing substitutes. It points, however, to the testimony of the Superintendent about the difficulty of obtaining substitutes. There are a plethora of districts available to potential substitute teachers in the vicinity of the Burlington District. Further, there is the testimony of the three teachers that they would not substitute in the Burlington District if there were Fair Share when they are on the list elsewhere for teaching.

The Board also notes the proposed rule of the Department of Public Instruction which shows the difficulty of getting substitutes. The unique situation of the Burlington district in competition with a large number of districts does not exist in any other area of the state to the same degree. It therefore should be given heavy weight since the District anticipates extreme difficulty in placing and maintaining substitutes if the Association offer prevails.

The Board also says that the Association offer will also deny the pupils the highest quality substitute teachers and will place a heavier burden on the regular teachers.

As to the survey of the Association, the District holds that the method of the survey invalidates the response. The survey was designed to elicit a response on very immediate problems, so it is predictable that the term "Fair Share" would evoke little or no reaction. Further the term "Fair Share" was not explained to substitutes in writing and none have experienced Fair Share. The results are suspect. The Board also notes that the methodology is suspect when it presents to teachers a list of educational problems experienced and includes with it a labor relations term which they have not experienced. If the Association had presented a choice between voluntary dues and mandatory Fair Share, the results would have been more credible. The Employer notes that of 35 substitutes on the list for 1979-80 term only nine have voluntarily requested the District to deduct dues as of the date of hearing.

Discussion. The two main concepts which emerge from the foregoing recitation of the positions of the parties are the concept of the Board that Fair Share will interfere with recruiting because it makes the District less competitive, and the concept that Fair Share is required to make the Association stable which is its just due as a part of the larger public. Of the two positions, the Arbitrator is of the opinion that the Board has the greater claim as to what the general public concern is. It is true that no citizens expressed a concern either by calling for a public hearing, or by attending a meeting, and that no Board member attended the meeting. This does not then become tantamount to their being no public interest. Though the public interest may be minimal, yet it must be presumed that it is being voiced by the chosen representatives in this matter.

The Arbitrator recognizes that the Association itself can be in some lights considered as a "public" in the sense that any public/group with a special set of concerns becomes recognized as "public." Yet it would defeat the intent of the statute, as the Arbitrator perceives it, for the Association to be held as the single genuine public in the matter. The statute, in the

opinion of the Arbitrator, contemplates that there is a general public interest and an employee interest, two distinct entities. Their interests may coincide. In this case, on this issue of Fair Share, the Arbitrator believes that the Board, representing the general public, has made a case why the interests do not coincide. The Arbitrator holds that on the basis of the evidence, there is a likelihood of increased recruiting difficulties for the Board if Fair Share becomes mandatory, though not extreme difficulties as contended by the Board.

In making the above judgment, the Arbitrator has taken into consideration the questionnaire on problems encountered by teachers. The relatively low response on Fair Share has a meaning, of course, but the Arbitrator would have found the questionnaire more convincing if the issue between mandatory and voluntary dues payment had been directly addressed.

The conclusion is that the Board offer more nearly meets the statutory guideline on the interest of the public than does the Association offer.

VIII. COMPARISONS. Board Exhibit 5 was a map of Cooperative Educational Service 18 (CESA 18) comprising Racine and Kenosha Counties and small portions of Waukesha, Jefferson and Rock Counties. Fifteen high school or general school districts were shown. In this area, however, are 32 districts including elementary districts and about 50 schools (BD. 6).

The Board also listed districts in the state with substitute teacher bargaining units. The list is as follows (derived from Bd.9):

TABLE II
Selected Data on State Districts with Substitute
Teacher Bargaining Units

<u>District</u>	<u>Pupil Enrollment</u>
Milwaukee	93,636
Madison	26,182
Green Bay	19,132
Kenosha	18,429
Burlington	3,454

The Association for its part submitted a list of comparable districts consisting of CESA 18 and the Southern Lakes Athletic Conference. This included 43 districts (Association Exhibit pp.16).

Association Exhibit p. 19 was a list of 10 comparable districts within Racine County. Association Exhibit pp. 20, 21 listed the School District Organization of CESA 18 and Southern Lakes Athletic Conference. Association Exhibit 22 was a map of CESA 18 and the Southern Lakes Athletic Conference. The only additional district beyond the CESA 18 group is the district of Mukwanago.

The Association's Position. On the matter of comparable teachers and districts the Association makes several arguments. One is that the Arbitrator is restricted in considering comparability to employees who are organized for collective bargaining. Fair Share can not exist where the employer unilaterally determines conditions of work. There is no similarity between the substitute teachers who are organized and employees who are not organized.

The Association notes that the Burlington substitute teachers are organized, certified, professional teachers. They fit the description contained in the Wisconsin Statutes, Chapter 111.70, Section 1(e1)i. The substitute teacher is required to meet the standards of teacher certification, engages in the work of a professional nature and is organized under the statutory definition.

The Association says that the appropriate standard of comparability here is the list of districts which have organized units of substitute teachers. Comparing this list, there is no difference in the work performed by the Burlington substitute teachers and the other organized substitute teachers. The Association notes that there are only five of such units, but these must be recognized as the standard of community of interests until there are more bargaining units throughout the state. The work of the Burlington teachers is similar to that in other existing units.

The Association says that there are similarities between Burlington substitute teachers and regular teachers. The areas of similarity included that teachers must be

certified to teach, will normally be placed in the area of their certification, and will be given thorough consideration for job vacancies in the bargaining unit. Another similarity is that the substitutes are not required to work in place of a teacher engaged in a legal strike. They are also required to attend an orientation session, and their work day is defined the same as regular full time teachers. Assignments beyond the regular day are compensated on the same basis as period substitution by teachers. Continuous assignment for one quarter or more receives compensation based on the teachers' agreement. They are also eligible for the State Teachers' Retirement System with deposits paid by the Board. They also have to undergo the same physical examination as do regular teachers.

The Association holds that the substitute teachers have a further similarity with regular teachers to be considered in determining comparable grouping. The Association notes that they are doing the same work as regular teachers in the same building and under the same administrators and have a reasonable expectation of continued employment. The Association says that the WERC ruling on the Madison case provides substantial data on similarity between teachers under temporary contract and regular teachers, whereas the other cases cited by the Board do not. Also the issue here is not whether the WERC should expand a voluntary defined unit of regular teachers to include substitute teachers.

The Arbitrator is compelled to make comparison between the Burlington substitute teachers and other employees performing similar services. The Association asserts that the substitute teachers are performing services similar to regular teachers and therefore should be grouped with them for comparability.

The Association says that the Burlington district is similar to districts in the Association's basic list of comparison districts of CESA #18 and the Southern Lakes Athletic Conference which is the same as CESA #18 except that Mukwonago is included. The Association made eight subordinate comparisons of the districts and lists the top eight districts as far as each comparison is concerned. The comparisons are made as to the number

valuation, average income per taxpayer. The following listing shows the frequency of occurrence of similarity of these district to Burlington according to the eight tables:

Durlington	8
Salem k-12 Area	6
Delavan-Darien	5
Wilmot k-12 Area	5
East Troy	5
Kenosha	4
Mukwonago	4
Lake Geneva k-12	4
Whitewater	4
Waterford k-12 Area	4
Palmyra	4
Union Grove k-12 Area	3
Elkorn	2
Williams Bay	2
Walworth k-12 Area	0

The Association asserts that there are thus significant similarities existing between Burlington and the districts on its basic list, and no district is so uniquely different as to indicate its elimination as an appropriate comparative standard. The list consists of contiguous districts that work together and also through the WIAA Athletic Conference, groups of the same general size and area. The characteristics of organization as public districts with their own taxing authority, reception of state aids, and requirements on teachers are the same.

The Association notes that the employees in these districts as well as on the substitute lists who are certified professional teachers and organized for bargaining are appropriate for considering in matters of comparison.

The Board's Position. The Board said that only five districts had substitute agreements, and the value of their comparability as the Board sees it is discussed elsewhere. The Board, however, listed the districts in CESA 18 as being competitive districts for obtaining substitutes.

Discussion. The Arbitrator believes that data from both CESA 18 and the Southern Lakes Conference has validity for comparison. He also believes that the comparison of state districts with substitute teacher bargaining units should be considered, since this standard has a special application.

IX. COMPARISON OF CONDITIONS OF EMPLOYMENT WITH RESPECT TO FAIR SHARE. Association Exhibit pp. 35-36 contains provisions of a full Fair Share Agreement between the Burlington Education Association and the Burlington District.

Association Exhibit pp. 37-38 are the Fair Share provisions of the Burlington Secretaries Association. This is also a full Fair Share agreement.

Association Exhibit pp.38-40 supplies data on the teachers covered by Fair Share in Cesa 18 and Southern Lakes Athletic Conference and in Racine County. The following data is derived therefrom.

TABLE III
Prevalence of Fair Share in CESA 18 and Southern
Lakes Athletic Conference and in Racine County

	CESA 18 & SLAC		RACINE COUNTY	
	<u>No.</u>	<u>%</u>	<u>No.</u>	<u>%</u>
FTE Teachers covered by Fair Share	3951	85	1872	94
FTE Teachers not covered by Fair Share	678	15	111	6
Fair Share contracts	20	50	7	70
Non-Fair Share contracts	20	50	3	30

Association Exhibit 41 showed that there were five organized substitute teachers' organizations in the

state. Three of these, Milwaukee, Madison and Green Bay had Fair Share provisions. Kenosha did not have it, and Burlington is at an impasse.

Of the three with Fair Share, Board Exhibit 10 shows that the Green Bay contract contains a "grandfather" clause. Madison has full Fair Share, and the Milwaukee provision requires 60 calendar days of service. (Board Exhibits 10-14 inclusive)

Board Exhibit 15 was a copy of 1973 Assembly Bill 759 which had as one purpose requiring Fair Share. Board Exhibit 16 was a copy of 1975 Assembly Bill 940 with the same purpose. Board 17 was a similar bill for 1977 (A. 758).

Board Exhibit 18 was a 1972 decision of the Wisconsin Employment Relations Commission against including substitute teachers in the bargaining unit of regularly scheduled teachers (Joint School District No. 1 of the City of Bloomer, et al. and Bloomer Teachers Assn.)

Board Exhibit 19 was a copy of a WERC decision authorizing substitute teachers to form their own union (Kenosha Education Substitute Association, 1976).

Board Exhibit 20 was a ruling of the WERC in two matters involving MADISON TEACHER, INC. as to whether teachers under temporary contract should be included in an existing certified bargaining unit of regular full-time and part-time certified teachers. The Board held that there was a sufficient community of interest to include these (1977).

Board Exhibit 21 was a ruling of the WERC excluding three substitutes from a bargaining unit of full time certified teachers (Greendale Board of Education and Greendale Education Association, 1974).

The Association's Position. The Association, in addition to its arguments on comparable districts, says that its offer is appropriate in comparison with other employees performing the same service. Its offer is to deduct Fair Share at the rate of 4.5% of salary not to exceed the current cost of representation. The Association presented a table of comparison

in the Association and Board offer with those of districts with substitute agreement. The Association offer of mandatory enrollment compares with the same provision in three of the four other districts. The Association and all four of the other districts require automatic continuance; only the Board has voluntary revocation. Only one district has a waiting procedure, and only one has a grandfather clause. The Association offer has the features of a rebate procedure and also offers a deduction based on salary earned. The Association says its offer is more similar to the other districts than the Board's offer. The special features found in the Milwaukee and Green Bay districts are there to accommodate local conditions, but in this case the Board makes no attempt to accommodate membership problems in a unit of substitute teachers.

The Union says that its offer is also appropriate in comparison with other public employees in the same community. In comparison with the teachers and secretaries, the Association offer includes mandatory enrollment as compared to the Board offer which includes voluntary enrollment and revocation. Both the teachers and the Association offers have the feature of a rebate. The teachers and the secretaries also have automatic continuance while the Board does not.

The Association says that its offer of Fair Share is appropriate in comparison with other employees engaged in similar work in the same community and in similar communities.

The Association notes that its exhibits show that Fair Share is common among the CESA #18 and Athletic Conference districts, and even more common among the Racine County districts.

It also lists in various groups, the consolidated (k-12) districts in which a majority of the teachers and a majority of the districts have Fair Share. It lists the consolidated and Union High Districts contiguous to Burlington with 4 out of 7 districts containing the majority of teachers have Fair Share.

It also lists districts most similar to Burlington. Seven of nine districts have Fair Share, and a majority

of teachers are covered by it. The Association says that the information indicates that Fair Share is prevalent among the districts described, and therefore the Association's offer of Fair Share is appropriate in comparison with regular teachers in the communities similar to Burlington.

The Association says that its offer of Fair Share is appropriate according to statutory criteria related to comparability. It notes the data that it has provided to show that Fair Share is prevalent and notes the absence of Board data on this subject.

The Board's Position. The Board contends that the relevant comparative data does not support the Association demand. The parties agree that only five districts have bargaining units composed of substitute teachers. These districts, outside of Burlington, are substantially larger than the Burlington District. Thus, mathematically, a teacher substituting in the Burlington District, has a smaller opportunity for substituting than a teacher in a larger district. The substitutes are then forced to maintain their names on other substitute lists. Also substitute teachers in the big districts have less opportunity to appear on other substitute lists.

The Board notes that the closest district with a substitute teachers unit offers only voluntary dues deduction. Also the employee must have ten days of service. In Green Bay there is a grandfather clause exempting teachers who did not belong prior to 1978-79 agreement. In the Milwaukee contract, employees must work one and one-half days in a payroll period and have completed sixty calendar days of service to be covered. In the case of the Association demand, all substitute teachers are to be included regardless of the length of employment.

The Board notes among other things that in 1977-78 44% of the teachers worked ten days or less, and 96% worked less than sixty days. Under these standards, nearly all of the 44% of teachers would be ineligible for membership under the Kenosha contract, and 95% would be excluded under the Milwaukee contract from Fair Share deductions.

The Board says that assuming the Association had offered

a grandfather clause like that in the Green Bay agreement, only 9 of the 32 listed substitutes would be compelled to pay Fair Share. The comparison in this respect does not support the inclusion of a blanket Fair Share provision in the agreement.

The Board holds that Association data with respect to Fair Share in contracts involving area teachers are irrelevant. The WERC has noted real distinctions between regular full-time and regular part-time teachers on one hand and per diem casual substitute teachers on the other. Substitute teachers are not interviewed, may not necessarily work in the area of certification, are not paid according to education and experience, and are not afforded insurance or paid leave benefits. However, assuming for argument that the Association data is relevant, it should be noted that only 20% of the districts have Fair Share deductions.

The Board also notes that the Burlington Secretaries are also regular full time or regular part time employees unlike the casual substitutes who can choose on any given day in what district they will substitute.

Thus substitutes are clearly distinguished from regular full-time and regular part-time employees and any comparison between the two lacks proper foundation.

The Board, in its Brief analyzed the four decisions submitted as exhibits on how the WERC ruled on the proposed inclusion of substitute teachers in the regular bargaining units. The Board noted that in the several cases it distinguished substitute teachers as a separate group, and set up certain criteria for number of days of service before it would consider including them in regular teacher groups. The Commission, according to the Board, intends to decide unit eligibility in each case, based on the unique circumstances of substitute employment. In this case, the Association is requiring that all substitutes, regardless of length of employment in the district are being included. This is an exceptional circumstance unlike that elsewhere.

Discussion. On the basis of the foregoing data and arguments, the Arbitrator is of the opinion that if substitute teachers are to be compared with full time or part

time regularly employed or appointed teachers, the Association offer more nearly meets the statutory guidelines. Also it is more comparable to the conditions obtaining in the regular full time teachers in Burlington and to the Burlington Secretaries Association. On the basis of comparison however with agreements in other districts having substitutes, the Arbitrator is of the opinion that the Association offer has a unique feature which makes it sufficiently dissimilar from that of the others that it does not compare with them. This is the provision that every one is to be considered under Fair Share on the first day of employment, a kind of blanket provision not generally prevalent.

The question then arises as to which group of employees are more comparable in the offers - comparison to substitutes and comparison to regular full time teachers. The Arbitrator on the basis of the information supplied by the Board with respect to WERC rulings believes that the more significant of the comparisons is that of substitutes under contract with other substitutes under contract. In this case the Arbitrator believes that the prevailing weight then goes to the view that the proposed offer of the Association is not sufficiently comparable to that of other substitutes under contract and the weight therefore falls to the Board's offer.

X. OVERALL COMPENSATION AND CONTINUITY AND STABILITY OF EMPLOYMENT. The Association in its brief notes that with the exception of a District payment for retirement, substitutes receive no vacation time, holidays, or insurance or paid sick leave. The lack of continuity and stability of employment on the part of substitutes is not conducive to the voluntary payment of dues and this, in turn, does not meet the interest of the public in having a stable substitute teachers' organization.

Further, the benefits directly enjoyed by the Association are minimal. The instant Agreement is the first agreement between the Substitute Teachers' Association and the District. The benefits in the Agreement are

primarily benefits for the employees. The only real benefit that the Association can directly enjoy is Fair Share.

The Board made no direct comment on matters of total compensation.

Discussion. The Arbitrator believes that while it would contribute to the strength of the Association to have Fair Share, yet the factor of public interest is more significant in this matter.

XI. OTHER FACTORS. The Board raises two issues. It notes that there have been repeated attempts of labor unions in three successive sessions of the Wisconsin legislature to legislate mandatory Fair Share and the legislature has refused. Fair Share is a mandatory subject in bargaining, subject however to mutual agreement. For the Arbitrator to impose mandatory Fair Share, he would be placing the District at an extreme disadvantage with 32 other districts in the area in recruiting and retaining qualified substitutes. The Board says that this is not in the public interest.

On another matter, the Association submitted Board Exhibit p.34. This was a copy of a page of a letter dated October 19, 1979, from Attorney Michael Roshar representing the Board to LeRoy Welke. On Fair Share, the District offered a Fair Share clause which would provide for the deduction of 12% of the monthly salary of the substitute, but would provide a thirty day opportunity for any current substitute to withdraw from coverage. The Association offered a provision which would deduct 12% from the monthly check, not to take place until the substitute taught for ten days, and thereafter the substitute would be always under Fair Share.

The Board says that the correspondence is not a public document. Further it was part of a good faith attempt

by the Board to resolve the matter. Also it is a well established principle of arbitration that compromise offers will not be permitted to prejudice a party's case when it comes to arbitration. A tentative offer is just that, an offer to avoid litigation and promote agreement. Such offers must therefore be disregarded in arbitration.

Discussion. On the matter of legislative effort to make Fair Share mandatory, the Arbitrator here considers that the matter must be decided on the basis of factors other than the history of attempts to make it mandatory. The factors upon which the judgment is to be made are those previously cited here as part of the statutes.

On the matter of considering tentative offers, the Arbitrator believes that arbitral practice properly bars such matter since the combination of factors and conditions in a package of offers at any time changes under the impact of bargaining. Therefore only the existing offers are treated here. It should be noted that both tentative offers reflected in Board Exhibit p.36 are not the offers of the parties here.

XII. SUMMARY DISCUSSION. Of the various matters and comparisons discussed here, the Arbitrator feels that one factor is outstanding; that is the factor of whether it is in the interest and welfare of the public to meet either offer. The prevalence of unions or associations of substitute teachers is rare. The district is in an area where there are few such unions. The evidence is that teachers can place themselves on several lists. The evidence is that perhaps seven of the current substitutes in the Burlington district would opt not to teach in the district if Fair Share became mandatory. The Board is therefore fearful of its competitive position. The Arbitrator believes that this is a justified concern. While a case for the Association can be made on comparability with the conditions enjoyed by other teacher

associations in the area where Fair Share is prevalent, yet the unique situation of how substitutes are employed and where they may go for employment is sufficiently different from the situation of regularly employed teachers, that the Board should not be subjected to what might be a serious competitive disadvantage in getting enough teachers certified for specific subjects. More experience is needed or more substitute associations would have to come into existence before the Arbitrator could properly evaluate or justly uphold the Association proposal. On the basis then principally of the public interest in the Burlington District, the Arbitrator believes that the Board offer more nearly meets the statutory guidelines.

XIII. AWARD. The offer of the Burlington Area School District with respect to the Agreement between it and Burlington Substitute Teachers Education Association should be incorporated in the new agreement between the parties.

Frank D. Zedler
Mediator-Arbitrator
December 1, 1979