BEFORE THE MEDIATOR/ARBITRATOR

In the Matter of the Petition of Campbellsport Education Association to initiate Mediation/Arbitration between said Petitioner and Campbellsport School District	Case No. 12 No. 37508 Med/Arb 4036 Decision #24173-A

APPEARANCES: Armin F. Blaufuss, UniServ Director, Winnebagoland UniServ Unit-South, appearing on behalf of the Association.

Mulcahy & Wherry, S.C., Attorneys at Law, by James R. Macy, appearing on behalf of the District.

ARBITRATION AWARD

Campbellsport School District, hereinafter referred as the District or employer, and Campbellsport Education Association, hereinafter referred to as the Association, were parties to a collective bargaining agreement which expired on June 30, 1986. The parties were unable to resolve a number of issues in their negotiations pursuant to a reopener clause in that agreement covering the 1985-1986 school year. On September 2, 1986 the Association filed a petition with the Wisconsin Employment Relations Commission (W.E.R.C.) to initiate mediation/arbitration pursuant to section 111.70(4)(cm)6. of the Municipal Employment Relations Act. During the investigation conducted by a mediator on the staff of the W.E.R.C., the parties were able to resolve all of the issues in dispute, except one. On December 22, 1986 the W.E.R.C. issued a certification of impasse and ordered that the remaining issue in dispute be resolved through medication/arbi-

tration. The parties selected the undersigned as mediator/ arbitrator and the W.E.R.C. issued an order appointing the undersigned as mediator/arbitrator on February 3, 1987. A meeting was held on September 23, 1987, at which time the undersigned endeavored to mediate the remaining issue in dispute. The parties were unable to resolve the remaining issue in dispute through mediation and, pursuant to prior agreement between the parties, the arbitration hearing was held on that same date. Post-hearing briefs and reply briefs were filed and exchanged by December 21, 1987. Full consideration has been given to the evidence and arguments presented in rendering the award which follows.

BACKGROUND

The sole issue in dispute relates to the question of whether the collective bargaining agreement should continue to contain a provision, identified as Article VI B.5., dealing with "class size workload". The dispute has a long history and has been the subject of two prior arbitration proceedings. A copy of the provision in question is attached hereto as "Appendix A".

It is the Association's position that, prior to its first proposal to include the provision in the parties' agreement, there existed a "gentlemen's agreement" dealing with "class size" at the secondary schools, ie., junior high and high school. The District acknowledges that, for a number of years prior to the 1982-1983 school year, it pursued a practice, similar in some respects to the terms of the alleged "gentlemen's agree-

ment", but denies that there was an express agreement to limit class size at the secondary schools to 150 or 160 students per teacher of academic classes, as alleged by the Association.

In either event, it was as a result of the perceived breach of the "gentlemen's agreement" that prompted the Association to make a proposal in 1982, dealing with "class size workload" at both the elementary and secondary schools. Specifically, the District laid off seven full time and part time teachers, equal to 4.7 full time teachers, for the 1982-1983 school year, after negotiations concluded for the 1981-1982 school year. The Association sought, unsuccessfully, to convince the District to reverse the decision for various reasons, including its belief that there would not be a significant decline in student enrollment for 1982-1983. The enrollment decline during the prior year (1981-1982) had been seventeen students. In that year, the District laid off 1.31 F.T.E. teachers or approximately one teacher per 13 students. In fact, the pupil decline in 1982-1983 was 8 students, meaning that, the ratio of laid-off teachers to pupils was one teacher for each 1.7 pupils.

In November, 1982, the District filed a petition with the Wisconsin Employment Relations Commission challenging the Association's proposal as a permissive subject of bargaining. The proposal, as modified during the course of that proceeding, was found to be a mandatory subject of bargaining by the W.E.R.C., in a declaratory ruling issued on August 29, 1983.[1] The modified

1/ Decision number 20936.

proposal was included in the package of proposals which was submitted by the Association to mediation/arbitration before Arbitrator Stanley Michelstetter in 1983. On June 29, 1984, Arbitrator Michelstetter issued an award, selecting the Association's final offer, for the terms of the agreement to be included in the 1982-1984 collective bargaining agreement. There were a total of six issues submitted to arbitration before Arbitrator Michelstetter and, in rendering his award, Michelstetter concluded that the wage proposal outweighed the other issues by a sufficient margin to require that the Association's offer be selected under the statutory criteria. However, with regard to the class size workload language proposed by the Association, which read the same as it does not, except for a provision calling for delayed implimentation, to be effective for the 1984-1985 school year, Arbitrator Michelstetter concluded that the District's position should be favored.

In reaching the conclusion, Arbitrator Michelstetter put the burden of proof on the Association to establish that a legitimate problem existed which required contractual attention and that its proposal was reasonably designed to effectively address the problem. Based upon the evidence and arguments before him, he concluded that the statutory criteria most useful with regard to this issue were those dealing with the interests and welfare of the public, comparisons with employees in comparable districts and "other factors" traditionally considered

in collective bargaining. Applying the criteria to the burden of proof, Michelstetter had the following to say with regard to his conclusion that the employer's position should be favored:

> The comparative and other data offered by the Association leaves no doubt that this Employer has tended to have a high class size and that particularly in 1982-83, as a result of layoffs, the class size situation worsened.
>
> Thus, it is entirely reasonable that the Association has consistently brought its concerns to the bargaining table, and that the parties have mutually attempted to deal with the issue. Although considerable litigation effort has been directed to establishing class size differences, no evidence at all has been offered to show the relationship between class size and the amount of extra work performed by a teacher (effects on wages, hours and working conditions). For this reason, the Association has failed to meet its burden of proof as to the existence of a problem which reasonably requires contractual language and that its offer is reasonably designed to remedy the problem.[1]
>
> A fundamental reason stressed by the Association for the adoption of this language is the parties' bargaining history. In fact, it is rather apparent from the positions of the parties and testimony at hearing that ths issue has been at the forefront of a marked deterioration of relationship of the parties and its adoption appears to have meaning well beyond the actual terms.
>
> At the center of this issue is the so-called "gentleman's" agreement on secondary school class sizes allegedly reached in the negotiations for the 1977-78 collective bargaining agreement. The majority of testimony in this matter dealt with the parties' sharply differing views as to whether this agreement ever existed and, if so, what its terms really are. It appears this "agreement" was more in the nature of an assurance of intentions. Unwritten unenforceable agreements and assurances are a fundamental part of the negotiation process which by means of their unenforceable nature facilitate the negotiation of agreements, by avoiding unneccessary conflict. This, in turn, furthers both the interests of the public and the parties. The use of these agreements can be frustrated by penalizing a party for having, in good faith, attempted this approach. Accordingly, in the absence of bad faith in the creation of an unenforceable agreement, or clear evidence the parties intended otherwise, the only inference properly drawn from the failure of such agreement is that the parties have unsuccessfully attempted to resolve the issue. Accordinly, in this case, the Undersigned finds the failure of the "gentlemen's agreement" does support the need for contractual language on class size, but does not compel such a result. Accordingly, I conclude the Employer's position is favored on this issue.

[1] While the experience of the Undersigned would support a conclusion that in the absence of special help, a larger class size would affect a teacher's wages, hours and working conditions, evidence is necessary to quantify the relationship.

During their negotiations for the terms to be included in their 1984-1986 collective bargaining agreement, the parties again failed to reach agreement on a number of issues, which were submitted to arbitration before mediator/arbitrator Edward B. Krinsky. In an award dated October 28, 1985, Arbitrator Krinsky concluded that the Association's offer should be favored in a number of areas, ie., salary, duration, long term disability pay, pay for chaperons, and release from extracurricular activities, but that the District's offer should be favored on the issues of class size, pay for scorers and timers, and limits on the number of extra duty assignments. Overall, Arbitrator Krinsky concluded that the Association's offer was preferable over that of the District.

A review of Arbitrator Krinsky's award and the evidence in this proceeding establishes that the Association did endeavor to provide evidence concerning the impact of class size on teacher workload in support of its proposal. In fact, some of the same teachers who testified in that proceeding, testified in the proceeding herein. Similarly, some of the same data which was submitted in that proceeding, was submitted in this proceeding, in updated form. The District took the position that the Association had the burden of proof to justify its "continuation" and argued that it had failed to meet that burden for many of the same reasons asserted by the District in this proceeding. The Association argued that its evidence had overcome some of the reservations expressed by Arbitrator Michelstetter and that the language should be continued, for reasons presented to

Arbitrator Michelstetter and repeated in the proceeding herein. Arbitrator Krinsky's determination that the District's position should be favored on this issue was accompanied by the following discussion:

> The arbitrator believes that the District has met its burden of proof on this issue. The evidence does not persuade him that the teachers of this District have a workload which is greater than that of teachers generally, and it is not even clear that the teachers who testified in this proceeding have workloads which exceed those of their fellow teachers who have slightly fewer students in their classes. Given that Arbitrator Michelstetter would not have implemented the class size provision initially had he been free to make his award on that issue, given that the enrollments situation has improved and that there is no current evidence of a serious problem justifying compensation for exceeding class size limitations in the manner established in the current language, and given that no other comparable district has adopted similar class size language, the arbitrator favors the District's position on this issue.

As noted in the award of Arbitrator Krinsky, the District alleged that there had been problems of interpretation and administration of the provision in its first year of application. In this proceeding, the District introduced testimony and evidence with regard to those problems. That evidence is discussed more fully below in connection with the positions of the parties in the discussion portion of this award.

As noted above, the dispute herein arose out of the negotiations under the 1985-1986 reopener provision contained in the agreement which was established as a result of Arbitrator Krinsky's award. Negotiations did not begin until February of 1986. Unlike the situation which occurred during the prior two rounds of negotiations, the parties were able to resolve nearly all of the issues in dispute through negotiations, including mediation conducted prior to and subsequent to the

filing of the petition in this case. As part of their stipulations submitted to the W.E.R.C., the parties agreed to submit the remaining issue to arbitration and to escrow further payments due under the language, pending the outcome of this proceeding. Evidence indicates that the parties have continued to bargain with regard to the wages, hours and working conditions applicable since the expiration of the agreement under which this dispute arose, on June 30, 1986 and, in fact, reached agreement on the wage schedule to be applicable during 1986-1987, shortly prior to the hearing herein.

DISTRICT'S POSITION

According to the District, the Association bears the "burden of proof" in this proceeding, in support of its demand to maintain the class size payment language in question. According to the District, the provision is a "novel" one and, it notes, the Association has failed to convince two prior arbitrators that it should be included in the agreement. Arbitrator Michelstetter noted that there was "no evidence" to establish a relationship between class size and the amount of extra work performed by teachers and only included the provision in the agreement, because it was part of the Association's final offer, which was selected for other reasons. Because the language was not to be implemented until the outset of the instant agreement in 1984, the District argues that Arbitrator Michelstetter "intended" for the parties to renegotiate the provision before its scheduled implementation in 1984-

1985. According to the District, the parties' failure to do so was attributable to the Association's intransigeance on this issue.

Arbitrator Krinsky likewise concluded that the provision should not be included in the agreement, the District notes. Thus, since neither arbitrator found merit to the Association's arguments in support of the provision, the Association still bears the burden of proof, according to the District. Reviewing its evidence in relation to several of the statutory criteria, the District makes the following arguments in support of its claim that the association has not met its burden of proof:

1. The provision is totally without comparable support. Most comparable districts do not include any provision dealing with class size in their collective bargaining agreements and those four agreements which do include some provision do not provide for any payment to teachers for alleged class size overloads. The provision constitutes an administrative burden on the District. An issue arose during the pendency of the Krinsky arbitration proceeding concerning its proper interpretation, ie., whether payments are to be computed on an annual rather than a semester basis, and it was only after protracted discussion of a grievance that was filed that the District acceded to the Association's demand, which had the effect of doubling the payments received. In addition, it is necessary to utilize a complicated formula, twice each year,

in order to compute the size of the payments to be received under the provision. This procedure must be followed, regardless of the level of cooperation provided by teachers in reporting the necessary data.

2. The additional payments are unjustified, in view of the total compensation currently afforded District teachers. Based upon the relative rank among districts deemed comparable and the provision of various fringe benefits, the cost of the overload language ($4,682 in 1984-1985; $3,237 in 1985-1986; and $9,458 in 1986-1987) is unjustified. This is particularly true when consideration is given to the relatively modest economic resources of the District based upon measures such as equalized value, per capita income, state aid and state credits, and heavy reliance on agricultural property.

3. The provision of this novel benefit is also unwarranted when consideration is given to the increases received by teachers in the District since 1981-1982, in relation to the increases in the cost of living that have occurred in that same period. A sample of "career progressions" during that period demonstrates that teachers have received percentage increases which were more than double the increase in the cost of living during that same period.

Turning its attention to the Association's arguments, the District makes the following reply:

1. The Association's characterization of the history of the

class size dispute is "misleading, incorrect and in complete disregard for the record". The alleged "gentlemen's agreement" was found to be both non-existent and not controlling in the two prior arbitration awards; the factual argument concerning the reasons for the 1982 layoffs has been fully argued and expressly rejected in the two prior arbitration awards; and the Association conveniently downplays the problems which exist under the current, unsupported class size language.

2. The "data" submitted by the Association in support of the provision is based largely on hearsay and represents no more than that which was considered and expressly rejected by two prior arbitrators. There are numerous flaws with the D.P.I. data; the internal surveys are unreliable and self-serving hearsay which show no consistent pattern or correlation to the number of students in the classroom; the testimony of teachers is likewise unreliable, self-serving and fraught with problems due to the numerous variables that affect teacher work-loads; the external surveys, in addition to being hearsay, represent incomplete data which is likewise fraught with failure to address numerous variables; and the national studies relied upon are either self-serving or fail to deal with the numerous variables that must be considered along with class size, when evaluating its impact on education, objectively.

3. The Association has failed to provide any quid pro quo for the class size provision itself or in return for any

actual reduction in class size achieved through its operation. This failure is especially significant because the fringe benefit in question is not a common fringe benefit, supported by comparables, and in view of the Association's failure to establish that the provision is justified. Contrary to the Association's position, class size at Campbellsport has been decreasing since it peaked in 1982-1983 and only a few teachers have suffered an alleged "overload", as noted by Arbitrator Krinsky. Much of the Association's evidence attempting to prove the existance of a problem is inconclusive for that purpose and the provision itself has proven to be burdensome and difficult to administer. Conversely, it is not true that the Association has ever offered any quid pro quo for the provision, which the Association seeks to maintain, even though it has been rejected twice by arbitrators.

4. The Association's efforts to continue the class size language represent a punitive and unyielding solution to the current workload arrangements at the District. There are times when the District cannot avoid placing more students in a classroom than permitted under the provision and it is punitive to require the District to pay teachers additional compensation under such circumstances. In effect, the Association is seeking to levy a "fine" on the District when it exceeds the "magical numbers" provided, notwithstanding the failure to establish its impact on either workload or education. While the Association

claims there has never been any meaningful bargaining on this issue, the evidence is to the contrary. The District has sought to bargain on the matter, but the Association has consistently refused to entertain any of the proposals made by the Board, which would result in alterations of the language.

In conclusion, the Board asks that the class size provision be deleted from the agreement in order to "pave the way for the parties to reach a bilateral resolution to the issue".

ASSOCIATION'S POSITION

According to the Association, its proposal, maintaining the existing class size provision, is more reasonable than the District's proposal, which would totally eliminate that provision.

Contrary to the Board's position, the Association argues that the "burden of proof" is on the District, to justify its proposed elimination of the provision. Citing the award of Arbitrator Weisberger in Ozaukee County (Sheriff's Department),[2] the Association argues that a provision included in the agreement must be treated as an "existing contractual benefit", for purposes of burden of proof analysis, even if it was included in the agreement as the result of a prior arbitration award and even if it was not favored by the arbitrator in that proceeding. Arbitrator Weisberger concluded that to hold otherwise would be contrary to the intended effect of total package final offer arbitration and encourage rather than

2/ Decision #17676-A, October 13, 1980.

discourage further arbitration proceedings.

Further, according to the Association, the Board has failed to meet its burden of proof in this case. The alleged "problems" cited by the District administrator in his testimony have either been resolved or are exaggerated according to the Association. Thus, early in the administration of the language, the Association agreed to exclude emotionally disturbed and educable mentally retarded students from the class size count. The problem which allegedly exists over the proper interpretation of the language was the result of a clear misinterpretation of its wording and has been resolved, the Association notes. The alleged difficulties in making the actual computations is greatly exaggerated since the number of teachers deemed eligible has varied between three to nine and the District administrator admitted he could make the calculations in approximately fifteen minutes each. The fact that this claim is a red herring is supported by the fact that the District has not proposed any changes in the method of calculation, by way of simplification.

In the Association's view, the District has maintained an uncompromising demand that any effective class size standard be eliminated, notwithstanding the evidence that a real class size problem exists and continues to exist in the District. Citing the numerous exhibits introduced into evidence concerning class size figures statewide, in comparable districts, and in the

District itself, the Association maintains that there is a continuing tendency in Campbellsport to maintain high class sizes at all levels. The class size provision, which is specifically designed to deal with this problem, is part of the status quo wages, hours and working conditions in the District and the District has offered no reasonable justification for its elimination, according to the Association.

While the District cites the comparability criterion in support is its proposed elimination of the class size provision, Arbitrator Weisberger likewise concluded that favorable comparability data alone was insufficient in the Ozaukee County case to support the proposed elimination of the provision there in dispute (holiday premium pay benefits). Also, four of the agreements deemed comparable by Arbitrator Michelstetter all have class load language or lost preparation time language and two actually provide for teacher aids to teachers with excess class loads. Further, any comparability analysis also should include a comparison of pupil-teacher loads and the evidence here confirms Michelstetter's conclusion that the District has tended to have a high class size which worsened in 1982-1983 as a result of layoffs.

While comparable districts may not have class size provisions which are similar, the District here would not have such a provision had the District honored the "gentlemen's agreement", according to the Association. The evidence establishes that the District significantly increased teacher class loads in 1982-1983 and

the District has continued to maintain above average class loads since that time. While the pupil-teacher ratio improved in rank from dead last to nine out of thirteen, it has since declined to a rank of twelve out of thirteen. Other factors as well support a favorable finding under the comparability criterion, according to the Association.

Secondly, the Association argues that the District has eliminated the benefit without offering an economic quid pro quo. Analyzing the settlements in comparable districts, in terms of dollars and percentage increases, the Association argues that it has not received above average settlements, while the total cost of the class size language will amount to a little over ten thousand dollars, after the value of the 1986-1987 settlement is factored in. Further, according to the Association, it is difficult to place an economic value on the class size provision since its chief value is to act as as a deterrent to the imposition of unreasonable class loads. For example, during 1982-1983, the District assigned secondary teachers as many as 199 students. While the number and size of overloads has decreased, there is also evidence that the District is assigning unusual large class sizes at the elementary level. Teachers there have been assigned as many as 31 and 32 students in 1986-1987, which is similar to the number assigned in 1982-1983. Citing other arbitrators concerning the need for an economic buyout of an existing provision, the

Association argues that the provision in question is currently worth approximately $125 per teacher, in monetary terms alone. Even so, according to the Association, the salary settlement achieved in 1985-1986 was $90 less than that received in comparable districts, according to its calculations. However, the Association again repeats its belief that the value of the provision is not purely economic and represents a valuable part of the established wages, hours and working conditions in the District.

The Association goes into considerable detail in its written argument, analyzing the evidence it presented in support of its claim that class size continues to be a real problem in the District. That evidence consists of data derived from D.P.I reports concerning teachers and pupils and teacher-pupil ratios; internal and external surveys concerning teacher-pupil ratios in the District and among comparable districts and the testimony of teachers in the District who were called to testify concerning the actual impact of class size overloads on their work load in the classroom and outside the classroom.

In the Association's view, the existing class size provision is an equitable and effective method to address the class size problem which does exist at Campbellsport. In this connection, it reviews in detail the bargaining history of the "gentlemen's agreement" and the District's alleged repudiation of that agreement when it laid off seven teachers. In prior years, the

agreement, although legally unenforceable, had been enforced, with some commonsense limitations, through informal discussions. Then, when the two key persons representing the District left their positions, the District disregarded the agreement and thereby undermined the Association's willingness to accept the District's view of the "gentlemen's agreement", ie., "trust the Board to do what it has always been doing, that we would not exceed a reasonable number". Instead, the District has pursued a practice of maintaining a spending pattern per pupil which is substantially lower than other comparable districts, by pursuing a pattern of above average class sizes.

Finally, in support of its proposal to maintain the existing language, the Association argues that it is in the public's interest and welfare to do so. In support of this argument, it cites the results of a citizen's advisory curriculum report which was supportive of providing teacher-pupil ratios which were appropriate for effective learning; the evidence that the District maintains a teacher-pupil ratio which is significantly above comparable districts and even higher in relation to statewide averages; and a number of reports which support the finding that there is a strong relationship between lower class sizes and educational achievement. In its brief, the Association analyzes those reports in some detail.

In reply to arguments advanced by the District, the Association advances the following counterarguments:

1. While the parties are in disagreement as to who has the burden of proof in this proceeding, both parties share the burden of negotiating a voluntary resolution of the class size problem which exists. The "gentlemen's agreement" constitutes an example where the parties shared this burden and met it. Arbitrator Michelstetter recognized the importance of that agreement and other arbitrators have recognized the significance of past practices, which one party seeks to incorporate into subsequent agreements. Also, other arbitrators, including Arbitrator Richard U. Miller, in Bangor School District[3], have held the burden of proof shifts when a provision is included in the agreement under circumstances such as occurred in this case.

2. The District's refusal to include Kewaskum and Slinger, among the comparables used here is contrary to the practice which existed prior to the first arbitration proceeding in the District and the size similarities between those districts and Campbellsport. Further, the District includes Kewaskum among its comparables for purposes of analyzing fringe benefits.

3. The District's analysis of class size provisions in comparable districts ignores the fact that such provisions are designed to meet differing needs and that the provision here meets the "need" established by the evidence. The exhibits and testimony presented by the Association not only establish the existance of that need, but answer the various questions

3/ Decision #23049-A, July 19, 1986.

and criticisms contained in the decisions in the two prior arbitration proceedings. While all but one of the comparable provisions are less stringent in their requirements, the per pupil expenditures and class size practices of the District justify the provision as worded.

4. A further review of the alleged administrative problems establishes that they are insubstantial or non-existant.

5. The District's salary improvement calculations fail to take into consideration changes in the salary structure and its application which occurred during the relevant period, in order to artificially raise the District's rank at salary schedule bench marks. A more reliable comparison would consist of actual dollar or percentage increases granted, as reflected in the Association's exhibits. Further, fringe benefits, rather than being above average, are no better than average among the comparables.

6. The cost of the class size provision is not a basis for its rejection because Campbellsport Teachers do not enjoy salary or fringe benefits which are superior to other comparable Districts; the District is no worse off financially than its comparables; the District's data concerning the agricultural nature of its economy is misleading and exaggerated; and the cost of the class size provision is not particularly great and has already been budgeted for.

In conclusion, the Association cites other arbitration awards in support of its contention that the provision should

be viewed in the same general light as any other provision arising out of traditional collective bargaining and retained in the interest of furthering voluntary resolution of problems and discouraging further arbitration.

DISCUSSION

The first question which should be addressed in this proceeding relates to the appropriate placement of the "burden of proof." Ordinarily, in an arbitration proceeding, the question of the appropriate placement of the burden of proof is either well established or of little consequence, because the "preponderance of the evidence" standard is applied in non-disciplinary grievance proceedings. However, as the cases cited by the Association reflect, burden of proof analysis can be of controlling importance in an interest arbitration proceeding, where one party seeks to introduce a new provision or disturb the status quo, by eliminating one.

After giving considerable thought to the matter, the undersigned concludes that, primarily for reasons cited by Arbitrator Weisberger and Richard U. Miller, the burden of proof in this case should be placed on the District.[4] One potential problem with this approach, relates to the possibility that a provision of relatively minor importance, but clearly unreasonable, will find its way into an agreement as part of an overall package deemed more reasonable than the other party's package.

4/ It is not entirely clear whether Arbitrator Krinsky reached the same conclusion, however, the wording of his decision, quoted above, suggests that he did.

But the proponent of such an unreasonable proposal in the first instance, runs a high risk of having its entire package rejected. More importantly, if the proposal is truly unreasonable, such a shifting of the burden of proof is of no great consequence. The other party will be in a good position to meet the burden of proof thus imposed, in a subsequent proceeding.

The disputed provision, while somewhat unique, is not entirely without relevant comparisons; nor is it clearly unreasonable. Other nearby districts, among the comparables cited by both parties, have language dealing with class size and class size work load, including provision for the hiring of aides. Further, an analysis of the reasoning of both Arbitrator Michelstetter and Arbitrator Krinsky reveals no evidence that either of those arbitrators found that the provision was unreasonable. On the contrary, they merely concluded that the District's position was to be favored as to that particular proposal, based upon the record before them.

While some of the evidence in this proceeding duplicates the evidence presented to Arbitrator Krinsky, there are a number of differences. First of all, the record here is detailed with regard to the alleged problems of administration which have been created by the provision. A close analysis of those alleged problems discloses that they do not justify a decision requiring removal of the provision from the agreement. The

question concerning the proper interpretation of the provision has been resolved in a way which is consistent with the clear wording of the provision and does not render the compensation afforded by it, unreasonable in relation to the additional work load which Association witnesses state occurs in the classroom and outside the normal teaching day. The formula utilized for its implementation is somewhat complex, but not unduly so in relation to the number of times it needs to be administered and the other computations normally required for payroll and other purposes. Further, as the Association points out, the District could have made a counterproposal dealing with either of these problems and has other remedies available for any teachers who might fail to cooperate in providing needed data.

Also, Arbitrator Krinsky's record apparently convinced him the work load problems complained of were minor and had significantly declined since the layoffs took effect in 1983-84. While some of the more extreme examples that arose during that year have not been repeated since, there is some evidence that the alleged work load problems have reversed trend for the 1986-87 school year, based on the number of teachers eligible for pay and the amount of such pay generated under the formula.

While the undersigned does not mean to minimize the importance of a $10,000.00 expenditure in a budget in a District the size of Campbellsport, that expenditure must be weighed

against a number of factors. While the records may not conclusively establish that the relatively low cost per pupil expenditures in the District are significantly related to the relatively large class sizes that exist in the District, it is self-evident that the District can achieve a very significant savings if, for example, it pays an elementary teacher under the formula for handling a class which exceeds the stated number, rather than hiring an additional teacher. Again, if the numbers built into the formula are deemed too restrictive, the District could propose different figures, and seek to justify them in some future round of negotiations. It failed to do so here. Instead, its proposal is to eliminate the provision entirely.

In these respects, and in other respects, the record in this proceeding is different and more comprehensive than the record in the proceeding before Arbitrator Krinsky. In that proceeding, the provision was, in effect, prospective in application, even though negotiations were delayed to the point where it had actually taken effect, before the parties presented their cases to Arbitrator Krinsky. Some of the alleged administrative problems not been dealt with effectively. Here, not only is the record replete with evidence concerning those matters, the parties have both put forth considerable evidence and argument on this issue in isolation, in relation to all of the relevant statutory criteria.

In this case, the stipulations of the parties are relevant, in that they establish the terms of the agreement and, in particular, their agreement to escrow payments under the provision pending the outcome of this proceeding. Both parties are well served by that stipulation, in the view of the undersigned, and there is no basis for finding that it supports the position of either party.[5]

As noted above, the evidence with regard to comparisons might not compel the inclusion of the provision in the agreement, but does lend some support to its continuation. More importantly, it is significant that the provision deals primarily with local working conditions, just as the other agreements which contain class size or class size work load language do. The long and painful history of the dispute over this provision dealing with local working conditions, has implications, both in terms of the interests and welfare of the public and in terms of "other factors" considered by arbitrators in proceedings such as this.

No useful purpose would be served by attempting to determine whether a "gentlemen's agreement" in fact existed and the "terms" of the agreement. Even so, several important factors

---

5/ In fact, the agreement itself notes that it is without precedent.

emerge from an analysis of bargaining history. First of all, rightly or wrongly, the District has always attached great importance to maintaining final authority over decisions affecting class size and remains openly skeptical of claims that lower class sizes will necessarily result in improved learning on the part of pupils. Under the law, the District has the right to maintain this position and the question of whether it is pursuing sound or unsound educational policy relates to the permissive aspects of the class size/work load amalgam.

Secondly, because of the history of class size/work load disputes in the District, the Association has attached great importance to what it perceived to be a "gentlemen's agreement" and its subsequent breach. Further, the Association understandably views the class size/work load language, which has been found to be a mandatory subject of bargaining, to be its only viable means of insuring that the District does not utilize its legal authority in a way deemed unduly burdensome to individual teachers. Only the work load aspect of the class size/work load amalgam is a mandatory subject of bargaining and, to the extent that it constitutes an effort to deal with the problems peculiar to the labor relations that exist in the District, it is deemed to be in the best interest and welfare of the public, at least under current circumstances.

In concluding that the proposal constitutes a reasonable

effort to accommodate the work load concerns of the Association with the District's right to establish educational policy, the undersigned recognizes that class size is only one variable which relates to the work load of a teacher. However, all things being equal, common sense (as well as the testimony of record) suggests that a teacher necessarily must put forth more effort to handle a larger class, both in the classroom and outside the classroom. Much of the District's evidence and arguments relate to the fact that "things are not always equal." Thus, it is possible, that a teacher might be blessed, in a given year, with a larger but "easier" group of students. It is also possible that a teacher could vary his or her presentation and utilization of testing materials to make his or her teaching load easier, without necessarily harming the learning process and possibly improving it. In addition, it is undoubtedly true that the difference between a class of 26 and a class of 27 is not particularly great.

In the last analysis, these contentions on behalf of the District must fail. There are many examples of compensation schemes and rules relating to working conditions, which are based upon "arbitrary" limits. Employees who both put in a "40-hour work week" might work at far different paces, yet, it is common to pay such employees a premium for working beyond that number of hours, regardless of differences in their individual

effort. The salary schedule itself presumes an improvement in teaching performance, based upon years of experience and educational attainment. Each teacher who acquires the requisite number of credits is able to advance on the salary schedule, based upon the "arbitrary" figures utilized for measuring such matters. However, a teacher who falls one credit short does not so qualify.

The overall compensation afforded District teachers is representative of the compensation enjoyed by other comparable teachers, as the District alleges. Even so, the Association is correct in its contention that the record here is lacking in any evidence of an economic or other "quid pro quo" for the provision, which the District would delete by its offer. While the District has endeavored to show weaknesses in the evidence and testimony presented by the Association concerning class size figures generally and among comparables and with regard to the work load within the District, it has offered no evidence of its own which would appear to be more reliable for those purposes. Therefore, for all of the above reasons and because of the finding that the burden of proof in this case should be placed on the District to justify its proposal to delete the provision, the undersigned renders the following

AWARD

The final offer of the Association, which will have the

effect of continuing to include the class size work load language in the agreement, is hereby selected.

Dated at Madison, Wisconsin this 19th day of February, 1988.

George R. Fleischli
Arbitrator

5. Class Size Workload:

a. The parties recognize that the number of students assigned to a teacher is a matter of basic educational policy and that the District may assign any number of students it so desires to a teacher's classes. The parties also recognize that the number of students assigned to a teacher directly affects the conditions of employment and workload of that teacher.

b. Teachers in grades K-6 who are assigned twenty-seven (27) or fewer students per school day, averaged on a semester basis, in academic subjects, shall receive wage compensation in accordance with the provisions of the Salary Schedule. Split-grade teachers in grades K-6 who are assigned twenty-two (22) or fewer students per school day, averaged on a semester basis, in academic subjects, shall receive wage compensation in accordance with the provisions of the salary schedule. Teachers in grades 7-12 who are assigned one hundred sixty (160) or fewer students per school day, averaged on a semester basis, in academic subjects, shall receive wage compensation in accordance with provisions of the salary schedule.

c. In the event the District chooses to assign more students to a teacher per school day than the class size workloads set forth above, the teachers so affected shall receive, as work overload compensation in addition to their scheduled salaries, additional compensation each semester in accordance with the following rates:

1. Grades K-6: Additional compensation at the rate of one percent (1%) of the teacher's yearly base salary for each student in excess of twenty-seven (27) per school day, averaged on a semester basis.

2. Split-grades (K-6): Additional compensation at the rate of one percent (1%) of the teacher's yearly base salary for each student in excess of twenty-two (22) per school day, averaged on a semester basis.

3. Grades 7-12: Additional compensation at the rate of one-quarter percent (0.25%) of the teacher's yearly base salary for each student in excess of one hundred sixty (160) per school day, averaged on a semester basis.

d. For teachers with less than full-time contracts with the District, the class size workloads described above in paragraph b., and the additional compensation provided for in paragraph c., shall be prorated according to the percentage of a full-time contract held by such teachers.

e. The provisions of subsection B.5. shall not apply to physical education, music, art and special education teachers, where instructional needs and/or legal requirements dictate a modification in the class size workloads referred to above.

f. 1. For the purpose of determining the number of students assigned to a teacher "per school day, averaged on a semester basis", the first ten (10) school days of the semster, and the number of students assigned to a teacher during that period of time, shall be excluded from the calculation.

2. Any additional compensation earned by a teacher pursuant to subsection B.5. shall be separately itemized and paid at the end of each semester.

3. The class size workload provisions of subsection B.5. shall be effective with the beginning of the second semester of the 1982-83 school year.