IN THE MATTER OF: **AN ARBITRATION**

AND IN THE MATTER OF: **A GRIEVANCE FILED BY C.U.P.E. LOCAL 3465 DATED OCTOBER 15, 1998**

BETWEEN:

TRANSCONA-SPRINGFIELD SCHOOL DIVISION NO. 12

- and –

CANADIAN UNION OF PUBLIC EMPLOYEES LOCAL 3465.

AWARD OF ARBITRATION

A. BLAIR GRAHAM Q.C. SOLE ARBITRATOR

APPEARANCES
KATHY MCILROY COUNSEL FOR THE UNION
ROBERT SIMPSON COUNSEL FOR THE SCHOOL DIVISION

INTRODUCTION

This matter came on for hearing on September 16, 1999.

At the outset of the hearing, the parties agreed that I had been properly appointed and that I had jurisdiction to deal with the subject grievance as a sole arbitrator, and that there were no objections to the arbitrability of the grievance.

On October 15, 1998 the Union filed Policy Grievance 98-07, which stated:

> "The Canadian Union of Public Employees, Local 3465 (hereinafter referred to as "CUPE") claims there is a difference between themselves and the Transcona-Springfield School Division (hereinafter referred to as the "School Division"). The School Division has misinterpreted and/or misapplied and/or violated Articles 4, 9, other relevant articles of the Collective Agreement and the Labour Relations Act, s.80 (2). The School Division has: Created a term position (Custodial No. 6-98-99), which is in direct violation of our contract. Custodians working on weekends are to be paid as per the Collective Agreement."

The collective agreement now in force between the parties (Exhibit 4) is for the term from January 1, 1998 to December 31, 1999 (the "New Agreement"). It was signed on January 19, 1999 and was being negotiated during the time the subject grievance was filed. Its terms were retroactive to January 1, 1998, and therefore apply to this dispute. The clause in the New Agreement which directly bears on this matter

is Article 10 and is identical insofar as custodial and maintenance workers are concerned to Article 9 in the Collective Agreement that was in force from and after January 1, 1995 (the "Old Agreement").

The salient provisions in Article 10 of the New Agreement are as follows:

> "ARTICLE 10 – HOURS OF WORK
>
> Custodial – Maintenance Only
>
> 10.08 The working hours for various classes of employees on staff shall be eight (8) hours a day for five (5) consecutive days, Monday to Friday …
>
> 10.10 Overtime
>
> (a) Any time worked over the normal daily hours or forty (40) hours in the week and authorized by the Division, shall be considered overtime and paid for at the rate of time and one-half (1 ½ x) for the first four (4) hours and double (2x) after four (4) hours in any day Monday to Saturday.
>
> (b) Overtime Rates on Sundays and Statutory Holidays
>
> All overtime worked on Sundays other than as specified in Clause 10.12 of this Article, shall be paid at double time the standard rate of pay for every hour worked. Any employee who is required to work on a Statutory Holiday shall be paid at the rate of double time based on his/her standard rate of pay for every hour worked in addition to his/her regular pay."

FACTS

The material facts relevant to this matter are essentially uncontested. They are as follows:

(a) school buildings in the Division are frequently used by various groups outside of regular school hours;

(b) the Division itself uses school buildings outside of regular school hours for a variety of activities including school sport events and continuing education programs;

(c) other community groups and organizations, including the city of Winnipeg also use school buildings for various activities;

(d) at all times material to this grievance, it was the policy of the Division to charge a fee to those other community groups and organizations for their use of school buildings outside of regular school hours;

(e) the fees charged to those other community groups and organizations were intended to recover at lest some of the costs incurred by the Division in making its facilities available for community use;

(f) whenever school buildings wee to be used outside of regular school hours, the user, whether the Division itself, or an outside organization, would be required to apply for and obtain a permit. When a permit was issued by the Division, several copies would be distributed internally, so that appropriate employees of the Division would be aware that a particular building was to be used for a particular purpose at a specified time outside regular school hours. Typically the employees receiving a copy of the permit would include the Principal of the school in question, the Head Custodian of that school, and the teacher or teachers involved, if any. For example a phys-ed teacher or coach would receive a copy of a permit if a school gymnasium was being used for a game or practice;

(g) in most, if not all cases, a custodian would be required to be present when a school was being used outside of regular hours;

(h) normally the Head Custodian of the school would be given the first opportunity to work during the period specified in the permit. If the Head Custodian was not interested in working at that particular time, the opportunity would be given to the night custodians, or other custodians employed at that school, and failing interest on their part to other custodians within the Division;

(i) this arrangement would frequently involve the Division paying overtime rates to custodians who would work during the times specified in the permits. In the case of outside organizations using the facilities, the Division would typically recover those overtime costs from the outside organization using the Division facilities;

(j) for some time prior to the fall of 1998, the City of Winnipeg has used Murdoch MacKay Collegiate, one of the school buildings in the Division for a teen recreation program. The program used a portion of the Collegiate as a type of drop-in centre, allowing teenagers to use the school for recreational purposes (e.g. basketball), and more generally as a gathering place. The intent of the program was to "keep teenagers off the street". It was designed to attract neighborhood teenagers, many, if not the majority of whom, would be students in the Division;

(k) the City operated the program both in the summer months, during evening hours, and throughout the school year, during the day on Saturdays and Sundays;

(l) arrangements in relation to the program in the summer of 1998 (and perhaps earlier) involved a casual custodian working during the evenings at a regular rate of pay. This arrangement was based on an agreement between the School Division and the Union. Prior to the fall of 1998 arrangements in relation to the program during the school year involved the Head Custodian, or some other custodian working the allotted times on Saturdays and Sundays at the overtime rate specified in the Collective Agreement, namely time and a half for the first four hours on Saturday, and double time for any hours in excess of four on Saturday and on Sunday;

(m) prior to the fall of 1998 the Division recovered those overtime costs from the City;

(n) prior to the commencement of the fall school term in 1998, the city objected to the Division's practice of charging the City for the overtime costs the Division was incurring in relation to the Saturday and Sunday attendances of custodians. The City threatened to cancel the teen recreation program if overtime rates, as opposed to regular rates of pay were charged to the City for its use of Murdoch Mackay Collegiate on Saturday and Sunday;

(o) the Division has estimated that on the basis of 100 hours being paid at time and a half and 324 hours being paid at double time, the over time costs it would incur over a school year in relation to the teen recreation program would be approximately $7,600.00;

(p) after the City objected to the Division, Mr. Morrow, the Superintendent of the Division, approached John Friesen, the Head Custodian of Murdoch Mackay Collegiate and Stephen Edwards, the National Representative of CUPE, and proposed that a part-time custodian would be assigned to work on Saturdays and Sundays in relation to the city's teen recreation program and paid at the regular rate of pay. Messrs. Friesen and Edwards did not agree to that proposal;

(q) thereafter the Division circulated a posting (Exhibit 5) dated October 7, 1998 relating to a term position for a custodian at Murdoch Macky Collegiate for the applicable Saturdays and Sundays from 2:00 p.m. – 9:00 p.m. The term was to commence immediately and to end on December 20, 1998. The December 20 date was referred to in the posting because that was the date the

City's permit for the teen recreation program was due to expire. However it was hoped and expected by the Division, that the City would apply for a new permit effective January of 1999 and that the term position would accordingly be extended;

(r) the position was never filled because although a suitable candidate was found, that individual had an opportunity to assume a full-time regular position elsewhere. A re-posting was circulated dated October 30, 1998, but by then the subject grievance had been filed and negotiations wee underway between the Division and the Union with respect to a new Collective Agreement;

(s) the Division therefore decided not to fill the posted position, and has continued to pay overtime rates to full-time custodians working on Saturdays and Sundays in relation to the City's teen recreation program;

(t) the Division, in the recent past has made some use of part-time custodians, but that use has not been extensive. Approximately 40 custodians were employed by the Division in the 1998-1999 school year, only two of whom were part-time.

THE POSITIONS OF THE PARTIES

1. THE UNION

The Union's arguments in support of the grievance are simple and straightforward. It asserts that Article 10 (Article 9 in the Old Agreement) is a clear restriction on the normal management right to create a new shift and/or to require work to be done a weekend.

The Union says that Article 10.08 stipulates that a regular work week shall consist of eight (8) hours a day for five (5) consecutive days, Monday to Friday. It does so in mandatory terms by use of the work "shall". The mandatory work "shall" is used to define the number of hours and days to be worked, and also to define each of the regular shifts namely the day shift, the afternoon shift and the evening shift.

Furthermore, Article 10.10 specifically outlines the circumstances in which overtime is to be paid. The Union asserts that the combined effect of Articles 10.08 and 10.10 is that overtime is to be paid at the rates stipulated for work performed on Saturday and Sunday, and that the agreement reflects in clear language, the intention of the parties that the agreement reflects in clear language, the intention of the parties that regular working hours are limited to a forty (40) hour week worked Monday to Friday. Expressing the same proposition in somewhat different terms the Union argues that the Division has bargained away Saturday and Sunday as regular working days.

The Union acknowledges the existence of a part-time employee category in the Collective Agreement but says that the existence of that category does not detract from the effect of the Agreement that regular hours of work occur on Monday to Friday, and that overtime rates are to be paid on Saturday and Sunday.

The Union is also adamant that the Division cannot use part-time employees to create what is effectively a new regularly scheduled shift outside of the regular shifts outlined in Article 10.08.

The Union cautions against construing the management rights clause in the Agreement so broadly as to render Article 10 of the Agreement meaningless. Indeed the Union emphasizes that Article 10 is a clause which specifically alters the management rights provisions in the Agreement.

2. THE DIVISION

The Division states that before construing Article 10, certain definitions in Article 2, and the management rights clause in Article 3 must be carefully considered.

Article 2 contains definitions of full-time employee, part-time employee, and temporary term employee applying to both custodial and maintenance workers the subject of this grievance) and paraprofessionals and library clerks. Those definitions are:

> "…(i) "Full-Time Employee" means an employee who regularly works the full prescribed hours of work per week;
>
> (ii) "Part-Time Employee" means an employee who is scheduled to work less than the full prescribed hours per week on a regular and recurring basis;
>
> (iii) "Temporary/Term Employee" means an employee hired for a specific period of time of twenty (20) working days or more for the completion of a specific job or until the occurrence of a specific event; an employee hired under this designation will not normally work for more than six (6) months, however, in the event such a requirement exists, the Union shall be notified of any duration in excess of six (6) months. Positions of less than three (3) months duration will be excluded from posting requirements in Article 9.01";

Article 2 also contains a definition, applicable to custodial and maintenance workers only, of a casual employee. It is:

> (v) "Casual Employee" (spare) means an employee who is employed on an irregular and unscheduled basis. A casual employee is not covered by this Agreement."

The Division argues that the above noted definitions are significant because they represent an acknowledgement by both parties that there will be employees who work less than the prescribed hours, and who may not be working the same shifts as full-time employees.

Article 3, the management rights clause provides as follows:

> "ARTICLE 3 MANAGEMENT RIGHTS
>
> 3.01 The parties specifically recognize the Division’s

> responsibility and right to manage all of the affairs of the Division, and all of its activities, and hereby confirm that responsibility and right, except as it is clearly and specifically altered by the terms of this Agreement…"

The Division argues that the management rights clause is very broad and that it does not purport to specify what the Division can do, but instead makes it clear that the Division can undertake anything by way of managing its workforce and organizing its activities, unless such an undertaking would contravene another provision of the Collective Agreement.

In terms of Article 10.08 the Division maintains that the Article establishes the normal hours of work and the normal shifts for full-time employees, and sets out a basis for the calculation of overtime. Article 10.10, sets forth the rates of pay that are to be paid to employees who are entitled to receive overtime, including those working on Saturday and Sunday, but it does not describe or define the employees who are entitled to receive overtime rates.

The Division also makes the following points:

(i) The Collective Agreement contemplates part time, temporary/term, and casual employees. Article 10 does not apply to part time or casual employees but only to full time employees who work regular shifts;

(ii) The Division was entitled to hire a custodian to a term position for the purpose of working Saturdays and Sundays in relation to the Teen Recreation Program, and Article 10 does not apply to such an employee;

(iii) No full time employee will lose anything either in terms of hours or in terms of pay as a result of the Division hiring a custodian to such a term position;

(iv) The Division is acting with two legitimate objectives in mind, namely to reduce costs, and to preserve a desirable program for the teenagers in Transcona;

(v) The School Division is respecting the existence and integrity of the Union by hiring a person that will be within the scope of the Collective Agreement;

(vi) The onus of establishing a breach of the Collective Agreement is on the Union, and the Union has not discharged that onus.

ANALYSIS

I have reviewed all of the jurisprudence and arbitral authorities that were referred to me by counsel for the parties.

Those authorities involve analysis of the effect and consequences of clauses which establish regular hours of work, or regular schedules of work.

Several principles of the law relating to this area are well established including:

(i) the scheduling of hours and days of work is a management right. If there are to be restrictions on that right, they must be present in a Collective Agreement in clear and specific terms;

(ii) if a Collective Agreement contains provisions which establish regular hours and/or days of work, employers must respect those provisions. Accordingly, for example, if regular working hours are stipulated in the Collective Agreement as being from 8:00 a.m. to 5:00 p.m., Monday to Friday, the employer cannot change the hours from 6:00 a.m. to 3:00 p.m. Monday to Friday, or from 8:00 a.m. to 5:00 p.m. Tuesday to Saturday;

(iii) notwithstanding provisions establishing regular hours of work, an employer is still able to schedule work outside of those regular hours. However hours worked outside the specified schedule will normally attract the payment of overtime;

(iv) moreover, if a Collective Agreement contains provisions establishing regular hours of work or a regular schedule of work, such a schedule cannot be modified so as to create a new permanent or semi-permanent shift outside of the regular schedule, unless another provision of the Collective Agreement permits such scheduling, or unless such a schedule is required to accommodate an usual or emergency situation;

(v) the existence of provisions establishing regular, or normal hours of work do not constitute guarantees of work or employment. Therefore employers are able to assign less than normal hours of work to employees, including regular full-time employees.

The above noted principles provide a framework, which assists in considering some of the issues in this case. However the above noted principles are not determinative of the ultimate result because certain other facts and considerations are operative.

The Collective Agreement

The Collective Agreement between the Division and the Union contemplates various classes or categories of custodial employees, namely full-time part-time, temporary/term, and casual employees.

The significant majority of the custodians currently employed by the Division are full-time employees. In the 1998-1999 school year there were two part-time custodians, one at Murdoch McKay Collegiate and one at a school in Anola. The Division must have also employed some casual custodians relatively recently because there was evidence that casual custodians had worked summer evenings in relation to the City's teen recreation program.

Central to the Division's case in this arbitration are three related propositions namely that:

(i) the Collective Agreement specifically contemplates the use and deployment of custodians other than full-time custodians;

(ii) the management rights clause (Article 3) is broad and permissive and would allow for the assignment of a "temporary/term custodian" to work Saturdays and Sundays in relation to the teen recreation program. Conversely there is no provision in the Collective Agreement that would constrain the Division's management right to do so;

(iii) a reasonable, common sense interpretation of Article 10 is that it does not apply to part-time or temporary term employees.

In determining whether the Division is correct, I must answer three questions:

1. Does the Collective Agreement contemplate and permit the hiring of employees other than full-time employees?

2. Does Article 10 apply to part-time and temporary/term employees?

3. Is the employer attempting to circumvent the provisions of Articles 10.08 and 10.10, and specifically attempting to avoid the effect of the stipulation of regular working hours and the payment of overtime rates on Saturdays and Sundays, by hiring term employees to work a new (Saturday/Sunday) shift?

The answer to the first question is readily apparent; it is yes. The Collective Agreement specifically contemplates part-time and temporary/term employees, who are covered by the Collective Agreement, and casual employees who are not. The Division does employ part-time custodians although few in number, and also has used casual custodians in the recent past.

The Union, quite properly, has not argued that the Division is prevented from hiring and utilizing part-time, term, or casual custodians.

The remaining two questions are inter-related.

It is not clear when reading Article 10.08 and Article 10.10 in isolation whether they are intended to apply to only regular full-time employees, some classes of employees, or all classes of employees. Article 10.08, which is only applicable to custodial and maintenance workers (and not paraprofessionals and library clerks) refers to "various" classes of employees. The work "various" does denote that the Article applies to more than one class of employee. However the word "various" is ambiguous and could be construed as meaning either:

(a) the various of classes of custodial and maintenance employees referred to in the Agreement, i.e. all such classes;

or

(b) whichever of the classes of custodial/maintenance employees specified in the Agreement it can be logically applied to in any specific factual context i.e., potentially less than all of the classes.

To resolve such ambiguity, the clause should be considered in a specific factual context. It is also permissible to look at other Articles in the Collective Agreement for guidance.

it is known that the Division wishes to hire a temporary/term employee for the purpose of working Saturdays and Sundays during the school year in relation to the teen recreation program.

How is Article 10.08 to be construed in relations to those facts?

I note that Article 10.09 which would apply to all employees within the scope of the Agreement, including temporary/term employees. It states:

> "10.09 Employees coming within the scope of this Agreement shall take shifts according to the ruling of the Division. A shift refers to hours of work set out in 10.08".

The section specifically refers to the hours of work set out in 10.08, but not the days of work. Therefore there is nothing in Article 10.09 that would limit the Division's right to assign a temporary/term custodian to work on Saturday and Sunday.

Article 10.10 is the overtime provision. The operative language in that Article is:

> "Any time worked over the normal daily hours or forty (40) hours in the week, and authorized by the Division, shall be considered overtime…"

This clause means that in order for an employee to paid overtime, that employee must have worked in excess of eight hours, on any given day, or forty hours in any given week before being entitled to receive overtime. Article 10.10 then further stipulates that the rate to be paid for overtime is 1 ½ x for the first four hours, and 2x after four hours in any day Monday to Saturday, and 2x time for any overtime worked on Sundays.

However, in order to be entitled to be paid at an overtime rate when working on Saturday or Sunday, the employee must have fulfilled the prerequisite of either working more than eight hours on the Saturday or Sunday or more than 40 hours in that particular week.

Recognizing that the Collective Agreement contemplates the hiring of part-time or temporary/term employees, and construing Articles 10.08, 10.09, 10.10 in the context of the Division's wish to hire temporary/term custodian to work Saturdays and Sundays in relation to the City's teen recreation program, I conclude that provisions of Article 10.08 would <u>not</u> apply to such temporary/term custodians,

and that Article 10.10 would not require the payment overtime rates for such custodian if they were only working shifts of eight hours or less on Saturday and Sunday.

The above noted reasoning is contrary to the Union's assertion that the Division has bargained away Saturday and Sunday as regular working days at least for part-time or temporary/term employees. With respect, I cannot accept the Union's argument in that regard.

Although, I have found that Article 10.08 would not apply to temporary/term custodians that may be hired to work on Saturdays and Sundays in relation to the City's teen recreation program, careful consideration should also be given to the Union's argument that the Division should not be allowed to circumvent the provisions of Article 10.08 and 10.10 by hiring temporary/term employees to work what is effectively a new shift and to deprive full-time custodians from the opportunity of earning overtime by working on Saturdays and Sundays.

In considering that argument I have found the decision in Re Metropolitan Separate School Board and Canadian Union of Public Employees, Local 1280 (1994) 48 L.A.C. (4th) 242, to be instructive.

That case dealt with a very similar article relating to hours of work which stipulated that the normal work week shall consist of 40 hours, Monday through Friday, comprising eight hours per day. The union position in that case was similar to the union position before me.

At p. 269 and 270 of the decision, the Union position is outlined as follows:

> "It is the submission of the Union that Article 8.01 provides that the normal work week for the employees is eight hours which was the normal week for Caretakers. Part-time positions existed only for Cleaners. The employment of those part-time Caretakers in or prior to 1986 was not discussed with the Union and that position referred only to the particular circumstances for that work. Substantial overtime has been required by the Caretakers in addition to their full eight hours which should be continued for that classification…
>
> It is its position, that full-time hours have been available for Caretakers, and should have been filled accordingly, while the creation of part-time Caretaker positions is a violation of Article 8.01 which requires the normal work of eight hours in the day."

The majority of the Board of Arbitration in the Metropolitan Separate School Board and CUPE case rejected the union's submission. Their reasoning, as outlined at p. 272 was as follows:

> "What occurred was that a vacancy in the Caretaker classification arose through attrition in one of the smaller schools and as a result of the operational study made for the purpose of reducing costs in the school system, the Employer determined that the work required in this school as well as in other small schools could be completed by a Head Caretaker and a part-time Caretaker working at six hours in the evening shift and not eight hours of a full-time Assistant Caretaker as previously occurred. This change in operations did not result in

> the reduction of hours of the Head Caretaker or indeed any other Caretaker employed at the time of the grievance. it did result in the replacement of a full-time Assistant Caretaker by a part-time employee working six hours in the evening shift. It is clear on the evidence that this decision was made for appropriate business reasons by the Employer in consideration of the financial constraints it faced at the time and was made in good faith and not to adversely affect this bargaining unit. Both full-time and part-time employees are included in the bargaining unit represented by the union and are subject to the terms of the Collective Agreement.

The majority of the Board of Arbitration also stated at p. 273 of the decision:

> "…the employer replaced a full-time employee with a part-time employee at the smaller school for purposes of efficiency and lowering its wage costs while at the same time completing the required work. None of the full-time Caretakers working the normal workweeks set out in Article 8.01 had their hours reduced by the Employer through the posting of the vacant position for a part-time employee. The Collective Agreement does not restrict the employer's right to staff its requirements in this manner and to use part-time employees in the classification covered by the Collective Agreement. The Employer did not reduce the hours of work of a Caretaker employed and working at the time of the job postings in 1996 for Assistant Caretakers but filled vacancies with Assistant Caretakers to work six hours in the evening shift, and in so doing those employees fall within the term of part-time employees defined in Article 19.02".

Finally at p. 264, the majority of the Board of Arbitration summarized their decision in the following terms:

> "The effect of the evidence before this Board is that the Employer made a decision having regard to the requirements of its operations to post part-time positions for Caretakers rather than employing full-time Caretakers and thereby reduced its wage costs. That decision and its implementation we find is not contrary to the terms of the Collective Agreement for the reasons set out above."

I am in agreement with the majority of the Board of Arbitration in Metropolitan Separate School Board and CUPE.

In adopting their reasoning in support of my decision in this case I note the following:

1. The Collective Agreement contemplates and permits the hiring of part-time and temporary/term custodians.

2. The Collective Agreement does not restrict the Division's right to use part-time or temporary/term custodians to meet staffing requirement in the custodial/maintenance classifications. For the reasons outlined earlier in this decision I have concluded that Article 10 does not represent such a restriction.

3. The Division has bona fide reasons for its intended actions namely to reduce its costs of operation, and to help preserve a valuable program for the teenagers of Transcona.

4. The Division has acted in good faith in that its actions will not result in a reduction of hours for any full-time custodians, and the Division will be creating a position that will be within the scope of the Collective Agreement.

Accordingly I am finding that the Division's intended course of action does not contravene any provision of the Collective Agreement. The Union's grievance is therefore dismissed.

Dated this 25th day of October 1999.

A. BLAIR GRAHAM
Sole Arbitrator