IN THE MATTER OF AN ARBITRATION

BETWEEN:

Transcona Springfield School Division No. 12
(hereinafter referred to as "the School Division")
AND
Canadian Union of Public Employees, Local 3465,
(hereinafter referred to as "the Union")

Sole Arbitrator:
D.E. Jones Q.C.

On Behalf of the Union:
Ray Bissonnette, Union Steward
Steve Edwards, National Representative

On Behalf of the School Division:
Robert A. Simpson

This matter came before me as Sole Arbitrator on April 16, 1998. At the outset of the hearing the parties confirmed that Policy Grievance #97-02 was properly before me and that I had jurisdiction to deal with it.

The Policy Grievance #97-02 dated March 7th, 1997, states as follows:

> The Canadian Union of Public Employees, Local 3465 (hereinafter referred to as "CUPE" 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 Schedule "A" Rate of Pay, other relevant Articles of the Collective Agreement and the Labour Relations Act, Section 80(2). The School Division has misapplied and misinterpreted Schedule "A" Rate of Pay by not paying custodial employees by the hour. Instead, the Division has averaged our salaries over 24 pay periods based on the employees' total salary. The Division should be calculating our hours based on the pay period.
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> CUPE requests that:
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> (1) The School Division acknowledge they have misinterpreted and/or misapplied and/or violated Articles Schedule A" Pay Period other relevant articles of the Collective Agreement and the Labour Relations Act, section 80 (2);
>
> (2) The School Division cease and desist the misinterpretation and/or misapplication and/or violation of Articles "Schedule A" Pay Periods, other relevant Articles of the Collective Agreement and the Labour Relations Act, Section 80(2);
>
> (3) The School Division acknowledge the error and immediately start to calculate the employees rate of pay on the basis of the hours worked for that pay period.

The School Division has denied the grievance.

The position of the Union is that the Collective Agreement (Exhibit 1) entered into by the parties and signed on June 20th, 1995 only refers to an hourly rate of pay in Schedule A and that the School Division's practice of paying 2080 hours per year semi monthly was in violation of the Collective Agreement.

The position of the School Division is that the method of payment is at the heart of the dispute. Historically, the School Division has paid its custodial employees semi monthly based on an annualized salary. This annualized salary has been calculated based on eight hours per day, 260 days per year. In 1995, however, there was an inadvertent omission in Schedule A of the Collective Agreement when the monthly column (which set out the monthly salary) was left out. It is the position of the School Division that the absence of the monthly column does not give rise to a complete change in a long established method of payment to custodial employees.

Both parties called evidence in support of their positions. It is not my intention to review all of the evidence in detail but to highlight its most salient points.

The first witness called on behalf of the Union was Ron Toews. Mr. Toews is the head caretaker at Dugald School. He has been employed with the School Division since 1987 and held the position of first vicepresident of the Union 1994 - 1996 and was on the negotiating committee that negotiated the Collective Agreement. In his direct testimony Mr. Toews stated that the Union wanted to simplify Schedule A and preferred that only the hourly rate be listed. On cross examination Mr. Toews confirmed that the School Division had for many years paid its twelve month employees based on a formula that took the hourly rate, multiplied that by eight hours, again multiplied by 260 days and then divided by 24 pay periods. This continued after the Collective Agreement was signed on June 20, 1995, and was not questioned until April, 1996. He confirmed a grievance was filed in March, 1997.

Mr. Toews also stated during his cross examination that the Union was seeking payment for hours worked. He conceded that there was currently no particular method of keeping track of employee hours, although schools had an alarm system that could provide a record of entry and departure of custodians.

Mr. Toews thought there was a "little discussion" but he could not specifically recollect any details of any discussion held during negotiations with respect to this change as to how employees were to be paid, or, its effect on the cost of payroll, or, keeping track of hours, or, when it was to come into effect.

Exhibit 7, a proposal submitted by the Union to the School Division on May 11, 1995 and Exhibit 8, a proposal submitted by the School Division to the Union of May 12, 1995 were reviewed by Mr. Toews. It was agreed to by Mr. Toews that Exhibit 8, which refers to both hourly wages and monthly wages, was the final position from the School Division which lead to the conclusion of an agreement between the parties.

John McDonald was the next witness who gave evidence on behalf of the Union. Mr. McDonald has been a head custodian for nine years and has held numerous positions with the Union. Mr. McDonald testified that in the fall of 1995 a member of the union asked him if custodians would be paid for the extra day in 1996, which was a leap year. Mr. McDonald said that he had never thought of this before and looked at the Collective Agreement. He said that he had always been paid semi monthly, calculated on the basis of an annualized salary of 2080 hours per year. After looking at the Collective Agreement, Mr. McDonald said that it was his conclusion that because it only refers to an hourly rate the School Division was not following the Collective Agreement and that the School Division should be using the correct amount of hours in the year. On cross examination, Mr. McDonald confirmed that until he was contacted by a fellow Union member in the fall of 1995, the Union was unaware of "the problem".

Mr. McDonald drew to the Board's attention several postings which advertised custodial vacancies (Exhibits 20, 21, 22, 23, 24). Exhibits 20 and 21 postdate the Collective Agreement and refer to only an hourly rate. Exhibit 22 predates the Collective Agreement and refers to an hourly rate. Exhibits 23 and 24 predate the Collective Agreement and refer to a monthly salary.

Laird Long was the only witness called by the School Division. Mr. Long is currently Secretary Treasurer of the School Division but served previously as Assistant Secretary Treasurer and was involved throughout the collective bargaining in 1995 as a member of the School Division's negotiating team.

It was Mr. Long's evidence that throughout the negotiations there was no discussion whatsoever between the parties with respect to the formula or method of payment to the custodians. He stated that everyone is aware that the longstanding formula and method of payment for twelve month nonteaching positions is 8 (hours) x 260 (days) = 2080 hours x hourly rate which gives an annualized salary which is paid semi monthly. Mr. Long said that an hourly rate is set forth for three reasons: first, to establish an annualized salary; second, to calculate overtime; third, to compare for pay equity.

Mr. Long further testified that in the spring of 1995 the parties negotiated briefly, reached a stalemate and then the strike occurred. The parties reconvened after two weeks and in a flurry of negotiations an agreement was achieved. During all of these negotiations, according to Mr. Long, there was no discussion with respect to the change in method of payment and no work was done by anyone on the School Division bargaining team to cost out such a change, or, to set up a process for monitoring hours. Mr. Long stated that the final settlement increased the School Division's total payroll cost by 2.1%. If the Union had in fact proposed the change in method and formula it was now asserting, that would have resulted in a further .8% increase to payroll costs. Mr. Long was emphatic in stating that it was not possible for him to have missed a discussion during negotiations that would have had such a financial impact.

The School Division forwarded its final proposal (Exhibit 8) to the Union on May 12, 1995. Mr. Long pointed out it clearly set out an hourly wage and monthly wage figure. He said that this final proposal was the basis for the Collective Agreement. However, upon receiving the typed Collective Agreement from the Union and proofreading it, "I did not notice that the monthly column had been taken out of Schedule "A". The Collective Agreement was then forwarded for signing with this omission.

No further witnesses were called by the School Division.

Mr. Long also commented on the postings referred to by Mr. McDonald. He noted that these postings are not his particular responsibility and are not prepared or reviewed by him prior to posting.

In argument, Mr. Bissonnette stated that the Union wanted to be paid for hours worked and that Mr. Toews' recollection of the Union's discussion to remove the monthly column from Schedule "A" of the Collective Agreement was confirmed by the Collective Agreement signed by the parties. As a result the Union should be able to be paid for the hours worked, which in 1995 was 260 days x 8 hours, in 1996, 262 days x 8 hours, in 1997, 261 days x 8 hours.

In argument Mr. Simpson urged the Board to find that Exhibit 8, which represented the School Division's final offer and which lead to the settlement of the dispute between the parties, clearly reflected a monthly column. This format was consistent with past practice and with what was being proposed for the pare professional agreement that was being negotiated at the same time and which was also referred to in Exhibit 8.

Mr. Simpson asked that Mr. Long's recollection of what was discussed during negotiations be preferred over Mr. Toews' recollection. Mr. Simpson argued that since Mr. Long would have been very much involved in any change that would have taken place, to suggest that discussion ensued about a change in how pay is calculated for the one particular bargaining unit without Mr. Long remembering it is difficult to conceive of. Further, Mr. Long would have had to have costed such a change (which amounted to .8%). Bearing in mind that the overall increase was 2.1% to suggest that an additional .8% would have been agreed to without Mr. Long being aware of it is not plausible. The only conclusion that can reasonably be reached is that there was no change to the formula or method of payment discussed or agreed to in negotiations. Accordingly then, Mr. Simpson argued, when the Collective Agreement was sent over to the School Division the monthly column was omitted. This omission was not noticed through inadvertence. It cannot be found, therefore, that both parties agreed to the removal of a monthly salary for 1995 - 1996.

More importantly, Mr. Simpson argued that, with or without the reference to monthly salary in the Collective Agreement, there was no agreement to change the method of payment to employees. He pointed out that the Collective Agreement was signed on June 20, 1995 and the employees continued to receive semi monthly cheques in the same manner as they had previously received them (Exhibits 14, 15). Nothing was raised, and, if the Union thought that a change had in fact been negotiated, Mr. Simpson asked why it was not brought immediately to the attention of the School Division. It was urged by Mr. Simpson that I find that the long standing practice described by the employees who testified continued up to and throughout the negotiations in the spring of 1995 and is unchanged by the Collective Agreement.

In light of these facts, Mr. Simpson argued first that the Collective Agreement has no clause at all that establishes a method of payment to employees, and hence is ambiguous. The Union's position that the Standard Hours of Work clause in Article 9 should be multiplied by the hourly rate in Schedule "A" to arrive at the salary does not address the issue of method either. It was, therefore, the position of the School Division that the Collective Agreement is ambiguous and at the very least has a latent ambiguity. This would be the case even with the inclusion of the monthly column. Accordingly, Mr. Simpson argued that the past practice of the parties reveals how it was intended the employees should be paid.

The second position which Mr. Simpson argued was that the Collective Agreement should be rectified. He stated that the most recent cases give arbitrators the power to rectify. The "real agreement" between the Union and the School Division is evidenced by Exhibit 8 and the practice prior to and subsequent to the Collective Agreement. The omission of the monthly column from the Collective Agreement was as a result of inadvertence on the part of the Union and the Employer.

As a third alternative, Mr. Simpson argued that at the very least there is an estoppel. In essence, the Union is not allowed to sit in negotiations and say nothing with respect to a change as significant as how employees are paid and wait until the agreement is signed and then purport to rely on such a provision, and assert it, at a time when the employer cannot effect a change.

In support of the School Division's position, the following cases were filed and reviewed by Mr. Simpson:

(1) Re Board of Education for City of York and Ontario Secondary School Teachers' Federation, District 14 25 L.A.C. (4th) 390

(2) Re British Columbia Nurses' Union and Communications, Energy & Paperworkers Union of Canada, Local 444 49 L.A.C. (4th) 374

(3) Re Alcan Canada Products Ltd. And Metal Foil Workers' Union 5 L.A.C. (3rd) 1

(4) Re Seminole Management Engineering Co. and Canadian Automobile Workers, Local 195 4 L.A.C. (4th) 380

(5) Re Peterborough Civic Hospital and International Union of Operating Engineers, Local 796 23 L.A.C. (4th) 312

(6) Re Corporation of City of Toronto and Canadian Union of Public Employees, Local 79 27 L.A.C. (4th) 363

(7) Re Casa Verde Health Centre and Service Employees International Union, Local 204 33 L.A.C. (4th) 284

(8) Re Alberta Sugar Co. And United Food & Commercial Workers International Union, Local 383 34 L.A.C. (4th) 374

(9) Re Sterling Place and United Food & Commercial Workers International Union 62 L.A.C. (4th) 289

(10) The Agassiz Teachers' Association of the Manitoba Teachers' Society and The Agassiz School Division No. 13 (unreported) September 17,1987

I have reviewed the evidence and argument presented by the parties. I am persuaded by the first position put forward by Mr. Simpson. The Collective Agreement does not have a method of payment set out within it. The designation of an hourly rate does not lend itself to a determination of how employees are to be paid. I find that there is a latent ambiguity. As was stated in the British Columbia Nurses' Union and CEP, Local 444 case, "*This, then, is a situation in which the meaning of ambiguous provisions is found in the apparent agreement of the parties through significant past practices... If a provision in an agreement, as applied to a labour relations problem is ambiguous in its requirements, the arbitrator may utilize the conduct of the parties as a need to clarify the ambiguity... The principal reason for this is that the best evidence of the meaning most consistent with the agreement is that mutually accepted by the parties*." (p. 385)

The practice between these parties for twelve month nonteaching positions is clearly that which is based on an annualized salary using 2080 hours per year. (8 [hours] x 260 [days] = 2080 hours x hourly rate). The postings referred to by Mr. McDonald and Mr. Long are not determinative of this practice.

I am also of the view that the evidence before me clearly discloses that the parties did not negotiate a change to either the formula or method of payment. To find otherwise would require me to reach the implausible conclusion that Mr. Long did not realize that such a significant change had occurred and that the School Division had agreed to a relatively significant increase to its payroll without exploring the attendant cost or processes for implementation. I am of the opinion that this did not happen and that Exhibit 8 reveals the true agreement between the parties. I accept that the Collective Agreement was signed without a monthly column due to an inadvertent omission.

For the reasons set out above, the grievance is dismissed.

DATED at the City of Winnipeg in the Province of Manitoba, this 27th day of May, 1998.

Diane E. Jones Q.C.
Sole Arbitrator