IN THE MATTER OF AN ARBITRATION:
BETWEEN

ST. JAMES SCHOOL DIVISION NO. 2,
(hereinafter referred to as "the *Division")*
and
CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 744,
(hereinafter referred to *as "the Union')*

Grievance Issue: Ten month employee grieved denial of a temporary work assignment that became available during the normal school closure at spring break.

Board of Arbitration	P.S. Teskey, Chairperson R.A. Simpson, Nominee of the Division B. Hunt, Nominee of the Union
Date of Arbitration:	September 5, 1996
Location of Arbitration:	Winnipeg, Manitoba
Appearances:	G.D. Parkinson, Counsel to the Division M. Kernaghan, Representative of the Union W. Sumerlus, Counsel to the Union A. Kwasnica, Grievor W. Schultz, Grievor

AWARD

This matter concerns two individual grievances (Exs. 2 and 3), both of which read as follows:

> "I claim there is a dispute between myself and the St. James Assiniboia School Division No. #2, hereinafter referred to as the "School Division". The School Division had misinterpreted and/or misapplied and/or violated Articles 1, 4, 21 and other relevant Articles of the Collective Agreement and the Labour Relations Act, Section 80(2). The School Division did not assign me to a temporary work assignment that became available during the normal school closure at spring break.
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> I REQUEST:
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> 1. The School Division acknowledge they have misinterpreted and/or violated Article 1, 4, 21 and 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 violation of Article 1, 4, 21 and other relevant Articles of the Collective Agreement and the Labour Relations Act, Section 80(2);
> 3. The School Division redress me in full."

It was not in dispute that Ms. Kwasnica was the senior of the two grievors.

At the commencement of the hearing the parties agreed that the Board of Arbitration was properly constituted and had jurisdiction to determine the dispute. We were asked to reserve on the issue of calculation of quantum should same ultimately prove necessary.

The parties proceeded by way of agreed facts and documents.

The issue arises as a result of the following situation. Prior to Spring Break in the Division in 1995, a

request had come forward from one of the schools to move three rooms of furniture and equipment into storage outside of the school. The work required one truck driver and one other individual to assist. It ultimately required three days of work (four hours per day each), completed during Spring Break while the students were out of school.

Although we were nor advised of the precise date of the request or when it was determined how long or by who the work would be done, it appears to have been a planned event.

A casual employee was assigned to assist the truck driver, not Ms. Kwasnica (who normally works as a courier for the Division), nor Mr. Schultz (who normally works as a bus driver). Both grievors are what are referred to as "ten month employees", who only work during the actual school year. It was further agreed the: no other employee was regularly scheduled to assist the truck driver but there is reference in the job descriptions (Ex. 8) of the truck driver and the utilityman/groundsman positions (both of which are in the bargaining unit) to transporting and assisting with movement of furniture, etc.

It was further agreed that, in the past, the twelve month bus drivers had been assigned to assist the truck drivers with labour type work as also had summer student employees, casual employees, and utilityman/groundsman employees.

There was no evidence as to why the Division in this particular instance chose to have the work performed by a casual employee although we do note that the pay scale of "Casual Rates" contained within the Collective Agreement indicates that casual employees are paid significantly less than the regular or temporary employees.

To understand the issue, it is necessary to reproduce portions of the Collective Agreement as follows:
"ARTICLE 2 DEFINITION"

2.01 Regular FullTime Employees are those employees who are working the full hours of work as per Article 14 (Hours of Work).

2.02 Regular PartTime Employees are those employees who are working less than the full hours or work as per Article 14 (Hours of Work).

2.03 Temporary Employees are those employees hired for a specific period of time or 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. Should a temporary employee become a regular "fulltime!' or a regular "parttime" employee with no break in employment. seniority shall be retroactive to the first day of continuous temporary employment. Temporary employees receive hourly vacation pay according to the Employment Standards' Act.

2.04 Casual Employees are those employees who are employed on an irregular and unscheduled basis. A casual employee is not covered by this Collective Agreement. Casual employees shall be paid as set forth in the classification and salary schedule attached hereto.

2.05 Student is an employee hired during the period between May 1st and September 1st in any year and is not included within the scope of this Agreement.

NOTE:
Union dues shall not be deducted from persons classified as casual employees or students.

14.04 Work Year All fulltime and regular parttime employees (excluding parttime Bus Drivers) in the employ of the Division as at November 25, 1985 shall work the full calendar year. An Bus Drivers (fulltime and parttime) appointed after November 25, 1985 shall work the school year only.

ARTICLE 21 LAYOFF AND RECALL

21.01 a) Role of Seniority in LayOffs
Both parties recognize that job security shall increase in proportion to length of service. Therefore, in the event of a layoff, employees shall be laid off in the reverse order of their bargaining, unit wide seniority. An employee laid off may bump an employee with less seniority providing the employee exercising the right is qualified and able to perform the work of the less senior employee.

b) Reduction in Hours
An employee whose hours of work have been unilaterally reduced and who does not wish to take the reduction in hours shall, a: the option of the employee be deemed to have been laid off and shall have recourse to Clause 21.01 a).

21.02 Recall Procedure
Employees shall be recalled in the order of their seniority, provided the employee is qualified and has the ability to perform available work. In this case the posting procedure for the vacant position to which the laidoff employee is being recalled shall be bypassed.

21.03 No New Employees
New employees shall not be hired until those laid off have been given an opportunity of recall provided those on layoff have the qualifications and abilities to perform the available work.

21.04 A laidoff employee who elects to have his name placed on the recall list and who works in casual, substitute or temporary assignments, shall have his period of recall extended by an equivalent number of working days.

21.05 Advance Notice of LayOff
Unless legislation is more favorable to the employees, the Employer shall notify employees who are to be laid off fifteen (15) working days prior to the effective date of layoff. If the employee has not had the opportunity to work the days as provided in this Article, he shall be paid for the days for which work was not made available.

21.06 In the event temporary work assignments become available during normal school closures, the Board agrees to offer employment to ten (10) month employees on temporary layoff to positions for which they are qualified. Employees interested in undertaking

> work assignments shall advise the Personnel Office, in writing, by May 15th of each year of their interest in accepting such assignments and indicating their preference. if any for fulltime or parttime assignments."

At the commencement of the hearing, Mr. Parkinson indicated that, in light of Article 21.06 and for the purposes of this hearing only, the Division was not disputing that the grievors were on temporary layoff and had met the other prerequisites of Article 21.06 in terms of being qualified and having provided the necessary notification to the Division of their availability and interest.

We were also provided with the previous Collective Agreements between the parties (Exs. 4, 5, 6. and 7) between the years 1983 through 1992. Mr. Kernaghan took us through those in some considerable detail but we do not need to repeat all of same here. Suffice it to say that the distinctions in Article 2 between the various types of employees have evolved over the years and the present wording relating to the definitions of temporary and casual employees first came into the Collective Agreement in 1989, as did the present Article 21.06. The present Article 14.04 (although numbered differently) first appeared in the Agreement effective March 1, 1987.

Given the above information, it is apparent that we are really only dealing with the grievance of Ms. Kwasnica since, if entitlement exists at all, it would only apply to her as there was only one position and she was the most senior employee.

As indicated above, Mr. Kernaghan in his submission traced the development of the Collective Agreement with respect to all of the Articles reproduced above.

As there was no dispute that Ms. Kwasnica had met the prerequisites of 21.06 and that Spring Break was to be considered as a normal school closure, entitlement should exist.

The Union's position was that assisting the truck driver was clearly bargaining unit work both by past practice and according to the job descriptions and amounted to what should be considered as typical duties.

The second issue was whether the work assignment should have been performed by a temporary or casual employee as the work in question here was a scheduled and planned event. Having known in advance that the specific assignment was required, it should have been assigned to a temporary employee. However, even if it was deemed to be casual employment, it should first have been offered to the senior noncasual employee under Article 21.04, We might note that Mr. Parkinson did not agree that this was a situation of layoff for the purpose of Article 21.04 and we have no evidence with respect to that particular issue.

Mr. Kernaghan suggested that under Article 21.02, the work should have been considered as temporary and a recall of the senior employee should have occurred.

We were reminded of the importance of seniority as a benefit to all employees and that we should read the Collective Agreement as a whole in terms of the proper interpretation.

As well, Article 21.03 provided that no new employees be hired until laid off employees had the opportunity of recall. Under either Article 21.06 or the other provisions of Article 21, the senior employee ought to have been offered the work assignment.

We were provided by Mr. Kernaghan with the following authorities which will be discussed as

necessary in the decision portion of this Award.

Re Board of School Trustees of School District 61 (Greater Victoria) and Canadian Union of Public Employees, Local 382 (1979), 25 L.A.C. (2d) 430 (Brown)

Re British Columbia Hydro & Power Authority and International Brotherhood of Electrical Workers. Local 213 (1986), 24 L.A.C. (3d) 283 (Larson)

Those authorities stood for the proposition that recall rights could and should apply to temporary assignments and that Article 21.04 was specific in the type of work that laid off employees could be recalled for which included both casual and temporary work.

The Union was not disputing the right of the Division to hire casual employees to augment the regular work force but that could not be done at the expense of the rights of the members of the bargaining unit. Accordingly, the grievance ought properly to be allowed and a remedy ordered for Ms. Kwasnica.

Mr. Parkinson submitted that the facts in the Agreement were all straightforward and, on that basis, the grievance ought to be denied.

Casual employees (as with student employees) had been excluded from Ex. 1 by agreement between the parties other than setting casual rates of pay which were significantly less than regular employees.

The wording of the grievance and the sense of it, suggested that it fell under Article 21.06, not the other provisions of Article 21, and there was no agreement that the grievors were on layoff for any purpose other than 21.06. Article 14.01 was not significant in the context of the grievance under 21.06.

Article 21.04 simply referred to calculation of seniority but did not contradict Article 2.03 which was specific and, as well, only confirmed that there was a difference between casual and temporary employees in terms of coverage under the Collective Agreement and differentials in pay.

The parties had been aware of that distinction when agreeing upon Article 21.06 and the restriction to "temporary work assignments" was therefore significant since "casual" was not included.

Evidence of past practice only indicated that the Division had a choice of a variety of ways to perform the particular work in question.

Under Article 21.02 the grievors would not be considered as being on layoff during Spring Break since it would only be a temporary interruption of their normally scheduled work such as was the case with a weekend.

If the work was casual there was no obligation for the Division to offer it to the grievors under 21.06.

It was suggested that the real issue that this Board had to determine was the difference between casual and temporary and Counsel conceded that the wording of the Agreement was not without some difficulty. However, we were urged to interpret the wording within the labour relations milieu and context. In that respect, we were provided with an extract from the "Rules of Board Practice" and Practice Note number 2 of the Manitoba Labour Board when determining distinctions between regular parttime employees and casual employees for the purposes of proceedings under that statute. Mr. Parkinson suggested that the issue was whether the employees were regularly scheduled or if they performed their services on an ad hoc basis.

In this instance, the work assignment had been a "one shot" event and there was no evidence that it

would ever happen again. It was a classic example of what the Labour Board would consider as casual employment since it was not regularly scheduled week by week.

We were also provided with the decision of the Manitoba Court of Appeal in Children's Aid Society of Eastern Manitoba et al v. Rural Municipality of St. Clements [1952], 6 W.W.R. (NS) 39, Re Village of Gold River and Canadian Union of Public Employees. Local 3399 (1993), 33 L.A.C. (4th) 116 (Ready), Re Canada Safeway Ltd. and Carey (November 23, 1987, unreported, Sask. Q.B.), which will be discussed later in this Award as necessary.

Reference was also made to pp. 549550 of Palmer and Palmer, Collective Agreement Arbitration in Canada (Third Edition), as well as certain other definitions of "casual" in the context of employment from Carswell, Words and Phrases Judicially Considered, Volume 2"C" at pp. 279 to 281.

It was significant that Article 21.06 did not refer to either casual or to student work but restricted itself to temporary work.

The interpretation urged upon us by the Union was characterized as doing damage to the Agreement negotiated between the parties and we were cautioned not to go further than what had been negotiated.

It was submitted that the job descriptions were not particularly relevant because the issue was not whether he Division could have hired permanent employees to do the work but it was significant that assisting the truck drivers had previously been performed on a number of different bases including by casual employees.

We were reminded that any work, even that work performed by casual employees, generally was scheduled and that the fact of having been scheduled in advance did not convert the work into "temporary". If prior scheduling was the determining characteristic, there would be no such thing as casual work at all. The proper governing factor ought to be the regularity of the work as opposed to this type of situation of sporadic relief.

If the Union was correct in its argument concerning the other portions of Article 21, there was no need at all for Article 21.06 as the need for same would be entirely covered under 21.02. However, Article 21 did not cover nonbargaining unit work.

In reply, Mr. Kernaghan submitted that the difference in pay rates was irrelevant if the obligation existed for the Employer to have offered the work to the senior employee. In a sense, whether the work was casual or not was also irrelevant since employees on lay off could be recalled to any of the positions or work indicated in 21.04. The wording of the grievance had referred to all of Article 21 (as well as other Articles) and was not restricted to 21.06 alone.

The regularity of the work was not to be the governing issue as, if the work performed was a regular event (such as once a week), it would be posted and performed by a regular parttime employee. Under 21.06 ten month employees could take priority over either casual or student employees if they chose to do so.

DECISION

In general terms, we agree with Mr. Kernaghan's proposition that the Collective Agreement must always be read as a whole, but we also agree that Mr. Parkinson's submission that the substance of this matter in dispute is a grievance under Article 21:06 as is indicated by the wording of the grievances themselves. We further agree that the critical issue here is what is to be considered the difference between casual and temporary work assignments. As indicated above. it is really only the grievance of Ms. Kwasnica that

we must consider.

Given this particular fact situation, the issue of student employees is irrelevant. The work that was performed here was during Spring Break and the term "student" in Article 2.05 is only applicable between May 1 and September 1 in any year and we do not need to deal with that issue further since it is not what is before us.

Although Mr. Kernaghan very ably argued the possible implications of the other provisions of Article 21 (and Article 14), we find that the instant case can be determined within the parameters of Article 21.06 and Article 2. It does not appear coincidental to us that the different categories of employees which presently exist within Article 2 of the Agreement were negotiated between the parties at the same time as Article 21.06 and it flows from that that the parties intended the definitions in Article 2 to be applicable to Article 21.06, albeit the term "temporary work assignment", not "employees", is used.

However, as Mr. Parkinson noted quite accurately, those definitions and the wording of 21.06 are not without some difficulty of interpretation. It is fair to say that the Collective Agreement is not a miracle of draftsmanship and the parties may well choose, through further negotiations, to attempt to clarify the situation.

We have also tried to take into account the "labour relations milieu" as referred to by Mr. Parkinson but, of course, that context is not always identical within each workplace and, ultimately, the wording of each specific Collective Agreement must govern.

It does appear to us that Article 21.06 was designed to create a preference for temporary work assignments to the ten month employees in certain, but limited, circumstances. The omission of the words "casual" or "student" from the Article inclines us to conclude that it is only intended to apply to work assignments which would fall under the definition of Article 2.03. That is really the only issue before us since there was agreement that all other requirements of 21.06 have been met with respect to Ms. Kwasnica (and Mr. Schultz). We have carefully considered the authorities and the various definitions of "casual" and "temporary" placed before us (and have looked at others as well).

The difficulty of finding the distinction between the definitions of "casual" and "temporary" is illustrated in the following definitions from Carswell furnished by Mr. Parkinson which include:

> "Casual ... ordinarily means accidental, occurring by chance or accident, without design or previous arrangement.
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> … The word "casual" is the antonym of "regular" and means occasional or coming at uncertain times without regularity in distinction from stated or regular.
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> … there is an element of chance or a chance factor which requires that the voluntary and immediate availability of a potential employee coincide with the unforeseen need of an employer to have the work done. Conversely, as soon as the need is foreseeable, only parttime work is automatically created: the employee is not a casual worker but a parttime one.
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> .. Casual employment is therefore the product of a given employer's unforeseen need to have work performed and the chance, random and voluntary availability of a given employee.
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> ... you look to the nature of the employment and not to its duration to determine whether an employee is truly casual.
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> ... this term ["casual employee"] has been used to describe employees who are employed on a call-in basis. Usually these employees wore; very irregular hours as required. When they are called by an employer about their availability for work there is no obligation for them to accept the hours

offered."

We have also considered the definitions in Black, M.A., Black's Law Dictionary (Sixth Edition) of "temporary" and "casual" which are as follows:

> "*Temporary*. That which is to last for a limited time only, as distinguished from that which is perpetual, or indefinite, in its duration. Opposite of permanent.
>
> *Casual employment*. Employment at uncertain or irregular times. Employment for short time and limited and temporary purpose. Occasional, irregular or incidental employment. Such employee does not normally receive seniority rights nor, if hours worked are below a certain number each week, fringe benefits. By statute in many states, such employment may or may not be subject to workers' compensation at the election of the employer. The test is the nature of the work or the scope of the contract of employment or the continuity of employment."

We note that Practice Note No. 2 Rule 28 of The Manitoba Labour Board sets the test for casual employees in that context to be employees who *"... appear on a work schedule and who work all or most or me twelve weeks reviewed by the Board*" although the Note also cautions *"Clearly, these are general applications of Rule 28 and may be modified in specific situations dealing with a unique industry or employment situation*."

The Manitoba Court of Appeal in Childrens' Aid Society of Eastern Manitoba et al (cited above), within the context of the then Child Welfare Act, comments at p. 45:

> "Further, the inaccuracy of language and indefiniteness of meaning in the subsection is illustrated in the use of "casual.' which ordinarily means accidental, occurring by chance or accident, without design or previous arrangement."

As the above definitions illustrate, part of the difficulty in distinguishing between the two definitions is that there is a certain amount of synonymity between them. The definition from Black's Law Dictionary of "casual employment" includes the word "temporary" and the definitions from Carswell indicate more that the test is foreseeability, not necessarily duration of the employment. Utilizing the definition in Practice Note No. 2 quoted above would render Article 21.06 meaningless entirely since none of the "normal school closures" (and we note that the term is plural) approach the twelve week period contemplated for the purposes of The Labour Relations Act.

Of course, all of the above definitions must be considered in light of the specific definitions contained within this particular Agreement. The evidence of past practice is not of great assistance in this instance as it has been performed previously in a variety of ways.

The "work assignment" to be performed here was foreseeable, in the sense of being nonemergent, and was reasonably capable of being scheduled in advance. Given the work required, moving the furniture and equipment from three rooms into storage, we find it is also finite and fits within the wording "completion of a specific job" as referred to in Article 2.03. If no employees had been available pursuant to Article 21.06, the work could properly have been offered to casual employees but, given that Ms. Kwasnica had met (by agreement between the parties) all of the other preconditions of 21.06, we feel that the "assignment" should properly have been offered to her and, therefore, we allow the grievance and order that she be compensated for twelve hours of pay at the appropriate rate. We shall retain jurisdiction should the parties encounter any difficulties in calculation of same.

Given our above finding, and given that the Agreement as to "temporary layoff" on the part of Mr. Parkinson was only for the purpose of 21.06, we do not need, nor intend, to deal with the other issues

raised with respect to the other provisions of Article 21.

The Board wishes to thank both Mr. Parkinson and Mr. Kernaghan for their able and expeditious presentations which were of great assistance to us. Each party shall bear the expense of its own Nominee and shall share equally in the expense of the Chairperson.

DATED the 1st day of October, 1996.
P. S. Teskey, Chairperson

I do not concur and am providing separate reasons
R A. Simpson, Nominee or the Division

I do concur and am not providing separate reasons.
B. Hunt, Nominee of the Union