IN THE MATTER OF:

AN ARBITRATION BETWEEN:
MYSTERY LAKE SCHOOL DISTRICT #2355
(hereinafter called the *"District")*

- and -

UNITED STEELWORKERS LOCAL 8223
(hereinafter called *the "Union")*

ARBITRATION AWARD

On June 8, 1999, Jack M. Chapman, Q.C., was appointed to act as sole Arbitrator with respect to a Grievance between the District and the Union. Initially, there were two Grievances, one relating to job postings and one relating to unfair demotion. Only the Job Posting Grievance proceeded to Arbitration.

By agreement between the parties, the Arbitration took place on October 20, 1999 in Thompson, Manitoba. Mr. Rob Simpson represented the District, and Mr. Wayne Skrypnyk appeared on behalf of the Union.

The parties are subject to a Collective Agreement covering the period from May 1, 1998 to April 30, 2000. This was filed as Exhibit "1".

At the commencement of the hearing, the parties confirmed that the matter could proceed to hearing and there were no preliminary objections. There was no other individual who required notice of the hearing and the Arbitrator was clothed with jurisdiction to resolve the matter. The issue of compensation, if any, would be resolved by the parties and the Arbitrator was to retain jurisdiction for that purpose.

At his opening comments, Mr. Skrypnyk pointed out the matter was a Policy Grievance and that the Employer had committed a breach of some of the provisions of Article 9 relating to appointments and promotion, and in particular, those which related to postings. In his view, the language was clear and unambiguous and any jobs within the scope of the Bargaining Unit had to be posted.

Mr. Simpson did not dispute the wording of Article 9, but noted that it only applied to positions which became vacant, and did not apply to situations where individuals were appointed to or transferred to

certain positions in the same classification, and if that transfer was done within the limitations on management's authority.

The Grievance is dated December 11, 1998. It was filed as Exhibit "2". The relevant portions read as follows:

> "Nature of Grievance
> The union has a grievance under the terms of the CBA because the position of Administrative Secretary to the Assistant Superintendent was not posted.
> Settlement requested in Grievance The union requests that this position be posted as per the C.B.A.
> Agreement Violation The CBA as a whole and any related legislation"

Ms. Angela English gave evidence. She had been employed with the Division since 1984 and was now the Senior Payroll Officer working at the Board Office. She kept track of employees, payroll benefits and seniority. She was a member of the Bargaining Unit and had taken part in various bargaining sessions.

Mr. Simpson then referred to page 39 of the Collective Agreement which stated that the permanent 10 month positions would be treated the same as the 12 month permanent positions. He stated, however, that the position of Administrative Assistant to the Superintendent was a 12 month position. The Administrative Assistant to the Special Services Superintendent was a 10 month position. After some discussion, it was agreed between Mr. Skrypnyk and Mr. Simpson that whether the position was 10 or 12 months, it had no bearing on the posting requirement.

Ms. English stated she had not always been in the Payroll Department. She was a Financial Facilitator and had been doing some payroll work. She was part of the non-teaching staff, and she got her position by applying to a posting. Her position as a Payroll Officer was posted and was not in the same classification as she previously held. During her tenure, all positions were filled by job posting.

During cross-examination, she confirmed that she knew Ms. Gordon who left her department to accept a position in two different departments. She acknowledged that a number of employees had their workload divided between two different departments, and she did not know whether those positions had been posted. She also agreed that Educational Assistants were traditionally reassigned without those positions being posted.

In re-examination, she confirmed that Educational Assistants were deemed term employees, and she was not sure whether they always were assigned to the same students.

Alana O'Halloran gave evidence. She had been working with the School Division as an Educational Assistant for four years. They were usually assigned to a specific school, and usually to a specific student. Whether the Division had positions available depended on the special funding they received and if there was a student who needed assistance. If there were no positions available, they tried to find work within the Division. The positions she found out about were by referring to postings. It was only on this one occasion that they were not posted.

It was suggested to her in cross-examination that Educational Assistants could be reassigned without posting. In her opinion, that only occurred to an existing position. She could not say whether or not the position Ms. Gordon received was posted. She did not know about all of the positions.

Ms. Gloria Jacobs, Payroll Officer, gave evidence. She had been employed in a number of capacities with the District. Her positions were periodically eliminated, and she would "bump" into other positions. In her opinion, positions were always filled by posting. There was some discussion as to what had transpired with Ms. Gordon, however, she was adamant that, in her time, even lateral moves were filled by posting. Educational Assistants were assigned when their need was determined. She was not aware they could be transferred. She was of the view that anyone assigned to the School Board Office would only be by way of posting. There was some considerable discussion as to the role of the Educational Assistant and the fact that they were released from employment in the spring, and might be recalled for the fall term, depending on the enrolment, and the funding available. She disputed that an Educational Assistant could be moved without posting or that any position could be filled without it being posted.

Mr. Robert MacGillvray gave evidence on behalf of the District. He was the Superintendent and has been employed there for a number of years. He is, in effect, Chief Executive Officer of the District and is familiar with the role of Educational Assistants. He said there were approximately 70 teaching assistants at various schools and at the Board Office. Each May or June they were laid off, and were reassigned for the fall term, dependant on funding and the students that would be there. Some received tentative appointments, dependent on whether certain specific students were returning to school. There was no posting for those positions. All Educational Assistants were in one classification. He reviewed, in some detail, all of the various individuals who had served in different positions as Secretaries to the Superintendents or Assistant Superintendents. They all worked in the Board Office. Some of those positions had been posted, but only when they were to be filled from outside of the classification. Some had not been posted, and been awarded to individuals within the same classification as the vacant position.

During cross-examination, he acknowledged that, generally, the positions of Administrative Secretary were basically the same, but some positions had not previously existed. Additionally, he was adamant that many of the individuals in those positions had shared workloads and filled in for each other. He acknowledged that on the rare occasion a position in the same classification might have been posted, but was adamant that where there was a vacancy which occurred, it was posted. However, certain positions, if in the same classification, were deemed not to require posting. Each time a position was to be filled,

the District reviewed classification and the other terms of the Collective Agreement prior to making any determination.

He also maintained the District had the right to transfer employees under the provisions of Article 2, being the Management Rights clause.

In argument, Mr. Skrypnyk stated that the language in the Collective Agreement was clear and unambiguous. He referred to Article 9.02 which reads as follows:

> "9.02 When a position within the scope of the bargaining unit is created or becomes vacant and is required to be filled, it will be advertised by means of an Employment Circular. Where a vacancy is expected to last for a period not exceeding thirty (30) working days, the vacancy may be filled without posting."

He said there were three criteria which had to be considered. One was if the job was created, or if one became vacant, and if it was required to be filled. This applied to any position within the scope of the Bargaining Unit. He said the Collective Agreement did not give the Employer the right to decide whether or not a position fell within those requirements. The language, in his opinion "stood on its face". Those criteria did not change simply because an employee might be in the same classification where the vacancy was. He noted Article 9.05 which reads as follows:

> "9.05 The Board will allow one (1) lateral movement once every twelve (12) months for each employee on a job posting of identical classification. Any further lateral movement within the 12 month period shall be at the Board's discretion."

The only discretion the Board had was when there was a second application. One had to consider what the term "identical" meant and, in any event, the article could not be interpreted to say that positions within the same classification did not have to be posted. In his view, the evidence of all the witnesses supported the proposition that all positions within the same classification had been posted. It was, in his opinion, completely irrelevant that the position might be in the same classification. The main criteria was whether it was a position within the scope of the Bargaining Unit.

In his view, the District had to consider the actual classifications and the salaries. That was the basis on which classifications were set. Although they might be in the same classification, and in the same salary range, nevertheless, the positions could be completely different. Each one, in his opinion, had to be posted. He also stated that the evidence was disputed, that the vast majority of positions had always previously been posted except one.

Mr. Skrypnyk referred to the following authorities:

Brown & Beatty, Canadian Labour Arbitration (3d), Article 5:2520
Re Regional Municipality of Ottawa-Carleton and Canadian Union of Public Employees Local 503 33 L.A.C. (3d) 299
Re Petro-Canada Inc. and Energy & Chemical Workers' Union. Local 593 1 L.A.C. (4th) 404

Not surprisingly, Mr. Simpson did not agree with the position of Mr. Skrypnyk. He emphasized that the onus was on the Union to establish a breach of the Collective Agreement and, in his view, it failed to do so. He noted that the positions referred to in evidence were in the same classification.

It was necessary to consider whether the vacant position fell into the same classification group. If it did, and if the District wanted to assign someone to that position from the same classification, it could do so without posting the position.

He stressed that the Employer was not attempting to defeat the Union or to challenge the concept of seniority, or a posting. It was certainly not trying to defeat the integrity of the Bargaining Unit, and it always acted in good faith. The evidence was that it reviewed each vacancy to see if it needed to be posted.

The District assessed the position in accordance with the terms of the Agreement, and its rights under it and no violation had been shown in this case.

Although Article 9.05 clearly showed that employees could move laterally, it did not detract from the Board's entitlement to determine who was to be assigned to such positions. Mr. Simpson referred to the following authorities:

The Flin Flon School. Division No. 46 and United Steelworkers of America Local 7975 and Linda Zimmer, unreported, Chapman
Canadian Labour Arbitration, Article 5:2510
The St. James-Assiniboia School Division No. 2 and The Canadian Union of Public Employees Local No. 744, unreported, Chapman

There is absolutely no question that the posting process is an integral part of any Collective Agreement and protects the rights of employees to apply for positions within the Bargaining Unit. However, those rights and the procedures to be followed must be specified in the Collective Agreement.

I have not recited in any detail, the evidence of the various witnesses complaining about the posting procedures. This is a Policy Grievance, I did not deem it necessary. However, all of the evidence has been considered. I am of the view that the primary guidance to this issue must be found in the Collective Agreement and also in a general jurisprudence relating to such matters. It is clear that a position that is within the scope of the Bargaining Unit can only arise because of a vacancy, or because it is created. If that position is to be filled, then that is to be done by posting. The question, however, is whether there must be a posting if the position is going to be filled by persons already in the employ of the District and who are in the same Classification. In other words, can the District, within the Management's Rights Clause of the Collective Agreement transfer or assign an individual already in that classification to the vacant or newly created position without posting.

The significance of the job posting procedure is set out in Article 5:2520 of Canadian Labour Arbitration and stresses the importance of the job posting procedure. I note the following: Article 5 in that Article, note the following:

> "'Apart from its scope, arbitrators have insisted that the posting process itself be fair and reasonable. 7 For example, it is clear that the posting must take place prior to a decision being made as to which employee is to fill the vacancy; otherwise, the posting would be as ineffective as no posting at all."

Arbitrator Mitchnick in the Petro-Canada Inc. and Energy & Chemical Workers' Union Local 593 case, at pages 413 to 415 noted as follows:

> "'The union counters with the argument that the language of art. 9.01 is clear and straightforward, as is the case itself, and that the use of the words "will be bulletined" means just what it says. The union argues that, as in the case of Re U.A.W., Loc. 195 and Bendix-Eclipse of Canada Ltd. (Windsor Plant) (1967), 18 L.A.C. 248 (Christie), there is no ambiguity in the posting requirements, and any evidence as to past practice is irrelevant. That case also went on to state, however (according to the headnote): "A job vacancy occurs whenever there is an existing job required to be filled." And the cases, once again, make it clear that management must first determine whether, according to its needs, there is "an existing job required to be filled". In Re Pilkington Brothers Canada Ltd. and United Glass & Ceramic Workers (1976), 13 L.A.C. (2d) 287 (Burkett), for example, the collective agreement contained "mandatory" job-posting language similar to the present, whenever a "vacancy" for a job within the bargaining unit existed, but arbitrator Kevin Burkett at pp. 290-1 nevertheless observed, on the basis of the established case-law:
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> > Arbitral jurisprudence holds that a vacancy does not exist because there is no one filling an existing classification or because the duties of an existing classification have been assigned to persons in other classifications. Rather it has been held that a vacancy exists when, in the opinion of the company, there is sufficient work in the classification to justify filling it. The jurisprudence has been capsulized in Re Polymer Corp. Ltd. and Oil, Chemical and Atomic Workers, Local 9-14 (1974),

5 L.A. C. (2d) 344 (Rayner) wherein it is stated at p. 346:

> "The threshold issue that must be decided before this article becomes operative is whether a vacancy does, in fact, exist. It is generally accepted that a vacancy does not exist simply because an employee is not filling a particular classification. Rather, a vacant position exists when there is adequate work to justify the existence of an employee in that position. In Re United Brewery Workers, Local 800, and Loblaw Groceterias Co. Ltd. (1967), 18 L.A.C. 420 (Weatherill), it was stated, at p. 423:
> 'Whether or not work is required in any particular classification ... is. in my view. a matter for the company to determine. When the company does determine that work is to be done in a particular classification. and there is no employee in that classification. then a vacancy. whether temporary or permanent. exists.'
> "In reaching that conclusion, he relied on a decision of a board of arbitration chaired by Reville, C.C.J., Re Oil, Chemical & Atomic Workers, Local 9-599, and Tidewater Oil Co. (Canada) Ltd. (1963), 14 L.A. C. 233. In that case the learned arbitrator stated: 'The term vacancies ... not merely means an emptiness or a vacant position in the dictionary sense of the term, but means a vacant position for which there is adequate work in the opinion of the Company to justify the filling of that position'.
> "This board accepts the reasoning enunciated in those particular cases and accordingly, if this grievance is to succeed the union must establish that there was, in fact, adequate work available in the classification in question. Indeed, the union must establish that the company would have had to come to that conclusion if it had acted reasonably and had taken an objective view of the facts. (emphasis added)." (emphasis added)."

The jurisprudence in such matters has been commented on by a number of Arbitrators. In the decision in respect of the Flin Flon School and Linda Zimmer, this Arbitrator quoted the decisions of Arbitrator Weller and Arbitrator Huband in two cases as follows:

> '"Arbitrator Weller in **Re United Steelworkers and Algona Steel Corporation,** 19 L.A.C. 236, made the oft quoted statement that:
>
> > "no one has a proprietary interest in a specific set of job functions she or he has been performing"
>
> The decision or Arbitrator Huband (as he then was) in **Felec Services Incorporated and International Brotherhood of Electrical Workers, Local 2085** (unreported) concluded that employees did not have the right to determine

the location at which they would serve. At page 5 he said:

> "But within the establishment of employees within that job category the company may assign them whatever location it desires" '"

Brown & Beatty at Article 5:2510 noted the following:

> "Thus, regardless of whether the collective agreement expressly so provides, arbitrators have recognized that management has some discretion in determining the existence of a vacancy, whether it is to be filled by a temporary or permanent employee, or a full-time or part-time employee, and its geographic location."

Arbitrator McDougall in Re **Nova Scotia Liquor Commission and Nova Scotia Liquor Commission Employees Union, Local 120,** 13 L.A.C. (3d) 430, commented:

> "... on the right of management to transfer employees except where that right had been modified by the collective agreement. He concluded in that agreement the right to transfer had not been modified and "in the absence of malefides on the part of the employer the right then to transfer is unfettered on the face of the agreement."

Brown & Beatty at page 5-45 of Article 5:2510 said:

> "Similarly, transfers within a classification have been held not to constitute the filling of a vacancy."

In The St. James-Assiniboia School Division No. 2 and The Canadian Union of Public Employees Local No. 744, this Arbitrator noted the comments of Arbitrator Schulman in a case involving The Winnipeg School Division No. 1 and Canadian Union of Public Employees. Local 110:

> '"We have also considered the decision of Arbitrator Schulman in the grievance between The Winnipeg School Division No. 1 and Canadian Union of Public Employees Local 110 respecting the grievance of F. Nardella. To a considerable extent the issues raised in that decision are similar to the matters before us. We do not propose to quote from that decision at any length but

Arbitrator Schulman, (as he then was) succinctly set out many of the issues which we have considered. The fact situation in that case was different as the entire sequence of events was triggered by the retirement of a particular individual. At page 13 he stated:

"The question is, did the retirement of Mr. Bauer, the Assistant Chief Caretaker at Elmwood High School, and the reclassification of Aberdeen/Argyle School create a vacancy inside the bargaining unit? An ancillary question is if there was a vacancy was the vacancy in the position of Assistant Chief Caretaker of Elmwood High School or was it in the pool of Assistant Chief Caretakers employed by the Division."

He went on to say:

"In order to resolve the issues in the case we must determine whether or not a vacancy has been created."

Arbitrator Schulman made reference to the IBEW and Felec Services case (supra).

At page 19 he concluded:

"In circumstances of this case we have concluded that the events of September 22 did not trigger a need to post the position of Assistant Chief Caretaker Elmwood High School. The Employer failed to post the position, but instead filled it by making a transfer which the Director of Buildings deemed desirable in the interest of efficiency and he made it from employees in the same classification and on the same salary schedule. Moreover he notified the Union prior to making such transfer. In so acting the employer exercised his rights under the Management Rights clause. He did not breach any provision of the Collective Agreement. It follows that the grievance must be dismissed."

It should be noted that in the instant case, the workforce was reduced. We are cognizant of course, from the stipulated facts (supra) that the Caretaker at Voyager School had retired. That vacancy was posted and awarded to Mr. Wolfe. The hours at Assiniboine School had been reduced and the incumbent transferred to Athlone School. The position vacated at Assiniboine School was a vacancy and was posted and was awarded to Mr. Hawkes. It is clear that where there were actual vacancies the posting procedures were followed.

We also note Arbitrator Schulman's comments in case involving the Manitoba Government Employees' Association and Manitoba Public Insurance Corporation (1980). That case involved the transfer of Claims Supervisors from one Autopac Centre to another. The Union grieved the transfer on the basis that it should have been posted and that when an employee was transferred from one Centre to another a second (or subsequent) vacancy was created which had to be posted.

At page 5 of his award Arbitrator Schulman said:
"To give effect to the grievance in this case would be tantamount to holding that the creation of a position at Centre No. 1 and transfer of Mr. Oliver there, created two vacancies within the one staff establishment. The Agreement between the parties does not support such a finding." "

We also note the decision of Arbitrator Slone in the Camp Hill Medical Centre and Nova Scotia Nurses' Union case where Arbitrator Stone, at page 324 said:

"Similarly, transfers within a classification have been held not to constitute the filling of a vacancy."

And at 326 and 327:

'"While it has been held in many cases that "an employee has no claim to a particular job within a classification, in the absence of explicit contractual language creating such a right", one need not even go that far. There are authorities (cited below) which make it clear that an employee has no implied right to her particular machine, or bundle of duties. The employer has a right to reorganize the workplace, where it is done in good faith and subject only to limitations which may be found in the collective agreement: ..."'

After considering the evidence and well established jurisprudence, I do not find any evidence of a breach of the Collective Agreement. The overwhelming jurisprudence is that positions which are or become vacant can be filled by transferring employees who are already in that classification to those positions without posting. I can find no evidence of any breach of the Collective Agreement, and accordingly, the Grievance is disallowed.

I wish to thank Mr. Simpson and Mr. Skrypayk for their full and complete presentations of the evidence and the jurisprudence. They were extremely helpful to me. In accordance with the terms of the Collective Agreement, each of the parties will be responsible for one-half of my costs.

DATED at Winnipeg this 26 day of June, 2000

J.M. Chapman, Q.C., Sole Arbitrator