IN THE MATER OF: An Arbitration Between:

ROLLING RIVER TEACHERS' ASSOCIATION NO. 37
(hereinafter referred to as The Association")

- and -

ROLLING RIVER SCHOOL DIVISION NO. 37
(hereinafter referred to as The Division")

- and-

HEATHER MOLCHANKO
(hereinafter referred to as The Grievor")

ARBITRATION AWARD

On October 21, 1997, an arbitration hearing into the grievances of Heather Molchanko and the Association was held. The Arbitration Board consisted of Gavin Wood as chairperson, Paul Moist as nominee for the Association, and Don Little as nominee for the Division. Mel Myers appeared as counsel for the Association and Rob Simpson appeared as counsel for the Division.

At the outset of the hearing, the parties confirmed the jurisdiction of the Board of Arbitration and that the Board was properly constituted.

This grievance arose as a result of the Division denying the Grievor's request that she be reimbursed for certain out-of-pocket expenses (in the total amount of $81.00) which she incurred as a result of her engaging in certain extra-curricular activities. By letter dated April 9, 1997, the claim for reimbursement was denied. On April 28, 1997, Ms. Molchanko grieved that denial on the following terms:

> Heather Molchanko submits that the School Division has misinterpreted and/or misapplied and/or violated Article 18(c) of the Collective Agreement by failing to reimburse her for reasonable and actual out-of-pocket expenses in the amount of $81.00, while she was authorized to engage in approved extracurricular activities on December 3 and December 7, 1996, February 25 and March 4, 1997.
>
> The Association also filed a grievance to the same effect on April 26, 1997.

Evidence

Evidence was heard from 4 witnesses. The Association called Ms. Molchanko. The Division called: Jim Hardy, assistant superintendent for the Division; Dwayne LaCoste, secretary treasurer of the Division; and Susan Cumming, labour relations consultant for The Manitoba Association of School Trustees.

Several exhibits were filed by agreement at the outset of the hearing, including the collective agreement for the period from January 1, 1995 - December 31, 1996 ("the Collective Agreement" or the "1995-1996 Collective Agreement"). During the course of the hearing further exhibits were filed.

Factual Circumstances

The circumstances surrounding the grievance are not in dispute and can be summarized.

The background testimony concerning the Rolling River School Division need not be set out. Briefly it serves in the order of 2300 students with a complement of approximately 140 teachers and an equal number of administrators and support staff. It provides a full range of academic programs from kindergarten to grade 12. As well, it offers a number of extra-curricular activities.

The extra-curricular activities generally require participation, supervision or coaching by one or more teachers. Each teacher recognizes that he or she will be called upon in either the spring (for the following school year) or in the early fall (for the new school year) to assume responsibility for some of these extra-curricular programs offered in their particular school. There is some equitable division of those activities amongst the various teachers and administrators of each school. For example, the assignment of extra-curricular activities for Rivers Collegiate for the 1996 - 1997 school year was filed (exhibit 11) showing 25 separate activities being divided up amongst the staff.

The practice of the Division for a number of years prior to the 1995-1996 Collective Agreement was to pay for certain expenses incurred by teachers in carrying on with these extra-curricular activities. The expenses were reimbursed after a form was filled out and filed. Routinely the form was reviewed by Mr. Hardy in his position as the Assistant Superintendent of the Division and, if found warranted, he would approve the expense for payment.

The Division paid for mileage for a teacher's vehicle used in travel to and from an extra-curricular event (and, when appropriate, bus fares and airplane tickets), the cost of meals incurred and/or the cost of accommodations required while the teacher was away from the school on an extra-curricular activity.

The then existing practice of paying certain expenses incurred by teachers while engaged in coaching or supervising extra-curricular activities was not provided for by a collective agreement until the 1995-1996 Collective Agreement. During contract negotiations in the fall of 1994, the Association presented a series of new clauses dealing with extra-curricular activities (exhibit 15). In particular, the Association proposed that teacher participation in extra-curricular activities would be voluntary. The Division totally rejected the proposal. Then on June 19, 1995, the Association's negotiation team indicated that they intended to present a counter-proposal on extra-curricular activities. Instead, on October 2, 1995 the negotiation team for the Division offered to accept three of the provisions contained in the set of proposals (exhibit 15) made by the Association. The Association accepted the inclusion of those three provisions in the Collective Agreement and agreed to drop the balance of its earlier proposal (including in particular, that extra-curricular activities would be voluntary).

Accordingly, in the 1995-1996 Collective Agreement the following provisions were included:

> ARTICLE 18: EXTRA-CURRICULAR ACTIVITIES
>
> (a) The parties acknowledge the importance of extra-curricular activities as an integral part of each student's educational experience.
>
> (b) An eligible extra-curricular activity is an activity which has received prior approval from the school principal.
>
> (c) Teachers authorized to engage in approved extra-curricular activities shall be reimbursed for their proven reasonable and actual out-of-pocket expenses.

There was little, or no, discussion during the negotiations between the representatives of the Division and the Association as to the intended meaning of Article 18(c).

The Board of Arbitration heard testimony concerning the provisions in other collective agreements in Manitoba dealing with extra-curricular activities. In the arbitration award of The Fort La Bosse School Division No. 41 and The Fort La Bosse Association No. 41. (December 2, 1993) the Board of Arbitration directed that a new article be inserted in the collective agreement dealing with extra-curricular activities. Included was the following: "Teachers authorized to engage in approved extra-curricular activities shall be reimbursed for their proven reasonable and actual out-of-pocket expenses". The Association had proposed that teachers be reimbursed for meals and/or lodging expenses. Prior to the La Bosse award, the Transcona School Division and Association had provided in the 1990-1991 collective agreement for the reimbursement of reasonable out-of-pocket expenses, which by practice apparently included reimbursement for meals, mileage and accommodation costs.

(The actual clause with regards to reimbursement was in the 1990-1991 collective agreement filed as exhibit 18) Ms. Cumming also testified that from her research the only expenses reimbursed by school divisions for extra-curricular activities were meals, mileage and accommodations. She was clear that babysitting expenses had never been reimbursed.

Ms. Cumming during cross-examination said that Article 18(c) of the Collective Agreement was not ambiguous.

The Board of Arbitration was further advised that the school divisions and teachers' associations throughout the province each year received compendia of provisions contained in all of the collective agreements in Manitoba. Those provide a base or contextual background for contract negotiations.

Concerning the immediate circumstances of the grievance, Ms. Molchanko became employed by the Division in April 1994 at Rivers Collegiate. She had previously worked as a teacher in Northern Manitoba. She took a term contract with the Division for the period from April to June 1994. She received a full-time term contract for the 1994-1995 school year. She received a contract as a regular staff teacher at three-quarters time for the period from September 1995 to June, 1996 (exhibit 8).

Ms. Molchanko is a single mother with a son, Mark, now aged 4 ½ years. During the 1996-1997 school year she had placed Mark in daycare, which required that he be picked up by 5:00 p.m. each workday.

During the 1994-1995 school year, Ms. Molchanko volunteered for the extra-curricular activities of "student council" and "year book". In the school year 1995-1996 she volunteered again for student council and year book, and also as a teacher-chaperon for the junior-high girls' volleyball team and the junior-high boys' basketball team. Generally volleyball and basketball teams have some games away from the Collegiate. In late 1995 Ms. Molchanko took her son with her on the bus transporting the team when she chaperoned the students at a basketball tournament in Minnedosa. Afterwards there was concern raised that her son, obviously a non-student, was not covered by insurance while on the school bus traveling to and from such events. As a result, the school principal advised Ms. Molchanko that she could not take her son to any further volleyball or basketball games away from Rivers Collegiate. Ms. Molchanko then advised that she would not be able to participate further as a chaperon in junior-high volleyball and basketball, explaining that she could not afford the babysitting charges.

In the 1996-1997 school year, Ms. Molchanko again agreed to act as the teacher on student council and year book. As a result of discussions she had with the school vice-principal, she also agreed to act again as a teacher chaperon for the junior-high girls' volleyball and junior-high boys' basketball teams.

During the course of that winter, she incurred certain babysitting expenses as a result of having to attend games or tournaments away from Rivers Collegiate. Ms. Molchanko submitted an expense voucher in December 1996, for certain babysitting expenses. She said that she heard nothing further with regards to the claim - it was not paid. Then in March 1997, she again submitted a voucher for the earlier expenses and as well for additional babysitting expenses in the total amount of $81.00. The voucher was accompanied by a letter from the Grievor dated March 21, 1997 (exhibit 5). Mr. Hardy consulted with Mr. LaCoste concerning the babysitting expenses claim. Mr. LaCoste confirmed in a memo (exhibit 13) to Mr. Hardy that the Division would not pay for such expenses. He wrote:

> "1. We wouldn't pay for this in the past and we won't in the future.
>
> 2. We don't pay for babysitting fees during the day and this in an extension of her day.
>
> 3. Reasonable and out-of-pocket expenses are those we have always normally paid, ie – meals".

Mr. Hardy wrote to Ms. Molchanko on April 9, 1997 (exhibit 7) in the following terms:

> Your request to be reimbursed for babysitting expenses while chaperoning the junior high volleyball and basketball teams has been denied as I do not believe that it is provided for or contemplated by Article 18(c) of the Collective Agreement.

The grievance of the Association was filed on April 26, 1997, and that of Ms. Molchanko on April 28, 1997.

Relief Sought

Ms. Molchanko and the Association seek a finding that the Division has "misinterpreted and/or misapplied and/or violated Article 18(c) of the Collective Agreements" and seek reimbursement for Ms. Molchanko in the sum of $81.00.

The Division seeks a finding that the denial of the claim is not in breach of the Collective Agreement.

Submissions of Counsel

Mr. Myers began his argument by noting that "the facts of the grievance" were not in dispute, and that there was really only one legal issue: specifically whether section 18(c) of the Collective Agreement had been breached by the Division's refusal to reimburse for the costs for babysitting. He pointed to the larger implications of the grievance, which might be one of first instance, noting the increasing number of single parents pursuing careers as teachers.

He then turned to a review of the specific wording of section 18(c). He maintained that the costs of babysitting claimed by the Grievor were not unreasonable and that they otherwise fell within the wording of section 18(c).

He questioned what could be considered unreasonable in her request for reimbursement. He also challenged the assertion that there was any ambiguity in section 18(c), which he maintained was clear in its wording.

Finally Mr. Myers made reference to the decision of Symesy Canada (1993), 110 DLR (4th) 470 S.C.C., as comparable to the considerations of this grievance.

Mr. Simpson, on behalf of the Division, began by denying that the refusal to reimburse for babysitting costs was a violation of the 1995-1996 Collective Agreement. He reminded the Board that the onus is on the Grievor to show that there had been a violation.

He then reviewed the circumstances leading up to the inclusion of section 18(c) in the Collective Agreement. He maintained that if the Association had wanted such costs to be reimbursed there should have been specific negotiations on the issue, rather than having the matter dealt with by attempting now to "slip" those costs into the wording of section 18(c). Section 18(c) was clearly intended to deal with the then existing practice of reimbursement of the costs of mileage, accommodations and meals.

Counsel for the Division went on to deny that it was possible to equate the costs of mileage to the costs of babysitting. Mileage costs were incurred specifically when the teacher was using his or her personal vehicle while away from the school. These were clearly out-of-pocket expenses which were reasonably incurred and which should be reimbursed. In contrast, the babysitting costs at issue were personal expenses incurred to allow the teacher to fulfill her obligations as a teacher.

Mr. Simpson disagreed with the suggestion that it was possible to interpret section 18(c) as to what was a reasonable cost to be reimbursed without putting that paragraph into context.

Otherwise he maintained that the clause was ambiguous, being wide open to interpretation that all sorts of expenses were covered. He maintained that in that regard the Symes decision had nothing to do with the task presented to the Board of Arbitration.

He then turned to the teachers' contractual obligations, which included the teachers' involvement in extra-curricular activities, with no specific time frame on their involvement and certainly not with a provision that teachers' obligations ended at 3:30 p.m. The obligations of teachers with regards to extra-curricular activities were not limited to the instructional day.

With regards to the obligatory nature of extra-curricular activities, Mr. Simpson referred the Board to the case of River East School Division No. 9 and the River East Teacher's Association No. 9 (David Marr, Chairperson, April 22, 1996). Mr. Simpson further suggested that there was essentially no difference between Ms. Molchanko asking for babysitting costs incurred during the extra-curricular activities in question and child care costs incurred while she was performing her contractual obligations during the instructional day.

Mr. Simpson next turned to the prior practice of reimbursement for mileage, accommodations and meal expenses incurred during extra-curricular activities carried out away from school. He characterized that practice as long standing and consistent. He reminded the Board of the history of the negotiations leading up to the inclusion of paragraph 18(c) in the Collective Agreement. The wording of paragraph 18(c) was consistent with the wording contained in other collective agreements as illustrated in the Transcona Springfield Division's collective agreement for 1990-1991 and in the La Bosse award. He reminded the Board as well that Ms. Cumming, as a result of her research, found that there was no circumstance in Manitoba in which a teacher had been reimbursed for babysitting costs incurred during the course of carrying out extra-curricular activities. The wording of paragraph 18(c) was not materially different from the provision included in other collective agreements.

Mr. Simpson, on behalf of the Division, presented the following cases to assist the Board of Arbitration:

(a) Re: Board of Education for City of York Ontario Secondary School Teacher's Federation (1992), 28 L.A.C. (4th) 390, in which is was written:

> We start by finding that the term "Registration Allowance" standing alone and unqualified as it does in art. 20.01(b) is at least latently ambiguous (see Re Leitch Gold Mines Ltd. and Texas Gulf Sulphur Co. (1968), 3 D.L.R. (3d) 161, [1969] 1 O.R. 469 (Ont. H.C.). Accordingly, we are entitled to rely upon the extrinsic evidence as an aid to determining the shared understanding of the parties with respect to the interpretation of art. 20.01(b). The federation submits that extrinsic evidence of the negotiating history between the predecessor bargaining agent and the employer and the extrinsic evidence of the dealings between the employer and its employees prior to the commencement of collective bargaining in 1975 is irrelevant. We disagree. Whereas the dealings between an employer and its employees prior to the advent of collective bargaining may be irrelevant that is a question to be decided on the facts of each case. Where, as in this case, the payment of an amount to a psychologist in recognition of his/her registration was provided for prior to collective bargaining and this same payment was then codified in the ensuing collective agreements, including the predecessor collective agreement to this one negotiated by this bargaining agent, and where, as in this case, no such allowance was provided for or paid to any other profession prior to or under the ensuing collective agreements, this evidence is relevant to the inquiry at hand. (p. 394/395)

(b) British Columbia Nurses' Union and Communication's Energy and Paperworker's Union (1995) 49 L.A.C. (4th) 374. The clause in issue was found to be ambiguous. Arbitrator MacIntyre ruled:

> All of this is very debatable, but an answer must be found. The one clear conclusion is that the agreement is ambiguous. I have great difficulty preferring one argument to the other. In such a situation, past practice and the apparent assumptions of the parties are a legitimate resource; not to amend an agreement; not to contradict the contract, but to reach a conclusion as to the meaning agreed or apparently agreed to by the parties. Counsel agreed that both parties have acted, for over 10 years, as if the union's asserted meaning was correct.
>
> The Arbitrator found: This, then, is a situation in which the meaning of ambiguous provisions is found in the apparent agreement of the parties through significant past practice. As Professor Paul Weller said in Re Int'l Ass'n of Machinists, Loc. 1740 and John Bertram & Sons (1967), 18 L.A.C. 362 [at pp. 367-8]: "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 an aid to clarifying 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. 384)

Based on those cases, Mr. Simpson argued that the Board of Arbitration was entitled to rely on the consistent past practice in interpreting paragraph 18(c).

Mr. Simpson turned to the following cases on the issue of estoppel:

A. Re: Sterling Place and United Food and Commercial Workers International Union (1997), 62 LA.C. (4th) 289 - in which Arbitrator Pineau found:

> At the heart of this matter is the fact that the employer's practice led the union to reasonably believe that the meal benefits would continue at least until the expiry of the current collective agreement. Accordingly, the employer is "Estopped" from withdrawing this benefit in mid-course of a negotiated agreement. This is not to say, however, that the employer is prevented from giving notice to the union that it intends to put the matter up for negotiation at the next round of bargaining. (p. 305)

(B) The Agassiz Teachers' Association and the Agassiz School Division No. 13 (September 17, 1997). On the issue of estoppel Chairperson Graham wrote:

> The Division in this case has foregone several opportunities to negotiate alternate wording of the administrative allowance provision, including the opportunity to renegotiate the wording of Article 3.07 prior to entering into the 1992-1994 Collective Agreement. The Division had no way of knowing such a renegotiation was necessary in order to maintain its method of calculating and paying administrative allowances. The Division, therefore, has relied to its detriment on the Association's apparent acceptance of the Division's calculation, and payment of those allowances.
>
> All of the elements of estoppel are present in this case, and I accordingly find that the Association is estopped from insisting the Division pay additional administrative allowances retroactively, on the basis of the number of teachers supervised by the individual grievers. (p. 17)

Mr. Simpson maintained that even if paragraph 18(c) was clear on its face, the negotiation background could still be considered as to whether the Association was estopped from maintaining that babysitting costs were included.

Mr. Simpson in reviewing the course of those negotiations acknowledged that there was no clear representation made by the Association that paragraph 18(c) was limited to the prior existing practice. But that was not conclusive. Rather the Association, he argued, could not "sit and do nothing" and now say that paragraph 18(c) was to be interpreted in a different manner from past practice. It would be

unfair for the Association having offered no interpretation of paragraph 18(c), to, now maintain that it went beyond long standing past practice.

Mr. Simpson concluded that the Association was therefore estopped from advancing a claim based on reimbursing costs not covered by the existing past practice, at least until the next collective agreement was negotiated.

In reply, Mr. Myers took exception to the suggestion of Counsel for the Division that the Association had in any way attempted to negotiate in "bad faith". He reviewed the circumstances surrounding the negotiation of the paragraphs of the collective agreement dealing with extra-curricular activities. He stressed that the Association had proposed a new approach with regards to extra-curricular activities (that is, that such involvement would be voluntary). The basic proposal of the Association, then, was totally independent of past practice. He maintained that the whole course of negotiations showed that the Association had no intent to incorporate the past practice with regards to reimbursement into the collective agreement.

Mr. Myers, in response to a question asked by counsel for the Division, asked in turn why the Division had not specifically limited costs covered under paragraph 18(c) to mileage, meals and accommodations.

Mr. Myers also reviewed the testimony called by the Division setting out the history of similarly worded reimbursement clauses arising from the La Bosse award and the Transcona School Division's collective agreement for 1990-1991. He maintained that the only connection to the similarly worded paragraph 18(c) was that both the Division and the Association in negotiating the collective agreement had access to compilations of past collective agreements.

Mr. Myers stressed that there was no evidence that paragraph 18(c) was intended to constitute an incorporation of past practice, but rather suggested that paragraph 18 constituted a "new deal" between the parties.

In that regard, Mr. Myers referred to the Agassiz Award, pointing out that Chairperson Graham noted:

> When an estoppel operates, one party has failed or neglected to enforce its strict rights under an agreement. The cases establish that when that party decides to enforce its rights, it can only do so by "reasonable notice" to the other party. (p. 18)

Mr. Myers agreed that if a practice is to end, a party must give reasonable notice. But here such notice was provided by the Association proposing the new approach to extra-curricular activities. That led to a back-and-forth set of negotiations, with no suggestion that past practice was in any way intended to continue. Ultimately, the Division may have assumed an interpretation of paragraph 18 and in particular, paragraph 18(c), but there was no such representation as to its meaning by the Association.

Mr. Myers carefully reviewed the process leading up to the inclusion of paragraph 18(c) into the collective agreement and concluded that there was no evidence of misrepresentation on the part of the Association that past practice was to be incorporated. Rather there was a totally new set of dealings with regard to extra-curricular activities, with both sides "receiving a result" from those negotiations. He maintained that the Board of Arbitration ultimately was being asked to "take away" contractual rights which had been previously bargained.

Mr. Myers next turned to the extent of costs covered by paragraph 18(c). He said that the paragraph did not cover daycare costs incurred by teachers during the instructional day; but that it was clearly worded

to include all reasonable expenses incurred during the course of teachers carrying out authorized extra-curricular activities. He maintained that the paragraph provided for a balance between the obligation of teachers to carry out extra-curricular activities and the recognition that they should not be penalized by having to absorb costs incurred in carrying out those activities.

Mr. Myers referenced the River East School Division Award as recognizing that the arrangement with respect to the carrying out of extra-curricular activities must be reasonable (at page 32). Mr. Myers maintained that it was unreasonable to require Ms. Molchanko to carry out extra-curricular activities outside of the regular teaching day, and yet not expect her expenses to be covered. He further maintained that there was no distinguishing feature between costs incurred by a teacher using his or her vehicle and the paying of babysitting costs. The key for both was whether they were reasonable expenses incurred in carrying out the extra-curricular activities.

Mr. Myers further challenged the relevance of the testimony that babysitting costs incurred in carrying out of extra-curricular activities had not been previously claimed. He pointed out that in the La Bosse Award, only mileage and meals were claimed.

In summary, Mr. Myers maintained that with the negotiations and inclusion of paragraph 18 into the Collective Agreement, the past practice ended. The obligation of the Board of Arbitration was to interpret the new provisions.

Mr. Myers then turned to the following authorities:

(a) Re: Board of Education for City of York - He maintained that this award was distinguishable on the basis of the specific representations made;

(b) Re: British Columbia Nurses' Union - That award was also distinguishable given the finding that the clause in issue was ambiguous;

(c) Re: Sterling Place Award - Again Mr. Myers argued this was distinguishable on the basis that the employer sought to terminate the existing practice during the term of the collective agreement.

Mr. Myers presented the following additional authorities:

(a) Re: Metropolitan Police Association and Metropolitan Toronto Board of Commission (1974), 45 D.L.R. (3rd) 548 (S.C.C.) - in which Mr. Justice Beetz supported setting aside the award on the basis that the arbitrator had incorrectly relied upon evidence consisting of a document containing proposals made in the course of negotiations. He wrote:

> It matters not whether the arbitrator was right or wrong when he found ambiguity in the collective agreement he had to construe. The use of this particular type of extrinsic evidence, if it became accepted, would render finally drafted and executed agreements perpetually renegotiable and would destroy the relative security and the use of the written form. (p. 572)

(b) Re: Country Place Nursing Home and Canadian Union of Public Employees (1981), 1 L.A.C. (3d) 341 - in which Arbitrator Prichard noted:

> The admissibility of extrinsic aids to interpretation of the collective agreement has, of course, been the subject of frequent commentary by Courts (R. v. Barber et al., Exp. Warehousement & Miscellaneous Drivers' Union. Local 419 (1968), 68 D.L.R. (2d) 682, [1968] 2 O.R. 245, 68 C.L.L.C. para. 14,098 (Ont. C.A.), arbitrators (Brown and Beatty, Canadian Labour Arbitration (1977), paras. 3:4400-3:4420, pp. 126-30) and labour relations boards (University of British Columbia and C.U.P.E. Local 116, [1977] 1 Can. LR.B.R. 13 (Weller). While not entirely free from doubt, it appears that evidence of the negotiating history may be admitted as an aid to the interpretation of the words of the collective agreement where there is no clear preponderance of meaning stemming from the words and structure of the agreement. It must be emphasized that this principle applies to the use of extrinsic evidence as an interpretative aid and that wholly different considerations may apply when an attempt is made to rely on extrinsic evidence as an independent source of obligations between the parties. Furthermore, it is also important to recognize that evidence of the negotiating history may often be of little assistance in interpreting the words of an agreement since the very nature of negotiations often results in the production of compromise language, which is purposely ambiguous. In these situations it may be that the agreement will reflect the negotiating position of neither of the parties but will reflect instead an intermediate position not expressly proposed by either side. (p. 345)

(c) Re: Richmond Lions Senior Citizen Housing Society and British Columbia Nurses' Union (1982), 6 LA.C. (3d) 319, which provided:

> The aim in any interpretation is to uncover the mutual intention of the parties. The first resource in that interpretative exercise is the language itself. From that principal resource an arbitrator moves to consideration of any extrinsic evidence properly receivable that addresses any vagueness or uncertainty in the language. The principles of interpretation in arbitral jurisprudence are less confining than those adopted in the common law but those principles continue to respond to the central theme that the search by the arbitrator in the interpretation exercise is a search for the consensus that sustains the inference of an agreement on the meaning alleged. (at p. 224)
>
> The employer conceded in bargaining that the language was the subject of considerable dispute as to its proper interpretation in other agreements. We have the novel situation where the parties agreed to the language in the full knowledge and anticipation that they applied different meanings to it and in recognition and acknowledgement that the opposite party did not agree. Hence, there was an absence of mutual intent with respect to the meaning of the language used but a mutuality with respect to the selection of the language itself. The evidence was that the employer

> modified its position from a flat refusal in order to secure a collective agreement. The union accepted the equivocation of the employer as to the meaning of the provision. Neither party insisted as a condition of concluding an agreement that its meaning must prevail and neither party insisted on language that would support its meaning exclusively. (at p. 325)

As a result, the Board of Arbitration found: "The best we can make of extrinsic evidence is that it was unhelpful and we were left to interpret the provision on the basis of the language alone" (at page 326).

Mr. Myers concluded by maintaining that the Board of Arbitration's obligation is to consider the claim for reimbursement on the wording of paragraph 18(c).

Consideration

The issue faced by this Board of Arbitration is whether the out-of-pocket expenses claimed by Ms. Molchanko are recoverable. This necessitates the interpretation of paragraph 18(c) of the 1995-1996 Collective Agreement.

The approach to be taken when called upon to interpret provisions of a collective agreement is settled. Unless a word or phrase is used in a specialized or technical sense, words are to be given their usual and ordinary meaning. Arbitrators should assume that the words of a collective agreement are used in their ordinary sense.

If the language used in a collective agreement is clear and unambiguous, interpretation should be confined to that actual language. On the other hand if a provision is ambiguous, then in interpreting the provision one may rely on extrinsic evidence. In Richmond Lion Senior Citizen Housing Society the Board noted that "the first resource in that interpretive exercise is the language itself" and that an Arbitrator "moves to consideration of any extrinsic evidence properly receivable that addresses any vagueness or uncertainty in the language" (page 224).

The extrinsic evidence utilized in interpretation may vary. Thus, in Re: Board of Education for City of York a provision found to be "at least latently ambiguous" allowed the Board of Arbitration to "rely upon the extrinsic evidence of the negotiating history...and the extrinsic evidence of the dealings between the employer and its employees" (page 394); in British Columbia Nurses Union a finding that the agreement was ambiguous caused the Board to find Past practice and the apparent assumptions of the parties" to be "a legitimate resource" (page 384); in Re: Country Place Nursing Home, the Board summarized its reliance on extrinsic evidence in the following terms: Evidence of the negotiating history may be submitted as an aide to the interpretation of the words of the collective agreement where there is no clear preponderance of meaning stemming from the words and structure of the Agreements (p. 345).

From these established interpretive principles, the first consideration then in interpreting paragraph 18(c) is whether it is ambiguous. Certainly, the parties presented two different views as to the meaning of paragraph 18(c).

Mr. Myers recognized this grievance as possibly a case of first impression, but maintained that paragraph 18(c) was unambiguous. He said that the paragraph on a plain reading of its words provides for the payment of all reasonable out-of-pocket expenses incurred while engaged in extra-curricular activities. According to Mr. Myers, it was incumbent on the Board to apply that straight forward interpretation to Ms. Molchanko's claim as the facts of the claim had been set out during the hearing.

Considerable evidence was heard with regards to the Division's past practice of paying certain expenses incurred in extra-curricular activities. Mr. Myers argued that past practice was irrelevant given the plain wording of paragraph 18(c). That wording represented a change from the past practice as to what the Division was committed to pay by way of expenses of teachers involved in extra-curricular activities.

Mr. Simpson maintained that the clause was subject to different interpretations and therefore, was ambiguous. By this view, paragraph 18(c) can be read as broadly as suggested by Counsel for the Association or can be limited to those expenses directly incurred in the actual carrying out of the extra-curricular activities. By the latter interpretation, the expenses must both be reasonable in amount and be reasonably incidental to the discharge or carrying out of the actual extra-curricular activity. Such expenses as travel costs, meal expenses and the costs of hotel accommodations would be covered by that interpretation and such expenses as babysitting costs would not. Counsel for the Division also stressed that in determining whether paragraph 18(c) was ambiguous, it was necessary to consider as well whether it was latently ambiguous in terms of its actual application.

Given that there were different interpretations of paragraph 18(c), Mr. Simpson submitted that it was a settled interpretive principle that extrinsic evidence should be relied upon by the Board. And, in particular, in terms of extrinsic evidence, it was appropriate for the Board to consider past practice of the Division in interpreting paragraph 18(c).

On the issue of latent ambiguity, the Board of Arbitration was presented with what amounts to a floodgate argument: specifically that a broad interpretation of paragraph 18(c) could lead to a variety of expenses being sought to be reimbursed. Examples of various circumstances of reimbursement were considered during deliberation as illustrative of the floodgate argument. The Board, however, is obliged to apply the plain meaning of the words and phrases of paragraph 18(c) if they are unambiguous. It is not for the Board to narrow the interpretation of paragraph 18(c) on the basis that one party to the Collective Agreement now maintains that a broad interpretation will potentially result in a floodgate in this case of reimbursement claims.

It must be noted, as well, that paragraph 18(c) does require that the expenses not only be actual out-of-pocket, but must also be reasonable. It does not provide for reimbursement of any and all expenses, but only those expenses that meet both of those criteria.

Clearly it is crucial to the outcome of this grievance to determine whether paragraph 18(c) is ambiguous. The Division argues that the Board consider the paragraph to be ambiguous because of the potential for two meanings including one which limits the expenses to those incurred directly, or if you will, as directly incidental to being a teacher engaged in extracurricular activities. After due consideration of that argument one must conclude that that interpretation of paragraph 18(c) requires one to read too much in to the paragraph.

The paragraph provides that a teacher authorized to carry out an approved extra-curricular activity will be reimbursed for out-of-pocket expenses that are actual and reasonable. It does not limit the expenses to a particular category, namely those incurred directly in carrying out the extra-curricular activities. One can appreciate that there was a past practice which limited reimbursement to three categories of expenses which all were incurred in the actual carrying out of the activity (meals, travel costs and accommodations). But in order for the Board to consider that past practice, it is necessary at law for the paragraph to be found to be ambiguous.

On plain reading, however, the wording of paragraph 18(c) is unambiguous. Teachers shall be reimbursed for actual and reasonable out-of-pocket expenses of approved extra-curricular activities. The wording of paragraph 18(c) is not limited to those expenses incurred directly in the actual carrying out of the activity.

Having found that paragraph 18(c) of the Collective Agreement is unambiguous, it is not necessary or appropriate for the Board in interpreting paragraph 18(c) to consider extrinsic evidence and, in particular, evidence of past practice. This is not to suggest that any actual expense is recoverable if the claimant teacher is engaged in an authorized extra-curricula activity. The expense, in order to be reimbursed, must be reasonable. What constitutes a reasonable expense will depend upon the circumstances of each request for reimbursement.

Mr. Simpson also argued that the Association and the Grievor were estopped from maintaining that babysitting costs could be reimbursed under paragraph 18(c). During argument, the Board was referred to several cases on the issue of estoppel. Particularly helpful in setting out the legal principles of estoppel is the Award of the Arbitrator in Agassiz Teachers' Association and Agassiz School Division No. 13.

After considering the submission of Counsel, the Board is unanimous that the circumstances of this grievance do not support the position that the Association is estopped. The history of the negotiation of Article 18 of the Collective Agreement has been set out above. It is not unfair to comment that it appears that neither the Division or the Association, during the negotiations, paid particular attention to the meaning or import of Article 18. In that respect it is somewhat analogous to the situation in Re: Richmond Lions Senior Citizen Housing Society' in which the negotiating parties expressly disagreed during negotiations as to what a particular provision meant. Despite that disagreement, the parties went ahead and included the clause in the 1995-1996 collective agreement. As noted in the Richmond Lions Award: "we have the novel situation where the parties agreed to the language in the full knowledge and anticipation that they applied different meanings to it..."(at page 325). In the present circumstances, the only element missing from the Richmond situation is it appears that the negotiators for the Division and the Association were not aware of each other's different interpretation of paragraph 18(c).

Having noted that, the circumstances set out in evidence do not cause the Association and Grievor to be estopped. The parties bargained and settled on Article 18. Neither side represented to the other as to the meaning of Article 18 or, in particular, as to paragraph 18(c). There was, according to the testimony, only an exchange of a written draft between the parties with the Division ultimately accepting a compromise proposed by the Association whereby the Association dropped two of the five clauses which it had originally submitted in negotiations.

Counsel for the Division forcefully argued that because of the long-standing past practice of reimbursement of only certain specific expenses, it was incumbent on the Association to expressly advise if its intention was to broaden the expenses for reimbursement by paragraph 18(c). With all respect, the Board is unanimous in rejecting that argument. It calls for an extension of the doctrine of estoppel beyond the principles set forth in the cases referenced by Counsel and quoted above. Specifically then the Board rejects the argument that the Association was obliged to make a clear representation in negotiations that the past practice was not intended to be codified in paragraph 18(c).

The Board was also faced with arguments involving aspects of the rights of single parents, parenting in general, poverty, women's rights and social welfare. While the Board consider these to be important public policy issues, the Board was unanimously of the view that the decision of this grievance does not turn on any of those matters.

Decision

Applying the actual grievance to the above consideration, it follows that the grievance is allowed. Ms. Molchanko was authorized to engage in certain extra-curricular activities. During the course of carrying out of those activities, she incurred certain out-of-pocket expenses, specifically costs of babysitting, for which she applied for reimbursement under the established procedure. The expenses were reasonable,

particularly given that her attempt to avoid those expenses (by taking her son to basketball games away from the school) had been rejected as inappropriate by the Division.

The Grievor is correct in claiming reimbursement. The grievance is allowed. The Division misinterpreted paragraph 18(c) of the 1995-1996 Collective Agreement by failing to reimburse Ms. Molchanko for the babysitting expenses in the total amount of $81.00 incurred on December 3 and 7, 1996, February 25, 1997 and March 4, 1997.

Both Counsel are to be complimented for their expeditious presentation of both the evidence and their submissions. The Chair wishes to also extend thanks to both Nominees for the preparation that went into the deliberation part of this arbitration process. Each of the parties will jointly share the costs of the Chairperson's fees and disbursements.

DATED at Winnipeg, Manitoba this 30th day of January 1998.

Gavin M. Wood
Chairperson