IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE FRONTIER SCHOOL DIVISION NO. 48,

(hereinafter called the "Division"),

- and -

THE FRONTIER TEACHERS' ASSOCIATION NO. 48 OF THE MANITOBA TEACHERS' SOCIETY,

(hereinafter called the "Association"),

- and -

JOHN EHINGER,

(hereinafter called the "Grievor").

BOARD:	David I. Marr, Chairperson Gerald D. Parkinson (nominee of the Division) A. R. McGregor, Q.C. (nominee of the Association)
COUNSEL:	R. B. McNicol, Q.C. and Elizabeth Murray, for the Division Mel Myers, Q.C., for the Association and Grievor

January 2, 1996

AWARD OF ARBITRATION BOARD

This matter was heard by this Board of Arbitration on August 23, 1995 in Winnipeg, Manitoba. There were no preliminary motions and the parties agreed that this Board was properly constituted.

On April 18, 1994 and April 25, 1994, the Grievor and the Association, respectively, filed similar grievances pursuant to the Collective Agreement between the Division and the Association, alleging that the Division had

"misinterpreted and/or misapplied and/or violated Article 3.03(d) of the Collective Agreement by failing to pay to (the Grievor) the appropriate pay increment effective January 5, 1994 being the first day of the Spring term" (Exhibit 2).

Specifically, the Grievor and the Association seek an interpretation of Article 3.03(d) of the Collective Agreement in their favour, as well as compensation to the Grievor for the appropriate pay increment effective January 5, 1994. However, in light of the past practice as far back as 1976, the only remedy

being sought is an interpretation of Article 3.03(d) of the Collective Agreement for future application, and not compensation to the Grievor.

Article 3.03(d) of the Collective Agreement between the parties (Exhibit 1) provides:

> "Date of increment coming into effect shall be the first day of the Spring or Fall term in which there is accumulation of one year of acceptable teaching experience.
>
> A minimum of 180 teaching days must be completed within a teaching year for one year of credit or 90 teaching days for one-half year of credit.
>
> Two half-years of experience shall be equivalent to one year of experience for increment purposes."

Notwithstanding that the Grievor and the Association, in their respective grievances, expressly sought an interpretation of Article 3.03(d), at the hearing of this matter, the parties concentrated only on the first sentence thereof, namely:

> "Date of increment coming into effect shall be the first day of the Spring or Fall term in which there is accumulation of one year of acceptable teaching experience."

The evidence adduced by the Division through Deborah MacDonald, the teaching payroll clerk of the Division since February, 1990, was to the effect that if a teacher accumulated a minimum of 180 teaching days between the commencement of the Spring and Fall terms, the Division would pay the appropriate increment in salary to that teacher beginning on the first day of the Fall term (September), as opposed to the first day of the Spring term (January). The parties acknowledged that this had been the practice since 1976, and several examples of this application since 1989 were provided (Exhibit 7). Perhaps the most dramatic example was that of Keith Rogers, who had accumulated his 180 days as of the second day of the Fall term (September 2, 1992), but did not receive a salary increment until the beginning of the Spring term (January, 1993).

The Grievor's own situation was that he hired on for a one year contract commencing September 1, 1993 and terminating June 30, 1994. Taking into account his carry-over days, he had accumulated his 180 days as of February 4, 1994. He applied for an increment as of the first day of the spring term (i.e., January 1, 1994), but the Division, following its past practice, took the position that he was not entitled to receive an increment in salary until the commencement of the Fall term (September, 1994).

Counsel for the Grievor and the Association made a cogent argument, based upon the plain meaning of the first sentence of Article 3.03(d), that because the Grievor had accumulated a minimum of 180 days as of February, 1994, he should be entitled to receive a pay increment as of the first day of the Spring term, i.e., January 5, 1994. Counsel for the Division argued that this would result in the Grievor receiving an increment in pay for a period of time during which he did not have the necessary experience. The corollary to this argument is, however, that the Division would reap the benefit of having a more experienced teacher without having to pay for that experience until the beginning of the next term.

Regardless of how one views the outcome, we have no difficulty in accepting the interpretation of the Grievor and the Association of the first sentence of Article 3.03(d) of the Collective Agreement. That is to say, in our view, the plain meaning is that a teacher is entitled to receive a salary increment on the

first day of either the Spring or Fall term in which the teacher has accumulated a minimum of 180 teaching days of acceptable teaching experience. In the Grievor's case, this would mean that he would be entitled to receive a salary increment as of January, 1994, as opposed to September, 1994.

Notwithstanding that the parties focused all of their attention on the first sentence of Article 3.03(d) at the hearing of this matter, in directing ourselves to the task requested of us, namely, to interpret Article 3.03(d) - that is, the entire Article - we sought written submissions from counsel for both parties in regard to the meaning of the second sentence of Article 3.03(d), namely:

> "A minimum of 180 teaching days must be completed within a teaching year for one year of credit or 90 teaching days for one-half year of credit."

The Division's counsel responded on September 8 and counsel for the Association and the Grievor responded on September 11, 1995.

Counsel for both parties emphasized that the past practice has been to carry over teaching days accumulated in one year into the next towards the accumulation of a minimum of 180 teaching days. Not only has the Division followed this practice, but also the Department of Education, which, as a matter of procedure, classifies and verifies the teaching experience of teachers. As demonstrated in Exhibits 4, 5 and 6, initially, the Department of Education certified that the Grievor had three years experience and, therefore, placed him in Class 5, however, he was not credited for any carry-over days (Exhibit 4). The Grievor had previously taught in the Division and Ms. MacDonald believed the Grievor to have five years experience, and the Division adjusted the Grievor's pay in accordance with that classification. The Department of Education still did not credit the Grievor with any carry-over days and, after further communication, the Department issued a letter on December 8, 1993 (Exhibit 6) confirming the Grievor's classification as Class 5 with five years teaching experience as of June 30, 1993 and 85 carry-over days at the commencement of the school term in September, 1993. Hence, by February 4, 1994, the Grievor had completed 180 teaching days within the teaching year.

Notwithstanding the past conduct of the parties, which was consistent with the Department of Education, we conclude, on a plain meaning of the second sentence of Article 3.03(d), that carry-over days are not to be credited from one school year to the next and used towards the accumulation of one year of teaching experience attained in the following school year. Read literally, the minimum (180 teaching days) must be completed within a teaching year for one year of credit. There is no provision for carrying over completed teaching days from one year to the next. While we can readily see the hardship of this interpretation, we can not escape the plain meaning of this sentence.

We are faced with a conundrum. On the one hand, the Grievor and Association urge us to find, by way of estoppel or otherwise, that completed teaching days are to be carried over from one year to the next. Counsel for the Association and Grievor points out that the parties have accepted by practice an interpretation of the second sentence of Article 3.03(d). Otherwise, no teacher would be entitled to the payment of a salary increment except on September 1 following the accumulation of a minimum of 180 teaching days in the previous school year (as stated by counsel for the Division in his letter of September 8, 1995). Clearly, this was not the intent of the parties, as past practice demonstrates through Exhibits 8, 9, 10 and 1l in respect of Basil Fitzgerald, and, indeed, the Grievor himself (Exhibit 6).

Notwithstanding that counsel for the Division has acknowledged that the plain meaning of the second sentence of Article 3.03(d) does not provide for carry-over days to be credited from one school year to the next and the Division has not indicated any intention to reverse its past practice of allowing for carry-over days, counsel for the Grievor and Association suggests that the Division would be estopped from changing its interpretation because the members of the Association, including the Grievor, have

accepted the Division's interpretation and practice in regard to the second sentence of Article 3.03(d) of the Collective Agreement.

As stated in Brown & Beattie, Canadian Labour Arbitration (3rd Edition), at pages 2-53 and 54:

> "It is apparent that there are two aspects of the doctrine as thus stated. There must be a course of conduct in which both parties act or both consent and in which the party who later seeks to set up the estoppel is led to suppose that the strict rights will not be enforced. It follows that the party against whom the estoppel is set up will not be allowed to enforce his strict rights if it would be inequitable to do so. The main situation where it would be inequitable for strict rights to be upheld would be where the party now setting up the estoppel has relied to his detriment." (for emphasis)

In the situation at hand, the Division is not seeking to interpret the second sentence of Article 3.03(d) literally and, therefore, there is no need to invoke the doctrine of inequitable estoppel. At the same time, however, neither the Grievor nor the Association has led any evidence to show that either of them has acted to their detriment as a result of the Division's present interpretation and practice in regard to the second sentence of Article 3.03(d).

Counsel for the Association and Grievor argues, in the alternative, that if this Board views the second sentence of Article 3.03(d) as ambiguous, then the Division should be estopped from adopting an interpretation contrary to its past practice in this regard. We do not, however, view the second sentence of Article 3.03(d) to be ambiguous. Rather, read literally, we conclude that the second sentence of Article 3.03(d) does not provide for carry-over days to be credited from one school year to the next.

As stated by Brown & Beattie at the bottom of page 2-60.1 and page 2-60.2:

> "One of the forms of conduct most frequently asserted as the foundation for the application of an 'estoppel' is the existence of a practice which deviates from the terms of a Collective Agreement. In considering- past practice in this regard, however, a distinction must be made between creating an estoppel and using it as an aid to the interpretation of the Collective Agreement. In the latter context, evidence of a past practice is admitted to assist the arbitrator in selecting the correct interpretation of a term in a Collective Agreement which permits more than one possible interpretation. Such evidence is available, however, only if the agreement is ambiguous or capable of more than one meaning." (for emphasis)

The conundrum is this. On the one hand, the Grievor and the Association urge upon us the "plain meaning" of the first sentence of Article 3.03(d), but argue that we should ignore the plain meaning of the second sentence of that Article. They further argue that the employer is estopped from invoking the plain meaning of the second sentence because of past practice which has been relied upon by the Grievor and the Association, to their detriment. We ask what evidence is there that the Association and/or Grievor have acted to their detriment as a result of the employers past interpretation of the second sentence? On the contrary, it has been to their betterment that carry-over days have been credited from one year to the next. (We, of course, recognize that the Association and the Division, in the course of the hearing, did not directly litigate the question of estoppel with respect to the second sentence of Article 3.03(d).)

Furthermore, since we find no ambiguity in the meaning of the second sentence, evidence of this past practice is not germane to the overall issue.

On the other hand, the Division urges upon us an interpretation of the first sentence of Article 3.03(d) to mean that a salary increase is not payable retroactively, but rather at the commencement of the next term following a teacher's accumulation of a minimum of 180 teaching days. The logic of an argument that a pay increment based upon experience should not be payable until such experience has been obtained is certainly compelling. As reflected by the Arbitration Board in Re Gibraltar Mines Ltd. et al (1980) 27 L.A.C. (2d) at page 427:

> "We believe there is force in the argument advanced on behalf of the company to the effect that the company may reasonably expect the level of hourly rates payable to be related to the amount of actual work experience the apprentice can apply to the trade at which he is employed by the company, and to reflect the greater value to the company of more experienced employees."

And further, at the bottom of page 428 and continuing on page 429:

> "...and in the Absence of clear language in the Collective Agreement to the contrary, it seems equally clear that the employer ought not to be called upon to pay a rate increase expressed to be contingent upon successful completion of the previous year in the apprenticeship programme unless and until the practical training component, as well as the schooling component, has in fact been completed."

Counsel for the Division argues that, notwithstanding the plain meaning of the second sentence, it has followed and intends to continue following the practice of allowing carry-over days. He further argues that the Division's interpretation and practice in regard to the second sentence enforces its interpretation of the first sentence. With respect, we do not agree.

It is our conclusion that both parties have wrongly interpreted Article 3.03(d) of the Collective Agreement. The grievances filed by the Association and the Grievor expressly seek an interpretation of the entire Article when, in fact, they only want an interpretation of the first sentence thereof. If we were to restrict ourselves to an interpretation of the first sentence, then we would conclude that the Grievor is entitled to a salary increment as of "the first day of the Spring term" (i.e., January 1, 1994).

However, we can not ignore the second sentence of Article 3.03(d), which, notwithstanding the past interpretation and practice of the parties, we conclude, on a plain meaning, to mean that there is no provision for carry-over days to be credited from one school year to the next and used towards the accumulation of one year of teaching experience attained in the following school year.

Although we do not find any ambiguity in the first sentence or the second sentence, as a result of our interpretation of the entire Article, and the past practice of the parties until these grievances were filed, it would be inequitable to both parties to accept either of their positions and, therefore, the grievances must be disallowed, except to the extent that the proper interpretation of Article 3.03(d) is now declared.

It does appear to the Board that an estoppel argument raised by the Division with respect to the first sentence of Article 3.03(d) would be successful to the end of the Collective Agreement and that, on a similar basis, an estoppel argument raised by the Association would be successful with respect to the second sentence of Article 3.03(d) if that question was directly litigated.

The provisions of Article 3.03(d), when read literally, do not reflect the intention of the Division, nor, we suggest, of the Association, and, therefore, we assume that both parties will be in a better position to clarify this situation in the next Collective Agreement.

We thank counsel for their cogent arguments and authorities. In accordance with the terms of the Collective Agreement, each of the parties will be responsible for the costs of their nominee and will jointly share the Chairperson's costs.

Dated at the City of Winnipeg, this day of January, 1996.

David I. Marr, Chairperson