Case Name:

Mission School District No. 75 v. British Columbia Teachers' Federation

IN THE MATTER OF an Arbitration under the Labour Relations Code, R.S.B.C. 1996
Between
School District 75 (Mission) (the "employer"), and
British Columbia Teachers' Federation/ Mission Teachers' Union (the "union")

[2005] B.C.C.A.A.A. No. 94

LAX/2005-274

Award No. A-068/05

British Columbia
Collective Agreement Arbitration

E. Burke (Arbitrator)

Heard: (Vancouver, B.C.) March 1 - 2, 2005.
Award: April 26, 2005.

(74 paras.)

Elementary Preparation Time Grievance

Appearances:

R. Alan Francis, for the Employer

Alan E. Black, Q.C., for the Union

AWARD

I. INTRODUCTION

1 This matter involves the interpretation of a collective agreement. The Mission Teachers Union ("MTU" or "Union") has filed a grievance maintaining that pursuant to Article D.14: Instructional Assignment, teachers must be given weekly preparation time. In particular, elementary teachers must be provided 90 minutes of preparation time per week. The Union maintains when a non-instructional day ("NID") or statutory holiday occurs and does not allow the teacher the contractually mandated preparation time, the Employer must replace the lost preparation time.

2 In response, the Employer maintains the language of Article D.14 simply provides for a maximum instructional time of 1335 minutes. Provided this amount is not exceeded in a week because of a statutory holiday or NID, the Employer says the collective agreement is not violated if the teacher receives less than 90 minutes preparation time that week. The Employer maintains the language is clear and past practice supports this position. Further, the Employer points out this is the third time this matter has been grieved and referred to arbitration. It maintains the prior withdrawals of two grievances act as a bar to this matter going forward.

II. BACKGROUND

3 The vast majority of the facts in this case are agreed to and incorporated in a Statement of Agreed Facts. These are recorded below.

1. This grievance (Employer's Document Book Tab 51) is brought by the BC Teachers' Federation ("BCTF") under Article D.14 (Instructional Assignment) of the Provincial Collective Agreement between BCTF and B.C. Public School Employers' Association ("BCPSEA") as it applies in School District No. 75 (Mission). The Mission Teachers' Union ("MTU") is the local teacher union in that district and was the certified union representing teachers in the district prior to the Public Education Labor Relations Act.
2. The corresponding Instructional Assignment clause in the 1989 - 1990 collective agreement between the Board of School Trustees of School District No. 75 (Mission) (the "School Board') and MTU is at Tab 1 of the Employer's Document Book. This was the first collective agreement covering teachers in the district. The corresponding Instructional Assignment clause in the 1990 - 1992 collective agreement is at Tab 2 of the Employer's Document Book. The corresponding Instructional Assignment clause in the 1992 - 1994 collective agreement is at Tab 3 of the Employer's Document Book.
3. On November 18, 1996, Mike Trask, then President of the MTU, sent a letter to Bill McAuley, then principal of West Heights Elementary School (Employer's Document Book Tab 4). The 1992 - 1994 collective agreement was still in force at that time.
4. On December 2, 1996, Mr. McAuley sent a letter to Mr. Trask (Employer's Document Book Tab 5).
5. MTU published and distributed a President's Newsletter dated November 29, 1996 (Employer's Document Book Tab 6).
6. On December 5, 1996, Mr. Trask sent a Memorandum to staff representatives (Employer's Document Book 7). Staff representatives are teachers who are representatives of the Union in each school in the district.

7. On December 6, 1996, Mr. Trask sent a letter to Brian Junek, then Assistant Superintendent of School District No. 75 (Mission) (Employer's Document Book Tab 8).
8. On or about December 13, 1996, Mission Teachers' Union published a President's Newsletter of that date (Employer's Document Book Tab 9).
9. On December 20, 1996, Mr. Trask filed a grievance by letter to Mr. Junek (Employer's Document Book Tab 10).
10. On January 9, 1997, Mr. Junek and Mr. Trask attended a step 2 grievance meeting with respect to that grievance. Mr. Trask gave to Mr. Junek a copy of his notes of the results of a survey he said he had carried out (Employer's Document Book Tab 11). He told Mr. Junek that his survey indicated that some principals were making up time scheduled on non-teaching days.
11. Mr. Trask sent a letter to Mr. Junek on January 13, 1997 referring to that meeting and referring the grievance to step 3 (Employer's Document Book Tab 12).
12. A step 3 grievance meeting was held on January 16, 1997. Mr. Junek told Mr. Trask he had conducted a survey of principals and confirmed his understanding that there was no practice in the district of making up preparation time scheduled on non-teaching days. He also told Mr. Trask that the School Board was not under an obligation to do so.
13. The next day, Mr. Trask sent a letter to Mr. Junek about that meeting (Employer's Document Book Tab 13).
14. BCTF referred this grievance to arbitration by letter dated February 20th, 1997 from Lynne Sinclair of BCTF to Dan Peebles of BCPSEA (Employer's Document Book Tab 14).
15. Susan Van der Flier, counsel for BCTF, sent a letter dated March 4, 1997 to Judith Anderson, counsel for BCPSEA in the matter proposing Jim Dorsey as arbitrator in the grievance (Employer's Document Book Tab 15).
16. Ms. Anderson replied by letter dated March 6, 1997, agreeing to that proposal (Employer's Document Book Tab 16).
17. On June 17, 1997, Mr. Dorsey faxed a Notice of Hearing to the parties setting October 7 and 8, 1997 as hearing dates (Employer's Document Book Tab 17).
18. Shortly before the hearing, Mr. Junek met with Rick Fitch who had replaced Mr. Trask as president of MTU, in an unsuccessful effort to settle the grievance.
19. October 6, 1997, the day before the first schedule hearing date, the Union unilaterally, and without prior notice, withdrew the grievance (Employer's Document Book Tab 18). The School Board did not at that time object to the unilateral statement that the withdrawal was "without prejudice."
20. During the period from October 6, 1997 to June 23, 2001, MTU did not grieve or otherwise dispute the practice of not re-scheduling or making up preparation time scheduled for a statutory holiday or other non-instructional day.
21. MTU filed a grievance with respect to this practice by letter dated October 4, 2001 from Mr. Trask, who was again president of MTU to Loris Pante,

the School Board's Director of Human Resources (Employer's Document Book Tab 19).

22. A step 2 grievance meeting was held on October 16, 2001 and Mr. Trask sent a letter dated the same day to Mr. Pante with respect to that meeting (Employer's Document Book Tab 20).
23. Mr. Pante replied by letter dated October 19, 2001 (Employer's Document Book Tab 21).
24. MTU referred the grievance to step 3 (Employer's Document Book Tab 22) and a step 3 meeting was held on October 31, 2001. Mr. Trask sent a letter to Mr. Pante regarding that meeting (Employer's Document Book Tab 23).
25. By letter dated November 13, 2003 from Murray Geiger-Adams to Mr. Peebles, BCTF referred the grievance arbitration, appointing Leanne Walsh as counsel (Employer's Document Book Tab 24)
26. Through an exchange of correspondence, Colin Taylor, Q.C. was agreed to and appointed as single arbitrator to hear the grievance (Employer's Document Book Tabs 25, 26, 27, 28 and 29).
27. Arbitrator Taylor sent a Notice of Hearing dated April 14, 2003 to the parties, setting November 26 and 27, 2003 as the hearing dates (Employer's Document Book Tab 30).
28. During September, October and early October of 2003, counsel for the parties exchanged correspondence relating to particulars and documents, among other things (Employer's Document Book Tabs 31, 32, 33, 34, 35, 36, 37 and 38).
29. On November 13, 2003, counsel for the School Board sent a letter to Arbitrator Taylor requesting an order for pre-hearing production of documents and particulars by the Union (Employer's Document Book Tab 39).
30. On November 14, 2003, counsel for the School Board sent a letter to counsel for MTU giving formal notice of intention to contest arbitrability on the basis of the prior settlement of a similar grievance (Employer's Document Book Tab 40).
31. By letter dated November 17, 2003, counsel for MTU notified counsel for the School Board that MTU wish to withdraw the grievance on a "without prejudice" basis (Employer's Document Book Tab 41)
32. In a letter of the same date, counsel for the School Board informed counsel for MTU that the school board did not agree to nor accept the withdrawal being "without prejudice" (Employer's Document Book Tab 42).
33. By a further letter dated November 17, 2003 to Arbitrator Taylor, counsel for the School Board requested that the arbitrator record the MTU withdrawal as a simple and unqualified withdrawal (Employer's Document Book Tab 43). A copy of this letter was sent to counsel for the MTU.
34. Counsel for the MTU responded by letters dated November 18 and 19, 2003 (Employer's Document Book Tab 44).
35. Counsel for the School Board sent a reply submission to Arbitrator Taylor by letter dated November 19, 2003, a copy of which was sent to counsel for the MTU (Employer's Document Book Tab 45).

36. Counsel for MTU sent a final written submission on the issue to Arbitrator Taylor in a letter dated November 20, 2003 (Employer's Document Book Tab 46).
37. On November 25, 2003, Arbitrator Taylor issued a decision on this issue (Employer's Document Book Tab 47).
38. On December 8, 2003, Mark Bradshaw, then president of MTU, sent a letter to Mr. Pante (Employer's Document Book Tab 48).
39. Mr. Pante replied by letter dated December 10, 2003 (Employer's Document Book Tab 49).
40. MTU filed a grievance by letter dated March 31, 2003 from Mr. Bradshaw to Mr. Pante (Employer's Document Book Tab 50).
41. By letter dated April 20, 2004, Mr. Bradshaw notified Mr. Pante of MTU's intention to refer the matter to arbitration (Employer's Document Book Tab 51).

4 Mike Trask, the previous President of the MTU, testified in this matter. Trask has been involved with teaching in the Mission School District since January 1981. Trask taught seven years of elementary school and the remainder in secondary school. He served six years as Union president and has occupied a variety of other roles with the Union including bargaining chair for many years. Trask indicated that preparation time is time scheduled during the week for teachers to attend to duties peripheral to instruction. At the elementary school level this may include getting materials ready for an experiment or demonstration for the class, getting machinery for the presentation of a video or materials from the library, photocopying lessons or assignments. In addition, preparation time is also used for planning for the week as needed; calling parents or receiving calls about students.

5 In Trask's view teachers are entitled to 90 minutes preparation time a week under Article D.14. In practice, the principal may assign preparation time in one block or two 45-minute time periods. Sometimes three 30-minute periods are assigned. To provide preparation time for a teacher, a non-enrolling teacher, who may be the librarian or music teacher, is utilized. These teachers do not have classrooms of their own and take the class of the enrolling teacher who will then use this time for preparation. Sometimes the principal provides preparation periods by taking a teacher's class. Normally a schedule for preparation time is prepared at the start of the school year in September. During the year however, statutory holidays and non-instructional days ("NID"), for professional development will impact in that scheduled time. That is where the dispute arises in this case.

6 In secondary schools, eight blocks of time are scheduled into a rotating two-day system; Day 1 and Day 2. One of these blocks is designated as a teacher's preparation period. As a result, if Day 1 or Day 2 falls on a statutory holiday or a non-instructional day, the schedule for that day moves to the next day students attend class. Instructional time and preparation time is not, therefore, missed on those days.

7 Trask was initially of the view that preparation time was assigned to all teachers in elementary school and made up in a variety of ways if missed. On November 18, 1996, Trask wrote to Bill McAuley, the principal of West Heights Elementary concerning the use of assemblies to provide preparation time for teachers. In that letter he said:

...

> The second matter concerns the scheduling of teachers' preparation time. Prep time must be scheduled every week - it is the Board's obligation to have appropriate staff in place.
>
> The use of school assemblies is an interesting way to provide prep time to teachers. I suggest, however, that it should be scheduled consistently, and not bounced around throughout the week. Given that teachers are expected to provide evidence of short-term and long-term planning, it would be reasonable to expect consistent timetabling on your part.
>
> Finally, with regard to prep time, I would ask you to advise me how your school re-schedules time for those teachers whose regularly scheduled time is affected by the occurrence of a statutory holiday or a PD day.
>
> Please let me know if we do not have a common understanding in these matters.

8 In reply to this letter, on December 2, 1996, McAuley, the principal said in part:

> ...
>
> Regarding school assemblies as vehicles for teacher preparation, this is an evolving concept ...
>
> Finally, regarding the prep time, statutory holidays and non-instructional days, we do what we can to make sure that everyone is treated equally, but we do not re-schedule preps missed on these days. Our assemblies are always on Tuesdays therefore they are seldom affected by these items, and if they are missed due to a NID or a holiday, they are rescheduled. Whenever holidays or NIDs occur on Mondays or Fridays, we work on a rotational schedule so that people with Monday and Friday preps are not constantly losing preps while others on mid week preps do not lose any. Last year, it worked out exactly and it did not matter what day of the week your prep was on, each teacher lost two preps in the course of the year.

9 In the November 29, 1996 President's Newsletter, Mike Trask said:

> PREP TIME
>
> Staff Reps also raised questions about the scheduling of time in some schools. Common sense suggests that time should be regularly scheduled. This would allow teachers to plan the use of that time most efficiently. Arbitrator Larson seemed to acknowledge that point in his recent award recording secondary prep time.
>
> Barring some emergency, I do not see much need for the schedule of prep time to vary, unless a statutory holiday or a PD day happens to wipe out a prep time. These days are known well in advance, so in such cases, of course, the prep time would obviously be re-scheduled within the same week.

10 Trask indicated he then got more of a sense of a problem with the scheduling of preparation time. As a result he wrote a memo to the staff representatives in December 1996 to find out how preparation time was assigned in the school and particularly how the issue of rescheduling missed time was dealt with. That memo said:

> I am writing to ask for your help in compiling information about the scheduling of preparation time in your school.
>
> I met with Brian Junek earlier today about a completely different matter, and at the end of the meeting he remarked on the article in my most recent newsletter. In the article, I mentioned that when a teacher's prep time is wiped out by a statutory holiday or a PD day, the prep time should be rescheduled within that week.
>
> Brian felt that this is not happening in the schools; I felt equally sure that it should be. Therefore, I ask you to call Cathy or me at the MTU office (phone 826-0112 or fax 826-3435) and let me know if your school reschedules prep time when it is missed on a holiday or a PD day ...

11 On December 6, 1996, Trask wrote to Junek, the Assistant Superintendent of School District No. 75 and said:

> ...
>
> Re: Elementary Preparation Time
>
> As I stated in our meeting yesterday, the MTU expects that prep time missed due to a stat holiday, PD day, etc. will be rescheduled within that week. Following the uncertainty you expressed yesterday, I have been checking with schools to verify whether missed prep time is being made up. It is still early in my search yet, but I have found some who have addressed this problem and one which may not have. I will get back to on this when my information is more complete.

12 In a subsequent President's Newsletter of December 1996, Trask wrote on this point:

> PREP TIME
>
> An article on this topic in the last newsletter has prompted some discussion on the scheduling of preparation time in elementary schools. The issue concerns the re-scheduling of prep time when it is wiped out by a stat holiday or PD day.
>
> My survey turned up a mixed bag of responses, with approximately half the schools making no effort to re-schedule the missed time.
>
> I believe the wording of Article D.4 is very clear: the Board is not excused from providing the prep time when a week has four days, rather than the usual five.

> I have spoken to Brian about this. We seem to have an area of difference which may require a grievance to settle.

13 On December 20, 1996 the Union filed a grievance alleging the Employer was in violation of the collective agreement, including Article D.4 Instructional Assignment. The grievance noted in weeks that include less than five teaching days, the Board has not undertaken to reschedule preparation time that had been affected by the occurrence of a non-teaching day during the week. The Union pointed out this problem was common to a number of elementary schools.

14 As set out in the Agreed Statement of Facts, the matter was referred to arbitration and scheduled for hearing in October 1997. Shortly before the hearing, the Union withdrew the grievance on a "without prejudice" basis without objection from the Employer.

15 Sometime later, Trask indicated in a bargaining proposal dated June 12, 2001, the Union sought to clarify the meaning of this provision by the addition of the following to Article D.14:

> This article means that when the teacher misses preparation time due to the occurrence of a Non-Instructional Day or a statutory holiday, the Board will restore the lost preparation time.

16 By this point, Trask was of the view no consistent practice existed between the parties but rather a "mixed bag". The Union presented the proposal at the local level, as it believed it was a non-cost item. The Board responded by indicating the proposal was a "cost" item and must be dealt with at the Provincial Bargaining table. Only non-cost items were dealt with at the local level.

17 On October 4, 2001, the Union filed a grievance alleging the Board was in violation of the collective agreement, including Article D.14: Instructional Assignment. That grievance letter noted:

> The Board has refused to replace the preparation time lost by several teachers at the schools, due to the Non-Instructional Day (NID) which occurred on Monday, October 1. More schools may be affected by the statutory holiday on Mon, October 8. For convenience sake, I suggest we include these schools in this grievance.

18 On October 16, 2001 the Union wrote:

> Re: Elementary Prep Time
>
> I am writing to confirm the results of our meeting at Step 2 in this matter, which was held this morning. I began by noting that some schools had scheduled teachers' prep time between Tuesday and Thursday, allowing them to avoid this problem.
>
> The problem is that some schools do not replace teachers' time when it is missed usually due to a statutory holiday or a Non-Instructional Day. This is most often a Monday/Friday problem. Article D.14: Instructional Assignment of the Collective Agreement provides that teachers in elementary schools receive 90 minutes per week prep time.

I suggested that the missed prep time could be made up in any of three ways:

a. re-schedule with the regular provider (nearly impossible in a larger school)
b. the AO hold an assembly elsewhere in the week for the affected teachers' classes
c. the Board hire a TOC for a day to replace the missed prep time.

You noted that the contract did specify 90 minutes prep time, but wondered whether a NID wasn't a full day of prep time. I believe we agree that a NID holds other duties for teachers, which are assigned by the Board and agreed between the Board and the MTU.

You agreed to review the matter and reply to me in writing.

19 October 19, 2001 the Employer replied as follows:

Re: Elementary Prep Time

The district has considered the arguments raised by the Union at the Step 2 meeting.

The district does not agree with the Union's view that scheduled prep time that falls on a NID or on a stat holiday is lost prep time. It has been a consistent practice to not reschedule such prep time.

Since the collective agreement does not contain a provision for the rescheduling of prep time, it is the Employer's position that no violation has occurred.

20 On October 31, 2001, the Union wrote a letter to the Employer as follows:

Re: Elementary Prep Time

I am writing to confirm the results of our Step 3 meeting in this matter, which was held this morning.

I inquired how you saw Article D.14 allowing the Board to withhold prep time when a statutory holiday or NID occurred during a week. You replied that the prep time was scheduled, that the holiday or NID does not mean it is withheld. I affirmed that holidays and NID's are not instructional time, therefore the prep time has not been scheduled.

You then stated that a day with no instructional time (holiday or NID) means the instructional time for the week has been reduced. I replied that Article D.14 clearly states that prep time is deducted from instructional time, not from the entire week (i.e. the non-instructional time).

> Regardless, you felt that the instructional time was still reduced; but not, as I replied, "for the purpose of preparation" as provided in D.14. This reduction was in fact for the purposes of other, non-instructional duties (or holiday).
>
> We then spoke about the practice in the district, but in the final analysis, we did not resolve the grievance. I advised you that the matter would be referred to the BCTF for arbitration.

21 On November 13, 2002 the British Columbia Teachers' Federation referred the matter to arbitration. The matter was set for hearing on November 26 and 27, 2003. As part of the preparation for the case, on October 27, 2003 the Employer indicated to the Union it was taking the position preparation time was scheduled by principals and not rescheduled, nor had compensatory time been provided. It maintained the Union had been aware of this practice. In addition the Employer requested the Union advise if they would dispute this assertion of past practice. On November 13, 2003, it also advised it would dispute the arbitrability of the grievance on the basis of the earlier withdrawal of a similar grievance. By letter of November 17, 2003 the Union sought to withdraw the grievance on a "without prejudice" basis. The Employer objected to the withdrawal on a "without prejudice" basis. After submissions on this point, the arbitrator dealt with the matter and concluded:

> ... the application of the Union to withdraw the grievance from arbitration is granted without conditions.
> (at p. 4)

22 Shortly after this, on December 8, 2003, the Union wrote to the Employer maintaining that Article D.14 of the collective agreement requires that full-time elementary teachers be provided with 90 minutes of preparation time per week. It went on to note that:

> This letter constitutes notice to the Employer that this continued breach of the Collective Agreement would no longer be tolerated. In the event that a non-instructional day, statutory holiday, or professional day occurs on a day when a teacher's preparation time is scheduled to occur, and the Employer does not re-schedule that preparation time for some alternate period during that week, the Union will grieve that breach of the Collective Agreement and pursue that grievance to arbitration.

23 On December 10, 2003, the Employer replied that it had been the consistent practice in the District to not re-schedule prep time. It also put the Union on notice that it would take the position the previous withdrawal bars any further proceedings on this matter.

24 On March 31, 2004, the Union grieved the loss of preparation time and asserted the Board was in breach of Article D.14 of the collective agreement. The matter then proceeded to this arbitration.

25 For ease of reference I will set out Article D.14: Instructional Assignment at this time:

1. The maximum weekly instructional assignment for a full-time elementary teacher shall be 1425 minutes per week, less 90 minutes which shall be provided for the purpose of preparation.
2. The maximum weekly instructional assignment for a full-time secondary teacher shall be 1545 minutes per week, less 193 minutes which shall be provided for the purpose of preparation.
3. Instructional assignment shall be defined as time during the instructional week devoted to teaching courses and lessons, supervise curricular activities, including study periods and assigned pupil contact time.
4. Part-time teachers of 0.4 FTE or more shall receive preparation time prorated to their FTE status.

III. ARGUMENT

26 The Union points out first that paragraphs 1 and 2 of Article D.14 are virtually identical except for the amount of instructional assignment and preparation time set out. Further the reference to instructional assignment time is described as a maximum. There is no obligation to teach the maximum; it could be less. There is, however, no suggestion of a maximum when dealing with preparation time. Rather that figure is absolute. Accordingly, if instructional time is less, that does not mean proportionately less preparation time is assigned. The Union relies on paragraph 4 in support for this proposition as the parties expressly addressed the issue where preparation time is to be prorated.

27 The Union says the evidence of Trask made clear that preparation time is scheduled and addressed on a school-by-school basis. The scheduling is coordinated by the administrative officer. In Trask's investigation, he found there was a "mixed bag" of practice in re-scheduling for missed preparation time. The Union maintains the case is not about the re-scheduling of preparation time per se but rather deals with the provision of lost preparation time. Accordingly, if a teacher loses preparation time and works out an arrangement with a librarian or music teacher to make up preparation time, the principal is not required to re-schedule the time. There is no evidence of a consistent direction from the Employer as to how preparation time is scheduled or how it should be dealt with. If there was evidence of a consistent practice of not providing missed preparation time, this should have been called by the Employer.

28 The evidence establishes preparation time is provided in a number of ways. Teachers who lose preparation time can use assembly time to make it up or do so on an individual basis by an arrangement with the librarian or music teacher. Further preparation time is normally not scheduled on Mondays and Fridays where a statutory holiday or NID is most likely to occur.

29 The Union maintains the Employer's argument that no contravention of the Article occurs as long as the instructional assignment time does not exceed 1335 minutes, is inconsistent with the language of the collective agreement. It does not take into account the mandatory requirement that 90 minutes of preparation time shall be provided. The Union argues the Employer's interpretation is accordingly inconsistent with the language of the collective agreement and a previous award between the parties. (See Board of School Trustees of School District No. 75 (Mission) and Mission Teachers' Union (Secondary schools preparation time), March 15, 1996 (Larsen)). In that case between the same parties, the Union points out the Employer acknowledged it had an obligation to provide preparation time.

30 The Union also maintains even if the parties have dealt with something in an erroneous fashion, where the language is clear and unambiguous a proper interpretation must be supported. (Howe Sound School District No. 48 vs. Howe Sound Teachers' Association [1995] B.C.C.A.A.A. No. 165.) Accordingly, the Union argues the Larsen decision must be followed unless it is clearly wrong or there is a factor in this case, not before Larsen, to suggest an ambiguity.

31 With respect to the factual background, the Union maintains the withdrawal of the 1997 grievance "without prejudice" cannot result in a suggestion that the Union adopted or accepted the Employer's interpretation of the collective agreement. There was no objection by the Employer to this withdrawal "without prejudice" and it was done in a manner which did not compromise the Union's rights. With respect to the second grievance of December 2001, the Union points out the Employer was not misled by the Union's position. While the Employer objected, the Union made clear the issue was live and not to be abandoned. Further, the Employer has not advanced estoppel. In December 2003, the Union put its position in writing that it no longer condoned the activity of the Employer. If there was any previous misunderstanding, that came to an end in December 2003. Finally, the Union maintains there is no prejudice to the Employer, as it is not seeking a remedy prior to this point in time. The Union is only seeking a declaration as to rights of teachers under the collective agreement

32 In response the Employer maintains all three grievances clearly state the issue is the scheduling of preparation time, where preparation time is scheduled on the statutory holiday or a NID and not rescheduled to another time. The Employer maintains the Larsen award dealt with a different issue of whether preparation time should be scheduled in one semester. The issue in this case arises only in elementary schools as secondary school classes are scheduled on a rotational block basis.

33 The Employer maintains there is abundant evidence the practice is consistent with not rescheduling preparation time. The Employer relies on the Statement of Agreed Facts where Junek told Trask that he had conducted a survey of principals and confirmed his understanding that there was no practice in the District of making up preparation time scheduled on non-teaching dates. He also told Trask the School Board was not under an obligation to do so. While Trask does not remember this, in cross-examination he agreed most cases in his survey were examples of avoidance or equalization or default and not the rescheduling of preparation time. In others, he was unable to say whether that was a matter just between teachers or mandated and or authorized by the principal.

34 In addition, the Employer points out the Union put a proposal at bargaining to amend the provision at issue to accomplish what the Union now asserts is the correct interpretation of the collective agreement. When they were not successful in bargaining, the Union grieved.

35 The Employer argues strongly the substance of this dispute is exactly the same as the previous two grievances. That substance is whether the Employer is required to reschedule preparation time. The question is whether the collective agreement should be interpreted as requiring a maximum number of instructional minutes or also 90 minutes of preparation time even if the minutes of instruction are below 1335 minutes.

36 Accordingly, the Employer maintains consequences attach to a withdrawal of a grievance at a certain stage. (Re City of Burnaby and Canadian Union of Public Employees (2000), 91 L.A.C. (4th) 40; Re Verspeeten Cartage Ltd. and Teamsters, Local 141 (2001), 103 L.A.C. (4th) 174; Canadian Union of Public Employees, Local 207 and City of Sudbury (1965), 15 L.A.C. 403; Re

North American Lumber Ltd. and International Woodworkers of America, Local 2693 (1990), 25 L.A.C. (4th) 402; Weston Bakeries Ltd and Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union 647 (1998), 76 L.A.C. (4th) 258; HEABC of behalf of Fraser Canyon Hospital and Hospital Employees Union, unreported, July 21, 1999 (Kelleher); Howe Sound Pulp and Paper Ltd vs. Communications Energy and Paper Workers Union, Local 1119 [2003] B.C.C.A.A.A. No. 168 (Kelleher). The Employer says the sequential withdrawal of grievances is an abuse of process and amounts to harassment. There has also been four years of condonation by the Union of the practice. This is illustrative of the rationale behind the jurisprudence set out above. The Employer has twice been put the expense of an arbitration hearing and the Union has withdrawn at the eve of the hearing. If the Union wanted the matter to be arbitrated, it should have done so in 1997 or 2001 when it was clear the Employer would not consent to the withdrawal without prejudice. It should now not be allowed to proceed.

37 With respect to the merits of the interpretation issue, the Employer maintains the plain meaning of the clause does not require rescheduling of preparation time on NID and statutory holidays. This is clear in light of the historic roots of the clause and the changes that have been set out therein. The change in language means a change in meaning. Alternatively, the Employer says the language is not clearly in favor of the Union's interpretation. As a result, the arbitrator must have recourse to past practice as an aid to interpretation, (see John Bertram and Sons (1967), 18 L.A.C. 362 (Weiler)). The Employer relies upon John Bertram, supra, to argue first there is a clear preponderance in favor of the Employer's interpretation in this case. That cannot be argued to be so for the Union especially in light of the history of the clause. Further, the evidence establishes the Employer's conduct unambiguously supports one meaning being the consistent practice of not re-scheduling preparation time. With respect to acquiescence, the Employer points out after the initial objection in 1996 the grievance was withdrawn in 1997. The practice continued for four more years without any evidence of objection with the full knowledge of the Union. Finally, if there's any doubt, it maintains this is dispelled by the fact the President of the Local has been aware of the situation but now says he no longer condones it. Accordingly, the Employer argues it has met the test in John Bertram and there is no obligation on the Employer to reschedule preparation time that falls on a NID or statutory holiday.

38 The language sets out a maximum instructional time rather than a minimum requirement to provide certain minutes of preparation time. As set out in School District No. 75 (Mission), supra, this clause provides a formula for delineating maximum instructional time, a finding which supports the Employer's interpretation in this case.

39 The Employer also relied upon Noranda Mines Limited and USWA, Local 898, April 27, 1981 (Hope). The Noranda line of cases establish that if a union seeks to claim a monetary benefit, it must have a clear or unequivocal language to show the mutual intention of the parties. Monetary benefit should not be inferred. The onus here is on the Union. The practice supports a mutual interpretation for the Employer.

40 In response, the Union initially points out that the Noranda line of cases do not apply as this is not a case of a monetary benefit. The Union presented the proposal in bargaining on the basis the clause did not involve a monetary benefit. Further, the Union does not seek monetary damages but rather a declaration that the Employer act in compliance with the collective agreement.

41 The Union points out the collective agreement does not refer to re-scheduling but rather the obligation to provide a specific amount of preparation time. In the focusing on the word

"re-schedule", the Employer is not dealing with the issue in this case. The issue is whether at the end of the day teachers are entitled to a collective agreement provision that affords them a specific amount of preparation time.

42 Dealing with the issue of the withdrawal of the grievance, the Union points out the cases that analyze this issue balance efficiency against substantive rights. While generally speaking, a speedy resolution is desired, one must also consider the question of substantive rights. Simply because a grievance was withdrawn, does not automatically mean it cannot be reinitiated. In this case, the first withdrawal was "without prejudice" and not opposed by the Employer. The second withdrawal the Union also communicated its desire to withdraw the grievance on the "without prejudice" basis. While this did not happen, it cannot be misunderstood that the Union did not accept the position of the Employer. It did not agree to its interpretation. This must be taken into account in deciding if it can be re-litigated. There is a significant difference in the cases cited by the Employer has the evidence indicates some reliance by the Employer on the withdrawal. In this case, the Union made clear that it did not condone the practice and would be filing a further grievance should the issue arise again. That is in fact what occurred and gives rise to the matter here. In setting up this proposition, the Union relied on a series of cases including Re North American Lumber Ltd. and International Wood workers of America, Local 2693 (1992) 25 L.A.C. (4th) 402; St. Gobain Abrasives and CEP, Local 12 (2003) 120 L.A.C. (4th) 73; Seaspan International Ltd. and International Longshore and Warehouse Union, Local 400 (2003) B.C.C.A.A.A. No. 300; Commercial Bakeries Corp. and Retail Wholesale, Canadian Division of Canadian Auto Workers, Local 462 (2004) 126 L.A.C. (4th) 298.

IV. ANALYSIS

43 In considering this case, I must first deal with the Employer's objection to this matter proceeding on the basis of the withdrawal of two previous grievances. There is no allegation that these two grievances do not involve the same subject matter.

44 The first withdrawal was done on a "without prejudice" basis. When the Union sought to withdraw the second grievance on the same basis, that condition was contested. The second grievance had been set for arbitration for November 26 and 27, 2003. As noted by Arbitrator Taylor, by letter dated November 17, 2003, the Union sought to withdraw the grievance on a "without prejudice" basis. The Employer, however, objected to that condition being attached to the withdrawal. Arbitrator Taylor cited a number of authorities including Re Verspeeten Cartage, supra, in which the arbitrator denied the union's application to attach a condition to the withdrawal and said:

> ... we will permit the Union to withdraw the grievances. The withdrawal, as a simple withdrawal, and without the qualifying condition that it is "without prejudice", will leave it open to the parties to argue, if necessary, at some future point in time, before another tribunal, the effect of the withdrawal. It is clear that in this case the parties disagree on the effect or consequences which would flow from our decision to permit the Union to withdraw.
> (at p. 5)

45 Prior to this conclusion, the arbitration board in Verspeeten Cartage, supra, noted:

> ... permitting the Union to simply withdraw these grievances "without prejudice" and without comment from the Board could perhaps result in prejudice to the Employer or an abuse of process in the future. For example, it would clearly be an abuse of the arbitration process if the Union were permitted to withdraw these grievances without prejudice, and thereafter sought to re-file the same or substantially similar grievances, dealing with the same fact situation and seeking the same or substantially similar relief, and then seek to have those grievances heard and determined by a different Board of Arbitration on the basis that the earlier grievances had been withdrawn "without prejudice". (See for example Canadian Labour Arbitration, Brown and Beatty (3d edition) at 2:3230 and the cases referred to therein.)
>
> We agree with the preponderant and prevailing authority which indicates that a Union's decision to withdraw grievances from arbitration once a Board of Arbitration has been constituted and a hearing has commenced is not without consequences. In our view, the Union cannot seek to avoid those consequences by unilaterally indicating that its withdrawal is "without prejudice".
>
> Acceptance of a principle that consequences attach to a withdrawal of the grievances at this stage of the proceedings however does not equate with the Employer's position that the grievances should instead be dismissed, and that such dismissal is, in effect, tantamount to an adjudicated finding on the merits. Whether or not that result should follow depends on the specific circumstances of the case and, as noted earlier, in particular the timing and factual circumstances surrounding the Union's request to withdraw the grievances from arbitration.
> (at p. 4 - 5)

46 The arbitrator similarly here did not allow conditions to be attached to the withdrawal. In doing so Arbitrator Taylor noted:

> As a general rule, an application to withdraw a grievance should not be subject to terms and conditions. The correct approach where the application to withdraw is made before the hearing commences is to permit the withdrawal and leave its significance to any further tribunal to determine.
> (at p. 4)

47 In Re City of Burnaby, supra the arbitrator noted the same. He said if an application to withdraw is granted, as a general rule it should not be subject to terms or conditions. In doing so he noted if the union was permitted to withdraw a grievance on the basis there is no compelling reason

for an arbitrator to refuse the application, it must accept the consequences of that withdrawal in that arguments can be made to another tribunal at another time as to the effect of the withdrawal. (at p. 46)

48 That is the situation here. The consequences of the Union's two previous withdrawals are now being argued in this case. I must determine the effect of the withdrawal of the two previous grievances on the grievance presently before me. In doing so however, I am cognizant of the comment in Verspeeten Cartage, supra, that the result depends on the specific circumstances of the case.

49 The Employer cited City of Sudbury, supra in support of its position. Further, it noted Re North American Lumber, supra. That case is helpful for the following comments:

> ... Arbitrators do not simply apply the rule without consideration of its purpose, Triangle Conduit, supra at page 337: "Rules established in the common-law of arbitration - indeed any legal rules - must be interpreted with reference to their underlying purposes and not in a rigidly legalistic way." As previously indicated in the Mueller case, the rule against the revival in a subsequent grievance of subject matter of an abandoned, settled or withdrawn grievance is seen to serve the purposes of: promoting expeditious use of grievance and arbitration procedures, avoiding unnecessary haggling or harassment over complaints, and allowing the employer the certainty that its pre-arbitration decision on a grievance has been accepted by the union ... (at p. 413)

50 In this case, the arbitrator noted the withdrawal of a prior grievance similar in substance but improperly filed as a policy grievance, was not a bar to the determination of a properly filed individual grievance. It points out the employer clearly understood at the time of withdrawal that the union would re-file and found the grievance to be arbitrable.

51 In Weston Bakeries Ltd., supra the arbitrator found an individual grievance subsequent to a prior policy grievance that raised identical issues and claimed identical relief was not arbitrable. The arbitrator found the individual grievance attracted the arbitral rule of abandonment, which prevents the revival of the same subject matter contained in an earlier policy grievance. He made this finding taking into consideration the purpose of the rule. In doing so he cited Re North American Lumber Ltd., supra, and said:

> ... Clearly, in finding that the abandonment, withdrawal or settlement of a grievance, in the instant case, by the union, acts as a bar to its revival, arbitrators have recognized that the parties "need for certainty and finality, the parties" interest in orderly processing of grievances and avoidance of unnecessary expenses associated with the arbitration process, properly entitle the employer to view the abandonment, settlement

> or withdrawal of a grievance as an actual or implied acceptance by the union, of its decision or position on the subject matter of a grievance ... (at p. 5)

52 While the Union also relied on North American Lumber Ltd., supra, it cited a number of other cases in support of its position that the matter should be allowed to proceed on the merits. (Re British Columbia Railway Co. and Canadian Union of Transportation Employees, Local 6, (1987) 28 L.A.C. (3d) 314). The Union relied specifically on the Triangle Conduit and Cable Canada (1968) Ltd. and United Steelworkers (1970), 21 L.A.C. 332. In that case, as cited earlier, the arbitrator found:

> ... Rules established in the common law of arbitration - indeed any legal rules - must be interpreted with reference to their underlying purposes and not in a rigidly legalistic way. It is true that the union technically may be said to have "abandoned" the first grievance here but, if so, it was in a very unusual situation. Perhaps the best statement of the purpose behind the rule is contained at p. 404 of the City of Sudbury case which was relied upon by the company:
>
> > The grievance procedure is designed to provide members of the bargaining unit and the union with a method of orderly processing their respective grievances. In order to avoid the expense inherent in the arbitration process the procedure provides for bona fide efforts to be made by both the grievor and management to settle the dispute at various stages and at various levels. It follows, therefore, that if the grievor and/or the union actually or impliedly accept the decision of management they should not be allowed to have second thoughts on the matter and re-process essentially the same grievance at a later date. If this were to be allowed, management would never know whether, in fact, its decision had been accepted by the individual grievor or the union representing him, and management could be plagued and harassed in what would be a plain abuse of the grievance procedure.
>
> In no sense did the union lead management to believe that it "accepted" the January 28 position, as Steele explicitly admitted in his testimony. Far from "plaguing" or "harassing" management by a series of grievances, the union objective in filing the new grievance and letting the old one lapse was simply to avoid unnecessary haggling about what the union believed to be an issue irrelevant to the merits of the case. Any possible prejudice to the company was avoided by the union claiming damages only from June 1969. Hence it would be quite inconsistent with the spirit and policy of the City of Sudbury rule to apply it and hold the specific union claim non-arbitrable here. For this reason we hold that we do have jurisdiction to decide the

grievance of June 6, 1969 ... (at p. 338)

53 The Union also relied on Re Saint-Gobain Abrasives and CEP, Local 12, supra. In that case the arbitrator was of the view that there ought not to be a blanket rule that the withdrawal of any prior grievance automatically bars the filing of a subsequent grievance that raises the same issue. He noted:

> ... This is so because a grievance may be withdrawn for reasons other than an acceptance of the other side's interpretation. However, there are certain indicia that may be relied upon in making the determination as to whether the withdrawal constitutes a representation by the party withdrawing the grievance that it is content to be governed by the other side's interpretation. These indicators must be considered in light of the reality that at the very least the grieving party who has moved to challenge the other side's interpretation or application of the collective agreement, and is now withdrawing or abandoning its grievance, has reconsidered its position. When this reconsideration occurs in the latter stages of the grievance procedure after a discussion of the issue, the withdrawal is in writing, signed by a responsible Union official or otherwise sanctioned by the Union and where the withdrawal is not made on a without prejudice basis, it can reasonably be inferred without compelling evidence to the contrary, that the grieving party agrees with the other side's interpretation and is content to be bound by that interpretation going forward.
>
> It is to be noted that is always within the power of the grieving party to withdraw on a "without prejudice" basis. The effect of doing so is to tell the other party that although it is withdrawing the grievance, it is making no concession with respect to the underlying issue.
>
> The importance of stating that the withdrawal is on a "without prejudice" basis is emphasized by Professor Baum in Re Acme Strapping Co. and USWA, Local 6572 (1991), 22 L.A.C. (4th) 400 (Baum), where, after reciting from Brown and Beatty, Canadian Labour Arbitration, 3d edition (Aurora, Ontario: Canada Law Book), he concludes that (p 410):
>
> > On the whole, it is fair to say that taking the so-called generally accepted approach has foreclosed the submission of a second grievance which duplicates an earlier one that had been withdrawn. If the party wants to save the opportunity for reconsideration of the grievance, then the generally accepted view dictates that this must be done by withdrawing the earlier grievance on a without prejudice basis. This is the purport of Mr. O'Shea's decision in Re Union Carbide Canada Ltd. and USWA, Local 6962 (1975), 9 L.A.C. (2d) 220 at p. 224. There the Union clearly stated that it withdrew the earlier grievance on a without

> prejudice basis, and the Company accepted that decision.
> (at p. 81 - 82)

54 The Union argues this is particularly the case with respect to the 1997 grievance and maintains the rationale behind the rule leads to the conclusion the matter should be allowed to proceed. The Employer says this is simply not the law in British Columbia. I turn to reviewing what the principles in these cases establish.

55 In City of Burnaby, supra and Re Verspeeten Cartage Ltd. supra each arbitrator dealt with a request by the union to withdraw grievances. In HEABC (Fraser Canyon Hospital), supra, the arbitrator found he had no jurisdiction to deal with a grievance on the basis the first three grievances were withdrawn. He noted specifically, however, that different considerations may arise if the union were to withdraw a grievance "without prejudice" as occurred in at least one of the withdrawals that I must consider. That distinguishing factor is important in this case and also applies in part to the Employer's reliance on Howe Sound Pulp and Paper Ltd. v. CEP, Local 1119, supra. There is a difference between a simple withdrawal and one "without prejudice" and/or one that is contested.

56 I am of the view that the comments originating in Triangle Conduit, supra, and referred to in a number of cases are pertinent today. In particular, the comment that "rules established in the common law of arbitration - indeed any legal rules - must be interpreted with references to their underlying purpose and not in a rigidly legalistic way." (at p. 337), must be applied. In citing the purpose behind the rule, City of Sudbury, supra, is often relied upon. Critical in that passage, however, is the comment that:

> ... It follows, therefore, that if the grievor and/or the union actually or impliedly accept the decision of management they should not be allowed to have second thoughts on the matter and re-process essentially the same grievance at a later date. If this were to be allowed, management would never know whether, in fact, its decision had been accepted by the individual grievor or the union representing him and management could be plagued and harassed in what would be a plain abuse of the grievance procedure.
> (at p. 404)

57 There is no doubt that in most cases a withdrawal of a prior grievance similar in substance will operate to bar the consideration of a similar grievance in the future. It will lead to the conclusion that the grievor and/or the union actually or impliedly accepted the decision of management. In this case, however, a number of factors are important. First, the initial grievance was withdrawn on a "without prejudice" basis without objection from the Employer. This put the Employer on notice that the Union did not accept the Employer's position in this matter. That principle is generally accepted in the jurisprudence today. Second, the Union sought to withdraw the next grievance on the same basis. The Employer objected making clear it did not accept those same conditions. The arbitrator consistent with the jurisprudence in this area, allowed the withdrawal on November 25, 2003 without conditions, thereby allowing the effect to be argued should a further grievance be filed. The Union very quickly forwarded a letter to the Employer on December 8, 2003 making clear their

continuing objection and intent to file a grievance should they be of the view that a breach occurred again. This is similar to North American Lumber, supra as the Employer was on notice at the time of withdrawal that the union would re-file a grievance. Shortly thereafter they did so.

58 In these unique circumstances I find the Employer was aware the Union did not accept its position and indeed was prepared to raise the issue at the first instance it occurred again. The fundamental purpose behind the rule is therefore not offended in this case. This is particularly so because the Union limits it remedy to prospective declaratory relief from the Award forward. While the situation here is unfortunate in that the Employer has been subjected to the expense of two previous grievances and withdrawals, I do not find an abuse of process established in the circumstances set out above or significant prejudice to the Employer. The circumstances are unusual in that the Union clearly identified each time it was not acceding to he Employer's interpretation. I note as an aside, however, at some point, despite this, consequences may flow such that the Union will be considered to have accepted the decision in order to avoid an abuse of the grievance procedure as articulated in City of Sudbury, supra. It is unlikely the Union would have been able to withdraw the grievance again without consequences in this case.

59 I now move to the merits of the interpretive issue in this case.

60 The Employer relies on the history of Article D.14 Instructional Assignment Clause; the Larsen award between the parties and past practice in support of its position.

61 I note first whether the clause is ambiguous or not, the most that can be said about practice as established by the evidence, as the Union described, it is a "mixed bag" of preparation time being made up. Further, I agree with the Union the real issue is not re-scheduling per se but whether the clause itself requires the provision to elementary teachers of 90 minutes of time for the purpose of preparation. While re-scheduling may be an aspect of preparation, the real issue is whether 90 minutes of preparation time for elementary school teachers is required by the collective agreement.

62 I set out a review of the clause from 1989 to present here for ease of reference.

63 Clause 1 was as follows:

1989 - 1990

> The instructional time shall be twenty-five (25) hours per week for full time elementary teachers and twenty-seven and one-half (27 1/2) hours per week for full time secondary teachers.

1990 - 1992

The instructional time shall be twenty-five (25) hours per week for full-time elementary teachers and twenty-seven and a half (27.5) hours per week for full-time secondary teachers.

1992 - 1994 to present

The maximum weekly instructional assignment for a full time elementary teacher shall be 1425 minutes per week, less 90 minutes which shall be provided for the purpose of preparation.

64 Clause 3 was as follows:

1989 - 1990

Full time secondary teachers shall be entitled to 12.5% of total instructional time for purposes of preparation.

(4) Full time elementary teachers, effective September 1989, shall be entitled to sixty (60) minutes per week for purposes of preparation time. (6) Effective June 30, 1990, full time elementary teachers shall be entitled to eighty (80) minutes per week for the purposes of preparation time.

1990 - 1992

Full time secondary teachers shall be entitled to 12.5% of total instructional time for purposes of preparation.

Effective June 30, 1991, full time elementary teachers shall be entitled to ninety (90) minutes per week for the purposes of preparation time.

65 The present Clause 3 was previously Clause 2. Clause 4 covers the same subject matter as it has previously done.

66 In my view the language in Article D.14(1) is clear and unambiguous. The provision of preparation time is modified by the word "shall". The case law setting out the mandatory nature of this proposition is well established. Further, as pointed out by the Union, where the time is to be pro-rated, it is specifically done so as in Article D.14(4). That clause provides that part-time teachers of 0.4 FTE or more shall receive preparation time pro-rated to their FTE status.

67 Furthermore, in my view Article D.14 does not refer to re-scheduling but rather the obligation to provide a specific amount of preparation time. The previous case between the parties, School

District 75, supra (Larsen) supports this conclusion. This same Employer was of the view in that case it had to provide preparation time. The only issue was whether that time was to be provided in the same semester. The case commenced with the comment:

> The issue in this case is narrow, which is to say, whether under the terms of the collective agreement teachers are required to be provided with preparation time on a weekly basis. While the Employer acknowledges that it has an obligation to provide preparation time, it takes the position that it is entitled to allocate it in a single semester ... (at p. 2)

68 There was no issue in that case that teachers were getting the proper amount of preparation time. The arbitrator found, however, there was:

> ... no ambiguity in that provision (Article D.4 (2)). What is important to understand is that subparagraph 2 prescribes a formula for the assignment of preparation time which is integral with the maximum instructional assignment of 1545 minutes per week. While preparation time is not defined by subparagraph 3 as being part of an instructional assignment, the 193 minutes is required to be deducted from the maximum 1545 minutes per week ... (at p. 7)

69 Arbitrator Larsen went on to find the Board could not allocate the full 1545 minutes per week as an instructional assignment in one semester because the effective maximum weekly instructional time is really (1545) - (193 minutes) = 1352 minutes. From this conclusion, the Employer now argues in this case that this clause essentially concerns the maximum instructional time only that can be assigned. It maintains if the instructional time does not exceed the maximum, the preparation time set out therein is not mandatory.

70 That conclusion, however, does not follow. The arbitrator in School District 75, supra, found the language is not ambiguous and ultimately concluded that "193 minutes of preparation time must be given each week" (at p. 9).

71 The Union in this case points out the clause before me is essentially identical with the substitution of different amounts of time and its applicability to elementary teachers. I agree. Those are the only differences between the clauses. As Arbitrator Larsen noted the language is clear. It requires the provision of 90 minutes of preparation. If that is missed, the preparation time must be provided. Under clause (2), secondary teachers are provided with the 193 minutes set out in the clause. Under clause (1) elementary teachers must be provided with the 90 minutes of preparation time as set out in Article D.14(1).

72 I do not find the history of the change in the collective agreement to affect this conclusion. The clause now combines maximum instructional assignment time and the provision of preparation time in one clause. That combination does not take away from the fact it deals with two issues - maximum instructional time and preparation time. Indeed the history of this clause supports this and establishes that both issues had previously been dealt with in Article D.4 (now D.14).

73 Finally, as noted earlier, past practice is ultimately not helpful to the Employer in this case. First, as I have found no ambiguity in the language, it is not of assistance. Even if ambiguity were present, however, it is not helpful. The most that can be said is that there was a "mixed bag" of practice or a mixed practice. The fact the Agreed Statement of Facts records a comment from Junek that a survey of principals he had done in 1991 confirmed no practice of making up preparation time does not establish a mutual understanding. There is no evidence of a consistent direction from the Employer on this point. Rather, throughout it was clear the parties had a difference of opinion over the years on this matter. Indeed the comments of Trask about this area amply confirmed that reality. This is also evident by the bargaining proposal and the different way each party treated the nature of that proposal. The fact no grievance was filed in a four year period does not change this conclusion in view of the differences historically identified between the parties on this point.

74 All of this, in my view supports the Union's interpretation in this case. The grievance is accordingly successful. Article D.14(1) requires the Employer to provide elementary teachers 90 minutes of preparation time per week. I retain jurisdiction should the parties require clarification on this declaratory remedy.