

IN RE ARBITRATION BETWEEN:

ISD #625, ST. PAUL PUBLIC SCHOOLS

and

EDUCATION MINNESOTA – ST. PAUL FEDERATION OF TEACHERS

DECISION AND AWARD OF ARBITRATOR

BMS No. 12-PA-0566

JEFFREY W. JACOBS

ARBITRATOR

7300 Metro Blvd. #300

Edina, MN 55439

Telephone 952-897-1707

E-mail: jjacobs@wilkersonhegna.com

August 6, 2012

IN RE ARBITRATION BETWEEN:

ISD #625, St. Paul Public Schools,

and

DECISION AND AWARD OF ARBITRATOR

BMS # 12-PA-0566

Teaching assignment grievance

Education Minnesota – St. Paul Federation of Teachers.

APPEARANCES:

FOR THE FEDERATION:

Meg Luger Nikolai, Staff Counsel Educ. MN

Jason McIntyre, Art Teacher

Nancy Solo-Taylor, French Teacher

Pete Grebner, Chemistry Teacher, Steward

FOR THE DISTRICT:

Jeff Lalla, General Counsel

Dan Mesick, Principal, Como Park High

Wayne Arendt, former Labor Relations Manager

Timothy Caskey, Exec. Dir. of Human Resources

Doug Revsbeck, Principal at Harding High School

PRELIMINARY STATEMENT

The hearing in the matter was held on June 4, 2012 at 9:00 a.m. at the St. Paul Schools Administration Building, 360 Colborne Ave., St. Paul, Minnesota. The parties submitted post-hearing Briefs dated July 6, 2012 at which point the record was closed.

CONTRACTUAL JURISDICTION

The parties' collective bargaining agreement covering period from July 1, 2011 to June 30, 2013. Article IV sets forth the grievance procedure. The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services.

ISSUE

Whether the District violated Article 9, Section 4 of the labor agreement when it when it failed to pay teachers teaching an extra course according to the schedule set forth therein. If so, what is an appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 8 BASIC SALARY SCHEDULES AND CONDITIONS FOR COMPENSATION

SECTION 4 COMPENSATION FOR EXTENDED SCHOOL YEAR

A teacher whose regular contractual assignment in any given year is extended beyond the school year as defined in Article 13, Section 2, shall be compensated on a pro rata basis except as noted in Appendix B.

ARTICLE 9 ADDITIONAL COMPENSATION PROGRAMS

SECTION 4. ADDITIONAL DAILY TEACHING ASSIGNMENTS.

Classroom teachers who, with the approval of the Superintendent, are assigned to a daily additional hour of classroom duties beyond the regular full teaching assignment for one (1) month or more, shall be paid the appropriate proportion of the annual rates listed in this section. This provision shall not exempt classroom teachers from preparation time required by the Minnesota State Board of Education or provided by the Board. Excluded from this provision are teachers in adult education programs or programs carried on outside the teacher's day as defined in this Agreement.

Effective July 1, 2011

BA	BA+15	BA+30	BA+45	BA+60/MA	MA+15	MA+30	MA+45	MA+60/SPEC	PhD/EdD
3	4	5	6	7/8	9	10	11	12/13	14
\$5,190	\$5,278	\$5,398	\$5,556	\$6,039	\$6,107	\$6,180	\$6,281	\$6,354	\$6,474.

ARTICLE 13 – TEACHERS BASIC CONTRACT YEAR AND TEACHER’S DAY

SECTION 2. BASIC CONTRACT YEAR

Subd. 1. For 2011-12 and 2012-13, the basic contract year shall consist of one hundred eighty-seven (187) teacher duty days. Evening conference are (sic) part of this one hundred eighty-seven (187) duty day work year. Each evening conference, for up to three (3) hours per evening, comprises one-half (1/2) of a duty day.

SECTION 3.

Subd. 1. For all teachers, the school day on which salaries shall be based is the period of time that the school is regularly in session for students plus reasonable time as is necessary to plan the day’s work, confer with pupils and parents, and perform such other duties that are appropriate for teachers. It shall include a daily duty-free lunch period. However, a teacher may accept an extra pay assignment in lieu of the duty-free lunch.

It is recognized that every teacher’s professional day, whether classroom or support staff, extends beyond student contact hours to include time for such responsibilities as additional planning and evaluation, faculty and committee meetings, parent conferences additional professional education and other professional responsibilities of the teacher.

It is further recognized that these additional activities are not necessarily accomplished in the building to which the teacher is regularly assigned, and if the teacher leaves the building, it is to be for professional or extraordinary personal reasons.

Subd 4. Secondary Preparation/Planning Time

Within the student day, for every twenty five (25) minutes of classroom instruction time assigned to a secondary classroom teacher on a regular daily basis, five (5) additional minutes of preparation time shall normally be provided in one or two uninterrupted blocks during the student day. Variations developed by the principal and staff in any building and approved by the Superintendent and the Board of Education shall be permitted, so long as the intent of this provision is observed, and the approximate equivalent to the preparation time per day prescribed herein, is provided within a week.

FEDERATION'S POSITION

The Federation took the position that the District violated the provisions of Article 9 Section 4 when it required teachers at Como Park high School to work a 7 period day without additional compensation. In support of this the Federation made the following contentions:

1. The Federation asserted that the language of Article 9 section 4 is clear and unambiguous and does not grant to the District the unfettered right to implement a 7 period day without providing the additional compensation called for in the contract. As a result, there is no need to resort to external evidence or negotiation history to ascertain the intent of the language – it requires that if the District assigns an “additional hour” of classroom duties it must provide the extra compensation.

2. The Federation noted that the language at issue has been in the labor agreement for many years and that the District's witnesses were unable to provided convincing evidence of the bargaining history or of any intent there than as expressed in the plain language.

3. The Federation asserted that even if one looks at the history of this clause, there is evidence to suggest that teachers have be compensated an additional hour of classroom teaching. Several Federation witnesses testified that when they were assigned to work additional classes they were paid under this language. It has also been used in instances where a teacher's duty day is extended due to being assigned to different school or where prep time or lunch period have been lost due to extra work assignments or from having to travel between schools.

4. The Federation noted that most of the teachers at Como Park teach five classes per day and that the addition of an extra class would, not surprisingly, add considerable work to their day. This grievance applies to the 7 teachers, out of a complement of 74 teachers at Como Park, who were assigned to teach 6 classes (and no PLC) as opposed to teaching only 5 classes. That extra class would mean additional preparation of lesson plans, certainly more tests and papers to grade and review, more students to deal with and more parents and guardians to deal with in both conferences and other matters. The Federation asserted that there is no question that the intent of the language was to provide additional compensation in exactly these circumstances. Further, it would be manifestly unfair and a strained reading at best to disallow the compensation when it was clear that the additional classroom responsibility would result in so much extra work.

5. The Federation focused too on the Professional Learning Community, PLC, time that teachers use to enhance their teaching skills and to discuss educational needs of students and to better provide education services to their classes. These are embedded into the teachers day represent one of the seen periods. Accordingly while some of the teachers work a 5 class, 1 lunch period and 1 prep period day. Many teachers, those who are active in PLC's, work a 6 class and 1 PLC period day. The District's action means that these are now effective teaching and additional class and should be compensated according to the provisions of Article 9, section 4 set forth above.

6. The Federation further asserted that despite other schools going to a 7 period day, those situations should not govern the result here since Como Park has not had a seven period day in the recent past. Further, there was a formal MOU executed between the parties with respect to the other schools. Thus, it is clear that the parties intended that the plain language of Article 9 set forth above would require extra pay unless there was an MOU to some other effect. Here there is no such MOU in place and the language of Article 9 section must govern this situation.

7. Harding High School adopted a 7 period day some years ago but, the Federation asserted, all teachers there had a PLC period. This resulted in a 5-1-1 schedule – 5 classes, a prep period and a lunch period. There were concerns raised though about this by the teachers.

8. The Federation went through the history of PCL's and the discussions surrounding a 7 period day at Como Park. Currently there are 74 licensed teachers at Como only 7 of which teach more than a 5 period day. Federation witnesses were quite adamant that teaching a 6 period day (he result of the 7 period day assignment) is generally a bad idea and that it means far more work and interaction with students and parents and that everyone who ever agreed to teach a 6th period “regretted it,” or words to that effect.

9. With respect to the language of Article 9 section 4 itself, the Federation argued that since only 7 of the 74 teachers at Como park teach more than 5 classes, that must consider the norm and should be equated with the term “full teaching assignment” as used in the operative language.

10. Further, the language of Section 4 speaks in terms of “additional daily teaching assignments.” This means that any additional teaching assignments must be compensated. The Federation cited *St. Cloud Area School District and St. Cloud Education Federation*, 10-PA-1102 (Imes) for the proposition that “teaching” means “direct provision of instruction to District students.” In the St. Cloud matter Arbitrator Imes ruled that the term “teaching” “incorporates the concept of providing instruction regarding a specific subject area through prepared lesson plans and establishing a method of evaluating whether those being instructed are acquiring the knowledge being imparted.” Slip op at 15. There the District argued that “resource” time (essentially study hall, was in reality teaching time since the teachers supposed to be helping students with reading. The Arbitrator disagreed with the District and applied the definition of “teaching” set forth above.

11. The Federation argued that by analogy, any assignment whereby a teacher is “providing instruction regarding a specific subject area through prepared lesson plans and establishing a method of evaluating whether those being instructed are acquiring the knowledge being imparted” is teaching time and thus requires additional work. The assignment of an additional period should thus be considered an extra “hour of classroom” duties within the meaning of Section 4.

12. Further PLC’s are not teaching assignments pursuant to Article 9 Section 4. Thus, the additional of an extra class must constitute an additional classroom duty and be compensated.

13. Further, adopting the District’s interpretation would render Article 9 Section 8 meaningless. That section makes no reference to the loss of prep time where teachers are assigned work as team leaders. The Federation cites the time honored interpretive tool that arbitrator’s should not interpret one clause in such a way as to render other clauses moot.

14. The Federation argued too that the contract nowhere provides that compensation is due solely to the loss of prep time. Indeed, the arbitrator is being asked to assume matters that are not in the contract at all and should reject that claim by the District. Article 9 Section 9 for example makes specific reference to the loss of prep time. The parties could have added a specific provision calling for the extra compensation in Section 4 only if there is a loss of prep time but they did not. The obvious implication is that the parties ‘ intent was to compensate teachers where they were being asked to provide any additional classroom duties – just as was assigned here.

15. Moreover, the Federation asserted that there is insufficient evidence of a binding past practice here despite the fact that some schools have implemented a 7 period day in the past. There is no consistency to this as many schools do not implement it or have but have then gone to a different schedule. The practice has not been in place for long enough to be considered longstanding by any definition – it has been in place for perhaps 2 years at one high school and, as noted above, there was a specific MOU in place for the 7 period day in the early 1990’s. Even the District acknowledged that this is a new problem, since PLC’s have not been embedded into the day until the 2008-09 year.

16. The Federation characterized the practices with regard to this as “all over the place.” Sometimes there is compensation for traveling, others where there is an actual lengthening of the day. Thus there is no mutuality since the Federation has never agreed that the assignment of extra classroom duties can be done in these circumstances without additional compensation. Further, even though there are specific provisions calling for compensation in these very circumstances, the District in this matter invoked only Article 9 section 4 for that proposition. The Federation quared – if there are specific provisions calling for compensation in these circumstances why then is Article 9 Section even there if not to provide compensation for exactly this scenario – i.e. where a teacher is assigned to an additional classroom duty with all of the attendant extra work that entails.

17. Finally, there has been no waiver of the Federation’s right to file this grievance. The mere fact that it has not filed a grievance prior to this matter does not result in the loss of that right. The Federation cited several arbitral decisions for the notion that the non-exercise of a contractual right (here the right to grieve over an issue) does not amount to a 'negative past practice' or a forfeiture of it in the future. The Federation has a right to enforce its contract as it sees fit and in response to those facts that it deems worthy of a grievance.

18. The essence of the Federation’s argument is that the assignment of a 7 period day results in additional classroom duties for seven teachers included in this grievance and that the plain meaning of Article 9 section 4 requires the payment of additional compensation. The District’s reliance on management rights or past practice is misplaced and must be rejected.

The Federation requests that the Arbitrator sustain the grievance and issue an order requiring the District to compensate Como Park High School teachers with a six-course class load according to the schedule set forth in Article 9, Section 4 of the parties’ collective bargaining agreement. Specifically, the District should be required to make whole teachers who did not receive pay for their additional teaching assignment in 2011-2012, and the District should be ordered to comply with the terms of that Article in successive school years.

DISTRICT'S POSITION:

The District's position is that there was no contract violation and that the District retained the right to assign a 7 period day as long as prep time and punch periods were not affected. In support of this the District made the following contentions:

1. The District agreed that many of the underlying facts of the case were not disputed and that prior to the 2011-12 school year Como Park High School had a 6 class period school day. Teachers taught five classes and had a period for prep time and an additional period for PLC, intervention (INT) and Professional development, (PD). The District also pointed out that elective teachers had the option of either having the same duty day assignments as the core subject teachers or teaching a sixth class and having the seventh period as their prep time. There were 11 teachers who were given this option. Four chose to teach just 5 classes and are not involved in this grievance. Others had unique schedules and are also not involved in this grievance. The District noted that there only 5 teachers who are involved here and those chose to teach six classes. See Exhibit 7.

2. The District asserted that PLC is instructional time, contrary to the Union's assertion. The District further asserted that PLC was embedded into the school day to enhance teachers' ability to engage in professional development and thus become better educators and mentors for the children.

3. The District noted and acknowledged that teaching an additional class may mean more work for the teachers, i.e. More students and parents to interact with, more papers and tests to grade and more time in the classroom in general. However, the District noted that this is no different than having a larger class size – something over which the Federation has no control and which is a matter of inherent managerial discretion as well. If the district decided due to budget cuts for example to increase class sizes, it could do so and there would be of course more work entailed with that as well.

4. The District also went through the individual teachers involved in this case and their actual schedules and noted that many of them teacher the same classes and thus do not have to create additional lesson plans. Thus the claim that there will always by definition mean wok planning for these teachers is in many cases simply untrue. See pages 4-6 of District Brief.

5. The District relied heavily on the testimony of Mr. Wayne Arndt who was a business agent for the Federation of teachers and later as a negotiator for the St. Paul School District. He indicated that he was familiar with the history and intent of Article 9 from its first placement in the CBA in the 1970's. He testified that the operative portion of this language is actually the second sentence, which reads as follows: "This provision shall not exempt classroom teachers from preparation time required by the Minnesota State Board of Education or provided by the Board." That he testified meant that only when a teacher loses prep time is there the additional compensation provided for in that language paid to the teacher. The language was placed there to meet State regulations regarding prep time and that if a teacher lost prep time for more than a month the teacher's consent was required and the teacher was entitled to the pay called for in Article 9.

6. The District cited examples for his this language has been applied over the course of many years and asserted that if a teacher had to work more hours than the "normal" work day (here from 7:30 to 2:00) that teacher would receive additional pay. If for example the teacher had to commute between schools and lost a lunch period or prep time the pay was due. If the teacher started at a high school but finished the day at an elementary school, which gets out later, the pay was due.

7. The District asserted that the normal day is and has been 6.5 hours and that the intent of the language is to compensate a teacher if they are required to work longer than that but was never applied or intended to compensate teachers if they were required to teach more classes within that time period,. The District further asserted that it has an inherent managerial right to assign however many class periods it wants during the normal work day.

8. The District noted that the basic duty day is set forth in Article 13 and defines it as “ the period of time that the school is regularly in session for students.” Here as noted, that is 6.5 hours from 7:30 to 2:00 each day. Thus any schedule changes with that period are within management’s authority and it is only when a teacher is required to work outside those hours or loses prep or lunch time that any compensation s due under Article 9, section 4. Thus there is no provision calling for extra compensation for duty assignments made within the duty day as define in Article 13 – those may be made at the discretion of the District.

9. The District also asserted that the CBA covers the entire District, not one high school. Further that other high schools have gone to a 7 period day in the past without complaint from the affected teachers. The District argued that there is thus a strong past practice in place that should be used to interpret the language despite the literal reading asserted by the Federation.

10. This issue did not arise until the PLC’s were embedded into the 7 period day. Along those lines the District noted that the case essentially revolves around the meaning of the term “regular full teaching assignment” as used in Section 4. The term “regular full teaching assignment” is not defined in the CBA but the District asserted that it has the same meaning as the term “regular contract assignment.” That, according to the District is not the “average” of the number of classes taught at Como nor is it what the majority of those teachers teach but is rather the duty day as defined above. The District argued that a regular contractual assignment is identical to a regular teaching assignment and includes all duties as assigned during the duty day whether they are in the classroom or not. Thus, the 7th period is just such an assignment and is not subject to additional pay.

11. Further the term regular contractual assignment means whatever duties are assigned to that teacher during the regular duty day, and include the duty free lunch and prep time. The District asserted that the literal interpretation by the Federation must be rejected and that the phrase must be viewed in the context of all other provisions of the CBA.

12. The District distinguished *St. Cloud Area School District and St. Cloud Education Federation*, 10-PA-1102 (Imes) and noted that the operative CBA language there was quite different and in fact actually used the term “average” in defining the teaching time. Further there was a vastly different issue there that involved whether “resource/study hall” time was truly teaching time.

13. Here there is a distinction in article between “classroom” duties and the “regular teaching assignment.” “Classroom” in that language is modified by teaching whereas the phrase “regular teaching assignment” is not. Thus, a “regular teaching assignment” includes matters other than teaching in a classroom, i.e. and include PLC time. Here too, the INT time does have some direct student contact components so this is a distinction as well.

14. Moreover, there is a specific acknowledgement in the CBA that the teacher’s professional day includes more than just teaching time, see Article 13, section 3(1) wherein the parties specifically noted that there are a number of additional duties for which there is no additional compensation. These duties can all be performed during the school day as assigned subject only to the additional pay for prep time and the duty free lunch period.¹

15. More importantly, according to the District, the term “teaching time” as used in the *St. Cloud* matter is a very different term and carries with it a very different meaning than “regular teaching assignment.” There was also no bargaining history or evidence of a past practice as there is here. The District reiterated its claims that the parties have over the course of time interpreted this consistently with the District’ position here and that this practice now trumps the Federations arguments. The language is ambiguous and the clear evidence of practice should now trump the claim that the language is “clear” as the Federation asserted.

¹ The District also noted that there may be additional compensation for certain special education duties as set forth in Article 13 but those are not directly involved in this matter.

16. The District claimed that there is now a binding past practice in place regarding the application of the language of Article 9 as set forth above and that it has never been applied to require extra compensation in situations like this in the past. It has only been used to provide extra compensation in those circumstances where a teacher works more hours than the normal day or loss either prep time or lunch period as the result of an extra assignment. The District went through the elements of past practice and asserted that each is present here and cited Elkouri for that proposition.

17. The District also cited to the 1990 MOU and asserted that it actually supports its position here since that MOU made no reference at all to Article 9, even though it was part of the CBA at that time. Rather, it established a 7 period day at Humboldt High and the only reason such an MOU would have even been necessary at that time was due to the requirement of teacher prep time. That was collectively waived by those teachers teaching a 6th classes and were thus shorted their prep time.

18. The essence of the District's argument here is that the assignment of classes is a matter of inherent authority which has not been diminished or waived by the terms of the CBA. Further, even though the literal meaning of the words in Article 9 section 4 may appear to give the Federations the compensation it seeks, the longstanding and consistent practice has been to the contrary and limited to a very specific set of situations not presented in this matter. Finally, the term regular teaching assignment is limited to the number of hours, not the number of periods assigned with that day, and the compensation requirement does not extend to the assignment of classes with the duty day.

The District seeks an award denying the grievance in its entirety.

MEMORANDUM AND DISCUSSION

FACTUAL BACKGROUND

Most of the essential facts of the case were not in dispute. Commencing with the 2011-12 school year the principal at Como Park High assigned certain teachers, the elective class teachers, to work a 7 period day. This meant that they were required to teach more classes than the core subject teachers. It was also clear that the PLC was embedded into the school day very recently.

It was further clear from the evidence that the vast majority of teachers at Como work a so called 5-1-1 schedule and teach 5 classes per day, get one hour prep time and a one PLC period. They also get duty free lunch period. PLC's are learning communities that give teachers the opportunity to meet with colleagues and discuss enhancements to the educational experience of the children. PLC's were not embedded in the schedule until very recently.

The teachers affected by this grievance are required to teach a 6-1 schedule and teach 6 classes.² It was also clear that the vast majority of teachers at Como teach five classes per day. The evidence showed too that the additional hour could be PLC, Intervention or Professional development.

The language of Article 9 Section 4 has been in the parties' contract since approximately 1977. It has remained unchanged since that time – what has changed is the addition of PLC's and the embedding of the PLC's into the daily schedule. There was conflicting evidence regarding the bargaining history of this provision but it was clear that at the time it was first negotiated the notion of PLC's did not exist in its current form and that the PLC's were not embedded into the daily schedule. Further, it was clear that while the provision has been used to provide compensation in the instances listed by the District, i.e. where teachers lose prep or lunch time or are required to work more hours than the normal day, there was no evidence that the parties negotiated the language with the intent that that “list” of applications was exclusive.

The normal duty day at the high schools is 6.5 hours from 7:30 to 2:00.³ There was some evidence to show that when teachers are for various reasons required to work beyond those hours they are paid the additional compensation set for the in Article 9. They are also paid if they lose their prep time or duty free lunch period.

² There was some dispute about exactly how many teachers are affected by this matter at Como. The Federation asserted that it was seven of the 74 teachers there while the District asserted that it was only 5 or perhaps 6. It was not absolutely clear from this but given the award below, the teachers who work the 6-1 schedule and who have not been compensated pursuant to Article 9 section 4 set forth above and the teachers entitled to the compensation claimed in this grievance.

³ There was some indication that the teachers are to be there slightly earlier than that, i.e. 7:15 and that they stay until 2:15 but that slight addition was not apparently germane to the determination of this case. For purposes of this matter it was assumed that the duty day was as set forth I article 13 and is 6/5 hours per day.

As discussed more below however, this evidence fell short of establishing a binding past practice due to the recent changes in the way PLC's were embedded into the schedule.

There was evidence to show that other schools have scheduled a seven period day in the past without apparent grievance from the Federation or complaint from the teachers. There was one instance where a Home Economics teacher at Harding High complained about the schedule but that was because she found it difficult to shop for things outside the school during the day. That was not apparently a complaint regarding the extra pay that is the basis of this matter.

The evidence as clear that the teachers at Como were consulted about the seven period schedule prior to its implementation but that at the end of the day the District took the position that it had an inherent right to schedule in this manner and that there was no obligation to provide the additional compensation sought by the Federation now.

It should be noted at the outset too that the Federation did not claim that the District was without the power or right to implement the seven period schedule. There is no limitation on that right in the CBA and indeed there was evidence to show that the District has never waived its right to implement a schedule that it felt was in the best interests of the District and the students. There was an MOU negotiated between the parties in 1990 but a review of that did not provide any support for even a potential claim that the District was somehow limited or waived its right to implement whatever schedule it wants.

As noted herein, this matter does not involve the question of whether the District has the right to implement the schedule – it does – but rather whether there is the contractual obligation to provide the additional pay set forth in Article 9 section 4 for the teachers who are required to teach “a daily additional hour of classroom duties beyond the regular full teaching assignment.”

There was no dispute that the seven period schedule was implemented for the 2011-12 school year and that several teachers at Como were required to teach an additional class. It was also clear that this assignment was for more than one month as required by the terms of Article 9 Section 4.

Further, the evidence showed, and this will become more important later on in this discussion, PLC time is not instructional time. The District asserted that it was but the evidence showed that it is not. There is no student contact during PLC time and while the District asserted that for the INT time there is some student contact the evidence showed that this is quite similar to the resource time in the St. Cloud matter before Arbitrator Imes. Her analysis is both analytically correct and is adopted here as well. Thus as a factual matter, PLC time was determined not to be instructional or “teaching” time.

CBA LANGUAGE

As in any matter involving contractual interpretation the obvious starting point is the language itself. On its face Article 9 Section 4 appears clear enough and requires additional compensation for teachers who are assigned to a “daily additional hour of classroom duties beyond the regular full teaching assignment.” The District acknowledged that the literal reading of this seems to support the Federation but argued that practice and usage over time have given greater weight to its position. The Federation argued that the language is clear and unambiguous and that resort to other interpretive tools such as past practice or bargaining history is unnecessary on this record.

At least a large part of the result here revolves around the meaning of the term “regular full teaching assignment.” That term is not defined in the CBA and as one might imagine, the parties had very different definitions for it. The District argued that the term means only the regular day as defined in Article 13. The Federation focused on the fact that only a few, perhaps 7 or fewer, teachers are working the additional class and that the “full teaching assignment” is thus what the vast majority of teachers teach at Como – here that is five classes. The Federation asserted that five, not six classes is the norm and that the term must be taken in context and that the meaning can be derived by the “normal” teaching load at any paritcular high school even though the language is in one contract covering the entire District. Thus, each case must be taken on its own merits and its own unique facts.

Further, terms in a collective bargaining agreement are presumed to mean something and where there is no definition provided for in the contract that meaning must be derived from the context and the factual reality in why they appear. Here it is clear that the intent of that term, while not a perfect definition, what is generally regarded as the normal teaching load. The other obvious fact is that only a few teachers are required to teach what by all account is an “extra” class. The language of Article 9 on its face appears to cover this very scenario and unless there is clear evidence of a practice or other intended meaning, the clear language will prevail.

On this record, the Federation’s arguments have greater merit. As noted above, PLC’s are not instructional time and thus are not to be counted as teaching in the strict definition of that term. As noted above, the rationale and analysis of Arbitrator Imes and her definition of “teaching” is supported on this record as well and is as she stated. Arbitrator Imes stated in *St. Cloud* as follows: “T]eaching time incorporates the concept of providing instruction regarding a specific subject area through prepared lesson plans and establishing a method of evaluating whether those being instructed are acquiring the knowledge being imparted.”

Moreover, a careful reading of the language supports the Federation’s assertions here as well. The term “hour” in Article 9 Section 4 is modified by the term “classroom duties” implying strongly that if a teacher teaches an additional hour of classroom duties there is the additional compensation. The District argued that “hour” as used in Article 9 Section 4 is not equated with a class period but is rather a block of 60 minutes of time. Accordingly unless the teacher either works more than the 65 hours per day or loses prep time or lunch period, there is no additional pay required. The language simply does not say that though and that argument rang hollow on this record.

The District argued that the more important clause is actually the second sentence that provides: “This provision shall not exempt classroom teachers from preparation time required by the Minnesota State Board of Education or provided by the Board.” First, this provision was not designed to cover this scenario but rather clarified that teachers are not to lose their prep time.

Further, the language cannot be read as exclusive – otherwise there would be no need for the first sentence making it clear that where a teacher is required to teach an additional classroom hour beyond the full teaching assignment, there is additional compensation.

The District also argued that the term “regular full teaching assignment” is to be read synonymously with “regular contract assignment.” The difficulty with this is that under generally accepted interpretive principles, the use of a different term in one part of the labor agreement connotes a different meaning. If the parties had intended that the additional compensation was *only and exclusively* to be paid where and only where the teacher was required to work additional hours beyond the duty day as defined in Article 13 they could easily have just said that. Instead the parties used this language which, when read literally, supports the Federation’s argument.

Reading the contract as a whole there were other possible terms that could be used to interpret this language. In Article 8 Section 4 the parties used the term “basic contractual assignment.” That language however references Article 13 and speaks in terms of the basic compensation. Article 13 speaks to the duty year and day. If the parties had intended that the only way to receive additional compensation was to work being those prescribed hours they would presumably have said that as well and may well not have needed the language in Article 9 unless of course there was an intent that the additional compensation provisions of Article 9 were for something beyond merely working more hours – i.e. working beyond the regular full teaching assignment. Here, it was clear that the terms “full teaching assignment” in Article 9 and “basic contractual assignment” in Article 8 were not the same.

Finally it should be noted that nothing in this decision undercuts the District’s inherent right to assign classes and to establish teaching assignments for all teachers. That however is not strictly the question in this case. The question is whether the contract requires additional pay under these circumstances. As noted above, the contact language the parties negotiated into their agreement does require that for the teacher who were assigned to work the 6th class and who were not paid additional compensation for that.

PAST PRACTICE ARGUMENTS

As noted above the district asserted that over time the parties have applied this language in very limited ways and that thus language was never intended to provide compensation where a teacher is assigned more than the normal teaching load for other teachers in that school. Despite the apparent literal meaning of the language, resort must be made to the practice and the act that there have been other instances where schools have gone to a seven period day without a grievance or even much complaint from the affected teachers.

Several facts undercut this argument. First, as Elkouri notes, “... caution must be exercised in reading into contracts implied terms lest the arbitrators start remaking the contracts which the parties have themselves made. The mere failure of a Company over a long period of time, to exercise a legitimate function of management, is not a surrender of the right to start exercising such right. ... *Mere non-use of a right does not entail the loss of it.* See Elkouri at 635, citing to *Esso Standard Oil*, 16 LA 73 (McCoy 1951). (Emphasis added). This applies to the failure to file a grievance as well. While the failure to file a grievance may well be a fact to consider that alone does not necessarily equate with the creation of a binding past practice.

Thus the mere fact that the Union under these facts never brought this up before does not necessarily make it a binding piece of the agreement, especially when such an interpretation flies in the face of clear contract language.

What was lacking here was any sense that the Union had agreed to the District’s interpretation. This is vastly different from the situation where such a situation has come up before or there was a grievance filed and either a settlement of that grievance or an arbitral award. The scenario presented here was that this simply never came up before. Thus, on these facts it was questionable as to whether this was a true past practice or not.

One need not go into a law review analysis here, since there was insufficient proof of a binding past practice. It is crucial to distinguish between a practice versus a binding past practice which can be equated with actual contract language. Different commentators have differing definitions and elements but generally a past practice can be defined as a mutually accepted or acceptable response to a recurring set of circumstances. It generally requires that the practice be consistent, longstanding and mutually accepted by the parties. It must also be to a consistent set of circumstances where the practice either changes or the underlying circumstances have not either been consistent or longstanding, those factors undercut the existence of a binding past practice.

Here several of those elements were lacking. First as noted above, while there has been no grievance filed over this, it was also shown that this has not arisen at Como until now. First, the PLC's were not embedded into the schedule until relatively recently. The notion of longevity was lacking. Further, the element of consistency was also not shown to be present. The evidence showed that this has not occurred in the past much, if at all, at least not at Como. Embedding PLC's is new and both parties recognized that. The evidence here demonstrated that there was no mutuality of agreement on this, even though the Federation has not filed grievances over this in the past. The facts of how the seven period day was done and who it affected were shown to be different at the other schools where that has been tried – again undercutting the mutuality element. On this record there was insufficient proof of a practice to undercut or obviate the language of Article 9.

Finally, even though some teachers were given the option to teach 5 or 6 classes, the District eventually took the position that it had the right to assign these classes. The District certainly does have that right but the language of Article 9 requires the payment of the additional compensation.

At the end of the day it must be remembered that only a few teachers were required to teach the additional classes. As with all such cases different facts may give rise to a different result but on this record, the clear language of Article 9 supports the Federation's claims.

Accordingly, the grievance is sustained and the additional compensation called for in Article 9 must be paid for the 2011-12 school year to those teachers who were assigned to teach a 6th class and who were not paid the additional compensation.

AWARD

The grievance is SUSTAINED as set forth above.

Dated: August 6, 2012

St. Paul Schools and Education MN - Award

Jeffrey W. Jacobs, arbitrator