BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between ST. FRANCIS FEDERATION OF NURSES AND HEALTH PROFESSIONALS, LOCAL 5001 and ST. FRANCIS HOSPITAL	Case 16 No. 47178 A-4892

Appearances:

Ms. Carol Beckerleg, Field Representative, appearing on behalf of the Union.

Quarles & Brady, Attorneys at Law, by Mr. David B. Kern, appearing on behalf of the Employer.

ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all time relevant to this proceeding, and which provides for final and binding arbitration of certain disputes. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed Arbitrator Herman Torosian to hear and decide a grievance involving the interpretation and application of the terms of the agreement as it relates to the payment of shift premium to 12 hour night shift employes. Hearing on the matter was held in Milwaukee, Wisconsin, on July 22, 1992. No stenographic transcript was made of the hearing and briefs were received by September 1, 1992. After consideration of the evidence and arguments by the parties, the Arbitrator issues the following Award.

Two issues were presented for resolution. Each issue is discussed separately below.

ISSUE I

The parties were unable to stipulate to a statement of the issue. Each party proposed its own statement of the issue, but agreed to allow the Arbitrator to frame the issue.

Employer:

> Did the hospital violate the collective bargaining agreement by not retroactively correcting an error in night shift differential payments prior to December 1,

1991? If so, what should be the remedy?

Union:

Did the employer violate the contract by not paying shift differential to night shift employes held over onto the day shift? If so, what should the remedy be?

Arbitrator's statement of the issue:

What is the appropriate retroactive remedy under the collective bargaining agreement to the December 31, 1991 grievance over the incorrect payment of shift differential to night shift employes held over onto the day shift?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE 7
Hours of Work and Overtime

. . .

7.03. Shifts. At the present time the work shifts are:

First Shift/Days: 7 a.m.-3:30 p.m.
Second Shift/P.M.'s: 3 p.m.-11:30 p.m.
Third Shift/Nights: 11 p.m.-7:30 p.m. (sic)

. . .

7.13. Shift Differential. Employees who work on the PM shift shall receive a shift differential of one dollar ($1.00) per hour for all time worked during PM shift hours. Employees who work on the night shift shall receive a shift differential of two dollars ($2.00) per hour for all time worked during night shift hours. . . . .

ARTICLE 24
Grievances

. . .

B. Grievances shall be subject to the following procedure:

Step One: The grievant shall present and discuss the grievance either orally or in writing, at the grievant's option, with her immediate supervisor within fourteen (14) calendar days of the occurrence of the

event giving rise to the grievance or within fourteen (14) calendar days of the date the employee became aware or should have become aware of the event giving rise to the grievance. The Supervisor shall respond in writing within seven (7) calendar days.

. . .

Step Five:

. . .

(d) . . . The arbitrator shall have no authority to impose liability upon the Hospital for any period of time before the effective date or after the termination of this Agreement, except as to a dispute over a matter that occurred while this contract was in force but not concluded under the Grievance Procedure before the expiration of the contract.

. . .

ARTICLE 29
Rules of Construction

29.01. In construing this Agreement, past practice shall not be considered except to the extent necessary in order to construe a provision of this Agreement that is found to be ambiguous, and past practice shall not be or become part of this Agreement.

Nothing shall be deemed a past practice unless it meets each of the following tests:

(1) long continued;
(2) certain and uniform;
(3) consistently followed;
(4) generally known by the parties hereto; and
(5) not in opposition to the terms and conditions in this Agreement.

. . .

ARTICLE 33
Duration

33.01 This Agreement shall be effective as of November 14, 1991 and will run for one

year, and will continue from year to year thereafter as to all of its terms unless at least ninety (90) days prior to said last mentioned date, or any year thereafter, written notice is given by either party that the contract (1) is terminated, or (2) is to be open for modification.

. . .

BACKGROUND:

There is no dispute over the merits of the underlying dispute that gave rise to the instant remedy issue. The Employer agrees that 12 hour night shift employes who begin at 7:00 p.m. and work to 7:30 a.m. are entitled to continue to receive night shift differential payment from 7:00 a.m. - 7:30 a.m. In November, 1991, the Employer verified that these 12 hour employes were incorrectly being denied the continuance and payment of night shift differential from 7:00 a.m. - 7:30 a.m. The Employer agreed to rectify the error retroactive to December 1, 1991, but no further.

POSITION OF THE PARTIES:

Union:

The Union argues that it first raised the underlying issue that gave rise to the instant remedy issue in June, 1991, and it took the Employer until October, 1991, to confirm that it was incorrectly paying certain 12 hour shift employes by not paying said employes shift differential for time worked from 7:00 a.m. -7:30 a.m. The Union argues that it took the Employer about four months to answer the Union's inquiries; a delay that was no fault of the Union. To limit back pay to the date of the third step grievance of December 31, 1991, would be to give the Employer an unjustified windfall. It is argued that in the future, all the Employer would have to do to limit back pay would be to delay responding to Union and employe requests, such as occurred in the instant case.

The Union contends that the Employer has also had a liberal policy regarding back pay as evidenced by prior cases. It is argued that in each of the cases the issues can be defined as continuing violations of the contract and all resulted in back pay for the full period of the violation. All of these issues were settled without following the grievance procedure as defined in the contract. Both parties were aware they occurred, and there was never any claim by the Employer limiting back pay to fourteen days.

Finally, the Union argues that the contract does have a clause, Article 25, Section B(d), related to the issue in question. Had the Employer wanted to limit continuing violation grievances to the fourteen day limit, they could have inserted that in the language on back pay. Said language, it is contended, limits back pay to the period of time of the current contract,

unless the issue was raised during the prior contract. Article 33, Section 33.01 (Union Exhibit 2), lists the duration of the contract as August 11, 1989, and continuing for two years. A review of Joint Exhibit I shows the effective date of the current contract as November 14, 1991 (Article 33). A grievance filed before November 14, 1991, would have allowed the Arbitrator to grant relief back to the beginning of that contract, or August 11, 1989. It is clear in this instance that the issue was raised prior to the expiration of the last contract and any remedy should include the period of time prior to the current contract.

Employer:

The Employer argues that it is undisputed that the instant grievance was brought under the 1991-92 agreement. Said agreement requires that a grievance must be filed within 14 calendar days of the event giving rise to the grievance or within 14 days of the date the employe became aware of or should have become aware of the grievance.

On these facts, it is argued, the Arbitrator cannot award retroactive relief to the Union as requested. Citing several cases, the Employer reasons that where a contract contains time limits for filing a grievance, arbitrators generally hold that they are empowered to provide relief only to the earliest day encompassed by the grievance at issue; in other words, a date 14 days prior to the filing of the grievance.

These arbitral principles, according to the Employer mandate that the grievance regarding unpaid night differentials after 7:00 a.m. be denied in its entirety, since the Hospital has already remedied the situation to a date prior to December 17, 1991, a point 14 days prior to the filing of the grievance in this matter.

Alternatively, the Employer avers that the Arbitrator has no authority to award retroactive shift differentials prior to the effective date of this agreement, or November 14, 1991.

It is undisputed that the contract under which this matter was brought first became effective on November 14, 1991. The contract, the Employer contends, is quite clear that the Arbitrator has "no authority to impose liability upon the Hospital for any period of time before the effective date . . . of this agreement . . ." (joint Exhibit 1, p. 44) The union's argument to somehow avoid this clear language puts the cart before the horse. The Union appears to rely on the following language which allows jurisdiction over disputes that occurred while "this contract was in force but not concluded under the grievance procedure before the expiration of the contract." That language, the Employer argues, is only applicable as to disputes heard by an arbitrator after this 1991-92 agreement expires in November of 1992--it cannot be reversed to allow an arbitrator to extend jurisdiction to a time frame prior to the effective date of the 1991-92 agreement, which is what the Union desires.

Nor, it is argued, can the Union succeed in arguing that this dispute really is being processed under the 1989-91 agreement, and attempt to take advantage of similar language with respect to post-expiration matters in that contract. First, this dispute did not arise under the 1989-91 agreement; while questions were raised about this issue during the term of that contract, there was no grievance filed and therefore the language allowing jurisdiction over matters "not concluded under the grievance procedure before the expiration of the contract" is simply inapplicable. In addition, such a holding would allow the Union to go back over prior collective bargaining agreements any time it could show that a matter had been the subject of some discussion between the parties at some point during those prior years. That is plainly not in keeping with the concept of collective bargaining agreements as having a definite beginning and ending date. As the Union acknowledged, there was a time frame prior to the effective date of the 1991-92 agreement when there was no collective bargaining agreement in effect whatsoever; that 1989-91 agreement had been terminated and no new successor agreement had been reached. It would be patently inappropriate, and clearly beyond this Arbitrator's jurisdiction, to allow the Union to bridge such a hiatus and obtain a retroactive arbitration award going back 28 months prior to the time the grievance was filed, to August of 1989.

Also, the Employer contends, the Union cannot draw upon the Hospital's past actions in asserting a right to retroactive relief back to August of 1989. What the Hospital chose to do in quite different circumstances with respect to different monetary issues in 1987, 1989 and 1991 is of little or no relevance in this matter. In light of the clause which precludes past practice from becoming part of the agreement and the clause allowing the Hospital flexibility to deviate from past practice in the exercise of its management rights, any actions by the Hospital, even if they rose to the level of a past practice for purposes of ambiguous contract language interpretation, could not be a basis for awarding such extensive retroactive relief in this case. In effect, the Arbitrator would be exceeding the limitation that he not "add to" the terms of the agreement by creating a contractual right to retroactive relief back to the effective date of the predecessor labor agreement! Plainly, isolated past situations in which the Hospital chose, for whatever reason, to award retroactive money to employes do not create a contractual right to such retroactive relief in entirely different circumstances.

Therefore, it is argued, if the Arbitrator concludes that the Union is not limited to retroactive relief only to a point 14 days prior to the filing of the grievance, he should conclude that there is no right to relief prior to the effective date of this contract, or November 14, 1991.

Finally, in the alternative, it is agreed that in the event the Arbitrator concludes that he is not bound by the foregoing principles, there is still no basis to award retroactive relief prior to June 4, 1991, and the Union's request for relief back to August of 1989 must be rejected.

The Union introduced evidence that it first raised the question regarding the cutoff of night differentials at a joint labor-management conference meeting on June 18, 1991. The

Employer reasons that even if one assumes that the matter therefore "arose" under the 1989-91 agreement, and that discussion constituted commencement of the "grievance procedure" under Article 24, the principles outlined in Section A above dictate that the Arbitrator not grant relief prior to a date 14 days before the issue was first discussed between the parties. Plainly, employes are charged with the knowledge of their pay and benefits and are free to inquire at any time regarding these matters. It would be highly inequitable and contrary to all accepted arbitral principles to allow grievants to recover retroactively to a point nearly two years prior to the time the first discussion regarding the issue occurred. Thus, there is simply no logical or legal basis to allow any retroactive award back to August 11, 1989, and the grievance should be dismissed.

DISCUSSION:

Contrary to the Employer's argument, there is nothing in the collective bargaining agreement that specifically limits a retroactive remedy to 14 days prior to the filing of the grievance. In most cases, however, this will be the logical result because Article 24, B, Step One of the agreement requires that grievances be filed "within fourteen (14) calendar days of the occurrence of the event giving rise to the grievance . . " However, the language also allows the filing of a grievance ". . . within fourteen (14) calendar days of the date the employee became aware or should have become aware of the event giving rise to the grievance." The retroactive application of remedy may very well exceed 14 days prior to the filing of the grievance under the latter situation because the grievant was not aware of or should have become aware of the event giving rise to the grievance. It is clear to the undersigned that Article 24, B, Step One, relied on by the Employer provides a time limitation for the filing of a grievance and not for the retroactive application of a remedy. 1/

1/1/ Of course remedies can and may be limited to 14 days prior to the filing of a grievance, but each case must be decided on its own facts. The Employer cites several cases in support of its position of limiting retroactivity back to the timely period for filing a grievance. First, while other arbitration cases may be instructive, they have no precedential value. Secondly, the Arbitrator does not find the cases cited as conclusive as the Employer does. In the Michigan Gas Utilities Co., it is apparent the arbitrator, in limiting back pay to the timely period for filing a grievance, was influenced by the fact that the union was aware or should have been aware of the grievance long before the filing of the grievance. He stated:

> The union may act on behalf of the employee in the processing of his grievance. It is bound by any knowledge its principal has. In this case it is barred from extended retroactivity by the employee's awareness for a long time that he was not receiving the shift premium due him. The fact that he did not want 'to make waves' does not enlarge his rights. (emphasis added)

This is supported by Article 24, B, Step Five, (d), of the agreement which specifically addresses the issue of remedy. Said Article states as follows:

> The arbitrator shall have no authority to impose liability upon the Hospital for any period of time before the effective date or after the termination of this Agreement, except as to a dispute over a matter that occurred while this contract was in force but not concluded under the Grievance Procedure before the expiration of the contract.

If the parties had intended to limit retroactivity to more than the above, then it seems logical they would have done so in said provision; but they didn't.

On the other hand, the Union argues for a remedy dating back to the beginning of the 1989-91 agreement, the date the Employer first began improperly paying employes under that agreement. Article 24, B, Step Five, (d), however, specifically prohibits the Arbitrator from imposing such a remedy. While said language allows liability beyond expiration of the contract as to a dispute occurring while the contract is in effect, it clearly does not allow for liability preceding the effective date of the contract. Here, the grievance was filed under the 1991-1992 collective bargaining agreement. Thus, by the terms of Article 24, B, Step Five, (d), retroactive liability cannot precede November 14, 1991.

Lastly, the Union relies on past practice in support of its position of remedies exceeding the 14 day limitation. Past practice, however, can only be considered ". . . to the extent necessary in order to construe a provision of this Agreement that is found to be ambiguous . . . "

Here the provision in issue, Article 24, B, Step Five, (d) is abundantly clear and not ambiguous; therefore, the Arbitrator is without authority to rely on past practice in granting retroactivity prior to the effective date of the contract. Therefore, past practice, if it exists, cannot be considered in deciding the issue herein.

> In Milwaukee Area Vocational, Technical and Adult Education District, back pay was limited because of undue delay in the filing of the grievance. The arbitrator found that the employes were aware beginning in the fall of 1988 ". . . that the problem was continuing without being addressed by the District. Nevertheless the employes did not file a grievance or make a steward aware of the problem until on or around the grievance initiation date of June 29, 1989." The arbitrator limited back pay because of a finding of undue delay. (In the instant case the Union did not unduly delay its filing of a grievance because it was the Employer who accounted for the extraordinary delay in investigating and answering the Union inquiries.)

Based on the above, the Arbitrator concludes that the appropriate remedy under the facts of this case is the retroactive payment of shift differential to the effective date of the agreement, i.e., November 14, 1991.

ISSUE 2

The parties stipulated to the following statement of the issue:

Did the Hospital violate the collective bargaining agreement by not commencing night shift differentials until 11:30 p.m. for employes who work at 12 hour shift from 7:00 p.m. until 7:00 a.m.? If so, what should be the remedy.?

BACKGROUND:

As in Issue 1, the facts giving rise to the instant issue are not in dispute. The dispute involves the payment of shift differential from 11:00 p.m. - 11:30 p.m. for 12 hour night shift employes. Said employes begin their shift at 7:00 p.m. and finish at 7:30 a.m. Employes were paid second shift differential pay from 11:00 p.m. - 11:30 p.m. The collective bargaining agreement defines work shifts as follows:

First Shift/Days:	7 a.m.-3:30 p.m.
Second Shift/P.M.'s:	3 p.m.-11:30 p.m.
Third Shift/Nights:	11 p.m.-7:30 p.m. (sic)

POSITION OF THE PARTIES:

Union:

A. History of the Language

Prior to the 1989-91 contract, employes had to work a minimum of six hours on the PM shift and four hours on the night shift to be eligible for the respective PM or night shift differential. During negotiations for the 1989 contract the Union made a proposal to eliminate the hours requirement for shift differential eligibility and proposed increasing the differential. The proposal resulted in the requirement for a minimum number of hours to qualify being deleted and the differential being increased.

Barb Janusiak, the Union argues, testified that the Union made the proposal to rectify the situation with twelve hour shift employes who were not receiving any PM shift differential because of the hours' requirement. During the discussions regarding this proposal, the Union asked for clarification regarding how the differential would be applied to day shift employes.

Barb Janusiak stated that the Union did not want to unjustly enrich those employes on an eight hour day shift. The Employer responded by indicating that day shift employes would not be eligible for the differential until they had worked the one-half hour overlap between shifts. The Employer made no mention of this applying to twelve hour night shift employes, and there was no language included in the contract to reflect a requirement to work the half hour overlap.

Joan Budnik, the Union contends, testified for the Employer that shift differential has been applied in the same way for years, but in 1989 the contract language regarding shift differential was changed. The minimum hours requirement was removed from the contract which should have resulted in twelve hour night shift employes receiving PM shift differential from 7:00 p.m. to 11:00 p.m., in addition to the night shift differential they were already receiving. The union avers that if it is true that night shift employes were not receiving the differential until 11:30 p.m., the Union was not aware of it. It is argued that Article 29.01 of the contract limits past practice to defining ambiguous language in the contract and defines the tests that must be met to qualify as a past practice. One of those tests is that the practice must be known by the parties; and, in this case, the Union was not aware of the practice.

B. Regular Shifts versus Twelve Hour Shifts

The Union argues that the Employer wants to compare two different things--regular shifts as defined in the contract; and, twelve hour shifts, which are not defined in the contract. The contract defines the eight hour shifts, which includes an unpaid lunch period resulting in a total of eight hours pay for each shift. The Union has never filed a grievance regarding the overlap period because it never questioned what shift an employe worked. If an employe was scheduled for 7:00 a.m. to 3:30 p.m., they were a day shift employe and not eligible for PM differential. The Union reasons that it would be ridiculous for the Union to insist on payment to day shift or PM shift employes that work the overlap when they are not working the next shift.

Twelve hour shift employes are classified as twelve hour days (7:00 a.m. - 7:30 p.m.) or twelve hour nights (7:00 p.m. - 7:30 a.m.). According to the Union, twelve hour day shift employes receive four hours of PM differential and eight hours of straight day pay because their primary hours, including their lunch period, occurs during day shift hours. The majority of hours for twelve hour night shift employes occur during the night shift. They take their lunch between the hours of 1:00 a.m. - 3:00 a.m. and should, the Union argues, receive the night shift differential beginning at 11:00 p.m., thereby giving them eight hours of night shift differential and four hours of PM differential. The Union contends that when looking at both the twelve hour and eight hour shift employes, the similarity in how differential has been applied has been based on their primary shift. This consistency would be maintained by applying the night shift differential beginning at 11:00 p.m. for those employes on twelve hour nights.

Employer:

A. The Plain language of the agreement supports the Hospital's practice with respect to shift differentials in this case.

The Employer argues that as Union witnesses acknowledged, the first shift at the Hospital does not end until 3:30 p.m. The second shift at the Hospital does not end until 11:30 p.m., and the third shift does not end until 7:30 a.m. Thus, the Employer contends, employes working during the second shift are properly regarded as not having "completed" their shift until after 11:30 p.m. The plain language of the agreement therefore supports the Hospital's payment of second shift premiums to the employes at issue until the time when their second shift work is completed, at 11:30 p.m. According to the Employer, there is no basis to conclude that these employes are entitled to a night shift differential prior to the completion of their work on second shift, and the grievance should be denied.

B. The Hospital's longstanding practice supports the conclusion that no violation has occurred in this case.

Joan Budnik, the Hospital's Director of Payroll, testified to her extensive knowledge regarding the Hospital's practice with respect to the payment of shift differentials at the hearing in this matter. She noted that since 1989, when the six hour and four hour limitations were removed, the Hospital had not changed its practice of not paying the next shift differential until the employe had completed his or her prior shift. According to the Employer, she also noted that even prior to 1989, when an employe did complete the six or four hour minimum work requirements thus entitling the employe to a second or night shift differentials "for all time worked" during those shifts, the Hospital still did not pay for the one-half hour overlap. The Employer argues that the reason, as both she and Mr. Smolinski noted, was obvious: the employe had not completed his or her prior shift, and until that occurred he or she was not entitled to the next shift differential. The only individuals who were, and are, entitled to the second or night shift differentials were those who started at the beginning of those respective shifts, at 3:00 p.m. or at 11:00 p.m.

Thus, given the Hospital's longstanding practice of never paying the next differential during the one-half hour overlap, which it continued to follow even after the language was changed in 1989, these employes are not entitled to the night differential until after they complete their second shift work. The grievance should therefore be denied.

C. The evidence concerning the negotiating history in 1989 provides further support for the Hospital's actions in this case.

The Employer avers that the evidence regarding the negotiating history in 1989

provides further support for the Hospital's position here. The Union's own bargaining notes indicate that despite the elimination of the six and four hour minimum requirements, the Union conceded that day shift employes would not get PM shift differentials for their 3:00 p.m. to 3:30 p.m. overlap work. The Employer states that neither the Union nor the Hospital offered meaningful evidence on the bargaining history relating to the issue of how the overlap from 11:00 p.m. to 11:30 p.m. would be treated. The Hospital submits that the negotiating history relating to the 3:00 p.m. to 3:30 p.m. overlap provides ample support for the Hospital's conclusion that both overlaps were meant to be treated in the same fashion. There is certainly no evidence of bargaining history to the contrary.

Moreover, it is argued, it is fundamentally inconsistent for the Union to acknowledge that the overlap from 3:00 p.m. to 3:30 p.m. can be treated in one way for purposes of shift differentials and yet to argue that the 11:00 p.m. to 11:30 p.m. overlap must be treated differently, particularly where there is no justification for such differential treatment in the applicable contract language. It is a fundamental principle that arbitrators should avoid interpretations of collective bargaining agreements which render such agreements inconsistent or which lead to nonsensical results. See Elkouri and Elkouri, How Arbitration Works, (4th Ed. BNA), p. 354. Yet that is precisely what the Union's argument would lead to here, since 12-hour shift employes who began their work at 7:00 a.m. would not receive the second shift differential from 3:00 p.m. to 3:30 p.m., while their counterparts who began work at 7:00 p.m. would be entitled to the next shift differential as of 11:00 p.m.

Moreover, the Employer argues, the bargaining history evidence introduced by the Union in support of its case, noting that the purpose in the Union's bargaining proposal was to remove the "inequities" between employes working on the PM and night shifts, does nothing to support their argument as to the one-half hour of overlap. The inequity which the Union sought to remedy in 1989 had nothing to do with the one-half hour gap at all, but instead dealt with the period from 7:00 p.m. to 11:30 p.m. when such employes received no differential because they did not meet the six hour PM shift requirement that existed under the predecessor contract (Union Exhibit 1).

It is clear that it is equitable and reasonable for the Hospital to take the approach it has taken for these many years with respect to the one-half hour of overlap; that is, to treat employes who begin work at 7:00 p.m. the same as their counterparts on the second shift, all of whom will receive second shift differential until they complete that shift. Night shift differential will commence for any of those employes, regardless of the total number of hours of their shift, only after they complete the second shift at 11:30 p.m.

Thus, the Employer reasons, the Union's acknowledgement in negotiations that the proposed change would not affect the treatment of the overlap between the first and second shifts mandates that the same conclusion be reached with respect to the overlap between the second and night shifts. The Hospital did not violate the contract by commencing night shift

differentials for these employes at 11:30 p.m.

D. The Hospital's actions are in keeping with the underlying intent of shift premiums.

It is argued that it is widely recognized that shift differentials or shift premiums are designed to provide extra compensation to employes for having to work less desirable hours or shifts. While, on its face, there may appear to be an inconsistency in allowing employes to work side by side during the one-half hour overlaps at different rates of pay, the differing treatment of these employes is in fact entirely in keeping with the intent behind such differentials.

Plainly, there is little or no inconvenience in requesting a day shift employe to work to the conclusion of his or her shift at 3:30 p.m. There is, however, some modicum of inconvenience associated with asking an employe to report for work at 3:00 p.m., a less desirable time of the day to begin work. While from 3:00 p.m. to 3:30 p.m. the day shift employe is only completing his or her work, the second shift employe is beginning work at that less convenient time, and is therefore entitled to the differential.

That principle applies with equal force to the overlap between the second and night shifts. While there is less inconvenience associated with asking a second shift employe to complete his or her work from 11:00 p.m. to 11:30 p.m., there is added inconvenience imposed upon an employe who must first report to work at 11:00 p.m. The "price" of that added inconvenience is the higher differential, and for that reason only those employes who commence work at 11:00 p.m. are entitled to that differential for that one-half hour period. That is undoubtedly why the Union conceded, during negotiations in 1989, that there was no intent to apply PM shift differentials to the one-half hour overlap from 3:00 p.m. to 3:30 p.m. One employe is simply completing his or her work; the other has begun work at a less convenient time.

Thus, the Employer argues, based on the clear language of the agreement defining the shifts and making clear that second shift does not end until 11:30 p.m., the longstanding practice of the Hospital with respect to the payment of shift differentials, the negotiating history and particularly the Union's concessions with respect to the treatment of shift differentials during the 3:00 p.m. to 3:30 p.m. overlap, and the basic theory underlying shift differentials, the Arbitrator should conclude that the Hospital did not violate the agreement by commencing night shift differentials for the employes at issue until 11:30 p.m. The grievance should be denied.

DISCUSSION:

The two contractual provisions relevant to shifts, hours, and the payment of shift differentials, as it relates to this issue, are Articles 7.03 and 7.13. They provide as follows:

ARTICLE 7
Hours of Work and Overtime

. . .

7.03. Shifts. At the present time the work shifts are:

First Shift/Days:	7 a.m.-3:30 p.m.
Second Shift/P.M.s:	3 p.m.-11:30 p.m.
Third Shift/Nights:	11 p.m.-7:30 p.m. (sic)

. . .

7.13. Shift Differential. Employees who work on the PM shift shall receive a shift differential of one dollar ($1.00) per hour for all time worked during PM shift hours. Employees who work on the night shift shall receive a shift differential of two dollars ($2.00) per hour for all time worked during night shift hours. . . . Night employees who are held over on the day shift will continue to receive the night differential.

. . .

It is apparent said articles do not directly or clearly address the dispute here because there is no reference to a 12 hour shift (neither to a 12 hour day nor 12 hour night shift).

Further, the Arbitrator is not convinced, as argued by the Employer, that the parties' bargaining history clarifies the meaning of Article 7.13 or 7.03. The bargaining history establishes that when the parties negotiated the elimination of the six hour and four hour minimum hours requirement in 1989, the Union agreed that day shift employes would not get PM differentials for the 3:00 p.m. to 3:30 p.m. overlap work. 2/ It is also clear, and the Employer agrees, that neither the Union nor the Employer offered meaningful evidence on the bargaining history relating to the issue of how the overlap for 11:00 p.m. to 11:30 p.m. would be treated. The Employer argues that it is fundamentally inconsistent for the Union to acknowledge that the overlap from 3:00 p.m. to 3:30 p.m. can be treated in one way for purposes of shift differentials and yet to argue that the 11:00 p.m. to 11:30 p.m. overlap must be treated differently. I disagree. From the record it appears that when the Union agreed with the Employer as to the 3:00 p.m. - 3:30 p.m. overlap, it was responding to first shift employes

---

2/2/ Prior to 1989, the collective bargaining agreement required an employe to work a minimum of six hours on the second shift before receiving second shift differential pay and four hours on the third shift before receiving third shift pay differential.

who begin their shift at 7:00 a.m. The overlap for a regular first shift employe is totally different than the issue created by a 12 hour employe working more than one shift but not beginning his/her shift at the normal beginning hour of the first, second or third shifts. Therefore, I find no guidance from the parties' bargaining history in resolving the instant issue.

I also conclude that previous similar cases offer no solution to the issue presented. Clearly, the parties intended a very limited use of previous similar cases. The agreed-to language, Article 29.01, does not allow the use of past practice unless it is used to construe a provision that is found to be ambiguous and then it will only be considered a past practice if the claimed past practice is "(1) long continued; (2) certain and uniform; (3) consistently followed; (4) generally known by the parties hereto; and (5) not in opposition to the terms and conditions in this Agreement."

Here there is not only a dispute over what the Employer's practice has been in the past, but, more importantly, even assuming the Employer is correct about the past practice, there is no record evidence that the Union was aware of the claimed practice by the Employer. Missing this criterion, past practice, as defined in the contract, cannot be established since it cannot be said that the practice is one that is "generally known by the parties hereto."

Thus, we are left with the contractual language as it reads. Both parties make reasonable arguments in support of their positions, even though the contractual language, 7.13 and 7.03, does not specifically refer to a 12 hour shift or the method of payment of shift premiums to 12 hour employes. 7.03 sets forth the first, second and third shifts and their hours and 7.13 the payment of shift differential. Because 7.13, in essence, states that "employees who work on the PM shift" receive second shift premium pay and "Employees who work on the night shift" (third shift) receive third shift premium pay, both parties can legitimately argue that said provision supports their position. Thus this language itself does not provide an answer to the dispute.

In addition to the above, the Employer in support of its position argues that since 12 hour night shift employes begin on the second shift they should complete that shift before they begin receiving third shift premium, while the Union argues that since 12 hour night shift employes work the entire third shift, that is their primary shift, and therefore, they should be receiving third shift premium beginning at 11:00 p.m.

Again, both positions are reasonable, but in the final analysis I find the Union's more persuasive. The deciding factor is that even though 12 hour night shift employes work the entire third shift as specifically set forth in 7.13 of the agreement, they do not receive eight hours night shift differential pay. If the Employer's reasoning is logically carried out, a 12 hour night shift employe could never get 8 hours of third shift premium unless he/she begins the 12 hour shift at exactly 11:00 p.m. This is the case even though the collective bargaining

agreement provides third shift premium for the hours 11:00 p.m. - 7:30 p.m. For example if the Employer decided to change the hours of the 12 hour night shift from 7:00 p.m. - 7:30 a.m. to 10:30 p.m. - 11:00 a.m., then under the Employer's reasoning 3/ shift differential would be paid as follows:

10:30 p.m. - 11:30 p.m.	1 hour second shift premium
11:30 p.m. - 7:30 a.m.	7 1/2 hours third shift premium
7:30 a.m. - 11:00 a.m.	3 1/2 hours no premium

Thus even though employes would be working the entire third shift along side regular third shift employes, as in the instant case, they would only receive 7 1/2 hours third shift premium.

I realize, as stated earlier, that the Employer has made a reasonable argument in support of its position. But under the circumstances of this case, I find the conclusions reached to be the most reasonable interpretation and application of Articles 7.03 and 7.13.

Based on the above, I conclude that the Employer violated the collective bargaining agreement by not paying 12 hour night shift employes third (night) shift premium pay from 11:00 p.m. - 11:30 p.m.

3/ The Employer reasons that employes receive second shift premium until they complete work on the second shift (11:30) before receiving third shift premium.

Based on the above facts and discussion therein, the Arbitrator renders the following

AWARD

Make all 12 hour night shift employes whole by paying them an amount of money equal to the difference between the second (PM) shift premium ($1.00) which was paid and third (night) shift premium ($2.00/hr.) for time worked from 11:00 p.m. - 11:30 p.m. This award is retroactive to November 14, 1991, the effective date of the 1989-1991 collective bargaining agreement. 4/

Dated at Madison, Wisconsin this 23rd day of December, 1992.

By Herman Torosian /s/
Herman Torosian, Arbitrator

4/ The rationale for the retroactive payment awarded is the same as discussed in Issue 1.