BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL NO. 150	Case 60 No. 49645 A-5105
and	
MERITER HOSPITAL, INC.	

Appearances:
Mr. Todd Anderson, Business Agent, on behalf of Service Employees International
Axley Brynelson, Attorneys at Law, by Mr. Michael J. Westcott, on behalf of Mer

ARBITRATION AWARD

Service Employees International Union, Local No. 150, hereinafter the Union, and Meriter Hospital, Inc., hereinafter the Employer, jointly requested that the Wisconsin Employment Relations Commission designate a staff arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. The parties submitted a Stipulation of Facts and Stipulated Issues on October 16, 1993, and submitted written argument by November 8, 1993. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

STIPULATED ISSUE

Whether Article XXIV, Section 3.B of the current Collective Bargaining Agreement requires the losing party to bear the expense of all copies of the transcript of the arbitration hearing.

STIPULATED FACTS

Meriter Hospital, Inc. and Local 150, Service and Hospital Employees International Union, AFL-CIO, (SEIU), have been parties to a series of collective bargaining agreements for many years. The 1975-1976 Collective Bargaining Agreement between the parties provided, inter alia:

> Section 3.1. ARBITRATION COSTS
>
> Each party will bear its cost of the arbitration. The expenses and fees for an arbitration will be shared equally by the local union and the hospital.

In the successor 1977-1978 Collective Bargaining Agreement the language was changed. The pertinent provision as set forth in the 1977-1978 Collective Bargaining Agreement is as follows:

> Section 5. ARBITRATION COST
>
> The fees and expenses for the arbitrator and the transcript of the arbitration hearing shall be

borne by the party who loses the arbitration case. Each party shall bear the cost of its own witnesses, exhibits and counsel.

The language as negotiated in the 1977-1978 Collective Bargaining Agreement has remained the same and currently exists in the 1992-1994 Collective Bargaining Agreement at Article XXIV, Section 3.B.

The parties are not aware of any instances since the 1977-1978 Collective Bargaining Agreement where a grievance proceeded to arbitration and the transcript of a court reporter was used until August, 1992. Since then there have been five arbitrations between the parties in which court reporters were utilized. While the parties agree that the losing party to an arbitration hearing must bear the cost of the original transcript of the arbitration hearing and that party's cost of its own copy of the transcript, the parties are in disagreement as to whether or not the losing party must also pay for the copy of the transcript of the arbitration which is provided to the prevailing party.

POSITIONS OF THE PARTIES

Union

The Union takes the position that Article XXIV, Section 3.B., of the Agreement, only requires the losing party in arbitration to pay for the copy of the transcript the arbitrator receives.

Due to the technical nature and days of testimony associated with their most recent arbitrations, the parties agreed that the hearings would be transcribed. At the conclusion of those hearings, the court reporter is directed to provide the arbitrator with a copy of the transcript and each party decides for itself whether it wants a copy of the transcript to aid in preparing post-hearing briefs. If a party decides it wants a copy of the transcript, it so notifies the court reporter. The responsibility for the expense of the transcript is assumed by the party at that point when it decides whether or not to order a copy. Having a copy of the transcript is not required to write a post-hearing brief.

The Union describes the wording of the contract language as singular in nature, "transcript of the arbitration hearing." Clearly, that language does not refer to multiple copies of the transcript. Further, the Grievant and other interested parties might also want a copy of the transcript. Under the Employer's interpretation, the losing party will be liable for an unlimited number of copies.

Employer

The Employer takes the position that the contract language is clear and unambiguous and requires that the loser in an arbitration pays for all copies of the transcript. The language provides that the fees and expenses of the arbitrator will be borne by the loser and also provides that the cost of the transcript will be borne by the losing party. It does not state that the cost of the original transcript or the cost of the arbitrator's copy of the transcript will be borne by the loser. It is clear that the parties intended the term "transcript" to include copies of the original transcript. If the wording of the contract is clear, there is no need to resort to the technical rules of contract interpretation.

The Employer asserts that even assuming, arguendo, that the contract language is susceptible to more than one interpretation, the governing rules of contract interpretation support its interpretation. The contract language specifically spells out the expenses that each party will bear: witnesses, exhibits and counsel. A transcript of the hearing does not fall within the definitions of those terms. However, the remaining wording of the subsection, "The fees and expenses for the arbitrator and the transcript of the arbitration hearing. . ." , are reasonably susceptible to including the cost of a party's transcript of the hearing. The precise reference to transcript in that wording certainly contemplates multiple copies of the transcript.

The Employer asserts that its interpretation is consistent with the intent behind the language. Under the predecessor language, each party would bear its own expenses in arbitration. There was no downside to losing an arbitration. The parties subsequently decided to change that approach and, except for the costs of witnesses, exhibits and counsel, decided that the loser would bear all expenses of the arbitration. It makes sense that each party would bear its own expenses for those items that were within its own control, otherwise a party could, by running up those expenses, create a situation where the other party could not afford to go to arbitration. That opportunity for abuse is not present with regard to the cost of the transcript, since it is not controlled by the parties. Thus, passing the cost of the transcript to the losing party is consistent with the conscious choice of the parties to shift the expenses that are not in the control of either party to the loser.

Further, since the parties specifically referred to the cost of the transcript in the disputed language, and had not referred to it in the predecessor language, they anticipated the cost of the transcript in drafting the present disputed language. Having decided to address that issue, it is disingenuous for one side to now suggest that the parties really meant to spell out that their own costs of the transcript should be borne by each party. Having addressed the issue in the first sentence, and left it out of the second sentence, it is obvious that the parties intended that the loser will bear this expense.

DISCUSSION

The Arbitrator disagrees that the wording of Article XXIV, Section 3.B., of the Agreement is clear and unambiguous. The words "transcript of the arbitration hearing", by themselves are susceptible of either interpretation asserted here by the parties. As stipulated by the parties, there is no past practice to aid in interpreting Section 3.B., and the evidence of bargaining history is limited to the relevant contract language that was in predecessor agreements. For the following reasons, however, it is concluded that the Employer's interpretation of Section 3.B. more accurately reflects the intent of the parties, as evidenced by that limited bargaining history and the wording of the provision when read as a whole.

First, the predecessor to Section 3.B., provided that each party would bear its own cost of the arbitration and split the expenses and fees for an arbitration hearing equally. The wording of the predecessor provision spoke only in general terms and did not specify what were to be included in a party's own cost and what were to be considered as expenses and fees of the arbitration hearing. That is not the case with the present language. The second sentence of Section 3.B., now specifies those costs that are to be considered a party's own responsibility with regard to its cost of the arbitration, and the first sentence now specifies that the cost to be borne by the loser includes the "expenses for the transcript of the arbitration hearing." That change in the wording indicates an intent to limit those costs each party is to bear and an

intent to broaden the costs for which the loser in the arbitration will be responsible.

Secondly, the first sentence of Section 3.B., includes the expense of the transcript of the hearing in the costs to be borne by the loser in the arbitration. The wording is general in nature and does not specify whether it covers only the cost of the original transcript or covers the copies of the transcript received by the parties as well. However, the parties' intent in that regard is made clear by their specifying in the second sentence of that provision the expenses for which each party is to be responsible on its own. The expenses listed do not include the cost to a party for its copy of the transcript. Having considered the cost of a transcript as an expense in an arbitration and referred to it in the first sentence, and then omitted it from the expenses specifically listed in the second sentence, evidences an intent by the parties to include all costs related to the transcript in the expenses covered by the first sentence. More clearly stated, they intended that the loser in the arbitration pay for the cost of the prevailing party's copy of the transcript as well.

Based upon the foregoing, the Stipulated Facts and the arguments of the parties, the undersigned makes and issues the following

AWARD

Article XXIV, Section 3.B., of the parties' Agreement is interpreted to include the cost of the prevailing party's copy of the transcript as part of the expenses for which the losing party in an arbitration is responsible. This interpretation is to apply to those prior arbitrations where a transcript was made of the hearing and to any such cases arising during the time covered by the parties' present Agreement. Pursuant to the parties' request, the Arbitrator will retain jurisdiction in this matter for thirty (30) days from the date of this Award.

Dated at Madison, Wisconsin this 28th day of January, 1994.

By David E. Shaw /s/
David E. Shaw, Arbitrator