BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LOCAL 150, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO

and

MERITER HOSPITAL, INC.

Case 75
No. 51805
A-5308

Appearances:

Mr. Steven J. Cupery, Assistant to the President, Local 150, Service Employees International Union, AFL-CIO, appearing on behalf of the Union.

Axley Brynelson, Attorneys at Law, by Mr. Michael J. Westcott, appearing on behalf of the Employer.

ARBITRATION AWARD

Local 150, Service Employees International Union, AFL-CIO, herein Union, requested the Wisconsin Employment Relations Commission to designate a member of its staff as an arbitrator to hear and decide a dispute between the parties. Meriter Hospital, Inc., herein the Employer, concurred with said request, and the undersigned was designated as the arbitrator. Hearing in the matter was held on June 2, June 27, and August 22, 1995, in Madison, Wisconsin. At the conclusion of the hearing, the parties filed post-hearing briefs by October 6, 1995.

ISSUE:

The Union proposed the following statement of the issue:

> Did the Employer violate the collective bargaining agreement when it assigned Nursing Assistant II's to Class 59 on September 6, 1994, and if so, what is the appropriate remedy?

The Employer proposed the following statement of the issue:

Whether the Employer's classification of the NA II position as a Pay Class 59 is unreasonable, and if not, what is the appropriate remedy?

The undersigned believes the issue is appropriately framed as:

Did the Employer violate the collective bargaining agreement when it refused to reclassify the Nursing Assistant II classification to a pay class higher than 59?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE:

ARTICLE III. EMPLOYER RIGHTS

Section 1. Scope

The parties recognize that this contract addresses the employer-employee relationship existing between the Hospital and its employees in the collective bargaining unit represented by the Union, and that the rights and duties between them in their relationship are those of employer and employee.

It is agreed that, except as otherwise expressly limited by this Agreement, the management of the Hospital and the direction of the work force including, by way of example and not by way of limitation, the right to select, hire and assign employees, promulgate and enforce reasonable rules and regulations it considers necessary or advisable for the safe, orderly and efficient operation of the Hospital, direct and assign work, determine work schedules, transfer employees between jobs or departments or sites, fairly evaluate relative skill, ability, performance or other job qualifications, introduce new work methods, equipment and processes, determine and establish fair and equitable work standards, select and implement the manner by which the Hospital's goals and objectives are to be attained, and to discharge employees for just cause or relieve employees from duty for lack of work or other legitimate reasons are vested exclusively with the Hospital, but

this provision shall be construed to harmonize with and not to violate other provisions of this Agreement.

It is further understood that all functions of management not otherwise herein relinquished or limited shall remain vested in the Hospital.

Section 2. Procedure in Case of Disagreement in Interpretation

In the practical administration of this contract, it will be necessary for supervisors and administrators to interpret its applicability to certain situations that may arise. For the sake of the vital and safe conduct of the Hospital's business, it is imperative and agreed that every employee shall follow the instructions of his/her supervisor. In cases where she/he disagrees with his/her supervisor on the interpretation of the applicable part of the contract or feels that a directive given is unfair to him/her, she/he shall have the right to question the interpretation or direction through the grievance procedure outlined in Article XXIV, Section 7. It is agreed that the failure of an employee to follow the reasonable instructions of his/her supervisor constitutes possible cause for disciplinary action including discharge.

ARTICLE IV. JOB CLASSIFICATIONS AND JOB DESCRIPTIONS

Section 1. Description Revisions and Establishing New Jobs

The jobs of Hospital employees are presently defined in existing job descriptions and/or position questionnaires. It is agreed that in order to maintain the flexibility of the health care delivery function, such jobs may be revised by the Hospital to conform to current operating conditions. Such changes, however, will be discussed prior to implementation, with a representative of the union or the union segment president and one chief steward and at least one person selected by the union from the affected classification. Final approval of job descriptions and/or position questionnaires rest with management. Job descriptions and position questionnaires shall accurately describe the work performed. However, the right to final approval shall not be used to unilaterally develop job descriptions without conferring with the union.

The Union may also request that a new job description

and/or position questionnaire be prepared if substantive changes have occurred within the job during the term of this Agreement. Nothing shall prevent the Union and Management from mutually agreeing to review substantive changes occurring outside of the term of this Agreement. Union requests must be submitted in writing to the Personnel department, stating the reasons which, in the Union's opinion, warrant the change(s) within thirty (30) calendar days from the date that the substantive changes have been incorporated into the expectations of the job or the time the Union knew or should have known of the changes. If Personnel determines that the job changes are substantive, the appropriate department will, within sixty (60) calendar days, rewrite the job description/position questionnaire. (Disputes arising as to whether substantive change(s) have occurred may be submitted to the grievance procedure of this Agreement). The rewritten Position Questionnaire will be reviewed by Meriter's Job Evaluation Committee within thirty (30) calendar days from the date that the newly revised Position Questionnaire is completed by the Department. The results of the Job Evaluation Committee will be communicated to the employees in the reevaluated position and the Union Segment President, and any appropriate wage adjustments will be implemented within thirty (30) calendar days from the reclassification by the Job Evaluation Committee (per Article VI, Section 3. C. of this Agreement).

The classification for the accepted job description and/or position questionnaire will be based on the systematic analysis used by the Hospital in the evaluation of such jobs. One employee selected by the Union from the affected jot title and an unpaid Union representative may participate in presenting the revised job description and/or position questionnaire to the Job Evaluation Committee. Jobs and classifications, when agreed upon by both parties, will be recognized as a part of the contract.

Job classifications that are not mutually agreed upon will be classified by the Hospital with the provision that any grievance with respect to their classification may be taken up through the regular grievance procedure hereinafter established.

Wage grades for job classifications in effect upon completion of this Agreement shall remain through the life of this contract subject to change only where significant alteration of duties warrants such grade change through the procedure outlined above.

BACKGROUND:

This arbitration case is concerned with the Employer's rating of the Emergency Service Technician II position, also known as the NA II position, and assignment to the appropriate pay class after review and analysis by the Job Evaluation Committee of the job description pursuant to the SEIU job rating plan. On March 21, 1992, the Employer made a proposal in negotiations for a collective bargaining agreement in which it proposed to reevaluate the NA I and II classifications within one month of the execution of the contract resulting from those negotiations. On March 26, 1992, in a letter from the then Labor Relations Manager, Perick, the Employer agreed to reevaluate the NA I and II job positions on June 11, 1992. Subsequent to that agreement, representatives of the Union and Employer met to discuss the position descriptions. On September 30, 1993, the Employer issued a revised position description which had been prepared by Lueth, signed off on by Stamm and other Nursing Department staff. Those position descriptions were presented to the Job Evaluation Committee on December 20, 1993. In addition to the position descriptions, the Evaluation Committee also received oral presentations from NA's. Thereafter, on February 9, 1994, Rentschler, Compensation Manager, wrote to SEIU Local 150 Representative Anderson advising him that

> . . . hospital administration has approved the reclassification of the Nursing Assistant II (Emergency Service Technicians) from a Payclass 59 to a Payclass 62.
>
> The Nursing Assistant I position received additional points in several evaluation categories, the change in point value was not sufficient to move the position title into the next higher Payclass 59.
>
> Following Union review and approval of both reclassification issues, the Nursing Assistant II reclassification would be retroactive to the beginning of the December 20, 1993 payroll.

Then, on February 21, 1994, the Union filed the following grievance: "The Union feels that the assigned Pay Class of the NA II/ER Tech to 62 is wrong.", and proposed the following solution: "Reclass of NA II/ER Tech to payclass 65 with effected (sic) employees moving into their current years of service. Retroactive pay to Dec 9, 1993." Union Representative Ellingson also, on February 21, 1994, sent a handwritten note to Labor Relations Manager Meester which stated:

> To keep in agreed timelines a union grievance has been filed regarding the reclassification of the ER Tech/NA II. We however would like to deal directly with this during negotiations. If this cannot be arranged, we would procede (sic) with Step 2 for this grievance, within 2 weeks of the conclusion of SEIU Local 150

contract negotions (sic).

Thereafter on February 28, 1994, Labor Relations Manager Meester replied to Ellingson and said:

> Per my discussion with Todd Anderson on February 28, 1994, this request to procede (sic) to Step 2 after negotiations is accepted.

Thereafter, on March 21, 1994, the Employer and Union entered into the following "Side Letter":

> The Hospital and Union agree that the Union may utilize the job evaluation process set forth in Article IV, Section 1 of the collective bargaining agreement with respect to the following positions:
>
> Nursing Assistant I
> Nursing Assistant II
> Painters
>
> Any reclassification that results (be it an increase or a decrease) will be effective on the first payroll period following the final determination of the evaluation committee. The Union will not, in the future, negotiate reclassifications of positions but rather will resort to the procedures set forth in Article IV, Section 1 of the collective bargaining agreement.

This agreement was signed by a representative of the Employer and Anderson from the Union.

By April 13, 1994, the parties' 1994-1996 collective bargaining agreement had been ratified. However, the Union did not file a request to proceed to Step 2 of the grievance procedure on the grievance dated February 21, 1994, as Anderson and Meester had agreed would occur if the Union wished to pursue that grievance after the conclusion of the contract ratification process. Also, at no time after Rentschler's February 9, 1994 letter until the commencement of this arbitration proceeding did the Employer ever implement the increase from Payclass 59 to Payclass 62 for the NA II position.

On June 2, 1994, Labor Relations Manager Meester wrote to Union Representative Anderson stating that she had enclosed copies of the Nursing Assistant I and II position questionnaires and stated that they had been reviewed by management and were accurate depictions of the job. She requested Anderson to review those position questionnaires and return them to her by June 12, 1994, noting any changes therein. She also indicated that the Employer

would set a date for the Job Evaluation Committee to convene within thirty days of the receipt of the Union's comments on the position questionnaires. Then, on September 6, 1994, Rothfuss, Acting Chairperson of the Job Evaluation Committee, wrote to Union Representative Anderson stating that:

> Over the past two months, the SEIU-150 Job Evaluation Committee has met several times to review the Nursing Assistant I, Nursing Assistant II (Emergency Services Technician) and Painters job descriptions.
>
> . . .
>
> After much discussion, the committee used our current evaluation tool and the following was our decision for each job. As you can see, there has been no change in their pay classes. (I am also attaching a break down of the final ratings.)
>
> | | |
> |---|---|
> | Nursing Assistant I | Payclass 56 |
> | Nursing Assistant II | Payclass 59 |
> | Painter | Payclass 71 |

Thereafter, on September 15, 1994, the Union filed the following grievance:

> The NA II/ER Techs went through the reclassification process on July 24, 1994. The reclassification committee reported back to the Union on Sept. 8, 1994 that the payclass assignment would remain at 59. In addition, on Feb. 9, 1994 the reclass committee reported that the workers would be reclassed to a 62 effective retroactively to Dec. 20, 1993. The Union filed a grievance regarding the appropriate payclass and through negotiations in March it was agreed to go through the reclass procedure again, referenced above. The past practice during challanges (sic) to appropriate payclass has been to not adjust payclass until complete resolution of the issue.

Under a proposed solution the grievance stated:

> Employees made whole in every way, including but not limited to,

> reclass of NA II/ER Tech to payclass 65 with effected (sic) employees moving into their current years of service. Retroactive pay as contract states in addition. Retroactive pay from Dec. 20, 1993 to Aug. 14, 1994 at payclass 62 for these effected (sic) employees.

On October 3, 1994, a meeting was held between the Union and the Employer to discuss the grievance, and on November 1, 1994, Meester advised Anderson of the Employer's third step grievance response. Thereafter, the grievance was appealed to arbitration which gave rise to the instant proceeding.

POSITIONS OF THE PARTIES:

Union Argument

The Employer is required by the collective bargaining agreement to classify ER Tech's based on a systematic analysis of the job description. In order to insure that the classification process is systematic, the Evaluation Committee uses the SEIU job rating plan or the tool which has been mutually agreed upon as the method of rating positions. The tool examines 11 categories. Those 11 categories are broken down into four major groupings: skill, effort, responsibility and job conditions. Within the "skill" grouping, the factors evaluated are education, experience and mental skills. Under "effort," the factors are physical requirements and mental and visual requirements. Under "responsibility," the factors examined are equipment or process, material or product, safety of others, and work of others. Lastly, under "job conditions," the factors examined are working conditions and unavoidable hazards. Each factor is rated and a numerical point value is determined for each factor. It is the sum of these points which determines to what pay grade the position is then assigned. The pay grade point breakdown is as follows:

Pay Grade	Point Pay
50	140 - 160
53	162 - 180
56	181 - 200
59	201 - 220
62	221 - 240
65	241 - 260
68	261 - 280
71	281 - 300
74	301 - 320

77	321 - 340
80	341 +

The job evaluation process has two stages. The first stage is that the job description is drawn up by the immediate supervisors and presented to the Job Evaluation Committee. The Committee then rates the position using the mutually agreed-upon tool. In this case, the job description for the NA II is drawn up by the Nursing Department with input from the ES Techs. The second phase of the classification process is the position classification evaluation conducted by the Evaluation Committee. This Committee is composed exclusively of management representatives, and it is the Committee's job to rate the position by applying the mutually agreed upon tool to the position description which was drawn up by the position supervisors. The Committee listens to oral presentations from the supervisor of the position being evaluated, as well as an employe selected by the Union who holds that position. Based upon the job description and the oral presentations, the Committee evaluates the position by individually rating the eleven factors and assigning the appropriate point level.

Because it is difficult to rate the eleven factors in the abstract, the Evaluation Committee makes comparisons between the jobs being evaluated and existing jobs, and this process is referred to by the Employer as sore thumbing or benchmarking. This is a process of implementing the tool but is not used as a substitute for the tool. While there are no written guidelines for sore thumbing, the practice is routinely conducted by the Evaluation Committee.

In this case, despite his familiarity with the evaluation process, Rothfuss failed to follow the most basic procedural requirement of the tool and disregarded the approved position description when he rated the position. When asked how much weight he gave to the position description, Rothfuss stated that he questioned the information contained therein and substituted his opinion based upon conversations with employers, managers and a recruiter. Furthermore, he did so without revising the position description which is required by the contract. In his evaluation of the ES Tech position, Rothfuss concluded that the ES Techs did not need prior experience, despite the fact that the position description stated that one year of experience was required. This conclusion was based upon a discussion with the personnel recruiter who had advised him that the Employer does not require any experience. The facts, however, are that the Employer does not hire Nursing Assistants unless they have six months of experience. Thus, the Union believes Rothfuss does not have credibility with regard to his assertion that ES Techs do not require prior experience. In the end, the Committee and Rothfuss erroneously concluded that the position would receive a second degree rating under the experience factor. The Union reaches the same conclusion with respect to the Committee and Rothfuss' conclusions respecting the degree of "mental skills" required by the position, as well as the "mental and visual" requirements for the position under the category of "effort," and the same for equipment or processes and material or product under the heading of "job responsibility." Finally, the Union also believes that the Committee mistakenly evaluated the "working conditions" factor at the second degree.

The Union concludes that the evidence established that the Employer failed to follow the job evaluation procedure contained in the collective bargaining agreement because it circumvented the specific procedure set forth therein and, as such, has marginalized the role of the Union in the classification process. Thus, the Union argues that the arbitrator must now determine the correct classification for ES Techs by evaluating them pursuant to the SEIU tool. This conclusion, the Union believes, is borne out by the fact that the Evaluation Committee did not use the job description as its basis for its conclusion, but instead substituted its own procedure. The Committee, through Rothfuss, chose to consult individuals outside the process for information unrelated to the job classification. As an example, despite the clear statement on the job description that one year of experience is required, Rothfuss decided that no experience was required. He reached that conclusion based upon the Nursing Assistant job interview requirement, which is outside of the evaluation procedure, and did not base his conclusions upon the job description as required by the contract. The Union believes that conclusion is supported by the fact that the Job Evaluation Committee received the same ES Tech job description that was used in an earlier evaluation of the position by the Committee, which concluded in placing the position at Payclass 62. Despite the fact that the Committee received no new information in September, 1994, from that which was presented to the Committee earlier that resulted in the rating of 62 which was communicated to the Union on February 9, 1994. The Committee, in the end, concluded that the December 20, 1993 rating of 62 was too high and lowered the pay class to 59.

The Union does not claim that the Employer was not entitled to gather information regarding the proper classification for ES Techs, but does contend that the contract establishes the forum for gathering that information is in the oral presentations to the Committee where both employes and supervisors are present. The Union believes that this requirement is in place in order to allow the Union and Employer to respond to issues raised during the opposing side's presentation. While the Union made a presentation to the September, 1994 Committee meeting, the Employer chose not to. Therefore, by waiving the supervisor's presentation, and instead gathering information when the Union had no opportunity to respond, the Committee eliminated the Union's in the process established by the contract. The Union finds incredible the Employer's claim that the Committee became more educated about the duties of the ES Tech through conversations with Schoengrunn, the head of the Emergency Room and the ES Tech Supervisor. Schoengrunn, however, was also on the Committee in 1993, when the Committee determined to rate the position as a Payclass 62 and she approved the final job description before it was sent to the Evaluation Committee. It makes no sense to conclude, as the Employer does, that Schoengrunn developed the job description, approved it for the Evaluation Committee and then as a member of that Committee argued that the description she created did not appropriately describe the position.

Furthermore, Rothfuss could not provide any reason, six weeks after the Committee concluded its evaluation resulting in a pay grade of 59, as to what information had changed from when the Committee decided upon a 62 Pay Grade, but can provide such an explanation a year later at the arbitration hearing. Also, if in fact, significant changes had occurred in the job

responsibilities for the ES Tech, it was the Employer's responsibility to rewrite the job description and allow the Union to participate before the Committee in a discussion of the new position description to insure the accuracy of the new description. However, no new description was created between February of 1994, and September of 1994, because there were no changes in the position. Also, the testimony of Rothfuss, wherein he credits the change in the evaluation due to certain responsibilities which had been eliminated from the ES Tech, is not credible because those changes in fact occurred in 1993, before the determination of Payclass 62. They did not occur between February, 1994, and September, 1994, and thus those changes cannot be used to support the reevaluation to Payclass 59.

The Union also contends that the appropriate remedy in this case is to retroactively apply the ES Tech reclassification to December 20, 1993, the date the Employer first violated the contract by incorrectly classifying ES Techs. It was on that date that the first contract violation occurred. Furthermore, that result is supported by the February 9 Rentschler letter to Anderson wherein he indicated that upon the Union's approval, the reclassification would be retroactive to the beginning of the December 20, 1993 payroll. In response to the Employer's claim that complete retroactivity is not appropriate because the Union failed to fully utilize the grievance procedure when it challenged the Committee decision to reclassify the position to a Pay Grade 62, the Union contends that the agreement between the parties to resubmit the position to the Evaluation Committee was not a final settlement of the issue, and therefore, it is still appropriately before the arbitrator. If, as the Employer argues, settlement was reached on the Union's grievance, the Employer should have implemented the 62 Payclass since the dispute was no longer ongoing. Implementation of this Payclass 62 never occurred because the Employer considered the agreement to resubmit the position to the Evaluation Committee as a continuation of the Union's challenge to the December 20, 1993 evaluation. Thus, no pay change has occurred because the past practice of the parties is not to implement reclasses until all litigation stemming from the process is resolved.

Employer Argument

The Employer believes that the contract clearly provides that Meriter has a right to fairly evaluate "relative skills, ability, performance or other job qualifications." The classification of a job is to be performed by the Hospital based upon the systematic analysis set forth in the SEIU job evaluation and classification guide. The Employer believes that its role is to classify positions subject to review by the arbitrator where that classification is challenged. It does not believe, however, that the role of the arbitrator is to substitute his or her judgment for that of the Employer. The contract does not provide for "interest arbitration" in the event the parties are unable to agree upon the classification level established by the Employer. Thus, the arbitrator's role is to review the classification to insure that the Hospital has not acted arbitrarily or capriciously. To do more would have the arbitrator exceed his or her authority as set forth in Article XXIV, Section 3.a. of the collective bargaining agreement. Also, the Employer believes

that it is the Union who bears the burden to prove that management's decision was incorrect. In order to sustain its burden of proof, the Union must produce tangible and convincing evidence to enable the arbitrator to reverse management's decision. In this case the Employer does not believe that the Union has sustained its burden of proof in establishing that management has misclassified the NA II position.

The Employer submits that the average or normal day of a Nursing Assistant II in the Emergency Room consists of spending approximately 1 1/2 hours per shift on patient care, with patient care being defined as time spent in direct contact with patients. Additionally, the Tech spends an average of 1 1/2 hours per shift restocking supplies necessary to the Emergency Room operation. Also, the Nursing Assistant II spends approximately 2 1/2 hours per shift transporting patients to other locations in the Hospital, such as x-ray. The Employer believes that the testimony of the Nursing Manager of the Emergency Room Services Department and NA II Steichen confirm the foregoing allocation of duties during the average work day.

Turning to the various factors which were rated under the tool, the first factor is experience. The total orientation program for the NA II position is six weeks. During the first two to three week period of time, the Tech shadows other Techs and receives training from them or a nurse, and during the last three weeks of the orientation program, the Nas begin working independently with guidance from the Charge Nurse. The Employer acknowledges that with respect to the experience factor there was some inconsistency between those items which are in writing and what actually occurs in the field. One exhibit showed that one year of recent patient/health care experience was required, whereas other similar postings for the same position did not indicate any required experience. Also, the position questionnaire suggests that one year of experience is required; however, the Employer insists that it is not that which is in writing that governs, but what is in fact going on. In the latter regard, the testimony of Stamm indicated that no experience had been required for the position since she assumed her responsibilities as the Emergency Room Services Department Manager. Obviously, she is the individual in the position to know best what the experience requirement is, inasmuch as she sets the experience requirement for the position and is also the individual who makes the hiring decisions. Finally, the Employer argues that there is no evidence showing there has been any recent change in the experience requirement for the NA II position, and that the experience rating which was given to the NA II position which has given rise to this arbitration was the same as the position had been rated in earlier evaluations without objection from the Union. Finally, the acting chairperson of the Job Evaluation Committee testified that the Committee determined there was no experience requirement based upon discussions with nurse managers and recruiters in personnel, and the Nursing Education Department.

With respect to the category of mental skills, the Employer contends that a review of the various duties demonstrates that the NA II is not exercising a great deal of discretion or judgment, but rather is making decisions within a set of fairly clear cut parameters. Rothfuss testified that the NA II position was rated as a second degree, rather than as a third degree as urged by the Union, was the result of the Committee attempting to find the best category for the types of daily tasks that an NA II would be required to perform. He testified that the second degree most closely fits the work of the NA II because employes rated at the second degree work from detailed instructions making minor decisions and choices of courses of action that are not completely covered under the job description, but the decisions are limited in scope and are usually controlled by precedent. This is the case with the NA II position in that most of the tasks that they perform are under the

direction of someone else, such as an RN or a physician. Finally, with respect to this factor like the experience factor, there was no evidence of any new or changed responsibilities demonstrating that the degree rating should be increased from where it had historically been rated. Since 1991, the position had been rated as a second degree. In conclusion, the Employer believes that the evidence establishes that the NA II's, while making some minor decisions involving the use of some judgment, do not do any planning or exercise judgment in the selection of available equipment and tools to be used in patient care. The assessment of the patient and diagnosis is always performed by the physician or registered nurse. Thus, the Employer believes that the second degree is clearly the better fit under the mental skills factor.

The next factor in dispute is the factor entitled mental and visual requirements. Again, it was the Committee's decision that the second degree most accurately described the NA II position. There was no evidence establishing that the NA II duties require constant alertness or continued application of mental and visual attention which is the hallmark of the third degree rating. Rothfuss testified that while there are times that NA II's must mentally and visually focus on the task, those times are infrequent. The Committee felt that the majority of the NA II's work day did not involve performing tasks that require constant mental alertness, and therefore, the second degree was the most appropriate rating.

Another factor in dispute is the responsibility for equipment or process. This factor assesses the NA II's responsibility for equipment or process through which his skill is applied to the duties he performs. The measurement is the amount of damage normally expected from a mishap in the use of the equipment or process specified for the task. The Committee evaluated this factor at the second degree, meaning that the probable damage to equipment handled by an NA II is seldom going to exceed $140. In reaching that conclusion, the Committee consulted with the Director of Biomedical Services concerning the probability of damage to most of the equipment repaired by his department resulting from usage by employes. It was his conclusion that it was unlikely that it would exceed $140. The Committee also considered the frequency of usage of any given piece of equipment by an NA II in reaching its conclusion. The Employer concludes that there is no record evidence that contradicts the conclusions of the Committee with respect to this factor, and therefore, the arbitrator should sustain the conclusion that it was appropriately rated at the second degree.

Another factor in dispute is the responsibility for material or product. This factor assesses the amount of damage likely to occur to materials transported, handled, processed, assembled, inspected, tested or maintained by NA II's as a result of their failure to exercise proper care. The amount of loss is measured in terms of financial loss or discomfort to the patient. The Employer points to the fact that most of the testimony concerning this factor dealt with discomfort to patients, and indicates that the Union's arguments fail to recognize that many of the procedures performed by NA II's are by their very nature going to cause discomfort to a patient. An example, would be the cleaning of wounds which, by its very nature, is uncomfortable for a patient. The Employer believes that what the tool is really measuring is the employe's responsibility to exercise care

which affects a patient's health or welfare. The primary difference between the second and third degree in the area of patient care is some discomfort as compared to discomfort of a moderate degree. Rothfuss testified that in concluding the second degree to be the most appropriate in dealing with the NA II's it concluded that in terms of monetary value the material or product seldom exceeded $200. The Committee also concluded that because of the limited responsibility of the NA II, inasmuch as they worked under the direction of a RN or an MD, they most appropriately belonged in the second degree category.

Working conditions was the final factor in dispute. The Employer argues that the working condition factor takes into consideration the physical conditions under which the workers perform their work. This includes the amount and continuousness of exposure to the unpleasant conditions in the work area, and the extent to which the exposure makes the job disagreeable. The Employer believes the evidence established that any disagreeable elements on the job which were continuous were minimal, and any exposure to elements of a moderate degree were, at best, intermittent. The Committee thus concluded that the second degree which speaks in terms of intermittent exposure to harmful chemicals, radiation, infectious disease, and infrequent or occasional exposure to one or more disagreeable elements most appropriately described the NA II position. The third degree requires these elements to be continuously present in a considerable degree. However, the NA II's exposure to blood, body fluids, cold and chemicals was intermittent and not continuous.

With respect to the Union's claim that it had agreed to withdraw its earlier grievance, and thereby agreed to the Employer's reclassification from Payclass 49 to Payclass 62, the Employer argues that position was first made known on the first day of hearing in this case, and it is merely a ploy to insure that the NA II gets a pay class upgrade even if the Union loses on the subject grievance. The Hospital's Labor Relations Manager testified that the Hospital's understanding upon entering into the Side Letter of Agreement providing that the Union would in the future not negotiate reclassifications of positions, but rather would resort to the contractual procedure for obtaining reclassifications, was that this agreement resolved the Union's grievance contesting the December, 1993 rating of the NA II position at the Payclass 62. Indeed, the Employer has continued to pay the NA II position at a Payclass 59, and not at Payclass 62 as would have been the case had it agreed with the Union that by entering into the Side Letter it had agreed with the Employer that Payclass 62 was the appropriate rating. In fact, the Union never grieved the continued payment of the NA II at a Payclass 59 until the subject grievance was filed. The Employer believes that if it were the parties' intent to go ahead with a Pay Grade 62, the Union surely would have grieved on the very first pay period following the execution of the March 21, 1994 Side Letter of Agreement, when employes were not paid at the higher rate of pay.

In conclusion, the Employer contends that there is no evidence in this record that the decision of the Evaluation Committee was unreasonable, arbitrary or capricious. Because it is not the arbitrator's role to substitute his judgment for that of the Committee, the fact that the evidence in this case supports the Committee's decision, that decision must be upheld even if the evidence could also support the Union's position. Thus, the Employer insists that the arbitrator must deny

the subject grievance.

DISCUSSION:

A threshold issue is whether the grievance filed by the Union on February 21, 1994, challenging the Employer's decision to reclassify the NA II from Payclass 59 to Payclass 62 is appropriately before the undersigned. The Union argues that the Side Letter of Agreement entered into between the parties on March 21, 1994, was not a final resolution of that grievance, as argued by the Employer, and thus the matter is still alive and before the undersigned. The undersigned does not believe a reasonable interpretation of the facts supports such a conclusion.

Specifically, the Side Letter of Agreement provided that with respect to the three (3) positions (NA I, NA II and Painter) being evaluated, any reclassification would be effective with the first pay period following a final determination by the Job Evaluation Committee. This language is clear and unambiguous and was agreed to after the Rentschler, February 9, 1994 letter to the Union communicating approval of a Payclass 62 retroactive to December 29, 1993. More importantly, the Side Letter was agreed to after the Union's February 21, 1994 grievance contesting the reclassification to Payclass 62. These facts, coupled with the additional fact that the grievance was not heard at Step 2, within two weeks of the conclusion of negotiations as Meester and Anderson had agreed would be the case if the reclass matter was not dealt with in negotiations, 1/ leads to the inescapable conclusion that the grievance filed on February 21, 1994, died and questions raised therein died with it. Thus, the only matter before the undersigned is the Union's September 15, 1994 grievance challenging the Employer's September 8, 1994 announced decision to leave the NA II Payclass assignment at 59.

Furthermore, the aforesaid conclusion necessarily means that there can be no remedy in this case, should one be ordered, that goes back to December 20, 1993. As has been pointed out by both parties, their practice has been not to adjust Payclasses until there has been a final resolution of the issue. The final resolution of the Employer decision to reclass the NA II to a Payclass 62 was the Side Letter Agreement to resubmit the issue to the Job Evaluation Committee with any resulting reclassification effective the first payroll period following the final determination of the Committee. The Committee's decision after resubmission was communicated to the Union on September 8, 1994. Thus, assuming that decision was communicated to the Union within 24 to 48 hours of the Committee's decision, any reclassification resulting from the grievance challenge before the undersigned, necessarily per the Side Letter Agreement, would take effect with the payroll period commencing after September 6 or 7, 1994.

The next issue that must necessarily be resolved prior to a review of the Committee's

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1/ This was communicated to Ellingson by Meester in writing on February 28, 1994.

decision to leave the NA II at payclass 59 is what standard of review is to be applied by the undersigned. The Employer argues that the arbitrator is not to substitute his judgment for that of the Committee. Rather, the Employer believes the arbitrator is restricted to reviewing the

Committee's decision-making process to determine if it acted arbitrarily or capriciously. Going further would, in the Employer's opinion, be to exceed the arbitrator's jurisdiction as set forth in Article XXIV of the parties' collective bargaining agreement.

Article IV, Job Classifications and Job Descriptions, of the parties' collective bargaining agreement provides:

> Job classifications that are not mutually agreed upon will be classified by the Hospital with the provision that any grievance with respect to their classification may be taken up through the regular grievance procedure hereinafter established.

Clearly, that language does not articulate any standard of review that the parties have agreed should pertain to cases like the instant case. Nor have the parties cited any prior decisions where they have previously argued this issue. Thus, I am left to conclude that this is a matter of first impression. I am persuaded that I should not engage in an independent analysis of the evidence before the Committee to reach a conclusion upon the appropriate Payclass for NA II's. Nor am I persuaded that the grievance procedure authorizes that result. Rather, I believe my role is, as the Employer argues, to review the decision-making process of the Committee to determine if it followed the contractually established procedures in reaching its conclusion, and if that decision reasonably flows from the evidence produced in following those contractual procedures, or whether the Committee acted arbitrarily or capriciously in reaching its conclusions.

Turning then to the process that was followed by the Committee, the Union claims it did not comply with the contractual requirement that the classification be the result of a systematic analysis of the Job Description or Position Questionnaire. The Union argues that the Committee ignored the one-year prior experience requirement appearing on the questionnaire (Jt. Ex. #5) and earlier position description (Union Ex. #2). Rather than using the aforesaid documents as required by Article IV of the contract, instead, the Union claims, the Committee used a Nursing Assistant job interview checklist, and consultations with others outside the process to obtain information upon which it based its conclusions. The Employer, to the contrary, insists that it is not what is in writing that governs, but rather what is in fact occurring.

The undersigned's analysis of this aspect of the dispute has led me to conclude that the Union's position is correct. That is, the Committee cannot chose to ignore the Job Description or Position Questionnaire. The contractual procedure turns on an analysis of the position description or questionnaire. In this case, both the Position Questionnaire and Job Description state under the respective headings "Minimum Prior Experience Required" and "Job Qualifications" one year of "recent patient/health care experience." To adopt the Employer's argument in the face of that evidence is to ignore the requirements of Article IV. Clearly, to do so would exceed the

arbitrator's authority. Practically speaking, the Employer's position could be compared to the phrase "having your cake and eating it too." It would be at the Employer's discretion when it wished to stand on the Position Questionnaire/Job Description requirements or ignore them. Clearly, one year of prior experience is a requirement or it isn't. The Position Questionnaire and Job Description require one year prior experience, and Article IV establishes them as controlling. Because the Position Questionnaire was not modified, the Committee had no choice but use it in its analysis. If it didn't believe it was accurate, it needed to take the appropriate steps to have it modified. However, until that occurred it was bound to follow it.

Thus, the Committee acted arbitrarily and capriciously and in violation of the contract when it ignored the one-year recent patient/health care experience requirement for an NA II when it analyzed the experience factor. The experience factor in the job rating plan states:

> This factor appraises the length of time typically required by an individual, with the specified educational qualifications, to learn to perform the work acceptably; that is, to meet minimum job standards. The amount of experience required is in addition to the time needed to acquire trade knowledge or similar specialized training which is covered under the Education Factor.
>
> The factor includes any necessary previous experience on related work, either within the organization or outside, together with the "breaking-in time" or period of adjustment and adaptation on the specific job itself. "Breaking-in time" is considered as time spent under competent supervision in continuous and intensive training on the job.
>
> **FIRST DEGREE (22):** Up to three (3) months.
>
> **SECOND DEGREE (44):** Over three (3) months up to one (1) year.
>
> **THIRD DEGREE (66):** Over one (1) year up to three (3) years.
>
> **FOURTH DEGREE (88):** Over three (3) years up to five (5) years.
>
> **FIFTH DEGREE (110):** Over five (5) years.

Obviously, one component is "previous experience on related work, either within the organization or outside." In this case, the one year of recent patient/health care experience clearly falls within that factor. In addition, it is undisputed that there is a six-week break-in period, wherein the new NA II initially shadows other NA II's and then gradually works into performing the job on his/her own. This period is also to be included within the experience factor as "breaking-in" time.

To arrive at the appropriate rating the Committee was to have combined the "breaking-in" time with the prior experience requirement to determine the appropriate degree level. If the Committee had done so, and not arbitrarily ignored the Position Questionnaire prior experience requirement, it would have been led to conclude the appropriate degree rating for the NA II was third degree with the accompanying 66 point value. That was a 22 point difference from what the Committee tabulated. Thus, without regard to any other possible modifications to the Committee's conclusions, the NA II total point value, when the appropriate experience rating is used, would be 237 points (215 + 22 = 237).

The next area of dispute regarding the job rating of the NA II concerns Mental Skills. Both times the Committee rated the position in this category it concluded a second degree rating was the most appropriate. The Union contends the rating should be a third degree.

The job rating plan states:

> This factor appraises the requirements of the work for independent action, the exercise of judgement, the making of decisions, and the use of planning, originality and foresight taking into account the complexity of the duties and the extent to which the work is circumscribed by precedent or standard practices and procedures. The appraisal of the duties reflects only the demands of the job with respect to its proper place in the organization and is affected by the degree and the nature of the direction over the work.
>
> Volume and/or variety in themselves do not affect the scoring of this factor; however, the character of the elements resulting from volume and/or variety are evaluated separately under the appropriate factors.

The parties' dispute centers on the difference in level and degree to which the NA II's job requires them to take independent action and exercise discretion in decision making, planning, originality and foresight. The job rating plan sets forth a general description of what distinguishes a second degree from a third degree rating.

SECOND DEGREE (28): This degree covers duties which require working from detailed instructions and making minor decisions involving the use of some judgement. The method of work is specified and the equipment provided, but the duties require some discrimination and care such as would be exercised in meeting quality standards, recognizing need for and making adjustments, and checking work or data. The duties involve making comparisons, recognizing need for and making adjustments, and checking work of data. The duties involve making comparisons, recognizing errors, and exercising care in the performance of the job rather than planning and selecting a course of action, and may consist of a number of elements of some duration. Although all courses of action are not completely covered by job instructions, decisions are limited in scope and are usually controlled by precedent.

THIRD DEGREE (42): This degree covers duties which require the planning and performing of work of some complexity, involving a sequence of operations, and the analysis of facts to determine what action should be taken within the limits of standard practices or recognized methods. It involves judgement in selecting and using available equipment and tools and in planning or altering the method of work, layout, or setup for various work assignments. Somewhat difficult decisions are required in such matters as choosing a course of action from various alternative methods and procedures, within standard practice, or determining corrective action or disposition in cases involving borderline variations from specified quality.

The Position Questionnaire (Joint Exhibit #5) contained a category of Mental Skills, and it provided the following:

Appraise the requirements of work for independent action, the exercise of judgment, the making of decisions, and the use of planning, originality and foresight necessary to meet the requirements of the job. (Four--One to two sentence statements.)

1) Knows how to use basic interviewing skills in obtaining date regarding patient's chief complaint from ES patients and their families.

2) Knows normal ranges of vital signs and reports out of range results or significant changes to RN.
3) Knows how to record on the ES patient record a subjective report of why the patient is here and understands the implications of the chart as a legal record.
4) Uses observation skills to note changes in patient status and reports them promptly to MD/RN.
5) Knows nursing procedures and applies therapeutic measures within defined nursing procedure.
6) Knows procedures for obtaining specimens in a manner that produces accurate results.
7) Has knowledge and understanding of varies patient conditions and treatment plans.
8) Has current certification in cardiopulmonary resuscitation.
9) Has current knowledge of mechanism of injury and understands care and management.

As noted earlier in this decision the Job Questionnaire or Position Description is what the classification for any job is to be based upon pursuant to Article IV of the parties contract. A comparison of the Mental Skill requirements of the Questionnaire with the testimony of witnesses leads me to conclude that the Questionnaire reflects what the testimony confirmed is required of an NA II. The Questionnaire also, to the undersigned, seems to more aptly fit within the second degree rating and most particularly the phrase "Although courses of action are not completely covered by jot instructions, decisions are limited in scope and are usually controlled by precedent." The Mental Skills section of the Questionnaire, in the undersigned's opinion, does not indicate that the NA II is planning patient care or determining what patient care is to be undertaken. Rather, it appears from the Questionnaire that the direct supervision of an NA II by an RN or treating physician and the existence of defined nursing procedures minimizes the employe's discretion in the selection of the course of action/treatment to be undertaken.

The Committee, in evaluating what degree rating to assess the NA II in the category of Mental Skills engaged in a comparative analysis between an NA II and Housekeeper, Food Service positions and Animal Caretakers. The Union takes exception to the conclusions reached by the Committee. Particularly, it points to the job requirements of an Assistant Cook that was rated at the third degree on Mental Skills, as evidence that the NA II should be rated at the third degree. While the undersigned would agree that the Mental Skills for an Assistant Cook do not appear to be sufficiently greater to warrant a third degree rating when compared to those required of an NA II, it does not automatically follow therefrom that the Committee rating of the NA II was arbitrary and capricious. It is also conceivable that the Assistant Cook should have been given a first or second degree rating on Mental Skills. There is simply not enough evidence in this record from which to conclude that the second degree rating reached by the Committee is so inappropriate

as to rise to the level of an arbitrary or capricious decision. Therefore, I am left to conclude that the second degree rating for Mental Skills must stand.

The next rating category in dispute is that of Mental and Visual Requirements. The Job Rating Plan provides the following with respect to this category:

> This factor appraises the requirements of the work for the application of mental and visual attention in terms of the duration and intensity of such application. It does not measure the degree of mental development or skill, but rather then (sic) extent of the mental and visual application or attention required.
>
> All levels of attention having job significance require some employment of mental faculties which is aided by perception, principally vision. Mental and visual demands are, therefore, considered as related aspects of the job requirement of attention rather than as separate and independent job characteristics and are evaluated as a single factor.
>
> Consideration is given to both the intensity and duration of the mental aspect of this factor. The intensity of such application varies in different jobs depending upon the work requirements. For example, simple work with few variations becomes practically automatic through repetition requiring little thought, while complicated work may require mental concentration in solving complex problems or meeting changing situations. Similarly, consideration is given to the duration and continuity of the alertness, attention, or thought required. The visual aspect of the factor varies chiefly with regard to the duration of elements on jobs requiring unusually close and exacting visual attention and the exercise of a high degree of manual dexterity in performing fine and delicate work.
>
> **FIRST DEGREE (5):**This degree covers duties which require only intermittent visual attention and little mental application since the work is simple or practically automatic.
>
> **SECOND DEGREE (10):** This degree covers duties which required frequent focusing of mental and visual attention of which require continuous visual attention with little mental application. It includes duties involving an intermittent flow or work, or relatively

short work assignments with frequent intervals between assignments, or work in which the employee is intermittently required to perform duties, issue or receive materials or tools. It also includes the operation of a machine or process which requires attention at the beginning and toward the end of the operation cycle, but during which there is a substantial waiting period requiring watchfulness only at intervals.

It includes simple tasks such as walking, cleaning, handling materials, using simple tools for rough work in which the visual requirements may be continuous but because of the simplicity of the work itself, little mental application is required.

THIRD DEGREE (15): This degree covers duties which requires constant alertness or continuous application of mental and visual attention.

It includes short cycle repetitive operations requiring continuous attention and the use of coordination to operate office machines and other equipment or to perform manual operations involving the use of various types of equipment.

In also includes longer cycle operations during which continuous mental and visual attention is required for the entire work cycle or constant alertness is necessary to take prompt action in the event of certain contingencies or to properly time and carry out the various steps in the operation sequence.

It includes duties requiring continuous mental and visual attention to the check quality of work, both visually and through the use of various types of gauges and equipment or to perform various clerical activities such as posting, checking, and filing records.

It includes diversified work which requires continuous attention to carrying out various tasks and may require a moderate amount of planning before performing the details of the work.

It includes work in which mental and visual concentration on complex operations or problems is occasionally required, but the majority of the duties require only continuous alertness or attention.

The Employer argued that job duty examples testified to by Union witnesses did not demonstrate that an NA II duties require constant alertness or continuous application of mental and visual attention which it believes are the "hallmark" of the third degree ranking. The Union believes the evidence established that the third degree was the most appropriate rating in this category and again points to the Assistant Cook position that was assigned a third degree rating. I repeat what I said earlier herein regarding the comparative analysis between Assistant Cook and NA II, and reiterate that such a comparison is not dispositive of the question presented.

Also, the Questionnaire is the operative document according to the contract. Under the Questionnaire heading of "Mental and Visual Requirements" it provides:

> Observes/compares/reports and documents patient status changes on a continuous basis.
>
> Observes equipment for proper function each time it is used.
>
> Must communicate patient information in a timely, consistent and accurate manner.

The undersigned's comparison of the Questionnaire with the testimony and Job Rating Plan has led me to conclude that the NA II job duties do not require "constant alertness or continuous application of mental and visual attention" particularly in light of the general descriptive characterizations contained in the introductory language of the Mental and visual Requirements factor in the Job Rating Plan. Therefore, it cannot be concluded the Committee's decision to rate the NA II in the category of Mental and Visual Requirements at the second degree was arbitrary or capricious.

The next factor in dispute is Responsibility for Equipment or Process. The Job Rating Plan contains the following narrative for this factor:

> This factor appraises the employee's responsibility to exercise care in preventing damage to the tools, equipment, and processes through which his skill is applied to the things he does. The damage considered is restricted to the items worked with and does not include secondary looses. (sic) Secondary losses are those which might conceivably occur as a result of a chain of events started from the error but which are virtually impossible to evaluate.
>
> The factor evaluates the damage normally expected from a mishap occurring through failure to observe prescribed standards of care in the use of the equipment or processes specified for the job. The cost of the labor and/or material and parts necessary to restore the items damaged to working order is considered rather than complete replacement value, unless salvage or repair is impractical.
>
> The factor does not include periodic maintenance or replacement costs resulting from ordinary wear or deterioration.

FIRST DEGREE (5): Probably damage to equipment or process is seldom over $10

SECOND DEGREE (10): Probably damage to equipment or process is seldom over $100-140

THIRD DEGREE (15): Probable damage to equipment or process is seldom over $4,000

FOURTH DEGREE (20): Probable damage to equipment or process is seldom over $5,000

FIFTH DEGREE (25): Probably damage to equipment or process is exceedingly high, reaching several thousand dollars

The undersigned believes the critical consideration under this factor is what damage can be "normally expected from a mishap occurring through failure to observe prescribed standards of care in the use of the equipment," by an NA II. The Union's argument for a higher rating is premised upon repair costs for equipment that an NA II may work with in carrying out his/her daily duties and responsibilities. This to the undersigned's way of thinking that argument misses the mark. In order to determine what degree is appropriate it is necessary to know what the NA II does with a particular piece of equipment, what is the "prescribed standard of care" in his/her usage thereof, and what are examples of damage and cost to repair that can result from failure to follow that procedure. This record is insufficient to reach any conclusion in that regard, and necessarily therefore, there is no basis upon which to determine if the Committee acted arbitrarily or capriciously in deciding the second degree rating it gave this factor.

The Union has also challenged the Committee's assessment that a second degree rating was appropriate under the category of Responsibility for Material or Product. The Job Rating Plan describes this factor as follows:

> This factor appraises the employee's responsibility to exercise care in preventing damage to items which are transported, handled, processed, assembled, inspected, testified or maintained, in avoiding loss from clerical errors, or in care affecting patient's health or welfare. Secondary losses are not included in the estimate when prescribed quality control, shop practices, clerical procedures or regular practice would normally furnish adequate provision for

detection or errors or prevention of damage. The monetary value assigned comprises the loss normally expected from an error, giving consideration to such items as the value of the typical material handled or worked on, the probable extent of the damage, the possibility of salvage and/or repair involved. The amount is based on the value of the purchased parts, materials, and/or labor required to repair or replace a specific item or items to the point of damage, or to rectify clerical errors, omitting any additional indirect charges which may be assigned for costing purposes.

FIRST DEGREE (5): Probably loss due to damage or scrapping of material or product is seldom over $20 or results in minor discomfort to patient.

SECOND DEGREE (10): Probable loss due to damage or scrapping of material or product is seldom over $200 or where some discomfort to patient present but where employee's responsibility limited.

THIRD DEGREE (15): Probable loss due to damage or scrapping of material or product is seldom over $500 or where patient may experience discomfort of a moderate degree.

FOURTH DEGREE (20): Probable loss due to damage or scrapping of material or product is seldom over $1,000 or where patient may suffer severe discomfort or require subsequent treatment where possibility of death or permanent damage is remove.

FIFTH DEGREE (25): Probable loss of material which may be damaged or scrapped is very high, up to several thousand dollars, or where action may cause permanent damage such as crippling or death and may result in patient taking legal action.

The Employer argued that, because the damage caused by NA II's to material or product seldom exceeded two hundred dollars, and that the NA II's responsibility for discomfort experienced by patients resulting from their care was limited because they work under the direction of an RN or MD, the appropriate rating was second degree. The Union, while it did not take issue with the Employer contention that damage to product seldom exceeded two hundred dollars, it did argue that this factor, as applied to the NA II position, is also to assess the level of discomfort caused patients by NA II improper care. The undersigned believes a fair reading of the

Job Rating Plan requires that both the value of damage to the materials used to perform the NA II job duties, as well as the level of patient discomfort that results when the NA II does not exercise the appropriate level of care, be considered.

The monetary value of damaged materials that can result from an NA II not exercising the proper level of care in the use thereof, based upon the record evidence, at least confirms that portion of the Committee's decision resulting in a second degree rating. The other aspect of this factor is the level of patient discomfort that can result from an NA II not exercising the appropriate level of care. Quite candidly, in the undersigned's opinion, the standards of measurement of "minor," "some," "moderate degree," or "severe" are so subjective and nebulous, without further definition, as to be almost meaningless in this process. What constitutes "minor discomfort"? Is it equivalent to a sunburn, rug burn, or scalding? How is "some discomfort" defined? The instant record is devoid of any explanation in this regard, even though there is evidence of many procedures performed by NA II's that will result in some level of discomfort to a patient and which, presumably, will be exacerbated if the NA II does not exercise the proper level of care in administering that procedure.

The undersigned, therefore, is left to conclude that he has not an inkling of how the Committee arrived at its conclusion that improper care exercised by NA II's in treating patients for which they are solely responsible would result in only "some discomfort" to the patient. It is also true that the Union adduced no evidence upon which to conclude the decision reached by the Committee was arbitrary or capricious. The record is just not sufficient on this point.

The last category of the Job Rating Plan that is in issue in this case is that of Working Conditions. The Committee rated the NA II at a second degree level and the Union believes the correct rating is third degree. The Plans contains the following language under the Working Conditions factor.

> This factor appraises the physical conditions under which the work must be performed in terms of the relative amount and continuity of exposure to the unpleasant conditions ordinarily present in the work or work area and the extent to which this exposure makes the job disagreeable.
>
> Consideration is given to the types of elements involved including atmospheric contaminants, temperature conditions, vibration, noise, and the substances with which the employee is in contact such as oil, grease, paint, chemicals, infectious disease, taking into account the effect of any protective equipment or clothing which the employee is required to wear. The intensity and duration of exposure to these elements, and whether they are present

simultaneously or alternately, are included in the appraisal.

FIRST DEGREE (10): This degree covers work which is performed in clean surroundings and which does not usually subject the employee to any of the disagreeable elements associated with shop work or where minor hazards are present.

SECOND DEGREE (20): This degree covers work which is performed under usual shop conditions involving continuous exposure of the employee to various disagreeable elements in minor degree or intermittent exposure to such elements in moderate degree.

It includes work which involves continuous exposure to the elements typically associated with shop work such as usual shop noise and vibration, detectable presence of atmospheric contaminants such as dust, fumes, and smoke, some soiling of hands and work clothes, heat in summer, and lack of uniformity in heating and ventilation in winter.

It includes work which involves intermittent exposure to various shop elements such as some oil on hands and forearms from operations, noise and vibration.

It includes intermittent exposure to harmful chemicals, radiation, infectious disease, steam or other conditions. It also includes infrequent or occasional exposure to one (1) or more disagreeable elements in considerable degree.

It includes duties which require the employee to travel about or work in various parts of the hospital and thereby involve exposure to usual hospital working conditions, provided that the duties do not in themselves involve considerable exposure to one (1) or more disagreeable elements. It also includes intermittent outdoor work with occasional exposure to inclement weather conditions.

It includes work in which some of the duties involve a more marked exposure to one (1) or more disagreeable elements but other duties require little exposure to such elements, and the combination of conditions is equivalent to that defined above.

THIRD DEGREE (30): This degree covers work which

involves exposure of the employee to various disagreeable elements with one (1) of the elements continuously present in considerable degree or several intermittently present in considerable degree.

It includes continuous exposure to chemicals, radiation, serious infectious disease, and cleaning solvents.

> It includes work which involves continuous handling of very oily or greasy parts such as in the disassembly and repair of mechanisms which have been in operation, or continuous exposure to noise.
>
> It includes various types of processing or service work which involve continuous exposure to one (1) type of disagreeable element in considerable degree or intermittent exposure to several such elements in considerable degree. This latter category includes continuous outdoor work with frequent exposure to inclement weather conditions.

The Union believes that the NA II's exposure to blood, body fluids, urine, feces, vomit, and infectious disease, in addition to combative patients, warrants a third degree rating. The Employer argues that while the NA II may be exposed to disagreeable elements, it is not on a continuous basis which is required for a third degree rating. Further, it argues that there was no evidence showing NA II's are intermittently exposed to disagreeable elements to a considerable degree.

In reviewing the record evidence, the Committee's conclusions, and evaluating them in light of the Job Rating Plan criteria, I must conclude its decision to assign a second degree rating was clearly not arbitrary or capricious. When one examines the NA II work day and realizes that it is not entirely consumed with patient contact, a conclusion that there is not continuous exposure to the aforesaid disagreeable elements necessarily follows. For it is the direct patient treatment duties of the position that result in the exposure. For example, restocking, ordering, maintaining an inventory, preparing rooms and charting are not normally duties that expose the NA II to those disagreeable elements. Thus, it was reasonable for the Committee to conclude the NA II is not continuously exposed to these disagreeable elements. Likewise, the evidence did not establish that in every instance of patient care the NA II encountered these disagreeable elements. Thus, the undersigned is persuaded that the Committee's second degree rating was not arbitrary and capricious.

In conclusion, the undersigned has found that the Committee, in applying the Job Rating Plan to the NA II classification, did not act arbitrarily or capriciously in deciding the degree level assigned to the factors of Mental Skills, Mental and Visual Requirements, Responsibility for Equipment or Process, Responsibility for Material or Product, and Working Conditions. The Committee's decision to ignore the prior experience requirement contained in the Job Questionnaire/Position Description was, however, arbitrary, capricious, and in violation of Article IV of the contract. The appropriate degree rating for prior experience, when the Job Questionnaire/Position Description is credited along with the breaking in time, is third degree. That change in degree rating also results in the NA II classification receiving sufficient points to place it in Pay Grade 62, rather than Pay Grade 59 that the Committee concluded was appropriate.

To remedy this violation, the Employer must retroactively assign the NA II classification to Pay Grade 62 effective with the first pay period following the Committee's decision, as provided for in the Side Letter Agreement. It must also make affected NA II's whole for their lost wages that resulted from the erroneous Payclass determination.

While most arbitrators, and particularly this one, do not normally offer gratuitous observations about the parties' processes, I feel compelled to do so in this case because I believe they could be helpful in their future dealings in this area of job rating and evaluation. It seems to the undersigned that the grievance and arbitration procedure is not the forum where the Union should first learn of the reasoning behind the Committee's decision(s) on degree rating. However, the way the procedure worked in this case, once the initial presentation was made to the Committee, there was no communication between the Committee, Union representatives and presenters, other than for the Committee's final decision. Thus, the Union was left with having to decide to grieve the Committee decision without any idea how it was arrived at or without any opportunity to point out for example if the Committee's research had resulted in its relying on obviously incorrect data. It is the undersigned's opinion that it would be in both parties' interest to be satisfied that they had an honest difference of opinion as to the appropriate degree rating, after everyone was knowledgeable of the reasoning that resulted in the rating, before a grievance is filed. That should necessarily be the case if the Committee were to convene a meeting of the presenters and Union for the purpose of sharing the rationale behind, what at that point would be, their preliminary conclusions based upon the presentations, documentation and subsequent research. This would afford the presenters and Union an opportunity to advise the Committee of where it does not have all of the relevant facts, or may have utilized incorrect data in coming to a conclusion. Also, it would allow the Union and employee(s) to attempt to rebut the results of any research it was not previously privy to. At the conclusion of this process, the Committee would then finalize and communicate its decision. The Union would then be in a better position to make an informed judgment as to the efficacy of grieving the Committee's decision, thus avoiding unnecessary, and costly litigation. Again, these are gratuitous observations offered in the spirit of trying to be helpful to the parties. Obviously, if either of you do not find them so, you can ignore them.

Based upon the foregoing and the record as a whole, the undersigned enters the following

AWARD

The Employer violated the collective bargaining agreement when the Job Evaluation Committee arbitrarily ignored the prior experience requirement of the Position Questionnaire/ Job Description in assigning a second degree rating to the Experience Factor contained in the Job Rating Plan which resulted in a Payclass 59 for the NA II classification. The Employer shall, therefore, remedy that violation by rating the NA II classification at Payclass 62 effective with the first pay period following the Committee's decision on or about September 7, 1994, and make employes whole for the lost difference in wage rates.

Dated at Madison, Wisconsin, this 21st day of October, 1996.

By Thomas L. Yaeger /s/
Thomas L. Yaeger, Arbitrator