BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

VILAS COUNTY

and

VILAS COUNTY COURTHOUSE EMPLOYEES, LOCAL 474-A, AFSCME, AFL-CIO

Case 77
No. 62911
MA-12477

(Call Pay Grievance)

Appearances:

Dennis O'Brien, Staff Representative, Wisconsin Council 40, AFL-CIO, 5590 Lassig Road, Rhinelander, Wisconsin 55401, appearing on behalf of Local 474-A.

John J. Prentice, Attorney at Law, 1110 N. Old World Third Street, Suite 505, Milwaukee, Wisconsin 53202, appearing on behalf of the County.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested and the County agreed that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance filed on behalf of Constance Valkenaar, who is referred to below as the Grievant. The Commission appointed Paul Gordon, Commissioner, to serve as the Arbitrator. Hearing on the matter was held on March 30, 2004 at the Vilas County Courthouse in Eagle River, Wisconsin. No transcript was prepared. A briefing schedule was set and the parties filed initial briefs on May 24, 2004. Reply briefs were filed on July 6 and 7, 2004, closing the record.

The parties stipulated to the following issues to be decided:

> Did the County violate the collective bargaining agreement when it denied Grievant two hours call pay for work performed on the evening of April 30, 2003, pursuant to Article XVII, C, of the collective bargaining agreement?
>
> If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE I – RECOGNITION

C. Agreements: Agreements reached by the parties to this Agreement shall become effective only when signed by the president and secretary of Local 474-A and authorized representatives of the Employer.

ARTICLE II – MANAGEMENT RIGHTS

The County possesses the sole right to operate County government and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to the following:

A. To direct all operations of the County;

B. To establish reasonable work rules and schedules of work, in accordance with the terms of this Agreement:

. . .

F. To maintain efficiency of County government operations;

. . .

I. To change existing methods or facilities;

. . .

L. To determine the methods, means and personnel by which County operations are to be conducted;

. . .

The County agrees that it will not use these management rights to interfere with the employees' rights established under this Agreement or for the purpose of undermining the Union or discriminating against its members. Any dispute with respect to reasonableness of the application of said management rights which are mandatorily bargainable with employees covered by this Agreement may be processed through the grievance and arbitration procedure herein.

. . .

ARTICLE VII – GRIEVANCE PROCEDURE

. . .

H. Decision of the Arbitrator: The arbitrator shall not modify, add to or delete from the express terms of this Agreement.

. . .

ARTICLE XVII – WORK DAY, WORK WEEK

A. Work Day – Work Week: Except as provided in Sections B and C below, the hours of work for the employees covered by this Agreement shall be thirty-seven and one-half (37-1/2) hours per week, seven and one-half (7-1/2) hours per day, Monday through Friday. The work day shall begin at 8:00 a.m. and end at 4:00 p.m. with an unpaid one-half hour lunch period.

B. 40 Hour Work Week: The work week for Custodians and Deputy Zoning Administrators shall be forty (40) hours per week, eight (8) hours per day Monday through Friday. The work day for existing Custodians in the Courthouse shall be 1:00 p.m. to 9:00 p.m. The work day for Deputy Zoning Administrators shall be 7:30 a.m. to 4:00 p.m., expect [sic] in instances where they must perform inspections at times not within that schedule. In such instances, the Deputy Zoning Administrator's schedule may be modified by mutual agreement with the Zoning Administrator to meet inspection demands/schedules.

C. Call Time: Employees called to work outside their normal schedule of hours, except where such work is an extension of the work day, shall be paid two (2) hours call pay, at their normal rate, in addition to the pay for the hours worked.

BACKGROUND AND FACTS

Grievant is an administrative secretary in the County Forestry Office and, among other things, does receptionist and bookkeeping work there. Her normal hours of work are 8:00 a.m. to 4:00 p.m., Monday through Friday. She was required by her Supervisor to work a special public meeting in Boulder Junction concerning an ATV issue on the evening of April 30, 2003. She was given this directive at least one week prior to the meeting. She told her supervisor that she did not want to go to this meeting but, was told she had to attend. On April 30th she worked in the Forestry Office, then went home. She left her home about 5:30 p.m. and made the ½ hour drive to be at the meeting location by 6:00 p.m. as directed. She set up chairs and took minutes of the meeting, which started at 6:30 p.m. When she filled out her time sheet in addition to the hours worked she requested two hours of call time pay. The County paid her for the hours worked, but denied the call pay. That led to this grievance.

The Agreement covering the time period involved here was signed by the parties on August 27, 2002. The matter of call time was discussed during the 1998 bargaining between the parties. The contract clauses at issue on call pay, Article XVII, Sections A and C, read the same as then set out in Article XVII, Sections A and D. The parties became aware that call time pay was routinely being requested and paid for previously scheduled elections work, training, and certain maintenance and custodial work. Not all of the Union membership and bargaining team members had been aware of that. The evidence at the hearing herein did not

clearly establish if other prescheduled meetings were also a concern. From the County perspective, these meetings were reflected in the minutes of the October 8, 1998 Personnel Committed meeting. However, Elizabeth Carter, a confidential employee from the personnel department who prepared the minutes, testified that she could not remember if night meetings were specifically discussed at the bargaining table. During the bargaining, members of the Union team indicated their agreement that call time should not be paid for the elections, training and maintenance/custodial work. The Union itself did not take a survey or vote on those or any other application of the call time provision.

The minutes of the October 8, 1998 Personnel Committee state in pertinent part:

> **Initial Bargaining Session Courthouse Local 474A -**....Mr. Prentice then explained the County's bargaining proposals to the Courthouse Local 474a.
>
> Call time was a topic of discussion. Mr. Prentice explained that it is his understanding that there is a past practice regarding Call-time. He explained that call time should not be used when hours of work are scheduled. Election night in the County Clerk's Office, training and meetings that are required of employees are examples of scheduled work for employees. It is not and will not be subject to the call-time provision in the contract. Kathleen Ray was unaware that this was happening and should not happen. The County is now serving notice and will submit the notice in writing that this past practice will terminate on 12/31/98.

By letter of November 4, 1998, The County, through its labor Attorney, John J. Prentice, wrote to the Union on the subject of call pay as follows:

> Pursuant to our discussions in negotiations, this will confirm that effective December 31, 1998, Vilas County will terminate the practice of employees receiving two (2) hours call pay for prescheduled work; i.e., election night, schedule training or building maintenance (waxing floors). Article XVII (work day, work week), subsection C, provides that employees called to work outside their normal work schedule will be paid two (2) hours call pay when the work is not an extension of the work day. Scheduled work is an extension of the workday.
>
> If you have any further inquiries regarding this matter, please do not hesitate to contact us. Thank you for your cooperation.

The Union as a body did not become aware of the limitation on call time until the November 4th letter was discussed at a union meeting. Some Union members, such as Linda Small, felt there was a loss of a benefit by no longer being paid call time for training meetings outside the normal work hours.

After January 1, 1999 the County ceased paying call time for any previously scheduled work. There were three occasions, one of which being this grievance, where such call time was requested and denied. Numerous employees worked scheduled times outside their regular schedule and did not request call time pay. The record did not establish how often, if at all, this was contiguous with the normal work schedule. Several employees who did work unscheduled times outside of their regular schedule requested and received call time pay.

THE PARTIES' POSITIONS

Union

To summarize, the Union argues that the agreement language, construed as a whole, is clear and unambiguous. It sets out the normal workday and workweek, and what compensation is paid when an employee is called to work outside their normal schedule. While the November 4, 1998 letter sought to severely restrict the practice of paying call-pay, the practice of paying call pay is the result of a clear contract provision from which the County cannot relieve itself by simply repudiating the practice. If so, the County could simply repudiate other agreement provisions.

The effect of the letter was to restrict payment of call pay, but the Union disagrees with the interpretation of the language of the agreement. The County's concept of pre-scheduled work is not and has not been part of the agreement. Pre-scheduled does not equal an extension of the normal workday. Using an extension of the normal work hours immediately preceding and following is more logical than inserting the County's pre-scheduled concept.

The County's letter is limited to three instances for exclusion. The Union's apparent acceptance of that does not mean that all call pay matters are subject to being an extension of the normal workday because it was prescheduled. The County is unclear about its own position, given the testimony of Burzinski, Carter and Zelten as to non-union employees, multiple pre-schedules on the same evening, and supervisor-arranged call pay.

The Union notes that workers must be available to respond to the needs of citizens whenever these needs arise. To remain available the workers receive call pay. That is why it is in the agreement, which cannot be unilaterally changed by insisting on unwritten restrictions such as pre-scheduled work.

County

To summarize, the County argues the Union either agreed to or, if not, did not challenge the discontinuation of the practice or the County's interpretation of the contract language. The Union cannot credibly claim it did not have knowledge of the County's

position. From January 1, 1999 the County has established a practice of not paying call time to employees who were scheduled to work outside their normal work hours or given advanced notice to do so. The contract language only requires payment when one is called to work, as opposed to required to work outside the normal schedule. And meetings are no different than elections, trainings or certain maintenance.

The County argues the intent of Article XVII, C, is to compensate for those called into work unexpectedly, and the Union agreed when the issue came up. Call time meant that you were called into work without advance notice. Zelten's authority does not constitute scheduled work and Burzinski knew she would not receive call time pay.

The County also argues the Union has waived its objection because it had knowledge of the right allegedly being abridged and acquiesced to it over a long period of time. Prior to January 1, 1999 call time had been paid for evenings and Saturdays, but after bargaining it changed. The issue was raised at bargaining and union meetings. Ms Small, then a union steward, knew she would no longer get call pay for evening and weekend trainings. The Union understood this and Small stopped attending trainings outside working hours. The Union had an opportunity to bargain the issue prior to termination of the practice and did not challenge the County's interpretation.

Union Reply

The Union replies that meetings were not discussed in the November 4th letter. Ray and Small were not aware of their rights to challenge the County's action. The County had been in the practice of paying for scheduled work which could have required that the policy remain unchanged. The County has been inconsistent about its restrictions. The Union has not waived its right to object because this matter is distinct from any previously discussed limitation. The County generated Joint Exhibit 9, the meeting minutes, and chose the words that describe the bargaining discussions. The other testimony does not support including meetings as exempt from call pay. The definition of "called" can include "require". The County wants to ignore the past. Some limitations were agreed to by the Union, but the instant matter is not among them.

County Reply

The County replies that the parameter of "called to work" and "extension of the workday" is left to interpretation, and the practice of the parties is the best method to gauge their intent and the appropriate application of the language. It was never the intent to be paid call time for prescheduled work. The County acted quickly and effectively to terminate the practice. Other practices under the agreement do not involve construing the intent or terms. The most compelling indication regarding interpretation is the practice of the parties, not the dictionary. There is no logical distinction between meetings and election night work, trainings and maintenance. Bruzinski understood, when she was in the union, she would not receive call

time pay for prescheduled meetings. It was never the intent to pay for prescheduled work, the Union agreed and did not challenge the County's construction because its leadership and members understood the intent. Zelten's response to emergencies cannot be prescheduled.

DISCUSSION

Both parties in this case point to one or more practices in how the call pay provisions in the agreement have been and should be applied. But before the use of practice can be considered, a threshold question must first be decided. That is, is the language in the agreement ambiguous? Is it subject to more than one meaning? If the language is ambiguous then past practice can be used to find the intent of the parties and interpret the meaning and application of the language. While custom and past practice are used very frequently to establish the intent of contract provisions that are so ambiguous or so general as to be capable of different interpretations, they ordinarily will not be used to give meaning to a provision that is clear and unambiguous. If the language in the agreement is not ambiguous then past practice is not used to create an ambiguity or to determine intent.

In determining whether an ambiguity exists certain contract interpretation principles apply. The agreement must be read as a whole. Meaning must be given to all words and phrases in the agreement, and no words may be rendered superfluous. The specific prevails over the general, etc.

Turning to the language of the agreement to determine if there is an ambiguity, it is first noted that Article II – Management Rights, provides that it is a right of the County:

> B. To establish reasonable work rules and schedules of work, in accordance with the terms of this agreement.

The County's right to establish schedules of work, and thusly impact the availability of call time pay, must be in accordance with the terms of the agreement. The agreement does address schedules of work in Article XVII. The County's establishment of schedules of work must be in accordance with Article XVII.

Article XVII establishes the hours of work. The Section A, Work Day-Work Week clause uses the word "shall" and sets out specific starting times and ending times as the work day. The clause has only two exceptions, which are Sections B and C. Section C is the relevant exception. It refers to "normal schedule". Reading Section A and C together as we must, the normal schedule in Section C is as set out in Section A, which is 8:00 a.m. to 4:00 p.m. The meaning here, as urged by the Union, is that unless the extension applies, work outside 8:00 a.m. to 4:00 p.m. is subject to call time pay. Modifications of scheduled times

was addressed by the parties in Section B for the Deputy Zoning Administrator. If the parties had wanted such an excerption to apply to other employees they could have done so in the agreement. However, they did not.

For there to be an ambiguity the language must be susceptible to another meaning. The County argues that Article XVII can be read to fit prescheduled or scheduled time into the extension of the work day exception. The exception in Section C is where such work is an extension of the work day. The County's November 4th letter, and its argument, states that scheduled work is an extension of the workday. However, that is not what the clause says. The workday is defined as 8:00 a.m. to 4:00 p.m. To include scheduled or prescheduled work outside of those hours as the normal work week would be to add a word or provision to the agreement which is not there. This an arbitrator may not do. Article VII, Section H, of the agreement states that "[t]he arbitrator shall not modify, add to or delete from the express terms of this Agreement". Using a plain meaning of "extension", an extension of the work day would be to extend the normal starting time or normal ending time without any intervening time. To read the word "extension" any other way in this context would make the language of the agreement meaningless because the County could schedule or preschedule at it's will, repeatedly, with or without pattern or regularity, in total disregard to the normal hours set out in Section A. Article XVII is not reasonably susceptible to any such meaning. Therefore, it is not ambiguous.

The County also argues that the phrase "called to work" in Section C means to work unexpectedly without any advanced notice. But the agreement does not say that. In the agreement the phrase "called to work" is not limited by words such as "unexpectedly" or "in an emergency". Similar to Section B, the parties could have used that type of language, but they did not. The limitation that does occur is simply "outside their normal schedule of hours". This is not ambiguous. Also, I see no meaningful distinction between being "called to work" and "called in to work", as the parties argue in their briefs. Either way, the County is exercising its management right to determine when the employees are to work.

The language of Article XVII is clear and unambiguous. Resort to the practice of the parties is not required to apply the language to the facts of the case. With the exception of an extension of the normal starting and ending times (which does not apply here for the reasons stated above), call pay is required when the employer changes an employees schedule of work hours on a specific work day -- when they are called to work outside their normal schedule of hours. Similar clauses applied to similar circumstances have yielded this same result. SEE, CITY OF LADYSMITH (PUBLIC WORKS DEPT.), CASE 27, NO. 52433, MA-8970 (LEVITAN, 4/96) (prescheduled work outside normal work day in agreement, where call-in pay clause did not have an exception for extension of the normal workday).

Applied to the facts in this case, Grievant has a normal work schedule of 8:00 a.m. to 4:00 p.m. She was called to work, albeit with plenty of advance notice, for an evening meeting on April 30, 2003. The County required her to be there. On April 30, 2003, she worked at her usual work place and then went home. Even though the record is not clear how many hours she worked that day at her normal work place, it is clear that she did go home

after work, and there was a period of time that day between 4:00 p.m. and the time she was required to be at the evening meeting which was not an extension of the work day. She was directed by her supervisor to be at the meeting place by 6:00 p.m. to prepare the room and later take minutes. This in turn required her to leave her home ½ hour before then to make the drive to the required location. This was work outside her normal schedule of hours and the exception does not apply. Article XVII, Section C, requires that she shall be paid two (2) hours call pay, at her normal rate, in addition to the pay for the hours worked.

Even if the agreement language were ambiguous the result would be the same. This involves the question of whether any pre-1999 practice was effectively repudiated by the County. The October 8, 1998 Personnel Committee meeting minutes refer to "a past practice" regarding call time, and that "this past practice will terminate". The November 4, 1998 letter refers to "the practice" of employees receiving call pay. Setting aside for the moment the parameters of that practice, it is apparent that at least in some circumstances employees were receiving call pay for work scheduled outside their normal work hours in circumstances that were not mere changes, and thereby extensions, of the agreed upon starting and ending times in Article XVII, Section A. This would be a contract based past practice. After the October 8, 1998 negotiation session, the language in the agreement was not changed in this respect. There was no survey or vote of the Union on that issue. The only writing other than the meeting minutes is the November 4, 1998 letter to the Union from the County which the Union did not reply to.

There are two types of past practices which are separate and distinct. 1/ One type of practice is not addressed in the labor agreement; it exists apart from any provision of the labor agreement. This type of practice may be revoked by either party upon timely notice of repudiation. The other type of practice, a "contract-based" past practice, concerns subject matter covered by the contract; it exists to clarify some contractual ambiguity. Such contract-based practices are essential to an understanding of ambiguous contractual provisions. Over time the contract-based practice becomes an integral part of the ambiguous provision; and it will be binding on the parties during the life of the agreement even though the practice is not explicitly stated anywhere in the contract. "Contract-based" past practices cannot be revoked by mere timely repudiation. Rather, such a practice can only be terminated by mutual agreement of the parties to rewrite the ambiguous provision to clearly eliminate the practice or to eliminate the ambiguous provision entirely.

1/ SEE, PINELAWN MEMORIAL PARK (OVERTIME GRIEVANCE), CASE 3, NO. 60446, A-5966 (GALLAGHER, 1/02).

The clearest, most persuasive description of the operation of a contract-based past practice *vis a vis* one parties' attempted repudiation thereof was written by Arbitrator Richard Mittenthal. 2/ That description reads in relevant part as follows:

. . .

> Consider next a well-established practice which serves to clarify some ambiguity in the agreement. Because the practice is essential to an understanding of the ambiguous provision, it becomes in effect a part of the provision. As such it will be binding for the life of the agreement. And the mere repudiation of the practice by one side during the negotiation of a new agreement, unless accompanied by a revision of the ambiguous language, would not be significant. For the repudiation alone would not change the meaning of the ambiguous provision and hence would not detract from the effectiveness of the practice.
>
> It is a well-settled principle that where past practice has established a meaning for language that is subsequently used in an agreement, the language will be presumed to have the meaning given it by practice. Thus, this kind of practice can only be terminated by mutual agreement, that is, by the parties rewriting the ambiguous provision to supercede the practice, by eliminating the provision entirely, etc.

In addition, WERC arbitrators have adopted Mittenthal's analysis in cases involving the attempted repudiation of a contract-based practice by one party to a labor agreement. BROWN COUNTY (SHERIFF'S DEPARTMENT), CASE 567, NO.52381, A-8942 (BUFFETT, 12/95); BARRON COUNTY (SHERIFF'S DEPARTMENT), CASE 118, NO. 50790, MA-8382 (MCLAUGHLIN, 6/95). These cases hold that a contract-based past practice which fills in the blanks in an ambiguous contract provision cannot be eliminated except by mutual agreement to change the contract language. SEE ALSO, WOOD COUNTY (NURSES), CASE 113, NO 48253, MA-7555 (GRECO, 6/93); DOUGLAS COUNTY (MIDDLE RIVER HEALTH CARE CENTER), CASE 177, NO. 44909, MA-6453 (ENGMANN, 8/91).

2/ Past Practice and the Administration of Collective Bargaining Agreements, 14th Annual Meeting of the National Academy of Arbitrators, pp. 30-58 (BNA, 1961).

In the instant case, if there indeed was a past practice as to when call pay would be paid, the language in the agreement on that point was never changed to eliminate that practice. Although other language in the call time clause was negotiated, the operative language here

was not revised. The November 4, 1998 letter is not a change of the language in the collective bargaining agreement at Article XVII. This cannot be an effective repudiation of the practice. Moreover, under Article I –Recognition, Section C, "[a]greements reached by the parties to this Agreement shall become effective only when signed by the president and secretary of Local 474-A and authorized representatives of the Employer". Here, no documents signed by the Union contained any changes as to when call time would be paid. If past practice were to be considered in clarifying an ambiguity, it would favor the Union because the language was not changed. Without changing the language in the collective bargaining agreement, a repudiation of the practice, such as the November 4th letter, is not effective.

After 1998, the practice changed but the language in the agreement did not. This presents the quandary of which practice is the one to follow to seek the intent of the parties as to the meaning of the language. Under one practice call time is paid, under the other it is not. The subjugation of this language to two different, competing practices points out the utility of the above referenced repudiation rule, and why getting agreements in writing is needed.

There is yet another problem with finding that a past practice has filled the gaps of an ambiguity or defines meaning here. That problem is it is not clear what the past practice actually was and what the purported change in practice was. To modify an agreement by practice, the scope of the practice needs to be determined. The practice is no broader than the circumstances out of which it has arisen. *Elkouri & Elkouri, 5th Edition, p. 633*. Were the parties discussing all prescheduled work or only the circumstances that were mentioned? The Union representatives in the 1998 bargaining session only expressed agreement to the inapplicability of call pay to scheduled training, election night and some maintenance work. In this case the evidence is conflicting as to what circumstances the call time had been paid. County witness Elizabeth Carter testified she could not recall if meetings were discussed or not. Elections and maintenance/custodial work were discussed. The October 8th meeting minutes do not refer to maintenance/custodial work. They do refer to election night, training and meetings that are required of employees. The November 4th letter does not refer to meetings, but does refer to election night and schedule training or building maintenance. The November 4th letter also uses "i.e." in describing the prescheduled work. It is generally recognized that in contract interpretation, when something is specified, everything else is excluded. To express one thing is to exclude another. *Elkouri &Elkouri, 5th Edition, p. 497.* After 1998 the County has not paid for any prescheduled work. Thus, it is not clear what prescheduled work or if all prescheduled work was the subject of the discussions. This does not help determine what is prescheduled or what prescheduled work is within the scope of the practice. It does not help determine intent. Some of the Union negotiators did understand and agreed that paying call time in some of those circumstances was not what the agreement provided for. It is not clear, and the record does not establish, whether all prescheduled work or, if not all, just what prescheduled work the Union personnel agree should not be paid call time. Election night work is the only specific instance which is referenced in the testimony regarding negotiation discussions, meeting minutes and the letter. Before 1999 some Union

members did not know call time was being paid for scheduled work. After 1998 many employees from various departments worked prescheduled non-regular hours and did not request call time pay. Three did. Beyond election night, scheduled trainings and certain maintenance work, the evidence does not support a conclusion that all prescheduled work was paid call time before 1998, or that all prescheduled work after 1998 was understood by the union as no longer subject to call time pay even though at least one felt they were losing a benefit. This renders the scope of the practice unclear and not helpful in clarifying any ambiguity.

The agreement language is clear and unambiguous. Any practices of the parties, whatever their scope, cannot be used to create an ambiguity, nor was any practice effectively repudiated. Agreements reached by the parties, according to Article II, shall become effective only when signed by the parties. The November 4, 1998 letter is not signed by the Union, nor is it referenced in any writing signed by the Union agreeing to its terms. The letter cannot alter the agreement and there is no other writing signed by both parties that alters the language at issue here. The plain language of the agreement requires call time to be paid in this case.

The County argues that the Union has waived it's objection to the County's construction and application of the pay provisions in Article XVII, Section C, because the Union clearly knew the County's position, acquiesced to it over a long period of time, and the County has not paid call time to any employee for scheduled work outside the regular work schedule. The Union argues it did not waive anything. The subject of waiver is common.

Especially common in arbitration is that species of waiver known in law as "acquiescence". This term denotes a waiver that arises by tacit consent or by failure of a person for an unreasonable length of time to act upon rights of which the person has full knowledge.

While arbitrators generally hold that acquiescence by one party to violations of an express rule by the other party precludes action in regard to past transactions, they do not consider that acquiescence precludes application of the rule to future conduct.

The failure to act upon a right given by a contract may be considered by the arbitrator along with other evidence to help establish the intent of the parties in agreeing to certain language.

Arbitrators have frequently held that where one party, with actual or constructive knowledge of its rights, stands by and offers no protest with respect to the conduct of the other, thereby reasonably inducing the latter to believe that the conduct is fully concurred in, the matter will be treated as closed insofar as it relates to past transactions; but repeated violations of an express rule by one party or acquiescence on the part of the other ordinarily will not affect application of the rule in future operations. *Elkouri & Elkouri,* 5th Edition,

pp. 576, 577. Here, there is acquiescence in the failure to object to or contest call time matters after 1998, or grieve the first two of the three call time pay denials. Those matters would be waived, but they do not waive prospective challenges, such as the instant grievance. Similarly, a related rule is that a party's failure to file grievances or to protest past violations of a clear contract rule does not bar that party, after notice to the violator, from insisting upon compliance with the clear contract requirements in future cases. The failure of the Union to file grievances for the other two denials of call time pay are not waivers of the right to file a grievance in this case.

Accordingly, based upon the evidence and arguments in this case, I issue the following

AWARD

The grievance is sustained. The employer shall pay to Constance Valkenaar two (2) hours call pay, at her normal rate, for work performed on April 30, 2003.

Dated at Madison, Wisconsin this 30th day of September, 2004.

Paul Gordon /s/
Paul Gordon, Arbitrator

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