BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AFSCME LOCAL 1155

and

MEMORIAL MEDICAL CENTER

Case 26
No. 64786
A-6166

(Hours of Work Grievance)

Appearances:

Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 364, Menomonie, Wisconsin, appearing on behalf of Local 1155.

Mr. John C. Patzke, Attorney, Brigden & Petajan, S.C., Attorneys at Law, 600 East Mason Street, Suite 400, Milwaukee, Wisconsin, appearing on behalf of Memorial Medical Center.

ARBITRATION AWARD

AFSCME Local 1155, hereinafter "Union," and Memorial Medical Center, hereinafter "Employer," mutually requested that the Wisconsin Employment Relations Commission assign Lauri A. Millot as arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The hearing was held before the undersigned on March 7, 2006 in Ashland, Wisconsin. The hearing was not transcribed. The parties submitted post-hearing briefs and reply briefs, the last of which was received on June 5, 2006, whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there were no procedural issues in dispute and framed the substantive issues as:

> Whether the Employer, Memorial Medical Center, violated Article 9, Section 4 of the Collective Bargaining Agreement? And if so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 1
RECOGNITION

Section 1: Memorial Medical Center recognizes the Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, Local 1155, as the exclusive bargaining agent for all regular full-time and all regular part-time employees of Memorial Medical Center who are in the departments and positions as hereinafter described: ... Clinical Lab Tech, Med-Tech (MLT), Non-Registered Med Tech (MLT),

. . .

. . .

ARTICLE 4
GRIEVANCE PROCEDURE

Section 1: Should differences arise between the Employer and the Union as to the meaning and application of the Agreement, or as to any question relating to wages, hours and working conditions, they shall be settled promptly under the provisions of the Article. The Employer shall have a right to file a grievance and similarly use this procedure. The representative of the Employer and of the Union designated to handle grievances at each step of the foregoing procedure shall have full power and authority to finally adjust and settle any grievance which is referred to them pursuant to said procedure. The Union President shall receive a copy of the grievance and response at each step of the grievance procedure.

a. Any employee having a grievance shall take the matter to the Steward of the Union.

b. The employee and the Union Steward shall discuss the matter with the employee's immediate supervisor. If the problem is not resolved, the employee and Union Steward shall submit a grievance in writing to the employee's immediate supervisor not later than fifteen (15) normal working days after the occurrence or the date the employee could reasonably have known of said occurrence. (In the nursing department grievances involving mandatory days off shall commence with the nursing supervisor initiating the mandatory day off.) The written grievance shall contain a clear and concise statement of the issue, what part of the collective bargaining agreement was violated and what remedy is being sought. The supervisor shall make a decision in writing within five (5) normal working days thereafter.

c. If the immediate supervisor is not the department head and the grievance is not settled in (b) above, the grievance shall be submitted to the department head in writing within five (5) normal working days. The department head shall then render a decision within five (5) normal working days.

d. If no satisfactory settlement is made, the grievance shall be submitted in writing within ten (10) normal working days to the Hospital President. The Hospital President shall render a decision in writing within ten (10) normal working days to the steward who has processed the grievance. The grievant, the union president and the district representative will receive copies of the response.

e. If a satisfactory settlement is not reached within ten (10) normal working days of the written decision in paragraph (d) above, either party may serve written notice upon the other that the grievance shall be arbitrated. Both parties shall request the Wisconsin Employment Relations Commission to select an arbitrator from its staff unless both parties mutually agree to request the Federal Mediation and Conciliation Service or the American Arbitration Association to furnish a panel of arbitrators. If a panel is requested, the parties will alternately strike one name; first strike determined by the toss of a coin, until one name remains, who shall be the arbitrator.

The arbitrator shall conduct a hearing of the grievance as promptly as practicable. The arbitrator shall have jurisdiction and authority to interpret, apply and determine compliance with the provisions of this agreement and shall not have jurisdiction or authority to add to, detract from, alter, or ignore its terms in any way. The decision shall be final and binding upon both parties.

Each party shall bear the expense of the preparation of its own case and of its participants and witnesses. The fees and expenses of the arbitrator and other expenses related to the hearing shall be borne equally by the Employer and the Union.

It is agreed that time is of the essence, and that if any time limit set forth herein is not complied with, the grievance will be deemed decided against the party who failed to comply with the time limit. Time limitations set forth herein may be waived by mutual agreement. Any waiver of time limitation shall be in writing and shall be signed by a responsible representative of both parties to this Agreement.

ARTICLE 5
SENIORITY

Section 1: Unit wide seniority shall be determined beginning with the date of hire at Memorial Medical Center (MMC) or the facility formerly known as Memorial Medical Alcohol and Drug Treatment Center (MMADTC), including time spent on vacations, paid sick leave, military leave, approved leaves of absence or Worker's Compensation resulting from employment with MMC or the former MMADTC. A union employee who leaves the bargaining unit but remains employed at MMC for a period not to exceed sixty (60) days and then returns to the bargaining unit will not gain additional seniority during this period, but will suffer no loss in seniority.

Section 2: Department wide seniority shall be defined as the time spent on a permanent assignment to a department. When an employee voluntarily transfers to another department, he shall lose departmental seniority in the former department and begin acquiring seniority in the department to which transferred.

ARTICLE 9
WORK DAY – WORK WEEK – OVERTIME PAY

Section 1: Time scheduling is to provide equitable distribution of the Hospital staff for care of the patients twenty-four (24) hours a day.

. . .

Section 4: All employees required to rotate work shifts on a seven day a week basis will have their scheduled working hours arranged in such a manner that, insofar as is possible, all employees within each job classification and department will be treated in a fair and equal manner. The purpose of this Section is to assure that no employee is required to work a disproportionate share of weekend, holiday, or other shifts commonly considered to be undesirable. Weekends shall be considered Saturday and Sunday.

The Employer shall endeavor to provide all employees with every other weekend off on a fair and equitable basis. When alternate weekends off are not scheduled, the Employer will provide the next two weekends off, if possible.

a. The most senior employee in the Building Operations Department shall not be required to rotate work shifts except to fill vacancies caused by vacations or unexpected absences.

. . .

BACKGROUND AND FACTS

The Grievant, Katrina DeWitt was hired by the Employer on June 27, 1994 to a MLT position. She filed the grievance at issue in this case on April 9, 2004 alleging that "weekend scheduling in lab does not comply with Art. 9 Sec. 4 and any other provision that may apply" and requested that the Employer "begin rotating weekend scheduling." The parties attempted to resolve the grievance during bargaining for the 2003-2005 successor agreement, but were unsuccessful.

The Employer employs 14 medical technologists. The employees, their date of hire, credentials and union status are contained in a document which reads as follows:

MEDICAL TECHNOLOGISTS

Name	Credential	Date of Hire	Union/NonUnion
Kathy Mortinsen	CLS	2/23/76	Nonunion
Lynne Frantz	CLT	6/21/76	Afscme Union
Tom Stipetich	CLS	8/29/77	Nonunion
Nancy Caven	CLT	5/7/79	Afscme Union
Kathy Lang	CLS	11/11/80	Nonunion
Kerry Retzloff	CLS	5/13/82	Nonunion
Carolyn Cherney	CLT	6/14/82	Afscme Union
Laura Nabozny	CLS	8/10/87	Nonunion
Katrina DeWitt	MLT	6/27/94	Afscme Union
Dale Anderson	CLS	1/7/02	Nonunion
Pam Gendron	CLS	1/6/04	Nonunion
Michelle Vyskocil – PRN (Term 1/1/06)	CLS	1/16/04	Nonunion
Ulrike Cords-Kastens	MLT	3/1/04	Afscme Union
Amy Westlund	MLT	5/24/04	Afscme Union
Scott Philips	CLS	7/5/04	Nonunion

Although the Employer identifies some of the technologists as MLT and others as CLS, that differentiation is due to their credentials and there is no significant difference in the work performed. Moreover, the Employer does not differentiate between union or non-union status for work assignment or duties.

The Employer has, since 1996, assigned the four least senior employees on the Medical Technologist list to the 3 to 11 shift on weekends. The four individuals at the time of the grievance were the Grievant, Dale Anderson, Michelle Vyskocil and Laura Nabozny. Anderson, Vyskocil and Nabozny are credentialed as CLS and are non-union employees. Following is a breakdown of the weekend work assignments from April 2003 through April 2004 for these four least senior employees:

Tech	# 3/11s	# days	Total wkends	% of 3/11s
Laura Nabozny	13	5	18	25%
Katie DeWitt	12	7	19	23%
Dale Anderson	11	7	18	21%
Michelle Vyskocil (PRN Jan 04)	12	3	15	23%
Pam Gendron (hired Jan 04)	2	0		
Others				

No other union or non-union Medical Technologists are assigned the 3 to 11 shift on weekends.[1]

On April 15, 2004 the Employer denied the grievance in a letter which read as follows:

> Dear Denise:
>
> I am writing in response to the grievance AFSCME Local 1155 initiated on behalf of Katrina DeWitt on April 9, 2004.
>
> MMC laboratory schedules technical (CLS, CLT, MLT) for weekends on an equitable rotating basis. By practice the four least senior people from this group are the staff schedule for evenings – the 3/11 shifts – on the weekends. These four least senior people work 25% of their weekends on the day shift. The four least senior people at this time are 3 CLS's (not members of AFSCME) and 1 MLT (AFSCME member). After researching historical schedules it is evident that the practice of scheduling least senior people to the weekend evening shift has been in use since 1986. Until recently, there have been no objections to this long-standing practice from Local 1155 or any individual laboratory staff member.
>
> Since becoming aware of this objection, I have attempted to resolve this issue by reaching some compromise that all technical staff could support. MMC laboratory staff responded to various questions on staff surveys about voluntarily working the evening shift on weekends, altering scheduling patterns, and offering suggestions on possible schedule changes. There was no consistency of answers. Most staff did not want to be scheduled for evenings, especially on the weekends. One, maybe two, staff have volunteered to work some evening shifts on the weekend. Likewise, we have discussed these issues several times at staff meetings, but have reached no consensus.
>
> Some changes will be happening that will at least help with the workload on the evening weekend shift. MMC laboratory is in the process of trying to hire enough staff to cover nights (the 11/7 shift). This will help with the workload experienced toward the end of the evening shift.

[1] Amy Westlund, MLT, requested and the Employer assigned her to work a 3 to 12 shift every weekend. The Union asserted at hearing that the Employer failed to properly post this position when it was created. Whether that position was posted or not is not relevant to the grievance at hand and will not be addressed.

Also, recently one of the day techs on the weekend is scheduled for a longer shift providing help in the late afternoon.

As you know, only four of our medical technologists in the lab are covered by the AFSCME contract. Even if we were to agree to change our past practice and implement Article 9, Section 4 in the manner that you have requested, it would not decrease the frequency of the evening weekend shifts for Katrina. This problem involves union and nonunion staff and requires a solution beyond merely implementing contract language for our 4 union med techs.

MMC is looking at alternatives for scheduling and will continue to do so. A number of factors that will impact on staffing are in a state of flux. These include recruitment for a night shift and a major renovation of the lab. In the meantime, the volunteer(s) who have indicated they will work the evening shift on weekends will be scheduled to do so. Except for this, the scheduling practices used will not change at this time.

Sincerely,

Carol Evans
Director of Laboratory Services
Memorial Medical Center

cc: Steve Hartmann
Katie DeWitt

Additional facts, as relevant, are contained in the DISCUSSION section below.

ARGUMENTS OF THE PARTIES

The Union

This case involves the scheduling of weekend shifts for employees who normally and customarily work rotating day/evening weekday shifts in the laboratory.

The Employer is not assigning shifts in a manner that "assures that no employee is required to work a disproportionate share of weekend, holiday or other shifts commonly understood to be undesirable" and therefore, the grievance should be sustained.

Laboratory Services Director Carol Evans testified that employees are scheduled to rotate primarily between days and evenings, although some rotate between day, evening and nights during the week. Evans testified that there are nonunion professional employees doing virtually identical work in the lab as the union professional employees. Evans confirmed that the weekend evening shift is an undesirable shift.

The practice that the Employer has utilized has not been agreed to by the Union nor is it interpretive of Article 9, Section 4. The Union put the Employer on notice on April 9, 2004 when it filed the grievance in this case that the Union intended for the language of Article 9, Section 4 to be followed. The labor agreement expired on September 30, 2004, a successor agreement was bargained and the language of Article 9, Section 4 did not change. The Employer is not willing to follow the language of the Agreement because, as Evans stated, "this problem involves union and nonunion staff and requires a resolution beyond merely implementing contract language for our 4 union med techs." Union br. p.2. If the hospital cannot live with the language of the agreement, it must bargain other language. It has failed to do so in order to protect those who work only the weekend day shift and this is not a valid basis for violating the labor agreement.

Union in Reply

The Union finds the Employer's argument that the language of Section 4 is not clear and unambiguous to be absurd. The language, and specifically the second sentence, states a clear purpose. There is no debate that evening shifts are undesirable. There is also no debate that the Grievant has worked a disproportionate number of these shifts relative to the group as a whole or relative to the bargaining unit members. As such, the Employer's actions as it relates to the Grievant conflicts with the language of the second sentence.

Two years were spent trying to find another valid way to schedule undesirable shifts. All attempts were vetoed by the Employer and the non-bargaining unit members. These employees cannot determine the continuance of a violative practice and should not be considered, unless they become part of the group.

As to the Employer's assertion that seniority is relevant, since seniority was not included in the first part of Section 4, the Arbitrator must conclude that the parties did not intend for it to be considered when scheduling occurred.

Finally, it is not the role of the Arbitrator to schedule weekend shifts in the lab as suggested by the Employer. The Arbitrator should enforce the language of the agreement and require the hospital to create a weekend schedule that does not violate the agreement.

For the above reasons, the Union requests that the Arbitrator instruct the Employer to implement the language of the agreement until such time that they bargain new language.

Employer

The Union bears the burden of proof to show that the language of the parties' agreement has been violated. The language in question is ambiguous, the past practice supports the Employer's position and as such, the Union has not met its burden.

The language of Article 9, Section 4 is not facially clear as to its meaning and application. The structure of Section 4, is confusing and inconsistent with the remainder of the agreement and typical formatting. It contains unnumbered and unalphabetized paragraphs and labels a sub-paragraph "a" when the parties did not agree to a paragraph "b". Additionally the parties failed to define "disproportionate share," "commonly considered to be undesirable," "arranged in a manner," "insofar as possible," and "treated in a fair and equal manner." These structural irregularities, coupled with the ambiguous phrases, make it necessary to go beyond the four corners of the agreement to ascertain the meaning and application of Article 9, Section 4.

Although arbitrators utilize multiple aids when interpreting contract language, past practice is the best indicia in this situation. There is no evidence of bargaining history, grievances or compromise offers. The parties have, for over a quarter of a century, assigned evening weekend shifts to the least senior Medical Technologists in the Laboratory Services Department. The Union had full knowledge and has approved this method of scheduling shift assignments for weekends. During these 25 years, the contract language has remained unchanged. Consistent with the conclusion of Arbitrator Wolff in E J BRANCH CORP., 1999 "an established past practice becomes part of the written agreement under clear principles of labor contract construction."

The parties' practice is a reasonable interpretation of the labor agreement. It acknowledges that specific job classifications and departments are treated in fair and equitable manner relative to overall assignment of work hours, but also recognizes seniority as an equitable way to make work hour assignments. The Grievant is not complaining of the number of weekends, holidays or weekend days that she works nor the total number of evening shifts that she works. It is only the combination of evening shifts and weekends that causes her complaint. If evening assignments are undesirable, using seniority to assign the undesirable work shift is reasonable and consistent with the broader system of shift assignment by the employer. For example, the labor agreement specifically states this methodology is applicable with respect to the Building Operations Department.

As to the remedy the Grievant is seeking, only six of the Medical Technologists are bargaining unit members. The arbitrator's remedy is limited to these members. One member works weekends and not the full evening shift, two only work the evening shift on weekends, and a fourth works a different (8 per day/80 per pay period) shift. Of these four, three work what the Grievant believes to be undesirable shifts, evenings and weekends. From a practical standpoint, there is no remedy in this case.

Employer in Reply

The Employer challenges the Union's proposition that the language of Article 9, Section 4 is clear and unequivocal on its face. The Union's failure to address the issue of remedy is evidence that the language is not clear since the Union cannot articulate a precise course of action that would resolve the shift scheduling issue. Just as it could be the intent of the language to limit undesirable shift assignment during weekends, it could also be the intent of the language to negate undesirable shift distribution for all shifts.

As to the Union's focus on the second sentence of Section 4, it fails to explain how this sentence relates to the entire Section. If the sentence is intended to assure that no employee would work a disproportionate share of undesirable shifts, then how does this square with the first sentence that refers to only a specific group of employees?

The Employer maintains the Grievant's real complaint is that she is working a double undesirable shift since she must work evenings on weekends. The language of Section 4 does not prohibit this result.

The parties have adopted a method of interpreting and applying the language of Section 4. This is the custom and practice. The Union acknowledges that the scheduling practice has existed for greater than 20 years, it is well-known and accepted by the employees and that the Grievant has worked within the practice for 12 years. There is no cause to alter the current practice and it would be inequitable for the Arbitrator to do so at this time.

For all of the above reasons, the grievance should be dismissed.

DISCUSSION

As a preliminary matter, it is necessary that I address the limitations, in terms of scope and remedy, by which this decision is rendered. The parties have a unique situation in that there are union and non-union members working side by side, doing the same work, holding the same position/classification all within one department. This staffing anomaly was created in 1992 when the bargaining unit agreed to the removal of some of the positions in exchange for something which I assume must have been valuable. The result of that agreement was some of the members of the Laboratory department are protected by and subject to the terms of the collective bargaining agreement and some are not. As such and consistent with the Recognition Clause of the labor agreement, this decision applies to only those bargaining unit members.

Moving to the substantive issues, the evidence is not in dispute. The parties have negotiated language to address scheduling, and specifically, scheduling of shifts on weekends. The Union asserts that the language of Article 9, Section 4 is clear and unambiguous and that

the Employer is violating the language in the manner in which it is assigning weekend work. The Employer asserts that the language does not have a clear and unequivocal meaning and therefore the parties long standing past practice controls.

In a contract interpretation case, the arbitrator first looks to the language of the parties' agreement. If that language is clear and unambiguous and there is but one meaning conveyed, then there is no need to resort to extrinsic evidence. But if the language presents more than one plausible interpretation; extrinsic evidence, including bargaining history, past practice and course of dealing are utilized to ascertain the parties' intended meaning.

The language of Article 9, Section 4, currently reads just as it did in 1977 and provides in the first sentence that, "All employees required to rotate work shifts on a seven day a week basis will have their scheduled working hours arranged in such a manner that, insofar as is possible, all employees within each job classification and department will be treated in a fair and equal manner." This sentence indicates who it applies to -- all employees that rotate shifts, seven days a week. It then obligates the Employer to schedule working hours in a fair and equitable manner, when possible. This language does not dictate how shifts, weekdays, weekend, holiday or undesirable shifts are to be assigned; only that all scheduled shifts must be assigned in a "fair and equitable manner".

The second sentence provides that, "[t]he purpose of this Section is to assure that no employee is required to work a disproportionate share of weekend, holiday, or other shifts commonly considered to be undesirable." The parties did not need to include this sentence. Rather, by inclusion it appears the parties considered the fact that it was possible for an employee or a group of employees to be assigned a disproportionate share of undesirable shifts. More importantly, it establishes that the parties specifically intended for there to be equity in the scheduling of the undesirable shifts. This sentence, by its structure, modifies the first sentence and applies to the entire Section.

Moving to the third sentence in Section 4, it defines what days constitute a weekend, Saturday and Sunday.

The next two sentences in Section 4 were not contained in the 1977 agreement and were created as their own paragraph. The sentences provide that:

> The Employer shall endeavor to provide all employees with every other weekend off on a fair and equitable basis. When alternate weekends off are not scheduled, the Employer will provide the next two weekends off, if possible.

These sentences again modify the first sentence and reaffirm the parties' intent for equity when scheduling and specifically, equity in scheduling of weekends off. These sentences do not assist in determining how the parties intended shifts on weekends to be scheduled other than to establish that equity in rotation.

The last sentence exempts the most senior employee of the maintenance department from weekend work unless it is necessary due to vacancies. Specific provisions of a labor agreement restrict the meaning of general provisions, provided extrinsic evidence does not indicate otherwise. ELKOURI AND ELKOURI, HOW ARBITRATION WORKS, 6TH EDITION, P. 469-470 (2003). This sentence specifically negates application of the preceding language of the Section as it relates to the most senior employee in the maintenance department, but also supports the Union's argument inasmuch as it shows that the parties knew how to specifically exempt certain employees and/or departments from the preceding shift scheduling requirements.

Moving to the facts in this case, the Grievant is the least senior bargaining unit member and the third least senior member of the department performing medical technology duties. The Employer has for greater than 10 years assigned the four least senior employees in the department and classification to work the 3 to 11 shift on weekends. The 3 to 11 shift on weekends is understood by the Employer, as well as the Union, to be undesirable. The Employer's use of seniority based shift assignment which intentionally imposes the obligation to work undesirable shifts on the four least senior members in the department is incongruent with the parties' negotiated directive to treat all employees (affected by the contract language) in a "fair and equal manner". The unbalanced weekend shift assignments is inconsistent with the language of the parties' agreement.

The Employer maintains that the language of Article 9, Section 4 is unclear due to drafting structural irregularities and ambiguous phrases. I do not find that the unnumbered or un-alphabetized paragraphs create uncertainty nor do I find the phrases that the Employer points to as ambiguous to be determinative as to the outcome of this case. The fact that there is a sub-section identified as "a" and there is no "b" sub-section, especially when sub-section "a" is found at the section and creates an exception to the language of the section. While I agree that there may be multiple definitions to some of the phrases contained in Section 4, the common understanding of those phrases is sufficiently clear so as to allow the language of the Section to sufficiently communicate the parties' intent.

The Employer next argues that seniority is an equitable way to assign work hours. While I concur that seniority is a commonly used criteria negotiated by unions and employers for work assignments, leave requests, and other employment obligations and benefits, the result of seniority based provisions is that the more senior employees receive benefits which the lesser senior employees do not receive. This result is not equitable and the parties intentionally bargained equality for shift assignments on weekends, holidays and undesirable shifts.

The Employer maintains that a binding past practice exists which should be followed. There is no question that since 1996 and quite possibly well-before, the parties have followed a practice in scheduling that was inconsistent with the language of the agreement. Moreover, given the mutual knowledge, understanding and respect for that practice, a binding past

practice existed.[2] The Employer asks this arbitrator to find that the binding past practice overrides the clear language of the parties' labor agreement. Given the facts of this case, I join the ranks of the many arbitrators that have entertained such a conclusion, but ultimately do not find such a result because, the Union effectively repudiated the practice.

In April 2004 the parties were involved in negotiating a successor labor agreement which expired in September 2004. The Union put the Employer on notice when it filed the instant grievant that it was dissatisfied with the scheduling process and that it believed Article 9, Section 4, was being violated. Thereafter, the parties actively negotiated to create alternate language. There is no question that the Employer was aware that the Union no longer acquiesced to the manner in which the Employer was scheduling weekends, holidays, and undesirable shifts. It was at that point incumbent on the Employer to have the practice written into the agreement to prevent its discontinuance. This did not occur, the successor agreement was ratified and the practice that existed prior to that time was effectively terminated.

As to remedy, the Employer is ordered to comply with the terms of the labor agreement. The Employer dedicates a good portion of its briefs to explain to the Arbitrator the difficulties that will arise in implementing language of the agreement. Although I recognize and concur that implementation will be laborious and will extend beyond the language of Article 9, Section 4, and may impact on the non-represented members of the Medical Technology Department, the parties have fashioned the circumstances which created this scenario.

AWARD

1. Yes, the Employer, Memorial Medical Center, violated Article 9, Section 4 of the Collective Bargaining Agreement.

2. The appropriate remedy is for the Employer to immediately assign weekends, holidays and undesirable shifts in a fair and equitable manner consistent with the language of Article 9, Section 4 of the labor agreement.

Dated at Rhinelander, Wisconsin, this 4th day of August, 2006.

Lauri A. Millot /s/
Lauri A. Millot, Arbitrator

[2] A past practice exists when the conduct is: 1) unequivocal, 2) clearly elucidated and acted upon, 3) readily ascertainable over a reasonable period of time as a fixed and established past practice of the parties. Richard Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements, *Arbitration and Public Policy, Proceedings of the Fourteenth Meeting of the National Academy of Arbitrators*, (BNA, 1961).

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