BEFORE
EDWIN H. BENN
ARBITRATOR

In the Matter of the Arbitration
between
ILLINOIS STATE BOARD OF EDUCATION
and
ILLINOIS FEDERATION OF STATE
OFFICE EDUCATORS, LOCAL 3236,
IFT-AFT

CASE NOS.: FMCS 10-59615-A
Arb. Ref. 10.319
(Denial of Adjusted
Work Time For Travel)

OPINION AND AWARD

APPEARANCES:
For ISBE: Kristin Alferink, Esq.
For the Union: Mary Lee Leahy, Esq.

Date of Award: November 16, 2011
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I. ISSUE

Did the Illinois State Board of Education (“ISBE”) violate its collective bargaining agreement with the Illinois Federation of State Office Educators, Local 3236, IFT-AFT (“Union”) through the issuance of an email dated November 24, 2009 which stated that “[e]ffective immediately, staff will not be eligible to accrue adjusted work time for time spent traveling” and, if so, what shall the remedy be?¹

II. RELEVANT FACTS

The Union represents “... professional employees of the State Board of Education who are assigned to the classifications of Consultant and Principal Consultant ....”² When this dispute arose, the July 1, 2005 until June 30, 2009 Agreement was in effect.³

The employees covered by the Agreement perform duties which, in some instances, require that they travel to different geographic locations than their offices.⁴ This dispute is about how ISBE treats travel time for those trips.

On November 24, 2009, Division Administrator for Educator and School Development for ISBE Patrick Murphy sent the following email to the staff:⁵

Although past practice has allowed for time spent traveling to be used toward adjusted work accumulation, this will not be approved moving forward. Effective immediately, staff will not be eligible to accrue adjusted work time for time spent traveling. Adjusted work time may be accrued only through hours of actual “work” completed above the 7.5 hour daily schedule. For purposes of this discussion, “work” is defined as time spent on-site at schools, conferences, meetings and the like. Time spent traveling to and from travel destinations will not be honored toward adjusted work time.

Division Administrator Murphy testified:⁶

Q. What was the purpose of sending this E-mail?

A. To notify staff that while I’d been inappropriately providing adjusted work time for time spent not working, specifically time that they were traveling, and to let them know that this practice of mine would no longer continue.

¹ See Tr. 5; ISBE Brief at 13; Union Brief at 1. The parties were not in complete agreement on the statement of the issues. Tr. 5-6. My statement of the issue fairly frames the dispute.

² Joint Exh. 2 at Article 1.

³ Id. at Article 33. The 2005-2009 Agreement was continued in effect after its expiration until a new Agreement was negotiated. Tr. 6-7.

⁴ Tr. 18, 62, 81-82, 84.

⁵ See Joint Exh. 1; Tr. 93-94.

⁶ Tr. 94-95.
Q. How was this error brought to your attention?

A. I was involved in a meeting with Mr. Don Evans, director of HR, Dr. Tomlinson, my district superintendent, and Kristin Alferink. And in that meeting Mr. Evans alerted me to the fact that he had been alerted that I had been incorrectly providing adjusted work time for staff for time they were spending not working, rather time spent traveling, and to correct the issue.

Q. Why had you been allowing staff to accumulate adjusted time for hours spent traveling.

A. I remember when I was a principal consultant that I had received similar time for compensation time that I had spent traveling. So when I came back to my management position, it was something that I was used to, something that I had received as a consultant. Therefore, I expected that must be the same practice to continue, so I just continued to do it as I was familiar with it.

Murphy testified that as a principal consultant at ISBE he received adjusted time (also referred to as “comp time”) for travel during the period November 1999 through May 2004 and:

Q. And if you went above seven and a half hours when you were traveling due to your work assignment, you received adjusted time; right?

A. Yes.

Murphy further testified that he inquired of other managers how travel time was handled with respect to employees receiving adjusted time and “I seem to recall having conflicting responses ... [a]nd since there wasn’t any clear direction I was doing anything wrong or opposite what somebody else maybe was or wasn’t doing, I just continued with the practice that I was doing.”

Director of Human Resources and Professional Development Donald Evans testified that he looked into how travel time was being treated:

A. I checked in with various division administrators and had conversations to see what they were doing.

Q. What did you learn from these meetings.

A. It was all over the board. It was going on. It was not going on. It was going on under terms if they’re going out of state, if it’s on the weekend. There was nothing consistent, and it needed to be addressed certainly.

As shown by the testimony of Division Administrator Murphy, the ramifications of his November 24,

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7 Tr. 99-100, 102.
8 Tr. 95.
9 Tr. 150.
2009 e-mail can be significant for an employee:10

ARBITRATOR BENN: Now let’s take another example. It’s not a visit near my house, but I have an 8:00 o’clock appointment in East Dubuque. I leave my house at 5:30, so it’s a two-and-a-half [hour] drive to get to East Dubuque. I’m there until 4:00, and then it takes me two and a half hours to drive home. So that’s five hours of travel in addition to the 7-1/2 or 8-hour workday. Before November of 2009, what did I get in terms of adjusted time for that.

THE WITNESS: Again, assuming the preapproval, they may have received compensation for that time, adjusted time travel.

ARBITRATOR BENN: Five hours adjusted time?

THE WITNESS: Yes.

ARBITRATOR BENN: What about now?

THE WITNESS: They would not receive compensation towards accumulated comp time.

The Union grieved contending that “… the new policy be rescinded …” and seeking make-whole relief.11 The parties were unable to resolve the dispute and this proceeding followed.

III. RELEVANT LANGUAGE

Article 5
Hours of Work

Section 2. Hours

The normally scheduled work day for all employees covered by this Agreement will consist of seven and one-half (7½) hours, excluding an unpaid lunch period.

The work week is defined as a regular reoccurring period of 168 hours consisting of 7 consecutive 24-hour periods (Monday through Sunday). The normally scheduled work week begins on Monday, ends on Friday, and consists of thirty-seven and one-half (37½) hours.

A policy regarding travel time will be approved by the Employer after discussion with the Union. All affected employees must be fully informed in writing regarding such policy.

Section 3. Work Week - Work Month

The Employer may change the normally scheduled work day, work-week, or work month for some or all of the employees to meet Agency needs and responsibilities.

When such changes are necessary, the Employer will make every effort to provide the affected employee(s) with a reasonable period of advance notification and to limit the total work week for each employee to thirty-seven and one-half (37½) hours. When changes result in hours worked in excess of the thirty-seven and one-half (37½) hour normally-scheduled work week for some or all employees, the affected employee(s) will, subjected to the following paragraph, be given time off equal to the excess hours worked.

An employee will only be given compensatory time off (“Comp Time”), however, if the specific number of hours accrued in excess of the seven

10 Tr. 130.
11 Joint Exh. 1; Union Brief at 15.
and one-half (7½) hour work day or thirty-seven and one-half (37½) hour work week were pre-approved in writing by his or her immediate supervisor. Such Comp Time will be used within sixty (60) calendar days of the end of the month in which accrued. An employee must request such use in writing in advance and the immediate supervisor will approve such use based on the Employer’s needs and responsibilities. If such request is denied, the time limit to use the hours accrued will be extended by three (3) calendar months.

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IV. DISCUSSION

A. The Burden

This is a contract dispute. The burden therefore falls on the Union to demonstrate a violation of the Agreement. 12

B. The Showings

1. Does Clear Contract Language Resolve The Dispute?

The first question in a contract dispute is whether clear contract language resolves the matter? 13 If it does, “… I need go no further to resolve the issue herein.” 14

Article 5, Sections 2 and 3 of the Agreement are the relevant provisions in this case. Those sections provide that “[t]he normally scheduled work day for all employees covered by this Agreement will consist of seven and one-half (7½) hours …” (Section 2 [emphasis added]) and “[a]n employee will only be given compensatory time off (“Comp Time”), however, if the specific number of hours accrued in excess of the seven and one-half (7½) hour work day or thirty-seven and one-half (37½) hour work week were pre-approved in writing by his or her immediate supervisor” (Section 3 [emphasis added]).

Employees covered by the Agreement will, as part of their duties, sometimes travel to locations to perform those duties. Contrary to Division Administrator Murphy’s November 24, 2009 e-mail that “… ‘work’ is defined as time spent on-site at schools, conferences, meetings and the like”, “work” for those employees who travel is not defined

12 See The Common Law of the Workplace (BNA, 2nd ed.), 55 (“In a contract interpretation case, the union is ordinarily seeking to show that the employer violated the agreement by some action it took; the union then has the burden of proof”); Tenneco Oil Co., 44 LA 1121, 1122 (Merrill, 1965) (in a contract case, “… [t]he Union has the burden of proof to establish the facts necessary to make out its claim.”).

13 I-T-E Imperial Corp., 67 LA 354, 355 (Weiss, 1976) (“The threshold question in this case is whether the language of … the

[continuation of footnote]

collective bargaining agreement is so clear and unambiguous that I need go no further to resolve the issue herein”).

14 Id.
that way in the Agreement. The word “work” is not clearly defined in the Agreement — one way or the other. Does an employee’s “work day” include travel to and from a location where the employee must perform duties (as the Union argues) or does the employee’s “work day” begin upon the employee’s arrival at the location (as ISBE argues)? In terms of clear contract language in this Agreement, that question is not answered.

“A contract is ambiguous if it is reasonably susceptible to more than one meaning.” 15 Plausible arguments can be made to support the interpretations advanced by both ISBE and the Union. The contract language is therefore ambiguous.

2. Past Practice

Past practice is an important tool for ascertaining the meaning of ambiguous language. 16 Here, there was a past practice which can be used to explain the ambiguity in the language.

Division Administrator Murphy admitted in his November 24, 2009 e-mail — “... past practice has allowed for time spent traveling to be used toward adjusted work accumulation ....” 17 It may be that the past practice varied from division to division — and that seems to be the case. According to Murphy, he made inquiries of other managers how travel time was handled with respect to employees receiving adjusted time and “I seem to recall having conflicting responses ... [a]nd since there wasn’t any clear direction I was doing anything wrong or opposite what somebody else maybe was or wasn’t doing, I just continued with the practice that I was doing.” 18 Indeed, Murphy testified that as an employee prior to taking his current position, he recalled being compensated with adjusted time for travel going back to 1999. 19 Further, according to Director of Human Resources Evans, prior to the November 2009 e-mail from Murphy, for granting adjusted time to employees for travel “It was all over the board. It was going on. It

15 The Common Law of the Workplace, supra at 74.
16 Elkouri and Elkouri, How Arbitration Works (BNA, 5th ed.), 507 (“One of the most important standards used by arbitrators in the interpretation of ambiguous contract language is that of custom or past practice of the parties.”).
17 See Joint Exh. 1.
18 Tr. 95.
19 Tr. 99-100, 102.
was not going on. According to ISBE, “Evans inquired how various Division Administrators were treating adjusted work time, and learned that is was ‘all over the board’ — with no consistency.”

To be a past practice, the conditions in dispute must be “(1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both Parties”. Here, the “practice” may not be clean nor consistent. Indeed, as ISBE asserts:

... Evans testified that across the Agency, adjusted time was being handled vastly differently among division[s]. As adjusted time was being handled so disparately, such as that it was given in some divisions, was not being given in others, and when given in some divisions was only given for out of state travel ....

However, there is no question as testified by ISBE’s witnesses Division Administrator Murphy and Director of Human Resources Evans that there was a past practice wherein some employees in certain divisions were given adjusted time for travel. The fact that some employees received adjusted time for travel for such an established period of time as shown in this case is sufficient to be a past practice — particularly for those employees who received the benefit. The existence of that practice — as non-uniform as it may have been — becomes the basis for interpreting the meaning of the ambiguous contract language in this case. In short, in interpreting the language, the past practice shows that for applying adjusted time for travel, in some divisions adjusted time was given for travel while in others it was not.

Because of the established past practice for certain employees in the bargaining unit, the Agreement must be interpreted that, as a matter of contract, those employees received adjusted time for travel. When Division Administrator Murphy canceled that practice in his November 24, 2009 e-mail, ISBE, through Murphy, violated the Agreement as it had been interpreted by the parties. As such, the Union has met its burden to show a violation of the Agreement. The grievance therefore has merit.

20 Tr. 150.
21 ISBE Brief at 4.
22 Celanese Corp. of America, 24 LA 168, 172 (Justin, 1954).
23 ISBE Brief at 23.
3. ISBE’s Other Arguments

ISBE’s well-framed arguments not addressed above do not change the result.

First, ISBE argues that the adjusted time policy is set forth in the Agreement. As discussed supra at IV(B)(1), no such clear language exists in the Agreement that travel time would or would not be considered as “work” time. “Work” is not defined.

Second, ISBE relies upon Article 5, Section 3 of the Agreement as not allowing for travel time for adjusted work time. By its plain terms, Article 5, Section 3 allows for schedule changes with advance notification with an obligation by ISBE to try to keep the work week to 37½ hours and compensation with comp time for work in excess of 7½ hours in a day or 37½ hours in a week. However, and again, this dispute — i.e., whether travel time is “work” time — is not the subject of clear contract language in that section of the Agreement.


The parties have made it clear in the Agreement that my function is to interpret only the words of the Agreement. See Article 20, Section 5(B) of the Agreement [emphasis added]:

**Article 20 Grievance Procedure**

**Section 5. Arbitration**

B. Authority and Duties of the Arbitrator. The arbitrator will have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this Agreement. The arbitrator will consider and decide only the specific issue submitted and will have no authority to make an award on any other issue not so submitted. The arbitrator will be without power to make an award contrary to or inconsistent with or modifying or varying in any way the applicable laws and rules and regulations having the force and effect of law. The award will be based solely upon his/her interpretation of the meaning or application of the relevant terms of this Agreement to the facts of the grievance submitted.

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My authority therefore flows strictly from the terms of the collective bargaining agreement. I am not

24 ISBE Brief at 13-14, 19-22.
25 ISBE Brief at 16-17.
26 ISBE Brief at 16-18.

In an arbitrator is confined to interpretation and application of the collective bargaining agreement ...

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... Thus the arbitrator has authority to resolve only questions of contractual rights ....

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... [T]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land .... [T]he resolution of statutory or constitutional issues is a primary responsibility of courts ....

There has been no showing by ISBE that finding it violated the Agreement as it has been interpreted by the parties when ISBE discontinued a practice it had followed for years with respect to allowance of adjusted time for travel for certain employees violated any “... applicable laws and rules and regulations having the force and effect of law” as contemplated by Article 20, Section 5(B) of the Agreement. That being the case, I must confine myself to the Agreement and not to the statutory provisions relied upon by ISBE because the parties agreed in Article 20, Section 5(B) that as an arbitrator my “... award will be based solely upon his/her interpretation of the meaning or application of the relevant terms of this Agreement to the facts of the grievance submitted.”

Fourth, ISBE relies upon Article 25, Section 7 of the Agreement. That section provides:

** Article 25 Hours of Work **

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**Section 7. Employee Protection While on Travel Status**

Employees who are engaged in approved business travel, are on official travel status, and are either stranded or prevented from traveling due to the closure of highways, airports, rail facilities, or other means of transportation may be authorized to remain on travel status until a cessation of severe or hazardous weather allows travel to resume. When an employee is stranded or otherwise prohibited from traveling while on Agency business, the employee may remain in work status, and will suffer no loss of pay accumulated vacation or personal leave.

This section does not apply to home-based employees unable to leave their homes to begin their day’s activity nor does this Section apply to field-based employees with the same difficulty.

Again, there is nothing in that section of the Agreement which

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27 ISBE Brief at 18-19.
clearly addresses travel time as work time. Article 25, Section 7 addresses instances where employees are on travel status and are stranded or prevented from traveling due to events such as weather-related conditions. That is not this case.

Fifth, ISBE argues that if there was a practice under the 2005-2009 Agreement to grant employees adjusted time for travel, that was extinguished by the current Agreement because the Union made proposals in contract negotiations for the current Agreement which included earning adjusted time for traveling, which ISBE rejected. 28

The evidence supports ISBE’s factual contentions. The Union did make such proposals for the current Agreement and those proposals were rejected by ISBE. 29

It is a fundamental rule of contract construction that when the language is ambiguous (i.e., here because “work” is not defined with respect to the inclusion or exclusion of travel to a location), I can turn to bargaining history behind the contract language to attempt to ascertain the meaning of the ambiguous language. 30 Further, and in support of ISBE’s argument, a party’s failed attempt to gain a provision through negotiations will weigh against interpreting ambiguous language in favor of that party’s position. 31

However, the fact that a party seeks to clarify an existing right at the bargaining table cannot be used against that party if the proposed

28 ISBE Brief at 26.
29 Tr. 138-145; ISBE Exhs. 3 at 11 (“All travel time shall be considered as hours worked”); 4 at 4 (All work related travel time shall be considered as hours worked”) and 5 at 1 (“Time spent during work-related travel shall be considered as work time” with specified conditions).
30 How Arbitration Works, supra at 501, 504, 598:
Precontract negotiations frequently provide a valuable aid in the interpretation of ambiguous provisions

... [I]f an agreement is not ambiguous, it is improper to modify its meaning by invoking the record of prior negotiations.

Under the parol-evidence rule a written agreement may not be changed or modified by any oral statements or arguments made by the parties in connection with the negotiation of the agreement. A written contract consummating previous oral and written negotiations is deemed, under the rule, to embrace the entire agreement, and, if the writing is clear and unambiguous, parol evidence will not be allowed to vary the contract.
31 How Arbitration Works, supra at 504 (“If a party attempts but fails, in contract negotiations, to include a specific provision in the agreement, many arbitrators will hesitate to read such provision into the agreement through the process of interpretation.”).
clarification is rejected. See How Arbitration Works, supra at 505:

However, where a proposal in bargaining is made for the purpose of clarifying the contract, the matter may be viewed in a different light. ...

See also, Hospital Service Plan, 47 LA 993, 993-994 (Wolff, 1966).

The Union now argues that to sustain the Company’s position in effect would be to grant it the relief it sought but could not obtain in collective bargaining.

On its face this would seem to be so, for it is fundamental that it is not for the Labor Arbitrator to grant a party that which it could not obtain in bargaining.

This restriction, however, has its limitations. If, in fact, the parties were in dispute, on the proper interpretation of a contract clause and one of them unsuccessfully sought in collective bargaining to obtain clarification, it would not necessarily follow that the interpretation sought by the unsuccessful party was wrong. As was so aptly stated by Arbitrator David Cole in New York Herald Tribune, 36 LA 753, 759: —

“I do not subscribe to the view * * * that when a proposal is rejected it follows as a rule of interpretation that the agreement necessarily denies to the proposing party the benefit that would have resulted from the rejected proposal. I say this because the agreement may already provide such a benefit by accepted rules of construction, and the purpose of the proposal may simply have been to clarify this so that there would be no temptation to question this.”

The evidence offered by ISBE concerning the Union’s contract proposals for the current Agreement shows that the Union was seeking to clarify a right it believed already existed (correctly, for some employees). The fact that ISBE rejected that clarifying language therefore cannot be used against the Union’s position in this case.

Sixth, ISBE relies upon the “zipper” clause found in Article 31 of the Agreement to “... negate any past practice found by the Arbitrator.”

According to ISBE:

In this case, a new agreement, with a dual zipper clause, took effect in February, 2011, thereby foreclosing on the possibility that any alleged past practice can be allowed to continue after the ratification of said contract. Therefore, should the arbitrator find that it is acceptable to evaluate whether a past practice exists, and in this evaluation actually find there was a past practice, this past practice must be ended at the ratification of the new contract.

This is really a new argument not fully raised by ISBE until the filing of post-hearing briefs. At the beginning of the hearing, there was a brief discussion concerning the ef-

32 ISBE Brief at 27.
33 Id.
fective dates of the parties’ Agreements:34

MS. LEAHY: I believe there is one more issue though that I meant to address when we talked about Joint 2 [the 2005-2009 Agreement]. At the time of the events, technically this Agreement had expired, but it continued to be in effect by agreement of the parties until the subsequent contract was signed off. I believe that was not until March of 2011. Is that your understanding, Ms. Alferink?

MS. ALFERINK: The new Agreement was signed in February of this year, but otherwise that is my understanding.

MS. LEAHY: I just wanted to be sure that Joint Exhibit 2 was in effect in November of 2009.

MS. ALFERINK: I agree.

ISBE’s opening statement at the hearing did not address its argument that the zipper clause in Article 31 ends any past practice relevant to this case.35 Specifically, according to ISBE at the hearing, the focus of the case from its perspective was on the existence of a past practice:36

MS. ALFERINK: ... I believe at the conclusion of the case you will find that there was no past practice, and that there was no violation of the contract.

Further, there is nothing in this record to show that the zipper clause defense was relied upon by ISBE in the lower steps for processing the grievance.

Technically then, I should not even consider ISBE’s zipper clause argument. See Daniel International Corp., 71 LA 903, 908 (Bernstein, 1978):

The Company made no such argument at the hearing and so the issue was not effectively raised. ...

... Had the Company desired to raise those issues, it could have done so at the hearing. It chose not to. The effort comes too late in the brief.

See also, Pittsburgh Railways Co., 33 LA 862, 867 (Sembower, 1959):

The point was not raised in the hearings, but in its post-hearing brief the Company urged that any award relating to retirees is improper ...

... If there is ambiguity here, it becomes significant that the Company did not raise the question during the hearings when it could have been met by the Union ....

However, even if I could consider ISBE’s zipper clause argument, that argument is not persuasive.

Article 31 (the zipper clause) provides:

34 Tr. 6-7.
35 Tr. 10-12.
36 Tr. 12.
**Article 31**

**Entire Agreement**

This Agreement, upon ratification, supersedes and cancels all prior practices and agreements, whether written or oral, unless expressly stated to the contrary herein, and constitutes the complete and entire Agreement between the parties, and concludes collective bargaining for its term.

The parties acknowledge that, during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and the Federation for the duration of this Agreement, each voluntarily and unqualifiedly, waives the right and each agrees that the other will not be obligated to bargain collectively with respect to any subject or matter referred to, or covered in this Agreement.

Ordinarily, language like that found in Article 31 — *i.e.*, “[t]his Agreement, upon ratification, supersedes and cancels all prior practices and agreements, whether written or oral, unless expressly stated to the contrary herein ...” — coupled with the prohibition of the kind found in Article 20, Section 5(B) of the Agreement (“[t]he arbitrator will have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this Agreement”) will extinguish previously existing past practices. See *Anheuser-Busch, Inc. v. Beer, Soft Drink, Water, Fruit Juice, etc. Local Union No. 744 I.B.T.*, 280 F.3d 1133 (7th Cir. 1986), cert. denied, 537 U.S. 885 (2002) cited by ISBE.37 However, *Anheuser-Busch* is not applicable.

In vacating the arbitrator’s award in *Anheuser-Busch*, the Court found fault in the arbitrator’s failure to find that the zipper clause in that case extinguished past practices concerning commission rates paid to employees (280 F.3d at 1135-1136 [emphasis in original]):

> The arbitrator somehow sustained the Union’s grievance, and found that the employer’s payment of the greater commission rate to all drivers during the brief span of but the first two months (60 days) of the new five-year contract constituted a “practice,” in the eyes of the arbitrator, that rose to the level of a “post-execution amendment” of the agreement. This action, according to the arbitrator, allegedly nullified the company’s right to invoke the thoroughly negotiated and mutually agreed upon contract provision dealing with the parties’ agreement to have the two-tiered commission rate. The arbitrator somehow made this finding in spite of the very specific and limiting language in the zipper clause of the contract, “This Agreement ... supersedes all prior agreements between the parties ... oral or written, including all practices

37 ISBE Brief at 27.
not specifically preserved by the express provisions of this Agreement," as well as the specific arbitration clause forbidding him from modifying the written contract. The arbitrator recognized that the company's April 27, 1998, decision to pay the two-tier (lower) commission rate to drivers working two-person routes was in full compliance with the terms of the collective bargaining agreement agreed to by the Union and the company in each of the three contracts (1990–2003) referred to herein; that the 1998 contract also contained the zipper clause; and that the 1998 contract was the product of exhaustive negotiations. But instead of adhering to the limitations the contract placed on his authority and to the unambiguous and plain language of the contract as it was written, the arbitrator took an end-run around the clear and unambiguous restrictive terms of the contract. The arbitrator somehow reasoned that because the employer allowed the first two months of the sixty-month contract to elapse before changing its practice to adhere to the written contract's commission rates clause, it thus "deprived the Union of its right to bargain [over commission rates] for almost five years," a result that the arbitrator somehow felt (without any explanation) was a "fundamentally unfair maneuver inconsistent with well-settled principles of collective bargaining."

The problem with ISBE's argument is that in Anheuser-Busch, "...this contract required no interpretation: the zipper clause was unambiguous; the arbitration clause was unambiguous; and the commission-rates clause was unambiguous." 280 F.3d at 1140. However, the language in this case — i.e., whether "work" includes travel time to a location to allow for adjusted time — is not clear as was the language in Anheuser-Busch. Instead, in this case, past practice is being used to interpret the ambiguous language in the Agreement concerning whether work time includes travel time so as to allow for adjusted time. Violation of past practice is not being used by me as an independent violation of the Agreement. Past practice is being used by me to interpret ambiguous language.

Where a zipper clause exists, past practice can still be used to interpret ambiguous language. See e.g., Edmont Wilson, 54 LA 686, 688 (Nichols, 1970) (where the union therein attempted to assert the existence of a zipper clause to bar consideration of past practice supportive of an interpretation favorable to the employer [emphasis in original]):

The Union has cited this Article XV language [the zipper clause] as a prohibition against the continuation of a practice. That is not per se correct. It is abundantly clear that the parties adopted this close-out clause as a means of eliminating side agreements and understandings affecting matters not covered by this contract. That, however, does not negate understandings or practices which interpret and apply language which was negotiated by the parties and which is a part of the Agreement which they have entered into as the guide lines for their mutual relationships during the term of the
Agreement. ... Since that particular language is ambiguous some guide lines to its interpretation must be used. The prior practice is found to be the only basis that does not abrogate the limitation found in Article XV [the zipper clause].

Therefore, even if I could consider ISBE’s zipper clause argument, that argument does not change the outcome of this case.

C. The Remedy

It has long been held that arbitrators have a broad degree of discretion in the formulation of remedies.38 Further, the purpose of a remedy is to restore the status quo ante and make whole those harmed by a demonstrated contract violation.39

In the exercise of that remedial discretion and to restore the status quo ante, the provisions in Division Administrator Murphy’s e-mail of November 24, 2009 which provide that “[e]ffective immediately, staff will not be eligible to accrue adjusted work time for time spent traveling” shall be rescinded and the employees’ ability to have adjusted work time for travel shall be reinstated. Those employees who would have previously received adjusted work time for time spent traveling

38 See United Steelworkers of America v. Enterprise Wheel & Car Corp., supra, 363 U.S. at 597:

When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.

See also, Local 369 Bakery and Confectionery Workers International Union of America v. Cotton Baking Company, Inc., 514 F.2d 1235, 1237, reh. denied, 520 F.2d 943 (5th Cir. 1975), cert. denied, 423 U.S. 1055 and cases cited therein:

In view of the variety and novelty of many labor-management disputes, reviewing courts must not unduly restrain an arbitrator’s flexibility.

Additionally, see Eastern Associated Coal Corp. v. United Mine Workers of America, 531 U.S. 57, 62, 67 (2000) [citations omitted]:

[footnote continued]
shall be made whole by having adjusted work time credited to them for travel time over and above the 7.5 hour work day which was rescinded as a result of the November 24, 2009 e-mail.

However, the parties should not read more into this remedy than what is intended. According to the evidence — specifically, Director of Human Resources Evans’ testimony — not all employees received adjusted work time for time spent traveling. As noted throughout the discussion in this case and according to Evans, “It was all over the board. It was going on. It was not going on.” The affirmative restoration of the adjusted work time benefit for travel time and the make whole requirement in this remedy is only for those employees who, prior to November 24, 2009, received adjusted work time for travel. Employees in divisions who did not receive such a benefit are not entitled to that relief. The remedy applies only to those employees in divisions who had the benefit and then no longer were given the benefit after the November 24, 2009 e-mail. This remedy does not require that all employees in the bargaining unit receive the remedy. To require relief for those who did not have adjusted work time for travel time would be a windfall to those employees. That result is not intended.

This matter is now remanded to the parties to determine which employees and divisions had adjusted work time prior to November 24, 2009 given for travel and to restore that benefit to those employees and make those employees whole. With the consent of the parties, I will retain jurisdiction to resolve disputes which may arise with respect to implementation of the remedy.

**D. The Union's Prior Discussion Argument**

Relying upon Article 5, Section 2 of the Agreement (“A policy regarding travel time will be approved by the Employer after discussion with the Union”), the Union argues:

... It is undisputed that the November email was not discussed with the Union before - or after - it was sent. It was clearly a change in policy and practice that had been in effect since at least 1999. ... The failure to discuss the content of the November email with the Union constitutes a violation of the agreement.

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40 Tr. 150.

41 Union Brief at 11.
In light of my finding of a violation of the Agreement and the remedy in this case, it is not necessary to address the Union’s prior discussion argument. The finding of the violation and the remedy makes that argument moot.42 However, in determining the scope of the application of the remedy as required by this award, it is strongly urged that the parties use the provisions of Article 5, Section 2 to further discuss their differences and finally put this issue to rest.

**V. AWARD**

The grievance is sustained. ISBE violated the Agreement through the issuance of an e-mail dated November 24, 2009 which stated that “[e]ffective immediately, staff will not be eligible to accrue adjusted work time for time spent traveling.” The provisions in Division Administrator Murphy’s e-mail of November 24, 2009 that “[e]ffective immediately, staff will not be eligible to accrue adjusted work time for time spent traveling” shall be rescinded and the employees’ ability to have adjusted work time for travel shall be reinstated. Only those employees in divisions who previously received adjusted work time for travel and would have received adjusted work time for time spent traveling after November 24, 2009 shall be made whole by having adjusted work time credited to them for travel time over and above the 7.5 hour work day which was rescinded as a result of the November 24, 2009 e-mail.

This matter is now remanded to the parties to determine which employees and divisions had adjusted work time prior to November 24, 2009 given for travel and to restore that benefit to those employees and make those employees whole. With the consent of the parties, I will retain jurisdiction to resolve disputes which may arise with respect to implementation of the remedy.

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42 Had the Union prevailed on that argument, the remedy for that violation would have been the same as the one imposed in this case — *i.e.*, relief only for those employees in those divisions who had the benefit prior to the November 24, 2009 e-mail.

**Edwin H. Benn**
Arbitrator

Dated: November 16, 2011