

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :
of a Dispute Between :
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LOCAL 150 SERVICE EMPLOYEES : Case 22
INTERNATIONAL UNION AFL-CIO, CLC : No. 43171
 : A-4558
and :
 :
NORTHWEST GENERAL HOSPITAL :
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Appearances:

Mr. Ronald E. Thomas, Union Representative, 6427 West Capitol Drive, Milwaukee, Wisconsin 53216, appearing on behalf of Local 150, Service Employees International Union, AFL-CIO, CLC, referred to below as the Union.

Mr. James R. Korom, von Briesen & Purtell, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53202-4470, appearing on behalf of Northwest General Hospital, referred to below as the Hospital.

ARBITRATION AWARD

The Union and the Hospital are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The Union and Hospital jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Barbara Lewis, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held in Milwaukee, Wisconsin, on July 31, 1990. The hearing was not transcribed, and the parties filed briefs by September 10, 1990.

ISSUES

Was the layoff of the Grievant a violation of Article II of the collective bargaining agreement?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

**ARTICLE II
Management Rights**

Management has the sole and exclusive right to determine the number of employees to be hired, the hiring of same, the duties of each and the nature and place of their work.

Scheduling of personnel, standards of care, use of outside contractors, and all other matters pertaining to management and operation of the Hospital shall be exclusively the right and responsibility of management unless specifically modified in this agreement. However, the use of outside contractors shall not cause displacement of any presently employed persons.

BACKGROUND

As of August 1, 1989, the Hospital's Radiology Department was authorized to employ 10.7 full time equivalent positions, including one X-Ray Aide. On August 8, 1989, the Hospital filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. As a part of its effort to cut costs, the Hospital, effective August 14, 1989, eliminated the X-Ray Aide position.

The Grievant worked for the Hospital for about fifteen and one-half years prior to the elimination of the position of X-Ray Aide, and had worked about ten years in that position. The job description for the position of X-Ray, or Radiology, Aide reads thus:

JOB SUMMARY: Transports patients to and from the radiology department.
Performs clerical duties including filing reports and folders.
Processes X-Ray films and duplicates X-Ray films.
Assists technologists with patients.

JOB ACCOUNTABILITIES: Performs the duties of transportation of patients.
Performs darkroom processing duties using automatic processing equipment.
Duplicates films using the film duplicating (sic) equipment.
Performs filing and typing in the dept.
Assists technologist with patient exams.
Performs other duties as assigned.

EDUCATION/EXPERIENCE: High school graduation.

Paul Dadian, the Hospital's Chief Radiologic Technologist, supervises the Radiology Department. Primarily, the work of the Radiology Department consists of transporting patients to and from the department, taking and developing X-Rays, performing other diagnostic procedures and the related clerical and administrative functions. Dadian has headed the department for about twenty-five years. The department had, until August of 1989, primarily used three classifications of employees: X-Ray Techs, X-Ray Aides and a C.T. Coordinator. The Grievant was the department's last X-Ray Aide. Gayle Walters is the C.T. Coordinator. That position has been retained, and the job description for the position reads thus:

JOB SUMMARY

Schedules and coordinates C.T. activity and other procedures for both in- and outpatients at Northwest General Hospital and also other facilities.
Investigates HMO and insurance information, and provides secretarial duties.

JOB ACCOUNTABILITIES

Schedules and coordinates, by telephone, both in- and outpatients for C.T. procedures.

Schedules and coordinates, by telephone, both in- and outpatients for procedures that are not provided here, however, that are performed at other facilities.

Investigates patient 3rd party payor regarding information relating to C.T. or radiologic work.

Records statistical information regarding C.T. productivity.

Mails radiology reports, including x-Rays and C.T. films, when necessary.

Prepares and checks radiology charge slips for services rendered. Also channels charge slips for processing.

Submits additional computer information regarding variations of procedures performed and assigns computer code numbers to identify it.

Troubleshoots patient insurance information.

Compiles repeat analysis sheet on daily basis which includes the number of films repeated productivity monitorization, and the amount of films used on a weekly basis.

Performs secretarial duties, such as typing inter- and intra-office memorandums, answering the telephone and recording any messages.

Picks up and delivers all incoming and outgoing mail.

Performs clerical duties such as pulling and filing of film folders, filing of radiology reports, typing and recording in the daily log book (sic).

Performs other duties as assigned.

EDUCATION/EXPERIENCE

High school diploma. Secretarial experience and hospital/medical background.

Until roughly two weeks before the elimination of her job, the Grievant worked a split shift. For the two weeks preceding her layoff, the Grievant worked on the day shift. Throughout this period, the Grievant assisted in transporting patients, filing patient records, and performing miscellaneous darkroom and receptionist duties. The majority of her time was devoted to transporting patients and filing records. Patient transport required, she estimated, about one-half of her time. Her darkroom duties involved the developing of prints, typically on Saturday mornings. Her receptionist duties consisted of answering the phone when necessary, and scheduling patients into the department.

The work of the Radiology Department involves considerable overlap between the classifications noted above. The Grievant sometimes assisted X-Ray Techs in taking X-Ray prints. X-Ray Techs assisted the Grievant in transporting patients, and would transport patients without the Grievant if she was not available. Phones in the Radiology Department were answered by whatever employe was available when the phone rang. Walters would file patient forms when the Grievant was not available. Some of the work of the department was, however, exclusively that of one classification. Only X-Ray Techs, for example, could take X-Ray exposures, or review the developed prints for quality.

Dadian testified that the work and the staffing of the Radiology Department has changed markedly over time. For example, in 1981, roughly 70% of the X-Ray procedures performed in the Hospital were performed on an in-patient basis. By 1984, 40% of such procedures were in-patient. In 1984, the Radiology Department employed five X-Ray Aides. By 1987, only 29% of the department's X-Ray procedures were performed on an in-patient basis, and the department employed only one X-Ray Aide. From 1987 through the present, the number of in-patient X-Ray procedures has fallen to 26%.

Dadian stated that X-Ray Techs have always performed the duties of X-Ray Aides, but that as the number of X-Ray Aides in the department was reduced, the X-Ray Techs performed more of the duties previously assumed by Aides. Dadian estimated that from 1987 until the elimination of the Grievant's position, X-Ray Techs performed from thirty to forty percent of all patient transport duties.

Dadian stated that the Radiology Department consists of six separate rooms, each staffed by an X-Ray Tech. The Hospital employed, at the time of the arbitration hearing, roughly seven full-time equivalent X-Ray Techs. The Hospital uses one X-Ray Tech on its second shift, and does not, for funding reasons, operate a third shift. Dadian noted that the Hospital has continually advertised for X-Ray Techs since 1987, but has found qualified individuals "very, very difficult" to find. At the time of the arbitration hearing, the Hospital had authorized the Radiology Department to employ 9.9 full-time equivalent X-Ray Techs.

The Hospital's Administrator directed Dadian to cut staff. He selected the Grievant because she was not certified to do the work of an X-Ray Tech. That work, in Dadian's estimation, was essential to the operation of the department, since the X-Ray Techs could assume the Grievant's duties, but the converse was not true. By not selecting an X-Ray Tech, Dadian felt he had assured the department flexibility in scheduling diagnostic procedures, including but not limited to X-Ray procedures. Dadian further felt the decision secured as immediate care for patients as possible, and enhanced the Hospital's competitive position since the department, when patients are present, is revenue generating. Dadian testified that he did not select the C.T. Coordinator for layoff because he did not feel the Grievant was qualified to do the billing, statistical and quality assurance work performed by Walters.

Further facts will be set forth in the DISCUSSION section below.

THE UNION'S POSITION

The Union contends initially that "the issue to be decided is whether Management abused the Management rights clause in the layoff of (the

Grievant)."

Noting that the Grievant's "position of X-Ray Aide is a clearly recognized classification that is part of the collective Bargaining Agreement," the Union asserts that the record demonstrates "a need for the grievant's work to be performed on an on going basis." That work, the Union contends, requires similar qualifications and job responsibilities as the position of C.T. Coordinator. Beyond this, the duties performed by the Grievant have, with limited exceptions, historically been performed by bargaining unit members, according to the Union. Prior to the Grievant's layoff, any performance of her duties by non-unit members was "secondary in nature," according to the Union. Since the performance of her duties has now become the primary function of non-unit employes, it follows, the Union contends, that the Hospital has eroded the work of unit members. This erosion of unit work violates established arbitral precedent and thus constitutes, the Union argues, an abuse of the Hospital's management rights. To remedy this contract violation, the Union asks that the Grievant "be placed back in her job classification of X-Ray Aide and be made whole, for all wages and benefits denied her."

THE HOSPITAL'S POSITION

The Hospital states the issue posed by the grievance thus: "Was the layoff of (the Grievant) a violation of Article II of the collective bargaining agreement?"

After a review of the record, the Employer contends that "(n)either the management rights clause nor any other provision of the contract contains language which prohibits Northwest General Hospital from assigning work historically performed by bargaining unit employees to individuals outside the bargaining unit." The Union's attempt to read such a prohibition into the contract must be rejected, the Hospital argues, since arbitral precedent establishes both that management retains rights to transfer work in the absence of a contractual limitation and that any such limitation must be expressed by the parties, not implied by an arbitrator. Beyond this, the Hospital contends that Article II expressly limits the Hospital's right to use "outside contractors" to displace "presently employed persons." Because the grievance involves "work . . . assigned to other employees of the hospital", it follows, according to the Hospital, that the parties "have implied the hospital may assign such work to other hospital employees outside the bargaining unit without restriction."

Even if, by implication, the collective bargaining agreement is construed to protect bargaining unit work, the Hospital contends that "an inferred protection of bargaining unit work must be carefully and narrowly construed to take into account legitimate management prerogatives and rights to operate the business in an intelligent and proactive way." Since there is no proof that the Hospital laid off the Grievant with "anti-union animus or . . . without some basis in law or fact"; since "there has been no historical exclusivity" of the Grievant's duties; since the Hospital has transferred such duties to non-unit employes in the past without objection from the Union; since the nature of the Radiology Department's work has changed over time; and since the Hospital faces an increasingly competitive market and possesses limited financial resources to compete in that market, it follows, according to the Hospital, that the present record will not support even the inference that the Hospital lacked the authority to transfer the Grievant's duties to the X-Ray Techs.

Viewing the record as a whole, the Hospital concludes that it "made a rational business decision in laying off the grievant," and that the grievance must be denied.

DISCUSSION

The parties have, essentially, stipulated the issue on the merits of the grievance. The issue stated above adopts the Hospital's formulation of the issue simply because the Hospital stated the issue in the form of a question, not in the form of a statement. The phrasing of the issue indicates, however, no more than the parties' general agreement that Article II is the focus of this dispute. The Union, contrary to the Hospital, contends that certain job security rights are implicit within Article II. More to the point here, the Union contends that the Hospital abused its rights under Article II by laying the Grievant off and assigning her work to non-unit employes.

Article II grants the Hospital the authority to lay the Grievant off "unless" that authority has been "specifically modified in this agreement." As noted above, the Union has not cited any express modification, but has contended that the erosion of unit work posed here must be viewed as an abuse of the Hospital's management rights.

It is not necessary to address the Hospital's contention that no "implicit" job security protection can be found in Article II to resolve the

issues posed here. If such protection can be inferred, it must be based on proof sufficient to establish the Hospital's abuse of its management rights. Such proof is lacking here.

The standard for evaluating the evidence of abuse has been, in a sense, stipulated. Each party cites the following provision from Chrysler Corporation, 36 LA 1018, 1022 (Smith, 1961), to guide this evaluation:

(T)he decision to allocate work to employees outside the bargaining unit should be one made in the honest exercise of business judgement, and not arbitrarily, capriciously, or in bad faith.

The record establishes that the elimination of the Grievant's position, however regrettable, represents an "honest exercise of business judgement."

Initially, it should be noted that there is no contention the Grievant's layoff was motivated by anti-union animus. The Union has acknowledged that the Hospital's desire to trim costs motivated the layoff.

Beyond this, the duties at issue here have never been defined by contract or by practice to be exclusively bargaining unit work. Rather, the transport, filing, receptionist and darkroom duties performed by the Grievant have all been performed by non-unit employes. More significantly, the Hospital has, from 1984 until the present, transferred X-Ray Aide duties to non-Aides. From 1984 through 1987 four X-Ray Aides were laid off. There is no evidence this transfer of duties was challenged by the Union, and there is no apparent basis to distinguish these past transfers of duties from that which is challenged here.

Most significantly here, the decision to eliminate the Grievant's position was dictated by an immediate financial need, not addressable by other means. The Hospital is in the process of trying to effect a Chapter 11 reorganization. It is undisputed that the Hospital's need to reduce costs is immediate. Dadian's testimony that X-Ray Techs are in short supply is un rebutted, as is his testimony that their services are essential to the operation of the Radiology Department, and that the department is understaffed regarding X-Ray Techs. The Grievant's assertion that laying off an X-Ray Tech would have saved the Hospital more money than laying her off ignores that the department is income generating, and that the X-Ray Techs can perform the duties of an X-Ray Aide while an Aide can not perform the duties of a Tech. Nor will the record support the assertion that the Hospital could have preserved the Grievant's position by eliminating the position of C.T. Coordinator. The duties performed by Walters and the Grievant are dissimilar, and there is no persuasive evidence that the Grievant was qualified to assume those duties. More significantly, there is no apparent contractual basis to justify such a result. The assertion that unit work has been eroded does not establish that an arbitrator can reorganize an employer's administrative structure.

In sum, the Hospital, faced with the necessity of trimming costs, selected the Grievant's position as the most expendable in the Radiology Department. This does not reflect on the Grievant's competence as an X-Ray Aide or on her performance as a long-term employe. Rather, it reflects Dadian's honest business judgement that other employes could perform the Grievant's duties as an Aide, but the Grievant could not perform the duties of other department employes. This decision can not be characterized as an arbitrary, capricious or bad faith judgement. It follows that there is no basis to conclude that the Hospital abused its management rights under Article II by laying the Grievant off. Since no contract provision expressly limiting those rights has been established, it follows that there is no contractual basis to afford the Union the remedy it seeks.

AWARD

The layoff of the Grievant was not a violation of Article II of the collective bargaining agreement.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 11th day of October, 1990.

By _____
Richard B. McLaughlin, Arbitrator