BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 150	
	Case 8 No. 45172 A-4752
and	
BETHANY-RIVERSIDE NURSING HOME	

Appearances:
Mr. John Wittenberg, Business Representative, appearing on behalf of the Union.
Rider, Bennett, Egan and Arundel, Attorneys, by Mr. Timothy J. Pawlenty, appear

ARBITRATION AWARD

The Employer and Union above are parties to a 1990-91 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the call-in pay grievance of Sandra Vanderwyst.

The undersigned was appointed and held a hearing on April 1, 1991 in LaCrosse, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs, and the record was closed on May 9, 1991.

ISSUES

As proposed by the Union:

1. Was Sandra Vanderwyst's time card altered without her knowledge?

2. Was Sandra Vanderwyst eligible for call-in pay?

As proposed by the Employer:

1. Whether grievant is entitled to call-in pay for working a short extension of her regularly scheduled shift.

2. Whether the reference in the grievance to writing on the front of grievant's time card should be addressed.

RELEVANT CONTRACTUAL PROVISIONS

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ARTICLE VIII

HOURS OF WORK

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8.2 - Overtime will be paid at the rate of one and one-half times (1 1/2X) for all hours worked in excess of forty (40) hours per week. If an employee works in excess of their regularly scheduled shift, within their normal work week, said employee will not be required to take time off of their normal work week to prevent payment of overtime.

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ARTICLE XVIII

GENERAL PROVISIONS

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18.10 - Call-ins. Employees who are called in to work at any time other than the start of their scheduled shift shall be paid one (1) hour at their base hourly rate of pay in addition to all hours worked. If any employee agrees to work a double shift, or any portion thereof, call time will apply.

> Employees will be called in by seniority, starting with the most senior employees first. This will be done by department/classification. Employees will be asked to volunteer for call-ins descending the seniority list after Article 8, Section 4, has been applied. If an insufficient number of employees volunteer, employees will be required to work call-ins ascending this list. To cover the cost of operating a personal automobile in performance of duties, a maintenance employee will be reimbursed at the rate of twenty-one cents ($.21) per mile. In addition, maintenance employees will be paid this rate of twenty-one cents per mile to and from the facility, when called for work other than their scheduled shift. No employee will be required to use their own vehicle in the performance of their job duties, unless specified herein.
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FACTS

Grievant Sandra Vanderwyst had been employed for 13 years as a Nursing Assistant at the Home when she was requested, on two occasions in late 1990, to work beyond her normal hours. On November 5, 1990 the grievant worked from 6:00 a.m. until 4:30 p.m., and on November 17 she again worked from 6:00 a.m. to 4:30 p.m. In each case this represented a two-hour additional period worked; Vanderwyst noted on the back of her time card for each date a claim for one hour's call-in pay, but was not paid for the call-in, and filed the grievance based on her interpretation of the collective bargaining agreement. Vanderwyst testified that she had not previously been kept over for part a succeeding shift since the Agreement was negotiated.

It is undisputed that this Agreement represents the first time that there has been any provision regulating call-in pay negotiated between the parties. Two other employes, Sharon Rinartz and Cheryl Johnson, testified that they had received call-in pay under Article 18.10 on a number of instances since the collective bargaining agreement was negotiated. The Union offered in evidence copies of Rinartz and Johnson's time cards for a number of pay periods, purporting to show payment of call-in pay under circumstances similar to the grievant's. Nursing Director Nancy Johnson, however, testified in detail concerning these incidents, and of approximately 51 total examples included on the time cards in question, Johnson testified as to each instance (except for two) that these were either mischaracterized as examples of payment by Johnson or Rinartz, or that these employes were paid call-in pay for reasons which fell within the Employer's interpretation of Article 18.10. Johnson and two other management witnesses testified that that interpretation included payment of the one hour call-in pay addition whenever an employe was specifically called in from home; requested to come to work with less than 48 hours advanced scheduling notice; or worked past the employe's regular shift by more than 4 hours. This last element, all three management witnesses testified, was voluntarily added by management some time after the collective bargaining agreement was negotiated, because they had discovered that employes were requesting to be sent home at the end of their shift and then called in again rather than being kept over, so that they could receive the call-in pay. All three management witnesses testified that in their opinion they had no other liability to pay call-in pay for an employe kept over into the succeeding shift, unless the employe was kept for the entire following shift. The management witnesses characterized the only clause applicable on its face to employes not called in specifically from home as the overtime provision, Article 8.02. There is no dispute that the Employer paid the grievant consistently with Article 8.02. But there is also no dispute that the Employer never discussed its "four hours over equals call-in" interpretation with the Union in negotiations. Nancy Johnson testified that the two instances in which Cheryl Johnson was paid call-in pay for working over less than four hours into the succeeding shift were administrative errors on her own part, resulting from the time pressure to complete the time cards' processing and the fact [agreed by all witnesses] that the time cards used are difficult to read.

With respect to alterations of Vanderwyst's time card, Vanderwyst testified that she never wrote anything on the front of the time card in question, but that several entries in pencil appeared there by the time the card was submitted as an exhibit, and one of them appeared to have been erased since its writing. Vanderwyst testified that she herself wrote only on the back of the card. The entries still legible at the time of the hearing included the words "call in" in pencil. There was no testimony to the effect that the written changes had any direct effect on the amount of money actually paid the grievant.

Nancy Johnson testified that in January, 1991 she had changed the format of overtime reporting to a new form, so that explanations and notes on the time card itself could be avoided. Samples of the new form were introduced into evidence by the Employer.

THE UNION'S POSITION

The Union first argues that the Employer has clearly violated Article 18, Section 9, because Nancy Johnson allegedly admitted altering Vanderwyst's time card in order to prevent confusion for the accounting department. The Union contends that the reason for the alteration is immaterial, because Section 18.9 clearly specifies that "any changes to the time card must be done with the employee's consent and supervisor's authorization."

With respect to the call-in pay specifically, the Union contends that the Employer has claimed for itself the right to "interpret" the language of the agreement with total disregard for the actual written language. The Union notes that Section 18.10 does not identify the alleged four-hour minimum, and the Employer's position is accurately rendered by Mike Apa's testimony that "management may interpret this as they see fit." The Union argues that the Employer has altered conditions of employment without bargaining and without notification to the Union or the employes, noting that Nancy Johnson testified that she and several other managers held a meeting and agreed at that meeting to implement the four-hour minimum. The Union argues that both Cheryl Johnson and Sharon Rinartz had been paid for call-in time under circumstances similar to the grievant's and that neither was ever notified by management that there was any alleged error in those payments. The Union also contends that the interpretation that the only payment for keeping employes over would be under Article 8.2 was unknown to the Union or employes until Vanderwyst filed her grievance.

The Union requests that the Arbitrator order the Employer to make the grievant whole for any and all lost wages and benefits.

THE EMPLOYER'S POSITION

The Employer contends first that the grievant is not entitled to call-in pay, because she was not called in as such, but was merely kept over for a short extension of her shift. The Employer contends that Article 18.10, by beginning with the phrase "employees who are called in to work . . . " limits the applicability of that section to situations where the employes are not already at the facility. The Employer argues that other parts of Section 18.10, relating to mileage, indicate that the provision is specific to employes who are not already at work. The Employer distinguishes "short extensions of regularly scheduled shifts" from "a double shift or a portion of a double shift" as used in that Article, on the grounds that under the Union's construction, any extension of a regularly scheduled shift would qualify for call-in pay. The Employer argues that to pay an hour's call-in pay for employes working ten minutes or one minute past their regularly scheduled shift would be absurd, and that the parties could not have intended such a result.

The Employer also contends that the grievant was in fact compensated for the additional hours at issue, under Article 8.2 of the agreement, which resulted in overtime pay at time and half for these hours. The Employer contends that applying call-in pay to those hours would result in "overlapping" of contract provisions which were intended to recognize different situations.

The Employer argues further that past practice did not support the Union's interpretation of the agreement, because the testimony of Rinartz and Cheryl Johnson was substantially inaccurate, as shown by Nancy Johnson's testimony. Also, the Employer argues, the bargaining notes kept by Kathy Lucey indicate that call-in pay was intended to apply only to employes who were required to begin work earlier than scheduled, called in to work when not scheduled, required to return to work after leaving the facility, or eligible because they worked a double shift. The Employer characterizes the "four-hour rule" as a voluntary improvement in working conditions, enacted by management at its discretion to resolve the practical problem of employes demanding to return home when they were needed at work, simply so that they could then be called in and receive the extra hour's pay.

With respect to the writing on the front of the grievant's time card, the Employer contends that this issue is moot because of changes made by the Employer in its time card system, and that in addition there was no evidence that the Employer wrote and then erased a notation concerning call-in pay on her time card.

The Employer requests that the grievance be denied.

DISCUSSION

Upon review of the record, I find that the issues can most fairly be defined as:

> 1. Did the Employer violate Section 18.09 of the Agreement by altering the grievant's time card without her consent?
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> 2. Did the Employer violate Section 18.10 of the Agreement by refusing to pay Sandra Vanderwyst one hour's call-in pay for November 5 and November 17, 1990?

3. If the answer to (1) or (2) above is yes, what remedy is appropriate?

With respect to the alteration of the time card, it appears that from Vanderwyst's testimony that writing was in fact introduced to the face of the time card by someone other than her, and without her consent. This much is undisputed. It is not clear, however, that any improper intent attached to that writing, or that any consequence resulted at all. At worst, what was written on the time card appears to be in the nature of explanation, and I am therefore unconvinced that it was a "change" within the meaning of Article 18.09. Furthermore, the Employer has already taken steps to minimize the possibility of a recurrence of this problem. I therefore do not find that the Union has demonstrated that the contract was violated by such notations as do appear on Vanderwyst's time card.

As to the call-in pay issue, I find that Section 18.10 is clear and unambiguous on its face. The language departs from the classical meaning of "call-in" by the specific sentence stating "if any employee agrees to work a double shift, or any portion thereof, 1/ call time will apply." This sentence is on its face a departure from the rest of the language in the paragraph, and extends the value of the one-hour payment to circumstances that obviously do not constitute a "call-in" in the classical sense. It is thus irrelevant for the Employer to argue that "call-in" does not classically include these circumstances. It is also irrelevant whether or not the Employer believes that it is in management's interest to extend "voluntarily" call time pay to employes who work four hours or more past their regularly scheduled shift end. As the Union argues, the language of Section 18.10 already extends that benefit to any employe who works "any portion" of a double shift, and there is therefore no justification in the Agreement's terms for limiting that benefit to employes who work a portion exceeding four hours. 2/ Meanwhile, there is no conflict between 18.10 and 8.02, and no persuasive reason given by the Employer why the two benefits to employes would not sometimes work in tandem; this is, in fact, common to many collective bargaining agreements under which an employe may receive some type of additional payment for what amounts to unusual inconvenience even though the same hours independently generate overtime pay.

As Section 18.10 is clear and unambiguous on its face, the past practice and collective bargaining history of the parties are irrelevant. I note, however, that the time cards have apparently been sufficiently difficult to read that all of the witnesses who testified concerning them admitted to difficulty in interpreting them. This apparently has contributed to the confusion. Meanwhile, the Employer's notes as to the collective bargaining are less persuasive than the actual agreement reached, for obvious reasons.

For the foregoing reasons and based on the record as a whole, it is my decision and

AWARD

1. That the Employer did not violate Section 18.09 of the Agreement by changing Sandra Vanderwyst's time card without her consent.

2. That the Employer violated Section 18.10 of the Agreement by refusing to pay Sandra Vanderwyst one hour's call-in pay separately for November 5 and November 17, 1990.

3. That the Employer shall, as remedy, pay the grievant two hours at straight time at the rate prevailing in November, 1990 for said call-in pay.

Dated at Madison, Wisconsin this 11th day of July, 1991.

By _____
Christopher Honeyman, Arbitrator

1/ Emphasis added.

2/ I note that Cheryl Johnson testified that on some occasions she did not get, or expect to get, call-in pay when she was working past her regular shift's end on a task which had been begun prior to the shift's end. This may suggest an interpretation of the clause in question which would result in employes who are engaged in some task which takes them past the normal ending time not receiving call-in pay. This may also answer the Employer's contention that it would absurd to pay call-in pay for extension of a shift of one or ten minutes' duration. I need not, however, determine the exact circumstances under which a shift extension might not constitute working a portion of a new shift, because that issue is not before me. There is no testimony to the effect that the grievant was performing a single, continuous and already-begun task for the two hours she was kept over on each occasion grieved, and the Employer does not argue for such a distinction. These instances therefore constituted a portion of a double shift.