BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
RIPON AREA RESIDENTIAL CENTER	Case 3 No. 47835 A-4961
and	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 150, AFL-CIO, CLC	

Appearances:
Mr. Steve Cupery, Representative, SEIU, Local 150, on behalf of the Union.
Mr. James R. Macy, Godfrey & Kahn, S.C., on behalf of the Employer.

ARBITRATION AWARD

According to the terms of the 1992-93 collective bargaining agreement between Ripon Area Residential Center (hereafter Employer) and Service Employees International Union, Local 150, AFL-CIO, CLC (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them involving how employes are to make up work time when they miss a scheduled weekend assignment. Hearing was held on December 1, 1992 at Ripon, Wisconsin. A stenographic transcript of the proceedings was made and received by December 7, 1992. The parties filed their post-hearing briefs (including a reply from the Employer) by February 4, 1993. The undersigned exchanged initial briefs for the parties. The employer chose to send its reply brief directly to the Union.

ISSUES:

The parties stipulated that the following issues shall be decided herein:

1) Did the procedure outlined in the Employer's memo of July 9, 1992 violate Article 1, Article 5.1, Article 7.2, 7.7 and 7.10 of the collective bargaining agreement.

2) If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

ARTICLE 1 - RECOGNITION

Section 1.1. The Employer recognizes the Union as the exclusive bargaining representative for all full-time and regular part-time residential living aides, skills trainers, recreational aides, work activity aides, housekeeping and laundry aides, maintenance workers and licensed practical nurses employed by the Employer at its place of business at 1002 Eureka Street, Ripon, Wisconsin; but excluding all office clerical employees, professional employees, managers, department heads, all other employees, guards

and supervisors as defined by the Act.

ARTICLE 3 - MANAGEMENT RIGHTS

Section 3.1. The management of the Employer and the direction of employees are vested solely and exclusively in the Employer. Such management and direction shall include but shall not be limited to the right to hire, recall, transfer, promote and demote and to lay off employees for lack of work or any other reason. Employer shall have the sole and exclusive prerogatives with respect to promulgation of work rules, classification of employees, assignment of work, including temporary assignments, determination of hours and schedules of work, including overtime, to change or modify procedures, establish new jobs, increase or decrease the number of jobs and to make changes whatsoever in the operation of its residential care facility. The Employer shall have the right to discipline and discharge for just cause. This paragraph is intended to provide the Employer with complete and sole discretion with respect to all matters, whether enumerated or not, except as expressly limited in this Agreement.

ARTICLE 5 - DISCIPLINE AND DISCHARGE

Section 5.1. A seniority employee shall not be disciplined, suspended or discharged by the Employer unless there is just cause for imposing such discipline, suspension or discharge.

. . .

ARTICLE 7 - WORKWEEK AND HOURS OF WORK

Section 7.1. The pay period shall consist of fourteen (14) days and shall be from Monday through the Sunday of the following week, inclusive. This provision shall not alter current pay practices for night shift personnel.

Section 7.2. The Employer operates twenty-four (24) hours a day, seven (7) days a week. A master schedule of hours will be determined by the Employer. A six week schedule will be posted two (2) weeks in advance. The Employer shall attempt to give as much advance notice as possible in cases of unanticipated emergencies that necessitate a schedule change. The Employer shall attempt to give as much advance notice as possible for changes in an employee's schedule, with a minimum of forty-eight (48) hours notice, except in cases of unanticipated emergencies.

Section 7.7. When an employee's starting or quitting time is changed on a temporary basis, the Employer shall provide affected employees with at least forty-eight (48) hours notice of such changes whenever possible. The Employer will make a reasonable effort to avoid such changes.

. . .

Section 7.10. Employees who are absent for their weekend scheduled shift will be required to make up the hours unless they submit a doctor's excuse for the absence or are sent home by the D.O.N., supervisor or other designated person. The make-up hours will be scheduled within a six (6) month period. Employees who have failed to work their scheduled hours will be added to a list in consecutive order of missed days. When an employee's name is added to the list, that employee will be obligated to work any shift until such time that the employee signs the list indicating their preference for their normal shift or volunteers to work a make-up weekend shift. The first employee on this list will be contacted when filling open schedules and will be obligated to work any open schedule or their preferred normal schedule, if indicated, upon three hours notice of the shift start time. Failure to report to work may lead to disciplinary procedures. The Employer retains the authority to readjust a full-time employee's master schedule when using the employee in a make-up hour capacity so as to prevent an overtime situation.

. . .

ARTICLE 8 - OVERTIME

Section 8.1. Overtime work shall be that work in excess of eight (8) hours in a twenty-four (24) hour period or in excess of eighty (80) hours in a fourteen (14) day pay period. Overtime shall not be pyramided.

Section 8.2. The Employer will make a reasonable effort to equitably distribute additional hours exceeding the normal work schedule or to fill scheduled hours for which the regular employee is not available. Additional hours known in advance will be posted and part-time employees who are not scheduled to work such hours will be permitted to volunteer for such hours on a first come, first served basis, as long as it does not constitute overtime. Additional hours known in advance will be filled using the following procedure:

A posting will be hung on the bulletin board by the time clock indicating open hours.

Part-time employees who are not scheduled to work such hours or within the 24-hour period of the hours open will be permitted to volunteer on first come, first serve basis.

The scheduler will assign hours to employees listed on the weekend call-in list.

The scheduler will ask employees to trade work schedules.

Full-time employees will be allowed to

volunteer.

If no one volunteers, then full-time and part-time employees, by seniority, will be assigned to work on a rotating basis, beginning with the least senior employee on the shift where the vacancy occurs. Preference in each step will be given to employees who work in classifications affected and to those who can work a full shift. Split shifts will be avoided whenever possible. Employees who commit themselves to work an open schedule on a voluntary basis will be obligated to work that shift and hours.

Section 8.3. Periodic vacancies due to call-ins will be scheduled as follows:

1. Asking part-time employees who signed up for a volunteer call-in replacement list and who are not scheduled to work within any one (1) twenty-four (24) hour period starting with the beginning time of the employee's last shift. Part-time employees in any department can sign up, but preference will be given to part-time employees who work in the classification which created the call-in.

2. The scheduler will assign hours to employees listed on the weekend call-in list.

3. Asking employees who are scheduled to work the next twenty-four (24) hour period to trade schedules.

4. Asking full-time employees who signed up for a volunteer call-in replacement list and were not scheduled to work within any one (1) twenty-four hour period starting with the beginning time of the employee's last shift. Full-time employees from any department may sign the volunteer list, but preference will be given to employees working in the same classification and department as created the call-in.

5. The supervisor will first ask for volunteers and, if none, the supervisor will assign the employees by seniority within that department on a rotating basis, beginning with the least senior employee on the shift where the vacancy occurs.

Section 8.4. Employees will be paid time and one-half their regular rate of pay for all overtime hours worked.

BACKGROUND:

The parties have had a collective bargaining relationship since 1988. There have been three successive labor agreements between the parties covering the years 1988-1989, 1990-91 and 1992-94. Section 7.10 of the currently effective labor agreement reads the same in all three agreements and neither the Union nor the Employer has ever proposed to change the substance of Section 7.10 during collective bargaining negotiations.

During negotiations for the 1992-94 agreement, the Employer proposed to delete then - Sections 7.8 and 7.9 on the grounds that they were non-mandatory subjects of bargaining. Sections 7.8 and 7.9 in the 1990-91 agreement read as follows:

> Section 7.8. Staffing levels will be determined solely by the administration on the basis of resident cognitive functioning and care levels, behavior and habilitative needs.
>
> Section 7.9. The Employer shall attempt to maintain staffing ratios which provide for equal distribution of work and reasonable work loads based upon resident needs and the current occupancy rate.

In those negotiations for the 1992-94 agreement, the Union agreed to delete Section 7.8 and to modify Section 7.9 read as follows:

> The Employer shall attempt to provide for equal distribution of work and reasonable work loads.

The parties also agreed to add a new economic provision, Section 7.13, which gave employes a weekend premium rate over and above their "base rate or overtime rate," 10 cents per hour "for all time worked in full hour increments beginning at 11:00 PM Friday and ending with 11:00 PM Sunday." Finally, the parties agreed to limit the number of scheduled weekends on which employes could take vacation days (where no such limit had existed previously), by modifying Article 23.2 to add the following underlined language:

> All vacation requests must be authorized by the employee's immediate supervisor and approved by the Administrator. All vacation must be taken within a twelve (12) month period following the employee's eligibility date. Any extension beyond the twelve (12) month period must be authorized in writing by the immediate supervisor and approved by the Administrator. The Employer will not unreasonably deny such requests. No more than one (1) week can be carried over to the next year and if not taken within the next twelve (12) months it is lost. No pay can be taken in lieu of vacation other than upon termination. No vacations will be granted between the dates of December 15 and January 15. Employees may select vacation time to include an equal number of scheduled weekends off to the number of weeks vacation earned by the employee (e.g. one week vacation, one scheduled weekend off per year). The employee may have additional weekends off if they are able to find a qualified replacement approved by the Employer.
>
> Vacation selection shall be done on or after January 1 of each year. If an employee has not yet earned his/her vacation, but will earn it at some point during

> the calendar year, the employee can still sign up during the sign up period for vacation dates to be taken when the employee becomes eligible to do so as set forth in Section 23.1. From January 1 through February 1 of each year, employees may select their vacation dates by filling out the vacation requests form designating their preference for vacation. Vacation selection shall be by seniority within the classification. The Employer will make a reasonable effort based on staffing needs to accommodate the employee's requested vacation schedule. If the vacation scheduled by the employee cannot be granted, the Employer shall discuss the matter with the employee and a second preference will be solicited. Once an employee's vacation has been approved, the senior employee may not bump another employee from his/her time off. The Employer will respond in writing to vacation requests made in January by February 28. Employees who have not scheduled their vacation during the above period, shall make their vacation request in writing to the employee's supervisor for approval 5 weeks prior to the beginning date of the vacation leave. The Employer will respond in writing to the vacation requests within two (2) weeks of receiving the request. Vacation salary is to be paid in the last pay period prior to the scheduled vacation.

During negotiations for the 1992-94 agreement, the Employer also proposed certain modifications to the contract which the Employer ultimately dropped. These changes were not incorporated into the 1992-94 agreement: 1/

Article 3 - Management Rights - ADD the following:

> ". . . to subcontract for goods and services, . . ."

Article 8 - Overtime - ADD the following to section 8.1:

> "Overtime shall not be paid for hours of work beyond eight (8) hours per day when such schedule is arranged pursuant to the voluntary request of the employee."

Article 8 - Overtime - MODIFY section 8.2, the sixth paragraph under the overtime fill procedure for clarification as follows:

> "If no one volunteers, then qualified full-time and part-time employees, by seniority, will be assigned to work on a rotating basis, beginning with the least senior employee where the vacancy occurs. Preference in each step will be given to employees who work in classifications affected and to those who can work a full shift. Split shifts will be avoided whenever possible. Employees who commit themselves to work an open schedule on a voluntary basis will be obligated to work that shift and hours.

1/ The Employer offered no evidence pertaining to bargaining history for the 1992-94 agreement.

Article 24 - Sick Leave - ADD the following section 24.2"

"The employer reserves the right to request medical verification for any medical leave of absence."

The 1992-94 labor agreement was negotiated from October through December, 1991. The contract itself was executed by the parties in early April, 1992.

FACTS:

The Employer's facility, located in Ripon, Wisconsin, houses approximately 60 residents who have different care levels, requiring different ratios of residents to staff under State and Federal guidelines. In January of each year, the State Bureau of Quality Compliance (SBQC) conducts an annual survey or audit of the facility to determine if it is meeting State and Federal requirements. In January, 1992 the SBQC conducted such an audit and found that the facility had not met Federal standards for staffing levels during an unidentified period of time in 1991. The SBQC issued a citation to the Employer. This citation was in part, a motivating force in the Employer's decision to issue the memos dated May 8th and May 14th, requiring weekend make-up work.

Since the beginning of the collective bargaining relationship between the parties, the Employer has used two methods to fill open shift assignments. One of these is a list, known as the weekend call-in list. This list is kept at the nurses' station and contains a space for the employe's name who has called in on a weekend to indicate he/she cannot work the assigned weekend shift(s). The language of Article 7.10 is quoted on the top of this list. The nurse (or aide acting in place of a nurse) receiving the call-in is expected to place the employe's name on this list immediately and then attempt to find an employe to replace the one that has called in, using the procedures detailed in Articles 7.10 and 8.3.

A different list is also maintained by the Employer, known as the open shifts list. This list is maintained in the employe lounge and it shows shifts that are available for non-scheduled employes to volunteer to work if they wish to work extra hours. The procedure for using this list is detailed in Article 8.2 of the contract.

Prior to May 8, 1992 some employes had been allowed to call in on a weekend, miss their scheduled weekend shift, but get their names off the weekend call-in list by volunteering (signing up on the open shift list) to work a weekday shift which they were not previously scheduled to work. If employes who had called in on a weekend failed to volunteer for an open weekday shift (or to volunteer for another weekend shift), they were subject to call-in on any shift with three hours advance notice per Article 7.10. Although the parties dispute in part whether weekend call-ins had increased prior to May 8, 1992, it is clear that weekend call-ins as well as call-ins during the week have been a problem since 1988. 2/

On May 8, 1992, Administrator Nola Feldkamp 3/ issued the following memo to "all nurses and night RLA's" (Resident Living Aides):

> RE: DIRECT CARE STAFFING RATIOS
>
> The purpose of this memo is to establish protocol for handling weekend call-ins in the RLA classification. The nurse or night RLA receiving the call-in should take the following action immediately,

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2/ The Employer submitted no documentary evidence to show that weekend call-ins had increased prior to May 8, 1992. Ms. Feldkamp stated that such call-in frequency was pretty high and that she felt something had to be done about it. Ms. Feldkamp, however, was hired on December 9, 1991, and had no knowledge of call-in levels prior to that time.

3/ Ms. Feldkamp was not present at bargaining over the 1992-94 contract.

except during the hours between midnight and 4:30 AM.

1. Fill out the absenteeism form for the employee calling-in.

2. Ask part-time employees on the volunteer call-in replacement list for help.

3. Ask full-time employees on the volunteer call-in replacement list for help.

4. Ask for volunteer trades from people scheduled to work within the next (24) twenty-four hours. This will postpone, but not solve the problem. You must then follow-up with finding a replacement for the vacancy created by the trade. You may wish to accept voluntary efforts for partial shifts and piece a replacement together. If this creates a vacancy, please follow-up with finding a replacement for the vacancy created.

5. Assign hours to employees listed on the weekend call-in list. Start at the top and proceed down the list. If your telephone call reaches a recorder, make your message clear that you are making an assignment from the weekend call-in list and that the RLA called will be expected to return a call to you and will be expected to come in for the shift specified, unless you are able to tell the RLA when he/she returns a call to you that you have been able to fill the vacancy with someone else. If, for any reason, the RLA does not return a call to you, the assignment will stand and the RLA will be expected to come in for the shift specified.

   Please give the following message to the recorder:

   "Hello, _____, this is _____ from RARC. I am trying to find an RLA replacement for a call-in. Please call me at the facility as soon as possible. You are on the weekend call-in list which obligates you to come in and work when requested. Therefore, I am assigning you to work _____
   (Day)
   from _____
   (Times of shift)
   and will expect you to be here. You must return a call to me to confirm this assignment. Failure to call and/or failure to report as assigned will result in disciplinary action".

If a recorded message has been left, do not consider the vacancy filled. Proceed down the weekend call-in list until the vacancy is filled with certainty. Proceed to the next step if the position cannot be filled with certainty.

6. When all of the above efforts have been unsuccessful, call the on-call nurse for direction. Protocol is also being established for the on-call nurse to follow. It is fairly complicated. The on-call nurse needs to be the in-charge person providing direction to the facility nurse/night RLA at this point. The following nurses are currently taking call:

Mary Lyke	Marty Wizner
Mary Sauer	Connie Birkrem

The call schedule is identified on a calendar posted at the nursing station.

This memo supersedes earlier memos in all matters where potential conflict may exist.

In a subsequent memo from Ms. Feldkamp to "all staff", also dated May 8th, the first May 8th memo was modified/clarified as follows:

RE: WEEKEND CALL-IN LIST

This memorandum is written to give you notice that effective May 15, 1992, it is our intention to enforce union contract language (Section 7.10) and use employees on the weekend call-in list to replace vacancies created by other weekend call-ins. We realize that in the past, enforcement of this contract provision has been lax. We can no longer afford to not utilize this provision since our efforts to achieve adequate staffing ratios are complicated by an increase in weekend call-ins.

While we realize that absences on weekends may be unavoidable, we feel that a call-in creates a make-up obligation to cover a subsequent weekend vacancy (full shift). Our intention is to follow-up all mandatory assignments made under this provision with appropriate disciplinary action. It may be to your advantage if you are on the weekend call-in list to volunteer for a make-up weekend shift if one is open and available. For regular employees, disciplinary action will consist of four progressive steps (verbal warning, written warning, suspension - 2 days, termination) For "on-call" employees, disciplinary action will consist of three progressive steps (verbal warning, written warning, termination). No distinction will be made with regard to whether the assignment is communicated to you in person, via telephone, or to you via a telephone recorded message. Please take special note of this last sentence if you are on the weekend call-in list and have your telephone hooked up to a

message recorder.

We regret that we must discuss this situation with you, but we feel that the outcome will benefit our residents and create a more stable work environment for the benefit of employees caught in the obligated-to-cover someone else's call-in situation.

. . .

Finally, on May 14, Feldkamp issued the following memo to "all staff":

RE: WEEKEND CALL-IN LIST

This is the second memorandum written to give you notice that effective May 15, 1992, it is our intention to enforce union contract language (Section 7.10) and use employees on the weekend call-in list to replace vacancies created by other call-ins, in particular, weekend call-ins.

We wish to further clarify that the weekend customarily includes the following shifts:

Friday	Night shift
Saturday	Day shift
	PM shift
	Night shift
Sunday	Day shift
	PM shift

Replacement assignments will usually be made for full shifts (8 hours). Personnel authorized to make replacement assignments for hours known in advance are the HCD, HCS, or delegate. Personnel authorized to make replacement assignments for vacancies due to call-ins include HCD, HCS, on-call nurse, floor nurse or a night RLA. These assignments will typically also be made for full shifts (8 hours). Assignments for less than 8 hours may be made in extenuating circumstances, subject to review for appropriateness. In any event, replacement arrangements of less than four hours in duration will not be sufficient to remove an individual's name from the weekend call-in list. The HCD or HCS will be able to remove an individual's name from the list once they have verified that the assignment was an acceptable work-back arrangement. Scheduler and employee conversations need to be clear with regard to distinguishing volunteer efforts from mandated assignments.

It may be to your advantage if you are on the weekend call-in list to volunteer for a make-up weekend shift if one is open and available. Your volunteer effort must be for a weekend shift and clearly accepted by either the HCD or the HCS as a suitable work-back arrangement.

The Union timely filed the instant grievance after the issuance of these memos. Thereafter, in an effort to inter alia settle the grievance, on July 9,

1992, Ms. Feldkamp issued a memo, "Make-up Weekend Assignments" which modified Feldkamp's May 8th memo regarding "Direct Care Staffing Ratios." The July 9th memo read in relevant part as follows:

. . .

> The attached procedure is offered as a compromise in an effort to resolve our differences with regard to this issue. All references to assignment via a telephone recorded message have been deleted. Also, the exact order in which both "hours" known in advance" and "vacancies due to call-ins" has been restored to reflect exact contract procedure.
>
> The unencumbered issue that remains is management's prerogative to control and direct the use of weekend make-up hours. As outlined previously, contract language is clear and unambiguous in section 7.10, 8.2, 8.3, and Article 3 with regard to this management right.
>
> Provision for disciplinary follow-up is specifically provided for in 7.10 when the employee who is obligated to work fails to report as directed. It is also generally accepted that failure to follow work rules or management directives related to work rules is grounds for disciplinary action.
>
> My investigation into past contract negotiations also supports management's interest in addressing problems with weekend staffing, i.e., a limitation was established as to the number of vacation days that could be taken on weekends. It would defeat the intent of past negotiations to limit scheduled absenteeism on weekends and then allow unscheduled call-ins on weekends to be made-up on weekdays per employee discretion.

The memo which was attached to Feldkamp's (above-quoted) July 9th memo modified the protocol for handling weekend call-ins, as follows:

. . .

> The purpose of this memo is to establish protocol for handling weekend call-ins in the RLA classification. The nurse or night RLA receiving the call-in should take the following action immediately, except during the hours between midnight and 4:30 AM.
>
> 1. Fill out the absenteeism for the employee calling-in.
>
> 2. Ask part-time employees on the volunteer call-in replacement list for help.
>
> 3. Assign hours to employees listed on the weekend call-in list. Start at the top and proceed down the weekend call-in list until the vacancy is filled.

4. Ask for volunteer trades from people scheduled to work within the next (24) twenty-four hours. This will postpone, but not solve the problem. You must then follow-up with finding a replacement for the vacancy created by the trade. You may wish to accept voluntary efforts for partial shifts and piece a replacement together. If this creates a vacancy, please follow-up with finding a replacement for the vacancy created.

5. Ask full-time employees on the volunteer call-in replacement list for help.3.

6. When all of the above efforts have been unsuccessful, call the on-call nurse for direction. Protocol is also being established for the on-call nurse to follow. It is fairly complicated. The on-call nurse needs to be the in-charge person providing direction to the facility nurse/night RLA at this point. The following nurses are currently taking call:

Mary Lyke	Marty Wizner
Mary Sauer	Connie Birkrem

The call schedule is identified on a calendar posted at the nursing station.

POSITIONS OF THE PARTIES:

Union:

The Union observed that the sole dispute remaining in this case is whether an employe who is absent from work on a scheduled weekend and is placed on the weekend call-in list must make up the hours missed by working an unscheduled weekend, as the Employer has contended. The Union urged that the language of Section 7.10 allows employes who are absent on a scheduled weekend to avoid having to work an unscheduled weekend by signing up on the open shifts list to work their preferred normal shift or any (unscheduled) weekday shift. The Union points out that its witness, Sue Meyers, confirmed that the language of Section 7.10 has remained unchanged and has never been disputed by the parties since it was placed in the parties' initial collective bargaining agreement. Meyers, as Chief Steward since shortly after the Union organized the Employer, also confirmed that she consistently advised employes to sign up on the open shifts list in order to get their names off the weekend call-in list. Meyers stated that this advice, given to Ms. Rose and Ms. Liptow, resulted in their removal from the weekend call-in list without their having to work an unscheduled weekend shift. The Union argued that the Employer's Health Care Supervisors knew and approved of the Union's described practice/procedure for administering Section 7.10 and that Meyers' testimony stood uncontradicted. In fact, the Union observed, both of the Employer's witnesses confirmed that the practice (based upon Employer magnanimity) had been as the Union described it prior to the Employer's issuance of its May and July memos, and that those

memos had admittedly been issued without prior notice to or negotiation with the Union.

In addition, the Union contended that the Employer could have used the procedure described in Section 8.3 of the contract to get staffing coverage had it chosen to do so. Meyers stated that staffing has always been a problem at the Employer's facility and that the Union has consistently attempted to assist the Employer in meeting staffing requirements. Thus, in the Union's view, the Employer's implicit contentions that it had no choice but to assert its management rights and require employes to make up missed weekend hours by working other weekend hours were groundless. The Union pointed to Section 8.3 as the proper procedure for filling vacancies due to call-ins.

The Union urged that the contract was vague and ambiguous and that the Employer was fully aware of the past practice regarding Section 7.10, which fills in the blanks in the agreement and supports the Union's arguments in this case. The Union argued that the Employer's issuance of its May memos further demonstrated the Employer's acknowledgement of contractual ambiguity. The Union also noted that Section 7.10 does not use the terms "make-up weekend list" or "make-up weekend hours". Nor does Section 7.10 otherwise use the word "weekend" when describing the hours that employes are required to make up.

The Union noted that the labor agreement contains various limitations on the Employer's exercise of its management rights. If the Employer's staffing needs were so severe, the Union asked, why the Employer had not raised the issue in bargaining and why, if the Employer believed it had reserved the right to require weekend make-up work as it asserted, the Employer felt the need to issue the May memos. The Union therefore urged that the grievance should be sustained.

Employer

The Employer argued that Section 7.10 is clear and unambiguous in reserving to the Employer, the right to assign employes from the weekend call-in list to work unscheduled weekends. In this context, the Employer urged, consideration of extrinsic evidence such as past practice or bargaining history is inappropriate. In addition, the Employer pointed to Section 6.5 which specifically prohibits arbitral additions, deletions and modifications of the labor agreement. The Employer urged that Section 7.10 allows the Employer almost unlimited discretion to assign employes, the only exceptions being that employes can request their normal shift time or they can be removed from the weekend call-in list by volunteering to work an unscheduled weekend. The Employer observed that no mention is made in Section 7.10 of employes having the discretion to meet their weekend work requirement by working an unscheduled weekday. The Employer urged that in these circumstances, a finding for the Union would essentially add a new contractual provision to the labor contract, contrary to its express terms.

The Employer contended that the Union has failed to meet its burden of proof to show a valid past practice was created by the parties' mutual, knowing agreement. The Employer noted that Union Steward Meyers never discussed her interpretation of Section 7.10 with management. In addition, the Employer noted that the Union proffered evidence of only two hearsay incidents to support its claim that a past practice exists, which evidence would be insufficient to demonstrate a past practice in the Employer's view.

In regard to bargaining history, the Employer urged that the Union's evidence on this point supported its position in this case. The Employer noted that it had placed the standard disclosure on its proposals, reserving the right to change its proposals at any time without prejudice to any right or

interpretation of the Employer. Second, the Employer asserted that although the items under negotiation for the 1992-94 agreement are not related to those items in issue in this case, the parties did recognize and discuss the need for employes to work more weekends by changing the contractual Vacation article. The Employer therefore urged that the grievance should be denied and dismissed.

Employer's Reply Brief:

Having reserved the right to do so at the instant hearing, the Employer filed a reply brief on February 4, 1993. The Union chose not to file a reply brief herein.

The Employer asserted that the Union's arguments in its initial brief regarding Section 8.3 were inappropriate and should be disregarded under the stipulated issue herein. In addition, the Employer contended, the Union's arguments would not only render meaningless the language of Sections 7.2, they would also destroy the distinction the parties intended to maintain between the meaning and application of Section 7.10 and Section 8.3. Furthermore, the Employer urged, the Union's interpretation of Section 7.10 would create an incentive for employes to miss their scheduled weekend work and negate the language of Section 7.10.

The Employer disputed the Union's argument in its brief that the Employer would not have issued the May memos had it truly believed it had reserved its right to reschedule weekends for absent employes. On this point, the Employer indicated that its issuance of the memos merely showed the Employer's concern that employes be notified in advance of the Employer's intent to assert its reserved rights in such a way that employes would be able to comply with the Employer's requirements. In conclusion, the Employer asserted that it did no more than exercise its reasonable management right to assure adequate weekend staffing and that the grievance should therefore be denied and dismissed in its entirety.

DISCUSSION:

The initial question that must be dealt with in this case is whether the language of Section 7.10 is clear and unambiguous regarding a weekend make-up procedure. In this regard, I note that the language of Section 7.10 has remained unchanged since it was placed in the initial labor agreement between the parties. An analysis of the first portion of Section 7.10 reveals that that Section requires employes who have missed their scheduled weekend shifts to make-up "the hours" "within a six month period". The first portion of Section 7.10 refers only to "the hours" or "the make-up hours." No reference is made in the initial portion of Section 7.10 to "weekend hours" or "make-up weekend hours." Thus, although the first portion of Section 7.10 requires employes who are not sent home by the D.O.N. and who do not have a doctor's excuse, to make-up hours they did not work on their scheduled weekends, the initial portion of that Section does not specifically require that the hours made up be worked on a weekend.

The second portion of Section 7.10 describes the procedure to be used when an employe calls in to be absent on a weekend. First, the employe's name must be added to "a list in consecutive order of missed days." When the employe's name is added to this list, Section 7.10 states that the "employee will be obligated to work any shift with only three hours prior notice" until "the employee signs the list indicating their preference for their normal shift or volunteers to work a make-up weekend shift." (emphasis supplied).

The ordinary meaning of the above-quoted language shows that the employe can avoid being obligated to work "any shift" by working another weekend or in

the alternative, by listing their preference for their normal shift. The language of Section 7.10 does not indicate any limitation on the employe's ability to choose the option of listing a preference for their normal shift. Thus, one can reasonably conclude, based on the language of Section 7.10, that the employe has the unfettered option to select any day they are not scheduled to work where there is an open shift at their regular shift time. The alternative listed in this sentence of Section 7.10, to volunteer for a weekend shift, demonstrates that the parties did not intend to require that the employe's designation of his/her normal shift preference be on a weekend shift to qualify. Thus, the language of Section 7.10 is clear and unambiguous, as the Employer has contended, but that language does not support the Employer's position herein.

The Union's evidence regarding employes who had their names removed from the weekend call-in list tends to support the above analysis of Section 7.10 and it therefore constitutes relevant parole evidence which is admissible to support the unambiguous contract language of Section 7.10. Notably, the Employer offered no contradictory evidence regarding the past application of Section 7.10. In addition, I note that Section 8.3 contains a procedure for requesting employes to work in the specific situations involved herein - when employes have called in and this has caused vacancies. Thus, I find the Employer's arguments unpersuasive that it had no alternative but to require employes to make up missed weekend hours on weekends only.

I do not find the Union's evidence of bargaining history particularly compelling in this case. It is significant, however, that no evidence was offered by either party regarding what the parties intended Section 7.10 to mean or how they intended to apply it. Beyond this point, although the parties discussed staffing level problems and agreed upon restrictions in the use of accrued vacation time on the weekends (apparently in exchange for a 10 cents per hour weekend premium rate), the parties did not discuss Section 7.10 during negotiations for the effective labor agreement.

The memos issued by Feldkamp in May and July, 1992, also tend to undercut rather than support the Employer's arguments in this case. Implicit in those memos are the notions that Feldkamp knew the labor agreement was in place, that she knew that the contract had been administered differently from the way she wished to administer it and she therefore felt the need to notify employes of the changes she desired to make. However, it is axiomatic in labor relations that making a change like the one Feldkamp made is not permitted mid-term of a contract without proper notification to the Union and the Union's agreement to such a mid-term change. In addition, as a general rule, absent the Union's voluntary agreement to a mid-term contract change, the Employer cannot insist upon the change and it may not unilaterally implement such a change during the term of the labor agreement. Rather, in cases such as the instant one, the Employer must wait until the expiration of the effective labor agreement to properly notify and negotiate with the Union for a change in the language of that agreement.

The facts clearly show that the Employer did not follow this procedure in this case. Therefore, given the clear language of Section 7.10 and the Employer's failure to properly negotiate a change therein into the effective labor agreement, the Employer was and is bound by the language of the effective agreement and the manner it had administered that language prior to May 8, 1992 unless and until such time as it successfully negotiates with the Union for the changes it seeks to make in Section 7.10.

AWARD

The procedure outlined in the Employer's memo of July 9, 1992 violated

Article 7.10 of the collective bargaining agreement.

The Employer shall therefore immediately retract its July 9 memo, it shall immediately cease requiring RLA employes to make up missed weekend hours on weekends only and it shall hereafter allow RLA employes the option of volunteering to work a weekend shift or of indicating their preference to work their normal shift on a non-weekend day on which they are not scheduled to work. 4/

Dated at Madison, Wisconsin this _____ day of April, 1993.

By _____
Sharon A. Gallagher, Arbitrator

4/ The Union neither sought nor proved that any employes had been injured (monetarily or otherwise) by the Employer's actions herein. Therefore, no make-whole remedy is appropriate here.