

BEFORE THE ARBITRATOR

 :
 In the Matter of the Arbitration :
 of a Dispute Between : Case 49
 : No. 48036
 SERVICE EMPLOYEES INTERNATIONAL UNION, : A-4977
 LOCAL 150, AFL-CIO :
 : Case 50
 and : No. 48037
 : A-4978
 MERITER HOSPITAL, INC. :
 :

Appearances:

Mr. Todd Anderson, Business Agent, on behalf of the Union.
Axley, Byrnelson, by Mr. Michael J. Westcott, on behalf of
 the Employer.

ARBITRATION AWARD

The above-entitled parties, herein the Union and Employer, are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Madison, Wisconsin, on December 15 and 16, 1992, and on February 12, 1993. The hearing was transcribed and the parties filed briefs which were received by April 1, 1993.

Based upon the entire record, I issue the following Award.

ISSUE

Since the parties were unable to jointly agree upon the issues, I have framed them as follows:

1. Are the two grievances arbitrable?
2. If so, did the Employer violate Article IV of the contract by:
 - (1) classifying the Operating Room Materials Aide position in pay class 65 rather than pay class 68; and/or
 - (2) classifying the Operating Room Aide position in pay class 59 rather than pay class 62?

DISCUSSION

The Employer operates a large medical complex in Madison, Wisconsin. In 1992, the Employer reorganized its operating room

area by eliminating the former Sterile Room Aide and Transporter

(Patient Escort) classifications and by creating new Operating Room Materials Aide, herein "O.R. Materials Aide", and Operating Room Aide, herein "O.R. Aide", classifications which were filled on August 31, 1992. 1/

O. R. Materials Aides are primarily responsible for delivering and maintaining the flow of instruments and supplies between surgery and supply processing distribution; maintaining inventory levels under the direction of the O.R. Materials Supervisor; inspecting and cleaning surgical instruments; and cleaning the operating room. O. R. Aides are primarily responsible for supporting the overall functioning of the operating room by performing various tasks which are considered inappropriate for the registered nurses and technicians. O.R. Aides therefore transport patients to and from the operating room, clean the surgical suits, handle surgical supplies, run errands, and discard wastes.

Both the O. R. Materials Aide and O. R. Aide positions were evaluated by a five-member Job Evaluation Committee - which consists of the Employer's representatives - and they were subsequently placed in pay grades 65 and 59 respectively. The O.R. Materials Aide and O.R. Aide classifications are one pay grade higher than the prior Sterile Room Aide and Transporter classifications.

The Committee's primary function is to review and ask any pertinent questions relating to the job and position questionnaire. Pursuant to Article IV of the contract, a bargaining unit employe and manager from the affected area appear before the Committee to give input regarding the positions being considered, and that is what happened here for both the O.R. Materials Aide and O.R. Aide classifications. The Committee uses a Job Evaluation Tool, herein "Tool", which measures skill, effort, responsibility, and job conditions - along with eleven categories under each of these four factors. Each category is measured on a point and degree scale of 1 to 5, with 5 being the highest. Hence, the higher the points and degrees, the higher the pay grade.

The Union in June filed two separate grievances claiming that the O.R. Aide and Materials Aide positions should be upgraded to pay grades 62 and 68 respectively. Representatives of the parties met to discuss these and other grievances on July 15, July 29, and August 5. As noted in greater detail below, there is a dispute as to whether the parties then agreed to mutually extend the grievance deadlines with the Union contending, and the Employer denying, that they did.

1/ Unless otherwise stated, all dates hereinafter refer to 1992.

The Employer on August 21 denied the grievances at the third step of the grievance procedure and the Union by letter dated September 11 requested arbitration. 2/ By letter dated September 25, Labor Relations Manager Judy Peirick denied the grievances and stated that they were untimely.

In support of the grievances, the Union asserts that its requests for arbitration were timely because it "operated fairly with the understanding that time limits had been waived. . ." On the merits, it contends that the O.R. Materials Aide position should be awarded an additional 137 points and upgraded to pay grade 68 because the Employer failed to award appropriate points for mental skills, responsibility for material or product, responsibility for equipment or process, responsibility for safety of others, and unavoidable hazards. The Union similarly maintains that the O. R. Aide position should be awarded an additional 231 points and placed in pay grade 62 because the Employer did not award enough points for experience, mental skills, physical requirements, responsibility for equipment or process, responsibility for material or product, working conditions, and unavoidable hazards. The Union also asks that all affected employes be made whole by paying to them the difference between what they earned and could have earned had they been placed at the appropriate pay grades from August 31 to the present.

The Employer, in turn, argues that the Union failed to make timely requests for arbitration under Article XXIV, Section 2, of the contract and that, as a result, the grievances are not arbitrable. The Employer also claims that it properly classified the O. R. Materials Aide and O. R. Aide at the appropriate pay grades.

The Arbitrability Issue

Turning first to the arbitrability question, Article XXIV, Section 3, of the contract provides:

If the matter is not settled in Step 3 or Step 4, the grievance may be submitted to arbitration upon written request of either party delivered to the other within ten (10) working days of the Step 3 response or mediation meeting if one was held. Should the matter go to arbitration, the party desiring arbitration shall request the Wisconsin Employment Relations Commission (WERC) to appoint a staff member of the WERC to serve as arbitrator for the dispute.

2/ The letter was not received by the Employer until September 18.

. . .

Section 6. Time Limitations

If an employee and/or Union fails to comply with the limitations of time specified herein, the Hospital may rightfully refuse to process a grievance further and the grievance shall be considered null and void. Nothing herein, however, limits the Employer and the Union from mutually agreeing to extend any time limitation. Time limitations expressed in working days shall not include Saturday, Sunday or holidays.

Here, the Union's September 11 request for arbitration was filed more than ten days after the Employer's August 21 third step answer, with the Union claiming that there was a mutual agreement between the parties to extend the contractual deadlines.

The record on this point is murky. Thus, Union Business Agent Todd Anderson, Union Chief Steward Thomas Elert, and Union Steward Brenda Frary testified in substance that Labor Relations Manager Peirick expressly agreed in the underlying steps of the grievance procedure to waive the grievance deadlines for all grievances relating to the reorganization. Peirick, on the other hand, testified that the July 15 extension was limited to a separate grievance involving "how the people were going to select into the positions." She also said that if the extension covered any additional grievances, she would have referred to them in her follow-up letter - which she did not do. As for the subsequent July 29 and August 5 meetings, Peirick said that she then asked for a two-week extension of time to answer a separate grievance -- something she said she would not have done had the parties earlier agreed to suspend the contractual deadlines for all of the grievances then being addressed.

This conflicting testimony is simply impossible to resolve. It suffices to say that the Union had a good faith basis for believing that the contractual time limits for requesting arbitration had been waived. Moreover, the newly-created O.R. Materials Aide and O.R. Aide classifications were not actually filled until August 31. As a result, no grievance had to be filed before then because it is well-recognized that the time for challenging an employer's actions in some cases can also start after the event itself occurs, rather than only when an earlier announcement to that effect is made. 3/ Since the Union's request

3/ See How Arbitration Works, Elkouri and Elkouri, p. 196 (BNA Books, Fourth Edition, 1985)

for arbitration was filed shortly after August 31, it can hardly be said that the Union was dilatory. When all of this is combined with the fact that the Employer has not been harmed because of the Union's subsequent request for arbitration, I find that the grievances are arbitrable.

The O.R. Materials Aide

The disputed categories regarding this position center on mental skills, responsibility for material or product, responsibility for equipment or process, responsibility for safety of others, and unavoidable hazards, with the Union requesting an additional 137 points for this classification so that it can be raised to pay class 68.

O.R. Materials Aide Caryl Karls - who was formerly classified as a Sterile Room Aide before the reorganization - testified regarding the discretion she uses in ordering and keeping track of supplies; how she uses care in handling and cleaning certain equipment such as drills, Doppler probes, and colydocoscopes; how it is sometimes difficult to maneuver carts in the elevator and how they routinely tip over; how she goes about turning over the operating room and disposing of blood and body parts; and how she and her co-workers are exposed to blood, needles, and infectious diseases. Karls also said that while her present duties have increased from what they were as a Sterile Room Aid, they nevertheless are "pretty similar". Harvey Mathes, the O.R. Equipment Supply Coordinator, corroborated part of Karl's testimony by explaining how he fixes expensive equipment routinely handled by Karls and other O.R. Materials Aides and how some of it is easily damaged.

O.R. Materials Aide Supervisor Christopher Laurent, in turn, testified that "The basic focus of this position is to serve as a link between the O.R. [operating room] and S.P.D. [supply processing distribution]" and "to order supplies" through internal and outside sources. He further testified that the position does not require much planning or the performance of unusual and difficult work; that considerable ingenuity is not needed; that "the carts we're putting on [the elevator] are somewhat incompatible with the machine which triggers breakdown"; that much of the equipment handled by the O.R. Materials Aides comes in the manufacturer's original package thereby making it difficult to break its contents; that but for minor cuts, he is unaware of any injuries to the O.R. Materials Aides; and that the use of protective equipment and universal precautions reduce, if not totally negate, any unavoidable hazards. Laurent also agreed that one of the major differences between the former Sterile Room Aides and present O.R. Material Aides is that the primary responsibility for turning over and cleaning the operating room has been taken away and given to the O.R. Aides and that the O.R. Material Aides do "vastly fewer" turnovers than before.

Compensation Manager Douglas Rentschler, who chairs the Job Evaluation Committee, testified in detail why the Committee awarded the points that it did for the O.R. Materials Aide (and O.R. Aide) and why the Committee placed the position in pay grade 65 - which is one pay grade higher than the former Sterile Room Aide position. Rentschler also said that many of the Union's arguments herein were never presented to the Committee. Ellen Braun, an Infection Control Practitioner, testified that there was very little chance that any O.R. Material Aides could be infected with either hepatitis or tuberculosis.

In determining whether the O.R. Materials Aides have been placed in the appropriate pay class, it must first be noted that they already are in a higher pay grade than the Sterile Room Aides who, as Karls testified, performed "pretty similar" duties as the O.R. Materials Aides. Hence, the Employer itself recognizes that their present skills and added responsibilities warrant increased compensation. The nub of this dispute therefore centers on whether those skills and responsibilities are sufficient to warrant a two-grade increase over what the former Sterile Room Aides received.

Turning first to the question of mental skills, the record establishes that the Materials Aides perform a very difficult job and that they are exposed to unique working conditions requiring a high degree of skill and dedication. But, the record also shows that while they exercise some discretion in the performance of their duties, the vast bulk of their overall work is fairly routine, as they are expected to follow well-established procedures regarding their inventory and other functions. Hence, they do very little planning and they are not always required to exercise considerable ingenuity, initiative and judgment - which are the hallmarks of the fourth degree. As a result, their mental skills are appropriately placed in the third degree as proposed by the Employer.

Their responsibility for equipment or process also warrants the third degree awarded by the Employer. For while Materials Aides handle microscopes and other equipment which are expensive, the record establishes that they otherwise seldom handle any equipment with a value exceeding \$4,000 - which is the Tool's maximum for the third degree. In addition, the probability of damage is very small, as this record shows that O.R. Materials Aides have never damaged any such expensive equipment.

As for responsibility for material or product, the Union correctly points out that clerical errors can result in the loss of equipment and that some equipment - such as a \$3,800 heart valve - is very expensive. However, almost all of this equipment is in its original package when it is handled by the O.R. Material Aides. The likelihood of damage is therefore very small.

Furthermore, much of their contact is limited to deliveries as opposed to actually working with it as part of their normal job functions. Hence, this factor is appropriately placed in the second degree, as this record fails to establish that O.R. Materials Aides damage materials or products in excess of \$200.

Responsibility for safety of others, however, should be increased because Materials Aides must be extraordinarily careful in disposing of canisters of body fluids, needles, blood, body tissue, and various other elements encountered in cleaning the operating room. Thus, any lack of care on their part can lead to disease or even death to others who may be exposed to such substances if they are not handled properly.

This factor, however, does not warrant the fifth degree sought by the Union because the Tool allots that only when "Inattention or carelessness in carrying out duties may result in fatal injury to others with little opportunity for the other individuals to act to avoid injury." That is not the case here since other hospital employes can avoid such injury through the use of universal precautions and other measures. Rather, this factor should be placed in the third degree because, as the Tool provides, this work "requires the exercise of care to prevent lost time injuries to others." An additional 5 points therefore must be added to the 10 points awarded by the Employer pursuant to the second degree.

As for unavoidable hazards, the last category in dispute, the O.R. Materials Aides routinely come into contact with blood and equipment which may carry such diseases as the HIV virus and hepatitis. Nevertheless, the risk of such injuries is substantially reduced through the use of universal precautions and vaccinations, thereby making it highly improbable that any such hazards will occur. Indeed, this record shows that very few O.R. Materials Aides have ever suffered serious injuries because of any unavoidable hazards. The Employer therefore properly placed this category in the third degree because, as the Tool provides, this work involves "exposure to lost time accidents and/or health hazards which may result in injury or temporary disability sufficient to prevent an employe from performing any regularly-established job on his next regular shift."

Altogether then, the foregoing establishes that an additional 5 points must be added to the 244 points awarded by the Employer, thereby bringing the total points to 249. That still falls short of the 261 points needed to advance to pay grade 68. Hence, the Employer did not violate the contract by classifying O.R. Materials Aides to pay grade 65.

The O.R. Aide

The categories in dispute regarding this position center on

material or product, experience, mental skills, physical demands, responsibility for equipment or process, and working conditions, with the Union claiming that an additional 231 points should be awarded so that this classification can be raised to pay class 62.

O.R. Aide Kay Notstad, a former O.R. Transporter, testified that because of her reclassification to an O.R. Aide on August 31, she now cleans rooms, strips and ships case carts, and does trash and linen bags. She also said that it takes about a year to gain all of the experience needed to perform her job; that all O.R. Aides must now be certified as a Nursing Assistant by the State of Wisconsin; that she uses considerable judgment in transporting patients; that there are heavy physical demands in her job; that she frequently deals with unavoidable hazards involving vomit, body fluids, blood, radiation, needles, the Human Immunodeficiency Virus (HIV) and hepatitis.

Half-time O.R. Aide Glenn Mitroff, also a former Transporter, testified about the hazards to the job by saying that over the years he personally experienced six separate incidents involving exposure to patient blood, a back injury, getting squished between a bed and a wall of the elevator, a needle stick, and slipping on a wet floor. O.R. Aide Kathy Ellingson testified that O.R. Aides need more than three months to know the essential features of their jobs and she explained how some patients have been injured when they were being transported. She also related the difficulty in dealing with certain patients and the unavoidable hazards O.R. Aides sometimes encounter involving radiation, lasers, chicken pox, measles, bloody clothing, etc. Ellingson also detailed the observation skills needed to perform her job. Biomedical Technician Terry Cunningham testified about the repair costs for various equipment handled by the O.R. Aides.

In rebuttal, Peirick testified that the Union at the third step of the grievance meeting asked that the third degree be given for material or product and that she subsequently agreed to raise this category from a two to a three, as reflected in her subsequent August 14 letter to Anderson. Peirick also said that the Committee properly placed the O.R. Aide in the appropriate pay grade and that none of the factors should be raised - a point reiterated by Director of Surgical Services Lynn Horn, who helped prepare the O.R. Aide position questionnaire.

Horn also said that O.R. Aides can perform almost all of their basic job functions within three months; that they have been given a list of priorities (Joint Exhibit 33) spelling out which tasks must be performed first; that two O.R. Aides are assigned to push a bed and that they can refuse to transfer a patient if they feel it is unsafe to do so; that they are never required to lift any items weighing 40 pounds or more; and that their protective clothing and use of universal precautions prevents them from being exposed to any danger.

Again, it must be pointed out that the Employer has slotted the O.R. Aides to one pay grade higher than the Transporter position which formerly performed many of the O.R. Aides' duties. The Union therefore is seeking a two-grade bump over this prior classification.

Turning first to material or product, I agree with the Employer that the Union is now precluded from challenging this factor because the Union agreed in the grievance procedure that this factor should be raised from a 2 to a 3, rather than the 5 which it is now seeking. Thus, I credit Peirick's testimony that the Union made this representation and that the Employer subsequently moved this factor from a 2 to a 3 to meet the Union's concern. In such circumstances, the Union had the affirmative obligation to reply to Peirick's August 14 letter wherein she expressly asked the Union to reply if it disagreed with increasing this category to a 3.

Union representative Anderson therefore erred when he claimed at the hearing he is "not aware of any requirement that he would need to single out the areas of the Employer's third step response that we specifically disagree with when operating." In fact, such a requirement does exist when, as here, the Union has asked the Employer to do something and when the Employer then turns around and does just what the Union wants. In such circumstances, the Union is not entitled to trial by ambush, as it was affirmatively required to come forward to explain why it has changed its position. Having failed to do so in the face of the Employer's detrimental reliance which the Union itself induced, the Union therefore cannot now seek to have this category raised.

As for the experience needed for this position, it is true that O.R. Aides generally know how to perform many of their routine tasks within three months as the Employer contends. However, it is also true that O.R. Aides during that time are not exposed to the many differing situations surrounding their jobs and that, as a result, it takes longer than that before they can properly perform all aspects of their jobs. The Employer itself recognizes that fact because the O.R. Aides' job description states, inter alia, that "One year nursing assistant or transporter experience preferred" and, "Six months hospital experience preferred." In addition, and unless grandfathered, O.R. Aides now must be certified by the State of Wisconsin and such certification is normally awarded after one year's experience. Thus, Horn acknowledged, "we will not hire anyone who isn't already a CNA [Certified Nursing Assistant] as of December [1992]." That is also why Ellingson testified that she and others who had one year's experience or more were grandfathered from the CNA requirement. When viewed together, all this establishes that there is a de facto requirement of one year's experience for this job.

As a result, this category should be placed in the second degree and given the additional 22 points separating the first and second degrees since the Tool for the second degree provides for experience of "Over three months up to one year".

As for mental skills, the O.R. Aides at times exercise judgment and independence in performing their various tasks, particularly as they relate to the transporting of patients. But at the same time, the movement of patients, products, and materials is fairly routine and their priorities are predetermined, thereby not requiring the use of much judgment in such situations. Furthermore, they have been told to call nurses if they encounter unexpected problems and they can insist that patients not be moved until cleared by medical personnel, thereby indicating that the latter are the ones who decide what should be done. Under these circumstances, Materials Aides have been properly placed in the second degree which covers "minor decisions involving the use of some judgment" and "Some discrimination and care. . ."

As for the physical requirements of this job, O.R. Aides at times must exert considerable physical effort in transporting patients and related medical equipment. However, these efforts are not continuous and the record is devoid of any instances of where O.R. Aides have lifted more than 40 pounds without mechanical or other assistance. In addition, at least two O.R. Aides are assigned to move any beds. Hence, there is no basis for raising this from the third degree awarded by the Employer since this work requires "moderate physical effort for sustained periods" and the "occasional exertion of considerable effort. . ."

As for responsibility for equipment or process, O.R. Aides sometimes handle microscopes worth nearly \$5,000 and other expensive equipment. Nevertheless, they spend the vast bulk of their time handling equipment which costs far less than that and the probability for damage is quite small. Furthermore, the Union has not produced any evidence regarding the cost of the equipment which O.R. Aides use as part of their job. The Employer therefore has properly placed this category in the second degree since it provides that probable damage to equipment or process is seldom over \$100 - \$140.

Working conditions for O.R. Aides are not always ideal since they are exposed to serious disease, are vomited on, have contact with blood and urine, and face combative patients. On balance, though, such unpleasant conditions are intermittent because O.R. Aides work indoors in well-lit and air-conditioned rooms with little discomfort. These facts therefore fail to measure up to the fourth degree sought by the Union, since the work herein does not always involve "continuous exposure. . . to one disagreeable element which is present in an extreme degree. . .".

Unavoidable hazards are the last category to be considered. As to that, I find that the Employer properly placed this category in the third degree because the use of proper precautions substantially reduces the risk of unavoidable hazards and because the probability of substantial injury is too remote to be placed in the fourth degree which covers work involving possible "permanent

partial disability to such severity as loss of arm or leg, or very severe burns or occupational disability or death." For here, the record fails to establish that any O.R. Aides have ever suffered these kind of severe disabilities. Instead, the kind of injuries recounted by Mitroff and others are much more akin to the kind of lost time accidents - such as a crushed hand or foot, loss of fingers, burns, or occupational diseases likely to result in lost time - provided for in the third degree.

Based upon the above, 22 additional points (representing the second degree for experience) must be added to the points awarded by the Employer, thereby bringing the total to 230 points. That therefore raises the classification to pay grade 62 because the latter encompasses any positions with a total of 221-240 points. Hence, it must be concluded that the Employer violated the contract by classifying the O.R. Aides as pay grade 59. To rectify that, the Employer shall immediately place all O.R. Aides in pay grade 62 and make whole all affected O.R. Aides by paying to them the difference between what they earned in pay grade 59 and what they should have earned had they been paid pursuant to pay grade 62 from August 31 to the present.

Furthermore, and in order to resolve any differences concerning the application of this Award, I shall retain my jurisdiction for at least sixty (60) days.

In light of the foregoing, it is my

AWARD

1. That the grievances are arbitrable.
2. That the Employer did not violate the contract by assigning the O.R. Materials Aide position to pay grade 65.
3. That the Employer violated the contract by not paying O.R. Aides at pay grade 62. To rectify that, the Employer shall take the remedial action noted above.
4. I shall retain my jurisdiction for at least sixty (60) days.

Dated at Madison, Wisconsin this 21st day of July, 1993.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator