

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :

of a Dispute Between :

: Case 48

SERVICE EMPLOYEES INTERNATIONAL UNION, : No. 48035

LOCAL 150, AFL-CIO : A-4976

:

and :

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MERITER HOSPITAL, INC. :

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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 March 25, 1993. The hearing was not transcribed and the Union there presented oral argument in lieu of filing a brief. The Employer filed a brief which was received by May 10, 1993.

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

ISSUE

Whether the Employer has violated Article 16 of the contract by requiring employes to respond to Code Guardways and, if so, what is the appropriate remedy?

DISCUSSION

The Employer for the last several years has maintained an emergency procedure called "Code Guardway" to deal with disruptive patients, visitors, or employes who do not respond to any other measures and who, at times, must be physically restrained by the minimum of 5 responders who are dispatched to such scenes. It is hoped that such a "show of force" in and of itself would be sufficient to bring a situation under control. These responders are called away from various parts of the Employer's medical facilities, including members of its engineering staff who otherwise have no other direct patient contact.

The Employer's March 14, 1991 policy statement regarding Code Guardways provides in pertinent part that:

Meriter Hospital shall provide a trained team to respond to behavioral emergencies in order to maintain a safe environment for patients and staff. A behavioral emergency is defined as any situation in which the behavior of a patient, visitor, or employee directly threatens his or her own safety or the safety of others. This policy is not invoked in criminal situations where police involvement alone is indicated (i.e., theft, weapons, illicit drugs). In these instances, Security must be notified; they will notify MPD.

Risk Manager Peter Ouimet - who is head of the Hospital Safety Committee - testified here that there were 17 Code Guardways in 1989; 4 in 1990; and 3 in 1992. 1/ At times, various employes have been kicked and have suffered minor injuries in responding to Code Guardways. In addition, several employes have been hurt in the periodic Code Guardway training. 2/ Employes do not receive any extra compensation for being assigned to Code Guardways and their participation is mandatory. The Employer uses Code Guardways to quell difficult situations because they are cheaper than hiring additional security personnel to perform this function.

The Union complained in 1989 that its members should not be forced to participate in Code Guardways and that their participation should be voluntary. There is a dispute as to whether the Employer at that time agreed that such participation should be voluntary with the Union asserting, and the Employer denying, that the Employer's representative made such a commitment.

Grievant Paul Zimmerman, who is classified as a Mechanic 2, filed the instant grievance on February 14, 1992, claiming that engineering personnel such as himself should not be required to participate in Code Guardways. Zimmerman's job description does not expressly refer to Code Guardways as one of the listed duties, but it does state that "Other duties and responsibilities" may be added "as deemed appropriate by the supervisor or for the general safety and well-being of staff and the facility."

In support of the grievance, the Union primarily argues that

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- 1/ Ouimet also testified that he does not know why there is no record of any 1991 incidents.
 - 2/ Clinical Adult Specialist Susan Janty - who helped promulgate the Employer's Code Guardway policies - testified that since then the Employer has made a number of significant changes in its training program and there have been no other injuries.

mandatory participation in Code Guardways is improper because Zimmerman's job description does not involve any direct patient contact and because employes have the right to refuse to perform such hazardous duties under Article 16 of the contract and the occupational safety and health act. As a remedy, the Union requests that the Employer be ordered to cease and desist from making Code Guardways mandatory.

The Employer, in turn, maintains that it has not violated any applicable safety laws; that it "has taken all reasonable steps to assure that the code guardway procedure is as safe as can be reasonably expected"; and that the job description specifically allows for the assignment of such other duties and responsibilities.

The resolution of this issue turns upon application of Article 16 of the contract which provides in pertinent part:

ARTICLE XVI. HEALTH AND SAFETY

The Employer shall observe all applicable health and safety laws and regulations and will take all reasonable steps to assure employee health and safety. Employees shall observe all rules and regulations pertaining to health and safety. Failure to adhere to established safety policies may result in disciplinary action. Should any employee become aware of conditions he/she believes to be unhealthy or dangerous to the health and safety of employees, patients, or visitors, the employee shall report the condition immediately to his/her supervisor. All unsafe or unhealthy conditions shall be investigated, explained and/or remedied as soon as is practicable. The employee shall have the right to grieve any remedy deemed unacceptable.

The Union will submit three nominations from the bargaining unit one of which will be appointed by the employer to serve on the Hospital Safety Committee.

The employer is committed to provide adequate equipment and training to minimize work-related injuries. The Hospital Safety Committee and Nursing Education Department will address this issue on a regular basis to ensure that equipment and training is available to all bargaining unit members.

The employer is committed to provide adequate personal protective equipment and access to appropriate vaccinations of employees at the employer's expense as defined by the Hospital's Antibiotic and Infection Control Committee.

Here, it is true that participation in Code Guardways has resulted in some minor injuries and that the potential exists for even other injuries in the future. But that in and of itself does not necessarily mean that the Employer is violating Article 16, as this language recognizes that situations may arise which pose some safety hazards since it states, "The Employer is committed to provide adequate equipment and training to minimize work-related injuries." [Emphasis added]. That is exactly what the Employer has done by offering necessary training for employees who participate in Code Guardways; by revamping its training procedures; and by constantly monitoring its Code Guardways procedures in order to cut down on injuries.

Moreover, there is no basis for finding that the Employer has violated any "applicable health and safety laws" at either the state or federal level, as the Union has been unable to prove that Code Guardways are proscribed by law. The Employer therefore has complied with this part of the contract.

Turning now to the question of whether the Employer has improperly gone outside the scope of grievant Zimmerman's job description, it is true that nothing therein expressly refers to Code Guardways. But, said job description does contain the catch-all phrase "the occupant of the position can also be assigned other duties and responsibilities" as "deemed appropriate by the supervisor for the general safety and well-being of staff and faculty." Pursuant thereto, the Employer has decided that employee participation in Code Guardways will enhance "the safety and well-being of staff and faculty." This determination is not unreasonable given the fact that Code Guardways appear to be the best way of dealing with certain situations given the Employer's existing personnel.

The only alternative would be to hire additional security personnel to perform this seldom performed function. But the added cost of doing that is prohibitive, and hence unreasonable, given the fact that Code Guardways now are only used several times a year.

In such circumstances, it must be concluded that the Employer has the right to make such work assignments under Article 1 of the contract, entitled "Employer Rights", which gives it the right to "direct and assign work", which is exactly what it has done here.

In so finding, I am mindful of the Union's claim that the Employer in 1989 promised to no longer assign engineering personnel to Code Guardways. However, this claim was disputed by then-Labor Relations Manager Judy Peirick who testified that the Employer at that time only discontinued such assignments because sufficient responders could be obtained from other sources and that the Employer never intended to make permanent such an arrangement. I credit Peirick's testimony because the June 19, 1989, Labor Management Meeting Minutes state that engineering and other staff "would no longer need to respond to the Code Guardways at the Methodist campus because the New Start and psychiatric staff were trained and there were sufficient members to respond."

This shows that engineering personnel were being relieved of this duty only because other personnel were available to do it, thereby leaving open the question - which apparently then was not discussed - of what would happen if there ever was a change in the availability of this other personnel, which is exactly what subsequently happened as a result of the Employer's subsequent consolidation.

But, it must also be noted here that while the Employer can assign Code Guardways to engineering and other personnel, the Employer itself acknowledges on pages 12-13 of its brief that employes responding thereto have the right to refuse to perform any duties which, based upon objective considerations, pose a serious threat of death or serious injury. That though, as the Employer correctly points out, is a separate question of whether the entire Code Guardways policy is improper. For the reasons stated above, I conclude that it is not.

In light of the foregoing it is my

AWARD

That the Employer has not violated Article 16 of the contract by requiring employes to respond to Code Guardways; the grievance is therefore denied.

Dated at Madison, Wisconsin this 1st day of September, 1993.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator