

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
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 ST. FRANCIS FEDERATION OF NURSES : Case 17
 AND HEALTH PROFESSIONALS, LOCAL 5001 : No. 48724
 : A-5034
 and :
 :
 ST. FRANCIS HOSPITAL :
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Appearances:

Ms. Carol Beckerleg, Field Representative, appearing on behalf of the Union.
 Quarles & Brady, Attorneys at Law, by Mr. David B. Kern, appearing on behalf of the Employer.

ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all time relevant to this proceeding, and which provides for final and binding arbitration of certain disputes. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed Arbitrator Herman Torosian to hear and decide a grievance involving the interpretation and application of the terms of the agreement as it relates to the assignment of non-nursing duties to a nurse. Hearing in the matter was held in Milwaukee, Wisconsin, on June 8, 1993. No stenographic transcript was made of the hearing and briefs were received by July 19, 1993. After consideration of the evidence and arguments by the parties, the Arbitrator issues the following Award.

Facts:

The facts of this case are not in dispute. The grievant, Peter Litzau, is an RN regularly assigned to work in the operating room (OR). In addition to performing his normal RN duties the grievant on September 12 and 13, 1992, was assigned non-nurse duties during emergency surgeries. The dispute is whether such assignments violate Article 3, Section 3.05 of the parties' collective bargaining agreement.

Surgeries are regularly scheduled in the OR from 6:45 a.m. to 11:00 p.m., Monday through Friday, and there is a full staff of RNs and ancillary personnel available to perform all tasks associated with those surgeries during those times. During the above hours when scheduled surgeries are performed, RNs are not required to perform the routine duties of ancillary personnel complained of in this grievance. The issue arises when such duties are assigned outside of the normal OR hours when ancillary employees are not scheduled to work and on-call nurses are called in to work because of emergency (not scheduled) surgeries. For such emergency surgeries RNs do perform some or all of the following ancillary personnel duties: picking stock and instruments for the procedure; transporting the patient to OR; labeling patient documents; assisting the anesthesiologist; answering the telephone; and cleaning the operating room after surgery.

The Hospital performs approximately 700 - 900 surgeries per month. About 8 - 12 surgeries per month are emergency surgeries when ancillary personnel

might not be available.

There are 7 - 9 OR nurses who rotate on-call assignments. The grievant was called in for emergency surgery twelve times in a period of 26 weeks covering April through October, 1992. On four of the call ins there was no ancillary staff available; on four other call ins there was ancillary personnel available for part of the shift; and on the four remaining call ins there was ancillary personnel available for the entire shift.

Pertinent Contract Provisions:

ARTICLE 3

Role of the Registered Nurse

. . .

3.05 Non-nursing Functions. The nurse will not regularly be required to perform the routine duties of ancillary personnel and other departments' employees. However, if something must be done promptly as a part of good patient care, and if there is no ancillary or other appropriate personnel available to perform this task, the nurse will be expected to perform it, with the understanding that established nursing practice takes priority over other duties.

Issue:

Unable to agree to a statement of the issue, the parties agreed to allow the Arbitrator to frame the issue. The following is the Arbitrator's statement of the issue:

Did the Employer violate Article 3, Section 3.05 of the collective bargaining agreement when it assigned non-nursing duties to grievant Peter Litzau on September 12 and 13, 1992?

Union's Position:

The Union would have the Arbitrator frame the issue as follows:

Does the Employer violate Section 3.05 of the contract when it assigns ancillary duties to the operating room Registered Nurses who are called in for emergency surgeries? If so, what shall the remedy be?

The Union avers that Section 3.05 of the collective bargaining agreement has been in the contract since the initial contract was negotiated in 1984. The Union initially proposed specific language detailing the duties that would not be required of RNs. Through the course of negotiations, the Union proposed and the Employer accepted the current language.

It is argued that the operative language of Section 3.05 is the meaning that should be applied to the word "regularly." Webster's New World Dictionary (Second College Edition) defines regular as "usual, consistent or habitual in

action." In the instant case, the Union argues, it is clear that "on call" RNs assigned to the operating room are regularly required to perform ancillary duties and the duties of other departments' employees. When RNs are called in between the hours of 3:00 p.m. Saturday to 11:00 p.m. Sunday they know, in advance, that they will be assigned ancillary duties.

The language of Section 3.05 also addresses the issue of when RNs can be required to perform non-nursing functions. The second sentence of Section 3.05 indicates these duties can be performed, if the duties must be done promptly in order to ensure good patient care. The Union claims that the second sentence is added to ensure that RNs will not refuse to perform these other duties in a situation that requires immediate action. The Union argues that it applies to situations that are unanticipated--not to situations that are known in advance.

RNs are also "on call" from 11:00 p.m. to 7:00 a.m. Sunday through Friday and from 7:00 a.m. to 3:00 p.m. Saturday. During these time periods the Employer does provide ancillary staff. Why, the Union asks, are the hours of 3:00 p.m. Saturday to 11:00 p.m. Sunday any different? While there are some scheduled surgeries Saturday morning, there are not scheduled surgeries during the other "on call" hours when ancillary staff is available.

The Union cites the fact that during the period from April 19, 1992 to October 17, 1992, a total of thirteen pay periods, the grievant was assigned "on call" a total of twenty-four times. Of those twenty-four "on-call" situations, the grievant was called in on twelve occasions; four when there was no ancillary staff available, four when there was ancillary staff available for part of the shift and four when ancillary staff was available for the entire shift. Of the four instances when there was ancillary staff available for part of the shift, they were not there after the surgery was completed to clean the operating room.

The Union notes that RNs in the operating room are assigned "on call," they do not volunteer. The grievant also testified that there are approximately five to seven nurses who rotate on the "on-call" assignments, meaning that each of them also receives approximately the same number of "on-call" assignments in a six-month period. The Union reasons that, assuming they are all called in approximately 50 percent of the time, as the grievant was, the time and instances involved are not minimal.

Cathy Di Pierro, Director of Surgical Services, testified, on cross examination, that the Hospital provides someone from labor and delivery to clean the anesthesiologist's work area. She also testified that there are cleaning personnel available in the Hospital during the hours in question.

During the hearing, the Union argues, the Hospital attempted to show that assigning a nursing assistant during the "on-call" hours in question would be inefficient, as the duties and time required to perform them is minimal. However, the Union agrees that as stated earlier, they do have a nursing assistant on duty during the 11:00 p.m. to 7:00 a.m. period as well as Saturday morning. Also, the Hospital does have other options available should they choose to use them. Transporting and cleaning can be assigned to other personnel already in the Hospital. The phone can be handled electronically during the actual surgery to eliminate the distraction.

The Union concludes by arguing that there is no dispute that RNs are required to perform ancillary duties during the "on-call" period from 3:30 p.m. Saturday to 11:00 p.m. Sunday. It is the Union's contention that they are regularly required to perform these duties, and allowing the Hospital to continue this practice is a clear violation of Section 3.05.

Employer's Position:

At the hearing the Employer proposed the following statement of the issue:

Did the Hospital violate the contract by assigning Peter Litzau to perform certain non-nursing functions in connection with emergency surgeries performed on September 12 and September 13, 1992?

The Employer argues that it is fundamental that, in deciding a grievance, the Arbitrator is to be guided by the "plain and clear" language of the agreement so as to give effect to the mutual intent of the parties. The Arbitrator need not look beyond Section 3.05 to determine that the Hospital did not violate the agreement in this case. It is clear, according to the Employer, that the Hospital does not "regularly" require nurses to perform the routine duties of ancillary personnel. The American Heritage Dictionary (New College Edition) defines "regular" as:

1. Customary, usual or normal.
2. Orderly or symmetrical.
3. Conforming to set procedure, principle or discipline.
4. Methodical; well-ordered.
5. Occurring at fixed intervals; periodic.
6. Constant; not varying. . . .

By the very nature of emergency surgery, it is clear, the Employer argues, that the Hospital does not regularly assign these duties to nurses. During regularly scheduled surgeries, a full complement of ancillary personnel is available. During nonscheduled times, the only surgeries performed are emergencies; by definition, they cannot and do not occur on a regular basis.

Moreover, the nature and amount of ancillary services that might be performed by a nurse varies depending upon the time and day of the call in. If the nurse is called in for emergency surgery during the regular work week in the middle of the night, the nurse might be required to assist with transporting a patient and setting up the instruments for the procedure, but regular cleaning personnel are available to clean the operating room after the procedure is completed. In other cases, the surgery may begin during a time when ancillary personnel are available (for example, during the day on Saturdays) but because the procedure goes beyond the time during which ancillary personnel are scheduled, the nurse might be required to perform cleanup after the procedure. Most fundamentally the Employer contends, there is no way of knowing whether an emergency surgery will occur or not; there is therefore no basis to conclude that a nurse will be regularly assigned any ancillary duties.

In addition, the Hospital has not violated the remainder of Section 3.05, since it is undisputed that ancillary services that are performed by RNs on an emergency basis "must be done promptly as a part of good patient care" and that no ancillary or other appropriate personnel are available to perform the task at issue at those times. Finally, the Employer claims, there is no dispute that the nurse's regular nursing duties take priority over these ancillary tasks, and the Union has made no allegation to the contrary.

In these circumstances, the Employer argues, the Union's argument of a violation of Section 3.05 must be rejected. The fact that nurses are required, on occasion, to perform these tasks as part of emergency surgical procedures does not lead to the conclusion that the nurse is "regularly" required to perform such duties. More importantly, according to the Employer, as a percentage of the nurse's working time and as a percentage of the actual

procedures performed by the Hospital, these instances are quite rare. Kathy Di Pierro, the Director of Surgical Services, estimated that in the circumstances giving rise to Mr. Litzau's grievance, the amount of time he spent performing non-nursing functions constituted approximately 3 percent of his working time that week. The Employer argues that fact was not rebutted by the Union. Moreover, Ms. Di Pierro testified without contradiction that the Hospital performs between 750 and 900 surgical procedures each month; she estimated that only 8 to 12 of those were on an emergency basis when ancillary personnel might not be available. The Employer argues that in short, the ancillary work performed by these employees is precisely the opposite of that which would violate Section 3.05; it is irregular, it is sporadic, it is infrequent, and it is unpredictable. It therefore does not run afoul of the agreement, and the grievance should be denied.

Further the Employer relies on bargaining history and past practice in support of its position. The Employer notes that it presented extensive evidence on the negotiating history underlying Section 3.05 of the contract. The Employer argues that evidence, which was not rebutted by the Union, showed that the Union proposed severe limitations on the Hospital's right to assign ancillary duties to nurses. According to the Employer, the Union's initial proposal absolutely prohibited housekeeping work from being assigned to nurses except in cases of emergency or where it immediately interfered with patient care. The proposal also prohibited the Hospital, except in cases of emergency, from requiring nurses to perform non-nursing functions such as transporting patients, cleaning the operating room, transporting specimens to and from the lab, and the like. The Hospital, it is claimed, rejected this restrictive proposal and a later proposal from the Union on the grounds that to implement such a prohibition would present difficulties with employees potentially refusing to perform work. Ultimately, the clause agreed upon by the parties prohibited regular assignments of ancillary services, but permitted such assignments if required by good patient care and if no ancillary personnel were available.

It is argued that the Hospital has abided by this restriction on the assignment of non-nursing functions is amply demonstrated by the fact that, in the seven years since the agreement first became effective, this case presents the only instance when the Hospital's practice with respect to ancillary duties performed by OR RNs has been challenged in arbitration. The Employer cites Kathy Di Pierro's testimony that nurses have been required to perform these services as part of emergency surgical procedures since she began her employment in 1990, and that they have continued to perform these services since after this grievance was filed in September of 1992. The Employer contends that the Union's and the employees' failure to challenge the Hospital's actions is telling; it is a clear indication that the Union has acknowledged that the practices involving RN duties in connection with emergency surgeries do not run afoul of Section 3.05.

Thus, the bargaining history reveals that the Union sought, and was not successful in obtaining, severe restrictions on the Hospital's right to assign ancillary duties to nurses. The practices of the parties, as claimed by the Employer, reinforce the conclusion that what the Hospital has been doing with respect to the assignment of duties in connection with emergency surgeries has been acknowledged by the Union not to run afoul of Section 3.05. Thus, the grievance should be denied.

Lastly, the Employer argues that accepting the Union's arguments in this case would lead to harsh and nonsensical results, which are to be avoided.

The Employer claims, as noted earlier, that regular surgeries are scheduled during regular times to ensure the availability of both RNs and

appropriate ancillary personnel. By definition, those surgeries that fall outside of those times are "emergencies," in the sense that the procedure cannot wait for a regularly scheduled time in order to be performed. Yet, it is argued, to accept the Union's argument would inappropriately and unduly interfere with the Hospital's management right to schedule employes and to operate in an efficient and economical manner, and would lead to harsh and nonsensical results. To have ancillary staff available for emergencies would, according to the Employer, be extremely costly and inefficient.

It is argued that where the ancillary duties are such a small percentage of the total work performed by the nurse, and where the performance of these duties is uncertain and occurs only on an emergency basis, it makes far more sense for the Hospital to do what it has done over the years--have the RN perform ancillary duties in these circumstances.

Based on the above, the Employer argues that it has complied with the plain language of Section 3.05 and does not regularly assign ancillary duties to RNs represented by this Union. However, in cases of emergency surgery where ancillary personnel are not available, the Hospital was within its rights in assigning such duties to the nurse in question. That assignment is consistent with bargaining history and the past practice of the parties, and to conclude otherwise would lead to absurd results. Thus, it is argued, the grievance should be denied.

Discussion:

Article 3.05 prohibits the Employer from regularly assigning a nurse the routine duties of ancillary personnel and other departments' employes. The issue in this case more narrowly defined is whether assignment of ancillary personnel and other departments' employes routine duties to the grievant during emergency surgeries constitutes the regular assignment of such duties within the meaning of Article 3.05. There is no dispute that the assigned non-nursing duties were required as a "part of good patient care" and that there was no "ancillary or other appropriate personnel" available to perform the non-nursing tasks.

Record evidence establishes that in a period of about six months the grievant was required to work emergency surgeries while on call on twelve occasions. But of the twelve call-ins, ancillary staff was available and worked in four cases; partial ancillary staff worked in another four cases; and in the remaining four cases there was no ancillary staff on duty to work.

The Union argues that under the circumstances of this case, the Employer violated Article 3.05 because it regularly assigned nurses non-nursing functions in emergency cases during certain hours during the weekend. The Union's focus is on whether the Employer has regularly assigned non-nursing functions to nurses. In other words, it is the Union's position that the Employer cannot under Article 3.05 regularly assign non-nursing duties to the nurses as a group in cases of emergencies. The language of Article 3.05, however, does not specifically prohibit the Employer from making such assignments when emergencies occur. The focus of the language is upon the nurse. It states "The nurse will not regularly be required . . ." Thus, the issue is not whether the Employer has regularly assigned non-nursing duties to the nurses as a group during emergencies, but rather, whether the grievant has been regularly assigned non-nursing functions. To determine this issue we must look at the assignment of such duties to the grievant in the context of his total assignment of duties and the regularity of such assignments.

In this regard, it is undisputed that the Employer has not regularly assigned non-nursing duties to the grievant during his normal 40-hour work week. Clearly, the only dispute involves weekend emergency surgery call-ins. In a period of six months the disputed assignment of non-nursing duties has occurred only eight times. 1/ Further, while the grievant is regularly on call, he is not called in on a regular basis or schedule. This is, of course, due to the very nature of emergency calls.

1/ As indicated earlier, while the grievant was called in twelve times during a six-month period, in only eight cases was the grievant required to perform non-nursing duties.

Given the irregularity and infrequency of the assignment of non-nursing duties as discussed above, the Arbitrator concludes that the Employer has not violated Article 3.05 of the collective bargaining agreement as alleged by the Union.

Based on the above discussion thereon, the instant grievance is denied in its entirety.

Dated at Madison, Wisconsin, this 27th day of October, 1993.

By Herman Torosian /s/
Herman Torosian, Arbitrator