BEFORE THE ARBITRATOR

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| In the Matter of the Arbitration of a Dispute Between | |
| BADGER REGIONAL BLOOD CENTER EMPLOYEES LOCAL 1558, COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES, NO. 40, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO | Case 16 No. 49793 A-5120 |
| and | |
| AMERICAN NATIONAL RED CROSS, BLOOD SERVICES, BADGER REGION | |

Appearances:

Mr. Laurence S. Rodenstein, 583 D'Onofrio Drive, Madison Wisconsin 53719, appearing on behalf of Badger Regional Blood Center Employees Local 1558, Council of County and Municipal Employees, No. 40, American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the Union.

Ms. Carolyn C. Burrell, Foley & Lardner, Attorneys at Law, Firstar Center, 777 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-5367, appearing on behalf of American National Red Cross, Blood Services, Badger Region, referred to below as the Employer.

## ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Local 1558 by its President, Virgil Miller. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on December 2, 1993, in Madison, Wisconsin. The hearing was transcribed, and the parties filed briefs and a reply brief or a waiver of a reply brief by February 18, 1994.

## ISSUES

The parties did not stipulate the issues for decision. I have determined the record poses the following issues:

Did the Employer violate the collective bargaining agreement when it reduced the normal hours of work of certain unit employees up to seven and one-half hours during the week of June 21-25, 1993?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 3 - MANAGEMENT

3.0 Except as may be expressly limited by this Agreement, the Employer has the sole right to plan, direct and control the working force, to schedule and assign work to employees, to determine the means, methods and schedules of operation for the continuance of its operations, to establish reasonable standards, to determine qualifications, and to maintain the efficiency of its employees . . .

ARTICLE 10 - SENIORITY

10.0 Unit seniority shall be defined as the total length of service with the Employer from the date of hire . . .

10.1 The Employer agrees to recognize the principle of seniority with due regard to ability and qualifications in promotions, layoffs and vacation selection, as set forth in this Agreement.

. . .

10.5 When it becomes necessary to reduce the number of employees in a classification, the junior employee(s) will be displaced. Employees affected shall displace the least senior employee in the same pay classification within their department, provided they have the ability and qualifications either to perform the available work immediately or within twenty (20) working days on a satisfactory basis. Should the affected employee be unable to displace a junior employee in the same pay classification, he will displace the least senior employee in his department, provided he has the ability and qualifications either to perform the available work immediately or within ten (10) working days on a satisfactory basis.

When an employee is reduced from his department, he shall displace the least senior employee in the bargaining unit provided he has the ability and qualifications either to perform the available work immediately or within ten (10) working days on a satisfactory basis.

Employees who may be affected by a

reduction will be given written notice five (5) days prior to the date of the reduction. Employees may, during this period, serve written notice on the Employer of their intent to take a layoff rather than displace a junior employee . . .

ARTICLE 19 - HOURS OF WORK

19.0 The normal work day for employees shall consist of seven and one-half (7 1/2) hours except for part-time employees . . .

19.1 The normal work week shall consist of thirty-seven and one-half (37 1/2) hours scheduled in consecutive days from Monday through Friday. Employees may be scheduled to work on Saturdays or even Sundays and holidays . . . Employees not normally scheduled to work on Saturdays shall be compensated at time and one-half their normal wage rate as such for all work performed on Saturday . . .

19.2 Neither Section 19.0 nor Section 19.1 shall be construed as creating either a maximum or minimum work day or work week . . .

19.11 Overtime and premium time shall not be pyramided. Furthermore, overtime shall be paid on the basis noted in Sections 19.0 and 19.1.

BACKGROUND

The grievance, dated May 2, 1993, 1/ reads thus:

In the Matter of the Mandatory Day Off during the week which ends 6/26/93

1/ References to dates are to 1993, unless otherwise noted.

> Local 1558, Wisconsin Council 40, AFSCME, AFL-CIO, the Grievant in this matter contends that the Employer, American National Red Cross, Badger Region, has violated the terms and conditions embodied in the 1991-93 Agreement by its decision to require some unit employees to take a day off without pay in the week prior to Saturday, June 26, 1993.
>
> The Employer's actions noted above violates the Agreement, including Articles 6, 10, 15, 19 and any provision of the Agreement which may apply.
>
> As remedy the Union seeks time and one half payment for all unit employees required to take time off without pay from their normal workweek by the Employer during the time period described above.

The parties, at hearing, stipulated the following facts were relevant to the grievance:

> Employees were scheduled to be present at a training meeting held on June 26, 1993, a Saturday.
>
> Each employee who was at that meeting was paid at a rate of time and one half pursuant to the contract.
>
> Certain employees of Red Cross who were required to attend the June 26, 1993 meeting worked their normal workday and workweek for the week of June 21 through June 25, 1993.
>
> Certain employees of Red Cross who were required to attend the June 26, 1993 meeting did not work their normal workday or workweek for the week of June 21 through June 25, 1993.
>
> Red Cross and Local 1558 have had a collective bargaining relationship for about 20 years.

The June 26 training meeting, known as Modified Operations, was part of a training program undergone by each of the Employer's blood service regions.

Modified Operations was part of a broader program called "Transformation," which the Employer's President announced in 1991. Under the Transformation, the Employer restructured its operations including the organization of its testing laboratories, the development of a standard computer system, the development of training programs and the reworking of quality control methods. The ongoing Transformation process was, at least in part, a response to litigation, started

in 1991, concerning the purity of the blood products distributed by the Employer. That litigation resulted in the signing of a Consent Decree on May 12. The Consent Decree was provided to all of the Employer's employes, and covered a number of the organizational changes defining the Transformation.

The date for Modified Operations was set by the Employer's national headquarters some time in the winter of 1992. The Employer determined that since the Saturday training would have to be paid at time and one-half, it would cut its overall costs for the Modified Operations by scheduling one day of work off during the week preceding Modified Operations. Gary Becker, the Employer's Principal Officer, directed department heads to reduce hours during that week as the department heads deemed fit. The department heads responded in a variety of ways. Some department heads altered employe schedules unilaterally, others held meetings in an attempt to schedule the hours off consensually, others allowed individual employes to select the hours to be taken off, and others reduced hours based on seniority. The hours ultimately taken off by employes varied from as few as two to as many as seven and one-half. Roughly three hundred fifty employes attended Modified Operations on June 26. Both represented and non-represented employes had their hours of work reduced during the work week preceding Modified Operations.

In the Spring, Virgil Miller, the Union's President, learned of the Employer's plan to reduce costs by reducing hours, and sought to discuss the matter with the Employer. Sometime late in April or early in May, Miller, and the Union's Staff Representative, Laurence Rodenstein, met with the Employer's Director of Human Services, John Ridgely. At that meeting, the Union proposed that the Employer provide employes with comp time equivalent to the hours lost due to the reduction of hours noted above. The time was to be taken before the end of October, when an agreed-upon wage increase was to take effect. Ridgely took the proposal back for consideration by his supervisors. Becker rejected the proposal. At the close of the meeting at which the proposal originated, both Rodenstein and Miller thought Ridgely had tentatively agreed to the proposal.

In the collective bargaining for a successor to the labor agreement which expired on October 31, 1982, the Union proposed to delete what appears in the current collective bargaining agreement as Section 19.2, and to delete the word "normal" from the statement, in Article 19, of the work day and work week. In the collective bargaining for a successor to the labor agreement which expired on October 31, 1985, the Union proposed to delete what appears in the current collective bargaining agreement as Section 19.2.

Further facts will be set forth in the DISCUSSION section below.

## THE PARTIES' POSITIONS

### The Union's Brief

After a review of the evidence, the Union contends that "(t)here exists no sound business reason for deviating from the normal work week/workday." Arbitral precedent establishes, the Union contends, that the Employer's authority to deviate "from a normal work week" must be based on "sound business reasons." No such reason can be found, the Union concludes, in the Employer's "proffered reason . . . to save money for requiring work on Saturday."

The Union's next major line of argument is that the reduction "may be considered as a one day or temporary layoff." Under arbitral precedent, this establishes that the reduction is governed by the agreement's terms, according to the Union. To conclude otherwise would, the Union cautions, gut the

agreement's seniority provisions: "Seniority limits the Company's unrestrained authority to assign work, just as it limits the Company's unrestrained authority to promote or layoff." The Union concludes that the "impact of the decision to transform the Red Cross organization through improving the quality control of the work product has resulted in improper layoffs."

The Union, viewing the record as a whole, concludes that the reduction "did not alter the Company's overtime costs, but reduced the costs of doing normal business . . . to shift the cost of AIDS protection away from itself and to lay them on employees." The Union requests that the Employer be ordered to "pay all affected employees for the hours improperly reduced."

The Employer's Initial Brief

The Employer phrases the issues thus:

> Did Red Cross violate the collective bargaining agreement by modifying the work schedule of certain employees during the week of June 21 through June 25, 1993? If so, what should the remedy be?

The Employer asserts that Article 3 reserves to it the right to schedule and assign the work of employes. This right, the Employer argues, has not been limited elsewhere in the agreement, and is underscored by Sections 19.0 and 19.1 which recognize that the "normal work day" and the "normal work week" should not "be construed as creating either a maximum or a minimum work day or work week." The significance of these provisions is, according to the Employer, further underscored by the parties' bargaining history, since "on at least two occasions the Union has proposed . . . to provide for a guaranteed work day and work week in the Contract." That the proposal has not been accepted establishes, the Employer argues, that "the Union through this grievance is attempting to gain in arbitration what it could not gain during negotiations."

The Employer then disputes the Union's contention that it lacked sound business reasons "for modifying employees' schedules." The Saturday training session was coupled with a reduction in that week's work schedules "in an attempt to hold down the entire cost of the modified operations," reflecting a fundamental imperative to contain costs, the Employer asserts. Nor was the training "required under a consent decree." The Employer contends that even if it had been, "it is unclear how the desire to control costs would not still have been a sound business practice."

Contending that "(n)o agreement, either verbal or written, was made by the Director of Human Resources" in response to a Union proposal to resolve the grievance, the Employer concludes that its contractual right to modify work schedules must be upheld.

Viewing the record as a whole, the Employer concludes "that the grievance in this case should be denied."

The Reply Briefs

The Union waived the filing of a reply brief.

In its reply to the Union's brief, the Employer notes that "it appears that there is little agreement on any aspect of this case." The Employer notes

that the Union frames the issue "in a manner which suggests that employees were forced to work less hours during the week in question than during a normal work week, and further implies that . . . those employes earned less money than normal." These implications are, according to the Employer, "without support in the record." The Employer asserts that the record shows that each employe "exceeded the number of hours that employee was not scheduled during the normal schedule of hours during the week," and that each employe earned more weekly pay due to the Saturday premium.

Noting that the parties do not agree on the contract provisions, other Section 19.0 and 19.1, governing the grievance, the Employer argues that the Union's failure to cite Section 19.2 does not render that provision any less pivotal. Beyond this, the Employer argues that Article 3 must be considered, while the various sections of Article 10 cited by the Union need not. More specifically, the Employer argues that no "vacation selections" or "promotion decision" is posed here, thus rendering Section 10.1 irrelevant except with regard to "layoffs." Regarding layoffs, the Employer contends that the Union's citation of arbitral precedent does not stand for the proposition the Union cites it for, and that even if layoff provisions do apply to this grievance "the Union did not meet its burden of establishing a violation of these provisions." What argument the Union has made on the application of seniority is without specific evidentiary support, according to the Employer.

The Employer also contends that certain representations in the Union's brief stand not as fact, but as unproven assertion. For example, the Employer argues there "is no factual basis for the claim that the Red Cross is a "for profit" business and the "suggestion that Red Cross scheduled the June 26 meeting in response to the consent decree is not supported by the record." The Employer concludes by requesting that the grievance be denied.

DISCUSSION

The Union's statement of the issues has been adopted as that appropriate to the record. That statement focuses the grievance on Article 19, and specifically on the tension between Sections 19.0, 19.1 and 19.2. More specifically, the grievance questions the relationship of the definition of a "normal" work day and work week in Sections 19.0 and 19.1 to the admonition of Section 19.2 that neither section "shall be construed as creating either a maximum or minimum work day or work week." The Employer's statement of the issue does not mention the "normal" work schedule, thus pointing the matter away from Article 19 toward Article 3. The general rights to schedule and to assign stated at Article 3 cannot be dismissed as irrelevant. However, that statement is general, and the provisions of Article 19 specifically address the Employer's implementation of those general rights. Examination of the grievance must, then, start with the specific language of Article 19. As the parties each argue, interpretation of Article 19 draws in other agreement provisions. Article 19, however, remains the focus of this dispute.

The interpretive difficulty is to read Article 19 as a whole, without denying meaning to any of the sections posed. Sections 19.0 and 19.1 establish a normal work schedule, but Section 19.2 unambiguously establishes that this "normal" work schedule cannot be interpreted as a guarantee of the stated hours. Evidence of bargaining history underscores that Sections 19.0 and 19.1 cannot, standing alone, establish the Employer violated the agreement by reducing employes' work hours to cut the costs of Modified Operations. It does not, however, follow from this that Section 19.2, read with Article 3, grant the Employer unfettered authority to unilaterally alter work schedules. This reads "normal" out of existence, rendering Sections 19.0 and 19.1 meaningless.

To assure that Sections 19.0 and 19.1 are given meaning, it is necessary to isolate the purposes of the sections. The use of "normal" in each section indicates an intent to stabilize work hours. This affords employes an expectation of a work schedule from which non-work lives can be organized. It also sets a standard relevant to other contract rights. Section 19.11, for example, establishes that the definition of a normal schedule serves as the "basis" for calculating overtime. Section 19.2 cannot be read in a fashion which defeats these purposes.

The Employer's reading of the three sections permits each to have meaning. The Union's does not, and it follows that the Employer's interpretation must be favored.

Initially, it must be noted that there is no contention that Modified Operations violated contractual provisions governing overtime. The issue thus becomes whether Modified Operations defeated the expectation of stability codified in Sections 19.0 and 19.1. The fundamental difficulty with the Union's view of the grievance is that concluding Modified Operations interfered with the expectation of stability flies in the face of Section 19.2. Modified Operations was, under either party's view, a singular and unprecedented event. The reduction of hours initially ordered affected employes generally, and was not part of a pattern of unilateral changes in work hours. This is not to say this puts the event beyond the contract, but to note the risk of harm to other agreement provisions is minimized by the singular nature of the event. Under the Employer's view, Modified Operations and the hours reduction which preceded it are the exceptions which prove the rule stated in Sections 19.0 and 19.1.

The Union's view of Modified Operations, however, effectively reads Sections 19.0 and 19.1 as a guarantee of the stated hours. This view denies meaning to Section 19.2. Viewing Article 19 in isolation, the Employer's view must be preferred over the Union's.

The Union contends, however, that an interpretation of Article 19 must take Article 10 into account. This poses the most troublesome aspect of this case. Examination of this point must focus both on the Modified Operations as ordered by Becker and as implemented by department heads.

As originally contemplated by Becker, Modified Operations was, in effect, a one-day shut down of operations:

> The directives were that if possible, that employees should be given a day off or their workweek scheduled off for one day of the week prior to modified operations. That included represented and unrepresented employees. 2/

It is unpersuasive to characterize this cessation of work as a layoff under Article 10. Article 10 does not expressly define "layoff" or address whether "layoff" includes a reduction in hours. It is apparent from Section 10.5 that a "layoff" contemplates a reduction in "the number of employees in a classification." Where such a reduction occurs, "the junior employee(s) will be displaced." The balance of the section addresses the impact of a competition between unit members for a shrinking pool of work. The general cessation contemplated by Becker does not involve a reduction of employees, or a shrinking pool of work. Nor does it contemplate a shrinking pool of income for unit employes. The hours worked on the Saturday of Modified Operations at time and one half exceeded the reduced hours of the affected employes. Thus, any reduction in income was one of potentially greater than "normal" income had there been no reduction of hours.

Against this background, the general one day cessation of work contemplated by Becker is less a layoff than a matter of scheduling. As such, it fits better under Articles 3 and 19 than Article 10. As noted above, the Employer's view of these Articles applied to the grievance is more persuasive than the Union's.

The fundamental problem posed here is that the general cessation testified to by Becker was implemented in varying forms by department heads. The parties stipulated that certain employes worked their normal hours while others did not. The Union, comparing a seniority list with a table of hours reduced per employe, notes that senior employes did not uniformly suffer less of a reduction than junior employes. Ridgely affirmed that only some of the department heads

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2/ Transcript at 36.

allocated the reductions by seniority. These facts point to a potential undermining of Article 10 by the means by which Modified Operations was implemented.

This is a significant point, but no contract violation can be found on this record. For the purposes of addressing this point, it can be assumed that Article 10 applies to a reduction in hours. This is a debatable point, given the 10 and 20 working day qualifications periods of Section 10.5. For the purposes of addressing the issues posed, however, it is assumed Article 10 applies to the reduction in hours.

That certain less senior employes suffered a lesser reduction of hours than more senior employes is a troublesome fact, but one which requires more evidence to establish a contract violation. The differences may be rooted in employe choice, since some departments allocated the reductions by consensus or by individual choice. The differences may be rooted in the full-time or part-time status of the affected employes. In either event, it is not clear what the Union specifically objects to. More significantly, Section 10.1 requires that, for layoff purposes, "due regard to ability and qualifications" must be made. The difference in hours may be tied to qualifications issues. Ultimately, any finding of a violation of the "principle of seniority" stated in Section 10.1 rests on assumptions not firmly rooted in record evidence. For that reason, no violation of Article 10 can be found.

This should not be read as a critique of the record developed by the parties. The absence of detail on the department by department implementation reflects not carelessness, but the focus of the grievance. The grievance challenges Modified Operations as an all or nothing proposition. As noted above, the Employer has the contractual authority to schedule the overall cessation of work sketched in this record. There may have been problems, however, with the departmental implementation of that hours reduction in light of the seniority principles of Article 10. Such details were not, however, the focus of the grievance. The discussion of those details thus stands primarily as a caution that the conclusions stated above must be restricted to the facts posed here.

Before closing, it is necessary to tailor the conclusions stated above to the parties' arguments. Each party has addressed the standards noted in Ampco-Pittsburgh Corp., 80 LA 476 (Briggs, 1982). Each party has focused primarily on the first of five standards applied by Arbitrator Briggs: "If the agreement defines the 'normal work week', the employer must have sound business reasons to make unilateral changes in that work week." 3/ The difficulty with the application of this standard is the impossibility of defining what a sound business reason is. Briggs noted that "(a)mong the sound business reasons accepted by arbitrators were plant efficiency, product quality, and economic considerations." 4/ It is difficult to see, outside of unlawful actions, what

3/ Ibid., at 476.

4/ Ibid.

action an employer could take which would not fit within these "sound business reasons." Viewed in isolation, this standard invites an arbitrator into second guessing a business decision as a business decision. An arbitrator is not a business consultant, but an interpreter of language in the employment context. The more persuasive focus of the inquiry is less the soundness of the reasons for an hours reduction than the intrusion of the reduction on negotiated rights. A review of the five standards set by Briggs bears this out. Four of the five standards, including the first, specifically address themselves to the relation of an hours reduction to specific contract language.

The final point concerns the impact of the settlement attempts which preceded the arbitration. Little can be said to directly address this issue, since it raises issues of the bargaining relationship rather than contract interpretation. It is apparent the Union perceived its discussion with Ridgely to have produced a tentative agreement. The proposal arguably addressed the interests of both parties. However, the evidence will not support a conclusion that a mutually understood and binding agreement was reached in those discussions. The Employer's rejection of the proposal may or may not impact the bargaining relationship, but affords no basis upon which the agreement provisions posed here can be interpreted.

## AWARD

The Employer did not violate the collective bargaining agreement when it reduced the normal hours of work of certain unit employees up to seven and one-half hours during the week of June 21-25, 1993.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 4th day of May, 1994.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator