BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CLARA BARTON BRIGADE,
LOCAL 1205, AFSCME, AFL-CIO

and

BADGER-HAWKEYE BLOOD SERVICE
REGION, AMERICAN RED CROSS

Case 35
No. 58149
A-5809

Appearances:

Mr. Laurence S. Rodenstein, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Union.

Clark Hill, P.L.C., by **Mr. Fred W. Batten**, on behalf of the Employer.

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "Employer", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Green Bay, Wisconsin, on January 13, 2000. The hearing was not transcribed and the parties there agreed I should retain my jurisdiction if the grievance is sustained. The parties subsequently filed briefs that were received by March 13, 2000.

Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUE

Since the parties were unable to jointly agree on the issue, I have framed it as follows: Did the Employer violate Section 11.13 of the contract when it used Collection Specialist II's – rather than Collection Specialist I's who are in the bargaining unit – to perform certain work and, if so, what is the appropriate remedy?

BACKGROUND

The Employer operates a blood bank at its Green Bay, Wisconsin, facility where it employs Collection Specialist I's ("C S I's") who are in the bargaining unit, and Collection Specialist II's ("C S II's") who are not. The parties agreed to their initial collective bargaining agreement in 1997. (Joint Exhibit 1).

Union President Terry Allen, a CS I, testified that CS I's perform three main tasks at the Employer's main facility and its mobile units: they conduct assessments of prospective donors; they draw blood from donors, and they oversee a donor's recovery. She said that before the Union negotiated the parties' initial contract in 1997, a CS I was usually assigned to a mobile unit and that CS II's were then mainly used on "special occasions" to assign work, and that they then rarely drew blood.

On cross-examination, she stated that before 1997, CSI's "rarely" worked with CS IIs and that after reviewing the records, she discovered that CS II's over a two-year period only worked alongside CS I's on seven occasions. She also said that she had previously served as a Charge Nurse, at which time she received step-up pay; that she had previously attended Charge Nurse meetings until she was told she no longer could do so; that in response, she and some other CS I's no longer serve as Charge Nurses; that other CS I's have continued to serve as Charge Nurses because they want to be part of management; and that, "Yes", the Union has discouraged employes from serving as Charge Nurses.

Doris Holbrook, a CS I who also is a Union steward, testified that some CS II's were assigned bargaining unit work before it was offered to bargaining unit employes and that, as a result, certain bargaining unit employes never received any hours. She said that she filed the Union's first grievance on August 16, 1999 (Joint Exhibit 2A); that as a result, Supervisor Mary Ann Potter agreed with the grievance by stating that more hours should be given to CS I's and that some CS I's then received more hours; and that the prior Union steward had quit, which is why this grievance was dropped at that time. She also stated that CS II's are performing bargaining unit work on a daily basis.

On cross-examination, she said that she is unaware if the Employer is trying to hire an additional five CS I's; that management agreed in the summer of 1999 that the practice of giving bargaining unit work to CS II's rather than to part-time CS I's who had their hours reduced to zero would cease; and that it, in fact, did stop about 30 days later.

Julie Olson, a CS I, testified that she has been assigned to work more than 20 hours a week even though she has asked management to not assign her more than 20 hours

Associate Director Carl Lindbeck testified that the Employer in the summer of 1999 agreed with the Union to stop assigning bargaining unit work to part-time CS II's if part-time CS I's were not getting any hours and that the Employer ever since then has followed this new policy. He also said that a tight staff always has been a problem, which is why the Employer in the past assigned CS II's to do bargaining unit work to maintain a "sufficient number of staff". He further stated that it is now necessary to assign more CS II's to perform bargaining unit work because some CS I's refuse to cross the line between management and labor and to serve as Charge Nurses; that CS I's are not entitled to attend supervisory meetings because management issues are discussed there; that CS I's are not excluded from other meetings; that the Employer in 1998 expanded its mobile operation, thereby increasing the use of CS II's; and that a revised computer blood collection system has placed an "enormous stress" on staff.

On cross-examination, he said the Employer no longer uses CS I's as Charge Nurses because of their "extreme reluctance" to serve in that role; that the Employer never offered to have separate meetings for CS I's regarding operational issues; that the Employer in the summer of 1999 never offered to make whole those bargaining unit employes who had their hours reduced; that everyone now is scheduled up to "their capacity"; that he cannot give a "direct answer" as to whether CS I's now work more hours; that there now are three more CS II's than when the contract was agreed to in 1997; and that there are no longer five vacant CS I positions.

Team Supervisor Sue Killinger explained why it has been necessary to use CS II's on so many occasions and said that only a few CS I's can do an atologist draw which involves drawing blood for a donor's own use. She added that CS I's have refused to sign up for some training opportunities (Employer Exhibit 3) and that, as a result, it has been necessary to assign work to CS II's. She also said that before the contract was signed in 1997, CS IIs were assigned "as needed".

On cross-examination, she explained why certain CS I's did not receive more hours.

POSITIONS OF THE PARTIES

The Union asserts that the Employer violated Section 11.13 of the contract because the "evidence supports the notion of a past practice which delimits bargaining unit work" and because the Employer has deviated from that past practice by regularly assigning bargaining unit work to supervisors. As a remedy, the Union asks that all affected full-time and part-time employes be made whole from the time of the first grievance.

The Employer contends that two of the grievances are not properly before me; that it "has always assigned" CS II's to perform bargaining unit work "when work was to be done and CS II's were available"; that the "assignment of CS II's to perform bargaining unit work when all CS I's have been assigned is permissible"; that it has "not abused" its right to do so here; and that it has been forced to use CS II's because CS I's refuse to serve as Charge Nurses.

DISCUSSION

Turning first to what grievances are properly before me, Section 9.1 of the contract, entitled "Definition of Grievance", states:

> A grievance is defined as any dispute involving the application or interpretation of the terms and provisions of this Agreement, except that insurance or retirement program claims that are subject to a claims review procedure and do not involve an interpretation of this Agreement shall not be subject to the Grievance Procedure established in this Agreement. A grievance shall be submitted to the Employer within ten (10) working days of its occurrence or when the employee knew or should have known thereof, or it shall be barred.

Here, the Employer at the time of the original August 16, 1999, grievance (Joint Exhibit 2A), was assigning bargaining unit work to CS II's even though some part-time CS I's had their hours reduced to zero. The Union's grievance – which expressly stated that the date of the alleged infraction was "Ongoing" - therefore was a continuing one that could be filed during any time that the Employer was following its challenged practice. See *How Arbitration Works*, Elkouri and Elkouri, pp. 281-282 (BNA, 5th Ed. 1997).

However, that grievance was not first discussed with the immediate supervisor as required under Section 9.2 of the contract which states in pertinent part: "The aggrieved employee shall discuss the grievance with the employee's supervisor at which time an effort shall be made to resolve the matter."

Associate Director Lindbeck therefore was correct when he replied on August 16, 1999, that the earlier filed August 16, 1999, grievance had to be first presented to the immediate supervisor (Joint Exhibit 2B). Union Steward Holbrook then discussed the matter with Supervisor Potter who denied the grievance on September 8, 1999. Other written grievances were filed on September 27, 1999, and October 18, 1999, which dealt with assigning a CS I to charge duties and the posting of a CS II position. The latter October 18, 1999, grievance (Joint Exhibit 2(d)) stated: "This is also an extension of [grievance] 99.12",

i.e., the initial August 16, 1999 grievance. The latter grievance, however, was not separately appealed after Holbrook spoke to Potter.

Nevertheless, since the issue raised in the Union's original grievance still lingers and hence must be resolved at some point, I find that the general issue of supervisors allegedly performing bargaining unit work should be addressed based upon the fully developed record before me.

Turning now to the merits of the grievance, Section 11.13 states:

Section 11.13 Work by Non-Bargaining Unit Personnel

> The employer may assign qualified Supervisors (Team Supervisors, and Collection Specialist II's) who will not be members of the bargaining unit covered by this Agreement to any operational site who may perform work normally performed by members of the bargaining unit. The bargaining unit work performed by supervisors shall be in accordance with past practice. The Employer may also utilize Nursing Assistants (student nurses) in accordance with past practice.

In order to determine what work can be performed by non-bargaining unit personnel under this language, it is necessary to determine whether CS II's at the time the contract was signed regularly performed the kind of bargaining unit work that is the subject of the grievance. This is not an easy question to resolve because CS II's have, to one degree or another, always performed some bargaining unit work. See AMERICAN NATIONAL RED CROSS (BADGER-HAWKEYE REGION) (Set-Up Grievance), Case 30, No. 56727, A-5705 (Nielsen, 4/99), wherein Arbitrator Daniel Nielsen ruled that the Employer did not violate the contract when it assigned CS II's to perform certain set-up duties. In so ruling, Arbitrator Nielsen found: "having supervisory nurses working as staff nurses included in the overall pool for random assignment to set-up work on special collections is a past practice." Id., at p. 7.

On the other hand, Arbitrator Nielsen found in another case that the Employer had violated the contract when it assigned supervisors to perform recovery duties for reactive donors. See AMERICAN NATIONAL RED CROSS (BADGER-HAWKEYE REGION) (Collection Clerk Grievance), Case 32, No. 56734, A-5708 (Nielsen, 4/99). In so ruling, Arbitrator Nielsen stated:

. . .

Articles I and XI provide exceptions whereby non-unit personnel can perform the work of unit nurses. The logical implication is that, absent the exceptions, the work could not be performed by those non-unit employes. This implication is strengthened by the concession of Susan Wettstein that the contract does generally reserve the taking of health histories and the extraction of blood to unit nurses. Thus I have concluded that the contract does prevent the Employer from assigning at least some bargaining unit work to non-unit nurses.

The scope of the contract's work protection is not all encompassing. Article I distinguishes the unit nurses from other employes by their performance of "collection duties . . . in blood collections." While every task performed by personnel assigned is in some way connected to blood collection, the bargaining history and the testimony at hearing establish that ancillary tasks are not necessarily protected. However, the contract's protection does extend to the core medical functions involved in the blood collection process. Given the need for professional training and judgment in the assessment and care of reactive donors, and the testimony that that task is part and parcel of the overall collection process, caring for reactive donors is fairly characterized as a core medical function. The fact that the Madison location has allowed collection clerks to be involved in caring for reactive donors, while the Green Bay location has until this grievance reserved this work to nurses does not render the work unprotected. In Article XI, the parties used the pragmatic standard of "work normally performed" to describe protected work. They negotiated this language knowing that there were differing practices at the two locations. Inasmuch as the language used refers to actual conditions, it can accommodate both practices.

Id., at p. 13 (Emphasis added).

. . .

Here, it is clear that CS II's have performed some of the very kind of bargaining unit work that traditionally has been performed by CS I's. Supervisor Potter acknowledged that very fact when, in response to the Union's initial August 16, 1999, grievance, she agreed to start using certain part-time CS I's who had their hours reduced to zero because CS II's had been performing bargaining unit duties. Indeed, the Employer's Brief at p. 2 acknowledges that the Union then argued "and the Employer agreed that this management right did not anticipate that non-bargaining unit employes would replace bargaining unit employes who were ready, willing and able to work their normal complement of hours. This practice ceased."

In addition, Arbitrator Nielsen stated that the Employer in the case before him claimed "supervisors rarely work as staff nurses." See *Nielsen Award*, Case 30, No. 56727, A-5705, p. 6. This earlier representation by the Employer indicates that CS II's have not regularly worked as staff nurses. The evidence here bears this out because Allen testified without contradiction that CS I's before 1997 were normally assigned to mobile units; that CS II's were then mainly used on "special occasions"; and that CS I's before 1977 "rarely" worked with CS II's.

There has been a substantial shift in the use of CS II's since then, as they are performing more and more of the duties previously performed by CS I's. That does not automatically mean, however, that the Employer has violated Section 11.13 of the contract.

Thus, the Employer is not responsible for the fact that an employe retired; that some CS I's, at the Union's urging, no longer want to serve as Charge Nurses; and that the collection of blood has become more sophisticated. The failure to perform charging duties has forced the Employer to use more CS II's as Charge Nurses. (This problem perhaps can be resolved if the Employer agrees to hold meetings where operational issues are discussed with CS I's as Charge Nurses. If no agreement can be worked out, and if some CS I's refuse to perform charge duties, the Union has no basis for complaining that CS II's are performing charging duties.) In addition, some CS I's have failed to take certain training courses that would enable them to perform additional duties. Moreover, the increased use of mobile units has increased the need for help away from the Employer's main facility. All in all, then, there are many reasons why CS II's are being used more and more to perform bargaining unit work. Trying to ascertain whether all of this additional work by CS II's violated the contract, however, is now almost impossible to determine given the ambiguity of this record.

Nevertheless, one thing remains clear: if bargaining unit work is available, Section 11.13 is intended to at least preserve the number of hours that bargaining unit personnel performed in 1997. As a result, the Employer was precluded from reducing the hours of part-time CS I's at the very time that CS II's were performing bargaining unit work covered by Section 11.13.

Another group of possibly aggrieved CS I's are those part-time and full-time CS I's who were assigned the same hours they had been working, but who were never given the opportunity to work any of the additional hours that the CS II's worked. Had those CS I's been given that opportunity, they would have been able to earn higher wages.

But trying to go back now in an attempt to recreate what should have been for all the CS I's is an impossible task given the state of the record and some of the legitimate reasons related above which dictated that CS II's had to perform some additional bargaining unit work. Hence, it is too speculative to award any backpay to either full-time CS I's or to those part-time CS I's who maintained their prior hours.

As for those part-time CS I's who had their hours reduced, the record indicates there was sufficient bargaining unit work to perform even taking into account the changed circumstances surrounding the Employer's operations. Indeed, Supervisor Potter herself acknowledged that when she agreed on September 8, 1999, to offer such work to those part-time CS I's who had their hours reduced to zero (Joint Exhibit 2F). The Employer's Brief at page 2 also acknowledges that "the Employer agreed that this management right [to assign work] did not anticipate that non-bargaining unit employes would replace bargaining unit employes who were ready, willing, and able to work their normal complement of hours."

However, since the Union did not immediately appeal Potter's determination by resubmitting its earlier August 16, 1999, grievance and by challenging whatever action the Employer took at that time, it is improper to now award back pay for a grievance that was not properly filed under the contractual grievance procedure.

As for the future, the Employer is under a continuing obligation to respect the jurisdictional boundaries set forth in Section 11.13 by not assigning bargaining unit work to supervisors if that causes any bargaining unit members to suffer any reduction in their hours, as Section 11.13 preserves bargaining unit work in the face of any such supervisory incursions.

This work preservation, however, only goes to the kind of "core" duties regularly or historically performed by CS I's. See Nielsen Award, Case 32, No. 56734, A-5708, pp. 13. "Non-core" duties hence can be assigned to non-bargaining unit employes without running afoul of Section 11.13.

What constitutes a "core" duty is difficult to determine based on this record. Nevertheless, it is clear that CS I's in 1977 were regularly assigned to work on mobile units and that CS II's at that time were only assigned to either assist them or to train new employes. Hence, CS II's seldom, if ever, worked alone on such occasions. As a result, and unless they are training new employes or assisting CS I's, supervisors cannot perform that kind of work alone, as that would violate the past practice that existed in 1997. All such work at mobile sites which does not involve training or assisting CS I's therefore must first be offered to bargaining unit employes -- be they part-time or full-time -- before it can be performed by supervisors.

The Union wants a broader remedy by pointing out that CS II's are now regularly scheduled; that there are now five more CS II's than there were in 1997; and that there are five less CS I's. All of this shows that CS II's are performing much more work than they did in 1997 and that they are being used more frequently than they were in the "random pool" referenced by Arbitrator Nielsen. But again, the lack of clarity in this record and the fact that they are now performing charging duties makes it impossible to ascertain all of the duties they are now performing. Working on the mobile units is clear, however, which is why the remedial part of this Award expressly addresses that job duty.

Lastly, the Employer maintains that the grievance is without merit because Section 12.01 states:

> "Nothing contained in this Agreement shall be construed as a guarantee or commitment by the Employer to any employe of a minimum or maximum number of hours of work per day, per week, or per year."

Nothing herein is meant to constitute any such "guarantee or commitment". All that is being decided here is that once the Employer chooses to have bargaining unit work performed, it cannot violate Section 11.13 when it does so. This issue does not go to whether there should be guaranteed hours; it only goes to making sure that Section 11.13 is followed.

Based on the above, it is my

AWARD

1. That the Employer cannot assign supervisors to perform the "core" bargaining unit duties protected by Section 11.13 if any such assignments reduce the hours of any regular part-time or full-time CS I's who are able to perform that work.

2. That the Employer must first offer to its regular part-time and/or full-time CS I's all work at its mobile sites which does not involve training or assistance before it can assign such work to supervisors if the CS I's are able to perform that work.

3. That to resolve any questions arising over application of this Award, I shall retain my jurisdiction for at least sixty (60) days.

Dated at Madison, Wisconsin this 13th day of June, 2000.

Amedeo Greco /s/
Amedeo Greco, Arbitrator

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