

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MERITER HOSPITAL, INC.

and

SEIU, LOCAL 150, AFL-CIO, CLC

Case 120
No. 64449
A-6157

Appearances:

Ms. Andrea Hoeschen, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman Goldberg, S.C., 1555 North RiverCenter Drive, Suite 202, P.O. Box 12993, Milwaukee, WI 53212, on behalf of the Union.

Mr. Michael J. Westcott, Axley Brynelson, LLP, Manchester Place, Suite 200, 2 East Mifflin Street, P.O. Box 1767, Madison, WI 53701-1767, on behalf of the Hospital.

ARBITRATION AWARD

According to the terms of Article 24, Section 3 of the 2002-06 labor agreement between the above-listed parties, the parties jointly selected Arbitrator Sharon A. Gallagher to hear and resolve a dispute between them involving whether the Union has a right to visit with unit employees in break rooms on patient floors. A hearing in the matter was held on May 24, 2005, at Madison, Wisconsin. A stenographic transcript of the proceedings was made and received by June 2, 2005. The parties submitted their briefs herein directly to each other with a copy to the Arbitrator which she received by July 18, 2005. The parties waived the right to file reply briefs.

STIPULATED ISSUES

The parties stipulated that the Arbitrator should decide the following issues:

1. Did the Employer violate Article 1, Section 4 of the collective bargaining agreement when it refused non-employee Union representatives access to employee break rooms/conference rooms?
2. If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 1 – GENERAL CONDITIONS

Section 1 – Recognition

The Hospital recognizes the Union as the exclusive bargaining agent for the employees included in the collective bargaining unit, which consists of all regular full-time and all regular part-time employees 0.1 FTE and above of the following hospital departments: Food and Nutrition Services; Environmental Services; Engineering Services; Physical Therapy; Patient Transport and Nursing Service, but excluding office, professional and technical employees (such as operating room technicians, student nurses and other student employees), supervisors and other non-included employees as certified by the National Labor Relations Board.

Section 2 – Definition of Employment Status

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Section 3 – Equal Opportunity Employment

. . .

Section 4 – Union Visitation

The Union will notify the Human Resources Department when visiting the Hospital.

RELEVANT HOSPITAL VISITORS POLICY

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POLICY STATEMENT:

This policy is intended to establish a safe and secure environment of care while meeting the needs of patients and their visitors.

SCOPE:

A. General hospital visiting hours are 1100-2000. After hours visitation is granted based on patient needs, physical space and the recognition that all patients need the support of family and friends.

. . .

C. Between 2000 and 0500 at the Park site, all visitor traffic will enter through the Emergency Services department where Security will issue visitors passes. Visitors who are on the patient care units after 2000 will be directed to the Nursing Station to obtain a visitor pass.

D. All visitors must remain in the area appropriate to their visit. Visitors found in areas not connected to their visit will be asked to return to the appropriate area. Security will be notified if visitors do not comply.

E. Visitors not abiding by reasonable rules of conduct will be asked to leave and will be escorted off the premises if necessary.

F. Children under the age of 14 must be accompanied and supervised by an adult.

G. For the purpose of this policy, the same color pass will be used from 2000 to 0700.

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BACKGROUND

During negotiations for the 2002-06 labor agreement, the parties applied a consensus – based model, a “modified intra-spaced approach.” As a part of this approach, the parties submitted “defined issues” and “reasons” therefore during bargaining. One of these submitted by the Hospital was as follows:

Defined Issue: There is a need for advance notice of any visitation by a Union Representative.

Reasons: Knowledge when calls come into Human Resources – ability to respond to questions (Er. Exh.3).

Chief Hospital spokesman, Chris Spanos testified as follows regarding why the Hospital submitted this defined issue:

(By Mr. Westcott:)

Q Can you tell us what was discussed across the table at the time Employer Exhibit 3 was presented?

A We -- the discussion was concerning that we needed notification when the Union reps were entering the hospital.

Q And was there any discussion as to who it was that was supposed to receive such notice?

A Yes.

Q Tell us about that, who that was.

A The discussion was that we would -- they would either need to notify me or one of the two labor relations managers.

Q And did the notice have to be in writing, or was verbal notice acceptable?

A Verbal was acceptable.

Q At some point in time then further on in this negotiation process, was any specific contract language proposed?

A Yes.

Q And who was that proposed by?

A Management.(Tr.89, see also Tr. 86-7).

Spanos explained that he later made a proposal which was ultimately adopted by the parties, (unchanged) and it became Article 1, Section 4 of the effective agreement.

During discussions regarding this proposal, Spanos stated that he explained why the hospital needed notification when Union representatives would be entering the Hospital, as follows:

(By Mr. Spanos:)

A I was receiving phone calls that the Union reps were on the premises.

(By Mr. Westcott:)

Q And had you or anybody else, to your knowledge, at Human Resources been given advanced notice of those visits?

A No.

- Q And so what, if anything, did you do as a result of those calls?
A I called Deb Timko.
Q Who is Deb Timko.
A Deb is the president of SEIU Local 150.
Q And did you in fact talk with Deb Timko?
A Yes.
Q Do you recall when that was?
A That was - I'm trying to remember now. I think it was January 14th - December 14th. That's when it was.
Q Of '04?
A Yes.
Q And tell us what was discussed between you and Ms. Timko.
A I told Deb that the Union reps were entering the hospital without notifying us, that they were being - they were going up in nonpublic areas, patient care areas and the conference rooms. I also said that they were talking to employees during work time. They were refusing to leave and security was being called. And they were not signing in when they were coming in.
Q And what, if any, response did you get from Ms. Timko?
A Deb had said that the previous Union coordinator, Don Morschauser, was causing some problems for her, and that she was under some scrutiny from the international. She also said that Don had actually filed a charge against her for firing Julie Quick, the previous Union rep, and that Don was getting some support convincing employees to decertify the Union.
Q How did this relate in your mind to this Union access issue?
A I believe that the - they wanted access to the C.N.A.s and, you know, I told Deb that I really couldn't get involved in all of that.
Q Did you offer any alternatives or suggestions to Deb during that phone call?
A Yes, I did.
Q Can you tell us what you offered?
A I said that, you know, we could post a notice on the bulletin board when the Union reps are here. We could offer - - schedule some rooms off the cafeteria that they could meet with members. And if need be, some of the members, housekeepers or engineers could actually approach some of these employees to say these meetings, they wanted to have some meetings with them. But the Union reps could not go up on the units.
Q And were any of those alternatives that you suggested acceptable to her?
A No, they were not acceptable to Deb. (Tr.94-96).

...

Spanos also described the Hospital's Visitors Policy, herein, as follows:

(By Mr. Westcott:)

- Q There are a number of different ways to get into the hospital building; is that correct?
- A Yes
- Q Do you know the number of entrances to it?
- A I would say there has to be at least eight.
- Q And at some point in the day is access to the facility limited?
- A Yes.
- Q At what point in time is that?
- A Access is limited from 8 P.M. till 5 A.M.
- Q And do you know why it is limited?
- A Well, to control access into the hospital, and also for – to provide the safest environment for the patients.
- Q Can you tell us a little bit about the areas of the hospital a member of the public has access to if it's not everywhere?
- A The areas that the public has access to is the main lobby, the atrium. They have access to the cafeteria when it's open. They have access to the Sidewalk Café and the coffee shop when it's open.
- Q As a member of the public, am I allowed to roam the halls of the hospital?
- A No.
- Q Am I allowed to access patient care areas?
- A No.
- Q If I – you mentioned that the entrances to the hospital are restricted after 8 o'clock. What is a person visiting the premises to do after 8 o'clock at night?
- A You have to enter through the emergency services area and report into that area.

THE ARBITRATOR: Employer 2.
(Employer Exhibit No. 2 is marked for identification)
THE ARBITRATOR: The witness has it.

- Q Chris, do you have what's been marked as Employer Exhibit 2 in front of you?
- A Yes.
- Q Have you ever seen that document before?
- A Yes.
- Q Can you tell us what it is?
- A It's the visitor policy.
- Q And does Meriter maintain various -- the written policies and procedures in the course of its employment?
- A Yes.
- Q And in your capacity as director of Human Resources and an AOC, do you have access to those policies?

A Yes.

Q And is Employer Exhibit 2 one of those policies?

A Yes.

Q Is this the policy that describes access rights of various individuals to the organization?

A Yes.

Q And could you explain for us how sub D works under the heading Scope?

A Basically if visitors -- when visitors come into the emergency room, they need to report into security, the security desk, and sign in, and then they're given a visitors pass. They have to report where they're going.

Q Are you looking at sub D as a dog?

A And they must also report the meeting area that they visited.

Q Now, does this policy, Employer Exhibit 2, only apply to after 8 o'clock P.M., or does it apply to all times of day?

A This policy applies to all times of the day. (Tr. 82-84).

. . .

Spanos stated herein that at bargaining he specifically told the Union that after hours (8:01 p.m. to 4:59 a.m.), visiting Union representatives needed to follow the Hospital's Visitors Policy and sign in. Spanos stated that he made it clear that Union representatives would have to remain in the public areas of the hospital such as the lobby, cafeteria, sidewalk café and atrium, as follows:

(By Mr. Westcott:)

Q Was there any discussion between the parties at the time the specific contract language set forth in Employer Exhibit 4 was proposed?

A Yes.

Q And tell us what was discussed in that regard.

A That Management needed -- that H.R., labor relations managers or myself needed to be notified when the Union reps were coming into the hospital.

Q What, if any, discussion at the time Employer Exhibit 4 was exchanged with the Union was there about the hospital's policy on visitors?

A That after hours they needed to follow the visitors' policy of the hospital and sign in.

Q Did the Union voice any objection to the across the bargaining table to you?

A No.

Q And what discussions were there at the time you proposed Employer Exhibit 4 to the Union regarding the areas of access of the hospital, if you know what I mean?

A The public areas.

Q Tell us about the discussion in that regard.

A We said that the -- when they entered the hospital, they would remain in the public areas, which is -- was identified as the cafeteria, the lobby, the atrium, Sidewalk Café. (Tr.90-91)

. . .

In contrast, Chief Union Spokesman Dan Iverson answered as follows under direct questions from Union Counsel Hoeschen:

Q Do you recall any conversations when negotiating over this provision, do you recall any conversations about what part of the hospital facilities the Union would have access to?

A Yes, I do.

Q And what do you recall on that topic?

A On that topic the best I can remember is that we had talked about actually two different scenarios. One would be nonpatient care areas, which are areas that workers were not in direct contact or in the vicinity of patients, and how we would go about -- what would be the criteria if we had to go in patient care areas.

Q And in discussing patient and nonpatient care areas, did employee break rooms come up at all?

A Yeah. That would have -- yes, it did. That would have been one of the areas that would have been considered nonpatient areas. It was employee break rooms, the employee's place -- I call it the canteen but the restaurant, I believe it's on the first floor of the hospital where people go to have their lunches, breakfast or whatever they may be, smoking areas that were about the premises outside the building. Those were nonpatient care areas that were defined under that criteria.

Q And were there discussions about what areas would be considered patient care areas with more limited access?

A Yes, there was. There was -- you know, we certainly understood or everyone understood that you can't walk into an operating room or place where there are patients being physically examined or work being done on them as an outpatient or as a patient that was admitted to the hospital, the emergency room, so on and so forth. But if we needed to talk to, as an example, a C.N.A., certified nursing assistant, that we could go in areas that she or he may still be working like a nurses station where we could ask questions if we needed to that didn't disrupt the direct patient care.

Q So the Union apparently agreed to the language that the Union will notify the Human Resources Department when visiting the hospital; is that right?

A Yes, it is.

Q Did the hospital propose any language for the contract regarding which areas of the hospital Union representatives would have access to provided they gave appropriate notice?

A Not that I can remember at all. The discussions on where we could go and where we'd have to go with certain criteria's that we discussed was all verbal to the best of my knowledge.

Q Do you recall any agreement in negotiating this provision, do you recall any agreement between the Union and Meriter as to certain areas that the Union reps would not have access even if they gave notice?

A No. The only ones – there was none that was agreed or put into writing. There was a general understanding of naturally the areas that you couldn't go in. Now, if there was an operation going on or something as such, where we did have an issue years ago, and I say years prior to that contract where that happened, and that would be an area that would not be able for us to just go into, which would be common sense. But there was nothing in writing that I was – when I was bargaining that contract in regards to where we could or could not go to the best of my knowledge. (Tr. 218-221)

...

On cross-examination by Hospital Counsel Westcott, Iverson answered as follows:

...

Q Well, do you recollect whether or not there was a specific defined issue submitted by Meriter Hospital on this requirement for advanced notice as opposed to some out-of-the-box contract language on it?

A My recollection, counselor, again, would be that there was conversations between Chris Spanos, who was the principal bargainer for the Employer, and myself that there was a need to be notified and how to notify because that was questionable, which led into some discussions of where the Union representative/organizer, whatever, could go.

Q But you don't remember if there was any contract language that was on the table proposed by either party at the time that you were discussing that in the context of?

A I can't remember if there was a written one specifically or not, no.

Q Do you recall signing, or do you recall the parties entering into a tentative agreement on the language?

A I'm not sure what the language is, counselor. I don't have it in front of me.

Q I'll read it to you. It's short; okay?

A If that's all right with everybody, it's fine with me.

Q It's Article 1, Section 4, which was a new section entitled Union visitation and it's one sentence. It says, "The Union will notify the Human Resources Department when visiting the hospital." That's the end of it.

A That's pretty much my recollection. The rest was verbal conversation.

Q Right. There was conversation as to what the hospital wanted to achieve through this issue or this language; correct?

A Yes. But it was limited.

Q And Chris [Spanos] told you as you had said, that, you know, there were situations where the Union would be on the premises and his phone would be ringing off the hook with people asking who's here and why are they here. Do you remember that?

A Distinctly, yes, I do. (Tr. 223-225)

...

Q Okay, I understand. And do you recall Chris [Spanos] talking about the visitor policy that Meriter Hospital had in terms of when members of the public visited the hospital during the course of these negotiations?

A That I don't remember.

Q Do you deny that that occurred?

A I can't deny it. I don't remember it. I can't say if it did or didn't. That action I don't recall.

Q Do you recall discussion during this bargaining by Chris [Spanos] where he is talking about people having to sign in after 8 o'clock P.M. the Union reps?

A I believe, in fact, yes. You know, since I'm under oath I can't, you know, definitively say yes or no. But I believe that was talked about, and I can't swear to it because I don't distinctly remember it. (Tr. 225-226)

...

Spanos admitted that the Hospital never proposed any contract language regarding acceptable areas of the Hospital the Union could visit or acceptable reasons for Union visitation. Spanos stated that the Hospital was comfortable leaving these details to informal discussions.

FACTS

Starting in October, 2004, the Union began an effort to have a greater presence or contact more of its unit employees at Meriter Hospital. At this time, Union Steward Coordinator and Meriter employee Tom Elert began escorting non-employee Union representatives (Claiborne Hill, Paul Sickel, Ariel Herzog, Renee Crawford and Carmen Dickinson) on his non-work time to all of the break rooms on the nursing units in the Tower and the East and West wings in order to meet and talk to Local 150 bargaining unit employees. Elert stated that he did not see or hear any confidential patient information during these visits.

On November 21, 2004, two Union representatives visited the Hospital cafeteria without giving Human Resources advance notice of their visit. When challenged by Nursing Coordinator Simo, Union Representative Dickinson stated that the cafeteria is a public area and she was not required to give advance notice of her visit there. On December 8, 2004, Former Union Representative Ariel Herzog entered the 9th Floor Tower 9 Tower conference/report room without knocking during patient care rounds.¹ Herzog asked to see nursing assistant "Brooke." Nurse Manager Marcia Dull asked Herzog to leave because confidential patient information was being shared and stated that he would have to wait to speak to Brooke until she had a break. Dull did not tell Herzog when Brooke's break would occur. Herzog then left the 9 Tower conference room.

On December 9, 2004, Herzog entered the 9 Tower conference/report room without knocking and sat down at a table where Tammy Gue and Brooke Novacheck were having lunch. Nurse Manager Dull entered the room for lunch also and sat at a different table. Herzog asked Novacheck if she would be interested in becoming a Union work site leader. Novacheck told Herzog to stop harassing her. Dull told Herzog to stop harassing her staff.

Later, on December 9th, Herzog approached Housekeeper Danielle Keyes in the 7 Tower conference room while Keyes was cleaning the room and he spoke to Keyes for 15 or 20 minutes while she was on the clock. Finally, on the evening of December 9th, Herzog had a meeting with a CNA arranged after 8:00 p.m. at the

¹ Herzog denied ever hearing or seeing any confidential patient care information during his visits to the Hospital.

Hospital. Herzog requested a pass for the entire hospital at the emergency room/reception area and was told he would no longer be allowed to visit employees on the nursing units; he would have to visit employees in the lobby. Nursing Administrative Coordinator (NAC) Cagle offered to request that certain CNAs meet with Herzog that evening in the lobby. Herzog declined.

On December 10, 2004, the Union filed the instant grievance, citing the entire contract and Articles 1 and 24 as having been violated and alleging, "Local 150 not able to access breakrooms on patient floors to talk to Union members. Hospital denying access to floors." The Hospital answered the grievance as follows on December 17, 2004:

. . .

It has been and continues to be Meriter Hospital's policy that persons not employed with Meriter are prohibited from engaging in solicitation or disruptive activities on the premises. While the Hospital has, in certain circumstances, allowed access to areas of the hospital that are regularly open to the public, it is under no obligation to extend this access to other areas. With the recent passage of the protections for patient health information under the Health Insurance Portability and Accountability Act, there is a heightened concern with respect to allowing non-employees access to break rooms where such protected health information is stored or discussed. We also see nothing in the collective bargaining agreement that guarantees or mandates union access to the Hospital or break rooms. The contract's Union Visitation provision requires that the union notify the Human Resources Department when visiting the Hospital (which has not been complied with in terms of the representative's recent visits) and does not restrict the Hospital's right to deny access if inappropriate.

We do not believe that restricting access to the break rooms will impact the union's access to its membership. We have discussed with you several alternatives to having the representative visiting in break rooms, such as allowing the union to post a notice on its bulletin board concerning dates and times when the union representative is on the premises and available to meet with employees in the cafeteria or a more private room. We do not believe that restricting access to the break rooms will impact the union's adjacent to the cafeteria. Pursuant to our obligations under the collective bargaining agreement, we also regularly provide you with contact information for employees in the bargaining unit for the purpose of assisting the union in the performance of its functions as collective bargaining representative. We are also willing to

discuss other acceptable alternatives to having non-employee union representatives on patient units in employee break rooms. That said, please be clear that is the Hospital's expectation going forward that the Union will comply with its obligation to notify Human Resources when visiting the Hospital, and will limit its visits to those areas appropriate for public visitation.

. . .

On January 5, 2005, Spanos sent a letter to Union Representative Timko, as follows:

. . .

In follow up to our telephone conversation on Tuesday, December 14, 2004, I wanted to inform you of Meriter's position based on additional clarification I received on the issue of allowing SEIU, Local 150 representatives in the break rooms on the nursing units. The Human Resources Department has recently received several reports from managers and employees on the nursing units concerning an SEIU union representative visiting employees, particularly, Certified Nursing Assistants, in employee break rooms located on the patient units. Some employees have reported to management that they are uncomfortable with the approach he is using and in some cases feel harassed by this individual.

It is our position that it is not appropriate for your union representatives to be visiting employees in the break rooms. It has been and continues to be Meriter Hospital's policy that persons not employed with Meriter are prohibited from engaging in solicitation or disruptive activities on the premises. While the Hospital has, in certain circumstances, allowed access to areas of the hospital that are regularly open to the public, it is under no obligation to extend this access to other areas. Break rooms are frequently used to discuss shift reports, and review other protected health information. With the recent passage of the protections for patient health information under the Health Insurance Portability and Accountability Act there is a heightened concern with respect to allowing non-employees access to break rooms where such protected health information is stored or discussed. As you are aware, Meriter is very committed to upholding the privacy of our patients and the protection of their rights, which is vital to our business. I am requesting that you notify your union representative(s) of our position on this issue.

We do not believe that restricting access to the break rooms will impact the union's access to its membership. The Labor Relations staff have several alternatives to having the representative visiting in break rooms, such as allowing the union to post a notice on its bulletin board concerning dates and times when the union representative is on the premises and available to meet with employees in the cafeteria or a more private room adjacent to the cafeteria. Pursuant to our obligations under the collective bargaining agreement we also regularly provide you with contact information for employees in the bargaining unit for the purpose of assisting the union in the performance of its functions as collective bargaining representative. We are also willing to discuss other acceptable alternatives to having non-employee union representatives on patient units in employee break rooms.

I know that you understand and value the importance and legal requirements of Meriter to protect the rights of our patients and their protected health information. We appreciate your compliance with our position regarding this matter.

...

On January 10, 2005, three Union Representatives were seen on 9 Tower without advance notice (reported, by NAC Knull). On January 11th, Dickinson, Herzog and a third Union representative visited the Environmental Services conference room to talk to employees without advance notice. On January 18th, the Union sent the following fax to Human Resources Manager Shirpert:

...

As per Article 1, section 4 of the collective bargaining agreement, we are writing to inform you that representatives from SEIU Local 150 will be in the Meriter Hospital facility to investigate grievances and administer the agreement on the following days this week: Wednesday January 19, Thursday January 20, Friday January 21, and Saturday January 22.

On February 2, 2005, Herzog tried to speak to a transporter employee about the Union. During his many encounters with Hospital managers from December, 2004, through early February, 2005, Herzog was often rude and disrespectful.

On February 4, 2005, Human Resources Director Spanos sent the following letter to Union President Timko:

On January 5, 2005, I sent you a letter in response to a third step grievance clarifying Meriter's position on allowing non-employee union representatives in break rooms. On January 14, 2005, we were informed of your intent to file for arbitration of the matter. Nevertheless, I have received notice that your representatives continue to access break rooms, despite our repeated requests to respect our request until the issue is resolved through arbitration. It is my understanding, based on our discussion and subsequent discussions with your representatives, that they are visiting with employees in general, and CNA's specifically, for purposes of developing internal leadership, general communication, and defusing any representational efforts by other members of the bargaining unit. On January 18, 2005, your representatives notified us of their intent to visit the hospital to "investigate grievances and administer the agreement."

Our position remains that it is not appropriate for your union representatives to be visiting employees in the break rooms. It has been and continues to be Meriter Hospital's policy to bar all persons from engaging in solicitation or disruptive activities on the premises. Further, the Hospital is not obligated by (sic) bargaining agreement or practice to extend greater access to private areas of the hospital than we would to the general public. The contract's Union Visitation provision requires that the union notify the Human Resources Department when visiting the Hospital and does not restrict the Hospital's right to deny access it deems inappropriate. Of note, your representatives have failed to comply with this provision on numerous occasions over the past months only giving notice, as noted above, on January 18, 2005.

We believe that restricting access to the break rooms will neither impact the union's access to its membership, nor interfere with its objectives of developing internal leadership, general communication, defusing any representational efforts by other members of the bargaining unit, investigating grievances, and administering the agreement. The Labor Relations staff have several alternatives to having the representative visiting in break rooms, such as allowing the union to post a notice on its bulletin board concerning dates and times when the union representative is on the premises and available to meet with employees in the cafeteria or, in the case of investigating grievances, providing a more private room adjacent to the cafeteria. Pursuant to our obligations under the collective bargaining agreement we also regularly provide you with contact information for employees in the bargaining unit for the purpose of assisting the union in the performance of its functions as collective

bargaining representative. We appreciate your compliance with our position regarding union visitation. Please be clear that it is the Hospital's expectation going forward that the Union will comply with its obligation to notify Human Resources when visiting the Hospital and will limit its visits to those public areas appropriate for visitation. If we determine that union representatives are not in compliance with these expectations, the Hospital will continue to deny access and may consider other legal means available to restrict access.

...

POSITIONS OF THE PARTIES

The Union

The Union urged that the most reasonable interpretation of Article 1, Section 4, is that the Union has the right to visit break rooms and conference rooms to meet with unit employees without getting advance permission. Article 1 Section 4, merely requires the Union to "notify the Human Resources Department when visiting the Hospital." If permission were required for Union visits, the parties could easily have stated so in Article 1, Section 4. They did not do so.

The question then arises whether the Union's contractual right to visit the hospital extends beyond the public areas accessible to visiting members of the public. Article 1, Section 4, contains no limitations on the areas the Union may visit. Therefore, in the Union's view, the Hospital may not now unilaterally impose restrictions on Union access which the hospital failed to negotiate into the labor agreement, citing BUTLER PAPER CO., 91 LA 311, 313 (WEISS, 1988), UNICARE HEALTH FACILITIES, 99 LA 349, 353 (ABRAMS, 1992), and LEATHERBACK INDUSTRIES, 109 LA 1202, 1206 (ALLEN, 1998).

In the Union's view, the Hospital's interpretation of Article 1, Section 4, is "illogical" as it would give the Union less access to the premises than a stranger or a person off the street. In this regard the union noted that between 5:00 a.m. and 8:00 p.m. visitors can enter the hospital whenever they wish and they are not restricted to public areas. "Yet the Hospital would require Union representatives to notify the Hospital before they visited public areas and would prohibit them from entering the hallways that every other member of the public is free to enter." (U. Br. p. 4) The Union observed that following the Hospital's interpretation of the contract resulted in a Union representative almost being ejected from the Hospital cafeteria while strangers were allowed to eat their lunches there unmolested.

The Hospital would limit Union representatives to meeting with employees they could identify or who had requested a contact in public areas of the premises, an unreasonable result which would essentially destroy the Union's access to unit employees. The other alternative suggested by the Hospital was for Union representatives to tell Management which unit employees they wished to speak to and then the manager would direct the employees to a designated area on the employees' break time. In the Union's view this could result in unlawful surveillance of Union activities and a chilling of the employees' Section 7 NLRA rights (Tr. pp. 212-13). In at least one instance (with Supervisor Cagle), a supervisor's facilitating contact did not work.

The Union urged that the evidence proffered by the Hospital regarding bargaining history is not credible. The more credible evidence came from former Union President Iverson who stated that the parties did not discuss restricting Union access but rather the discussion centered on the notice requirement and the Union's agreement not to approach employees while they were involved in patient care.

The Hospital failed to prove that Union access to employees in break rooms would interfere with patient care. The Hospital's claim that it was likely that patient confidentiality would be breached were Union representatives allowed to visit employees in Hospital break or conference rooms amounted to "unsubstantiated speculation" (U. Br. p. 7) as the testimonies of Hill, Herzog, Elert and Dickinson showed that they had not had any exposure to confidential patient information during their visits to Hospital units. And at least one supervisor stated that she could clear break or conference rooms of such information if she knew in advance that the Union would be visiting there.

The Union sought an award sustaining the grievance as the contract language does not allow the Hospital to restrict Union representatives to public areas when they visit the Hospital and the Hospital has failed to prove that allowing the Union access to break or conference rooms would unreasonably interfere with patient care.

The Hospital

The Hospital argued that the burden of proof is on the Union in this case to show that the hospital has violated Article 1, Section 4. However, the proof submitted only shows that the Union has violated Article 1, Section 4. In this regard, the Hospital urged that Article 1, Section 4, provides for notice of visits and it does not mention that the Union has a right of access to any part of the premises. In addition, the Hospital contended that the parties had no intention of changing the policies regarding visitation and the Union's access to the premises by their agreement to Article 1, Section 4. The Hospital contended that the labor agreement contained no "clear authority" for the

Union to visit unit employees at the hospital, citing MONTGOMERY WARD Co., 85 LA 13 (CARAWAY, 1985).

Furthermore, regarding the bargaining history of Article 1, Section 4, the Hospital noted that it raised the issue that there was a “need for advance notice of any visitation by a Union Representative,” and that it then proposed language to address only that issue; and that the reason the Hospital raised the issue was because Human Resources was receiving calls from managers that Union representatives were on the premises. Hospital Chief Spokesman Spanos stated that at bargaining, when Employer Exhibit 4 was proposed by the Hospital, Spanos made it clear that after hours, the Union needed to follow the Hospital’s Visitors Policy and sign in, and that the Union did not object to this approach. In addition, Spanos stated that before Employer Exhibit 4 was agreed to, the parties also discussed the Hospital’s opinion that Union Representatives had to remain in public areas of the Hospital while visiting employees, in accord with the parties’ previous past practice. The Hospital argued that Spanos’ testimony was more reliable than former Union President Iverson’s, whose recollection was sparse and who had admittedly not reviewed any notes prior to testifying herein. Iverson also admitted that he negotiated 20 to 30 contracts in 2002 when he negotiated Joint Exhibit No. 1. The Hospital observed that Iverson did not testify that the parties agreed to expand Union access to the premises beyond what had been the past practice, and no evidence of any practice allowing expanded access by Union representatives after Article 1, Section 4, was inserted in the contract was proffered by the Union.

The Hospital also asserted that its Management Rights Clause (Article 3) allows it to promulgate and enforce reasonable rules or policies in order to safely and efficiently operate the Hospital. The Hospital has a reasonable and necessary Visitors Policy in place which should be applied to non-employee Union representatives who visit its premises to assure the security and safety of its patients and all patient information. As the Hospital has restricted the public to certain areas of the Hospital, so should it be allowed to restrict non-employee Union representatives from non-public areas of the premises where confidential patient information is used and kept.

The facts of this case show that Local 150 representatives have many other avenues for contacting members. For example, the Hospital sends the Union detailed lists containing the unit employees’ names, addresses, and telephone numbers; and the Union could meet with members off premises outside of work hours or its employee Union representatives could meet with employees on their breaks and lunch periods. During the pendency of this case, the Hospital also suggested it could arrange for meetings between Union representatives and employees and that with notice Union representatives could also meet with employees in public areas of the Hospital. The Union rejected these management suggestions. The Union appears to want *carte blanche* to visit employees anywhere on the hospital premises.

The Hospital noted that the Union representatives violated the contract because they (admittedly) did not notify Human Resources that they would be visiting the Hospital premises before they arrived: Ariel Herzog stated that for a majority of the visits he made to the Hospital, he failed to give advance notice to Human Resources of his visits and Carmen Dickinson stated that she could not recall whether she notified Human Resources of her visits from November, 2004, through March, 2005.

Finally, the Hospital urged that the Union representatives' conduct while visiting the premises has been disruptive, inappropriate and at times disrespectful of Hospital managers. Herzog admittedly knew where the public areas were in the Hospital, he knew the Hospital's position was that Union representatives could only visit public areas, he admitted that he spoke to some employees while they were on the clock and went to non-public areas of the Hospital to visit employees in violation of the Hospital's policies. Herzog also admitted that even after he was asked to leave the hospital he would leave and return (through another door) to a different area of the Hospital. The Hospital further argued that it has uniformly applied its Visitor's Policy to all non-employee visitors; that it objected to the Union's violations of its Policy beginning in November, 2004, and it offered the Union alternatives to meet the Union's needs; that the Hospital has timely issued information to the Union concerning unit employees. The Union has knowingly and deliberately refused to comply with Article 1, Section 4 of the contract and with the Hospital's Visitors Policy.

DISCUSSION

The BUTLER case (91 LA 311 (WEISS, 5/88)), cited by the Union, involved a ULP charge that was deferred to arbitration under the COLLYER doctrine and specific contract language regarding union visitation, as follows:

. . .

Authorized agents of the Union shall have access to the Company's establishment during working hours for the purpose of adjusting grievances and ascertaining that this Agreement is being adhered to. Such entry shall only be made after first notifying a Company official. Such privilege shall be exercised reasonably and with minimum interference with work.

. . .

In UNICARE HEALTH FACILITIES, 99 LA 349 (ABRAMS, 8/92), the contract language describing Union visitation was much more comprehensive than that before me in this

case.² In addition, Arbitrator Abrams had before him evidence of a three year past practice whereby a Union representative had been allowed to “roam freely through the halls (f the nursing home) talking with employees and giving out his business card.” ID. at 350. In addition, the language regarding visitation was also more detailed in LEATHERBACK INDUSTRIES, 109 LA 1203 (ALLEN, 2/98).³ Finally, the case cited by the Hospital, MONTGOMERY WARD & CO., 85 LA 913 (CARAWAY, 11/85), also involved contract language much more specific than that involved in this case:

...

ARTICLE 37
VISITATION

“Representatives of the Union desiring to discuss matters of contract administration with the local manager or his designated representative which require visits to the location, shall make arrangements for such visit with the location manager or his designated representative. In the event it is necessary in the handling of a grievance to observe working conditions on the job, arrangements to do so shall be made by the location manager or his designated representative. Any reasonable request shall be complied with.”

² Article V – Union Visitation – Bulletin Boards reads as follows:

...

The Business Representative for the Union or the Union’s designee, after advising management of his presence shall have admission to all properties covered by this Agreement to discharge his duties as representative of the Union, provided that such admission shall not interfere with management’s operations. The Union, when possible, shall inform the Facility in advance of its intention to visit the building. The Employer shall make available to the Union in the Nursing Home a bulletin board for the purpose of posting union notices. The Union shall be permitted to conduct union meetings on the Employer’s premises with the Employer’s consent on the regular employer’s time, which shall not be unreasonably withheld.

...

³ That language in LEATHERBACK read as follows:

...

A representative of the Union shall be allowed to visit the Plant and discuss Union matters with Employees and/or Plant Management. Union representative will first notify the Management before entering the Plant and/or speaking to the Employees concerning contractual matters. It is understood that the exercise of the foregoing, or the business of the Steward shall be effected so that no unreasonable interference with the Employer’s business results.’

...

. . .

This Arbitrator has not found these cases to be helpful due to the vast difference in the contract provisions considered. Further, in my view this case must turn upon the facts submitted as well as those the parties chose not to submit or address. In this regard, I note that no evidence was submitted regarding how if at all employees' relatives or friends are allowed to visit them at the Hospital during their shifts. It is also significant that until Fall of 2004, no disputes arose between the parties regarding the scope of Union visitation at the Hospital. In addition, it is undisputed that the Hospital's Visitor's Policy has been applied to all who entered its doors, including Union Representatives, and, based upon this record, no objections thereto have been lodged by the Union.

Only one past exception was mentioned by former Union Representative Iverson, concerning an apparent attempt by the Union to visit a bargaining unit employee who was working in an operating room while a patient was receiving direct care (Tr. 221). The instant record does not reveal how this prior dispute was addressed except that in his testimony, Iverson strongly implied that the Union ultimately agreed with the Hospital that Union visitation of an employee during a patient operation was inappropriate and unacceptable. Thus, there is no evidence in this case that a past practice has arisen whereby Union Representatives have visited employees in break/conference rooms on the units.

Starting in the Fall of 2004, several different Union representatives began making a concerted effort to visit unit employees at the Hospital, coming unannounced at all hours of the day and night, and having employees active in the Union (such as Tom Elert) escort them up onto patient care units to seek out unit employees who might have questions, need information or be interested in becoming more active in the Union. It is in this context that Hospital Human Resources Director Spanos and his colleagues first became concerned about these increased unannounced Union visits. Spanos explained (and notably the Union did not dispute) that the Union was moved to increase Hospital visitations due to the threat of a possible decertification.⁴

During the parties' consensus-based bargaining, Spanos submitted an extremely limited "defined issue" and "reasons" in support of the later - proposed language of Article 1, Section 4. This is significant because this kind of bargaining is designed to limit and define important issues for bargaining. In addition, I note that no prior contract language existed concerning Union visitation and no evidence was submitted herein to show that the parties had ever discussed including a Union visitation clause in the agreement. Furthermore, the Hospital's Visitor's Policy had been in place for

⁴ I find it significant that Union President Temp was not called to testify herein. Therefore, Spanos' testimony concerning the Union's motivation for seeking increased visitation stands undisputed.

many years and no evidence was submitted to show that the Union had ever objected to the Policy.⁵

It is significant that Spanos never proposed any language describing what areas of the Hospital Union representatives could visit and when and under what circumstances or for what reasons they could visit employees there. Rather, he relied on discussions at bargaining to clarify this issue pursuant to past practice. However, the Union has claimed no such clarification occurred. Indeed, the Union has essentially argued that by its agreement to Article 1, Section 4, the Hospital agreed to allow Union representatives greater access to patient units than is given the public under its Visitor's Policy, including access at any time of the day/night to unit break rooms/conference rooms. In contrast, the Hospital has argued that it made it clear to the Union in bargaining that its proposal regarding Article 1 was not intended to alter or disturb the Hospital's past practice of applying its Visitor's Policy to all Hospital Visitors including Union representatives.⁶

Here, the Union has the burden to prove a violation of the contract has occurred. In the instances (a majority) where the Union failed to give the Hospital any kind of advance notice that a Union representative would be visiting the Hospital, the Union violated Article 1, Section 4, and no further inquiry need be made in those cases. In the few cases where the Union gave the Hospital advance notice of visitation, the questions arises whether did the Hospital violated the contract by refusing to allow Union representatives to visit employees in break/conference rooms on patient floors. As noted above, all that was accomplished by the inclusion of Article 1, Section 4, was to require advance notice of Union visitation. Presumably all else remained unchanged – the prior practice was not disturbed by the inclusion of Article I, Section 4. However, the parties failed to provide evidence herein to show how they had dealt with Union visitation prior to their agreement to Article 1, Section 4. Absent clear evidence of past practices and/or bargaining history on the subject, the Arbitrator has no idea what the relevant *status quo ante* was when the parties agreed upon Article 1, Section 4, to determine whether the Hospital's actions in this case violated past practice.

The parties have each argued that their witness to negotiations (Spanos and Iverson respectively), should be credited on the question of bargaining history. A close analysis of former Union Representative Iverson's testimony shows that he never asserted that the Hospital representatives led the Union to believe that Union representatives would be granted access to unit break and conference rooms. Indeed, Iverson's testimony shows that he understood that Union representatives would, at

⁵ The Hospital's Visitor's Policy is vague. For example, it appears to apply only to visitors of patients, not to visitors of employees. It is based upon the assumption that visitors will come to the Hospital, not to roam the halls, but to visit specific patients on the units. It does not address unit break/conference rooms in any way.

⁶ The Union proffered no evidence to show that the Hospital had not applied its Visitor's Policy across the board to all who entered its facility.

most, be allowed to visit with unit employees at unit nurses' status, where Union representatives could ask employees questions, presumably even if they were in pay status. Indeed, in reference to employee break rooms, Iverson described the first floor restaurant or canteen where employees go to have breaks, lunch or breakfast and the smoking areas outside the building, when he was asked about employee break rooms where Union representatives could meet with employees. Iverson also confirmed that the parties never agreed specifically upon the areas which Union representatives would be allowed to visit employees but that there "was a general understanding of naturally the areas you couldn't go in . . . which would be commonsense" (Tr. 218-221). In the view of this Arbitrator, Iverson's testimony did not reveal what that "general understanding" involved.

Furthermore, Iverson's recollection of events involved in bargaining was sketchy at best given the 20 to 30 contracts he admitted to negotiating at the same time in 2002. Indeed, Iverson could not even remember that a proposal was made on Union visitation and then he could not recall the agreed-upon language. When asked whether Spanos talked about the Hospital's Visitor's Policy at bargaining, Iverson stated he did not remember that subject coming up but he stated he could not deny that Spanos raised and discussed the Visitor's Policy at bargaining (Tr. 225-6).

In contrast, Spanos was clear on the point, that he told the Union in bargaining that the Hospital was concerned about Union representatives visiting the Hospital without giving any advance notice to the Human Resources department, and that the Hospital's Visitor's Policy would apply to visiting Union representatives as in the past. In these circumstances, Spanos' testimony must be credited on these points. Given the above analysis, this Arbitrator finds that the Union failed to prove that based upon its agreement to the language of Article 1, Section 4, the Union gained the right to enter the Hospital at any time and to visit "breakrooms on patient floors to talk to union members."

As a general rule in cases such as this, where no standards are expressed in the contract, arbitrators apply a test of reasonableness to judge the adequacy of advance notice. As noted above it is clear on this record that after agreeing to Article 1, Section 4, the Union failed to properly notify the Hospital on the majority of occasions that Union representatives visited the Hospital from the Fall of 2004 through the filing of the instant grievance. Each time it failed to give the Hospital any advance notice of visitation it violated Article 1, Section 4. Here, the record showed that on only one occasion, by memo dated January 18, 2005, the Union sent written notification of its intention to visit the Hospital on four days: January 19, 20, 21 and 22, 2005. As Article 1, Section 4, does not require written notification and as it does not specify a time certain for advance notice to be given to the Hospital, the Union's January 18,

2004 memo satisfied Article 1, Section 4. In addition, verbal notice would also be sufficient under Article 1, Section 4.⁷ This Arbitrator notes that in January of 2005, at one point Union Representative Carmen Dickenson told Human Resources Manager Shupert that she would be visiting the Hospital every Tuesday for an unknown period.⁸ This notice would also satisfy the broad language of Article 1, Section 4.

The bottom line here is that neither the labor agreement nor the Visitor's Policy addresses all the possible variations/needs of the parties and they need to sit down and discuss how to accommodate each other. This Arbitrator notes that both Spanos and Shupert suggested several alternatives to using unit break and conference rooms which the Union flatly rejected. In the long run, it is up to these parties to address the problems raised by this case.⁹ Neither the contract nor the Visitor's Policy/past practice address the Union's right to access unit break/conference rooms. This Arbitrator is therefore constrained to issue the following

AWARD

The Employer did not violate Article 1, Section 4, of the collective bargaining agreement when it refused non-employee Union representatives access to employee break rooms/conference rooms on the nursing units. The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin, this 18th day of October, 2005.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator

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⁷ A reasonable amount of notice would be 24 hours when the Union knows more than 24 hours in advance that it will need to visit the Hospital. As late as the morning of the date on which the Union would like to hold an afternoon meeting that day could also be reasonable in a situation where the Union has less than 24 hours' notice it will need to visit the Hospital. However, such language was not included in Article 1, Section 4.

⁸ Dickinson stated that several grievances had to be processed at this time and that since she was already at the Hospital one Tuesday per month for Labor-Management Cooperation meetings, she decided that Tuesdays should become "Meriter Tuesday" (Tr. 60-64).

⁹ It cannot be said that all employee break/conference rooms at the Hospital are alike. Thus, in the view of this Arbitrator, those rooms not on patient floors could reasonably be offered to Union representatives as no confidential patient information is used therein. (The Environmental Services Conference Room is such a room.) Indeed, confidential patient information should not be left lying around employee break/conference rooms on the patient units if the Hospital wishes to avoid lawsuits.