IN THE MATTER OF THE ARBITRATION BETWEEN

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 113,	)	FEDERAL MEDIATION AND CONCILIATION SERVICE CASE NO. 07-56751
Union,	)	
and	)	
CHILDREN'S HOSPITALS AND CLINICS OF MINNESOTA, INC.,	)	DECISION AND AWARD OF ARBITRATOR
Employer.	)	

APPEARANCES

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On September 18, 2007, in Minneapolis, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties by

changing the time when employees are permitted to punch out at the end of the work day. The last of post-hearing written argument was received by the arbitrator on December 16, 2007.

FACTS

The Employer operates two hospitals, one in Minneapolis and the other in St. Paul, Minnesota. The Union is the collective bargaining representative of the non-supervisory employees of the Employer who work in classifications the labor agreement describes as "non-professional," such as Nursing Assistant, Environmental Support Associate, Linen Aide, Driver and Building Maintenance Mechanic. These employees are divided into two bargaining units, one that includes those working at the Minneapolis hospital and the other that includes those working at the St. Paul hospital.

The current labor agreement between the parties, which covers both bargaining units, is effective, by its terms, from August 23, 2006, through February 28, 2009.

This grievance arose at the Minneapolis hospital (the "Hospital"), where the Employer provides housekeeping services through its Environmental Services Department (the "Department"). The Department employs about ninety-three bargaining unit employees who hold one of three classifications -- Environmental Support Associate, Floor Care Assistant or Linen Aide. The Employer's St. Paul hospital does not employ employees who perform housekeeping services, but, instead, contracts with nearby United Hospital to have its employees provide those services.

The Hospital uses four standard work shifts. The time between the start and end of each shift is equal to eight and one-half hours, consisting of a one-half hour unpaid lunch break and eight hours of paid time, including two fifteen-minute paid work breaks. Because most of the evidence presented at the hearing relates to the first shift, which starts at 7:00 a.m. and ends at 3:30 p.m., my description of the evidence, below, will also relate to that shift.

Since 2001, the Employer has used a time-clock system referred to as "Kronos" to record the time when employees throughout the Hospital start and end their workshifts. Kronos time-clock terminals are installed at seven locations throughout the Hospital. Each Hospital employee is issued a plastic card with his or her identity recorded on it electronically, and, at the start and end of each shift, the employee passes the card through a card reader on a Kronos terminal to record the time for which the employee will be paid. Hereafter, I refer to this process as "swiping in" and "swiping out," as the parties do.

The Kronos system records only in one-quarter hour increments. Thus, for an employee who swipes in seven minutes before or seven minutes after the 7:00 a.m. start of the first shift, Kronos records the time of the swipe-in as 7:00 a.m. For an employee who swipes in eight minutes before 7:00 a.m., Kronos records the swipe-in as 6:45 a.m., and, similarly, for an employee who swipes in at eight minutes after 7:00 a.m., Kronos records the swipe-in as 7:15 a.m. At the end of the first shift, Kronos' rounding to the nearest quarter hour causes it to

record the swipe-out of an employee who does so between 3:23 p.m. and 3:37 p.m as having occurred at 3:30 p.m. If the swipe out is done at 3:22 p.m. Kronos records it as having occurred at 3:15 p.m.

First shift employees of the Department are required to attend a daily staff meeting held in the Hospital's cafeteria promptly at the shift's start time, 7:00 a.m. The evidence shows that, in order to arrive at the staff meeting promptly at 7:00 a.m., these employees swipe in from one to seven minutes before 7:00 a.m. The nearest Kronos terminal is not far from the cafeteria where the staff meeting is held. Department employees, however, often must wait in line to swipe in behind first shift employees from other departments of the Hospital, some of whom take longer to swipe in because they must enter a numerical code as they do so. Because the Kronos rounding system records a swipe-in occurring from one to seven minutes before 7:00 a.m. as having occurred at 7:00 a.m., these employees are not paid for the time between their actual swipe-in and the 7:00 a.m. time recorded by Kronos. Union witnesses testified that, to balance the morning rounding gap necessitated by the line at the Kronos terminal and by the requirement that they attend the daily staff meeting promptly at 7:00 a.m., they have for many years swiped out from one to seven minutes before 3:30 p.m., thus creating an offsetting rounding gap in the afternoon.

Although all of the non-supervisory employees of the Department are bargaining unit employees and are employed by the

Employer, the Department is managed under contract with Sodexho, Inc. ("Sodexho"), an independent contractor with which the Employer contracts for management services in several of its departments. Cynthia A. Hammiller, whose title is Director of Environmental Services, but who is an employee of Sodexho, testified that she is the primary supervisor of bargaining unit employees who work in the Department.

Hammiller testified that, on January 17, 2007, at a 9:00 a.m. meeting of first shift Department employees, she told the employees that the "expectation was that they needed to work" the full eight hours of their shift, that it was not within expectations that they swipe out early and that they must wait until the end of the shift at 3:30 p.m. to swipe out unless they had a supervisor's approval to do so earlier. She gave Department employees who work other shifts similar instructions at a meeting held at 5:00 p.m. that day. Hammiller also testified that, if the ninety-three employees of the Department left work to swipe out seven minutes before the end of their shifts, the annual loss of productivity would equal the annual work of two full-time equivalent employees.

Hammiller testified that she knew that employees had been stopping work to break down their equipment carts, to put on their coats and to be at the Kronos terminals at 3:23 p.m., but that they were not being disciplined for that conduct. She told them that they could no longer stop work early. She also testified that employees must be at the daily staff meeting at 7:00 a.m. She testified that all Department employees wear

uniforms while working, that some arrive and leave in their uniforms, but that some change into and out of their uniforms at lockers furnished by the Employer. Those who change are expected to do so before 7:00 a.m. and after 3:30 p.m. -- the hours of the shift.

On February 13, 2007, the Union brought the present grievance, challenging Hammiller's directive of January 17, 2007. Thereafter, the parties tried to settle the dispute, using the labor agreement's grievance procedure, but were unable to do so.

On April 25, 2007, the Union initiated a charge before the National Labor Relations Board (the "NLRB"), alleging that Hammiller's directive of January 17, 2007, was an unfair labor practice. On June 19, 2007, the NLRB deferred its decision on the unfair labor practice charge, pending resolution of the present grievance.

The parties cite the following provisions of the labor agreement as relevant to the present grievance:

> Article I: Union Representation.
> Recognition. The Union will be the sole representative of all the non-professional employees of the Employer in the classifications set forth in the wage schedule of this contract and within the bargaining unit certified by the National Labor Relations Board or previously agreed upon by the parties. . . .
>
> Article II: Grievance and Arbitration.
> (A) A grievance is limited to a dispute or controversy between an Employee (or Union) and the Employer relating to the interpretation or application of the express terms and provisions of this Agreement.
> (C) . . . The authority of the arbitrator shall be limited to making an award relating to the interpretation of or adherence to the written provisions of this Agreement, and the arbitrator shall have no authority

to add to, subtract from or modify in any manner the terms and provisions of the Agreement. . . .

Article III: Working Conditions.
(D) Maintenance of Benefits. Where wages, hours and other conditions specifically covered by this Agreement are lower than those now received by an individual employee, such employee shall not have such conditions reduced by the execution of this Agreement.

Article IV: Hours of Work and Overtime.
(A) Workweek and Overtime. The regular pay period shall be eighty (80) hours. Eight (8) hours shall constitute a day's work to be completed within nine (9) consecutive hours. If an employee works in excess of eight (8) hours per day, or in excess of eighty (80) hours in a two-week pay period, overtime at the rate of one and one-half times the employee's regular straight-time hourly rate shall be paid for such hours. . . .

Article XX: Management Rights.
Except as specifically limited by the express provisions of this Agreement, the management of the Hospital, including but not limited to, has the right to hire lay off, promote, demote, transfer, discharge or discipline for just cause, require observance of reasonable Hospital rules and regulations direct the working forces and to determine the materials, means and the type of service provided, shall be deemed the sole and exclusive functions of management [sic].

The Employer's arguments also cite rules it has adopted -- its attendance policy and the Kronos User Guide, which states rules for hourly employees. Relevant parts of the attendance policy are set out below:

Policy: In order to maintain a safe and productive work environment, Children's Hospitals and Clinics expects employees to be at work on time, and ready to work, for all scheduled shifts [emphasis in original]. Deviations from assigned work agreements, and/or start times/end times must be pre-approved by an employee's manager/ supervisor. . . Absenteeism and tardiness are disruptive and may be considered grounds for disciplinary action up to and including termination. . .

Tardy: Means arriving for a scheduled shift at any time later than the time set to begin the shift.

> On-Time: Means the start time of the shift, not one minute later, ten minutes later or 2 hours later.
>
> Ready for Work: Means that the employee is dressed, prepped and ready to begin his/her job duties at the start of the employee's shift. For example, if the employee's shift starts at 3:00 p.m., the employee must be dressed, prepped and at their workstation at 3:00 p.m. not 3:05, 3:10 p.m. . . .

The Kronos User Guide, in the section entitled, "Understanding the Rounding Rule," states:

> Please keep in mind that even though the system rounds your time, you are expected to be at work at your designated time."

DECISION

The Union makes the following primary arguments. For many years, first shift employees of the Department have swiped out from one to seven minutes before the 3:30 p.m. end of the shift, without discipline. Several witnesses for the Union so testified, including Ida M. Miller, a Nursing Assistant who has worked the first shift for many years and who was a Union steward on that shift from 1996 through 2006. Miller testified that about four years ago, the then Director of the Department, Laramie White, passed out a memorandum to the Department's first-shift employees at a morning meeting, instructing them that they must no longer swipe out earlier than 3:30 p.m. Miller objected to White that first-shift employees of other departments were permitted to swipe out as early as 3:23 p.m. Miller testified that White explained the reason for the directive -- that employees were putting their equipment away early and standing by the Kronos terminals to swipe out. Miller testified that she told White she would bring a grievance

challenging his directive, that White told her he would talk to his superiors, and that the following day, he rescinded the directive.

The Union argues that the length of time during which employees have, with knowledge and acquiesence of the Employer, swiped out from one to seven minutes before the end of the shift makes that practice one that is contractually binding on the Employer and that cannot be changed without bargaining that leads to an agreement to change it.

In addition, the Union argues that, even if this practice is held not to be binding through knowledge and acquiescence, it is, nevertheless, a practice beneficial to employees that is protected by Article III, Section D, of the labor agreement -- its *Maintenance of Benefits provision*. As I understand it, the Union's argument is that the practice of swiping out one to seven minutes before 3:30 p.m. with Kronos' rounding till that time is a working condition that cannot be "reduced" to the strict definition of a work day given in the second sentence of Article IV, Section A -- that "eight (8) hours shall constitute a day's work. . . ." The Union urges that this working condition has existed for years and that, because it existed at the time the current labor agreement was negotiated and executed, it is a condition falling within the restrictions imposed on the Employer by the Maintenance of Benefits provision, which states:

> Where wages, hours and other conditions specifically covered by this Agreement are lower than those now received by an individual employee, such employee shall not have such conditions reduced by the execution of this Agreement.

The Union also argues that the requirement imposed on first-shift Department employees that they attend a daily meeting promptly at 7:00 a.m. without compensation for the time before 7:00 a.m. when they must wait to swipe in at the Kronos terminals, violates Article IV, Section A, of the agreement, which requires payment of overtime for daily work that exceeds eight hours.

In addition, the Union makes the following argument. It presented evidence that the first-shift employees of the Hospital's other departments are still permitted to swipe out from one to seven minutes before 3:30 p.m. The Union argues that the new requirement that Department employees must wait until 3:30 p.m. to swipe out is an unreasonable work rule because it adversely discriminates against them.

The Union also argues that the new requirement is unreasonable because it causes hardship to many first-shift Department employees. The Union presented evidence that they now must miss the public bus that arrives at the Hospital at 3:30 p.m. and, instead, must wait till 3:45 p.m. for the next bus, which follows a different route, lengthening their commuting time. In addition, the Union presented evidence that, because employees must now wait at the bus stop in front of the Hospital, they may be at risk of violence because of the nature of the neighborhood.

The Union argues that the new rule has caused some employees, who work a second job at a nearby hospital, to be late for the 3:30 p.m. shift-start at that hospital.

The Union argues that the Employer's rescission of a similar rule change four years ago after Miller threatened to grieve the change is the equivalent of a grievance settlement -- one that the Employer has now violated by Hammiller's directive of January 17, 2007.

The Employer makes the following primary arguments. Hammiller's directive of January 17, 2007, should not be described as a change of a work rule. It was merely a statement to employees of the expectation that they work during the entire work shift, and, as such, it was a restatement to them of the requirement that they work a full eight-hour shift, as required by the written attendance policy and the written Kronos User Guide. Hammiller's directive restated the reasonable work rules already in place -- something permitted under Article XX of the labor agreement, which provides that "the management of the Hospital . . . has the right to . . . require observance of reasonable Hospital rules. . . ."

The Employer argues that it was necessary to restate the rule because management had noticed that employees were stopping work and lining up at the Kronos terminals before the end of the work shift. The Employer concedes, however, that, by the directive of January 17, managers in the Department became more diligent in enforcing the existing work rule.

The Employer rejects the Union's argument that to require Department employees to work until 3:30 p.m. is unreasonable because it denies them a reasonable offset to the extra time they must take in the morning, as they line up at the Kronos

terminals from one to seven minutes before 7:00 a.m. in order to report promptly to the 7:00 a.m. daily Department meeting. The Employer argues that, if an employee swipes in earlier than 7:00 a.m,. he or she does so by choice and that the Employer has not disciplined employees for being a few minutes late to the daily meeting -- though the Union notes that employees can receive an adverse performance evaluation for being late to the meeting. In addition, the Employer argues that, even if employees must, in fact, swipe in a few minutes before 7:00 a.m. to be on time to the the 7:00 a.m. meeting, the time before 7:00 a.m does not qualify as compensable time under Section 4(a) of the Portal to Portal Act, 29 U.S.C. 254(a).

The Employer also makes the following arguments that the language of the Maintenance of Benefits provision of the labor agreement does not support the Union's position. It argues that swiping in and out is not something "specifically covered" by the labor agreement and therefore, that Hammiller's directive not to swipe out before 3:30 p.m. did not violate the Maintenance of Benefits provision, which protects only "wages, hours and other conditions specifically covered by this Agreement."

The Employer also argues that, even assuming arguendo that the directive of January 17 reduced "wages, hours and other conditions specifically covered" by the labor agreement, that reduction did not result from the execution of the labor agreement, but, instead, resulted from the mid-contract restatement of a work rule. According to this argument, the language of the Maintenance of Benefits provision cannot come into play unless execution of the labor agreement results in a reduction of a

covered benefit previously enjoyed, whereas, in the present case, the Employer rests its right to make the putative change on its management right to make reasonable rules during the term of the agreement.

The Employer makes several arguments rejecting the Union's argument that the directive violates the labor agreement as modified by practice. First, it argues that Article XX, the Management Rights provision, gives it the right to "require observance of reasonable Hospital rules" and that the directive of January 17, which requires employees to work till the end of the shift, was such a reasonable rule. According to the Employer, the practice alleged by the Union cannot override this express provision of the agreement.

Second, the Employer argues that, in the Maintenance of Benefits provision of the agreement, the parties have expressed the only circumstance in which a practice cannot be changed, i.e., when both of two conditions coincide -- 1) when the practice pertains to "wages, hours and other conditions specifically covered by this Agreement" and 2) when the Employer asserts that the execution of the agreement now permits the reduction of the practice. The Employer urges that, because the parties have expressed this limitation, the principle, expressio unius est exclusio alterius (the expression of one thing is the exclusion of another) should be applied, thus excluding the right of the Union to assert the binding effect of any other kind of practice.

Third, the Employer argues that Article II, Section A, of the labor agreement defines a grievance as a dispute about

"the interpretation of or application of the express terms and provisions of this Agreement" and that Article II, Section C, provides that "the authority of the arbitrator shall be limited to making an award relating to the interpretation or adherence to the written provisions of this Agreement . . . ." The Employer argues that there is no express or written provision in the agreement that deals with the time when swiping out must occur and, therefore, that an award deciding that a practice -- unexpressed and unwritten in the agreement -- has been contravened would violate Article II of the agreement.

I make the following resolutions of the parties' arguments. The written contract, in Article IV, Section A, contains language establishing eight hours as the length of a "day's work," or a work shift. The Union showed that for many years before the execution of the labor agreement in August of 2006 (and before the directive of January 17, 2007), a practice had arisen by which employees stopped working one to seven minutes before the end of the work shift in order to swipe out during that time. For those employees, the effect of that practice was to end the work shift one to seven minutes before the eight hours established as the length of the work day by Article IV, Section A. With the directive of January 17, the Employer sought to require employees to work the full eight hours established as the work shift by Article IV, Section A.

In Elkouri and Elkouri, How Arbitration Works, (Sixth Ed. 2003) 605, et seq., three uses of past practice are identified

that may affect interpretation of a labor agreement -- "1) to provide the basis of rules governing matters not included in the written contract; 2) to indicate the proper interpretation of contract language; or 3) to support allegations that the 'clear language' of the written contract has been amended by mutual agreement [implied in practice] . . . ."

In the present case, the written contract includes language establishing the length of the work day, and, thus, the use of practice at issue here is neither the first nor the second use described by the Elkouris -- "to provide rules governing matters not included in the written contract," or "to indicate the proper interpretation of [ambiguous] contract language." Rather, as I interpret the evidence and the argument, the grievance asserts that, by an agreement implied in practice, the parties have amended the labor agreement to permit employees to end the work day one to seven minutes earlier than the eight-hour day established by Article IV, Section A.

Such an amendment by practice is difficult to establish -- primarily because it requires proof of a clear, mutual intent to change the written agreement. The evidence in the present case comes close to showing such mutuality -- by an apparent acquiescence to the practice when, four years ago, the Employer withdrew a directive similar to that of January 17. I rule, however, that the evidence is not strong enough to establish a binding, mutually intended amendment of the labor agreement, implied in practice. Miller testified that Laramie White, then the Director of the Department, rescinded the directive after

she threatened to grieve it, but such a rescission may have occurred for other reasons than the Employer's assent to an amendment of Article IV, Section A.

I rule, therefore, that the evidence is not sufficient to establish a binding practice that establishes the right of employees to swipe out from one to seven minutes before the end of the shift at 3:30 p.m.

Nevertheless, for the following reasons, I rule that the practice of swiping out one to seven minutes before 3:30 p.m. is protected by the Maintenance of Benefits provision of the labor agreement. The Employer argues that swiping in and out is not something "specifically covered" by the labor agreement and therefore, that Hammiller's directive not to swipe out before 3:30 p.m. does not come within the scope of the Maintenance of Benefits provision, which protects only "wages, hours and other conditions specifically covered by this Agreement." I accept the Union's argument, however, that the directive does come within the scope of the Maintenance of Benefits provision because the directive would affect hours of work, a subject "specifically covered" in Article IV, Section A, by increasing them from one to seven minutes -- for employees, a "reduction" of conditions.

The Employer also argues that the Maintenance of Benefits provision protects only reductions that are caused by <u>execution</u> of the labor agreement, whereas the alleged reduction at issue came on January 17 in the middle of the term of the labor agreement. This argument urges a narrow interpretation of the

phrase, "conditions reduced by the execution of this Agreement." Under this interpretation, it appears that no reduction of conditions made during the contract's term would be protected by the Maintenance of Benefits provision -- unless, possibly, the asserted right to make the reduction is based upon a new contract term. I interpret the phrase more broadly to mean that the parties do not intend the labor agreement to reduce better "wages, hours and other conditions specifically covered" by the agreement even if, as here, the basis for the asserted right to make the reduction is a mid-term strict application of Article IV, Section A, expressed through a work rule.

I conclude that the practice of swiping out from one to seven minutes before 3:30 p.m. is protected by the Maintenance of Benefits provision of the labor agreement, Article III, Section D, for the duration of the agreement.

My decision in this case is based upon interpretation of the written provisions of the labor agreement -- principally Article III, Section D, and Article IV, Section A. As such, it fits the grievance-procedure requirements given in Article II, Section A -- which defines a grievance as a dispute about the interpretation of the "express terms" of the agreement" -- and in Article II, Section C -- which provides that an arbitrator's authority is limited to making an award relating to the interpretation of "the written provisions of this Agreement."

I do not rule on the Union's argument that the Employer has violated the labor agreement by requiring first-shift Department employees to attend a daily meeting promptly at 7:00

a.m. without compensation for the time before 7:00 a.m. when they must wait to swipe in at the Kronos terminals. As I interpret the grievance, which seeks maintenance of "the status quo in regards to punching in and out," that matter is not within the scope of the grievance.

AWARD

The grievance is sustained. For the duration of the current labor agreement, the Employer shall rescind Hammiller's directive of January 17, 2007, as described above.

February 17, 2008

Thomas P. Gallagher, Arbitrator