

**IN THE MATTER OF ARBITRATION BETWEEN**

<b>Good Samaritan Society, International Falls, Minnesota</b>	)	<b>FMCS No. 10-50591-3</b>
	)	
<b>“Company or Employer”</b>	)	<b>Issue: Seniority/Loss of Hours</b>
	)	
<b>and</b>	)	<b>Hearing Site: International Falls, Minnesota</b>
	)	
	)	<b>Hearing Date:       07-23-10</b>
	)	
<b>International Association of Machinists &amp; Aerospace Workers, Woodworkers, Local Lodge No. W33</b>	)	<b>Briefing Date:       09-03-10</b>
	)	
<b>“Union”</b>	)	<b>Award Date:         10-05-10</b>
	)	
	)	<b>Mario F. Bognanno, Labor Arbitrator</b>
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**JURISDICTION**

The Company, Good Samaritan Society, owns and operates a nursing home facility in International Falls, MN. The Union, IAMAW, Woodworkers, Local Lodge W33, represents two bargaining units: (1) Licensed Practical Nurses (“LPNs”) unit; and (2) Service & Maintenance Employees (“SMEs”) unit, which covers the Certified Nursing Assistant (“CNA”) job classification. With respect to each unit, the Company and Union are parties to a Collective Bargaining Agreement (“CBA”), with effective dates of October 1, 2009 through October 30, 2011. (Joint Exhibit 1(A)—LPN unit & Joint Exhibit 1(B)—SME unit)

Pursuant to the CBAs’ Article 7 this matter was heard in International Falls, MN on July 23, 2010. Appearing through their designated representatives, the parties were afforded a full and fair opportunity to present their respective case. The parties stipulated that the instant matter was properly before the undersigned

for a final and binding determination and they waived the CBAs' Article 7 provision requiring a decision within thirty calendar days following the close of the hearing. Witnesses were sworn, their testimonies were cross-examined and exhibits were accepted into the record. Post-hearing briefs were exchanged on or about September 3, 2010. Thereafter, the matter was taken under advisement.

## **APPEARANCES**

### **For the Union:**

Robert D. Walls	Assistant Directing Business Representative, IAMAW, District W3
Brenda Pavleck	LPN and Grievant
Pat Fredman	CNA and Grievant

### **For the Company:**

Timothy D. Loudon	Attorney-at-Law
Adam Coe	Administrator
Lou Tomsich	Workforce Consultant
Lisa Scherk	Workforce Consultant
Deanna Kittelson	Director, HR
Sharon Kastiuk	Director of Nursing

## **I. RELEVANT LPN AND SME CBA PROVISIONS**

### **Purpose of Agreement [Identical language in the LPN and SME CBAs]**

C.●●● The parties agree that there shall be no separate agreements, with individual members of the bargaining unit that are contrary to the terms of this Agreement and, *further, that no past practice that is inconsistent with the terms of this Agreement shall be enforceable absent the express consent of both parties.*

(Joint Exhibits 1(A) & 1(B); emphasis added)

### **Article 3, Section 3.1 [LPN CBA only]**

**Work Schedules:** The Care Center work week begins on a Sunday.●●● *Employer shall distribute shifts according to seniority as it is defined in Section 5.1. Employer shall not change the shift of any employee in an arbitrary and capricious manner without the consent of the Union. ●●● Normal starting and ending times will be: 6:00 a.m. – 2:30 p.m.; 2:15 p.m. – 10:45 p.m.; and 10:30*

*p.m. – 6:30 a.m.*

(Joint Exhibit 1(A); emphasis added)

**Article 3, Section 3.8 [LPN CBA only]**

Consistent with Article 15, Management Rights, the employer (management) are (sic) obligated to anticipate the changing market place (customer referrals and payment sources) and respond accordingly with operations and staffing. It is not the intent of the employer to change the schedules/hours of any employee or group of employees and reschedule those hours to another employee or category of employees in an arbitrary and capricious manner. Prior to management changing staffing levels covered by this Agreement, management will notify the Union of its intended actions. *Management will then meet with the affected employees and the Union to discuss and implement ways of utilizing those employees to minimize the impact on the bargaining unit.*

(Joint Exhibit 1(A); emphasis added)

**Article 5, Section 5.2 [Identical language in the LPN and SME CBAs]**

**Reduction in Hours:** *If reductions in hours are required due to changing economic, case mix, census or other changes that impact a specific department, shift, or job classification, those reductions will be based on the needs of the residents and the need to meet regulatory requirements. Where possible, the facility will:*

●●●

(c) *By cutting hours from part-time employees first by seniority, then full-time hours by seniority on the shift and position affected.*

(Joint Exhibits 1(A) & 1(B); emphasis added)

**Article 9, Section 9.2 [Identical language in the LPN and SME CBAs]**

*All meal breaks shall be without pay on the employee's own time.*<sup>1</sup>

(Joint Exhibits 1(A) & 1(B); emphasis added)

**Article 14 [Identical language in the LPN and SME CBAs]** The Employer retains the full and unrestricted right to operate and manage ●●● and to perform any inherent managerial function not specifically limited by this Agreement.

(Joint Exhibits 1(A) & 1(B))

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<sup>1</sup> With respect to LPNs, this sentence is uniquely followed by the language: "LPN's (sic) will only be called off their lunch break in case of an emergency." (Joint Exhibit 1(A))

## **II. ISSUE STATEMENT**

The issue in dispute may be phrased as follows:

Whether the Company violated relevant provisions of the LPN and SMC CBAs when it cut thirty minutes of paid time from shifts worked by the senior full-time night LPN and CNA grievants? If so, what is an appropriate remedy?

## **III. BACKGROUND AND FACT**

All three shifts of the facility are staffed with LPNs and CNAs, along with other job classifications. For years the full-time LPNs and CNAs working days and evenings have been scheduled to work 8½ hour shifts, consisting of 8 hours of paid work time and ½ hour of off-the-clock unpaid (lunch or rest) break time. In contrast, for many years, even decades, LPNs and CNAs working nights have been scheduled to work 8 hour shifts, consisting of 8 hours of paid work time, including ½ hour of on-the-clock and paid break time taken “on the run” and “when resident needs permitted,” if at all. Until recently, staffing and the level of resident demand dictated that night shift LPNs and CNAs not “leave the floor” when taking breaks. Night shift hours are from 10:30 p.m. to 6:30 a.m.

The above-described structure of day and evening shift schedules remains to this date. However, in July/August 2009, the Employer cut the number of hours paid to night shift LPNs and CNAs. While still being scheduled to work a 10:30 p.m. to 6:30 a.m. 8 hour shift, the LPNs and CNAs were being newly required to take a ½ hour unpaid break, off-the-clock.. Further, they were told that they should “leave the floor” and/or “facility” during break time. As a consequence of these changes, the affected night shift LPNs and CNAs have experienced economic losses. Formally, the affected full time employees were being paid for

80 hours of work every two weeks, now, after the changes, they are being paid for 75 hours of work on a biweekly basis. In addition, this reduction in paid hours also has reduced the amount of paid-time-off and retirement benefits that the affected employees may accrue.

It is uncontroverted that motivation for the referenced reduction in paid hours per shift for LPNs and CNAs was a business-related decision; the reduction was not an arbitrary and capricious decision, as prohibited by Article 3, Sections 3.1 and 3.8 in the LPN CBA; and the decision was compliant with the consultation requirement described in the LPN CBA, Article 3, Section 3.8. (Joint Exhibit 1(A)) Moreover, the record evidence shows that in 2008 the Employer trimmed the day and evening LPN and CNA staffing levels but not the night shift's staffing level, and that it did so to reign in operating expenses in step with falling levels of revenues and to resize the facility. The number of licensed skilled beds operated by the nursing home has fallen from 101 to 64 between 1963 and mid-2010. Currently, the facility's average daily census is approximately 57 residents—a number that is expected to continue spiral downward as funding and government regulations continue to compromise the Company's revenue outlook. (Testimony by Adam Coe)

On June 18, 2009, the Employer met with the facility's nurses to discuss the need for night shift reduction in paid hours. The record suggests that there were two full-time LPNs and two full-time CNAs plus one part-time CNA on the night shift. The Company reported that it needed to trim 1 hour of paid LPN time per shift and 1½ hours per shift of paid CNA time. (Joint Exhibit 7(1)) To reach

these goals, a number of options were discussed. (Joint Exhibit 7(1) through 7(6))

On or about July 17, 2009, on an across-the-board basis, the Company ceased compensating its three night shift CNAs for the ½ hour break that was newly mandated, achieving the goal of cutting night shift CNA paid hours by 1½ hours. (Joint Exhibit 7(7)) Although not entirely clear, the record suggests that the Employer's two night LPNs reduced the length of their shifts by 15 minutes and the junior LPN also took an unpaid ½ hour break, achieving the goal of cutting night shift LPN paid hours by 1 hour per shift. This arrangement proved unsatisfactory and at the Union's behest, it was changed. Hence, during part of July and August 2009, the junior LPN took a 1 hour unpaid break, while the senior LPN continued to work/break as usual. (Joint Exhibit 7(3) and (7)) However, this strategy also proved to be unsatisfactory from the perspective of resident care. Thus, on August 7, 2009, the Company alerted all concerned of its intent to formally change, on an across-the-board basis, night shift scheduling by mandating that all LPNs and CNAs take an unpaid ½ hour break during the course of their scheduled 8 hour shifts. (Joint Exhibit 7(8))

Shortly after implementation of this night shift change the Union grieved on behalf of the LPN and CNA Grievants in this case. (See: Joint Exhibit 2 (A) and Joint Exhibit 2 (B), respectively, both dated September 2, 2009) *Inter alia*, both grievances allege that the changes in question violated the seniority provisions in Article 5, Section 5.2(c) of the CBAs. On September 15, 2009, the Company rejected both grievances. (Joint Exhibit 7, (9), (10) and (11)) Ultimately, the grievances were appealed to arbitration for final resolution.

#### **IV. THE UNION'S POSITION**

Initially, the Union attacks the Company's argument that it did not cut the hours of night shift LPNs and CNAs, rather it is enforcing Article 9, Section 9.2 of the CBAs by requiring said employees to take an unpaid ½ hour break per shift. This construction of Company's actions, the Union argues, disguises the fact that the long-standing practice has been to pay the LPNs and CNAs who are scheduled to work 8 hour shifts for 8 hours of work, not 7½ hours per shift. In addition, the Union contends, this reduction in hours was wrongly made on an across-the-board basis rather than in compliance with Article 5, Section 5.2's seniority mandate.

Further, the Union argues that for 20 years Grievant Brenda Pavleck, LPN, had been scheduled to work an 8 hour night shift and that she was paid for 8 hours of work even though she may have taken ½ hour breaks. Moreover, the Union continues, for the past 5 years this same fact pattern applied to Grievant Pat Fredman, CNA.

Still further, the Union maintains that scheduling 8-hour night shifts, fully paid even though a break of ½ hour may have been taken is an enforceable practice and is not inconsistent with Article 9, Section 9.2 in the CBAs. Finally, for these reasons the Union requests that the two grievances be sustained and the adversely affected employees be made whole.

#### **V. THE COMPANY'S POSITION**

The Company begins by acknowledging that it did have a multi-year past practice of compensating night shift LPNs and CNAs for breaks; however, the

underlying business foundation for this practice has long since passed. In this vein, the Company argues that Article 9, Section 9.2 in the CBAs state that “All meal breaks shall be without pay on the employee’s own time” and that the preamble to the CBAs state that “...no past practice that is inconsistent with the terms of this Agreement shall be enforceable absent the express consent of both parties.” The Company urges that these negotiated terms allow the Employer to repudiate the practice in question and enforce Article 9, Section 9.2.

Next, the Company argues that if its actions are construed as a reduction in hours, it, nevertheless, complied with the LPN seniority requirements in Article 3, Sections 3.1 and 3.8 and with Article 5, Section 5.2 in both CBAs. First, the Company observes that it is uncontroverted that the Employer’s actions in this case were not “arbitrary and capricious.” Second, the Company points out that the reduced hours were motivated by “...changing economic, case mix, census or other changes that impact a specific department, shift or job classification...”, as required in Article 5, Section 5.2 of the CBAs. Third, the Company continues, Article 5, Section 5.2 also states that any reduction in hours will be “...based on the needs of the residents...” and, as Adam Cox, Administrator, testified without contradiction, the parties experiment with the strict application of seniority *per* Article 5, Section 5.2(c) failed to provide the requisite “level of resident coverage and continuity of care.” Finally, while the preferred way of reducing hours *per* Article 5, Section 5.2(c) is *via* seniority, this is not the “mandated” way, argues the Company, because the phrase “Where possible” obviously modifies the Employer’s obligation to reduce hours by application of strict seniority.

In conclusion, the Company maintains that to reduce night shift hours as dictated by the economics and regulations of the time cannot be based on seniority because to do so would compromise the interests of residents. For this reason, the grievances should be denied.

## **VI. DISCUSSION AND OPINION**

The facts of this case are largely undisputed. For several years, night shift LPNs and CNAs were being paid for working 8 hours even though, when feasible and during their scheduled 8 hour shifts, they would take up to ½ hour for a rest or meal break. However, breaks were taken “nearby,” within the facility, because patient load was such that they could be called back into service as dictated by resident care needs. Patient load has subsided over the years and to balance operating costs with revenues, the Company has been compelled to trim staffing levels and/or paid hours of work on its day, evening and night shifts. In this regard, the paid hours worked by LPNs and CNAs were reduced in August 2009. These reductions were across-the-board, without regard to seniority. In addition, these reductions had the practical effect of reversing the past practice of paying night shift employees during their ½ hour breaks. Further, the Company required the night shift employees to take a ½ hour break, off-the-clock and off premises, if they wished.

The practice of paying night shift employees for their ½ hour break time obviously conflicts with Article 9, Section 9.2, which provides in part that “All meal breaks shall be without pay on the employee’s own time.” Also, in a related vein, there is contract language in the CBAs’ introductory statements which holds that

“...no past practice that is inconsistent with the terms of this Agreement shall be enforceable absent the express consent of both parties.” However, in general, this language is gratuitous in the sense that a well established principle of contract interpretation is that when expressed language contradicts a past practice the former shall prevail. Of course, to uproot such a past practice during the term of an Agreement requires that the Union and employees be given adequate notice of the Employer’s intent to abandon the practice and to enforce the Agreement.

In this case, the Company notified both the Union and the affected employees of its intent to withdraw its secular acquiescence to the practice of compensating night shift LPNs and CNAs for break time and to enforce Article 9, Section 9.2 of the CBAs. Given the number of night shift LPNs and CNAs on payroll, this strategy perfectly fit the Company’s goal of reducing 1 hour and 1½ hours of paid time *per* shift for LPNs and CNAs, respectively. Moreover, the Company’s action did not change the 10:30 p.m. to 6:30 a.m. length of the night shift. However, this so-called “break time” strategy for reducing night shift hours upset the Union because it was seen as a convenient way to side-step application of the CBAs seniority requirements. Given their seniority, the Grievants in this case are losing 5 hours of pay biweekly, which equals the loss experienced by the other full-time night junior LPN and by the other full-time junior CNA.

As the Union suggests, the undersigned concludes that the instant matter should be analyzed as an Article 5, Section 5.2 seniority case as opposed to a past practice and Article 9, Section 9.3 (i.e., unpaid meal breaks) case. Be this as it may, the undersigned ultimately concludes that the Employer’s actions in this

matter do not violate the identified seniority language. This conclusion derives from the fact that language in Article 5, Section 5.2 sets forth two predicate conditions that must be met before the Employer is required to allocate reduced hours on the basis of seniority. Neither of these conditions was met. In part, Article 5, Section 5.2 is as follows:

**Reduction in Hours:** If reductions in hours are required due to changing economic, case mix, census or other changes that impact a specific department, shift, or job classification, those reductions will be based on the needs of the residents and the need to meet regulatory requirements. Where possible, the facility will:

•••

(c) By cutting hours from part-time employees first by seniority, then full-time hours by seniority on the shift and position affected.

(Joint Exhibits 1(A) & 1(B); emphasis added) Interpreting this language is straight forward. Clearly, reductions in hours “... will be based on the needs of the residents...” It is undisputed from the record evidence that the parties brief experiment with the application of Article 5, Section 5.2(c)’s seniority language among night shift LPNs did not meet the “...needs of the residents...” predicate and, by extension, the sense of the record is that in all likelihood the same outcome would have resulted had the experiment had been applied to CNAs. Indeed, although the moving party, the Union made scant reference to the “...needs of the residents...” matter. Second, this finding brings the Article 5, Section 5.2 predicate, “Where possible,” into play. Having found that the “...needs of the residents...” would not be met if the reduction in hours were allocated on the basis of strict seniority, it is “impossible” to reach and apply the Article 5, Section 5.2(c) seniority rule.

**VII. AWARD AND ORDER**

The above-articulated Issue Statement is answered in the negative. The grievances are denied.

Issued and ordered from Tucson,  
Arizona on the 5th day of October 2010.

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Mario F. Bognanno, Labor Arbitrator