

**In The Matter of Arbitration
Between:**

**New Brighten Health and Rehabilitation,
Employer
and
United Food and Commercial Workers, Local 1189,
Union**

**FMCS Case Number 16043-54412-8
Carol Berg O'Toole
Arbitrator**

Representatives:

For the Union:

**Timothy J. Louris, Esquire
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For the Employer:

**Sara B. Kalis, Esquire
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Witnesses:

For the Union:

**Jeanine Owusu, Union Representative
Donnie Baker, CNA
Andrea Derauf, NAR
Barb Drabant, TMA/NAR**

For the Employer:

**Carolyn Hervin, Executive Director
Michael J. Kloss, Director of Labor**

Preliminary Statement

The hearing in the above matter commenced on July 26, 2016 at 10:07 A.M. and concluded at approximately 4:45 P.M. on the same day. The parties involved are United Food and Commercial Workers, Local 1189, (Union) and New Brighton Health and Rehabilitation (Employer). The hearing was transcribed. Witnesses were sequestered. The parties presented opening statements, oral testimony, oral argument, and exhibits. All exhibits offered were received with the arbitrator's admonition that, depending on the exhibit, some would be given less weight. Post hearing briefs were timely filed by both parties on August 26, 2016. The arbitrator closed the hearing upon receipt of the last post hearing brief on August 26, 2016

Issue Presented

The parties agreed on the issues:

Issue One: Whether the Union met its burden of proof to show the Company violated the Collective Bargaining Agreement when the Company implemented a new schedule?

Issue Two: If so, what is the appropriate remedy? Transcript (T.) at 10.

Statutory Jurisdiction

The Employer and the Union are signatories to two collective bargaining agreement (Agreements), Joint Exhibit 1 and 2, covering the employees, including Certified Nursing Assistants and Licensed Practical Nurses, involved in this dispute. Both Agreements provide in Article 9 that if the grievance is not resolved during the grievance procedure,

the grievance may be referred to arbitration. The parties could not agree on a resolution through the grievance procedure; thus, the dispute is properly before the arbitrator. Both parties agreed that there were no other procedural or jurisdictional issues.

Union's Opening Argument

Counsel for the Union opened by stating that the Union has represented the fifty employees, Licensed Practical Nurses and Certified Nursing Assistants at New Brighton Health & Rehabilitation for "many, many years". T. at 17. The work schedule was created by the Employer and entails three shifts. Pay periods run for two weeks, from Friday through Thursday. T. at 18. This work schedule has remained the same until the change which was the impetus for this arbitration.

Counsel previewed the witnesses for the Union. Donnie Baker (Baker) is a Certified Nursing Assistant who works the second shift with the same schedule for ten years. It is called his "block". Barb Drabant (Drabant) has had the same schedule for fifteen years. T. at 20. Andrea Durauf (Durauf) is an employee who has had the same schedule for seventeen years. The stability and predictability is important to employees and allows employees to know how many hours will be worked so employees could plan. Counsel said that these reasons are why they negotiated specific language that restricts the Employer's right to modify the employees' schedule.

The Union stated that the Employer has always posted the schedule on time. Joint Exhibit 1 and 2, Article 4, Section 4.1.1. Counsel pointed to the key language in dispute and quoted Article 4, Section 4.1.4, "The Employer shall not change the shift of any employee in an arbitrary and capricious manner without the consent of any such

employee.” Joint Exhibit 1 and 2. Counsel stated that the Employer erased the entire schedule, took the names off, removed the configuration of “x’s” and the employee blocks that had been in place for years, and made everyone bid the new schedule. T. at 23. Employers were forced into a new block. Some employees had fewer hours. T. at 25. Counsel stated that the Employer never pointed to a single deficiency in the old schedule, nor did they make any effort to work with the Union to minimize impact to the employees. T. at 24. In the letter to the Union announcing the change, the Employer cited the “needs of residents and improved resident’s care”. T. at 25, Employer Exhibit 4.

Counsel for the Union stated that the change in schedule did not alter the overall totals where four to seven employees worked on any given work day. Mostly, in the old and new schedule, there are six employees working every day. The Union stated that there were certainly ways to guarantee six employees a day without “throwing everyone’s schedule out the window. But there was never any discussion with the Union to say we need to get uniformity from day to day.” T. at 26. Counsel suggested that the Employer could restructure, by moving an open day over to a day with lower staffing. Under the old schedule, employees had consistency with their days off. T. at 27.

Counsel stated that the Employer is curtailed by the language that requires them to state a specific reason before they institute a massive change and to maintain the schedule “whenever possible”. Joint Exhibits 1 and 2. The Union is not trying to hamstring the Employer and that residents’ needs always have to be considered first. The Employer has a lot of options: call in employees who are not scheduled; bring in

casual employees; post open positions for employees to bid on and fill; ask for volunteers to restructure their schedules. T. at 31-2. The Union stated that their position in this arbitration is not that the Employer is "locked into" a schedule. What the Union objects to is that the Employer threw out the schedule and never offered a good reason for doing so. A better solution would have been for the Employer to undo changes to the schedule to the extent that the schedule was untenable by modifying it, not throwing it out. To show the good faith of the Union, a grievance was filed well before the new schedule was implemented to avoid the trouble of undoing a schedule and disrupting business. However, the Employer went ahead with changing the schedule anyway. The Union seeks a reversion to the former schedule.

Employer's Opening Argument

Counsel for the Employer states that their basic tenet is that the Employer has the right to make a work schedule. She described the work of the Employer as rehabilitation services and a full range of nursing care, including skilled. Counsel described the business as much more than a care center or nursing home for the most vulnerable people, eighteen years old and up. Counsel stated that the rehabilitation part involves individuals recovering from major surgeries and helping them to regain functions. The work of the business includes all aspects of care: bathing; dressing, etc. The Employer said imagine getting bathing help from five or more people with a new person every week. Counsel stated that she had a 93 year old grandfather and knew how important change is to him.

Counsel stated that patient care was suffering and pointed to Union Exhibit 2. She stated that there was "open shift after open shift". T. at 36. Counsel stated that the

patient numbers don't change from Thursday to Monday and that the Employer needs to have certain people on. Counsel said the Employer implemented a number of changes to attempt to solve the problems. They increased pay, began using a temporary staffing agency, and promoted two people from the group. Counsel stated that it took the company months to resolve this problem. Counsel described the decision to implement a new schedule as not an uninformed decision. Counsel claimed that the new schedule has worked every single weekend. Counsel stated that the patient numbers don't change from a Monday to a Tuesday and they need to have certain people on and certain numbers of people. T. at 36. The Employer made a number of changes: wage increases; use of a temporary staffing agency; promotion of two people from the employee group to a supervisory role to support the night shift. It took the Employer a couple of months to resolve the problem. T. 37.

The Employer discussed the provisions in the Agreements that pertained to this dispute. Counsel stated, "The reality is there is almost two full pages of text dealing with scheduling." T. at 40. Counsel asked, "[W]hy would we need an almost two-page long Hours of Work language if the company didn't have the right to change all of the schedules..." T. at 39-40. Counsel stated that the language has remained consistent and just because the Employer hasn't changed the hours doesn't mean they can't. "But the reality is we didn't actually change the hours, we just changed the schedule..." T. at 41. Counsel then discussed the Management Rights Clause quoting Article 17, "Except as expressly limited by the CBA..." T. at 41.

The Employer started the planning for the change in December, 2015. The Employer made a concerted effort to look at staffing. The Employer sent the Executive Director to

a class and engaged an expert on revising schedules. T. at 39. The Employer said that they welcomed input from employees on the schedule but the single response they got was a grievance. The employer stated that business needs dictated a change and that they gave plenty of notice, including two weeks to bid. They indicated to the eight LPNs and forty-five CNAs that these are all the opening shifts to bid on. The Employer honored seniority and presented the optimal schedule. Counsel indicated that the employees had ample time to bid. The Employer stated that the Union cannot write added language into the contract to say the Employer can't change all the schedules. The Employer informed the Union and respected seniority. Counsel asked that the Union's grievance be denied.

Union's Rebuttal to Employer's Opening Statement

The Union argued that the Employer's argument is that there were so many open positions that the entire schedule needed revamping. Counsel for the Union said that it is the nature of the business to have openings and that the Employer has a list of employees to fill open positions. The Employer doesn't have to change every employee's schedule because there are some open positions. The Union is not seeking to have the Employer ask every employee for the schedule each employee wants. What the Union suggests is asking employees to work the open days. A staffing issue doesn't give license to overhaul the entire schedule. The result of the overhaul was that employees were moved from second shift to the first shift.

Employer's Rebuttal to Union

Counsel for the Employer state that the Employer modified the schedule as appropriate. Preferences were allowed to be expressed by bidding. T. at 48.

Union's Case in Chief

Witness: Jeanine Owusu

Owusu is a union representative for the United Food and Commercial Workers, Local 1189. She described her job. She monitors the contracts, takes calls from members who feel a violation of the contract has occurred, investigates, and files grievances for CNA's and LPN's. The Union has represented the employees at this site for thirty-six years. She has worked at this site for about ten years and has been a union representative for sixteen years. She previously worked as a nursing assistant and a TMA in a nursing home, Bethel Care Center in St. Paul.

Owusu testified that the two Agreements have the same provision, Section 4.1.1. Joint Exhibit 1 and 2. She testified that the Employer followed the first part as well as the second and that the Union has never had a complaint on those parts of the Agreements. The Union also had no problem with the five day posting provision.

Owusu explained how shifts are filled by seniority and finally how the Employer can actually force the least senior person to take the shift. T. at 57. Section 4.1.2, Joint Exhibit 1 and 2. The Employer can also call a temporary agency to help fill vacancies.

Owusu testified how she prepared Union Exhibit 12 regarding the schedule employees worked. She said the employees told her their schedule had never changed. The language required the employer to keep the blocs the same "whenever possible". Joint Exhibit 1 and 2.

Owusu explained some of the history of the Employer, stating that Fortis was the parent Company, purchasing the company on July 1, 2015. T. at 65-66. Owusu stated that on February 16, 2016, Hervin sent the letter (Union Exhibit 3) but never came to her

to discuss the new master schedule. T. at 66-67. The Union filed a grievance right away before the new schedule was implemented. She testified that she was not aware of any concerns with old schedule. Owusu said the Employer didn't talk to her about the schedule or problems with uniformity from day to day or with the number of LPN's they were scheduling. T. at 67.

Sometime after March 2, 2016, Owusu said she had a conversation with Mike Kloss. He maintained that the change of entire schedule was permitted under the management rights section of the contract. Owusu and Kloss agreed that this conversation was a first step and that mediation was next. Kloss told her that they were moving ahead to implement the new master schedule. Owusu identified a number of Union Exhibits related to the new master schedule.

Owusu testified that if there were any problems with the old schedule, they needed to work it out. Owusu said open shifts could be taken care of by reconfiguring and that existing employees could be used in that process. The Employer had all the power to create a new position. Owusu testified that with an open schedule the Employer can do whatever they please. "They can reconfigure it in any way they please." T. at 78.

On cross examination, Owusu testified that if they needed to fill a spot, the Employer could force the least senior employee to take it. T. at 81. She also testified that the Employer has used temporary staffing agencies. T. at 84. Owusu was asked how the employees felt about working with agency staff and Owusu said that the regular employees would prefer not to work with them. "They don't like it." She was asked if the Employer preferred not to use the staffing agency. She answered "Yes". T. at 85.

Owusu was asked about the frequency of the labor management meetings. She said they met every two weeks. T. at 86.

Owusu stated that the Employer never rearranged the vacated positions and that they should have done so. T. at 87. She testified that the Employer made day to day schedule changes. T. at 89. Owusu said she personally reviews all of the changes. Owusu acknowledged that there were 22 new CNA hires on the seniority list dated January, 2016. T. at 92. Employer Exhibit 8

Witness: Donnie Baker

Baker testified that she has been with the Employer and a CNA for eleven years. T. at 97. She described her job as caring for the elderly in a long term care facility. T. at 97. She worked the second shift. She worked the same shift on the old schedule for eleven years. T. at 100. She was asked if in the eleven years the Employer ever came to her to say that the schedule didn't work and we needed to change it. T. at 101. She said, "No". T. at 101. She didn't get a copy of the new schedule and only saw it after it was posted. T. at 101. She testified that she had three blocks to choose from. She described the change and said, "It was mentally hard. It was upsetting, it was not right. It...I had to change everything around this. And vacation planning, family planning, And needed the time to go over this from the last one and plan around it. It was physically hard and mentally hard. It was just too much." T. at 104.

On cross examination, she was asked when vacation was planned for the year. She said it was planned for June and she was allowed to take it. T. at 104. She said the change took a lot of time and was pretty stressful. Although she is the fourth person on the seniority list and the second full time most senior person, she ended up working a

whole different schedule. She said that she still had Saturday and Sunday off. T. at 110.

Witness: Andrea Derauf

Derauf testified that on November 2, 2016, she will have has worked 18 years for the Employer. She said she helps residents shower, toilet, walk, and get ready for bed. T. at 112. She worked her old schedule for 17 and ½ years. She testified that no one ever came to her to say the schedule was not working. She said that we had the meeting and they changed the schedule so that no one had three day weekends anymore. T. at 115. She described the problems. She said that some employees had appointments planned and family out of state. Derauf has a cabin. Derauf testified that the Employer said we can't worry about that, that they have to think about the residents. She was told to take vacation days. T. at 115. She said she rated her top three choices for a schedule and got her first one, but said she had a lot of seniority. With the new schedule she has to burn a lot of vacation to see her family out of state.

Derauf was asked about the use of the temporary pool. She said that she thought the company ran better without asking the pool. She said, "Well, they don't know the residents, they don't have a system, they don't know where nothing is, you have to show them." T. at 124.

Witness: Barb Drabant

Drabant testified that she is a trained medical aide, a CNA, and has worked for the Employer for twenty years. She has worked for twenty-eight years and besides being a CNA and TMA, she has worked in recreational therapy. T. at 122. Her job duties now are to get patients up, toilet them, fed them and put them to bed. She has worked with

the same schedule for seventeen years. She was asked if her schedule was not "workable". She testified, "No". She was told that the schedule change was "for resident care". When the new schedule was posted she had to pick three schedules she would do. Drabant testified that the Employer tried to make her go to the first shift, but she didn't want to. She testified she lost Thursdays and worked two fewer days or \$200 less than the old schedule. She testified that she also had to change weekends and was not "thrilled". She takes care of her extended family who live up North on her days off.

On cross examination, Drabant testified that she still takes care of her extended family. T. at 131.

Employer's Case in Chief

Witness: Carolyn Hervin

Hervin testified that she has worked for two years for the Employer at the New Brighton site. Before that, she worked for the employer in Golden Valley. T. at 133. She is currently the Executive Director at the Health and Rehabilitation of New Brighton and has been for just over two years. T. at 133. Hervin testified she has been a business manager for ten years and worked a total of four years for this company. T. at 133. She testified that Fortis purchased New Brighton Health and Rehabilitation in July of 2015. T. at 134. Fortis is the management company. T. at 134. It is a 100 bed skilled nursing facility for Medicare and Medicaid patients and has a respiratory unit with high nursing needs frequently requiring two nursing assistants for lifting patients. It also has a transitional or rehabilitation unit for persons eighteen years and up.

Hervin testified that patient cares are the number one priority. T at 135. Hervin described the tasks of daily living they assist patients with: feeding, dressing, lifting, including Hoyer lifts with two people, dealing with mental health issues. T. at 136. She stated that every day they have to adjust schedules based on daily needs. T. at 137. Hervin stated that her responsibilities haven't previously included working on the collective bargaining agreement. T. at 137. They now include grievance handling. T. at 137-138. She is the facility representative. T. at 138. She testified that she hates to receive grievances. T. at 138. Hervin testified that she had not worked with a union until June, 2014. T. at 138.

Hervin testified they had to change the schedule. She had one meeting with the Union about the schedule change and it became "uncomfortable". T. at 139. Hervin said that they didn't have Kloss with them, who is part of the team. The meeting ended in a positive place. Hervin said she realized that they needed to increase staff morale and thought they should move forward with the Labor Management committee meeting every couple of weeks. T. at 140. Hervin said she wanted to change the schedule one and one-half years ago but she was not "allowed to". T. at 141. Hervin said the Employer attempted to band-aid the schedule by changing the RN's schedules. T. at 141. Hervin said she didn't feel like she had the knowledge base to even have the conversation about making the schedule changes. T. at 142.

Hervin testified that the company was in a staffing crisis with lots of employees leaving. It was industry-wide. T. at 145. They asked themselves what they could change around. T. at 143. The company began the process with an "extreme" sign-on bonus. They opened negotiations about wage increases and sign on bonuses for the

bargaining group. T. at 144. They met with a contractor. T at 145. The determination was that the schedule was "too broken" to fix. T. at 145. In addition, they began using staffing agencies. On some days they used ten to twelve temporary agency staff at the site. T. at 146. Hervin testified that there were significant morale issues with the agency staff leaving everything for the regular workers to do. Hervin said, "The residents felt like every day it was a new face they didn't know who they were." T. at 146. Hervin testified that the "rotating door" left the staff frustrated, the residents very frustrated, a lot of concerns." T. at 146.

Hervin said she went with two others to a training class where she learned about a new scheduling tool with "x" (filled shifts) and "o" (open shifts) schedule which they typically don't show to staff. Hervin testified that the need for nurses day-to-day does not change; six nurses are needed. T. at 146.

Hervin said they needed nine or ten CNAs per day. T. at 150. In March and April, 2016, they had a retention problem. They identified individuals they felt were strong and made them nurse managers. They needed to have six nurses and ten CNAs on first shift, six nurses and ten CNAs on second shift, and three nurses and six CNAs on third shift. T. at 153.

Hervin described the rating system and how that had improved since 2014. It was a one star rating in June, 2014, and in 2016, a four star (out of five) rating.

Hervin began working with the consultant and sent him changes to see if he approved. The consultant, Klass, had worked for the company for several years. Hervin testified that she didn't know what his specific degrees were "or anything". T. at

159. They scheduled meetings in March and prepared the letter following the meeting. Hervin testified that Klass helped her write the letter. T. at 159.

Hervin said that the schedule was not discussed in the Labor Management meetings because she felt the company had the ability to make the decisions on scheduling. T. at 163. Hervin testified that such a discussion with the Union was not "appropriate".

Hervin described the letter to the Union identifying concerns. She said, "If we don't have adequate, consistent staffing, we cannot meet their needs. T. at 164. Hervin testified it was "our right to change the schedule" according to the Agreement, section 4.1.1. Joint Exhibit 1 and 2. The Employer could validate extenuating circumstances. The Employer gave Union members thirty days notice for the bidding. When they told the Union, Hervin said they got a grievance. They went to mediation which Hervin talked about as not being very successful. T. at 167.

Hervin said she scanned the Union's response, Union Exhibit 7, and sent it to Klass. Hervin testified that he advised her to move forward with the new schedule. Hervin testified that the reaction from the staff was "mixed" and there was "frenzy" by the time clock. T. at 167. Hervin said that the company honored all vacation requests. T. at 172. They also implemented an "on call" policy which came from Fortis. They hired a number of on-call people. T. at 175. Hervin testified that now their agency use went as high as twelve per day. T. at 175. They have hired over 25 people in the last 90 days in a variety of roles T. at 175-176. Hervin testified that they gave staff a raise but that didn't fix the problem. Hervin stated, "This fixed it." T. at 176. Hervin testified that the change in scheduling fixed the concern residents had for consistency in care to avoid the "I'm

not sure who my nursing assistant is today...I don't know what they look like..." T. at 180.

On cross examination Hervin was asked about various ways to obtain six employees "across the board" to solve the problems or deal with one position at a time. She said that she couldn't answer the question, but didn't agree that it would solve the problem. She agreed that wages were one factor in the staffing problems and stated that was a \$2 per hour starting wage increase and a 4% increase to all staff across the board. T. at 187. She said "that" worked. She said that changing the schedule around made a difference. Hervin was asked what made a shift unmarketable. She replied that it was too many days in a row. Under the new schedule, the longest span of days is four. She agreed that the Employer was free to create new positions, a few or many. Hervin was asked about discussing the new schedule at Labor Management meetings. She said she knew the Union had objections. Hervin said she didn't think the topic was appropriate for that forum and there was no consensus. She said that management had the right to decide. Hervin said that Owusu was very aware of what we had done. She said that Owusu should have called me. T. at 195.

On redirect, Hervin was asked about layoff. Hervin said they had none. Hervin said one of the goals of the company was to create a relationship with the Union, a conversation. She testified that she, "had not been in a union building prior so I didn't have knowledge of a labor management class training meeting, any of those things. T. at 181.

Witness: Michael J. Kloss

Kloss has been the Director of Labor Relations for Fortis since July 1, 2015. He described his background and said he was Vice President of Human Resources for Golden Living in Golden Valley. T. at 198. He stated he had thirty years of experience with twenty-two years at a non-union company, Federal Express. T. at 199. Klass testified that it became unionized when Federal Express bought Flying Tigers. T. at 199.

Klass testified that he helped Herwin write the letter to the Union about the implementation of a new schedule. T. at 202. He said that the Employer had an absolute right to change the schedule. T. at 202. He was asked about the meaning of "whenever possible". T. at 203. He said he could not answer that question. "What that means is we shouldn't be arbitrary and capricious with respect to willy-nilly changing days off on assignments..." T. at 203. When asked why that phrase doesn't appear in the contract and instead says "whenever possible", he responded, "I did not write this language. I cannot answer it." T. at 203. He said that residents are entitled to consistency of care and the company suffered on Saturdays and Sundays. The Employer also was overstaffed on some days and understaffed on others. He said it was necessary to make a change and that Article 4 and 17 provided clear and unambiguous language allowing them to do so.

Klass said he was one of the authors of the tool that became the Employer's new master schedule. He said it was a six tab Excel spread sheet. T. at 206. "We called it a program." T. at 206. The tool tells you immediately if you are overstaffed, understaffed, and on what particular days.

On cross examination, Kass said he helped draft the letter Hervin sent to the Union regarding the schedule. T. at 210. Employer Exhibit 4. Kass first said that Article 18 gave the Employer authority to impose the new master schedule. Joint Exhibit 1 and 2. Then he said, the "sole and exclusive" right to assign and schedule emanated from Article 17. He then agreed that the management rights was limited by Article 4, Hours of Work. Joint Exhibit 1 and 2.

On redirect, Kass recalled that scheduling was a management right and the hours would be part of the scheduling. When asked if the Union had the right to schedule, he said, "No. That's the sole responsibility of the Employer." T. at 214.

Discussion

Management Rights Clause of the Agreements

The management rights clauses pertinent to this dispute reads: "Except as specifically limited by the express written provisions of the Agreement, the management of Employer and the direction of the working forces shall be deemed the sole and exclusive function of Employer. Article 17, Management Rights, Joint Exhibit 1, (CNA contract).

The language differs in Joint Exhibit 2, the LPN contract. "Except as specifically limited by the express written provisions of this Agreement, the management of Employer and the direction of the working forces shall be deemed the function of the Employer". The "sole and exclusive" adjectives modifying the function of the Employer in the CNA contract are not in the LPN Agreement, Joint Exhibit 2.

Both Agreements then go on to list the specific rights, "a" through "n" in the CNA Agreement, and "A" through "N" in the LPN's Agreement. The lists are slightly different,

but substantively the same. Both lists include the Employer's right to "assign and delegate work" and "determine the number of hours to be worked" Notably, the word "schedule" is in neither list.

Hours of Work Clauses of Both Agreements

Both Agreements specifically limit the Employer's rights by two very important, long ago bargained provisions. They are:

- 1) "The Employer shall keep days off consistent from pay period to pay period whenever possible. The employee may voluntarily agree to changes in the work schedule." Section 4.1.1, Joint Exhibits 1 and 2.
- 2) "Employer shall not change the shift of any employee in an arbitrary and capricious manner without the consent of such employee." Section 4.1.1, Joint Exhibits 1 and 2.

No Voluntary Agreement

There was no evidence presented that any employee agreed to the "tool" developed by Klass, the imposed master schedule.

Arbitrary and Capricious Process without Consent

There was also no evidence presented that the schedule was imposed in any manner other than unilaterally. Employees testified that they first saw when it was posted on the bulletin board. It is incredible that the Employer went this route, given the Employer promoted wage reopener months before the imposition of the new schedule. Another opportunity was ignored, the labor management conference the Employer inaugurated. Either occasion would have been a natural opportunity to see if something

could be worked out and talked about. The Employer just might have gained some insight from consulting the people doing the work.

The Employer's view of management rights, that it has the sole and exclusive right to impose a master schedule, might have been correct for the CNAs were there not an extensive Article 4, Hours of Work. Joint Exhibit 1. For the LPNs, the "sole and exclusive" language, simply wasn't part of the Agreement. Joint Exhibit 2. However, like the CNAs, the LPNs had the restrictions against changing days off and shifts. These long ago negotiated provisions in both Agreements, eight sections and two subsections, delineate a number of restrictions on what Klass called the "sole", "exclusive", and "absolute" right of management to impose a whole new master schedule on employees. One party cannot decree absolute power over such a right, long ago given away in collective bargaining. The "tool" may be brilliant and may work elsewhere, but it simply cannot be imposed by one party over the other with this contracts.

Presumably, Klass gave the same "read" to Herwin, who admitted she was new to the field of labor relations, including contract management. It is no wonder Herwin acted as she did.

Klass's confusion and misinterpretation were not limited to a failure to consider both Agreement's language, Article 4, Hours of Work, or the lack of the "sole and exclusive" language for the LPNs. When asked about the Agreements, he first referenced Article 18 as the operative language supporting his view of the management rights. Article 18 in both Agreements deals with strikes and lockouts. Joint Exhibit1 and 2.

Klass also confused the Union with another local in his testimony at the arbitration hearing. It is even conceivable that when talking to Hervin on the phone prior to the imposition of the schedule, he referred to the wrong articles in the wrong contracts, with the wrong Union. His advice to Hervin was erroneous, given the clear language of both Agreements.

The witnesses made the point very plainly. They worked many years with the same schedule under the same contract language. Not one of the employees testified that the Employer had expressed problems with his or her individual schedule. In fact, the Employer didn't ever articulate, until perhaps this arbitration, the problems that they thought the new schedule could remedy. At the hearing the Employer maintained that a chief problem of the old schedule, the reason it didn't work, was there was inconsistently in care. Too many new faces with no one to depend on from day to day. No example was given where under the old schedule, a new face did personal cares daily so that residents never knew who was giving them baths, except in the use of the temporary pool. In fact, not a word was uttered about employees on the old schedule not showing up for work or ignoring their scheduled responsibilities.

Only one case was mentioned where an employee, some time back, had worked willingly on a schedule that was all weekends. When that employee left the Employer had an opportunity and probably an obligation¹ to reconfigure that particular schedule. It appears that was not done. Consistently during the arbitration hearing the Union maintained that there was an opportunity to change schedules every time an employee

¹ The Agreements provide that no employee will be scheduled for more than two weekends a month.

resigned. Given the turnover the Employer spoke of repeatedly, this was a frequent opportunity the Employee ignored.

Both the Employer and the Union felt the same about the use of a temporary pool. There was general agreement on “new faces” supplied by a temporary agency. It was bad for the residents because they never knew who was going to be taking care of them. So if the “consistency” of employees—same person bathing a particular resident day after day—was the major problem the Employer faced, the Employer needed to show how the consistency was suffering under the old schedule. They didn’t.

The language requires that the old schedule, specifically the days off and the shift, must be maintained “whenever possible”. That doesn’t prevent the Employer from ever changing a schedule, but it sets a pretty high standard in these two areas.

Almost two and one-half pages of language spelled out just what the Employer could do and not do with employee schedules. The Employer argued in its opening that the presence of “almost two page-long “Hours of Work” language proves that the Employer has the right to revise the schedules. T. at 40-41. I find that argument cuts exactly the opposite. There are two pages of restrictions to the Employer’s ability to revise the hours of the work schedule. Those details and plain words cut for the position the Union makes. The Employer is required to maintain the same schedule of days off “whenever possible”. The Employer cannot arbitrarily and capriciously change an employee’s shift.

Interpreting the Plain and Clear Words

This dispute centers on the meaning of the Management Rights clauses and the clauses entitled, Hour of Work”, sections 4.1.1. The phrase “whenever possible” is plain

and clear. “[I]f the words are plain and clear conveying a distinct idea, there is no occasion to resort to interpretation, and their meaning is to be derived entirely from the nature of the language used.” Ralphs Grocery Co., 109 LA 33, 35-36 (Kaufman 1997), as cited by Elkouri & Elkouri, *How Arbitration Works*, 6th Ed., BNA at 9-8.

The language of both Agreements requires that the days off must be maintained “whenever possible”. The Employer and the Union agreed to that language long ago. Both sides testified as such. And, both sides lived with this interpretation. Days off were kept the same. It evidently was possible to do so for decades. The Employer needed to prove now that nothing else was possible except changing the days off. They didn’t.

The Employer said they had staffing problems. They never delineated schedule problems. They tried many things to solve staffing problems before they imposed the master schedule. They reopened the Agreements to increase wages. They promoted some employees. They reconfigured their use of registered nurses. They stopped using temp pools. Then, they seized on the new “tool” and imposed that. Hervin thought the schedule was the problem, but other than the too many “new faces”, she didn’t explain why it was. The “new faces” problem appeared to be solved by the discontinuance of the temp pool, not the new schedule. A logical conclusion would be that the same solid crew of CNAs and LPNs with the same days off and same shifts they had worked for years served as an antidote to the “new faces” problem.

The only issue with the old schedule the Employer articulated in the arbitration hearing was the configuration of one job that required working every weekend. The Employer said it was very difficult to fill. No one or no labor agreement prevented the

Employer from changing that job around to make it more enticing to applicants. The former employee who had that weekend job, an employee who was going to college during the week, had left some time ago, so there was no need to maintain that same schedule.

Interpretations of One Clause that Nullify Another Clause

The Employer argued that the management had the sole and exclusive right to schedule. This interpretation of the Agreements would negate the limiting language of section 4.1.1 of both Agreements. A general rule in contract interpretation is that one gives effect to all clauses and words. "It is axiomatic in contract construction that an interpretation that tends to nullify or render meaningless any part of the contract should be avoided because of the general presumption that the parties do not carefully write into a solemnly negotiated agreement words intended to have no effect." John Deere Tractor Co., 5 LA 631, 632 (Updegraff, 1946), as cited by Elkouri & Elkouri, *How Arbitration Works*, 6th Ed., BNA at 9-35. Klass's insistence on the "sole and exclusive" right of management to do anything it wanted to do would make the language of sections 4.1.1 meaningless.

The collectively bargained for language set a standard. The days off and shifts of the CNAs and LPNs are to be kept the same unless it is impossible to do so. The shifts stay the same and cannot be changed in an arbitrary and capricious manner or unless the employee agrees to change the schedule voluntarily.

1) Days Off

"The Employer shall keep days off consistent from pay period to pay period whenever possible." Section 4.1.1, Joint Exhibits 1 and 2. There was testimony from

Union witnesses that days off were changed when the new schedule was imposed. No rationale was given for the notion that a change of days off solved any problem, let alone the only one enunciated-"new faces". They gave no explanation of what other efforts had been taken and failed.

2).Same Shift

The Agreements also proscribe that the "Employer shall not change the shift of any employee in an arbitrary and capricious manner without the consent of any such employee." Section, 4.1.4, Joint Exhibit 1 and 2. I cannot envision a better example of arbitrary and capricious than unilaterally imposing the new "tool" without discussion. Just one letter posted for employees near the time clock. Not even the courtesy of a letter sent to each affected employee. Despite the presence of a functioning labor management committee and, surprisingly, a contract reopener to raise wage, the Employer did nothing to explore changes with the employees so directly affected. Very senior employees testified as to the changes after many years of the same schedule. Not a single witness testified, nor did the Employer claim, that the Employer said to any employee that anything was wrong with the old schedule. Maybe this worked at a non-union company such as the old Federal Express, but not here. Not with this limiting language to which both the Employer and the Union agreed.

Award

The grievance is sustained. The Union has met its burden of proof. The Employer violated the Agreements when it unilaterally imposed the new schedule in March, 2016. The Employer must reinstate the old schedule of days off and shifts in effect before the imposition of the new schedule.

Dated this 22 day of Sept, 2016.



Carol Berg O'Toole