IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT, 1995*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

NORFOLK GENERAL HOSPITAL

- The Employer

-and-

ONTARIO NURSES' ASSOCIATION

- The Union

AND IN THE MATTER OF the grievance of Vickie Salembier and a Union grievance, both regarding the staffing of shifts

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Robert Hickman	- Counsel
Marylisa Forsyth	- Director Human Resources
Brent Richardson	- Coordinator Human Resources

On behalf of the Union:

Rob Dobrucki	- Labour Relations Officer
Linda Heffernan	- Bargaining Unit President
Vickie Salembier	- Grievor
Tom Szuty	- Labour Relations Officer

Hearing held July 23, 2009, in Simcoe, Ontario.

AWARD

INTRODUCTION

These two grievances involve the staffing of shifts at a hospital. When a nurse was sick, the Employer replaced the sick nurse with a full-time nurse from its float pool. Since the collective agreement provides that available work must be offered to part-time nurses, the Union submitted that the work of the sick nurse was available and should have been offered to a part-time nurse.

BACKGROUND

The parties made opening statements and then made their submissions against the background set out in their opening statements. The situation was as follows.

The Norfolk General Hospital (the Employer) is located in Simcoe Ontario. The Ontario Nurses' Association (the Union) represents the nurses employed by the Employer.

Both grievances arose from events which occurred during the week of Monday February 2 to Sunday February 8, 2009.

The individual grievance involved Vickie Salembier (the grievor), a regular part-time nurse who often works in the Intensive Care Unit. She worked 11.25 hours February 3. February 4 she was called for, and worked, a 7.5 hour night shift in the ICU replacing a sick nurse. After that shift she telephoned the Employer, indicated that she understood that the nurse was still sick, and inquired as to whether she would be needed to work the next night. The grievor was advised that she was not needed as the shift was being filled

by a full-time nurse already scheduled to work in the Employer's float pool. The Employer's decision to replace the sick nurse with the float pool nurse led to the grievance.

The second grievance was a Union grievance dealing with the same issues.

When a nurse had been absent, the Employer's long-time practice had been first to determine whether the shift needed to be filled, that is whether the remaining nurses in the unit could perform the work. If that was not feasible, the Employer's second step had been to consider whether another nurse already scheduled to work elsewhere in the hospital might be transferred to assist in covering the work of the absent nurse. If the Employer decided that it still required a nurse, its third step had been to follow the provisions in the collective agreement and offer the work to part-time nurses.

The Employer has a float pool consisting of four full-time nurses who are scheduled on a regular basis. The float pool was created on a temporary basis in 2007 and was made permanent in 2008. A float pool nurse may know where he or she will work before arriving at the hospital, or may be assigned after arrival.

THE AGREEMENT

The parties' collective agreement consists of two parts - the central agreement which governs the relationship between the Union and many other Ontario hospitals and a local section of the agreement involving only these parties. It is the language of the local agreement which is in dispute here. The parties' local collective agreement expires March 31, 2011. The key provisions are as follows:

ARTICLE B - MANAGEMENT RIGHTS

B-1 The Union acknowledges that except as expressly modified by any other Articles of this Collective Agreement, it is the exclusive function of the Hospital to manage and direct its operations and affairs in all respects and without limiting or restricting that function

. . .

(b) to hire, retire, classify, direct, . . . transfer. . . nurses and to assign nurses to tours . . .

(c) . . . to schedule the work and services to be provided and performed . . .

. . .

ARTICLE L - AVAILABILITY OF PART-TIME NURSES

L-1 Nurses employed on a Regular Part-time basis will be available to work as follows:
[There then follow provisions describing how many weeks in a year, shifts in a week, weekends, etc. a nurse must be available, including over the summer and a Christmas periods. Such nurses have to be available to work at least 22.5 hours per week]

(9) i) Prescheduled shifts will be distributed on as relatively equitable basis as possible.

ii) **Any additional tours which become available after schedules are posted will be offered** to Regular Part-Time nurses in accordance with seniority until each Regular Part-Time nurse has reached 22.5 hours per week which is the commitment of availability. [My emphasis]

iii) 22.5 hours commences from Monday to Sunday.

iv) Once all Regular Part-Time nurses have met their commitment of availability of 22.5 hours per week, remaining tours will be offered on the basis of seniority to all qualified nurses up to 75 hours per pay on the following basis:
1) Regular part-time nurse from the nursing unit
2) Job Share nurses from the nursing unit
3) Regular part-time nurses from other units
4) Job Share nurses from other units

. . .

UNION POSITION

The Union noted that the grievor worked only 18.75 hours in the week in question and

that under Article L-1 (9) (ii) (above) additional available shifts are to be offered to regular part-time nurses until they reach 22.5 hours per week. Sine the grievor had not worked 22.5 hours that week, was available, and could have worked this disputed February 5 shift in the ICU, the Union said the Employer was obliged to offer that shift to the grievor as a senior regular part-time nurse.

The Union said that when a scheduled nurse is not at work a shift normally becomes available for regular part-time nurses under Article L-1. The Union accepted that there was no minimum staffing level so that the Employer could decide not to fill a shift if the work could be preformed by the remaining nurses. But the Union said that the Employer could not move a nurse from any part of the hospital to replace an absent nurse. In particular, in this case the Employer could not move a nurse from the float pool.

The Union said that the part-time nurses had a clear entitlement to be offered shifts until they had worked 22.5 hours in a week. The Employer could not offer the shift to a float pool nurse after the schedule had been posted. Re-allocating a float pool nurse presupposed that a shift was available and all available shifts had to be offered to part-time nurses.

The Union relied upon the following authorities: Brown, Donald J,, and David M. Beatty, *Canadian Labour Arbitration* (Aurora, ON: Canada Law Book) Section 4:2120; *Re National Steelcar Ltd. and United Steelworkers, Local 7135* (2007), 161 L.A.C. (4th) 182 (Burkett); and *City of Hamilton and Ontario Nurses' Association* (August 5, 2006), unreported (Rose).

EMPLOYER POSITION

The Employer submitted that there was no obligation to offer part-time nurses 22.5 hours of work in a week. Part-time nurses were scheduled as needed such that the grievor had no right to this extra work.

Section L-1 (9) (ii) deals with "additional" shifts. However, this disputed shift was already in the shift schedule when it was posted. It follows that it was not an additional shift so this Section does not apply.

But even assuming that it was an additional shift, what is meant by an additional shift becoming available? Under the management rights article the Employer had the right to schedule work, and to assign and to transfer nurses.

The Employer noted that the Union accepted that the Employer had the right to decide whether it would fill a shift when a nurse was absent. It followed that a shift was not available until the Employer decided.

For many years if a unit needed another nurse because a scheduled nurse was absent, the Employer had looked to other units to determine whether a scheduled nurse could be moved. If so, the Employer had transferred the nurse. Although that had been the practice, the Union now said that was a violation of the collective agreement. But this clear past practice suggested that the parties' shared a common understanding of the meaning of the collective agreement. The parties have long operated on the understanding that a transfer from another unit was not a violation of the collective agreement. All that was done here was a transfer from another unit - a transfer from the float pool.

Section L-1 (9) (ii) deals with additional shifts which must "be offered" by the Employer.

In this instance, the Employer said there had been no offer of a shift. The Employer

also said that there could be no offer of a shift until the Employer decided to fill the shift with a nurse who was not already scheduled for work. The Employer said that the Union submission required a finding that the shift in question had been offered to the float pool nurse, something which had not happened.

In summary, the Employer said that there was no additional shift, that no additional shift was available, and that no additional available shift had ever been offered to any nurse in contravention of Article L-1 (9). The Employer asked that the grievances be dismissed.

The Employer referred to the following authorities: Mitchnick, Morton and Brian Etherington, *Leading Cases on Labour Arbitration* (Lancaster House), Sections 21.1 and 21.5; *Air-Care Ltd. v. United Steelworkers of America*, (1974), 49 D.L.R. (3d) 467 (SCC); *Hotel-Dieu Grace Hospital and Service Employees' Union, Local 210* (May 22, 1995), unreported (Joyce); *Cara Operations Limited and Airport Service and Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union 647, Affiliated with the International Brotherhood of Teamsters* (May 1, 2006), unreported (Luborsky); and *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association* [1981] CanLII 72 (ON C.A.).

CONCLUSIONS

The language of this collective agreement (Article L-1 (9), above) provides that in certain instances regular part-time nurses have a right to be offered a "tour," or shift. That right is triggered when an additional shift becomes available after the schedules are posted. The question in these grievances is this:

> Did an additional shift become available after the schedules were posted and was the Employer required to offer that shift to a regular part-time nurse?

What did the parties intend when they spoke of an additional shift becoming available? Did they simply mean that a scheduled nurse was absent? Neither party took that position.

The Union agreed that the Employer could properly decide not to replace an absent nurse and simply have the work performed by another nurse. However, the Union said that was only permissible if the other nurse was already scheduled to work in that same unit, in this instance already scheduled to work in the ICU. The Union said that the Employer could not move a nurse from elsewhere in the hospital.

I note that the float pool is relatively new at the hospital. The Union never suggested that the fact the replacement nurse came from the float pool made any difference in these grievances. The Union submitted that the Employer could not move a nurse from the float pool, from the emergency department or from any other unit in the hospital.

It was the Employer's position that it could move a nurse both from the float pool and from all hospital units.

When seeking the parties' intention, I begin as always with the language of the disputed provision. Looking at the language of section L-1 (9) (above), the parties clearly intended to deal with the distribution of hours and the section starts by requiring a relatively equitable distribution of shifts. It then deals with additional shifts. It appears that the parties intended to deal with shifts for nurses who were not already scheduled. I do not think the parties would have intended to have the Employer offer a shift to a nurse who was already at work or already scheduled to be at work. Instead the provision would appear to be addressing a situation in which the Employer has made a decision to bring in an additional nurse, that is a situation in which the Employer wanted more nurses

than it had already scheduled.

But can the Employer move a nurse from one part of the hospital to another, can it have the work done by a nurse previously scheduled to work elsewhere? In general terms, this collective agreement (Article B, above) allows the Employer flexibility in managing the hospital and assigning nurses. This is a collective agreement which the Union conceded has no minimum staffing provision (that is, no minimum number of nurses have to be at work in a unit, or in the hospital as a whole), an agreement which preserves a general Employer right to schedule work, to assign nurses and to transfer nurses.

Consider the situation when all scheduled nurses are at work and no nurse is absent for illness or any other reason. If the Union is correct, when one area of the hospital is particularly quiet and another area is unusually busy, the Employer would be unable to move a nurse from the quiet area to the busy area, but would instead have to bring in a part-time nurse for the busy area while the nurses in the quiet area have little to do. Given the provisions of this collective agreement noted above, I do not think the parties intended such a result.

Now consider the situation when a scheduled nurse is absent from work. I do not think the parties intended that the result would be different. I do not think that the parties intended that whenever the Employer needs a nurse in a particular area it must bring in a nurse for that shift, when it may have more nurses than it needs in another area of the Hospital. Instead, I conclude that the Employer has the right to assign nurses and to transfer nurses from one area to another.

The Employer suggested that no additional shift would ever be available if the Employer was simply filling a shift that had been on the original schedule but was not being worked

because a nurse was absent. Although the Employer did not pursue that suggestion, I reject it and instead find that an additional shift is available whenever the Employer seeks an additional nurse who had not originally been scheduled, whether that decision is based on the absence of a scheduled nurse, or on the Employer's view that it needs more nurses than it had originally scheduled, or otherwise. It matters not whether the *shift* had been previously scheduled - what is of significance is whether the *nurse* had been scheduled.
In summary, I conclude that no additional shift is available under this provision until the Employer decides that it needs an extra nurse, a nurse who would be in addition to those nurses already scheduled to work at the hospital. In coming to a decision as to whether it needs another nurse, the Employer has the right to move nurses from one part of the hospital to another. It is only at the point that the Employer decides to bring in an additional nurse that the provisions of Article L-1 (9) (ii) come into play.

The above interpretation of the parties' intention is reinforced by the Employer's practice which has long been consistent with the interpretation I have reached about the language of the collective agreement.

Returning to these grievances, I conclude that the Employer did not violate the collective agreement when it failed to bring in a part-time nurse for the shift in question and instead assigned another nurse, previously scheduled to work in the float pool, to replace the absent nurse. The grievances are therefore dismissed.

Dated at London, Ontario, this 21st day of October, 2009.

Howard Snow, Arbitrator