IN THE MATTER OF AN ARBITRATION

BETWEEN

ERRINRUNG THORNBURY INC.
- the Employer

and

CHRISTIAN LABOUR ASSOCIATION OF CANADA
- the Union

AND IN THE MATTER of a policy grievance regarding scheduling in the laundry and housekeeping department

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Paula M. Rusak	- Counsel
E. Ozimek	
C. Ozimek	
J. Lune	- Administrator

On behalf of the Union:

Peter Vanderkloet	- Ontario Representative
Betty Westrik	- Ontario Representative
Marie Turner	

Hearing held in Collingwood, Ontario on April 18, 1996.

AWARD

I. THE NATURE OF THE DISPUTE

Errinrung Thornbury Inc., the Employer, operates a small nursing home in Thornbury, Ontario. The employees are represented by the Christian Labour Association of Canada (the Union) and are covered by a collective agreement effective from May 1, 1994 to April 30, 1996. In this grievance, the Union protests the amount of bargaining unit work which has been done by an excluded supervisor.

The parties agreed on the following facts and no witnesses were called. Since 1993, the housekeeping/laundry department has had one hundred ninety-six (196) hours scheduled in each two week pay period. In late 1995 there was a temporary increase to two hundred and six (206) hours due to a "pneumonia problem." On January 5, 1996 the total hours for the department were reduced to one hundred eighty-six (186) due to the relatively low "census" (i.e. number of residents) at that time. On February 26, 1996 the hours were increased to one hundred ninety (190).

In early January, 1996 seven (7) of the forty-two (42) beds in the Home had suddenly become vacant. The Ministry of Health funds the Employer, as it does other nursing homes, on the basis of the number of residents.

Of the hours worked in the department, sixty (60) have consistently been worked by the housekeeping and laundry supervisor, Carol Hornett. Ms Hornett has also consistently worked an additional ten hours on her administrative duties, for a total of seventy (70) hours per pay period. Ms Hornett has performed her work in this fashion "historically." She continued to work her normal sixty (60) hours following the January reduction in hours. She

works from 7:00 a.m. until 2:30 p.m., with a thirty minute lunch break.

There are four part-time employees in the department as well, and they work during the period beginning at 7:30 a.m. and ending at 2:00 p.m. The work of both Ms Hornett and the part-time members of the unit involves laundry and cleaning, especially cleaning the residents' rooms.

Ms Hornett is a working supervisor and, as a supervisor, has been excluded from the bargaining unit. The essence of the Union's grievance was the following:

> When the hours were reduced in January, 1996 the Employer should have reduced the number of hours the supervisor devoted to cleaning and laundry work, instead of reducing the number of hours for the part-time members of the bargaining unit.

II. THE PROVISIONS OF THE AGREEMENT

I set out below the relevant provisions of the agreement. The principal provision, and the provision which the Union said had been violated, is Article 2.03. That Article spells out the protection for the work of the unit. The language of Article 2.03 is unusual.

ARTICLE 2 - RECOGNITION

2.01 The Employer recognizes the Union as the bargaining agent for and this collective agreement shall apply to all employees . . . save and except . . . Supervisors . . .

2.02 . . .

A part-time employee shall mean an employee in the bargaining unit who regularly works not more than twenty-four (24) hours per week.

. . .

2.03 Non bargaining unit personnel shall not normally perform bargaining unit work for the purpose of diminishing the hours of work which would otherwise be available to such employees except in cases of emergencies, instruction or where regular employees are absent from work and replacements are unavailable. This clause

however does not prevent a registered nurse from performing the work of a R. N. A.

ARTICLE 3 - MANAGEMENT RIGHTS

3.01 The Union acknowledges that all management's rights are vested exclusively with the Employer and without limiting the generality of the foregoing it is the exclusive function of the Employer:

. . .

(d) to have the right to plan, schedule, direct and control the work of the employees in the operation of the Nursing Home. This includes the right to introduce different methods, facilities, equipment, and to control the amount of supervision necessary, combining or splitting up of areas, work schedules, and the increase or reduction of personnel.

3.02 These rights will be exercised subject to the expressed terms of this Collective Agreement.

ARTICLE 11 - HOURS OF WORK, WORK SCHEDULES AND OVERTIME

11.01 Full-Time Employees

Nothing herein shall constitute a guarantee of hours of work per day or per week or of number of days per week. Regular hours of work for all full-time employees shall be seven and one-half (7½) per day exclusive of meal periods of thirty (30) minutes. Overtime shall be paid for all hours worked over seven and one-half (7½) in a day or seventy-five (75) hours bi-weekly, at a rate of time and one-half (1½) the employee's regular rate of pay. All overtime worked must be authorized by the Employer.

Part-Time Employees

Overtime will be paid to all part-time employees for all hours worked over seven and one-half (7½) hours in a day.

III. POSITIONS OF THE PARTIES

The parties agreed that under Article 2.03 employees who are not in the bargaining unit, employees such as Ms Hornett, are allowed to do bargaining unit work. They agreed that the provision was thus different from the protection of bargaining unit work clauses included in many other collective agreements. The parties disagreed on most other aspects of the application of the Article and in particular they disagreed on whether the Employer had

violated the Article in the situation described above. I summarize their respective positions below.

Position of the Union

The Union asserted that the Employer had violated Article 2.03 in assigning the supervisor to do the same amount of bargaining unit work following the January reduction in hours as she had done previously. The Union acknowledged that the supervisor was allowed to do bargaining unit work. However, when the Employer decided to cut the total departmental hours, it had to decide from whom it would cut the hours. While the Union said the Employer had acted in good faith, it submitted that the supervisor was only allowed to do bargaining unit work as long as the work available to members of the bargaining unit was not diminished. As the hours of work of members of the unit were diminished in January, the supervisor could not continue to perform the work. If the total hours were to be cut, then they should have been cut from the supervisor's hours.

The Union sought the following remedies:

1. A declaration that Article 2.03 had been breached,
2. Damages in the amount appropriate to compensate for the hours lost by members of the unit,
3. An order that the hours be restored to the members of the unit, and
4. An order that the supervisor be included in the bargaining unit.

The Union referred to the following authorities: Brown and Beatty, *Canadian Labour Arbitration*, 3rd edition, looseleaf (Aurora: Canada Law Book Inc.) Chapter 5 - Organization and Direction of the Work Place; *Re Miramichi Pulp & Paper Inc. and Canadian Paperworkers Union, Local 689* (1993), 35 L. A. C. (4th) 289 (Kuttner); *Caressant Care*

Nursing Home of Canada Ltd. (Fergus) and Health, Office & Professional Employees, A Division of Local 175, United Food & Commercial Workers (July 21, 1995), unreported (Whitehead); *Re Orenda Ltd. and International Association of Machinists, Lodge 1922* (1972), 1 L. A. C. (2d) 72 (Lysyk); and *Re Corporation of Town of Mount Forest and Canadian Union of Public Employees, Local 3141* (1989), 3 L. A. C. (4th) 289 (Joyce).

Position of the Employer

The Employer submitted that at issue was its right to maintain a certain level of supervision. The Employer said the collective agreement did not specify the hours of work for part-time employees. It did however, specify that the Employer determines the amount of supervision necessary (Article 3).

The January reduction in the number of residents resulted in less cleaning work to be done. While the Employer agreed that Article 2.03 permits non bargaining unit personnel to do bargaining unit work, the Employer submitted that the only express restriction on the Employer is one which prevents it from having non bargaining unit persons doing bargaining unit work "for the purpose of" reducing hours to the members of the unit.

The Employer agreed that it had diminished the hours of the members of the unit, but said it did so due to a drop in the number of residents. There was less total work. The supervisor's working hours remained the same as they had been historically. Although the working supervisor may do the same type of work as do the members of the bargaining unit, nevertheless the supervisor remains a supervisor throughout the entire day. There had been no change in the functions of the supervisor. The restriction in Article 2.03 only prevented the Employer from assigning hours to a supervisor in order to decrease the hours available to employees in the unit. This had not been done.

The Employer objected to some of the proposed remedies, and asserted that in this policy grievance the only appropriate remedy was a declaration.

The Employer referred to the following authorities: *Random House Unabridged Dictionary*, Second Edition, definition of "purpose"; *Re Cooper Tool Group Ltd. and United Steelworkers, Local 6497* (1981), 1 L. A. C. (3d) 93 (Palmer); *Re Kincardine & District General Hospital and Ontario Nurses' Association* (1994), 42 L. A. C. (4th) 199 (Verity); *Re Goodyear Tire and Rubber Co. of Canada Ltd. and United Rubber Workers, Local 189* (1973), 2 L. A. C. (2d) 438 (H. D. Brown); and *Re Pure Metal Galvanizing Ltd. and United Steelworkers* (1990), 11 L. A. C. (4th) 71 (McLaren).

IV. CONCLUSIONS

It is generally accepted that under a collective agreement management has the right to change the organization of the work place, provided it does so in good faith and in accordance with the provisions of the agreement. That general right has been recognised by these parties in Articles 3.01 and 3.02.

The Employer did reorganise the work in January, 1996. It reduced the total hours of work for laundry and housekeeping. It did so due to the reduction in the number of residents, and the consequent drop in funding. When the Employer decided to reduce the total hours for laundry and housekeeping it assigned the same hours to the supervisor and cut the hours of work for members of the bargaining unit. Instead the Employer could have maintained the total hours it assigned to members of the bargaining unit and reduced the hours which the supervisor spent on cleaning and laundry.

It has been common for Unions to seek to negotiate restrictions on this "right" of

management to organize work. Unions thus often seek restrictions on "contracting out" work normally done by members of the bargaining unit to other businesses, or restrictions on the Employer's right to reorganize members' work by introducing technological changes, or, as here, restrictions on the work that can be done by supervisors and other persons who are excluded from the bargaining unit. These parties have agreed to Article 2.03 as their limit on the bargaining unit work that can be done by supervisors.

The restriction contained in Article 2.03 is not common. The limitation on a supervisor doing bargaining unit work is tied to the purpose - that is "for the purpose of diminishing" hours in the unit.

A more common collective agreement provision, and the one under consideration in both the *Miramichi* and *Caressant Care* cases, *supra,* is one which prevents supervisors from doing work "normally performed by" members of the bargaining unit. In cases interpreting such provisions it has generally been held that the work must have been performed exclusively or solely by members of the unit in order to support a finding that the work is "normally performed by" the bargaining unit members (see, for example, *Caressant Care, supra,* at page 7).

However, in Article 2.03 these parties have agreed to a different approach, to a different standard. They have agreed that supervisors may perform bargaining unit work, as the supervisor in laundry and housekeeping has done, so long as that bargaining unit work is not performed "for the purpose of diminishing" the hours otherwise available to members of the bargaining unit.

As Article 2.03 is said by the Union to protect the hours of the part-time employees in this situation, it is helpful to examine the other provisions on hours of work for part-time

employees. This collective agreement does not otherwise contain provisions expressly guaranteeing hours for part-time employees. The definition of a part-time employee (Article 2.02) simply indicates that they regularly work not more than twenty four (24) hours per week. The hours of work provision (Article 11.01) simply indicates when overtime is to be paid. Thus if Article 2.03 was intended as a general protection of hours provision it is worded in an unusual way, especially when one considers the related provisions in the collective agreement.

The Union submitted that Article 2.03 required the Employer to reduce the hours of the supervisor. The Union argument was essentially this: if there is a reduction in bargaining unit hours at the same time as there is a non bargaining unit person doing the same type of bargaining unit work, then there is a violation of Article 2.03.

Before expressing my conclusion as to the proper interpretation of Article 2.03, I wish to outline three possible alternative standards.

1. Does Article 2.03 require proof of a coincidence in time of the two factors, that is:

   a) the performance of bargaining unit work by the supervisor;

   took place at the same time as

   b) the diminishing of the hours of work available for the unit members?

2. Or, does Article 2.03 require proof of a causal relationship - that is:

   a) the performance of bargaining unit work by the supervisor;

   was the cause of

   b) the diminishing of the hours of work available for the unit members?

3. Or, does Article 2.03 require proof of intention or design - that is:

   a) the performance of bargaining unit work by the supervisor;

   was done for the purpose of, or in order to bring about,

b) the diminishing of the hours of work available for the unit members?

The Union argument suggests the first interpretation. There are many ways of wording a provision such as this which would lead to alternative number 1 above. Similarly there are numerous ways of wording this provision if what was desired was the approach in alternative number 2. But the parties have adopted language which speaks of the "purpose" for which work is done by the supervisor. I believe the parties' intention in using the language of "purpose" was to convey the usual meaning of purpose, that is, the reason for which something is done, or the intended or desired result. I agree with the Employer submission that "purpose" conveys an element of design or intention - that one thing was done in order to bring about a second as the desired result. This is both the common understanding of the term in everyday use and the way the term is defined in the *Random House Dictionary*, *supra*. I am thus of the view that the third alternative is the approach which was intended by the parties.

It follows that in order to succeed in this grievance, the Union has to prove that the reason the work was assigned to the supervisor was to bring about a reduction in hours in the unit, or to put it another way, that the reduction in hours in the unit was the aim or goal in assigning the hours to the supervisor.

The use of the words "for the purpose of" diminishing hours creates a high standard and one which is likely to be difficult to prove in any situation. In the agreed facts before me, however, there is nothing from which I can draw the conclusion that the Employer had the supervisor do the bargaining unit work "for the purpose of" diminishing hours in the unit. The parties agreed that the total hours, that is the hours of the supervisor and unit members combined, were reduced due to the reduction in the number of residents. There was no agreement as to the reason why the Employer implemented the reduction in this manner, and,

in particular, there was nothing from which I could conclude it was done in order to reduce hours in the unit.

Returning to the three alternative interpretations above, clearly the two events - the supervisor doing the work and the reduction in the unit hours - occurred at the same time, and thus if the first alternative were the correct interpretation then the Union would have succeeded. If the second alternative were correct, that is if the Article required simply that the assignment of work to the supervisor caused the reduction, then the Union would also have succeeded. The assignment of work is an ongoing process and the Employer made new and different assignments in January (and subsequently). Given that the Employer had decided to reduce the total number of hours, in assigning the same laundry and housekeeping work to the supervisor as the Employer had in the past, the Employer can be said to have caused the hours available to the members in the unit to be diminished. Thus the assignment to the supervisor caused a diminution of hours to the bargaining unit.

What has not been shown, however, was that the assignment to the supervisor was done "for the purpose of diminishing" the hours, or was done intending or desiring to bring about that result, or that the result was the reason that the work was assigned in this manner. There are other reasons - such as a desire to maintain the hours of a full time employee or a desire to maintain the same amount of supervision (see Article 3.01) - which might have prompted the Employer to adopt this particular plan. The Union has alleged that the Employer has violated the agreement and, if it is to succeed in its claim, it must demonstrate that the assignment to the supervisor on and after January 5, 1996 was done "for the purpose of diminishing" hours in the bargaining unit. It has not done so. I thus find that the Employer's actions in assigning the work to the supervisor in January, 1996 and following did not violate Article 2.03.

The situation here is analogous to that in the *Cooper Tool* case, *supra*, although the Article

under consideration there was similar to alternative number 2 above. The clause at issue in that case prevented the Employer from assigning work to foremen or sub-foremen "to the extent that as a result" layoffs or terminations occurred. Arbitrator Palmer found both that bargaining unit work was being done by excluded foremen and that bargaining unit members were on layoff, but he could not conclude that one caused or "resulted from" the other. He stated in part as follows:

> there is no evidence in this case relating to the causal connection between the assignment of work to foremen and sub-foremen and the employees being laid off. While perhaps there are implications that somehow the scope of the lay-off might be lessened by keeping foremen and sub-foremen for [sic] working in the bargaining unit, such cannot be proven from the facts agreed to by the parties.
> . . .the key to this matter is the causal connection between the assignment of bargaining unit work to foremen or sub-foremen and the effect this has on the potential laying off or termination of bargaining unit employees. . .the question of the assignment of work . . . is an ongoing matter and it is irrelevant that the company makes no alteration in the amount of work assigned to foremen or sub-foremen before or after the lay-off of employees. As noted, the question of assignment is an ongoing one and despite no change in the degree of assignment, if the assignment at any time is such that it results in the lay-off or termination of a bargaining unit employee, it is improper. (pages 95-96)

In summary, in the grievance before me, Article 2.03 requires that the assignment of hours to the supervisor be made in order to bring about the reduction in hours in the unit, or that the reduction in hours in the unit is the aim or goal in making the assignment to the supervisor. However, as in the words of Arbitrator Palmer in the *Cooper Tool* case *supra,* it has not been "proven from the facts as agreed to by the parties" that the hours were assigned in violation of the standard established in the agreement. It has not been demonstrated here that the hours were assigned to the supervisor in order to reduce the hours available to members of the bargaining unit.

In light of my conclusion that the Employer did not violate Article 2.03, there is no need for me to consider the issues raised with respect to any limitation on the proper scope of remedy

for this policy grievance.

The grievance is dismissed.

Dated in London, Ontario, this _____ day of May, 1996.

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Howard Snow, Arbitrator