United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: May 30, 2007

TO : Gary T. Kendellen, Regional Director
Region 22

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Bergen Regional Medical Center
Case 22-CA-27349

530-6067-4055-3500
530-8045-3700
530-8045-3725
530-8054-0133
530-8090-4100

The Region submitted this 8(a)(5) case for advice as to whether the Employer's assigning to non-unit employees certain duties that it previously assigned to unit employees was privileged under the contractual management rights clause, or whether the Employer's reassignment of these duties constituted a transfer of unit work not addressed in, and thus not privileged by, the management rights clause.

We conclude that the Employer acted lawfully. The language of the management rights clause "specifically, precisely, and plainly" gives the Employer the unrestricted right to assign duties to its workforce.[1] Thus, the Union clearly and unmistakably waived its right to bargain over the Employer's assignment of the duties of these several employees, regardless of whether the Employer assigned their duties to unit or non-unit employees. The contention that the Employer's conduct instead constituted a transfer of unit work is a mere semantic argument that ignores both the plain language of the management rights clause and the necessary implications of that language.

FACTS

Bergen Regional Medical Center (the Employer) is an acute healthcare facility located in Paramus, New Jersey. At the Paramus facility, the Employer operates a Behavioral Health Department. Behavioral Health employees include registered nurses (RN's), licensed practical nurses (LPN's), and mental health specialists (MHS).

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[1] Allison Corp., 330 NLRB 1363, 1365 (2001).

The Health Professionals Allied Employees Union (the Union) represents two units of employees at the Employer's Paramus facility: a nursing professionals unit, and a non-nursing professionals unit. Behavioral Health RN's are part of the nursing unit; MHS employees are part of the non-nursing professionals unit.[2] Behavioral Health LPN's are represented by a separate labor organization. The Employer and the Union have had a collective-bargaining relationship for over seven years; their current contract—which covers both units—expires May 31, 2007.

In May 2004, the Union complained to the New Jersey Department of Health and Social Services (the State) that the Employer was out of compliance with certain State regulations. Specifically, the Union alleged that the Employer had failed to meet the State's requirement that 65% of all direct patient care hours must be provided by state-licensed personnel ("the 65% rule"). The State's subsequent investigation discovered that the Employer had failed to include the Behavioral Health Department, and thus its unlicensed MHS personnel, in its report. After examining relevant data for Behavioral Health, the State determined that the Employer had too few State-licensed employees working in the hospital. The State notified the Employer and the Union of the Employer's non-compliance, and directed the Employer to submit a correction plan.

In February 2006,[3] the Employer announced that it would comply with the 65% rule by replacing unlicensed MHS personnel in Behavioral Health with licensed non-unit LPN's, laying off the Behavioral Health MHS.[4] The Union demanded that the Employer bargain over that decision. The Employer has refused to bargain over its decision to reassign duties in Behavioral Health from MHS to LPN's claiming that the Union waived its right to bargain over the reassignment by virtue of the contractual management rights clause.

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[2] Mental health specialists are one of at least 18 classifications included in the non-nursing professionals unit.

[3] All dates are in 2006, unless noted otherwise.

[4] It is unclear precisely how many MHS were ultimately laid off, or what percentage of the non-nursing professionals unit was affected.

The management rights clause provides that, unless specifically limited elsewhere in the contract, the Employer has the right to "[h]ire, assign, transfer, promote, schedule, lay off, recall, discipline, demote, discharge for good cause its employees and direct them in their work; and control all Employer property." (Emphasis added). That clause also vests in the Employer "the sole discretion and the sole responsibility . . . the sole and exclusive right to . . . direct, designate, schedule and assign duties to the work force; plan, direct and control the entire operation of the Hospital; discontinue, consolidate or reorganize any department or branch[.]" (Emphasis added.)

With regard to lay-offs, the contract dictates that "the [E]mployer shall determine the units and/or departments where layoffs will be made and the number, job title, status and shift of employees to be laid off." The contract also mandates the procedure that the Employer must follow when laying off employees.

The Union claims that the above Employer-asserted rights are explicitly limited elsewhere in the contract. In particular, the Union cites portions of the parties' collective-bargaining agreement that require the Employer to notify the Union of any "proposed new rules, policies, procedures and/or modifications of existing rules, policies and procedures governing working conditions." With regard to non-nursing professional employees like the Behavioral Health MHS, the Union notes that the contract requires that the Employer give the Union written notice of "decisions involving a change in assignment or work conditions of employees[.]" The Union argues that these notice requirements prove that the Employer is obligated to bargain with the Union over the reassignment decision.

The Region's investigation disclosed two letters of understanding, incorporated into the collective-bargaining agreement, addressing issues that arguably implicate the Employer's claimed right to assign duties to members of its workforce. The first letter of understanding memorialized the parties' agreement that a re-named unit position would remain a unit position, and that the Employer would not assign to employees in that position any supervisory responsibility. The second letter of understanding designates two departments as responsible for carrying out procedures related to toxicology screening. There is,

however, no information regarding the circumstances that led to those agreements.

ACTION

The Employer's conduct constituted an assignment of duties expressly privileged under the specific, plain language of the management rights clause which grants the Employer the unrestricted right to assign duties to its workforce. The contention that the Employer's conduct instead constituted a transfer of unit work is a mere semantic argument that ignores both the plain language of the management rights clause and the necessary implications of that language.

Under extant Board law, whether a contract excuses a party's duty to bargain over proposed changes in working conditions is determined under the standard set forth in Metropolitan Edison:[5] a waiver of statutory rights must be clear and unmistakable.[6] To meet the "clear and unmistakable" standard, the contract language must be specific, or it must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter.[7] Thus, the Board looks to the precise wording of the relevant contract provisions to determine whether there has been a clear and unmistakable waiver.[8] If a management-rights clause "specifically, precisely, and plainly" grants an employer a specific right, without restriction, the Board will

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[5] Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983).

[6] Inasmuch as we conclude under the Board's extant test of clear and unmistakable waiver that the Union waived its right to bargain over the Employer's work assignment, it is unnecessary to consider a "contract coverage" analysis.

[7] Allison Corp., 330 NLRB at 1365, citing Trojan Yacht, 319 NLRB 741, 742 (1995). See also, Ingham Regional Medical Center, 342 NLRB 1259, 1261 (2004).

[8] Allison, above, 330 NLRB at 1365, citing KIRO, Inc., 317 NLRB 1325, 1327 (1995).

conclude that the Union waived its rights to bargain over that subject.[9]

The plain language of the contract establishes that the Union clearly and unmistakably waived its right to bargain over the reassignment of duties to non-unit employees. The contract explicitly states that the Employer has the unqualified right to "assign duties to the workforce." Although the contract does not define the term workforce, even a narrow interpretation would reasonably include any worker employed by the Employer at the Paramus facility, including LPN's working in Behavioral Health.[10] Thus, the Employer's work assignment to employees outside the unit falls squarely within the express terms of the management rights clause.[11]

We reject the argument that the Employer's action should be characterized as a transfer of unit work from MHS to LPN's that is not a work assignment privileged by the management rights clause. This argument, in effect, asserts 1) that the Employer's contractual right to assign duties applies only to individual assignments; 2) the mass

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[9] See, e.g., Allison, 330 NLRB at 1365; Ingham Regional, above, 342 NLRB at 1262.

[10] For example, Webster's New World Dictionary (3d ed. 1988) defines work force as "the total number of workers actively employed in, or available for work in, a nation, plant, etc." See also, Random House Unabridged Dictionary (2006) ("the total number of workers in a specific undertaking . . . the total number of persons employed or employable"); Webster's New International Dictionary (3d ed. 1971) ("the number of workers potentially assignable for any purpose").

[11] See Cincinnati Paperboard, 339 NLRB 1079 (2003) (union waived right to bargain about change in employer's shift policy; employer had the right to "schedule, [and] assign work" and "put into effect changes in working conditions"); Good Samaritan Hospital, 335 NLRB 501 (2001) (union waived right to bargain over new staffing matrices where it agreed to give employer the "sole and exclusive" right to determine the number of employees to be assigned to any shift or job and to determine appropriate staffing levels"). Compare, Stevens International Inc., 337 NLRB 143, 143 (2001) (although employer was privileged to assign unit work to "employees," the collective-bargaining agreement explicitly defined that term to exclude the supervisors to whom the employer had assigned unit work).

reassignment in this case instead constituted a "transfer of unit work"; and 3) the collective-bargaining agreement does not specifically address, and thus does not privilege, the transfer of unit work. This is a mere semantic argument that ignores not only the plain language of the contract, which is not limited to individual assignments, but also the necessary implications of that language.[12] The contractual right to "assign duties to the workforce" clearly implies mass assignments, as does the right to "assign . . . its employees." Thus, the Employer's right to assign necessarily includes the right to assign all the duties of more than one unit employee, even if the effect of the mass assignment is to "transfer" the work from one group of its employees to another.

The Union raises two other arguments against the Employer's claimed contractual right to assign duties to the workforce.[13] First, the Union cites other provisions in the contract requiring prior notice of assignment decisions. Second, the Union points to other management rights clauses in the industry as evidence that the contract provision at issue requires the Employer to bargain over any changes to non-nursing professionals' duties. Neither of these arguments has merit.

Other provisions in the contract require the Employer to give the Union notice of "decisions involving a change in assignment or work conditions of employees." This language requires only that the Employer give the Union some post hoc notice of any decision to change employees' assignments; this language does not impose any decision bargaining obligation on the Employer.[14] At most, this

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[12] See, e.g., California Pacific Medical Center, 337 NLRB 910, 914 (2002) (the employer's "unfettered" right to lay off employees included the right to close the affected unit).

[13] The Union did not attempt to generally define the scope of the management rights clause or otherwise define the Employer's right to assign duties to the work force.

[14] See, e.g., Ingham Regional Medical Center, 342 NLRB 1259, 1262 (2004) (contractual requirement that employer give union notice of its decision did not serve as requirement that the employer bargain over the decision itself).

language would, when appropriate, require the Employer to bargain over the effects of its decision.[15]

The Union's additional argument, based on purportedly broader management rights clauses in other collective-bargaining agreements, is unconvincing because provisions in other contracts have little probative value here. The Union submitted excerpted clauses from other contracts in the health care industry, but provided no evidence of how those clauses have been interpreted, either by the parties subject to them, or arbitrators who have interpreted them. Even assuming that the language of clauses in the other contracts may be relevant here, without evidence of how that language has been interpreted, those clauses do not support the Union's claim that the different language here should not constitute the Union's clear and unmistakable waiver.[16]

Finally, the parties' bargaining history and past practice do not undermine our conclusion that the Union waived its right to bargain over assignments of work. The record shows that, during negotiations for the parties' first contract in 1998, the Union proposed, and the Employer agreed to, the language in the current management rights clause.[17] The Union did not then, nor has it since, attempted to define the terms of the management rights clause, nor has it proposed more restrictive language in subsequent negotiations.

The two letters of understanding do not establish that the parties agreed in the past that the Employer's right to assign duties is limited. The letters of understanding do not explicitly address the Employer's authority to assign duties. One letter of understanding clarifies that a re-named bargaining unit position would remain in the unit and

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[15] The Employer's obligation to bargain over the effects of its decision was not submitted for Advice.

[16] See, e.g., Columbia Pictures Corp., 94 NLRB 466, 470 (1951) (evidence regarding the industry standard, though not "necessarily irrelevant," was not persuasive evidence).

[17] The Union proposed retention of the management rights clause that had been in the Union's contract with the predecessor employer.

would not take on supervisory functions.[18] The other letter of understanding merely designates which department— but not which employees— shall be responsible for processing toxicology screens. There is no evidence that the letters of understanding resulted from any claim by the Union, or concession by the Employer, that the Employer was not free to assign duties to the workforce as it saw fit. Indeed, without any information regarding either situation, these letters may well address only the effects of the Employer's exercise of its right to assign duties. Without more, these side agreements fail to show that the parties have agreed to limit the scope of the management rights clause.

In sum, the plain language of the contract establishes that the Union clearly and unmistakably waived its right to bargain over the Employer's assignment of duties from unit to non-unit members of its workforce. Accordingly, the Region should dismiss the refusal to bargain allegation, absent withdrawal.

B.J.K.

[18] It is unclear whether the Employer's re-naming of the position also involved changes to the duties performed by that employee.