

**UNION RESISTANCE TO NURSE STAFFING REDUCTIONS:
PROTECTIONS THROUGH THE GRIEVANCE AND
ARBITRATION PROCESSES**

BENJAMIN WOLKINSON

M. CATHERINE LUNDY

Michigan State University

ABSTRACT

Institutional efforts to lower costs by reducing the number of health-care workers employed constitute a critical concern for unions in the industry. Through examination of both reported and unreported decisions involving staffing issues that have been adjudicated between 1970 and 1998, the authors demonstrate how through use of the grievance arbitration process unions have sought to challenge such efforts. Specifically, through arbitration, unions have enforced contractual provisions establishing affirmative employer obligations not to reduce staff or to maintain minimum staffing levels. More general contract provisions on safety, seniority, and recognition as well as jurisprudential principles of past practice have been relied on to block efforts to lay off workers and transfer work to unlicensed personnel and/or nonbargaining-unit members. Moreover, the just-cause provision has been used to protect employees from charges of negligence in cases when understaffing has prevented close monitoring of patients. While limited staffing and financial resources may discourage and reduce the frequency of arbitration efforts, union success when resorting to this process shows its potential for helping unions maintain and promote adequate staffing levels.

Nursing services are central to the provision of hospital care. Nursing care takes on added importance today because of the increase in the number and severity of patients requiring intensive nursing care. At the same time, the rapidly changing

health-care environment and the continuing pressure to contain costs have frequently led hospitals to implement strategies that focus on efforts to reduce the number of nurses employed [1]. These cutbacks often result in excessive workloads and short-staffing conditions for registered nurses.

Unions have responded to this problem in a variety of ways, with each having as its objective quality care for patients and more appropriate working conditions for employees. One approach is statutory in nature, with unions seeking to persuade state legislatures to adopt laws requiring hospitals to meet fixed nurse-to-patient ratios. California is a successful example of this approach [2]. A second mechanism for insuring adequate staffing levels is use of the collective bargaining process. Where unions have possessed sufficient bargaining power, they have negotiated no-layoff guarantees, minimum staffing requirements, limitations on a hospital's authority to assign nonnursing functions to registered nurses, as well as restrictions on overtime work [3]. Through such provisions, unions seek to avoid ill-designed cutbacks in staffing.

In this article, the authors address a third mechanism for enforcing appropriate staffing standards: the use of the grievance arbitration process to challenge management staffing decisions. To pursue this analysis, the authors have examined all arbitration decisions involving staffing issues in hospitals that have been reported by the Bureau of National Affairs between 1970 and 1998. Because of the paucity of reported arbitration awards, the authors have supplemented the sample of cases with decisions published by the Commerce Clearinghouse and with unpublished arbitration awards. While infrequently resorted to by labor unions, the study demonstrates that unions can use the grievance arbitration process to vigorously protect their members from hospital restructuring efforts designed to reduce employment levels.

REDUCTIONS IN STAFF

Contractually mandated hiring and employment levels are clearly enforceable through the grievance arbitration process. For example, in *Department of Public Health, Department of Health for the County and City of San Francisco*, the contract required the employer to hire twenty-five professional employees, including nurses, within 90 days of the contract's ratification [4]. The employer failed to satisfy the commitment. In upholding the grievance, the arbitrator noted the employer failed to prove an inability to meet its contractual mandated obligation and gave it thirty days to do so.

Alternatively, if a union is unsuccessful in specifying contractually the exact size of the workforce, it may be able to negotiate less-specific guarantees. For example, the contract may require that the number of health-care professionals be adequate or, alternatively, that there be a sufficient number of nurses to address the needs of the patients.

The case involving the Ohio Nurses Association and Lucas County illustrates the utility of such provisions in promoting adequate staffing [5]. Here the union grieved the county government's failure to fill a vacancy in the position of public health nurse. The vacancy reduced the staff per 100,000 residents from six to five, resulting in an excessive workload for the nurses when they tried to meet community needs. The union contended that the county's refusal to fill vacancies breached the following provision:

Nurses shall not be required to assume work assignments so large that client needs and the public health are threatened, except in cases of emergencies or with the consent of the nurse [5, at 2043].

In sustaining the grievance, the arbitrator noted that at the current levels nurses could not provide follow-up visits. Additionally, he noted the current ratio of 20,000 residents per one public health nurse was far below the accepted norms in public health. As a result he concluded that there was a threat to the county's ability to provide adequate public health services [5, at 2045]. As a remedy, the county was directed to either fill the vacancy or reduce the caseloads of nurses to a manageable level [5].

SAFETY ISSUES

Management's right to reduce the workforce may also be challenged on the ground that such a reduction may subject employees to a safety or health hazard. Contracts commonly require management to provide workers with safe and healthful place of employment. One case where a hospital was barred from engaging in further layoffs because of safety concerns involved the Michigan Department of Mental Health at Northville, Michigan [6].

In this case the employer decided to lay off 110 resident care aides employed at Northville's Regional Psychiatric Hospital. The arbitrator noted that the agreement required the employer to provide a safe and healthful place of employment, free from recognizable hazards. Relying on the testimony of both management and employee witnesses, the arbitrator concluded that the risk of injury to the staff was significantly high before the layoffs and would be substantially increased by virtue of the layoffs. As a result, he concluded that the reduction in staff would breach the employee's contractual rights to a safe working environment. The arbitrator also dismissed the employer's contention that budgetary shortfalls justified major reductions in staff. While recognizing that economic or budget reductions are necessary realities, the need to reduce costs does not give an employer license to abandon or endanger the safety of workers [6].

This award is significant because it demonstrates that a waiver of a union's right to rely on safety provisions must be clear and unmistakable. The employer had contended that the union's unsuccessful attempt to negotiate specific staffing levels precludes the arbitrator from establishing them. The arbitrator rejected this

argument, finding that the union's failure to achieve staffing guarantees did not eliminate management's obligation to maintain safe working conditions [6].

What factors would persuade an arbitrator that the reduction of staffing levels would either endanger the safety of the staff or prevent employees, such as nurses, from satisfying their professional commitments and responsibilities? An arbitrator would typically take a case-by-case approach and consider: 1) the number of patients and their acuity level; 2) expert medical opinion as to the number of staff needed to provide appropriate patient care; 3) government reports, and 4) documented cases of patients not receiving appropriate medical care as a result of staffing shortages. In the Northville (Michigan) case, the union had successfully introduced U.S. Justice Department reports finding serious levels of understaffing that resulted in patients not receiving appropriate medical care [6].

Staff reductions creating job stress and interfering in an employee's capacity to perform may culminate in an employee's refusal to perform a job assignment. However, such actions will normally not be considered protected employee activity. In a case involving Flint Osteopathic Hospital and AFSCME Council 29, upon arriving at work a registered nurse found that she would be the only registered nurse assigned to her unit [7]. She informed the shift coordinator that unless another RN would be present she would leave and go home. When no additional nurse was provided, the grievant left the hospital. In her mind the presence of only a single RN for a unit of forty-two patients would result in unsafe patient care. Additionally, she testified that the nurse would be endangered herself because more than one patient could be going into crisis at the same time [7].

In deciding the nurse's right to refuse a job assignment, the arbitrator applied the traditional principle that employees must obey management's orders and carry out their job assignments unless the testimony indicated that they were confronted with immediate danger to their health and safety. He found the grievant at fault because she faced no immediate danger, while her absence posed a greater threat to patients. Although she may have disagreed with the adequacy of staffing levels, the remedy was to file a grievance and not to refuse the assignment. At the same time, he reduced the discharge to a disciplinary suspension without back pay [7].

It is rather doubtful that a short-staffing defense would typically justify a refusal to perform a given job assignment when there is no immediate risk to the employee. In requiring employees to satisfy their job duties, arbitrators are sensitive to the reality that in most cases the patients denied care would be confronted with a far greater threat than that facing the employee from working.

At the same time there are unique circumstances when an arbitrator might uphold a nurse's refusal to comply with a direct order. In *Southern California Permanente*, the arbitrator acknowledged that a nurse's refusal to carry out a doctor's orders may fall within the strict boundaries of allowable exceptions to the "obey-now—grieve later" doctrine [8]. In this case, a nurse was terminated for refusing to follow a doctor's order to give Demerol to a patient. The arbitrator ruled that although the nurse refused to carry out direct orders to administer the

drug, she was terminated without “just cause” because her refusal was justified by a reasonable apprehension of the possibility of harm to the patient and herself [8].

The arbitrator found that the nurse’s actions were reasonable, because the nurse had once been asked by the patient to illegally bring her Demerol; another nurse also said the patient had lied to the doctor about the date of her last shot, and the patient had informed the nurse that she had taken many medications that day. In permitting an exception to the arbitral standard of “obey-now—grieve later,” the arbitrator noted:

Commonly recognized as an exception to the rule is the right of an employee to decline a supervisor’s order if the employee has reasonable apprehension that an imminent danger to health and safety would otherwise ensue. In the health care professions, of course this exception is not simply an employee’s professional responsibility, it is as well an ethical one. It follows that, on occasion, the exception may justifiably apply to instances in which the employee has reasonable apprehension that execution of an order might entail substantial legal liability, or restriction of professional license, or violation of professional codes or law [8, at 1033].

TRANSFER OF WORK OUTSIDE THE BARGAINING UNIT

The grievance procedure may also be used to block management efforts to reassign work to nonunion employees. In an effort to reduce costs, hospitals may attempt to decrease staffing levels by transferring work outside of the bargaining unit. For example, in *Doctors Hospital of Pinole v. California Nurses Association*, the hospital notified the union of its plan to eliminate twelve bargaining unit charge nurse positions and to transfer their work to the clinical supervisor position [9]. In implementing this change, the hospital did not lay off any charge nurses but reassigned them to the critical supervisor position. As clinical supervisors, however, they would no longer be members of the bargaining unit [9].

In transferring jobs out of the bargaining unit, the hospital relied on its management rights clause, which reserved to the employer the exclusive right to “transfer, assign and supervise employees, to determine staffing, and make changes in its operation” [9, at 1204]. In addition, the employer noted that the agreement had no restriction on the performance of patient care by supervisors. In opposition, the union maintained the transfer of work out of the bargaining unit undermined the integrity of the bargaining unit. The union also contended that it increased the likelihood those remaining in the bargaining unit would be laid off, while other junior nurses lost the opportunity to be promoted to higher-level positions [9].

In reviewing these considerations, the arbitrator noted that the employer has a fundamental right to establish the nonbargaining-unit classification of clinical supervisor. However, this right did not afford it the unlimited discretion to remove jobs from the bargaining unit. Giving weight to the substantially negative impact

that the transfer of twelve positions would have on the bargaining unit, the arbitrator held that management's reassignment of charge nurse duties to supervisors breached the recognition clause and ordered the restoration of jobs to the bargaining unit.

The recognition clause can have no other meaning . . . that the charge nurse classification and the duties inherent in that classification have been bargained for in the collective bargaining agreement and cannot be summarily dismissed as inconsequential, because management has elected to establish a clinical supervisor position and unilaterally decided to incorporate in that classification work predominately performed by bargaining unit personnel [9, at 1207].

The arbitrator noted:

Job security is an inherent element of the labor contract, a part of its very being. If wages are the heart of the labor agreement, job security may be considered its soul. . . . The transfer of work customarily performed by employees in the bargaining unit must therefore be regarded as an attack on the job security of the employees whom the agreement covers and therefore, one of the contract's basic purposes [9, at 1207].

This decision is significant because it is reflective of a balanced approach many arbitrators take in subcontracting situations and in cases where employers seek to remove work from the bargaining unit and assign it to nonbargaining-unit personnel. In such situations, many arbitrators would find management's conduct arbitrary, unless it was specifically authorized by the contract, de minimis in impact, or alternatively required by an emergency situation [10].

FLUCTUATIONS IN STAFFING

The occurrence of "low-census days" for which the hospital maintains there is overstaffing relative to the number of patients has also contributed to a variety of grievances [11]. In some cases, in an effort to lower costs, hospitals may send full-time registered nurses home and replace them with nonbargaining-unit, part-time RNs or nurses aides, who are paid at a lower hourly wage. In *Burlington Medical Center*, the hospital, relying on a management-rights clause giving it the right to determine staffing, required a registered full-time nurse to take a low-census day to avoid overstaffing [12]. It then assigned her hours to a non-bargaining-unit, part-time nurse. This action, however, was successfully challenged by the union in arbitration, as the arbitrator upheld the union's claim that management had breached a clear letter of understanding that RNs would be the last ones to take a low-census day. This case again highlights the importance of bargaining for specific contract language that will protect nurses from fluctuations in staffing as well as management efforts to replace full-time registered nurses with lower-paid part-time nurses or nurse aides [12].

Similarly, grievances arise when hospitals assign nurses to mandatory standby during low-census days. Hospitals use mandatory standby as a way to reduce labor costs. For example, if a hospital is aware that nurses will remain on standby status if sent home during a low-census day, the hospital will readily send a nurse home with the confidence that, if necessary, the nurse can be readily recalled. On the other hand, if a nurse is sent home on a low-census day and does not remain on standby, the hospital risks being understaffed if the patient load picks up. Hospitals in the latter situation must maintain more staff on-site because they lack the luxury of simply recalling nurses.

These considerations were addressed in *St. Peter's Hospital and the United Staff Nurses Union Local 141, UFCW* [13]. In this case, the hospital would place on mandatory standby employees sent home during low-census days. At the same time, the collective bargaining agreement gave employees who were sent home because of a low-census day the right to take accrued annual leave to mitigate the unexpected loss of pay. Since mandatory standby status is inherently in conflict with the employee's right to take vacation leave, the arbitrator voided the assignment of mandatory standby status to employees sent home because of a low census [13].

Even when the contract is silent, unions can raise considerations of past practice to successfully challenge management-staffing decisions. Again because of considerations of low census, St. John's Regional Health Center in Minnesota unilaterally discontinued placing individuals in the position of charge nurse [14]. Instead, the charge-nurse position was reassigned to other nurses within the bargaining unit who were viewed as team leaders. The effect of management's policy was not to lay off any member of the bargaining unit. Rather, nurses were deprived of additional pay that amounted to \$121 a month when they assumed the bargaining unit position of charge nurse [14].

Here the arbitrator noted that there was a long-standing practice of utilizing charge nurses. Additionally, the team leaders were performing many of the tasks that previously had fallen within the purview of the charge nurse. Given this past practice and the employer's failure to negotiate for its elimination when it was negotiating the contract, the arbitrator held that the employer had to make whole nurses whose pay had been adversely affected by the elimination of the charge-nurse position [14].

THE JUST-CAUSE PROVISION

The just-cause provision requires employers to comply with substantive and procedural due-process requirements before disciplining employees. These requirements include:

1. Rules must be reasonable.
2. Employers must provide workers with copies of these rules.

3. Rules must be enforced in an evenhanded manner.
4. There must be substantial evidence that the rules have been violated, and
5. The penalties must be reasonable and equitable in light of the particular offense committed [15].

At the same time the just-cause provision does have some application to the issue of staff shortages. The just-cause provision permits and indeed requires the arbitrator to consider mitigating circumstances. In this regard, take a situation where a health-care employee is charged with a particular offense. It would be appropriate for the arbitrator to consider the contention that the discipline should be overturned, or at the very least reduced, because staffing shortages interfered with the employee's capacity to perform all the duties of his/her particular job.

A case that amply demonstrates an arbitrator's willingness to consider staff shortages as a mitigating factor involved the Department of Mental Health as its Northville [Michigan] Regional Psychiatric Hospital [16]. In May of 1985, two patients of the Northville Regional Psychiatric Hospital escaped during the dinner hour by climbing through a bathroom window. The grievant had the responsibility of monitoring these patients during the dinner hour, including the time spent in the bathroom. The grievant was discharged for neglect of duties, presumably because his lack of appropriate supervision had permitted their escape [16].

In overturning the discipline, the arbitrator found that staff shortages precluded the attendant from monitoring patients. As a result, the grievant could not be charged with negligence, and the arbitrator ordered his reinstatement:

The grievant was in a catch 22 situation. In the absence of other staff in the dining room, it was virtually impossible to adequately supervise two activities at the same time. Both sets of human needs, dining and bathroom had to be met. The grievant could not turn his back on requests for bathroom privileges, and he could not abandon the dining activities. As a result his total attention could not be devoted to one activity in exclusion of the other. . . . The only realistic option or solution was additional staff help in the dining room. The grievant had no authority to direct or order more help in the dining room. The department's witness when questioned about the proper staff specifically admitted that based on the number of patients there should have been another staff member. Given these perplexing problems, the department simply has not met its burden of proof on the neglect charges [16, at 10-11].

In another case, a hospital suspended a nurse for ten days after she had provided a patient with the wrong medication [17]. Her error could have had serious and possibly fatal consequences for the patient. The arbitrator noted that human errors in medical care cannot be avoided completely. However, strong disincentives need to be maintained to avoid such errors, particularly where the error results from the

failure to follow a well-established procedure to prevent errors, as in this case, reading the medication label twice [17].

The union had raised the defense of extenuating circumstances: a violent patient and a very heavy patient load. This particular arbitrator rejected this defense as an excuse for not following the established procedure. At the same time, he reduced the ten-day suspension because of the grievant's long record of above-average service [17]. Yet, for other arbitrators, particularly in dismissal cases, a heavy patient load may be considered a mitigating factor depending on the intensity or the difficulties arising from staffing shortages.

Returning to the nurse who miscalculated the patient, the following inquiry would be relevant: What was the nature of the staff shortage? Were other nurses who were normally present not available at this time? Was the nurse pressured to be elsewhere? Did she have to respond to emergencies?

SOME CONCLUDING OBSERVATIONS

Under federal labor policy, the scope of grievable and arbitrable disputes arising under a collective bargaining agreement is very broad. This principle was established over forty years ago in a series of Supreme Court decisions commonly known as the Steelworkers Trilogy. In *United Steelworkers of America vs. American Manufacturing Company*, the Court said:

The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim that on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator [18, at 567-568].

In the *United Steelworkers of America v. Gulf Navigation Company*, the Court reaffirmed the presumption favoring arbitration:

An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage [19, at 582-583].

In a time of radical restructuring of hospitals with emphasis on staff reductions, the grievance arbitration process remains a viable mechanism for protecting employee benefits and rights. Through arbitration unions may enforce contractual provisions establishing affirmative employer obligations not to reduce staff or to maintain minimum staffing requirements. Yet even when specific guarantees are not negotiated in the collective bargaining agreement, more general contract language might serve as a basis for successfully challenging efforts to reduce staff within the bargaining unit. In this regard, general language concerning management's obligation to provide safe working conditions as well as recognition and

seniority provisions have been employed to block efforts to lay off and transfer work to nonbargaining unit employees. Significantly, the just-cause provision has been used to protect employees from charges of insubordination arising out of a caregiver's refusal to perform actions, which, in the caregiver's professional judgment, would have endangered patient safety. It has also been utilized to defend health-care employees from charges of negligence in cases when understaffing has prevented close monitoring of patients.

In the past decade a major concern for nurses has been the growing presence of unlicensed personnel. In most instances, nursing assistants are used in simple bedside care, such as to change dressings and to take vital signs including blood pressure and temperature. Yet, in some instances, nursing assistants are being used to assist registered nurses in total bedside care, performing such duties as telemonitoring, physical therapy, and electro-cardiography [20]. The result has been not only a loss in job opportunities for unionized nurses but also excessive caseloads for registered nurses, as they must then provide and supervise care for a growing number of patients. Furthermore, the requirement to work with increased numbers of unlicensed personnel of questionable competence poses professional dilemmas for trained registered nurses. In this kind of circumstance, unions may rely on general safety provisions as well as common-law restrictions on the removal of work from the bargaining unit to initiate grievances challenging such activity.

Yet the limited number of arbitration cases reported suggests that local unions infrequently utilize the grievance arbitration process to challenge management restructuring efforts that may reduce staffing levels. Limited financial resources available to fund arbitration, as well as constraints on the availability of union staff may discourage and reduce the frequency of such efforts. Given the success unions frequently achieve in arbitration when challenging management staffing reductions, unions at both the local and international level have a strong strategic incentive to reverse such trends. Thus, as such reductions not only generate deteriorating working conditions for employees, but threaten as well the union's membership base, more aggressive use of the grievance arbitration process is consistent with the political and economic interests of both union members and union leadership in the health-care industry.

* * *

Prior to joining Michigan State University, Benjamin Wolkinson worked as an economist for the National Bureau of Standards as an industrial analyst with the U.S. National Labor Relations Board and as a conciliator for the United States Equal Employment Opportunity Commission. He is a member of the National Academy of Arbitrators. He has published many articles in professional journals and has authored the following books: *Blacks, Unions and the EEOC*; *The*

Employment Rights of Employers and Employees: A Guide to Employment Law, and Arab Employment in Israel: The Quest for Equal Employment Opportunity.

M. Catherine Lundy is an Associate Professor at Michigan State University School of Labor and Industrial Relations. Annually she administers a national conference for labor representatives in the health care industry. Ms. Lundy has worked as a labor advocate and holds a license as a Registered Nurse.

REFERENCES

1. American Nurses Association, *The American Nurse*, July-August, 1994, p. 1.
2. Todd, S. Purham, California to Set Level of Staffing for Nursing Care, *The New York Times*, October 12, 1999, p. A-1.
3. See, for example, such contracts as Presbyterian Hospital and New York Association, January 1, 1999-December 31, 2000; American Red Cross, Southeastern Michigan, SEIU Local 79, August 12, 1993-July 31, 1996; Mercy Hospital of Buffalo, CWA, June 4, 1994-June 3, 1997.
4. *Dept. of Public Health, Department of Health for the County and City of San Francisco*, 77 LA 716 (1981).
5. *Lucas County v. Service Employees International Union, Local 399*, 18 LAIS (Labor Arbitration in Schools) 2013 (1990).
6. *AFSCME Council 25, Local 960 v. Michigan Department of Mental Health*, May 18, 1987 (unpublished award).
7. *AFSCME Council 29 v. Flint Osteopathic Hospital*, June 13, 1978 (unpublished award).
8. *Southern California Permanente*, 106 LA 1033 (1040) (1996).
9. *Doctors Hospital of Pinole v. California Nurses Association*, 106 LA 1200 (1996).
10. Frank Elkouri and Edna Elkouri, *How Arbitration Works* (Wash. D.C.: Bureau of National Affairs, 1994) Fourth Edition, pp. 547-551.
11. A low census is defined as a decline in patient care requirements resulting in a temporary reduction in staff.
12. *Burlington Medical Center*, 101 LA 843 (1993).
13. *St. Peter's Hospital and the United Staff Nurses Union Local 141, UFCW*, 93-1 ARB 3190 (1993).
14. *St. John's Regional Health Center*, 96-1 ARB 6108 (1995).
15. Norman Brand, *Discipline and Discharge in Arbitration* (Wash. D.C.: Bureau of National Affairs, 1998), pp. 31-33.
16. *Junius Godboldo v. Department of Mental Health*, February 20, 1986 (unpublished arbitration award). See also 93-2 ARB 5782 (1993), where the arbitrator rejected the argument that short staffing was the reason behind patient neglect involving a number of patients who were found to be wet and lying in cold urine.
17. *Public Employees Federation v. State of New York, Office of Medical Health*, 3081 LAIG, Vol. 12, No. 10, October 15, 1982.
18. *United Steelworkers of America v. American Manufacturing Company*, 363 U.S. 564, 567-68 (1960).

19. *United Steelworkers of America v. Gulf Navigation Company*, 363 U.S. 574, 582-83 (1960).
20. Gooloo S. Wunderlich, Frank Sloan, and Carolyne Davis (eds.), *Nursing Staff in Hospitals and Nursing Homes: Is It Adequate* (Wash. D.C.: National Academy Press, 1996), p. 101.

Direct reprint requests to:

Benjamin Wolkinson
School of Labor and Industrial Relations
Michigan State University
435 South Kedzie Hall
East Lansing, MI 48824-1696