FILE NO. AA92-11-012

EMPLOYER: Victoria General Hospital

UNION: Manitoba Association of Health Care Professionals

ARBITRATOR: B. Schwartz

APPEARANCES: J.M. Christiansen, for the Employer
J. Janzen, for the Union

GRIEVOR: H. Passley/T. Magnowski/J. Bogacki/G. Zimmer/B. Klein

DECISION RENDERED: November 27, 1992

EXPEDITED ARBITRATION: Yes

ISSUES: WORK SCHEDULING - Shifts - changes in shift schedule; PREMIUM PAY - Overtime - proprietary rights; SKILL AND ABILITY - Assessment - Trial, training and familiarization period; MANAGEMENT RIGHTS - Reasonableness and fairness; SECTION 80(2) of The Labour Relations Act: The Grievors, who were Operating Room Technicians, had shift schedules which permitted them to earn extra money by working evenings and weekends. The Employer changed the work schedule so that they only worked the day shifts. The Employer made the change so that Registered Nurses, who had training in laser and laparoscopic surgery, were scheduled to worked on evenings and weekends, which provided surgeons the option of performing that type of surgery on an emergency basis during those times. After the change, the Grievors were confined to working the basic hours of work guaranteed by the collective agreement, at the ordinary rate of pay. As a result, the Union filed a grievance claiming the Employer was not acting reasonably, because it would not train the Grievors in the new surgery techniques.

AWARD: GRIEVANCE DENIED. The Arbitrator found that Article 7.01 of the collective agreement established the standard amount of work an employee performed in a day, and during a two-week period. The new schedule allowed the Grievors that basic amount of work time. Although the loss of the "extra money" was significant, the collective agreement did not recognize the right to do "extra work" and make "extra money". The desire of the employees to make the extra money did not give the Arbitrator any basis for questioning management's judgment about work schedules. As well, the Grievors' job descriptions did not suggest they had the right to become involved in all kinds of complex work. By the use of the word "or" in Article 2.16, management had significant discretion in assigning "routine or complex work" that the Grievors would be called upon to perform. The Employer did not have a need to train them in laparoscopic surgery as it already employed enough Registered Nurses who were trained in the techniques and it would be faced with some inconvenience to train the Technicians. Therefore, the Arbitrator ruled that the Employer had demonstrated that the shift change, and the training policies connected with it, were reasonable.

AA92-912

AWARD

RE: VICTORIA GENERAL HOSPITAL

and

MANITOBA ASSOCIATION OF HEALTH CARE PROFESSIONALS

Case no. 912/92/LRA

Re: Mr. Harold Passley
Ms. Theresa Magnowski
Ms. Julie Bogacki
Ms. Gail Zimmer
Mr. Brunhild Klein

Place of hearing: Charter House Hotel, Winnipeg
Date of hearing: 28 October 1992
Date of award: November 27, 1992

Appearances:

For the Association: Mr. Jacob Janzen
For the Employer: Mr. J. Milton Christansen
Arbitrator: Dr. Bryan Schwartz

Award

VICTORIA GENERAL HOSPITAL

and

MANITOBA ASSOCIATION OF HEALTH CARE PROFESSIONALS

Expedited arbitration, Case No. 912/LRA.

I. Introduction

The grievors are the five operating room technicians (ORTs) at Victoria Hospital. They act as "scrub" nurses during operations. Their complaint arises out of a change in their shift schedules. They used to work on a schedule that permitted them to make "extra money" - e.g., for working on evenings and weekends. On September 8, the ORTs were moved to a new schedule. It involves only day shifts. The ORTs are now basically confined to working the basic hours of work guaranteed by the collective agreement, at the ordinary rate of pay.

The Hospital says that its decisions about the training and deployment of ORTs have been reasonable. Management wants Registered Nurses, rather than ORTs, to work on evenings and weekends. Some of the surgeons want the option of being able to do laser surgery and newer laparoscopic surgery on an emergency basis - including evenings and weekends. It is the RNs who have been, or are being, trained for laser and newer laparoscopic work.

The grievors say that the Hospital has violated its duty, under the Collective Agreement and Manitoba Labour Relations Act, to administer the contract reasonably. They say that ORTs are paid less than registered nurses, and they can easily be oriented to do new kinds of surgery. In their submission, the Hospital's policy of not training them in the new kinds of surgery, and no longer using them on evenings and weekends, makes no sense.

II. Legal Background

The duty to administer the Collective Agreement reasonably.

Article 4.01 of the Collective Agreement is a standard management rights clause. It says that unless otherwise provided in the Agreement, the Hospital can manage the hospital, including:

> the right to maintain efficiency and quality of patient care; the right to direct the work of the employees; the right to hire, classify, assign the job content and the number of

employees required thereto; the right to assign duties and responsibilities and the right to alter job descriptions.

Article 4.02 constrains management's discretion:

The Hospital agrees to exercise its management rights in a fair, reasonable and equitable manner.

Article 4:03 reproduces the exact language that s. 80 of the Manitoba Labour Relations Act requires to be in all collective agreements:

In administering this Agreement, the Hospital shall act reasonably, fairly, in good faith, and in a manner consistent with the Agreement as a whole.

I have adjudicated several recent disputes involving the interpretation of s. 80 or clauses that reproduce its language. My general approach has been as follows:

> I would venture a few general comments about section 80 of the Labour Relations Act. First of all, the language it prescribes - "in administering the collective agreement, the employer shall act reasonably, fairly and in good faith..." - must be considered a full and legitimate aspect of every collective agreement in Manitoba. It must be given full force and effect by employers, and by arbitrators. It is often said that arbitrators must interpret the collective agreements as written, and not the agreement they would prefer to see. Just as arbitrators should not "supplement" collective agreements with provisions of their own invention, arbitrators should not diminish agreements by dismissing provisions that properly belong.
>
> The second point I would make is that s. 80 should not be viewed as calling for "justice in a vacuum". It speaks of fair play in administering a particular collective agreement; it specifically calls upon employers to take account of the terms of the collective agreement as a whole. The terms of s. 80 are an integral part of a collective agreement, and just like any part, they must be read with the others.
>
> Accordingly, in determining whether the employer made proper use of references, I shall frequently make reference to more specific terms of the Collective Agreement. (Notre Dame Medical Nursing Unit No 19B and Notre Dame Nurses Local 55 of the Manitoba Nurses' Union, July 16, 1992).

Looking at other sections of the Collective Agreement can reveal some of the values that are most important to the parties. The values established can provide guidance as to what is

"reasonable" with respect to issues not specifically addressed by a specific provision. The employer should try to develop a coherent approach to administering the agreement, in which the specific provisions operate smoothly together.

The Agreement constrains the extent to which management can assign "extra duties", and provides for compensation when it does. There are no specific rights to do "extra" work.

An arbitrator must decide on the "level of scrutiny" to give a managerial decision. Sometimes, the arbitrator may start with an especially strong presumption against second-guessing a managerial judgment. For example, if a managerial decision is a technical one, an arbitrator may be reluctant to condemn the judgment of a knowledgeable and experienced manager. Another factor to be considered is the nature of the employee interests involved. If especially important interests of employees are at stake, the arbitrator will be more prone to say to the employer "show me that you have a very solid basis for your decision."

In some cases, common sense may easily identify an interest as being especially important; you do not need a collective agreement to know that physical safety is important. In other cases, the parties, through specific provisions of the collective agreement, have identified a value (such as seniority or job security) as being especially important.

The Collective Agreement establishes a standard amount of work an employee does - during a day, and in the course of a two-week period; Article 7.01. The new schedule allows the full-time ORTs that basic amount of work time. The part-time employees have not contended that they have been reduced below the contractual minimum.

In this case, common sense says the loss to the employees is significant. The "extra" money is not the majority of their usual compensation, but it is far from negligible. The main witness for the union estimated that she was losing over $350/month in "extra" pay. She was a part-time employee, and by my own rough calculations, her "loss" amounted to over a quarter of her usual monthly compensation.

As counsel for the employer has pointed out, however, the "extra" money has been compensation for "extra" work and inconvenience. The grievors are no longer called upon to work as much overtime, and "odd" hours such as evenings and weekends.

The Collective Agreement itself does not contain any specific provisions that give an employee a right to be put on evening or night shifts, weekends, or to be placed on "standby" (that is, directed to be available to be called in on short notice). It

compensates employees who are directed to carry out these "extra" assignments. The Agreement actually provides some safeguards against being assigned these duties if they are unwelcome; Article 8.08, for example, enables an employee to refuse overtime if there are others willing and able to accept the assignment.

The right to do "extra work" and make "extra compensation", then, is not a value that is specifically recognized by the Collective Agreement.

All things considered, the desire of the employees to make "extra" money does not give me a greater-than-usual basis for questioning management's judgment about work schedules. Scheduling decisions often involve a loss of opportunities for employees to make "extra" money. Yet a long line of arbitral case law says that scheduling work is a core management function, and arbitrators should allow employers reasonably broad scope to make the discretionary decisions involved; see Brown and Beatty, Canadian Labour Arbitrations, s. 5:3100.

Character of Specific Jobs: ORTs must be capable of taking on complex work. It would be unreasonable for an employer to disregard this fact. But the ORT job description does not suggest they have a right to become involved in all kinds of complex work.

Article 2.16 of the Collective Agreement sets out "job classifications". These descriptions are used for establishing pay rates. Article 2.16(d) defines an ORT as "a technician who performs assigned routine or complex surgical support procedures". Some other job descriptions confine the scope of responsibilities to the routine; see, for example, "cardiology technician", Article 2.16(d)(1).

The job description refers to work that is "assigned". I t would be a fair inference from the job description - note the word "assigned" - that the employer could, if it wished, train and direct ORTs to get involved in a new kind of complex procedure. A reasonable employer cannot arbitrarily disregard the fact that ORTs are capable of doing complex work.

Article 2.16 obviously does not, however, confer an absolute right by ORTs to be involved in every single kind of complex surgery at the Hospital. In the phrase "assigned routine or complex work", the words "assigned" and "or" suggest that management has significant discretion concerning the tasks that ORTs will be called upon to perform.

Article 24: Technological Change.

Article 24 specifically addresses "technological change" - a change in Hospital procedures that is directly related to a new

kind of equipment.

The article directly applies only to a specific but important class of cases - those in which the technological change threatens to displace employees, or affect their classification. If so:

-the employer should consult the union, and try to work out a plan;

-employees displaced by the change have the right to move to vacant positions for which they are qualified;

-if an employee needs new skills to work with the new equipment, or work in a new area, she should be a given a reasonable training period, without loss of pay.

The union made it clear at the outset that it was not arguing that Article 24 has been breached. No employees have been displaced or reclassified.

The union argues, however, that Article 24 should be read as indicating a broader commitment by the parties to adapting to change. To at least some extent, I would agree. An employer acting reasonably would not wait until employees are actually facing immediate displacement or reclassification before considering the need to respond to technological change. It would recognize some responsibility to look ahead, and consider ways in which change can be accommodated in a smooth and constructive manner.

It is time to look in more detail at the specific facts of this case.

III. Management's line of justification for making the shift change.

The employer called as its only witness Ms. Wendy Morgan-Eckley. She is the Nurse Manager of the surgical suite. She is a trained Registered Nurse and a very experienced manager. She is currently working on a Master's degree in nursing. On July 14, 1992, she wrote a letter explaining the reason for the shift change. At the hearing, she provided further information and reasons in support of the basic points made in the letter.

Here is a summary of the "line of justification" put forward by Ms. Morgan-Eckley.

1. Surgeons want the option of doing laser and newer laparoscopic surgery on an emergency basis.

For many years, during regular surgical hours, surgeons at the hospital have been using laparoscopes in gynaecological procedures

and a few other contexts. The procedures mostly involve diagnosis, rather than the removal of organs. ORTs have been used as scrub nurses. Recently, surgeons have tried newer laparoscopic procedures - including the removal of gall bladders and ovaries. In a letter of July 14, Ms. Morgan-Eckley wrote to one of the grievors that "it is the policy of the Hospital" that ORTs would be not be trained in the majority of the newer laparoscopic procedures.

Since about 1986, surgeons at Victoria have also performed laser surgery; only RNs have been involved.

Surgeons at the Hospital approached Ms. Morgan-Eckley, and said they wanted the option of being able to respond to emergencies - including those arising in the evenings, nights and weekends - by doing newer laparoscopic surgery, or laser surgery, or the two together.

It was the surgeons' request that caused Ms. Morgan-Eckley to think about a shift change.

2. By virtue of fundamental training, RNs are better suited than ORTs to be involved in the technical and potentially dangerous tasks involved with laser surgery.

Since lasers were introduced at the Hospital, in 1986, the consistent policy of the Hospital has been to allow only doctors and nurses who are specifically trained and certified in laser surgery to be involved. The laser is a powerful piece of equipment. Mistakes could result in a patient being burned, or even killed. From Ms. Morgan Eckley's comments and the Laser Manual, the Hospital seems to think the advantages of using RNs include the following:

(i) The work is very "technical", in Ms. Morgan Eckley words. RNs have a extra year of training, she says, and are more familiar with biology and physiology. Ms. Morgan-Eckley made this comment in the context of explaining how powerful and potentially dangerous lasers are; she was implying, I believe, that using only RNs provides an extra assurance of safety and competence. The Hospital's Laser Manual says that laser nurses are responsible for "patient education", and that would appear to be another reason to prefer nurses with a more extensive background.

(ii) ORTs are only trained in performing "scrub nurse" duties. During laser surgery, however, the three nurses involved can switch positions a lot. There is not necessarily someone occupying the scrub position all the time.

3. Assigning only RNs to evening and weekend work makes it more likely that a surgeon will have the necessary support to do laser

work.

On cross-examination, Ms. Morgan-Eckley admitted that of her 27 RNs, only 16 are currently trained in laser surgery, and only 10 are certified. It takes three nurses to do laser surgery, and after regular hours, only two RNs are regularly present. A third nurse would have to be called in to assist. Ms. Morgan-Eckley admitted that it "could happen" that a surgeon would want to do emergency laser surgery, but would be unable to do so because the RNs on site were not laser trained and certified.

4. Having RNs on staff in the evening weekends allows for more flexibility in assigning staff.

Ms. Morgan-Eckley says that nurses are not always involved in surgery. If RNs are on site, they can do other work if there is no emergency surgery going on. They can, for example, provide pre-operative education and counselling for patients. ORTs are used only as scrub nurses in a surgical setting.

5. It is not necessary to train ORTs to do newer laparoscopic surgery, because there are already enough RNs who can do it.

While Ms. Morgan-Eckley explained that a rationale of the Hospital's policy on using only RNs for laser work is that their background knowledge of physiology and biology gives them a permanent advantage over ORTs in doing laser work. She made no such claim with respect to newer laparoscopic techniques. The current "policy" (as it is put in her letter of July 14) of not using ORTs in laser work was defended by Ms. Morgan-Eckley on the basis of three considerations:

(i) Laparoscopic work can involve lasers as well. Newer laparoscopic surgery can involve the use of lasers; when it does, laser-trained RNs should be present.

(ii) The sequence of training can logically start with RNs, because they train and supervise others. With complex procedures, RNs are often trained first, other employees later. The Hospital's job description of an RN includes "staff and student development". Among the tasks are "assists in the direction, supervision and instruction of auxiliary personnel." Ms. Zimmer, one of the grievors, described the RN as "sort of the director" among the nurses in an operating room.

(iii) It is not cost-effective to train ORTs when there are already enough trained RNs.

It takes about a day to train a person in the newer laparoscopic techniques. There are already enough trained RNs to be involved, so it is currently not "cost-effective" to

train ORTs.

IV. The union's objections to managements' line of reasoning; my own comments and conclusions.

Point # 1 (Doctors want to do more laser and newer laparoscopic work on an emergency basis):

The Association did not in the least question the reasonableness of the doctors' request. Between the introduction of the new schedule and the time of the hearing - less than two months - no laser surgery was performed on an emergency basis. (By contrast, about six to eight newer laparoscopic procedures have been performed on evenings or weekends). But as long as there is a significant possibility that laser work will benefit even one patient, it would seem reasonable for a hospital to consider ways to accommodate that possibility.

At some point in the future, the Hospital might discover that doctors never do find it suitable to do laser surgery on an emergency basis. A reasonable employer would take into account the lessons of experience. But all I am charged with is considering the reasonableness of the employer's current policies, based on the information that is currently available.

Point # 2 (RNs are better equipped by their technical training to do laser surgery; ORTs are trained only in the scrub position, and laser surgery involves interchange of positions):

From the uncontested evidence of Ms. Gail Zimmer, one of the grievors, it is clear that this group of ORTs has had a long and creditable history of adapting to technological change. They have been oriented and performed in routine laparoscopic surgery. They have adapted to new kinds of surgery, such as total joint replacements, that involve many trays of equipment.

In support of its position, the union called Ms. Jan Haven. Since 1975, she has been the head nurse in the E.N.T. section at the Health Sciences Centre. She is involved with procedures such as opthalmalogical surgery, oral surgery and endoscopy. According to Ms. Haven, ORTs are used in all kinds of surgery at the Health Sciences centre, including newer laparoscopic work and laser surgery. To train an experienced ORT for newer laparoscopic work is not a "long, time consuming process". It can be done in "a matter of hours". The orientation for an ORT for lasers is also not a "long, time-consuming process". At the Health Sciences Centre, ORTs are used as circulating nurses, as well as in the scrub position.

Let me assume, for the purposes of argument, that a reasonable employer could train ORTs to work in laser surgery, and assign them to those duties. Some crucial questions would still remain. Would it be reasonable for this hospital to say "ORTs are acceptable,

but it is better to use only RNs"? Could a reasonable manager say "the advantages of using only RNs outweigh their extra salary costs involved"?

Ms. Morgan-Eckley explained that to develop Victoria's procedures, senior nurses were sent to established laser centres for training and certification. In assessing the reasonableness of Ms. Morgan-Eckley's opinion about using only RNs in laser surgery, it should be noted that her views are not merely personal and idiosyncratic. An opinion is less likely to be arbitrary or mistaken if it supported by the professional judgment of others, and consistent with the lessons of experience. The manual was prepared by others, and according to Ms. Morgan-Eckley, its recommendations have "worked well".

Victoria Hospital was a pioneer, in Winnipeg, of using laser surgery. (The Health Sciences Centre borrowed from the Victoria manual in developing its own policies). The manual was prepared in 1986 and updated in 1987. It expects much of the nurses involved. They must not only be RNs, but also have five years of operating room experience; a "demonstrated knowledge of laser physics and the scientific application in surgery". They must be able to look after the "education of the patient".

An arbitrator should be cautious about second-guessing the judgment of experienced and trained professionals on a matter involving patient care and safety.

Counsel for the union cited Re Nova Scotia (Civil Service Com'n) and N.G.S.E., 13 L.A.C. (4th) 322 (Cromwell). The case was about provincial tax collection officers. They were working, as an experiment, on a modified work week. The Collective Agreement specified conditions (such as loss of service to the public) under which an employer could terminate such an experiment. The employer did so. An arbitrator reversed its decision. He ruled that the employer must act reasonably, having regard for its interests and those of its employees, in deciding whether the schedule was causing problems. The manager making the decision thought on the basis of long experience that a regular work week is better. But having authorized the experiment, he had no rational basis to declare it a failure.

The arbitrator noted that the employer did not consider alternative ways of dealing with any perceived problems. It did not analyze the productivity statistics or consult employees to see if the modified week was actually causing difficulties. These steps could have been taken with "little effort or expense".

In Re Nova Scotia, the employer was contractually obliged to evaluate a specific in-house experiment. There is no such specific obligation here. Insofar as employee interests are involved, the

Victoria Hospital had to be reasonable in its overall approach in development to laser-nursing policy. In developing its manual, it sent senior nurses for orientation and training at established laser centres. It has now had considerable experience with that policy; according to Ms. Morgan-Eckley, it has "worked well".

In the course of developing its policy, a reasonable employer might sometimes conduct a "trial run". Unlike the Re Nova Scotia case, however, the collective agreement here does not specifically envisage one. It is not clear that it would have been easy, cost-effective or safe for this hospital to have experimented with ORTs in laser surgery. By Victoria Hospital's standards, it takes at least two days to orient an experienced RN in laser work. ORTs have less background in biology and physiology, and it might take more time to fully orient one of them. In addition to explaining the operation and effects of the equipment, the ORTs would have to be trained to work as circulating nurses and patient educators. Even if all that work were done, it might take months before the "trial run" could be evaluated. In the meantime, the Hospital might lose the chance to give its RNs more training and experience with the equipment. The Hospital might also have some concerns, from the patient care perspective, of even experimenting with ORTs when it has plenty of RNs available.

Part of "reasonableness" in decision-making might sometimes involve studying a comparable situation. The Health Sciences Centre is close by, and it does use ORTs. In this case, it is doubtful whether such a comparative study could be done quickly, easily or cheaply. In the Re Nova Scotia case, the employer simply had to evaluate its own in-house experiment against some simple criteria (e.g., effect on accounts-receivable). Here, the employer would have to look at a wide array of facts at another institution, where professional and managerial standards might be different.

Point # 3 (Having RNs only on staff in the evening and weekends increases the opportunity for doctors to do emergency laser surgery):

At the hearing, Ms. Morgan-Eckley agreed that no laser surgery has been performed since the shift change was implemented. The time frame, however, was less than two months. It would be reasonable for a Hospital to consider, among other things, the welfare and safety of even a very few potential patients. A reasonable employer would learn from experience, and it may eventually teach the doctors and nursing staff that there is really no chance that laser work will be done on an emergency basis. In the meantime, the interest in accommodating laser work is a reasonable one. The union did not suggest otherwise.

It is true that even under the new shift schedule, there may not be enough laser-trained nurses on site or on standby at a given point in time. The employer is trying, however, to complete the

laser training of the registered nursing staff. In the meantime, it can reasonably try to increase the chances that enough laser-trained staff will be available during an emergency.

Point # 4 (There is greater flexibility if RNs are on-site, because they can do patient education when not involved in surgery):

Patient education is not a function in which this group of ORTs has been trained, or been called upon to perform in practice. There was no evidence that it would be quick or easy for the Hospital to now train ORTs with respect to patient education.

It seems reasonable to consider the patient education factor in working out a schedule for the evening, at time at which there is not always surgery taking place.

Point # 5 (it is not necessary to train ORTs in newer laparoscopic surgery, as there are already enough trained RNs):

Since the shift change, there have been a number - somewhere between six and eight - of newer laparoscopic operations performed on evenings and weekends. It is time to look at the Hospital's policy of only orienting RNs for this work.

The case for excluding ORTs from newer laparoscopic surgery is less substantial and less "permanent" than with lasers. As far as I can see, the Hospital did not present evidence, or even argue, that a properly oriented ORT would be inferior to an RN as the scrub nurse. There was no evidence that newer laparoscopic surgery involves equipment that is much more complicated or dangerous than the largely diagnostic work in which ORTs have long been involved. Ms. Haven, from HSC, said that ORTs could be trained for newer work in a matter of hours. On one occasion (on the irregular orders of doctor) an ORT - Ms. Zimmer - actually participated in a newer laparoscopic operation. She performed without difficulty.

It was understandable that the Hospital would first train RNs in the newer laparoscopic techniques. Their job description includes supervising and training others, including ORTs. It is not clear to me, from the testimony, whether all of RNs have been trained yet. According to Ms. Morgan-Eckley's testimony, it takes a one-day course to orient RNs in newer laparoscopic techniques. I am prepared to make the assumption most favourable to the union, and assume that the RNs are almost all trained in newer laparoscopic techniques now, so the "sequence of training" argument does not justify the Hospital's not training the ORTs.

Ms. Morgan-Eckley testified that it is not "cost-effective" to train ORTs for newer laparoscopic work, as there are already enough RNs who can do it. It is not clear to me whether the

orientation takes place on a collective basis, or each individual RN must be oriented individually. Whatever the case may be, there are only five ORTs, and even if they had to be oriented individually, it would appear that the burden to the Hospital would be modest.

Prior to the shift-change decision, it might well have been a good idea to train ORTs for newer laparoscopic surgery. The Hospital would then have had more options available to it with respect to assigning work. On the other hand, some modest inconvenience would have been involved in orienting them; the ORTs continued to have a variety of complex tasks to perform, and none of them approached the Hospital administrators to request the advanced training. With some hesitation, I would conclude that quite apart from the shift-change decision, it was reasonable for the Hospital to refrain from orienting ORTs in the newer laparoscopic techniques.

The Hospital could probably not justify its shift-change decision on the sole basis that it is not "cost-effective" to train ORTs for newer laparoscopic techniques. Mrs. Morgan-Eckley herself freely admitted that it costs more to have an "RN-only" policy for night shifts. The Hospital is now paying overtime, shift differentials and standby pay to employees whose rates are substantially higher.

In making the shift-change decision, however, the Hospital took into account a variety of considerations. They included the relative advantage of RNs at laser surgery and patient education. The Hospital could reasonably have deemed these considerations to be a reasonable basis for making the shift change. It could reasonably have considered the modest burden of training ORTs in the newer laparoscopic techniques as an additional, less weighty, factor in support of its overall decision about evening shifts.

As an arbitrator, my task is confined to seeing whether the Hospital has reasonably administered the Collective Agreement. It is not for me to determine what the best possible policies and practices would be. On the evidence presented, the Hospital has affirmatively demonstrated that the shift change, and the training policies connected with it, were reasonable.

V. <u>A note on the burden of proof.</u>

The burden of proving a contactual violation is usually on party making the allegation. Arbitrators have carved out some exceptions. For example, in discipline cases, the burden is on the employer to show that its actions are consistent with the Collective Agreement. In some other kinds of cases, where the employer may have information not readily available to the union, arbitrators have considered placing the burden on the employer.

In the Re Nova Scotia case, the arbitrator thought that the onus might be on the employer to affirmatively demonstrate that it had exercised its discretion reasonably; the arbitrator noted that the collective agreement identified specific conditions that an employer must consider before terminating a modified work-week experiment.

There is no need for me to explore the "onus" issue in this case. At the hearing, no question was actually raised about the grievors' presenting their case first. The employer then presented its own evidence. At the end of the day, I believe that the employer did show, on the balance of probabilities, that its practices to date have been consistent with the Collective Agreement.

VI. Concluding Comments.

The grievors here may be concerned that Hospital's "policy" of not training ORTs for newer laparoscopic work is a permanent one. Their counsel expressed the concern that they are being wrapped in a "cloak of ignorance". As far as I know, the Hospital has not said to employees that the policy is immune from review or change. It is still less than two years since RNs were oriented in the newer laparoscopic techniques. Again, Ms. Morgan-Eckley testified that until the shift change, no ORTs actually asked her to provide them with training in the newer laparoscopic techniques.

I will refrain from extensive speculation on whether the Hospital can, over the longer run, reasonably maintain its policy of not training ORTs in newer laparoscopic surgery. I would think that a reasonable employer would, from time to time, reconsider - and sometimes change - its policies in light of the expressed desires of its employees, their contractual interests, and the challenges facing the enterprise as a whole. My responsibility, however, is confined to deciding the current grievance based on the current state of affairs. For now, the ORTs continue to be involved with a variety of routine and complex procedures, and are being assigned their contractually-guaranteed number of work hours. If the continuation of their fundamental working conditions became doubtful as a result of not being trained in newer laparoscopic surgery, the Hospital would have to take another look at doing so. There might be some advantages to providing the orientation before any specific problems come into view; but it appears that whenever the training becomes necessary or desirable, it can be provided in short order.

In view of the overall analysis provided here, the grievance is denied.

I would like to express my appreciation to the counsel and witnesses for both sides. All concerned approached the case in a courteous and straightforward manner. Due to their co-operation,

and the clarity and efficiency with which they presented evidence and argument, the cases for both sides were fully and ably presented in a single hearing day.

Dr. Bryan Schwartz
27 November 1992