

IN RE ARBITRATION BETWEEN:

IBEW #949

and

PEOPLE'S CO-OPERATIVE SERVICES

DECISION AND AWARD OF ARBITRATOR

BMS CASE # 10-RA-1645

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June 1, 2011

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DECISION AND AWARD OF ARBITRATOR
BMS CASE # 10-RA-1645
Meter Reader job requirement Grievance

APPEARANCES:

FOR THE UNION:

Richard Kaspari, Metcalf, Kaspari, Howard, Engdahl,
& Lazarus
Vince Guertin, retired Business Mgr. Local 949
Rick Bartz, Bus. Representative Local 949

FOR THE EMPLOYER:

Reid Carron, Littler Mendelson PC
Elaine Garry, President of People's Co-op.
Peter Reese, Meter Technician
Eugene Schmit, Meter Reader
Jeff Allen, Dir of Operations
Donald Hillman, VP of Planning & Support

PRELIMINARY STATEMENT

The hearing in the matter was held on March 1, 2011 at 10:00 a.m. at the Hilton Garden Inn, in Rochester, MN. The evidentiary record closed at that time and the parties submitted post-hearing Briefs on May 10, 2011.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement, CBA, dated June 1, 2009. The grievance procedure is contained at Article III and IV. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services. The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator. The parties also agreed that the requirement that the matter be certified by the BMS per Article IV of the CBA was waived and that the that agreed to proceed to arbitration regardless of the Bureau's inaction.

ISSUE

The Union stated the issue as follows: Did the employer violate the Collective Bargaining Agreement when it assigned the disconnection and reconnection of non-self contained meters to the Meter Reader classification and if so, what is the appropriate remedy?

The Employer stated it as follows: Did the Co-operative violate the collective bargaining agreement (the “Outside Agreement”) when it changed the job requirements of the Meter Reader classification in January 2010?

The issue as determined by the arbitrator is as follows: Did the Employer violate the collective bargaining agreement and/or the December 17, 1992 agreement between the parties when it changed the job requirements of the Meter Reader classification in January 2010 and assigned the disconnection and reconnection of non-self contained meters to the Meter Reader classification? If so what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

ARTICLE I.

Recognition, Coverage, Duration & Modification

- A. This agreement applies only to the maintenance and construction employees of the Co-operative, excluding CEO, department managers, line superintendent, professional employees, office personnel and janitor.
- B. This agreement shall become effective as of June 1, 2009 and shall remain in full force and effect until September 30, 2011. It shall renew from year to year thereafter, unless either party shall notify the other in writing that it desires to modify or terminate this agreement not less than sixty (60) calendar days prior to the expiration date of the agreement. Nothing in this section shall be construed as preventing the parties at any time from amending this agreement by mutual consent. It is further agreed that this twenty-eight (28) month agreement can be reopened at anytime should significant changes occur that affect the Co-operative’s financial status or organizational structure.

ARTICLE II.

Union & Co-operative Security

- B. The control and supervision of all operations and the direction of all working forces, including the right to hire and to determine the qualifications, job requirements, scheduling, hours of work and the size and character of the working forces are vested exclusively in the Co-operative. Its decision relative to these matters shall be final except as modified by the provisions of this agreement.

The Co-operative reserves the right to alter existing practices if appropriate to meet the needs of members. ...

ARTICLE VI.

Classifications & Wages: Schedule of Hours

- A. The occupational classifications and rates of pay are listed in SCHEDULE "A." These rates shall prevail for the duration of the Agreement. Nothing herein contained shall prevent the Co-operative from changing operating and production methods, hours of work as necessary or adopting new methods or creating new occupational classifications on new or changed methods. The rates of pay for new classifications shall be negotiated with the Union. (Joint Exhibit 1.)

In addition to the above referenced provisions the parties jointly signed a letter dated December 17, 1992. That letter provides in relevant portion as follows:

People's Co-operative Power Association and Local 949 have come to the following agreement and understanding relative to the position of Meter Reader.

1. The current pay rate of \$16.74 is abolished.
2. The new position will be in the outside Union but does not require a lineman qualified employee.
3. The employee in this position will not be on the Call Out list.
4. This position will do all duties associated with the Meter Reader position, including but not limited to:
 - a. Meter reading.
 - b. Collections.
 - c. Disconnects/reconnects limited to self-contained meters of 300 volts or less, line-to-line voltage. Employee will receive proper training.
 - d. All other duties previously performed or consistent with the position.
5. Except in emergency type situations, the employee, if lineman qualified, will not be assigned line work. If so assigned, the lineman rate will be paid for hours so assigned.
6. The new rate from June 1, 1992 through May 31, 1993 will be \$15.00 per hour, and on June 1, 1993 will be \$15.60 per hour. See, Joint Exhibit 3-H.

UNION'S POSITION

The Union took the position that the Employer violated the CBA and the December 17, 1992 agreement when it unilaterally changed the Meter Reader's duties by deleting the words "self-contained" from the Job Description and in contravention of the parties' clear agreement as set forth in the 1992 agreement. In support of this position the Union made the following contentions:

1. The Union asserted that this case is simple despite the Employer's efforts to complicate it. The Union noted that prior to 1992 the person in the position of Meter Reader at that time had some physical limitations on his abilities to do certain portions of the job. When he retired the Employer, sometimes referred to as the Co-op, proposed replacing him with a far less qualified employee and at a lower rate of pay. After the Union objected to that and after negotiations between the Co-op and the Union, the parties eventually reached an agreement on December 17, 1992 set forth above.

2. The Union noted that one of the clear requirements of that agreement was that the Meter Reader would "disconnect and reconnect electric meters that are limited to *self-contained meters of 300 volts or less*, as paragraph 4C of the 1992 agreement provided. (Emphasis added). The job description was changed to reflect that and provided in relevant part as follows (that is until January 10, 2010):

PEOPLE'S CO-OPERATIVE SERVICES

POSITION DESCRIPTION

Position: Meter Reader

3. Disconnect and reconnect electric meters that *are limited to self-contained meters* of 300 volts or less; collect money when assigned; and check disconnected accounts monthly to ensure accurate electric usage by members and minimize the risk to the Co-operative. [Emphasis added.] See Joint Exhibit 19B.

The Union asserted that the clear agreement of both the 1992 agreement and the position description as well as the longstanding practice was reflected in the position description and in fact the Meter Readers only changed meters that were *self contained*. Following this agreement, the Co-op assigned the installation and removal of self-contained meters less than 300 volts to the Meter Reader and that this has been the case consistently from 1992 until January 2010. .

3. The Union noted that there is a substantive difference between a "self contained meters" and other types. Self-contained meters are connected in series with the power line serving a customer and may be disconnected or reconnected for maintenance or in connection with a cutoff or restoration of service. Non-self-contained meters are connected in parallel to a power line by a transformer.

4. The Union described the essential difference between a self-contained, or 2S meter, and others is that the smaller, mostly residential 2S meters have the power running through them and disconnecting them cuts power to the building. Other meters, like 3S and 4S meters, simply monitor the power and disconnecting those do not cut the power to the affected building but does disconnect the meter function.

5. The Union asserted that the Co-op unilaterally repudiated the 1992 Agreement when it deleted the words “self-contained” from the position description and allowed Meter Readers to change meters that were not self-contained. These meters had been changed/serviced only by other more qualified employees until January 2010 and that had been the longstanding, clearly understood past practice until the Company’s violation of the CBA and 1992 Agreement.

6. The Union further asserted that Article VI, Section A, specifically references the existing job classifications in the bargaining unit and provides that the rates of pay for those positions will remain the same throughout the Agreement’s term. That provision clearly states that the rates of pay, set forth in Appendix A of the CBA, “shall prevail for the duration of the Agreement.” The Union further asserted that such an agreement can only be amended by mutual consent. Here, of course, the Co-op did this unilaterally in clear violation of the CBA.

7. The Union also noted that even though there is a provision in Article VI B reserving the right to alter existing practices, what is presented here is no mere practice but rather a binding past practice and a specific written agreement set forth in the 1992 letter agreement between these parties and a specific provision in the labor agreement that limits management rights under Article II B to the express terms of the CBA. Here too there is a specific provision in Article VI requiring that rates of pay for occupational classifications, including that of Meter Reader, “shall prevail for the duration of the Agreement.” The Union argued that those rates of pay were negotiated with certain job duties in mind and that the Co-op cannot unilaterally change them without re-negotiating the rates.

8. The Union countered the Co-op's claim that Article II gives it the right to unilaterally alter the existing job descriptions and asserted that the Co-op's reliance on Article II ignores the second sentence of that paragraph, which limits the Co-op's rights "except as modified by the provisions of this agreement." Further, the Co-op cannot ignore the December 1992 agreement, which specifically limited the Meter Reader's job to self-contained meters, using general management rights language, especially where that language is specifically and clearly limited "by the terms of the CBA."

9. The Union further asserted that the longstanding practice of having Meter Readers service only self contained meters of less than 300 volts further supports the claim that such a change can only be implemented through negotiation by the parties and cannot be unilaterally implemented by one party. The Union relied on the provisions of Article VI set forth above as well as Article I, providing for mutual consent to any changes.

10. The Union noted to efforts in the past to change the description of the Meter Readers and asserted that the Company has tried several times, without success to do so. In November 2008 the Co-op tried to replace the Meter Reader position with a "Collections/Meter Technician 1" position. That position would have had the responsibilities of the Meter Technician position, in addition to collection duties, but would have paid less than the Meter Reader position. The Union objected and the employer eventually withdrew that request. The Union pointed to this as further evidence of the parties' understanding that the provisions cited above prohibits the creation of a change in position description without negotiation and asserted that the Co-op is simply trying to bypass the negotiation process by unilaterally implementing the change.

11. The Union countered the claim by the Co-op that there is a history of allowing the Co-op to modify work requirements of other positions, both in the "inside unit" and "outside units," without objection. The Union asserted that those instances were distinguishable in that there was no violation of a specifically negotiated limitation on those positions' duties, as set forth in the 1992 agreement and then essentially codified in the position description for 18 years.

12. The Union went through several prior instances noted at Tabs 5, 6, 7, 8 and 9 of the hearing exhibits and argued that these cases showed the Union's clear position that the Co-op cannot create a new classification during the term of the Agreement without negotiation of the pay rates or that the "change" was within the job description and did not meet the threshold set forth in Article VI A of the creation of a new classification. (Tr. At 61-62.)

13. In other instances, see e.g. Tab 8, the Union was forced to file charges with the NLRB due to the unilateral implementation of a new wage rate and the failure to live up to prior agreements reached relative to those. The Union asserted that it has not acquiesced where there has been a violation of any prior agreements reached with the Co-op and that this is at the very heart of this matter – i.e. the failure of the Co-op to adhere to a prior agreement with respect to the Meter Reader position regarding self-contained meters. The Union acknowledged the Co-op's general rights under Article II and VI, but asserted that the clear language of the 1992 agreement is still in place, Tr. at 54, and has never been superseded by any subsequent negotiation or agreement. As the Employer noted, the language of Article II and VI were the same in 1992 as they are now and have not changed since.

14. The Union asserted that there is no limitation on the language of the 1992 agreement – it says and means that the Meter Readers may only connect and disconnect self contained meters less than 300 volts. Thus any assertion by the Co-op that this language was limited to cutting off or restoring a customer's service and that the 1992 language was never intended to apply to the removal and installation of meters for repair or maintenance is simply without support in the language itself. There has never been any such limitation over the course of time and none appears in the language of the 1992 letter or the pre-January 2010 position description.

15. Finally, the Union rejected flatly any suggestion that the need for efficiency compels this result. First, the Union took issue with whether there really was any cost savings here and questioned the Co-op's assertions in this regard. Second, and more to the point, clear CBA language and the parties' agreements trump any argument based on efficiency. The parties negotiated an agreement that was in place for 18 years. The Union asserted most vehemently that if the Co-op wants to change that agreement it certainly can – through negotiation with the Union over the pay rate for the changed position; just as it did in 1992.

The Union seeks an award sustaining the grievance, and directing the Co-op to cease and desist in the assignment of the connection and disconnection of non-self-contained electric meters until such time as that limitation on the position's duties might be changed through collective bargaining.

EMPLOYER'S POSITION:

The Employer took the position that there was no contract violation here. In support of this the Employer made the following contentions:

1. The Employer noted that technology changes frequently and that in the early 1990's mostly meters were read manually by having a person physically go out to the meter and read it in order to bill for the service. This used to require Meter Readers to spend a week or more every month in the field reading meters. Of course now most meters have an Automated Meter Infrastructure, AMI system (Tr. 141, 142) that reads the meters automatically and sends the values to the office where they can be read there. (Tr. 142.)

2. Occasionally though there is a malfunction requiring the reader to inspect the meter to determine what the problem is. Once there the Meter Reader may determine that the problem is with the communication system between the meter and the office but the Meter Reader may determine that the meter itself is defective and needs to be replaced. (Tr. 177-178).

3. The Co-op described in similar detail the difference between a 2S and 3S meters as did the Union, see above. The Co-op however went a step further and asserted that until January 2010 the Meter Readers were not changing 3S, or other meters with even higher designations due to the language of the 1992 agreement. They could change a 2S meter if they found that it needed replacing but were left in the somewhat curious and very inefficient place of having to call a Meter Technician or other workers out to replace a 3S or higher meter. This required a second person and truck to be dispatched to the same location to replace the meter. This was both highly inefficient, costly, and unnecessary.

4. The Co-op asserted that the Meter Readers were quite capable of doing this work and that with minimal training they were able to do this safely and competently. The Co-op noted that the current incumbent Meter Reader himself told his managers that it was “crazy” that he was not able to replace a 3S meter and pointed out the inefficiency of having to have another person come out, sometimes many miles out, to a remote location to do something he felt he could do. (Tr. 180, 194).

5. Based on this feedback from the very employee who was affected by the limitation on changing only self contained meters, the manager approached the president of the Co-op who made the decision to simply delete the self contained language for the job description of the Meter Reader and to provide training to allow the Meter Reader to change self contained meters. Training was provided and the Meter Reader began doing this work shortly after the job description was changed in January 2010. The Co-op saw this as a win-win for everyone since no work was taken out of the bargaining unit; it was simply a minor shift of work from one classification to another within the unit. The Employer asserted that it is obvious that the need to change meters quickly and efficiently is crucial; they are the “cash registers.” Further, the additional cost of having to send out a second person to do something the first one could do just as easily is ludicrous.

6. Further, there was nothing to suggest that this was motivated by a desire to simply shift work from higher paid classifications and no evidence that the Lineworkers or Meter Technicians, who are paid at a higher rate than the Meter Readers, were losing work or had their hours cut as the result of this minor shift in duties. The Co-op noted that that even after the current Meter Reader began changing meters, there was still no loss of work for other units and that the transition has gone smoothly without any problems noted by any of the actual employees affected by this change.

7. The Employer further noted that the Meter Technicians and Lineworkers have training and skills far beyond that of the Meter Reader so they need not worry that somehow their jobs are at risk due to this minor change. Further, to have these highly skilled workers doing a task that the Meter Reader can do just as well with a few hours training takes them away from the jobs they are best at and are trained for. Having the Meter Reader do this work is well within his training and abilities and is safe (the Co-op noted that with 2S meters the power runs through the meter, whereas the 3S meters do not have power running directly into the box making it in a way actually safer to change those).

8. The Employer relied heavily on the language of Article II and VI set forth above and asserted most vigorously that these provisions allow the Co-op to change the job duties without the need to negotiate those changes as the needs of the operation, technology or business requirements dictate. Article II gives the Co-op “the right to ... determine the job requirements, [and] scheduling. The Co-op noted that these inherent managerial rights are vested exclusively in the Co-operative and that this is recognized in the CBA itself.

9. Further, even though the language of Article II sets forth that the “decision relative to these matters [right to determine the job requirements and schedule] shall be final except as modified by the provisions of this agreement there is nothing in the 1992 letter that abrogates this right. That agreement simply set forth what the job requirements were at that time and the pay rate was at that time. Obviously the pay rate has changed many times and there is nothing in that letter or in any subsequent negotiation that undercuts the right to change the job duties for that position.

10. Moreover, the Co-op asserted that if the clear language of Article II were not enough, Article VI provides that “The Co-operative reserves the right to alter existing practices if appropriate to meet the needs of members.” Joint Exhibit 1. This right as specifically reserved to the employer in the 2009 negotiations and must be honored now. The Co-op reserved the right to change any existing practices, such as the practice of disallowing Meter Readers from changing non self-contained meters.

11. The CBA further provides that “Nothing herein contained shall prevent the Co-operative from changing operating and production methods.” This means that the listing of occupational classifications is not written in stone; they may be changed when the Co-op decides they should to meet the needs of the organization. Thus, while the Co-op conceded that it did change the job description unilaterally it asserted it had every right to under the clear terms of Article II and VI.

12. The Co-op countered the Union’s claims regarding the language of Article VIA and asserted that this language only applies to the creation of a “new classification.” The Co-op vigorously asserted that the addition of the duty of changing out non self-contained meters does not create a new classification; it merely added a new duty to the existing classification of Meter Reader. Thus, the language of Article VI A does not apply here at all.

13. Moreover, even if the Co-op *had* created a new classification, there is nothing that prevents that from happening. All that Article VI requires is that the parties negotiate the rate of pay for that new classification. The language demonstrates an unmistakable waiver of any obligation to bargain over the creation of a new classification and a waiver of the obligation to bargain over the addition of any new duties given to an existing one – either way the Union’s case fails.

14. The Co-op further asserted that neither does the language of Article VIA regarding the rates of pay” prevailing “for the duration of the Agreement.” The Co-op did not change the rate of pay for the Meter Reader; it merely added a job duty to the classification; something which it has done with many other classifications over time.

15. The Co-op took issue with the Union's claim that the 1992 letter forever required that the Meter Reader could only change self contained meters. First, it argued, this is inconsistent with the clear language of Articles II and VI of the CBA, both of which reserve to the Employer the right to change job duties and to create new classifications.

16. Second, the Union's conclusion is not consistent with the underlying purpose of the negotiations leading to the 1992 letter in the first place. The Co-op asserted that the purpose of that letter was to negotiate the rate for what was in reality a new position, just as the letter says, as noted herein. Mr. Guertin admitted as much when he essentially acknowledged that the purpose of the letter was to give the Meter Readers the authority to disconnect and reconnect service as part of the collections process—that is, the Meter Reader himself could disconnect a delinquent account and reconnect it when it was brought up-to-date if the account was served by a self-contained meter. (Tr. 76-78). Moreover, the actual limitation in the 1992 agreement was the 300 volts, not the self-contained piece, since there were some self-contained meters of more than 300 volts. Thus, the issue of the “self-contained” language is a red herring by the Union. (Tr. 78-79).

17. The Co-op made the point that while there is no difference between replacing these different types of meters, service disconnects and reconnects are quite different on a 3S system versus one using a 2S meter. The parties who negotiated the 1992 agreement were thus likely not even thinking about whether the Meter Reader would change malfunctioning meters. Accordingly, the “absolute” prohibition posited by the Union was simply not intended by the 1992 agreement.

18. Third, the Co-op suggests that the grievance did not even refer to that letter strongly suggesting that the letter was an afterthought and that the Union may not have even known it was in place when this grievance was filed.

19. The Co-op pointed to a number of other situations where job descriptions changed without negotiation with the Union and asserted that this demonstrates tacit assent to the notion that the Co-op can make these changes unilaterally. In those instances where there was a grievance or charge filed with the NLRB, there was an allegation of a failure to negotiate appropriate wages for these positions. None involved the creation of a new classification. The Co-op noted that even the current Meter Reader's job description has changed in other ways without objection from the Union. (Tr. 171-172). The Co-op raised numerous other instances where both outside and inside unit jobs were changed during the life of a contract without objection from the Union. See Employer Brief at pages 22 to 30.

20. The Co-op pointed to the Union's own witnesses and asserted that they essentially acknowledged that there had not been a new classification created by the addition of this new duty. Mr. Guertin acknowledged that the letter of December 1992 created a "new position." See Joint Exhibit 3H. (Tr. 71 and 114.) Mr. Bartz acknowledged that the 1992 negotiations for the new position, involved many more changes than are at issue here. Thus, the Meter Reader job as described by the 1992 letter certainly was a new classification even though the name did not change, but the minor change to job requirements implemented in January 2010 did not create a new classification. Thus there is no obligation to bargain over the wage rate for it under Article VI.

21. The CBA does not provide for any sort of "litmus" test to determine whether a new classification has been created which would then trigger the requirement to bargaining over the rate for it. The Employer argued that here though one is not necessary since the changes to the Meter Reader position were well within its prerogative under the contract and since there is no limitation on that right anywhere in the agreement.

22. The Co-op distinguished the situations cited by the Union in support of its claim that the parties have agreed to negotiate either the creation of a classification, a change in duties or rates of pay in scenarios where there was not a new classification. As examples, when the Co-op posted the Meter Technician position there was no wage rate with it. The Union grieved this but the parties eventually negotiated a rate. Similar results occurred for the General Maintenance position and the Collections/Meter technician positions. In all of these the issue was the rate of pay and in each the Co-op created a new classification and the parties eventually negotiated a wage rate. The Co-op argued that these are different from the instant situation in that they were new classifications.

23. The Union's reliance on the provisions of Article I and the provision regarding mutual consent to mid-term changes is misplaced. That clause merely provides that the parties may amend the language by mutual consent but does not abrogate the provisions of another Article, including Article II or VI. The Union is attempting to grossly inflate the meaning of this provision to something it was never intended to do. It certainly does not require the Co-op to negotiate over changes in job duties or any other matter reserved to it under the clear terms of the management rights provisions of the CBA.

24. Finally, the Co-op vehemently denied that there was any evidence of anti-Union animus or that the decision to change the job requirements was motivated by the difficult negotiations for the last labor agreement.

The Employer seeks an award denying the grievance in its entirety.

MEMORANDUM AND DISCUSSION

Underlying facts – There were few disputes about the underlying facts that gave rise to the grievance but there were some disputes about the history of the various contractual provisions and how they came to be in the contract and what they meant.

The Employer, People's Co-operative Services, also referred to as the Co-op, provides electrical services to customers in southern Minnesota and is headquartered in Rochester, Minnesota. The parties have a longstanding bargaining relationship going back many years.

There is an “outside unit” consisting of maintenance and construction employees who service the Co-op’s distribution grid and physical plant. See Joint Exhibit 1. In addition, there is an “inside unit,” which includes the office clerical and engineering department employees. Joint Exhibit 26. The Meter Reader is in the “outside unit.” Local 949 represents both units and their contracts are similar if not identical, at least with respect to the salient provisions involved in this matter.

By way of background it is important to note that for a few years prior to 1992 the Meter Reader position was held by Mr. Erwin Anderson, who was a qualified Lineworker but who had some physical restrictions that prevented him from doing all of the tasks of a Lineworker. As such he was performing the Meter Reader functions and was paid approximately 90% of the Lineworker rate. (Tr. 92-93) See also Joint Exhibit 3B, & 4A. Mr. Anderson was qualified to work on most aspects of the Co-op’s distribution system, including the connection and disconnection of all types of electrical meters. (Tr. 92-93.)

When Mr. Anderson retired in 1992 the Co-op proposed eliminating the Meter Reader position and replacing it with a position called Accounts Representative/ Collector. That job would have paid approximately two-thirds of the Lineworker rate. Joint Exhibit 3B. This set off a series of objections from the Union regarding this proposal and a series of letters went back and forth between the Union and the Co-op’s President at the time.

There was considerable dispute about what the December 1992 agreement letter actually meant in the context of what was being discussed and the intent of the parties at that time. To determine that the trail of correspondence and the testimony of Mr. Guertin was reviewed in some detail. The correspondence in Exhibit 3 shows that the Union objected to the creation of the new position of Account Rep/Collector and that the Union asserted that there were no new methods upon which to base the creation of this new job. The Union was concerned that the Co-op was merely changing the title of “Meter Reader” and paying it a lower wage under the guise of calling the same job something else. See Joint Exhibit 3A, June 3, 1992 letter from Mr. Guertin to Frank Welter.

Mr. Welter's response, Joint Exhibit 3B, was in relevant part that the new position had no line worker responsibilities, whereas the prior Meter Reader position apparently had – it was just that Mr. Anderson was unable to perform those due to an injury so they never insisted that he do those. The Company acknowledged that they were essentially giving a break to one individual employee but chose not to “repeat that mistake.”

The Union's response to that was to acknowledge that the Union was not at that time challenging managements rights nor was the Union bargaining with the last correspondence. The Union indicated that it would not bargain over the rate of pay until the question of the creation of the new position was settled. Joint Exhibit 3C.

The Company responded by offering two options: one to post for a Meter Reader position for a line qualified person. Option 2 was to post for an Account Rep/Collector position that would not need to be line qualified and whose duties would be disconnects of self-contained meters of 600 volts or less. Joint Exhibit 3D. The notion to limit the duties of these positions insofar as they related to certain types and sizes of meters came from the Co-op, not the Union.

The Union in response indicated a strong preference for the Meter Reader position. Joint Exhibit 3E. The Co-op agreed with that as set forth in the letter of November 20, 1992 and indicated that it was prepared to negotiate a “rate for the vacant Meter Reader position.” Joint Exhibit 3F.

The parties agreed to open those negotiations, Joint Exhibit 3F and 3G, and the eventual letter of December 17, 1992 resulted. As stated above, that letter reflects the agreement with respect to the Meter Reader position. It was clear that it was a “new position” since those words are used in the body of that letter. It was also clear though that the parties specifically negotiated a limitation in that position to “disconnects/reconnects limited to self-contained meters of 300 volts or less.”

The Co-op argued that this was intended to limit the meter connection/disconnection to situations where service was being disconnected due to non-payment of bills and was never intended to deal with malfunctioning meters. That however is not found anywhere in these documents or in the underlying correspondence leading up to it. Further, as will be discussed somewhat more below, in none of the other situations where job duties have changed or where new positions were created was there anything like the sort of jointly negotiated limitation or proscription of duties as is found in the December 17, 1992 letter, Joint Exhibit 3H. That fact looms large over this case.

The job description for the Meter Reader contained the limitation of “self-contained meters of up to 300 volts” from 1992 until January 2010 when it was unilaterally changed by the Co-op to remove the “self-contained” language. There was no dispute that this change was made unilaterally and without negotiation with the Union.

It was also clear that at least some of why this was done was in response to the Meter Readers themselves coming to management asking for the change. They found it inefficient to go out to a meter, sometimes in very remote locales, find that the meter was a non-self contained meter, but is one they felt they could have changed if they were allowed to under the terms of the position description, yet have to call for another employee to come out in a separate truck to replace the meter. There was evidence to show that the 3S meters can be replaced with appropriate training to the Meter Reader and that the training is relatively minimal in nature. There was also evidence to show that the 3S meters do not have actual power running through them as a 2S meter would.

Finally, the evidence showed that the 1992 agreement was not amended or superceded by any specific language in any of the subsequent bargaining agreements between 1992 and 2010. As will be discussed below, the language of Articles III and VI stayed substantially the same, with some changes that did not materially affect the outcome here, throughout that time as well.

Thus, the evidence showed that even though there were the same management rights clauses in the agreement in 1992 as appear now, the parties negotiated specific limiting language as to the duties of the Meter Reader into their agreement and that those duties stayed the same until January 2010 when the self-contained language was removed from the job description. It is against this backdrop of events that the matter proceeds now.

As in any matter involving the interpretation of contract language and what it means and/or how it is to be applied in a specific situation, the starting point is the contract itself.

The Union pointed to Article I and argued that the clause that provides: “Nothing in this section shall be construed as preventing the parties at any time from amending this agreement by mutual consent” must mean that when the parties negotiate the compensation for a position in the context of a specific, formally negotiated agreement limiting the duties of the classification, that agreement can only be amended, during the term of the contract, by mutual consent. The Union’s point may be well taken but not necessarily based on that clause. The clause in Article I does not in and of itself require that any changes in job duties must be negotiated by mutual agreement. It merely allows an agreement to the existing language by mutual consent.¹ The language is thus enabling language allowing the parties to sit down and negotiate a change if they mutually agree to do so.

The Union’s claim must therefore be based on something else if the claim is to prevail. The general clause found in Article I does not on its face prohibit the action taken by the Co-op.

¹ It should be noted that it is axiomatic that matters contained in a labor agreement cannot be unilaterally changed once there has been mutual agreement to those items. Here the Co-op is not attempting to change the compensation paid to the Meter Reader per se. That would of course be a blatant violation of the contract and would certainly require mutual consent for such a mid-term change. The question here though is whether the 1992 agreement limits the Co-op’s ability to make such a mid-term change by unilateral action on these limited facts.

The Co-op on the other hand argues that its rights to make this change are reserved in both the language of articles II and VI. Article II provides that the “control and supervision of all operations and the direction of all working forces, including the right to hire and to determine the qualifications, job requirements, scheduling, hours of work and the size and character of the working forces are vested exclusively in the Co-operative.” While this general admonition is limited by the “provisions of this Agreement,” the Co-op argued that there is nothing in the agreement that specifically limits this right.

Further, Article VI provides that “nothing herein contained shall prevent the Co-operative from changing operating and production methods, hours of work as necessary or adopting new methods or creating new occupational classifications on new or changed methods.” The sole limitation in that language deal with the obligation to negotiate rates of pay. The Co-op argued that it has an unfettered right to change job duties or to create a new position if it sees fit and nothing limits that right except that if there is a new classification created the parties need to negotiate the rate of pay for that. The Co-op argued that this is precisely what was done in 1992 – a new position was created and the parties negotiated the rate of pay for that, which incidentally was somewhat lower than it had been prior to 1992 due to the difference in job duties for the new position.

Frankly, without the 1992 agreement this case would be over now. The contract language set forth above is quite clear and reserves to the Co-op the right to change production methods, job duties etc. or to create a new position as it sees fit. The only obligation would be to negotiate an appropriate rate of pay for any new classification thus created under the terms of Article VI.

Moreover, even where there can be shown that there is an existing practice, such as the position description having the words “self-contained” in it for some 17 or 18 years, the terms of Article II further provides that “the Co-operative reserves the right to alter existing practices if appropriate to meet the needs of members.” While each case must rise and fall on its own facts, to the extent that the Union's claim here rests upon a claim that there was an existing practice alone, the claim would likely be denied. That however is not at issue here and this discussion is included by way of background.

Thus, as noted above, without the 1992 agreement between the parties with the language regarding self contained meters the case would clearly be decided in favor of the Co-op. There was some claim that the Union did not reference the 1992 letter in its initial grievance and that they may not have even known about it when writing this grievance. On this record that argument was given little weight since it was quite clear that the Union relied heavily on that letter in the hearing and that the Co-op had more than ample notice that it would be at least a substantial basis for the Union's claims here. The Union claimed the same thing and argued that the Co-op may not have been aware of the existence of the 1992 letter when it made the decision to delete the self-contained language from the position description and that the sole motivation at that point was efficiency and not the adherence to a longstanding agreement between the parties. Again, the motivation itself does not control the result; the contract language and the parties' agreements do. Here the question is whether the 1992 letter limits the Co-op's rights on these limited facts to delete the restriction on self-contained meters.

After a thorough review of that letter, it is determined that the Union's point is well taken on these very limited and specific facts.² First, the language in the 1992 letter is clear and unambiguous. It limits the Meter Readers to "Disconnects/reconnects limited to self-contained meters of 300 volts or less." The parties clearly understood what that meant and in fact incorporated this into the position description for almost 18 years. There was further no disagreement about what those meters were or what that language meant. While the Co-op argued that the 1992 agreement only dealt with situations involving disconnection/reconnects of service where there was an issue of payment of the bill and was not intended to deal with malfunctioning meters, the evidence did not support this contention. The 1992 agreement was not limited to that and Mr. Guertin did not actually admit to that, as Co-op's counsel wanted him to. (Tr. 77-78.)

² It should be noted that this decision is limited in its scope to the specific facts presented here. There is nothing in the 1992 agreement or in the CBA itself that limits the rights of the Co-op to change any other duties of the Meter Reader position. Obviously the sole issue here deals with the self-contained meters and future decisions must await future facts. The point here is that this decision deals with the question of the self contained meters and nothing else.

Second, the very same management rights language found in the current agreement was in the 1992 agreement. There was no evidence that it changes in any material way over time or that the parties ever agreed to modify or change the 1992 agreement due to any change in language in the labor agreement. The fact that the Co-op agreed to this even though the language was essentially the same further strengthens the Union's claim that the understanding, written down and memorialized in a letter agreement between the parties is that this particular job contains a specific limit on the job duties, not found in other job duties, that limits what this position can perform. That limitation is thus part of the collective bargaining relationship between these parties and has been for almost 19 years. While Article I certainly provides that this can be changed, it can be changed through negotiation.

Moreover, with regard to the other instances where job duties were changed, there was a mixed bag. In some there was the creation of a new position, just as there apparently was in 1992, and the parties negotiated the rates of pay for those. To that extent the actions were consistent with the labor agreement. The distinction is that in none of those cases was there the sort of limiting language that was specifically negotiated and agreed to regarding the job duties of a particular position.³

For whatever reason, the Co-op chose to negotiate away part of its rights to establish the job duties for this one position as a part of a more general negotiation about the creation of the position and the wage rates for that position. It is not for an arbitrator to question the wisdom of such a decision; it is the job of the arbitrator to interpret what the parties have negotiated for themselves. Here the unmistakable fact is that there is a specific limitation set forth in a signed agreement, unchanged by the parties for 19 years or so years, limiting the duties of this position. Why it is there is not and cannot control the decision here.

³ It should also be noted that the evidence here did not support a finding that there was a new position created for the Meter Reader position thus creating the obligation to bargain over a new rate. As noted herein, the decision rests upon the language of the 1992 agreement and the specific limitation agreed to by the Co-op to limit the duties as set forth in that agreement.

The Co-op argued that it will be far more cost effective and efficient to allow the Meter Readers to change 3S meters and that the limitation on self-contained meters no longer makes sense from a cost efficiency standpoint. The evidence absolutely supported that view. The problem of course is the language of the 1992 agreement that prevents it from happening without further negotiation in that language between the parties. Thus because of that specific language the grievance must be sustained despite the apparent efficiency to be achieved in changing it.

Since this matter is a deferral from the NLRB, some consideration was made to whether the Co-op's decision was in any way motivated by anti-Union animus or whether it was in response to the difficult negotiations for the current labor agreement. On this record there was no such evidence whatsoever. Negotiations are frequently lengthy and even a bit acidic. That fact alone does not rise to the level of an unfair labor practice.

Further, it was clear that the Co-op's motivations in making this change were actually as much motivated by comments from its employees, also Union members, as anything else. On this record there was thus no evidence of anything rising to the level of an unfair labor practice or that the decision was in any way motivated by a desire to take work from the Union. Indeed, as the Co-op correctly pointed out, this work stays within the Union bargaining unit. It merely shifts the work from one classification to another.

Finally there was no evidence that the higher paid employees were losing work due to this change. In fact they seem to be working the same number of hours as before and were not heard in this proceeding to complain that their hours are being reduced or that their work was adversely affected.

Accordingly, the grievance is sustained on the limited facts and circumstances as set forth herein.

AWARD

The grievance is SUSTAINED on the limited basis as set forth herein. The Co-op is ordered to cease and desist from assigning the Meter Reader to connect and disconnect non-self-contained electric meters.

Dated: June 1, 2011

Jeffrey W. Jacobs, arbitrator

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