

IN THE MATTER OF ARBITRATION BETWEEN

CITY OF AUSTIN, MINNESOTA

Employer

and

**DECISION AND AWARD
BMS Case No. 14-PA-1237
(Denial of Job Posting)**

**INTERNATIONAL UNION, UNITED
AUTOMOBILE, AIRCRAFT, AEROSPACE,
AGRICULTURAL IMPLEMENT WORKERS OF
AMERICA (UAW), LOCAL 867**

Union

Arbitrator:	David M. Biggar
Date and Place of Hearing:	December 4, 2014 City Hall Austin, Minnesota
Date Record Closed:	The parties filed briefs on December 29, 2014 and the record was closed on that date.
Date of Award:	January 9, 2015

APPEARANCES

For the Union:	For the Employer
Mike Krumholz, International Representative UAW 680 Barclay Boulevard Lincolnshire, IL 60069	Cyrus F. Smythe, Jr., Consultant 18955 Maple Lane Deephaven, MN 55331 David Hoversten City Attorney, Austin, MN

INTRODUCTION

UAW Local 867 (Union) and the City of Austin, Minnesota (Employer) are parties to a collective bargaining agreement covering employees of the Employer's Wastewater Treatment Plant Department. The employees operate and maintain the equipment utilized in the Employer's Waste Water Treatment Plant Department. On March 21, 2014, the Union filed a grievance claiming that the Employer had failed to follow an agreement made with the Union during negotiations leading to the current collective bargaining agreement between the parties. The Union subsequently moved the grievance to the arbitration step of the contract.

Having been chosen to serve as the Arbitrator, I conducted a hearing on December 4, 2014 at the City Hall in Austin, Minnesota. Both parties were allowed to present testimony and supporting documents. They were allowed to examine or cross-examine witnesses, all of whom testified under oath. The parties agreed to file briefs by December 29, 2014. I received briefs from both parties on that date, and then closed the record.

ISSUE

The parties were unable to stipulate to the issue before the Arbitrator and elected to leave this task to me. The Employer argued that the grievance must fail and could not be considered because it did not allege a violation of specific language in the collective

bargaining agreement. Having considered the positions of the parties and the evidence in the record I define the issue as follows:

1. Did the Employer violate any provision of the collective bargaining agreement when it denied the posting of Richard Carlson for the position of Maintenance Technician/Relief Operator because he did not meet the qualifications of the position?
2. If the Employer's actions violated the agreement, what shall be the remedy?

FACTS

The current agreement covering the terms and conditions of employment for the bargaining unit (Joint Ex. 1) is effective from January 1, 2014 through December 31, 2016. There are ten bargaining unit employees. Their dates of hire (the seniority list) are attached to the collective bargaining agreement as Appendix B.

The previous collective bargaining agreement (Joint Ex. 4) covering this unit of employees was in effect from January 1, 2011 to December 31, 2013. I will refer to this as the old contract, and the current agreement as the new contract. Article XVII of both the old contract and the new contract lists the "Job Classification and Duties" for the positions in the bargaining unit. The positions set forth in the old contract are Utility Relief Operator, First Relief Operator, Second Relief Operator, Third Relief Operator, Fourth Relief Operator, Operator and Maintenance Machinist. The positions listed in the new contract are Utility Relief Operator, First Relief Operator, Second Relief Operator, Third Relief Operator, Operator, Maintenance Machinist/Relief Operator and

Maintenance Technician/Relief Operator. Article XVII of the old contract listed both the qualifications and duties for each of the positions. Article XVII of the new contract lists only the duties and not the qualifications for the positions.

The Employer and Union agreed to modify, add and delete certain classifications in Article XVII during the negotiations that led to the new contract. The new contract added the Maintenance Technician/Relief Operator position to Article XVII (17.7). The new contract also added relief operator duties to both the Maintenance Technician position and the Maintenance Machinist position. (Joint Ex. 1, Art. 17.6 and 17.7). At the same time, the Fourth Relief Operator position in the old contract was deleted from the new contract.

The dispute brought forth by the grievance deals with the position of Maintenance Technician/Relief Operator. For simplification, I will refer to it as the Maintenance Technician position. That position was occupied by a bargaining unit employee who had been hired during the term of the old contract. This employee holds a master electrician license enabling him to perform electrical work for the Employer which it would otherwise have to contract out. It is not clear from the record what position this employee was hired into, but he occupied the newly created position of Maintenance Technician at the time of the negotiations and ratification of the new contract.

In November, 2013, the Employer developed a "Position Description" for the newly created Maintenance Technician position. This description (Joint Ex. 2) lists the minimum qualifications needed to hold the position. It contains the specific requirement that the holder of the position must hold a master electrician license. It lists as duties the "knowledge of design, maintenance, and repair of electrical systems...." (Joint Ex. 2)

It is not clear whether the Employer developed new classifications for all positions. In any event the Union became aware of the Position Description for the Maintenance Technician position with the requirement that the holder of the position must possess a master electrician license prior to or during negotiations. This was a concern to the Union. The employee occupying the position at that time had a master electrician license. There is no evidence that any other employee in the bargaining unit holds a master electrician license. The Union wanted to know if this license would go with the incumbent employee in the event he exercised his seniority to go to another position, or someone with more seniority bumped him from the Maintenance Technician position. In essence, the Union wanted to know if the special electrical work that only this employee could perform would go with him if he moved to another position. This would enable a person with more seniority who was otherwise qualified for the Maintenance Technician position to bid into this position even if he did not have the master electrician license.

This sparked questions from the Union during meetings with the Employer. It wanted to know if the electrical work/license would go with the employee then occupying the Maintenance Technician position, so that another employee might exercise seniority to bid into the position.

The testimony of witnesses for the Union dealt with questions asked by the Union of the Employer both during bargaining sessions and at a meeting between the parties. They testified that the Union was given assurances by the Employer that in the event the employee with the master electrician license left the Maintenance Technician position, the electrical duties he had - which he could perform because the license - would go with

him to his next position. The Employer generally agreed that the Union had expressed its concerns and asked those questions.

On January 9, 2014 the matter had still apparently not been resolved. On that day Mike Krumholz, the Union's International Representative sent Tricia Wiechmann, the Employer's Human Resources Director, an e-mail message. He said employees were still confused regarding the proposed Maintenance Technician position. He posed two hypothetical situations which advanced the understanding that the Union believed the parties had reached regarding the master electrician license requirement of the Maintenance Technician position. He asked in essence whether the work/license would follow the current occupant in the event he left the position and if a more senior employee could post for the position as the license requirement would be gone. (Employer Ex. 1, a string of three separate messages on one page.) He asserted that the Union understood that this is what the parties had agreed to.

Wiechmann replied to Krumholz on January 13, 2014 (Employer Ex. 1). She said that the example and contention in his message that the license would follow the current holder of the Maintenance Technician position was not the Employer's position. She said the Employer wanted the Maintenance Technician (and the position of Maintenance Machinist/Relief Operator, which is not at issue here) to be locked into the last Relief Operator position. She referred to two of the Employer's supervisors as desiring this. Essentially, this would require anyone in the Maintenance Technician position to hold a master electrician license as the job description called for.

Krumholz responded to Wiechmann on January 22, 2014 (Employer Ex. 1). His message said "The tentative agreement was ratified yesterday based on my example and

not Chad and Paul's" (the two supervisors Wiechmann had referred to in her message to him.) Union witness Dennis Harmer who attended the meeting where employees ratified the new contract said that some employees were still concerned because the language in the job description was not consistent with what the Employer allegedly said would happen. He recalled that the Union said that the contract could be ratified and that the Union could file a grievance later if this dispute became a problem. The new contract was ratified and signed by the parties.

At an internal posting meeting on March 21, 2014 Richard Carlson - a unit employee with a seniority date of January 16, 1995 (Appendix B to new contract) - posted or bid on the Position of Maintenance Technician/Relief Operator, then occupied by the person with the master electrician license. The Employer told Carlson he was not qualified for the position because he did not have a master electrician license. On that date the Union filed a grievance on Carlson's behalf because he did not get the position. (Joint Ex. 3.) The grievance alleged as its reason "Employer is enforcing contract other than the intent of negotiations." The remedy requested by the grievance was to "Follow agreement that was negotiated."

On April 3, 2014, Wiechmann responded to the grievance on behalf of the Employer. (Joint Ex. 5.) She said that Carlson posted on the position of Maintenance Technician/Relief Operator position. She added that he did not meet the qualifications, and specifically mentioned the fact that he did not possess a master electrician license. The Employer denied the grievance for this reason. The Union moved the grievance to the arbitration level on about April 11, 2014. (Joint Ex. 6.) The Employer requested more details concerning the grievance in a letter from Wiechmann to Krumholz on April

23, 2014. There is no evidence in the record of any further discussion between the parties concerning the dispute.

POSITION OF THE PARTIES

Position of the Union

The Union's position is that it had reached an agreement with the Employer during negotiations regarding the master electrician license held by the employee occupying the Maintenance Technician position at the time of negotiations. The Union asserts that the Employer agreed the license and the work it enabled the employee to perform would move with that employee in the event he posted to another position or someone with more seniority posted on the Maintenance Technician position. It claims the Employer also agreed that another employee posting on the position would not need to have a master electrician license to successfully post on the position. In sum, it claims that the Employer should be obligated to follow through with the agreement it made during negotiations. Carlson was denied the position because he did not have a master electrician license. He should be given the position, as he was more senior than the employee in the position.

Position of the Employer

The Employer rejected the Union's proposals or hypothetical assertions concerning the master electrician license requirement for the Maintenance Technician position at the end of negotiations. There is no ambiguity in any terms of the contract. The membership was aware that the position of the Union that the license would go with the employee was inconsistent with the language of the job description and they

discussed it at the ratification meeting. Some employees voted not to ratify the agreement because of that. The contract was ratified by the employees and signed by both parties. There is no violation of any language in the written agreement.

RELEVANT CONTRACT LANGUAGE

Article III, Employer Authority:

- 3.1 The Employer retains the full and unrestricted right to operate and manage all manpower, facilities, and equipment; to establish functions and programs; to set and amend budgets; to determine the utilization of technology; to establish and modify the organizational structure; to select, direct and determine the number of personnel; to establish work schedules; and to perform any inherent managerial function not specifically limited by this Agreement.

Any term and condition of employment not specifically established or modified by this Agreement shall remain solely within the discretion of the Employer to modify, establish, or eliminate.

Article V, Employee Rights – Grievance Procedure

5.1 DEFINITION OF A GRIEVANCE

A grievance is defined as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of this Agreement.

ARBITRATOR’S AUTHORITY

- A. The Arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and conditions of this AGREEMENT. The arbitrator shall consider and decide only the specific issue(s) submitted in writing by the EMPLOYER and the UNION, and shall have no authority to make a decision on any other issue not so submitted.
- B. The arbitrator shall be without power to make decisions contrary to, or inconsistent with, or modifying or varying in any way the application of laws, rules, or regulations having the force and effect of law.....

Article XVII. 7. Maintenance Technician/Relief Operator – Duties:

- a. Shall perform general plant and grounds maintenance.

- b. Shall clean and maintain buildings and equipment at the Wastewater Treatment Plant.
- c. Shall perform electrical and instrumentation work with a minimum of technical guidance. Perform preventive maintenance on electrical distribution systems, motors, pumps and instrumentation.
- d. Shall be last relief operator called upon to operate for vacation, holidays, compensatory time and other leave. May be required to operate to stay current.
- e. Commercial Driver's License.
- f. May be called upon to cover opposite shift when necessary, in an emergency.
- g. Hours of work: Monday through Friday; 7:00 AM start.

DISCUSSION AND DECISION

With the grievance, the Union wants the Employer to be ordered to live up to an agreement made at the bargaining table. The Employer denies that it made any such agreement. To support its position the Employer has presented evidence that it communicated its final position regarding the Maintenance Technician position to the Union in the January 13, 2014 e-mail from Wiechmann to Krumholz. This was some 7 or 8 days prior to the contract's ratification by the employees on January 21, 2014.

(Employer Ex. 1.)

The grievance also does not specify any Article or language in the new contract that the Employer is alleged to have violated. The Union points to no ambiguous language which, if construed in its favor, would support its argument that the Employer had violated the collective bargaining agreement. In the Section of the grievance form entitled "Detailed Reasons for Grievance" it is alleged "*Employer is enforcing contract other than the intent of negotiations.*" In the section of the grievance form entitled "Specific Adjustment Requested" the grievance states "*Follow agreement that was negotiated.*" Joint Ex. 3.)

I phrased the issue as I did because the dispute boils down to whether the Employer could refuse to allow Carlson to post on the Maintenance Technician position because he did not hold a master electrician license, which the Employer required of this position. The Union claims the Employer cannot deny the posting to Carlson, because it made an alleged agreement during negotiations that the position could be filled by someone without a license because the work required by the license would go with the employee who held the license. The Employer contends there was no such agreement. It argues that it has the right to determine the requirements of the job. The Union does not question the validity of the position description for the Maintenance Technician/Relief Operator position. Rather, it claims that the Employer had promised or made an agreement to overlook the requirement for the master electrician license when the position became vacant in the future.

I deal first with the Employer's argument concerning the form of the grievance. The Employer argues that the grievance should be denied because it does not allege a violation of a specific section or language in the new contract. I read the definition of a grievance in Article 5 to be broad enough to encompass the Union's grievance. It is a dispute about the interpretation or application of terms of the agreement which it claims it had with the Employer. An employee posted on a position and was denied the position. The Union believes he was aggrieved because of the agreement it had with the Employer. The Employer knew what the grievance was about and was not prejudiced in any way in defending it. I will consider the grievance putting forth the issue as I phrased it earlier in this decision.

Regarding the substance of the grievance, most of the facts are not disputed. The Union was concerned about the requirement that the person occupying the Maintenance Technician position must have a master electrician license. It did not want that requirement to mean that the occupant could not leave for another position, or that someone without a master electrician license could post into the new position. I find that it did ask the Employer on more than one occasion if the license and work would go with the person occupying the position at that time, thereby enabling another employee to post on the position. I also find that the Employer did respond at some point in some manner that led the Union to believe that they agreed that the license would go with the person. This is the basis of the agreement the Union claims the Employer is obligated to follow.

The Employer agrees that the Union expressed its concerns about the master electrician license in the form of questions or hypotheticals to the Employer at bargaining sessions and another meeting between the parties. At some point the Employer said something that led the Union to believe that the license would go with the current occupant of the position, as the Union contends. It is not clear when this was. But this did not end the matter. It is clear that the Employees and Union were still concerned when Krumholz sent the e-mail message to Wiechmann on January 9, 2014. This is at or near the end of the negotiations between the parties.

It soon became clear that the understanding that the Union had regarding the master electrician license was not consistent with the Employer's position. Wiechmann's response on January 13, 2014 demonstrates the lack of agreement between the parties at that time. As the content of this e-mail exchange is central to my decision, the messages are set forth verbatim in chronological order below:

From: Mike Krumholz [mailto:mkrumholz@uaw.net]
Sent: Thursday, January 09, 2014 9:21 AM
To: Trish Wiechmann
Subject: WWTP

Trish,

I met with the WWTP group yesterday and there still seems to be some confusion in regards to Article 17.3, Maintenance Technician/Relief Operator. So both sides have a clear understanding of this position I will use a couple of examples:

- If the person that currently holds this position was to post on to an open Relief Operator position on days his Master Electrician License would follow with him. This would then leave the last Relief Operator position open for someone to post on to if they wanted.
- In the event that an employee was displaced from their position, they would have the right to assume the last Relief Operator position based on seniority. This would then allow the person to assume another position based on seniority and again having his Master Electricians License follow with him.

Wiechmann responded as follows:

>>>Trish Wiechmann 01/13/2014 1:27PM>>>

Mike – In talking with Chad Heard and Paul Jenkins, it was their intention that the Machinist and Maintenance Tech would be locked into the last relief operator position and between these two positions they would be able to choose what shift by seniority they would want (first or second shift). This is how they were originally approached by union membership/representative to have it set up. The main duties of those positions are for machinist and maintenance tech, so that is why they would be on last relief so they would only be required to operate occasionally (spending more time on specific duties). Otherwise, if we can't agree as outlined above, then those two positions would be removed from the relief operator rotation (as machinist now is in the contract). But by having them in the rotation it only helps all other employees get time off etc. by having an extra person in the rotation.

Let me know. I would need to know by Thursday AM in order for this to be on the 1/21 Council agenda.

Thanks

Krumholz responded on January 22, 2014 as follows:

From: Mike Krumholz mkrumholz@uaw.net
Sent: Wednesday, January 22, 2014 7:51AM
To: Trish Wiechmann
Subject: RE: WWTP

The tentative agreement was ratified yesterday based on my example not Chad and Paul's.

This correspondence between the Employer and Union's representative is the most persuasive evidence of the parties' position on the master electrician license issue at the time of the ratification meeting. It shows that even shortly before the ratification meeting, the Union was still concerned about the requirement that the Maintenance Technician job description required the master electrician license for the position. It wanted to know if that requirement stayed with the position or whether it would go with the current occupant (who had the master electrician license) if that person left the position. Secondly, could an otherwise qualified candidate who did not hold a master electrician license post on the Maintenance Technician position (with the license/work going with the occupant if he was bumped from the position.)

Krumholz was seeking Wiechmann's assurances that his version of the hypothetical situations he posed would be adhered to. That would allow the license to follow the person and someone without a license to post on the job. Although the Union claimed that the Employer had given it such assurances earlier there was still uncertainty about this on January 9, 2014.

Wiechmann's response clearly shows that the Employer did not agree with the hypotheticals posed in Krumholz's January 9, 2014 message. She said the

Employer's position was that the Maintenance Technician/Relief Operator person and Maintenance Machinist/Relief Operator person would be locked into the position. She made it clear that if this was not agreeable to the Union, the positions of Maintenance Technician/Relief Operator and Maintenance Machinist/Relief Operator would be removed from the relief operator rotation. The Maintenance Technician/Relief Operator in the position (with the master electrician license) would be locked into the position. The position would require its occupant to have a master electrician license. I view this as the Employer's "counter" to the Union's "proposal" that the master electrician license would follow the current occupant of the position when he moved to another position.

From this exchange, it is clear that there is no agreement on this issue between the parties as of January 13, 2014. The Employees voted to ratify the contract on January 21, 2014. Regarding the issue of the master electrician license being required by the job description Union representatives explained what they believed to be the agreement reached at the table. The contract was ratified. The parties signed a new collective bargaining agreement (Joint Ex. 1) effective from January 1, 2014 through December 31, 2016.

The Union has not cited any specific language in the contract that the Employer has violated by denying the position of Maintenance Technician/Relief Operator to Richard Carlson. It claims the violation here is the agreement that it claims the Employer made at the bargaining table. However, there is insufficient evidence that the Employer and Union reached any agreement that the license

would follow with the current occupant and that someone without a license could post for the position.

The Employer acted consistent with its position in the January 13, 2014 e-mail to the Union and the requirements of the position description when it denied the position to Carlson. The position description was a joint exhibit (Joint Ex. 3) of the parties. It requires that the Maintenance Technician/Relief Operator must have a master electrician license. I find that the Employer's denial of Mr. Carlson's posting on the Maintenance Technician/Relief Operator position did not violate any agreement between the parties. I also find that the Employer did not violate any specific section of the contract. Its exercised rights set forth in Article III of the agreement.

CONCLUSIONS

The Employer did not violate any provision of the agreement, or any other understanding or agreement it had with the Union when it denied the request of Mr. Carlson to post onto the Maintenance Technician/Relief Operator position.

AWARD

The grievance no. LP 000 405 (Joint Ex. 3) is hereby denied and dismissed.

Dated this 9th day of January, 2015

David M. Biggar, Arbitrator