

IN THE MATTER OF ARBITRATION BETWEEN

**SPIRIT MOUNTAIN RECREATION
AUTHORITY,
Duluth, MN
(Employer)**

and

**DECISION AND AWARD
(compensation – recalled employees)**

BMS CASE NO: 15-PA-0343

**AFSCME MINNESOTA COUNCIL 5,
South St. Paul, MN
(Union)**

ARBITRATOR:

James N. Abelsen

HEARING:

April 24, 2015

POST HEARING BRIEFS RECEIVED:

May 15, 2015

APPEARANCES:

FOR THE EMPLOYER:

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FOR THE UNION:

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INTRODUCTION

This matter came on for hearing on April 24, 2015 at the offices of the City Attorney in Duluth, Minnesota. The parties submitted post hearing briefs on May 15, 2015, at which time the record was closed.

The parties agreed that there were no procedural defects, no issues of arbitrability, and that this matter was properly before the arbitrator.

ISSUE STIPULATED BY THE PARTIES

Did the employer compensate employees recalled from layoff correctly in May of 2014? If not, what is the appropriate remedy?

RELEVANT FACTS AND BACKGROUND

The Union and Employer are parties to a Collective Bargaining Agreement (CBA) covering the period of time July 1, 2012 through June 30, 2015.

In 2010, the Employer added an Adventure Park program to its array of services and created the position of Adventure Park Attendant (APA). These positions were staffed in large part by non-bargaining unit employees but also by some bargaining unit employees who were laid off from their regular jobs during the summer.

These APA positions were not included in the CBA until October 31, 2013 when the parties agreed to include them as part of a Unit Clarification Settlement.

As part of that stipulated agreement, the parties agreed, "... to discuss and negotiate the Adventure Park Attendant job descriptions and pay rates through the Employer-Union Personnel Committee." The parties have thus far been unable to reach agreement.

In that no agreement had been reached when the APA positions had to be filled for the summer of 2014, the Employer unilaterally set the pay rate for those positions at

\$7.25 per hour, and offered positions to fourteen (14) Bargaining Unit Members who were being placed on lay off. Only two (2) of the fourteen (14) accepted.

The Union filed a grievance on May 13, 2014, contending that the Employer was obligated to offer the APA positions to laid off bargaining unit members based on their seniority, which the Employer did, and that the rate of pay for each such employee should not be the \$7.25 rate established by the Employer, but should be the rate of pay each recalled employee was receiving in the position from which they were laid off.

UNIONS POSITION

The Union makes essentially two arguments to support its position. First, they contend that the language in the CBA requires that the Employer pay laid off employees their “regular or normal” rate of pay when recalled to a temporary summer job. And secondly, that the Employer has recognized that obligation in the past and has followed that practice in a number of instances – essentially arguing that there has been a course of conduct by the employer and a mutual understanding by both parties of what the CBA requires.

1. Contract Language

The Union first argues that their position is supported by the following language in the CBA:

Article 9, Section 4. When it becomes necessary to recall employees from a layoff, employees shall be rehired in reverse order of layoff by overall seniority in class first; provided however, that employees temporarily rehired in a different job class from their own are qualified.....

Article 9, Section 2. Employees who are reassigned to a lower paying position will be placed at the step in the range for that position which most closely matches the wage they were making prior to their reassignment. (Emphasis added).

The Union notes that over the last two years a significant number of employees were recalled from lay off, often times “at an amount similar to their current rate,” which

they believe is consistent with the language in Section 2 requiring payment... “which most closely matches the wage they were making prior to reassignment.”

2. Employers Past Practice

The Union next argues that because the Employer has, for at least the last two years, paid many employees who were recalled from lay off the same wage they were making prior to reassignment, they have thereby acknowledged their contractual obligation to do so.

As support for this argument, the Union produced evidence in the form of a list of twelve (12) employees, who in 2013 and 2014 were laid off and subsequently recalled into other jobs, and were paid in that new job at or near the wage they were receiving prior to layoff. For example:

	<u>Regular Job</u>		<u>Recalled Job</u>
Employee A :	Housekeeping - \$12.52	/	Lift Maintenance - \$12.65
Employee B :	Summer activity - \$8.58	/	Adventure Park - \$8.50
Employee C :	Lift Operator - \$15.50	/	Summer Activity - \$15.50 Adventure Park - \$15.50
Employee D :	Lift Operator - \$10.47	/	Summer Activity - \$10.60

This list of jobs and pay rates, argues the Union, is evidence that no matter what job someone is laid off from, the job they are recalled to will carry the same or a very similar wage rate as their regular job. And the fact that the Employer paid those same or similar rates for two different jobs is evidence that the Employer believed that this is required by the contract. Therefore, this unilateral change in that practice is a basis for upholding the grievance.

EMPLOYERS POSITION

The Employer contends that the \$7.25 pay rate they offered is appropriate and clearly consistent with the following contract language:

Article 9, Section 2. Employees who are reassigned to a lower paying position will be placed at the step in the range for that position (emphasis added) which most closely matches the wage they were making prior to their reassignment.

In this case, argues the Employer, the laid off employees were in fact, "...placed at the step in the range for that (lower paying) position which most closely match(ed) the wage they were making prior to their reassignment." The APA position is a lower paying position and the \$7.25 hourly rate of pay is the "range" for that position, so what was offered and paid was precisely what was required by the contract.

The Employer also cites as support for its position, the following Section of the CBA:

Article 23, Section 3. During a layoff or recall procedure should an employee be placed in a position in a different job class than his/her own, he/she shall be paid the hourly rate for that class (Emphasis added) as reflected on Attachment "A".

As noted, the APA job class and pay rate have not yet been agreed upon by the parties and is therefore not yet listed on Attachment "A" of the contract. And in the absence of an agreement as to the pay rate, the Employer believes it had the right to unilaterally set the pay at the hourly rate it had been paying all along.

ANALYSIS AND DISCUSSION

The history of the dispute and the facts presented by the parties are fairly consistent. Spirit Mountain employees are often laid off in the summer, but with the Adventure Park Program and other summer activities a number of those employees are recalled to other positions, such as the APA position, which become available in the summer.

The APA jobs were appropriately established by the Employer in 2010 and were outside the bargaining unit until the fall of 2013. Prior to the APA position being included in the bargaining unit the wage rate was set by the employer at \$7.25 per hour and the jobs were filled primarily, if not exclusively, by non-bargaining unit members.

In 2014, following inclusion of the APA positions into the bargaining unit, and following many failed meetings, negotiations and mediation sessions, the Employer offered the APA positions to laid off bargaining unit employees at the pay rate it had been paying previously, \$7.25 per hour (*See Penn-Dixie Cement Corp, 47 LA 601, 605 (1966), Peerless Wire Goods 49 LA 202 (1967)*). The parties continued to negotiate but as noted, no agreement has yet been reached.

The crux of the disagreement is over the interpretation or application of language in the CBA as it applies to the rate of pay bargaining unit members should receive. Both parties rely to some extent on the same contract language to support their position – the Employer relying on what it believes is clear unmistakable language not subject to interpretation, and the Union relying on a past practice or interpretation of that language which they believe both parties have understood and followed in the past.

Applicable Contract Language

The following sections from Article 9 of the CBA are cited by both parties as support for their position:

Article 9, Section 4. When it becomes necessary to recall employees from a layoff, employees shall be hired in reverse order of layoff by overall seniority in class first....

The evidence and testimony indicates that this requirement was satisfied. The Employer does not dispute its responsibility under this section, and the Union raised no issues concerning how the Employer ultimately selected laid off employees to be offered the APA positions.

Article 9, Section 2. Employees who are reassigned to a lower paying position will be placed at the step in the range for that position which most closely matches the wage they were making prior to their reassignment.”

Here the parties disagree as to how that language has been applied in the past and how it should be applied in this case.

Past Interpretation of Contract Language

The Union claims that all or at least most recalled employees have historically been paid essentially the same wage in their recalled job as they were paid in their regular job. In support of that, they offered as an exhibit, a list of twelve (12) individuals who in 2013 and 2014 worked two or three different jobs for the Employer and were paid essentially the same wage for each job.

The Employer does not dispute the accuracy of that information, but what cannot be determined simply from what the Exhibit shows, and what is not explained by the evidence submitted by either party, is why those different jobs were paid the same or very similar amounts. Were recalled employees paid the same for those jobs even though the jobs may have been significantly different from each other and carry different pay ranges (as the Union implies)? Or were they paid the same for those two or three jobs because those jobs are similar or are in the same pay range (as the Employer implies)?

The challenge in trying to determine which of these two possibilities is most likely the case is that neither the CBA nor the evidence provides a clear answer. Specifically, the problem is this:

First of all, the CBA contains two lists of job classifications in two different sections of the contract (Art 9, Sec 1, and Attachments A & B). But the two lists are not the same and only one list (Attachments A & B) shows pay rates. So only some jobs listed in the contract have a pay rate attached to them.

Secondly, in looking at the Unions list of twelve employees with multiple jobs, and matching those jobs with pay rates set out in the contract, there is not a single case

where both jobs for any one individual have pay rates that are shown in the CBA. So because of that disconnect or missing piece, it is not possible to determine the reason why those twelve individuals were paid the same or similar amounts for two or more jobs. Was it (a) because the Employer simply chose to pay that amount or believed that is what they were required to pay under the contract (which is the Union position), or (b) was it because the two or three jobs each one performed were in the same or similar pay range (which is the Employers position). That simply cannot be determined from the contract.

That being the case then, the merits of each party's position must be considered based on what the CBA and the evidence actually do show and what can be concluded from that evidence.

FINDINGS

- The evidence shows that twelve (12) individuals held more than one job in the same year and were paid the same or similar wage for each job. If the pay ranges for the multiple jobs of the twelve were in different job classifications, as the Union implies, then the Union position that the Employer paid the same rate for multiple jobs without regard to the different pay ranges would have some validity. But even if that were the case, and even though that adds some validity to the Union position, it does not necessarily follow that a binding past practice or course of conduct has thereby been created. (*Sodexo Corp. Servs*, 120 LA 577, 581 (2004), *Consolidated Container*, 121 LA 557, 560 (2005), *Kohler Printing* 125 LA 137, 146 (2008)).
- Another explanation for the twelve (12) individuals receiving similar pay is that the different jobs were in the same or similar pay ranges. That would be the most logical explanation that would be consistent with the clear contract language which says that “employees... will be placed at the step in the range for that position which most closely matches the wage they were making prior to their reassignment”. And when there is such clear and unambiguous language as there

is in this case, a minimal past practice or course of conduct by the Employer, if that were ever established, would not be sufficient to warrant ignoring such clear contract language. (*Elkouri and Elkouri, 7th Ed., Ch 12.9*)

- Since there is no indication that a grievance was filed when the twelve (12) individuals with two different jobs were paid a similar rate, it would be reasonable to assume that the Union concurred that the Employer was following the contract and was paying the employees within the range that was closest to what they were paid in their regular jobs. That would be consistent with what is required by the CBA and is the most logical conclusion.
- To adopt the Unions position that all employees offered APA positions should receive the same pay as they received for their regular jobs, could very well produce the unreasonable result that one of the lower paying classifications in the bargaining unit, i.e. Adventure Park Attendant, could actually end up being one of the higher paid positions, since the most senior and probably highest paid people being laid off are entitled to those jobs. It is unlikely that such a result would be the intention of either party and to interpret the contract to achieve such a result would be unreasonable. (*The Common Law of the Workplace: Sec. 2.12, 81, St. Antoine 2d ed., BNA Books, 2005*).

DECISION

Based on the record as a whole and for the reasons cited herein, the grievance is DENIED.

Dated: June 22, 2015


James N. Abelsen, Arbitrator