

IN THE MATTER OF ARBITRATION BETWEEN

City of Saint Paul
"Employer"

BMS Case No. 16 PA 0388

and

Decision and Award

International Union of Painters
And Allied Trades, District Council 82
"Union"

John W. Johnson, Arbitrator
March 4, 2016

Date of Hearing:

January 19, 2016

Date of submission of Post Hearing Briefs:

February 4, 2016

APPEARANCES

For the Union:

Tim Andrew, Attorney, Andrew and Bransky P.A.

Terry L. Nelson, Business Manager/Secretary Treasurer, District Council 82

Ken Clark, Painter, City of St Paul

For the Employer:

Rachel Tierney, Assistant City Attorney

Tom Stadskev, Traffic Operations Engineer

Rick Solheid, Traffic Operations Supervisor

Courtney Anderson Ewald, Public Works Human Resources Consultant

Statement of Jurisdiction

The hearing was held in the above matter on January 19, 2016 at the Minnesota Bureau of Mediation Services offices in St Paul, Minnesota. The Arbitrator, John W. Johnson, was selected by the parties pursuant to the Minnesota Public Employment Labor Relations Act of 1971, as amended (PELRA).

At the hearing each party was given the opportunity to present evidence and arguments. The parties then submitted post hearing briefs, which were e-mailed on February 4, 2016.

ISSUE

The Union and the Employer state the issue in slightly different ways. The Employer's statement is: "(1) Is the City's temporary assignment of Tim Byrne as a trainer for the paint striping machine in April 2015 while classifying him as a Traffic Maintenance Worker in the Machinists Union a violation of the Collective Bargaining Agreement between the Union and the City. (2) If so, what is the remedy." The Union states the issue as, "Whether the City of St. Paul's assignment of Tim Byrne to the paint striping machine in April of 2015, while classifying him as a Traffic Maintenance Worker under the City's contract with the Machinist's Union violates the parties Collective Bargaining Agreement? If so, what shall the remedy be?" I find no material difference between these statements.

RELEVANT CONTRACT LANGUAGE

Article 2: The Employer Recognizes the Union as the exclusive representative for collective bargaining purposes for all personnel having an employment status of regular, probationary, provisional, and temporary employed in the classes defined in Appendix A as certified by the Bureau of Mediation Services in accordance with Case No. 73-PR-479-A dated April 17, 1973.

Article 3.1 The employer retains the right to operate and manage all personnel, facilities and equipment; to establish functions and programs; to set and amend budgets; to determine the utilization of technology; to establish and modify organizational structure; to select, direct, and determine the number of personnel; to perform any inherent managerial function not specifically limited by this agreement.

Article 18.1: Disputes concerning work jurisdiction between and among unions is recognized as an appropriate subject to determination by the unions representing employees of the employer.

Article 18.2: The Employer agrees to be guided in the assignment of work jurisdiction by any mutual agreements between the unions involved.

Article 18.3: In the event of a dispute concerning the performance or assignment of work, the unions involved and the Employer shall meet as soon as mutually possible to resolve the dispute. Nothing in the foregoing shall restrict the right of the Employer to accomplish the work as originally assigned pending resolution of the dispute or to restrict the Employer's basic right to assign work.

Article 18.4. Any employee refusing to perform work assigned by the Employer and as clarified by Sections 18.2 and 18.3 above shall be subject to disciplinary action as provided in Article 15 (DISCIPLINARY PROCEDURES).

Article 18.5: There shall be no work stoppage, slow down, or any disruption of work resulting from a work assignment.

Article 21.5 The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this Agreement. The arbitrator shall consider and decide only the specific issue 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. The arbitrator shall be without power to make any 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. The arbitrator's decision shall be submitted in writing within thirty (30) days following the close of the hearing or the submission of briefs by the parties, whichever be later, unless the parties agree to an extension. The decision shall be based solely on the arbitrator's interpretation or application of the terms of this Agreement and to the facts of the grievance presented. The decision of the arbitrator shall be final and binding on the Employer, The Union, and the employees.

Article 22.1 The Employer may, at any time during the duration of this Agreement, contract out work done by the employees covered by this Agreement. In the event that such contracting would result in a reduction of the work force covered by this Agreement, the Employer shall give the Union a ninety (90) day calendar day notice of the intention to sub-contract.

Appendix A: The classes of positions recognized by the Employer as being exclusively represented by the Union are as follows: Lead Painter, Painter, Apprentice [.]

Appendix D: (Outlines employer and employee contributions toward various fringe benefit funds.)

FACTS

In October of 2014, Tim Byrne, who had been employed in the classification "Painter", for many years, retired from the City of St. Paul Public Works Department. At the time of his retirement Mr. Byrne was the incumbent Painter in the City's sign shop. Prior to his assignment in the sign shop he had worked for several years operating the City's only paint striping machine. In September 2014, Mr. Byrne had trained another Painter in how to operate and maintain the paint striping machine. Shortly after Mr. Byrne retired,

that same Painter was terminated from his employment with St. Paul. This left Mr. Ken Clark as the only Painter employed in the Traffic Control Division of the Public Works Department. Mr. Clark had been trained by Mr. Byrne in the operation of the sign shop in August 2014, and assumed those duties as Mr. Byrne retired. Immediately prior to assuming the sign shop duties Mr. Clark had operated and maintained the paint striping machine for four years.

After the Painter who had been trained on the striper was terminated from his employment, the City hired another Painter, Jeff Paulson. Mr. Byrne was then hired back on a temporary basis to train Mr. Paulson in the operation and maintenance of the paint striping machine. Mr. Byrne worked a total of 64 hours in April 2015, training Mr. Paulson. During his reemployment, Mr. Byrne was employed in the classification "Traffic Maintenance Worker", a title represented by the Machinist's Union. The circumstances of this reemployment were grieved by the Union.

POSITIONS OF THE PARTIES

Union

The Union contends that the Employer violated the agreement by hiring Mr. Byrne as a Traffic Maintenance Worker instead of as a Painter. The Union cites Articles 18.2 and 18.3, arguing that the employer was obliged by these articles to meet with the Painter's Union and the Machinists Union, which represents Traffic Maintenance Workers, to address any potential disagreements about whose work it was that Mr. Byrne was doing upon his reemployment. Further, the Union cites past practice, claiming that both the operation and maintenance of the paint striping machine, and training others in its operation and maintenance, have consistently been recognized as Painter work and assigned to Painters. The Union further argues that this long standing past practice, without complaint by the Machinists Union, constitutes the "mutual agreement" referenced in Article 18.2 that must guide the City in assigning this work.

The Union further contends that the Employer hired Mr. Byrne as a Traffic Maintenance Worker as a way of assisting Mr. Byrne in an attempt to avoid having his pension from the Painters and Allied Trades Union interrupted. The regulations of this pension require that a retired Painter who works as a Painter after retirement, for 40 hours or more in a month, have his pension suspended (Union Exhibit 6, page 20), Mr. Byrne's pension was suspended for the month in which he worked 64 hours.(Testimony of Mr. Nelson).

According to the Union, the employer had the option of having Mr. Clarke work overtime to train Mr. Paulson, and would not have had to hire Mr. Byrne at all.

As a remedy, the Union seeks to have Mr. Clark compensated for the overtime he would have earned if he, rather than Mr. Byrne, had trained Jeff Paulson. In its post hearing brief the Union specifies that Mr. Clark should be paid 64 hours at time and one-half, plus the negotiated hourly benefit contributions. The Union also seeks the dues it would have received had Mr. Byrne been hired as a Painter.

Employer

The employer states that Mr. Byrne would agree to come back and train Mr. Paulson only if he was not hired in the job title Painter, because he would lose money if he came back as a Painter. (Testimony of Ms. Anderson-Ewald). Mr. Byrne would agree to come back only if he was not placed in the Union. (Employer's post hearing brief). The employer contends that it had no choice but to agree to Mr. Byrne's demand that he not be hired back in the title Painter. Mr. Paulson needed to be taught how to run and maintain the striping machine. Mr. Clark, although he knew how to run and maintain the striper, was fully occupied in his sign shop assignment, and could not be spared to train Mr. Paulson. The only other person available to train Mr. Paulson was Mr. Byrne.

The Employer does not believe that its actions in hiring Mr. Byrne in this way violate the Contract. It Cites Elkouri and Elkouri, who identify several factors that can justify hiring an employee outside the union to do what would otherwise be done by a Union employee. Among these are; that the effects of the action are “de minimus”, and also that an emergency requires the action . The Employer contends that its actions were required by emergency, and that the effect on the Union was de minimus. It was necessary to wait until spring, when roads were clear of snow and ice, and the striper could be used, before training could occur. It was necessary to leave Mr. Clark in his sign shop assignment so that that work did not fall behind.. It was therefore necessary to hire Mr. Byrne, and to accede to his terms, in order to get the job done. As for the effect on the Union, the employer states that 64 hours is a very small percentage of the total amount of work done by employees of this Union, and that there was no lose of hours for any Union employee. The Employer further cites Article 3, addressing its management rights, and part of Article 18.3 addressing the employer’s right to accomplish work, and to assign work.

DISCUSSION

Elkouri and Elkouri, in their discussion of assigning work outside the bargaining unit, state that “arbitrators are divided on the question of whether, in the absence of contract provisions to the contrary, management has the right to assign bargaining unit work outside the bargaining unit.” Elkouri and Elkouri How Arbitration Works, 7th Edition, Kenneth May Ed., page 13-136. Some arbitrators have held that in the absence of specific restriction in the collective bargaining agreement, employers have that right. Id. at 13-136. Other arbitrators have ruled against the right of employers to assign work outside the bargaining unit on the ground that it is not included in the scope of general management rights clauses. Id. at 13-138. Others have ruled against managements assertion of a right to assign work outside the bargaining unit on the basis that the recognition, seniority, or job security clause is violated by such action, or that the because the job is listed in the contract, it is part of the contract, and its reassignment outside the bargaining unit therefore violates the contract. Id. at 13-138, 139. Still other arbitrators

rely one or more of a list of eleven considerations provided by the Elkouris that may justify assignment outside the bargaining unit, Id. at 13-137,138, which includes two that the Employer states are relevant to the current grievance, specifically;

1. The quantity of work or the effect on the bargaining unit is minor or de minimus in nature.
10. An emergency is involved.

With respect to the emergency argument, the Employer's assertions that it had to wait until spring to train an employee in the operation of the striper, rather than do it piecemeal over the winter as the union suggests, makes sense. It also makes sense that it could not spare Mr. Clarke from his sign shop assignment. The employer could have worked Mr. Clarke overtime to train Mr. Paulson, but the employer's arguments in the hearing and in its post hearing brief. about why this was not feasible also make sense. However, in its post hearing brief the Union describes a possible approach to hiring Mr. Byrne that would not have involved either placing him in the Mechanical Maintenance Worker classification or the loss of his pension benefit for any month. According to the Union's brief., the employer could have employed Mr. Byrne in the Painter classification for less than 40 hours each in consecutive calendar months, thus allowing him to work the necessary number of hours to train Mr. Paulson, but not work 40 or more hours in a month. This possibility makes the employer's "emergency " argument less persuasive.

As for the de minimus argument, It is clear that no one in the bargaining unit lost any time or was otherwise adversely affected by Mr. Byrne's reemployment or the manner in which it was done. It is also clear from the employer's presentation that 64 hours is a tiny fraction of the number of hours worked by employees in the Painters Union.

In its brief the Employer cites three arbitration awards in which the arbitrator relied, at least in part, on the de minimus argument, to rule in favor of the employer. In *IBEW v. Owatonna Public Utilities*, FMCS Case No. 080925-59709-3 (Befort, 2009), the

employer, after a bargaining unit employee retired, re-distributed her duties, some to jobs outside the bargaining unit and some to jobs within. The employer also created a new position in the bargaining unit, resulting in the same number of bargaining unit position as before the reassignment. Based on the maintenance of the same number of bargaining unit positions, and the fact that no bargaining employee lost a job, the arbitrator determined that the effect of the employer's actions was de minimus, and ruled in its favor. In his award, the arbitrator characterized the de minimus argument as "no harm, no foul."

In *ISD #740 v. Operating Engineers Local 70*, BMS Case No. 132-PA-0081 (Remington, 2013), the employer's practice of assigning janitorial duties to supervisory employees was grieved. The arbitrator ruled against the employer's actions in part, finding that the employer violated the collective bargaining agreement when it assigned one supervisor to work 4 hours per day on cleaning duties, but also ruled that the employer could assign cleaning duties to a supervisor, as long as they did not exceed 2.75 hours per day, relying on contract language that the employer could assign work to temporary employees outside the bargaining unit so long as they worked less than 2.75 hours per day. The arbitrator's award also required the employer to desist from its practice of having one supervisor work more than 2.75 hours per day on cleaning duties. The arbitrator applied the term "de minimus" to 2.75 hours per day, but relied on specific contract language in determining his award.

In *Minnesota School Employees Association v. ISD #12*, BMS Case No. 14-PA-0099 (Befort, 2014), the union represented two bargaining units affected by reorganization, and grieved the employer's action in restructuring positions resulted in reassignment of work to employees outside these bargaining units. The union claimed that the employer had an obligation to negotiate the effect of these changes. The arbitrator noted both that the employer had no obligation under PELRA to negotiate matters of organizational structure and workforce size, as the union contended, and that the collective bargaining agreements

in question both contained language preserving the employer's authority to determine "the organizational structure and selection and direction and number of personnel". The arbitrator then looked at whether the employer's actions harmed the interests of unit employees by reassigning their work to employees outside their bargaining unit. Concluding that the effect was de minimus, the arbitrator denied the grievance.

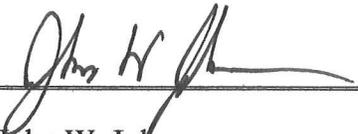
I find there are differences between the grievance at hand and the cases cited by the Employer. There was no reorganization involving the reassignment of what the union claimed was "bargaining unit" work. There was no contract language giving the employer a limited right to assign work outside the bargaining unit. There was instead a retired Painter re-hired to do what Painters do. Given the importance to a union of having some control over the definition of what "union work" is, and what work its bargaining unit covers, I find the de minimus argument by itself to be unpersuasive in this case. "No harm, no foul," should not be used to justify any employer action whatsoever regarding "union work". I am more inclined toward the idea, identified by the Elkouris, that the recognition clause, and the fact that the Painter classification is listed in the contract, argues against hiring someone into another job classification to do what a Painter does. My logic is simple. If you hire a Painter, because he's a Painter, to do what a Painter does and has done in the past, he's a Painter. I find therefore, that the Employer did violate the agreement by hiring Mr. Byrne as a Mechanical Maintenance Worker instead of as a Painter.

However, it does not follow from this determination that the Union is entitled to the relief it requests. To justify that would require a finding that re-hiring Mr. Byrne at all was a violation of the contract. That is not so. The Employer acted within its management rights to decide that the best way to train Mr. Paulson was to hire a former employee to train him, so that no overtime need be paid, and so Mr. Clark did not have to be taken away from his sign shop duties. Article 3 clearly gives the Employer that right. It would also be necessary to find that the only alternative to hiring Mr. Byrne was to work Mr.

Clark overtime to train Mr. Paulson. That too is not so. The Union's own post hearing brief lays out an alternative that would have allowed Mr. Byrne to be hired as a Painter and work 64 hours to train Mr. Paulson, without Mr. Byrne's running afoul of the Union's pension requirements.

AWARD

The Employer violated the collective bargaining agreement by hiring Mr. Byrne in April of 2015 as a Mechanical Maintenance Worker instead of as a Painter. The required remedy is for the Employer to pay to the Union the dues it would have paid had Mr. Byrne been hired as a Painter.



John W. Johnson

March 12, 2016
Date