

Northfield, City of

TIME REQUIRED TO FORWARD: 29 DAYS

IN THE MATTER OF ARBITRATION)
)
between)
)
City of Northfield,)
Minnesota)
)
-and-)
)
International Union of)
Operating Engineers Local)
Union No. 70)
November 26, 2007
))

APPEARANCES

For City of Northfield, Minnesota

Cyrus F. Smythe, Consultant, Labor Relations Associates,
Deephaven, Minnesota
Elizabeth C. Wheeler, Human Resource Director

For International Union of Operating Engineers Local Union No. 70

M. William O'Brien, Attorney, Miller-O'Brien-Cummins,
Minneapolis, Minnesota
Dave Monsour, Business Representative
Sandra Bremer, Steward

JURISDICTION OF ARBITRATOR

Article 6, Employee Rights-Grievance Procedure, Section
Step 4, of the 2004-2005 Collective Bargaining Agreement (General
Unit) (Union Exhibit #1; City Exhibit #3) between City of
Northfield, Minnesota (hereinafter "City" or "Employer") and
International Union of Operating Engineers Local Union No. 70
(hereinafter "Local 70" or "Union") provides for an appeal to
arbitration of properly processed and determined disputes.

RECEIVED BMS-

18 DEC 07 11:2

The Arbitrator, Richard John Miller, was selected by the Employer and the Union (hereinafter "Parties") from a panel submitted by the Bureau of Mediation Services. A hearing in the matter convened on October 31, 2007, at 9:00 a.m. at City Hall, 801 Washington Street, Northfield, Minnesota. The hearing was tape recorded with the Arbitrator retaining the tapes for his records. The Parties were afforded full opportunity to present evidence and arguments in support of their respective positions. The Parties elected to file posting hearing briefs with an agreed-upon submission date of November 16, 2007. The briefs were timely submitted and received by the Arbitrator on November 17, 2007, after which the record was considered closed.

ISSUES AS SUBMITTED BY THE PARTIES

Article 6, Employee Rights-Grievance Procedure, of the 2004-2005 Collective Bargaining Agreement provides in Section 4(A), Arbitrator's Authority, that "[t]he 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."

Accordingly, the City submits its written statement of the issues as follows:

Did the Union in the AGREEMENT negotiated for the GENERAL UNIT with the City of Northfield for January 1, 2004 through December 31, 2005 agree to establish a new and substantially

modified ARTICLE 2 RECOGNITION from ARTICLE 2 RECOGNITION in the January 1, 2001 through December 31, 2003 AGREEMENT which eliminated the job classification of "Transit Driver" from the bargaining unit and additionally excluded all "Part-time employees from the bargaining unit?"

As a result of the Union and City of Northfield AGREEMENT for January 1, 2004 through December 31, 2005, can the Union represent a part-time employee in the grievance process as an "employee" when an "EMPLOYEE" is defined in ARTICLE 3 DEFINITIONS, Section 4 as: "EMPLOYEE: A member of the exclusively recognized bargaining unit."

The Union submits its written statement of the issues as follows:

Whether Employer violated Article 15 of contract in payment of employee Nora Sexton her Veteran's Day holiday in 2006.

STATEMENT OF THE FACTS

The Parties have been signatories to several collective bargaining agreements. The contract in effect from January 1, 2001 to December 31, 2003, contains the following language in Article 2, Recognition, Section 1:

The EMPLOYER recognizes the UNION as the sole and exclusive bargaining representative, pursuant to Minnesota Statute 179A.03, for Employees in the classifications which follow, excluding all other classifications of Employees not specifically enumerated herein, except those classifications expressly included by subsequent mutual written agreement with the UNION:

Public Works Department - Street Division

Secretary/Receptionist I
Secretary/Receptionist II
Public Works Operator I
Public Works Operator II
Public Works Operator III
Custodian I
Custodian II

Administrative Department

Custodian I
Custodian II
Transit Driver
Transit Coordinator
Secretary/Receptionist I
Secretary/Receptionist II
NCRC Program Coordinator

Finance Department

Secretary/Receptionist I
Secretary/Receptionist II
Accounting Clerk I
Accounting Clerk II
Accounting Clerk III
Motor Vehicle Clerk I
Motor Vehicle Clerk II

Community Development Department

Secretary/Receptionist I
Secretary/Receptionist II

Parks and Recreation Department

Park Operator I
Park Operator II
Park Operator III

Police Department

Secretary/Receptionist I
Secretary/Receptionist II
Police Clerk
Custodian I
Custodian II

who are employed for more than 14 hours per week or 67 days per year, excluding Employees in:

Liquor Store
Engineering Division
Wastewater Division

Library
Water Division
other Employees of the Police Department

and excluding Employees who are:

Managerial
Confidential
Non-clerical
Temporary
Other Employees of the City

Supervisory
Professional
Seasonal

(City Exhibit #2).

The Parties negotiated different language in Article 2, Recognition, in the 2004-2005 Collective Bargaining Agreement:

The EMPLOYER recognizes the UNION as the Exclusive Representative for all employees of the City of Northfield who are employed for more than 14 hours per week and for more than 67 work days per year, excluding employees in the Liquor Store, Library, Engineering, Water, Waste Water and other employees of the Police department. Managerial, Supervisory, Confidential, Professional, Non-clerical, Part-time, Seasonal and Temporary employees are also excluded.

(Union Exhibit #1; City Exhibit #3).

A full-time employee is defined in the City Employee Handbook, Policy 3.10, Type of Employees, as a person who is employed and regularly scheduled basis for forty (40) or more hours per week in a single job category. (City Exhibit #20).

Part-time City employees are defined in the City Employee Handbook, Policy 3.10, Type of Employees, as Regular Part-time benefited (hired per-2007 and post-2007) and Regular Part-time Non-Benefited. Regular part-time benefited employees hired before January 1, 2007, working an annual average of 24 hours or more per week receive pro-rated benefits based on hours worked. Regular part-time benefited employees hired after January 1, 2007, working an annual average of 32 hours or more per week receive pro-rated benefits based on hours worked. (City Exhibit #20).

Regular part-time non-benefited employees working an annual average of 14 to less than 32 hours per week are ineligible for City paid benefits programs other than legally mandated benefits. (City Employee Handbook, Policy 3.10, Type of Employees - City Exhibit #20).

The City Personnel Policy revised February 5, 1996, indicates in Article V, Section B that permanent part-time employees working an annual average of 25 hours per week or more will receive pro-rated benefits. (Union Exhibit #27).

The Grievant, Nora Sexton, was hired on January 2, 2001, as a part-time Transit driver. She is classified as Part-time 70% which means she works an annual average of 28 hours or more per week (70% x 40 hours/week). (City Exhibit #13).

Holiday pay for Union members is addressed in Article 15 of the 2004-2005 Collective Bargaining Agreement. Article 15, Section 1 clearly identifies Veteran's Day as a holiday. Article 15, Section 2 clearly defines the required holiday pay as "one and one-half (1 1/2) times the employee's base pay rate for hours worked. This is in addition to the employee's base pay." In other words, holiday pay consists of base pay plus 1 1/2 times base. Article 15, Section 3 makes clear that if the actual holiday falls on a Saturday, the preceding Friday shall be the designated or "observed" holiday and paid as such. If the holiday falls on a Sunday, the following Monday will be the designated holiday and paid as such.

In this case, Veteran's Day in 2006 fell on a Saturday. The City designated the preceding Friday as the observed holiday. The Grievant worked 6.5 hours on the observed Friday holiday. The City paid the Grievant for 6.5 straight-time hours at her base rate of \$16.94 per hour for the actual time worked on Friday and 6.4 straight-time hours at her base rate of \$16.94 per hour for holiday pay for a total of \$218.55.

The Union objected on November 29, 2006, to the City's method of calculation for the Grievant. (Union Exhibit #2, p. 1). The Parties were unable to informally resolve their holiday pay dispute. (Union Exhibit #2, p. 2). As a result, on February 20, 2007, the Union filed a written grievance. (Union Exhibit #2, pp. 3-4). The remedy desired in the grievance is that since the Grievant worked on the designated Veteran's Day holiday she should have been compensated for 6.4 hours holiday pay, plus time and one-half for all hours worked that day for a total of \$273.61. According to the Union, the Grievant is owed the difference of one-half time more of her base rate than paid by the City or \$55.06 more, pursuant to the Article 15, Section 1 of the 2004-2005 Contract. (Union Exhibit #7).

The grievance was denied by the City, and it was processed to final and binding arbitration by the Union. (Union Exhibit #2, p. 5).

UNION POSITION

Never has an employer worked as hard - as the City has here - to evade responsibility for holiday pay to the Grievant for such an obvious Contract violation. Rather than simply acknowledging its responsibility for the obvious holiday pay error - an error amounting to \$55.06 - this Employer constructs an elaborate hoax of a defense. Rather than pay the required

holiday pay, this Employer insists on an arbitration where it contends - for the first time in the grievance process - that the entire class of employees to which the Grievant belongs, the Transit class, is not covered by the contract, a contention that is uniformly belied by the Employer's course of conduct, as well as its own pay and bargaining records.

Astoundingly, this is an Employer that - seemingly out of sheer arrogance - clings to the flotsam of its incredulous position, even after the "ship" of its defense has been sunk by the implosion of its own cargo.

Sanctions should be awarded in this case to deter future bad faith by the City. In this case the City's bad faith is evident in both procedure and substance. It has manipulated the grievance process for dilatory purposes, while offering a wholly frivolous defense. First, the Employer delayed a 2006 grievance for nearly a year, rejecting all effort to resolve a fairly innocuous dispute, while also rejecting many earlier arbitration dates offered by the Union and this Arbitrator. Second, it refused to consolidate this dispute with a related one scheduled for arbitration in December. Third, it refused to even discuss pre-arbitration resolution. Fourth, it flouted the Union's early request for pertinent documents in the case. Fifth, and with no

apparent chagrin, the City flouted the Arbitrator's subpoena which commanded the production of those same documents on Monday, October 29, 2007. (Union Exhibit #3). Sixth, at arbitration the City failed to produce or even identify the subpoenaed documents, offering merely and curtly, "they are included in our (exhibit) book." Seventh, the City's case was grounded in obvious bad faith, consisting of embarrassingly preposterous defenses. Eighth, as the doomed ship of its case began taking on water and listing, the Employer's representative lashed out at the Union and its representative, while also subjecting the Arbitrator to thinly veiled threats of appeal should the Arbitrator dare to rule against the City. Ninth, the Employer objected to submitting a \$50 grievance on oral argument to the Arbitrator, and insisted that the matter be briefed. Finally, the City refused the suggestion, made both by the Union and the Arbitrator, of a reasonable page limitation for the filing of post hearing briefs.

Based upon the foregoing arguments, the Union requests the following remedies:

- 1) An Order that the City comply with Article 15 regarding all Transit workers employed for more than 14 hours per week;
- 2) An Order sanctioning the City for bad faith conduct - for dilatory tactics, for flouting Arbitrator subpoena power, for constructing frivolous arguments and

defenses, for needlessly driving up the cost of the process, and for wasting City tax money - and awarding the Union its attorney fees and costs, including the Arbitrator's fee.

- 3) An Order that the City compensate the Grievant for unpaid holiday pay in the amount of \$55.06.

CITY POSITION

The Union made no attempt to renegotiate Article 2, Recognition, for a Contract beginning January 2006 even after being informed by the City of the content of Article 2 in the 2004-2005 Contract and the specific exclusion from the bargaining unit of groups of employees under Article 2, Recognition, in the 2004-2005 Contract including part-time employees.

By specific language, which cannot be modified by the Arbitrator as stated in Article 6, Section 4, of the 2004-2005 Contract, a number of groups/classes of City employees are excluded from coverage by the 2004-2005 Contract. Among the groups/classes are "Part-time" employees as well as management, supervisory, professional, confidential, liquor stores, and seasonal and temporary employees. The Union has no more right to represent part-time employees in grievance processing than the Union has the right to represent managerial, supervisory, Water, Waste Water, confidential employees or other employee groups also specifically excluded from the bargaining unit by Article 2 of the 2004-2005 Contract.

The Union's attempt to represent a member of an employee group specifically excluded by the City and the Union from the bargaining unit in Article 2, Recognition, of the 2004-2005 Contract is not arbitrable. As a result, the grievance and all requested remedies should be denied.

ANALYSIS OF THE EVIDENCE

The City raised for the first time at the arbitration hearing that the grievance is not substantively arbitrable and would challenge the Arbitrator's decision in court if he ruled that the grievance was arbitrable, and if he ruled in favor of the Union on the merits of the case.

The law in the State of Minnesota provides that questions of substantive arbitrability are legal questions that will be decided by the court in a de novo proceeding as to whether or not the arbitrator exceeded his or her authority in determining a particular grievance dispute. While a party may submit an issue of substantive arbitrability to an arbitrator, if the arbitrator determines that the grievance is arbitrable, the matter may subsequently be placed before the court de novo to be decided as a matter of law. State v. Berthiaume, 259 N.W.2d 904 (Minn. 1977).

Since the United States Supreme Court decision in the Steelworkers Trilogy, it has been well recognized that a

grievance arbitrator's authority to decide a dispute is derived solely from the collective bargaining agreement. In fact, the Arbitrator's authority in this matter is limited by the language in Article 6, Section 4(A) of the 2004-2005 Contract, wherein an arbitrator "shall have no right to amend, modify, nullify, ignore, add to or subtract from the terms and conditions of the Agreement."

When arbitrators exceed their powers by deciding matters that the parties have not agreed to arbitrate, the courts will not enforce their awards. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Minn. Stat. § 572.19, subd. 1. The Court succinctly stated this principle as follows:

[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Enterprise Wheel, 363 U.S. at 597.

The Minnesota Supreme Court has determined what should be considered by an arbitrator in interpreting and applying a collective bargaining agreement. In Ramsey County v. AFSCME Council 91, Local 8, 309 N.W.2d 785 (Minn. 1981), the Court dealt with a dispute where real estate appraisers for the county were

to be grandfathered in at a vacation accumulation rate previously earned which was not specifically set forth in the collective bargaining agreement. The arbitrator found for the real estate appraisers and the District Court vacated the award. The Minnesota Supreme Court reversed and reinstated the award. The Court noted that an arbitrator does not exceed his powers within the meaning of the provision within the Uniform Arbitration Act if the award draws its essence from the collective bargaining agreement, viewed in light of its language, its context, and any other indicia of the party's intent, including past practice.

The City's arbitrability claim is that since the Parties agreed in the 2004-2005 Contract to exclude a number of groups/classes from coverage, including "part-time" employees, the Arbitrator may not rule that part-time employees can be defined as an "employee" covered by the Contract, and a member of the Union, and entitled to be covered by the contractual grievance procedure. Specifically, the City avers that while a full-time Transit driver is covered by the terms and conditions of the 2004-2005 Contract, a part-time Transit driver, such as the Grievant in this case, is not covered by the Contract.

The City's arbitrability claim is without merit for several reasons. If there is one principle of contract interpretation upon which arbitrators agree, it is that where no ambiguity

exists in the language of a contract, then the obvious intent of that language governs and must be enforced. The prior contract, effective January 1, 2001 to December 31, 2003, expressly enumerates in the Recognition clause (Article II, Section 1) the classifications covered by the contract and includes expressly the Transit employees. Thus, there is no dispute that the Transit employees were in the Bargaining Unit and covered by the prior contract.

For the 2004-2005 Contract, the Parties modified the Recognition clause in Article II by eliminating enumeration of the covered classifications. The Recognition clause establishes that, unless classifications were expressly excluded, the Parties intended inclusion of classifications. Because the Recognition clause lists the excluded classifications, a long list of the included classifications is simply redundant. Clearly, the 2004-2005 Contract language modification in the Recognition clause was made for the sake of form and not substance. The Parties simply eliminated the long list of covered classifications, in favor of a short list of excluded classifications without changing the substance of the Recognition clause.

While the Parties eliminated the list of each class covered by the 2004-2005 Contract, they added a clear statement of the classifications that are not covered: employees in the Liquor

Store, Library, Engineering, Waste Water, and other employees of the Police Department, Managerial, Supervisory, Confidential, Professional, Non-clerical, Part-time, Seasonal and Temporary employees. Had the Parties intended and agreed, as the Employer claims, to delete the Transit employees, those employees would have been identified in the foregoing list of excluded employees. Since this exclusionary list does not include the Transit employees, they are included in the Bargaining Unit.

In spite of the fact that the itemization of excluded employees does not reference Transit employee, the Employer argues that, because most Transit employees do not work 40 hours and, therefore, are part-time Transit employees, the 2004-2005 Contract's exclusion of "Part-time" employees effectively excludes Transit employees. This argument does not carry any weight in that the prior 2001-2003 contract excluded part-time while including Transit employees. Moreover, PELRA includes, in the definition of public employee, "part-time employees whose service does not exceed the lesser of 14 hours per week or 35% of the normal work week in the employee's appropriate unit." (MSA 179A.03, Subd. 14(E)). The Parties negotiated language in the Recognition clause of the 2004-2005 Contract that "[t]he EMPLOYER recognizes the UNION as the Exclusive Representative for all employees of the City of Northfield who are employed for more

than 14 hours per week and for more than 67 work days per year." Clearly, the Parties intended their reference to "Part-time" to track PELRA's definition. As a result, the Recognition clause in the 2004-2005 Contract is clear and unambiguous: employees working more than 14 hours per week and for more than 67 work days per year are covered by the terms and conditions of the 2004-2005 Contract unless expressly excluded. Since Transit employees are not excluded from the Recognition clause, and if they work the threshold amounts (more than 14 hours per week and for more than 67 work days per year) they are entitled to receive the pay and benefits enumerated in the 2004-2005 Collective Bargaining Agreement.

It is undisputed that the Grievant worked more than 14 hours per week and for more than 67 work days per year and, thus, satisfied the work threshold amounts for 2006. Consequently, since the Grievant worked on the recognized 2006 Veteran's Day holiday, she was entitled under Article 15, Section 1 of the 2004-2005 Contract to receive "one and one-half (1 1/2) times the employee's base pay rate for hours worked. This is in addition to the employee's base pay." The Grievant should have received \$273.61 under Article 15, Section 1 rather than \$218.55 that was paid pursuant to the City Employee Handbook and Personnel Policy. She is owed the difference of \$55.06.

Even if the Arbitrator ignores the clear and unambiguous Contract language, as noted above, and utilizes extrinsic evidence, the City's position cannot be sustained by the evidence. The City offered no proof that Transit employees who meet the work threshold amounts (more than 14 hours per week and for more than 67 work days per year) are not covered by the 2004-2005 Contract. While the City's representative, Cyrus Smythe, argued repeatedly that a "deal" was struck in bargaining for the 2004-2005 Contract to delete the part-time Transit employees from the Bargaining Unit, the City's only witness, Elizabeth Wheeler, Human Resource Director and negotiation team member, offered no evidence to substantiate that argument. She knew of no unit clarification proceedings before the Bureau of Mediation Services to remove the Transit employees. She offered no bargaining proposals addressing the issue, and no notes reflecting the alleged deal or even discussion about the Transit employees.

The Union's testimony, on the other hand, on this point was clear and precise. Union Business Representative Dave Monsour, who was the lead negotiator for the Union in the 2004-2005 Contract negotiations, testified that the subject of deleting the Transit employees from the Bargaining Unit never arose in bargaining, nor on any other occasion. There were no proposals

exchanged between the Parties over this issue. This evidence clearly establishes that during negotiations of the 2004-2005 Collective Bargaining Agreement there was no intent by the Parties to alter the substantive scope of the Recognition clause coverage.

There is further evidence that weakens the City's case. It is axiomatic in labor relations that the goal of all Unions is to maintain and increase membership. The Union's existence depends on representing the rank and file. Thus, it would be illogical to believe that Local 70 would negotiate Recognition clause language in the 2004-2005 Contract that would diminish the size of their Bargaining Unit. Further, while contending that Transit employees are not in the Union's bargaining unit, the Employer admits deducting Union dues from the pay of those employees. Similarly, the Employer-produced pay matrix for the employees in the Bargaining Unit, covering the years 1998 to 2006, lists the Transit employees as among those in the Unit. (Union Exhibit #5).

The Employer's proposals for the Parties' successor 2006-2008 contract is also inconsistent with the City's arbitration position. The City's final proposal for current bargaining, identifies by name all employees currently covered by the 2004-2005 Contract, including Transit employees (Nora Sexton, Karen

Grisim, Lori Larson, David Hermstad, and Steve Anderson). (City Exhibit #4, p. 17). Further, the City's proposal for the 2006-2008 contract states in Article 15, Section 3 that "[t]ransit employee are not covered by this section." Obviously, if the Recognition clause language truly supported the Employer's position that Transit employees are not covered by the terms and conditions of the 2004-2005 Contract there would be no need for the City to propose placement of this specific language in the holiday pay section of the new contract.

Finally, the City's generated pay records were contrary to their own arguments. The Employer introduced City Exhibit #6 - a color-coded chart - which was created for the arbitration, to apparently show that the City's practice of paying holiday pay to Transit employees is inconsistent. A yellow box on the exhibit means that the Transit employee did not receive the required overtime pay for holiday work; a green box means that the Transit employee received the overtime holiday pay pursuant to the contracts in effect at the time of the holidays. Because the chart revealed both yellow and green boxes, the City argued that the overtime pay practice is inconsistent.

Between 2001 and September of 2003 the holiday pay boxes are all yellow. There are several reasons to explain this situation. First, Transit employees did not become City employees until

2001; before that they were independent contractors. Second, the 2001-2003 contract was not executed until September of 2001. Finally, in 2003 a payroll employee alerted the City's payroll manager that the Transit employees were not receiving holiday pay as they should under the 2001-2003 contract. As a result, the Transit employees began to receive the contractually mandated holiday pay at the end of 2003.

After 2003, and for the last four years, the City's holiday pay practice toward Transit workers has been clear and consistent: those Transit employees who worked enough hours - more than 14 hours per week - to be considered "benefit employees" always received the overtime pay required for holidays. Those working less than the minimum required for benefit status did not receive the holiday pay. This practice parallels the 2004-2005 Contract's Recognition clause language stating that employees working more than 14 hours weekly are covered by the Contract. This practice establishes a clear and consistent pattern of paying holiday overtime to every benefit-status Transit employees, for every holiday worked, since the end of 2003, which is contrary to the position taken by the City in this case.

In the final analysis, the Union has met its burden of proof to sustain the grievance. The City's position cannot be

sustained on its evidence produced at the hearing. The City's position is contrary to clear and unambiguous 2004-2005 Contract language, the Employer's course of conduct, as well as its own pay and bargaining records and its proposals for the successor 2006-2008 contract. Clearly, the Arbitrator's decision encompasses the four corners of the 2004-2005 Contract and all of the space in between. His decision draws its essence from the prior, current and future collective bargaining agreements, viewed in light of their language, their context, and the other indicia of the Parties' intent, including the recent overtime holiday pay practice for Transit employees.

While the City's position is not sustainable by the evidence, the Union seeks to have the Arbitrator impose sanctions (costs and fees) against the City in order to deter future bad faith by the Employer. This is rejected for several reasons. First, Article 6, Section 4(C) of the 2004-2005 Contract states that "[t]he fees and expenses for the arbitrator's services and proceedings shall be borne equally by the EMPLOYER and the UNION..." Second, the Union will have the opportunity to recover costs and expenses against the City, since the Employer's representative stated several times during the hearing that the Arbitrator's decision will be appealed to the courts if he rules in favor of the Union, which is the case here. The courts have

consistently rejected frivolous appeals by ordering sanctions against the frivolous party.

AWARD

Based upon the foregoing and the entire record, the grievance is sustained. The Grievant is entitled to receive the amount of \$55.06 for unpaid 2006 Veteran's Day holiday pay.

Richard John Miller

Dated November 26, 2007, at Maple Grove, Minnesota.