IN THE MATTER OF ARBITRATION	)	**GRIEVANCE ARBITRATION**
	)	
between	)	
	)	**Metropolitan Transit**
Metropolitan Council/	)	**Payroll Duties -**
Metropolitan Transit	)	**Merits**
	)	
-and-	)	**BMS Case No. 07-PA-726**
	)	
Amalgamated Transit Union,	)	
Local 1005	)	**February 22, 2008**

))))))

Metropolitan Council/Metropolitan Transit (hereinafter "Metropolitan Transit", "Transit", "Metropolitan Council", "Council", or "Employer") and Amalgamated Transit Union, Local 1005 (hereinafter "Union" or "ATU") provides for an appeal to arbitration of disputes that are properly processed and determined to be arbitrable through the grievance procedure contained in Article 5.

The Arbitrator, Richard John Miller, was selected by Metropolitan Council and the Union (hereinafter "Parties") from a panel submitted by the Bureau of Mediation Services ("BMS"). A hearing in the matter convened on November 13 and December 13, 2007, at the BMS Offices, 1380 Energy Lane, Suite 2, St. Paul, Minnesota. The hearing was transcribed. The Parties were afforded full opportunity to present written evidence, testimony, and arguments in support of their respective positions. The Parties elected to file post hearing briefs with an agreed-upon postmark date of February 1, 2008. The post hearing briefs were submitted in accordance with those timelines and received by the Arbitrator on February 4, 2008. The Parties also agreed that if reply briefs were deemed necessary they would be postmarked no later than February 8, 2008. The reply briefs were submitted in accordance with those timelines and received by the Arbitrator on February 11, 2008, after which the record was considered closed.

The Parties agreed to waive the Board of Arbitration referenced in Article 13 which allows the Arbitrator to make the sole decision in this matter.

ISSUE AS DETERMINED BY THE ARBITRATOR

Did the Employer violate the Collective Bargaining Agreement by assigning Transit Department payroll duties to non-ATU employees, and if so, what is the remedy?

STATEMENT OF THE FACTS

The facts are not in serious dispute. The ATU represents all drivers, mechanics and clerical employees of the Metropolitan Council Transit Operations Division. The Metropolitan Council is the regional planning agency serving the Twin Cities seven-county metropolitan area.

The Metropolitan Council and the Union have been signatories to several collective bargaining agreements including the current Contract which is in effect from August 1, 2005 to July 31, 2008. (Joint Exhibit #1). All Transit payroll functions are embedded in the Contract's payroll job classification including Senior Payroll Clerk, Timekeeper, Mechanical and Students Payroll Clerk, Confidential Payroll Clerk, Timekeeper Instructor, and Clerk Floater. The Transit payroll functions have been covered by the collective bargaining agreements since approximately 1936, when the employer was Twin City Rapid Transit Company. (Union Exhibit

#11). Although the Transit operation name has changed over the years, the ATU's representation of Transit payroll employees has remained unchallenged and uninterrupted for more than seventy-five years.

The Transit payroll function has remained covered by the collective bargaining agreements despite numerous moves, changes in employers, and implementations of new technology and computer systems. The payroll process has changed many times since 1936. Throughout the years, payroll processes were changed and upgraded in the name of efficiency. Despite this evolution, ATU remained the bargaining representative of those employees performing Transit payroll functions until recently.

In 1994, the Legislature abolished the Metropolitan Transit Commission, Metropolitan Waste Control Commission, and the Regional Transit Board, and merged these agencies with the Metropolitan Council through legislation known as the Metropolitan Reorganization Act of 1994 ("MRA"). The MRA established Metropolitan Council as the principal public planning agency for the Minneapolis-St. Paul seven county metropolitan area and the operating agency of the mass transit and environmental treatment systems for the metropolitan region. (Employer Exhibit #3, p. 2). At the time the Council was created, the former operating agencies, including the

Metropolitan Transit Commission, were disbanded and replaced by the Metropolitan Council as the operating political subdivision. Minn. Stat. § 473. 123, subd. 1. As such, the Council is the employer for all employees in any of its operating divisions including Transit and is the only entity with legal authority to enter into contracts, including labor agreements. Minn. Stat. § 473.129.

The Council is composed of four separate and different functioning divisions, Community Development, Transportation, and Environmental Services, along with the Regional Administration/ Chair's Office. Community Development includes the Metropolitan Housing and Redevelopment Authority, and is responsible for the Council's regional growth strategy, as well as planning and technical assistance to local communities. The Transportation Division includes Metropolitan Transit and Metropolitan Transportation Services, which among other duties, operates Metro Mobility. Metropolitan Transit operates both buses and light rail trains throughout the metropolitan area. The Environmental Services Division operates and maintains regional sewers and treats wastewater at eight regional treatment plants. The Regional Administration Division includes the Regional Administrator, the General Counsel's office, Human Resources, Diversity, Finance, Government Affairs, and Public Affairs.

The Council currently employs a total of approximately 3,625 employees. Approximately 2,600 of those employees are in the Metropolitan Transit division of the Council. Approximately 2,250 of these employees are members of the ATU. Of those, approximately 2,100 are drivers and mechanics whose job it is to operate and maintain buses and trains. Prior to the reorganization at issue in this case, there were 14 employees in the Transit Payroll Department, including 11 ATU members. Following retirement and other attrition, the total number of payroll positions at issue in this case is 5.

Metropolitan Transit operates out of ten different facilities. (Union Exhibit #14). These facilities include five garages, the Fred T. Heywood office building, an overhaul base, Transit control center, operations support center, rail operations and maintenance facility, and the Metropolitan Transit police headquarters. (Id.)

Metropolitan Transit is one of the country's largest transit systems. (Union Exhibit #13). It anticipates significant growth and has a goal to double the transit system by 2030. This growth will require an increase in employees in the Metropolitan Transit division of the Metropolitan Council.

During the several years following the merger, various support functions of the different predecessor agencies were

centralized and combined. This consolidation was taken in response to legislative direction at the time of the merger to take action to operate with efficiencies. Minn. Stat. § 473.125. The centralization of support functions was therefore undertaken to increase efficiency and cost-effectiveness as well as to improve internal controls. For example, support functions such as Human Resources, Benefits, Diversity, Information Services, Legal, Audit, and Risk Management were changed from a divisional focus to a centralized department providing services Council-wide to employees in all divisions. Some of those consolidations and reorganizations involved changes in union representation from ATU to AFSCME or to non-ATU employees including Human Resources, Metro Mobility, Benefits, Legal, and Risk Management.

Payroll functions were not merged until very recently. Regional Administration employees have performed the payroll functions for Environmental Services, Metropolitan Transportation Services, and Community Development divisions of the Council since the 1994 merger. These employees have been in St. Paul and have been represented by AFSCME.

Until the reorganization at issue in this arbitration, a completely separate and duplicative payroll department operated out of the old Metropolitan Transit Commission Building known as

the Heywood Office Facility in Minneapolis. This payroll office handled creating paychecks for most of Metropolitan Transit. Most Transit payroll department employees were represented by ATU. The two payroll units worked at separate locations, had different supervisors, and worked on separate payrolls.

Since 1936 there have been many changes in the manner in which payroll is processed. The greatest changes have always related to the introduction of new computers or computer software which resulted in changed job duties. For example, for many years payroll had been manually processed on large sheets of paper. PeopleSoft and TX-Base were introduced in approximately 2004 to help process the mechanics' payroll. Using this system, the maintenance personnel scanned in and out of work with a time card which electronically recorded their work hours. With the introduction of this system, the payroll employees no longer recorded maintenance hours manually. Their role became more of an audit function to make sure that the employees were being paid correctly. The payroll employees' focus became verifying that the computer generated data was accurate.

Transit driver payroll too moved from a manual to an automated computer program. The program, TimeRoll/TimeCalc, was introduced in the 1990s to process driver payroll. TimeRoll/

TimeCalc captured all of the "picked work", the basic driver schedule, in the TimeRoll system. The timekeepers then received the "work fills", adjustments to the basic schedule, from the garages and they would enter that time into the TimeRoll system. A work fill contained all of the open or changed work for the day, such as sick leave or tardiness. A fundamental component of the timekeeper's job was to make all of the adjustments from the normal work schedule. The timekeepers then reviewed the hours and time recorded by TimeRoll/TimeCalc for each driver to make sure they were being paid correctly. Those very same payroll functions remain today.

It was clear to Council management that there were a number of inefficiencies and quality control concerns in the processing of payroll. This was confirmed by a Best Practices' analysis conducted by the Council's Controller, Mary Bogie, regarding standards for efficient payroll operations. (Employer Exhibits #9-12). The Best Practices' analysis demonstrated that the Council's payroll practices were neither efficient nor cost-effective. (Employer Exhibit #12).

Council management identified a number of inefficiencies. With two separate and distinct payroll departments the duplication of tasks was extensive and interchangeability of staff was restrictive and limiting. There were separate managers

at Transit and at Regional Administration, resulting again in unnecessary duplication and potential problems with internal controls. In addition, a number of payroll processes existed throughout the Council that would be more cost-effective if new technologies were used to replace a number of labor-intensive, manual tasks. (Employer Exhibit #9). The payroll system used at Transit for drivers was by far the most antiquated and costly labor-intensive process that remained at the Council, and that system could not be computerized so easily. An additional inefficiency that was identified was the number of payroll cycles being run at the Council. Identifying a computer system to replace the manual processes used at Transit became a top priority for Council managers.

As a result, the Council decided to reorganize the payroll department early in 2005. The goal was to create an efficient, cost-effective, corporate-wide system with improved competencies. Managers knew the Transit payroll department manager planned to retire in March 2005, making it easier to consolidate management. The Council had identified HASTUS as the new computerized payroll time entry system that would replace the former labor-intensive system used at Transit for drivers.

HASTUS was specifically designed to track the pay and hour provisions of the Contract relating to driver pay and hours.

With each new collective bargaining agreement negotiated by the Parties, HASTUS will need to be updated. (Union Exhibit #28, p. 14). There are also many aspects of driver pay that have not been coded into the HASTUS program and thus cannot be captured by HASTUS.

As with its predecessor program TimeRoll/TimeCalc, HASTUS is designed to record basic driver hours. The hours worked by the drivers are entered into HASTUS at the garage by the dispatchers. As with TimeRoll/TimeCalc, the timekeeper plays a critical auditing role. The payroll employee processing driver payroll runs a "payroll book" and analyzes and audits the many adjustments in the driver's work for the week. The payroll book is the equivalent of the TimeRoll/TimeCalc work roll.

After HASTUS generates the payroll book, the payroll employee audits each driver's hours, looks at all the exceptions that the drivers had in a day, and compares them to the HASTUS record to make sure all adjustments and corrections are entered, such as perks, their spread, their two-hour minimum, their intervening, and other Contract rules. The payroll employees itemized in their testimony the many adjustments that must be made manually and that are not captured by HASTUS. (Day 2 Tr. 88-94). In essence, the role of the employee processing driver payroll is to make sure that the time and hour entries in the

payroll book are consistent with the Contract, so drivers are paid correctly.

The Council determined that the best and most efficient organizational structure would be to consolidate the payroll functions for all of the Metropolitan Council and centralize those services at Regional Administration in St. Paul. The reorganization would replace the vertical "silo" approach where services were provided on a divisional basis, with an integrated horizontal system where services would be provided across the entire corporate structure. Payroll job duties would assume a functional, rather than a divisional focus.

The restructuring included the elimination of all the old and obsolete payroll job classifications and the creation of two new job classifications, Senior Payroll Specialist and Payroll Specialist, to perform the payroll duties for the entire Metropolitan Council in the newly reorganized Payroll Department. Job duties would be assigned on a functional basis so that payroll employees would be trained to be able to perform all different payroll duties across the entire Council and not just a few functions nor just on a divisional basis. (Employer Exhibit #6). The new duties would largely entail systemic analysis, as opposed to the former duties of ATU payroll employees that was largely detailed computations done manually. The new jobs would

include the following functional job duties and relevant responsibilities:

- Peoplesoft Technology (analysis and support of payroll system software that is used for all Council employees);
- Audit and Data Analysis (evaluation of the overall payroll system, business processes and organization to ascertain the validity and reliability of information and assess internal controls);
- Interfaces (analysis of multiple computer systems used in the payroll department, including HASTUS, Workforce Director and Synergyn, to ensure reliability, identify problems, work with technical staff to correct any problems);
- Deductions (process various deductions, such as garnishments, child support, and tax levies for all Council employees utilizing computerized system);
- Tax Reporting (process tax information needed to file taxes for entire Council; prepare W-4's);
- Accounting/General Ledger (analysis of payroll data as it relates to postings in the General Ledger; identification of problems and solutions);
- Time Reporting (data entry for Council employees in Environmental Services and Regional Administration still using manual processes; analysis and correction of data problems in computer scheduling software, including HASTUS, Workforce Director and Synergyn);
- Employee Records (creating, organizing, and maintaining payroll-related employee data and records for all Council employees; responding to payroll-related inquiries from both inside and outside the Council).

(Employer Exhibit #6).

Council management recognized that the portion of the reorganization that involved the implementation of HASTUS would

result in the elimination of several ATU payroll positions since many of the duties formerly performed manually would be replaced through the new computer system. The Council carefully considered the impact of the payroll reorganization on its employees and worked to avoid any adverse effects.

Beginning in early 2005 and continuing for well over a year, Council management met with ATU leadership (and staff) to describe the restructuring and reorganization process. (Employer Exhibit #22). During those meetings, the Council committed to the ATU that it would not layoff any of its members who were doing payroll work.

The Council began utilizing the HASTUS payroll system in August 2006 and moved all Payroll Department employees previously located at the Heywood Office Facility in Minneapolis to St. Paul, consolidating the Payroll Department into one physical location in October 2006. The Council intended to abolish old positions and fill all new positions in the newly constituted corporate-wide Payroll Department at that time. Instead, due to the filing of several grievances by the ATU, the Council waited to eliminate old positions and fill new positions.

During the discussions with the Union, there was particular focus on the Council's intended implementation of HASTUS and the impact HASTUS would likely have on jobs. As part of the HASTUS

implementation, many of the daily tasks performed by ATU payroll employees would move to ATU dispatchers, located in the individual garages. Most of the remaining daily tasks being performed by ATU payroll employees would then be computerized through HASTUS. Pre-HASTUS work required individual employees to apply the complicated rules of compensation set forth in the Collective Bargaining Agreement to every individual employee's pay records to calculate the appropriate compensation. This process was extremely labor-intensive and time-consuming. (Employer Exhibits #14-19). With the introduction of HASTUS, the application of those complicated compensation rules would someday be accomplished by a computer.

On or about November 2005, two ATU members whose jobs were included on the list of possible positions to be eliminated filed a grievance. (Employer Exhibit #24). The grievance challenged the proposed elimination of the payroll positions, as well as the transfer of certain payroll functions to dispatchers, and raised concerns about the efficacy of the proposed HASTUS system. (Employer Exhibits #24-26). The Employer denied the grievance throughout the contractual grievance steps. (Employer Exhibits #23, 25, 26). The ATU did not pursue the grievance to final and binding arbitration pursuant to the last step in the contractual grievance procedure.

Several additional meetings were held with the ATU leading to the implementation of HASTUS that occurred in August 2006. During these meetings, the focus of the discussion was the Union's concern about prospective layoffs and representation issues under the proposed reorganization and implementation of HASTUS. Council management continued to assure the ATU that no layoffs would result as a consequence of the two new job classifications of Payroll Specialists and Senior Payroll Specialists, and continued to discuss the move of the Payroll Department to St. Paul. The Council was aware that AFSCME would reasonably consider the newly created payroll positions to be contained within the provisions of their collective bargaining agreement with the Council, and discussed this potential conflict with the ATU.

In response, Union President Michele Sommers filed two grievances challenging the reorganization, both dated July 21, 2006. (Employer Exhibit #1, pp. 1, 2). The first grievance challenged the Council's plan to "remove payroll/office finance positions from the ATU 1005 Bargaining Unit." (Employer Exhibit #1, p. 1). The second grievance related to the Metropolitan Council's obligations regarding layoffs, bumping rights and seniority. (Employer Exhibit #1, p. 2). The ATU grievances cite Article 3, Section 3 of the Collective Bargaining Agreement as a

primary basis for its grievances. Article 3, Section 3 states in relevant part:

> Except as provided herein, no bargaining unit work shall be done by employees who are not members of the ATU.

On August 21, 2006, Metropolitan Transit offered settlement terms to ATU to resolve the grievances. The settlement offer provides the following in relevant part:

> ATU filed two separate grievances regarding the move of payroll positions from Metro Transit to Regional Administration. One grievance sought to prevent the Metropolitan Council from making the move. The other grievance claimed that employees in ATU involved in the move were effectively laid off and thus had bumping rights under the labor contract.
>
> * * *
>
> The following is being offered to settle this grievance:
>
> 1. All payroll employees currently in the ATU bargaining unit will be moved to the Robert Street facility as soon as is administratively feasible. These employees will remain ATU members and as such be under the ATU contract and work rules.
>
> 2. All payroll department employees will be considered Regional Administration staff and will serve the entire Metropolitan Council.
>
> 3. The matter of the appropriate bargaining unit for the affected employees will be taken to the Bureau of Mediation Services (BMS) for a unit clarification.
>
> 4. If the BMS rules that the affected positions are no longer within the ATU unit, the Employer and Union agree to expedite arbitration on the matter of layoff and bumping rights.

5. If the BMS rules that the affected positions are to remain within the ATU, the Union will withdraw its second grievance regarding layoff and bumping rights.

(Employer Exhibit #1, p. 3).

The Union accepted the Employer's settlement terms which resolved the two outstanding grievances filed on July 21, 2006. The Employer claimed that this settlement bound the Parties to abide by the BMS determination as to whether ATU or AFSCME should represent the new positions, and to any claim that the Union might have to these new positions under Article 3, Section 3 of the Contract. The Union argued, on the other hand, that the settlement agreement did not bind the Union to the BMS unit determination and, most certainly, the Union did not agree to waive any future claims under Article 3, Section 3.

The Metropolitan Council moved all Payroll Department employees previously located at the Heywood Office Facility in Minneapolis to the Robert Street Facility in St. Paul consolidating the Payroll Department into one location in October 2006. The Metropolitan Council also had in existence at this time, the two new job classifications (Payroll Specialist and Senior Payroll Specialist), partially made up of long time ATU bargaining unit duties. As a result, ATU filed two grievances on November 15, 2006, which are the instant grievances in dispute in this case. (Joint Exhibit #2). One of the grievances related to

the posting of the jobs, which included ATU duties. (Joint Exhibit #2, p. 1). The other grievance is broader in scope and requests that all ATU bargaining unit work remain in the ATU bargaining unit pursuant to Article 3 Section 3 of the Collective Bargaining Agreement. (Id., p. 2). One of the grievances is a subset of the other in that both deal with work preservation under the Contract.

The grievances were denied by the Employer throughout the processing of them through the steps contained in the contractual grievance procedure. The Council claimed that the BMS was the forum for resolution as agreed to by the Parties' August 2006 agreement. (Joint Exhibits #3, 4, 5A, 5B).

On April 10 and May 18, 2007, the BMS conducted a unit determination hearing to decide whether to place the newly created positions of Payroll Specialist and Senior Payroll Specialist in the ATU bargaining unit or in the AFSCME bargaining unit. On August 16, 2007, the BMS assigned the two newly created positions to the AFSCME bargaining unit. (Employer Exhibit #3, p. 9).

As a part of the unit clarification proceeding, the ATU argued that Article 3, Section 3 must be considered by the BMS, claiming that since the new job classes will be performing work previously done by ATU members the Council would be violating the

Parties' Collective Bargaining Agreement. In reaching its conclusion, the BMS stated:

> Further, this ATU argument is inconsistent with an established Bureau principle of bargaining unit assignments. We have long held that it is for the public employer to establish job classifications and decide which classifications perform which duties or functions. When a job classification has been created, it is then for the Bureau to determine the bargaining unit assignment of such, based upon the Minn. Stat. § 179A.09, subd. 1 (2006) criteria.

(Employer Exhibit #3, p. 7).

However, the BMS Unit Clarification Order dated August 16, 2007, did not interpret Article 3, Section 3 of the Collective Bargaining Agreement, as BMS specifically stated that the "...CBA between ATU and the Council is not a factor in our decision." (Employer Exhibit #3, p. 8).

On August 29, 2007, an arbitration hearing convened between the Parties in which the Council argued that the instant grievances were not arbitrable. The Arbitrator rejected that argument and ruled on October 9, 2007, that the grievances were arbitrable. The Arbitrator determined that Article 3, Section 3 was "ripe" for decision on the merits of the case. He rejected all of the Employer's arbitrability claims including their argument that the BMS determination should have ended the Union's attempt to force employees in the two new job classifications to be placed within the ATU bargaining unit.

Meanwhile, the Council eventually completed filling the new payroll positions in October 2007, following the BMS unit clarification decision in August 2007. All five of the former ATU members were hired to fill the new positions. As the Council had committed, no employees were laid off. In fact, because the new positions entailed greater responsibilities, all five of the former ATU members received pay increases. The ATU members continued to be represented by ATU and process Transit payroll until shortly before the arbitration hearing.

UNION POSITION

This arbitration is about payroll duties and functions that have been ATU bargaining unit work since the 1930s. In the interest of restructuring, the Employer has assigned Transit payroll functions to non-ATU personnel. The problem is that, in all their planning for this change, the Employer neglected its collective bargaining partner, neglected to secure or even seek ATU agreement to this change. And, the Employer ignored crystal clear work preservation language.

The Metropolitan Council violated the Collective Bargaining Agreement when it removed bargaining unit duties from the ATU bargaining unit. Article 3, Section 3 of the Contract states plainly, clearly and unambiguously, "Except as provided herein, no bargaining work shall be done by employees who are not members

of the ATU." ATU does not seek modification of the BMS representation determination. Unit clarification is the role of the BMS, and they have placed new positions, resulting from the Employer's restructuring, in the AFSCME bargaining unit. The question for this Arbitrator concerns duties, not positions. ATU is seeking, specifically, enforcement of the mutually agreed upon work preservation clause in the Contract through an order restoring Transit payroll work to the bargaining unit and prohibiting non-bargaining unit employees from performing that work unless bargained with the Union.

The Employer makes a valiant, but fatally flawed, effort to evade the clear Contract language. The Employer argues, for instance, that a reorganized payroll department is more efficient. Had the Employer sought to bargain over the issue, they may have found that the Union agrees. But nowhere in arbitral awards will the Employer find authority for the proposition that convenience trumps the Contract. Collective bargaining tends to create institutional inconveniences as parties jostle to an agreement.

The Employer also argues that with the introduction of new computer software, the bargaining unit payroll duties have in effect disappeared. Common sense, together with testimony by the actual workers, as well as Employer admissions proves otherwise.

Transit employees make up the greater part of the Council's workforce. Those employees must be paid. Their payroll must be and is processed. It is immaterial that occasional software upgrades update the manner in which Transit payroll is processed. Indeed, the evidence establishes that payroll employees are currently performing duties for Transit payroll that have been performed by members of the ATU for more than 75 years.

The Employer's decision to remove ATU bargaining unit work from the ATU bargaining unit is in violation of clear unambiguous Contract language. The Union respectfully requests that the Arbitrator sustain the grievances and restore all ATU bargaining unit work back to the ATU bargaining unit.

METROPOLITAN COUNCIL POSITION

The Metropolitan Council has consolidated and integrated its payroll functions into a restructured, corporate-wide payroll department. No longer does the Council have any payroll employees performing functions for just a segment of its operations. This reorganization has included technology changes, elimination of positions and duties which have become obsolete, and the creation of new jobs which are interchangeable and focused on functions across the organization. The old methodology and processes for doing payroll is gone. The new structure and way of doing payroll is based on a best practices

model which greatly enhances efficiencies and cost effectiveness by eliminating duplication, unnecessary payroll runs, and wasteful, old-style computations and calculations.

The Union claims that the Council is prohibited from creating this new function-driven payroll structure. The ATU claims the Council has taken their work and given it to non-ATU employees in violation of Article 3, Section 3. The Union's contention is wrong. The Council's integration and restructuring of its payroll functions does not violate Article 3, Section 3.

First, the evidence overwhelmingly supports a finding that the work preservation language of Article 3, Section 3 is limited and applies only to circumstances in which specific work which had been performed by ATU members is given to supervisory employees of the Council. In fact, the Parties have previously submitted this very same language to an arbitrator for interpretation resulting in the finding that Article 3, Section 3 has always been intended to be limited to supervisors.

Second, in any event, the newly constituted payroll staff (Payroll Specialists and Senior Payroll Specialists) are not doing what previous ATU staff had been doing for years. Employee functions in the new department are performed across divisions and corporate wide. Their work functions are entirely different as they no longer are restricted to employee payroll within a

specific division or, even more so, within a specific job classification within a specific division. The work methodology and processes are now different. In other words, the work itself is different even when compared to producing paychecks for Transit employees. Much of the work was transferred to other ATU employees (dispatchers) and virtually all of the remaining work was eliminated through new technology. Once the transition is complete regarding the new technology, there will be only a small portion of work that has any resemblance to work previously done by ATU members. This carryover work is de minimis making up only a small amount of time each pay period. Put simply, work being performed in the new Payroll Department is not the same work previously performed by ATU members prior to the rollout of the new technology and creation of the new jobs. It is not bargaining unit work.

In addition, the Council asks that the Arbitrator interpret the amendment to the Contract negotiated and agreed to by the Parties in August 2006, which amended the normal grievance resolution mechanism set forth in the Contract. This request is entirely appropriate as it relates to deciding the merits of this case. It falls within the wheelhouse of the Arbitrator's jurisdiction to interpret the Contract, including the Parties' amendments to the Contract. The August 2006 agreement resolves

the issues identified in the subject grievance including any Article 3, Section 3 issues involved with the reorganization. The ATU has violated its agreement to abide by the BMS decision.

Finally, the ATU's attempt to prevent the consolidation and restructuring of Metropolitan Council payroll functions is antithetical to legislative mandates for public sector agencies to seek efficiencies and cost effectiveness. In addition, the Union's misapplication of the limited work preservation clause found in the Contract would have monumental adverse impacts on any future restructuring effort by expanding in an unprecedented manner a clause previously interpreted to have limited scope. Moreover, such an application will have the practical effect of establishing an inconsistent result with the binding decision of the BMS and undoubtedly yield further strife and legal action by other labor groups within the Council. The ATU's attempted misapplication and expansion of Article 3, Section 3 will necessarily result in freezing a critical support services organizational structure which needed to changed and modified for the sake of efficiency and cost savings which will benefit the organization and the general public.

For the foregoing reasons, the Metropolitan Council respectfully requests that the Arbitrator dismiss these grievances in their entirety.

ANALYSIS OF THE EVIDENCE

It is well established in PELRA that an employer has the right to reorganize and restructure its organization without mandatory bargaining. PELRA states, in relevant part:

> A public employer is not required to meet and negotiate on matters of inherent managerial policy. Matters of inherent managerial policy include, but are not limited to, such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure, selection of personnel, and direction and the number of personnel ....

Minn. Stat. § 179A.07, subd. 1.

In addition, Article 4 of the Collective Bargaining Agreement contains a Management Prerogatives provision which states:

> The ATU recognizes that all matters pertaining to the conduct and operation of the business are vested in Metro Transit and agrees that the following matters specifically mentioned are a function of the management of the business, including, without intent to exclude things of a similar nature not specified, the type and amount of equipment, machinery and other facilities to be used; [and] the number of employees required on any work in any department....

Arbitrators dealing with the same Parties, as here, have consistently reasoned that the Council and its predecessors have an inherent managerial right under PELRA (Minn. Stat. § 179A.07, subd. 1) and Management Prerogatives under Article 4 of the Contract to create new job classifications and assign related job functions, as long as:

- the actions are taken in good faith; and
- the Parties have not negotiated a specific limitation.

(ATU, Local 1005 v. Metropolitan Council, Office of Transit Operators, BMS 96-PA-1461 (Aug. 2, 1996) (Boyer) (finding organizational restructuring and the resulting elimination of jobs and the creation of new job classification was a matter of inherent and negotiated managerial discretion) (Employer Exhibit #30); ATU, Local 1005 v. Metropolitan Transit Commission, BMS 89-PP-1107 (May 2, 1989) (Berquist) (finding Transit had managerial right under Article 4 and PELRA to create a new customer relations department, consolidate job functions, reassign employees and assign new duties) (Employer Exhibit #28); ATU, Local 1005, AFL-CIO v. Transit Operating Division of the Twin City Area Metropolitan Transit Commission, BMS 80-PP-742-A (March 10, 1980) (Fogelberg) (finding it within management's prerogative to establish, combine, and eliminate jobs and job classifications when done in good faith to improve business methods and operations) (Employer Exhibit #29)).

Based upon PELRA, the Contract, and the arbitration decisions, it is clear that the Council not only has the right, but also the obligation to operate its business effectively, efficiently, and economically. Such operation directly benefits the work force in the form of fair wages and job security.

Unless clearly and specially restricted by the Contract or by oral understandings, interpretations, and/or mutual commitments of the Parties which have developed over the course of time so as to form an implied term of the Contract, management retains the right to reorganize operational methods and necessary changes in jobs, job content, and job classifications to meet changing conditions. This right, of course, must be exercised subject to the implied obligation to act fairly, reasonably, and for proper objectives and purposes.

The Parties have acknowledged and have often recognized management's inherent right to reorganize its operations. The Council has exercised its managerial authority to reorganize and restructure its operations on many previous occasions. In particular, since the 1994 merger, the Council has consolidated several support services, replacing functions within the separate operating divisions into a single department with duties that are Council-wide. The support services that have been consolidated since the merger include Human Resources, Diversity, Information Services, Audit, and Risk Management. Indeed, even prior to the merger, the Council exercised its managerial authority to reorganize and restructure departments including Metro Mobility, the Legal Department, and Transit Customer Service. At times the Council's organizational restructuring involved layoffs,

subcontracting, and switching of union affiliations, similar to this case.

The Union does not contest the Council's management right to reorganize the Payroll Department by creating the two new payroll classifications of Senior Payroll Specialist and the Payroll Specialist. The two new positions are responsible for processing both Transit and non-Transit payroll. The employees hired to fill the new positions include five former ATU members who are now AFSCME members.

The Union also does not contest the determination by the BMS that the new positions are properly placed in the AFSCME bargaining unit. The Transit payroll employees continued to be represented by ATU and process Transit payroll until two weeks prior to the arbitration hearing.

Thus, this arbitration is not about the newly created payroll positions or their placement in an appropriate bargaining unit, but it is about payroll duties and functions that have been ATU bargaining unit work since the 1930s. ATU is seeking, specifically, enforcement of the Contract language contained in Article 3, Section 3 of the Contract, through an order restoring Transit payroll work to the ATU bargaining unit and prohibiting non-bargaining unit employees (AFSCME employees) from performing that work unless bargained with the Union.

An arbitrator cannot "ignore clear-cut contractual language" and he "may not legislate new language, since to do so would usurp the role of the labor organization and the employer." Clear Coverall Supply Co., 47 LA 272, 277 (1966).

Clear and unambiguous contract language is expected to be applied as the reasonable and common usage of the terms would dictate. National Can Corp., 77 LA 405 (1981); Selig Mfg. Co., Inc., 71 LA 86 (1978). A contract clause is not ambiguous if the arbitrator can determine its meaning with no other guide than knowledge of the simple facts on which, from the nature of the language in general, its meaning depends.

The language in Article 3, Section 3 first appeared in the 1967 collective bargaining agreement and has not been changed since that date. The operative language states: "Except as provided herein, no bargaining unit work shall be done by employees who are not members of the ATU." By its expressed terms, this language is unambiguous work preservation language. This language is clearly designed to prohibit the transfer of bargaining unit work to non-bargaining unit employees. This prohibition applies to all Council "employees" attempting to remove bargaining unit work from the ATU.

There was not a single Council witness that could establish where the ambiguity exists in Article 3, Section 3. The reason

management cannot find ambiguity in Article 3, Section 3 is because none exist. This language cannot be clearer or more precise.

When interpreting contract language, arbitrators have long held that parties to an agreement are charged with full knowledge of its provisions and of the significance of its language. McCabe-Powers Body Co., 76 LA 457, 461 (1981). Accordingly, the clear and unambiguous mandate in Article 3, Section 3 must be enforced, even if the results are contrary to the expectations of the Council, as it represents, at the very least, what the Parties should have understood to be the obligations and the benefits arising out of this negotiated language. Heublein Wines, 93 LA 400, 406-407 (1988); Texas Utility Generating Division, 92 LA 1308, 1312 (1989); City of Meriden, 87 LA 163, 164 (1986).

The clear and unambiguous language in Article 3, Section 3 supersedes whatever management rights the Council has under Article 4 of the Management Prerogatives language. The Council's right to manage is expressly limited by the expressed language contained in Article 3, Section 3. Under this language, the Council has forfeited the right to unilaterally transfer bargaining unit work to any and all Council employees who are not members of the Union.

It is the role of an arbitrator to ascertain the intent of the parties from the language written by them. If meaning can be evinced through one reasonable, clear and unambiguous interpretation, the arbitrator cannot venture outside the collective bargaining agreement to determine the intent of parties. Resort to parol evidence of what transpired during negotiations or to occurrences since the contract was consummated cannot be considered where, by careful analysis of the contract language, a single reasonable interpretation can be evinced. In fact, there is arbitral authority that an arbitrator should even ignore past practice, negotiating history, and anything else if they conflict with the plain language of the contract. U.S. Suzuki Corp., 68 LA 845 (1977); Caribe Breaker Co., 63 LA 261 (1974).

Under Minnesota law, which governs this case, disputes surrounding unambiguous contract terms are appropriate for summary judgment. Matter of Turners Crossroad Dev. Co., 277 N.W.2d 364, 369 (Minn. 1979). The Minnesota Supreme Court has held that the court must "fastidiously guard against the invitation to 'create ambiguities' where none exist." American Commerce Ins. Brokers, Inc. v. Minnesota Mut. Fire & Cas. Co., 551 N.W.2d 224, 227 (Minn. 1996). In the context of this arbitration proceeding, the import of the parol evidence rule

is that where the language of the Contract is not patently ambiguous, the construction of the Contract is for decision by the Arbitrator, and no extrinsic or parol evidence is necessary. Divergent interpretations do not necessarily create an ambiguity, especially where an interpretation is "contrary to the clear language of the contract." Banbury v. Omnitron Int'l., Inc., 533 N.W.2d 876, 880 (Minn. App. 1995).

As previously stated, there is no ambiguity in the Contract language contained in Article 3, Section 3. Thus, there is no need for the Arbitrator to look anywhere else for guidance as to the meaning of this language. However, even assuming arguendo that the courts could somehow find some ambiguity in this Contract language, the Employer's contention that Article 3, Section 3 only prohibits supervisors from performing ATU bargaining unit work cannot be reconciled with the plain language.

The ATU unit was wall-to-wall when the operative language in Article 3, Section 3 was added to the contract in 1967. When the Transit was wall-to-wall, those other "employees" were obviously supervisors. However, Transit has been embedded in a much larger structure including supervisors and many other non-bargaining employees since the introduction of the operative language in Article 3, Section 3.

If the Council wanted the language in Article 3, Section 3 to apply only to "supervisors", it was incumbent upon them to initially placed this limitation in the contract or negotiate this change with the Union once the ATU unit was no longer wall-to-wall. It is clear that both Council and Union negotiators are skilled professionals that are capable of negotiating clear and unambiguous contract language, such as replacing "employees" with "supervisors". In fact, the Parties have negotiated at least six contracts since Transit was made a division of the Metropolitan Council, but the Employer has made no effort to modify the language of Article 3, Section 3. Yet, the word "supervisors" does not appear anywhere in the text of Article 3, Section 3. The Parties instead negotiated language that used the word "employees" which has a broader, unambiguous, work preservation meaning and application than simply using the specific word "supervisors". This work preservation language has remained unchanged and endures as a bulwark against all encroachment by all Council "employees" performing bargaining unit work.

The Council introduced five arbitration decisions that they deemed to support their case that the intent of the language in Article 3, Section 3 was ambiguous. (ATU, Local 1005 v. Metropolitan Council, Office of Transit Operators, BMS 96-PA-1461 (Aug. 2, 1996) (Boyer) (Employer Exhibit #30); ATU, Local 1005 v.

Metropolitan Transit Commission, BMS 89-PP-1107 (May 2, 1989) (Berquist)(Employer Exhibit #28); ATU, Local 1005, AFL-CIO v. Transit Operating Division of the Twin City Area Metropolitan Transit Commission, BMS 80-PP-742-A (March 10, 1980) (Fogelberg) (Employer Exhibit #29); ATU, Local 1005 v. Metropolitan Transit Commission, BMS 94-PA-1467, (May 27, 1994) (Jacobs) (Employer Exhibit #33A); ATU, Local 1005 v. Metropolitan Transit Commission, BMS 88-PP-15, (April 02, 1988) (Jacobs) (Employer Exhibit #34).

There is no mention whatsoever as to Article 3, Section 3 in the arbitration decisions rendered by Arbitrators Fogelberg (issue involving reclassification of dispatchers) and Berquist (issues involving establishment of new customer service department, reassignment of the duties and responsibilities of the position of lost and found in the transportation department and the duties and responsibilities of the position of customer service in the Transit information center to the new customer service representative position with added additional responsibilities and duties). Arbitrator Boyer mentioned Article 3, Section 3 as being the Union's position in his case dealing with the issues of the elimination of position, placement of the employee on layoff, and consolidation of essential functions into a newly created bargaining unit position. However, Arbitrator

Boyer did not address or even mention Article 3, Section 3 in his decision.

The two Jacobs' cases mention Article 3, Section 3, but both applied to the Employer's decision to sub-contract work to a supervisor and sub-contracting a route to a private provider. In the 1988 case dealing with sub-contracting a route to a private provider, Arbitrator Jacobs stated that "Article 3, Section 3 prohibits bargaining unit work from being done by employees who are not in the unit." (Employer Exhibit #34, p. 11). Notably Arbitrator Jacobs' use of the underlined expansive "employees" is inconsistent with the Council's supervisor-specific Contract interpretation.

The 1996 arbitration decision by Arbitrator Jacobs noted that in reference to Article 3, Section 3, "[t]his language was negotiated in 1967, and was proposed by the Union to prohibit supervisory personnel from doing bargaining work." (Employer Exhibit #33A, p. 11). Arbitrator Jacobs, however, decided the case without directly addressing the temporary assignment challenge by the Union.

The two arbitration cases decided by Arbitrator Jacobs are inapposite because they deal with the Employer's decision to sub-contract work. The language in Article 3, Section 3 is clearly inapplicable to sub-contracting issues. Moreover, his decisions

are devoid of any suggestion that there is ambiguity in the language of Article 3, Section 3. Despite its efforts in citing the above five arbitration cases, the Employer cannot escape the clear and unambiguous work preservation language contained in Article 3, Section 3.

The Council claims that the reorganization of the Payroll Department involves comprehensive and pervasive changes as follows:

- Payroll duties are now centralized and are performed on a horizontal, Council-wide basis. There is no longer Transit payroll and non-Transit payroll, as the Union has claimed. There is only Metropolitan Council payroll - one company, one payroll. There are no longer six payroll cycles. (Employer Exhibits #7-8).

- Payroll duties are now organized on a functional, not divisional basis. Under the new structure, the duties largely involve systemic analysis instead of the former duties of making/verifying calculations. The Union has totally ignored this critical and substantial change.

- The technological changes made by HASTUS are major, not a minor technical upgrade, or an "incremental automation". The Union references limited, vague testimony that there have been previous technological changes, but there is nothing in the record to support its assertion that HASTUS is similar, and no evidence previous changes involved centralization of duties or functional/systemic analysis changes. The record, however, does show the wide-sweeping changes of HASTUS. (Employer Exhibit #13).

- The record demonstrates the only Timekeeper duties remaining that were formerly performed by ATU employees are the few duties listed in Item 15 of Employer Exhibit #13. Those duties are both de minimis, and have been commingled with similar duties on a Council-wide basis.

- The Union's reliance on Senior Payroll Specialist Cheryl Holloway's estimate of "same work" included both duties that transferred from her previous job performing payroll for drivers as listed in Employer Exhibit #13, Item 15 and verification duties, which are only transitional duties. When asked to estimate the amount of time she spent on duties listed in Item 15 alone, Ms. Holloway's estimates totaled approximately 10 hours per pay period, or 12.5% of her time on this work. It is important to note that this evidence only reflects it takes 12.5% of one person's time in the entire Payroll Department.

The Union refutes the Council's arguments by the following evidence:

- 72% of the Met Council workforce (2600 of 3600 employees) is in the Transit Division, and must be paid every two weeks.

- The pay of 2,250 ATU members has to coincide with the precise pay and hours provision of the Contract.

- The software upgrade, HASTUS, is simply one upgrade in a long line of software upgrades, including TX-Base and TimeCalc/TimeRoll, and is wholly designed around the terms of the Contract.

- Many of the pay provisions of the Contract, as well as other adjustments, are not encoded, not captured by HASTUS and must be entered manually.

- Even those pay provisions encoded in HASTUS regularly generate -- and at the average error rate of 25% -- erroneous data that must be caught and corrected manually. (Union Exhibit #28, p. 5).

- The review-and-correct function, essential to the production of accurate payroll data, has always been ATU work and has only increased with the introduction of the upgrade.

Clearly, the above evidence establishes that the Employer's claim that the duties associated with the processing of Transit

payroll have vanished is without merit. It is undisputed that with the introduction of HASTUS, as with other software, there has been a major shift in the focus of the payroll duties, but as was the case with all software preceding HASTUS, the employees processing Transit payroll must closely review the HASTUS-produced data for error.

The review-and-correct (or audit) function obviously remains for Transit payroll, but so do other core sets of Transit payroll duties that have not changed for decades. Since the 1930s Transit payroll employees have made critical pay and hour adjustments, beyond the core work hours and pay calculations, for all Transit employees. It is undisputed that these adjustments are not captured by HASTUS, and include a number of pay deductions, such as child support, garnishments, as well as accident, DOT, leave of absence, leave of service, perfect attendance, probation, W-4 and other adjustments. There is also that the set of duties essential to producing accurate Transit payroll, such as investigating pay discrepancies raised by employees, a common payroll need in every workplace, as is the filing and organization of all Transit payroll paperwork and electronic data.

While it is true that the above payroll duties have not changed for many decades and will not disappear entirely in the

future, they are both de minimis and have been commingled with similar duties on a Council-wide basis.

Because HASTUS is not coded to capture all pay adjustments, operates at a 25% average error rate, and a sizable HASTUS audit function continues, Transit payroll cannot be produced today without the performance of this critical set of auditing or correction duties. It may very well be in the near future that HASTUS will attain near perfection or have a de minimis effect on the ATU bargaining unit, such that this work will no longer belong to ATU payroll members. For the purpose of this arbitration, however, that day is not here. The work removed from the ATU bargaining unit in this case is still being performed by "employees" of the Council who are not members of the ATU. The language in Article 3, Section 3 applies to the transfer of work out of the ATU bargaining unit to employees of the Council not in the ATU bargaining unit.

The record shows that the Council has reorganized and assigned ATU work to non-ATU employees on at least four previous occasions. The most recent example of the Council's reassignment of ATU work to a non-ATU employee involved a former ATU Human Resources clerk. As part of the consolidation of the Human Resources Department, all of the work of the ATU Human Resources clerk was shifted to St. Paul in 2005 and the same duties

formerly done by the ATU member were all given to an AFSCME employee and a non-represented employee.

Similarly, the Council transferred two former ATU benefits employees to St. Paul, where they performed the same duties first as non-represented and later AFSCME members.

The third example involves the transfer of administrative duties at Metro Mobility from the ATU to AFSCME. Administrative support job duties had been performed by ATU members for over 17 years. While the Council acknowledges there was a few-month gap when the work was contracted out, it immediately came back in house to the Council around the time of the 1994 merger and the very same ATU job duties were assigned to AFSCME.

Finally, the ATU formerly included several legal clerical positions, as evidenced in the collective bargaining agreement covering 1965-1967. (Employer Exhibit #31). Those positions no longer existed in the successor contract. (Employer Exhibit #32). The work did not go away but rather was reassigned to non-ATU employees.

While the above examples establish that the Council has reorganized and assigned ATU work to non-ATU employees on at least four previous occasions, the Union did not waive its right in this case to grieve or object to the unilateral changes by the Council that violated Article 3, Section 3 even when it have not

objected to similar changes in the past. The mere failure of a party over a long period of time to exercise a legitimate right under their collective bargaining agreement is not a surrender of the right to start exercising such a right. Mere non-use of a contractual right does not entail a loss of it. Excel Corp., 106 LA 1069, 1071-72 (1996); New Orleans S.S. Association, 105 LA 79, 85 (1995); Clorax Co., 103 LA 932, 939 (1994).

At the hearing, the Employer again argued that the August 21, 2006 grievance resolution precludes this arbitration. The Employer introduced testimony by both Ms. Koski and Ms. Bogie regarding their understanding of the grievance resolution with ATU. They believed that BMS would decide the unit in which the new positions would be placed.

The Arbitrator has already ruled on this issue during the arbitrability portion of his decision on October 9, 2007. He ruled that the grievances were arbitrable and rejected the Council's arguments concerning the August 21, 2006 grievance resolution.

Even assuming arguendo that this issue is "ripe" for decision on the merits, as alleged by the Council, the results are the same--the Employer's position is denied. The language of the resolution letter prepared by Julie Johanson, Assistant General Manager - Administration, on August 21, 2006,

references two specific grievances: "One grievance sought to prevent the Metropolitan Council from making the move. The other grievance claimed that employees in ATU involved in the move were effectively laid off and thus had bumping rights under the labor contract." (Employer Exhibit #1, p. 3). The Employer even attached the referenced grievances to the resolution letter. (Employer Exhibit #1, pp. 1, 2).

Neither of the grievances mentioned in the resolution letter are at issue in this arbitration. The August 2006 grievances do not address the same issues as the instant grievances filed on November 15, 2006. (Joint Exhibit #2). The language of the resolution letter does not mention removal of bargaining unit work which is the sole focus of the instant grievances. Looking at each of the letter's numbered items, it is clear that the letter is addressing a wholly different issue than the removal of bargaining unit work.

While it was the belief of both Ms. Koski and Ms. Bogie that the BMS would decide the unit in which the two new payroll positions would be placed, this is exactly what was done by the BMS. They determined that the two payroll positions belonged in the AFSCME bargaining unit, and the ATU is not seeking a determination that the positions should be in the ATU bargaining unit. However, the BMS declined to consider the impact of

Article 3, Section 3 in their unit determination which is the issue in the instant grievances. (Employer Exhibit #3, p. 8). The Parties have mutually agreed that an arbitrator shall decide all Contract dispute pursuant to their contractual grievance procedure.

The evidence establishes that the Union agrees that the Council's actions in reorganizing and centralizing payroll function were all taken in good faith in order to improve efficiency, reduce costs, and improve internal controls. However, this does not mean that the Council has the right to violate the clear and unambiguous Contract language contained in Article 3, Section 3.

The Arbitrator fully understands that a decision to restore bargaining unit work to the ATU bargaining unit could cause inconvenience and maybe lawsuits. Convenience and efficiency, however, does not trump principles of collective bargaining, and the Employer should not be rewarded for violating Article 3, Section 3 of the Collective Bargaining Agreement. In fact, at the arbitrability hearing, Union Counsel M. William O'Brien specifically asked that the Employer refrain from filling the payroll positions until after the Arbitrator rendered a decision. The Metropolitan Council filled the positions, fully aware of the risks, two weeks before the arbitration began.

However, before anyone rushes to file a lawsuit the Parties should first attempt to bargain over this issue. This is the way this matter should have been resolved in the first place. The Parties are fortunate as their current Contract expires on July 31, 2008. The time period from now to July 31, 2008, or thereafter, will give the Parties ample opportunity to resolve this issue during bargaining for their successor contract.

AWARD

Based upon the foregoing and the entire record, the grievance is sustained. The Arbitrator orders restoration of all duties related to the processing of Transit employee payroll back to the ATU bargaining unit. This order prohibits non-bargaining unit employees from performing that payroll work, unless and until, the Parties resolve the matter through bargaining.

Richard John Miller

Dated February 22, 2008, at Maple Grove, Minnesota.