

IN THE MATTER OF ARBITRATION BETWEEN

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IBEW LOCAL 949,)	
)	ARBITRATION
Union,)	AWARD
)	
and)	
)	REASSIGNMENT OF
)	UNIT WORK
)	GRIEVANCE
OWATONNA PUBLIC UTILITIES,)	
)	
Employer.)	FMCS CASE NO. 080925-59709-3
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Arbitrator: Stephen F. Befort

Hearing Date: February 11, 2009

Date post-hearing briefs received: March 6, 2009

Date of decision: March 20, 2009

APPEARANCES

For the Union: Richard A. Williams, Jr.

For the Employer: Steven C. Zach

INTRODUCTION

IBEW Local 949 (Union) is the exclusive representative of a unit of office and clerical employees employed by Owatonna Public Utilities (Employer). The Union claims that the Employer violated the parties' collective bargaining agreement by unilaterally transferring unit work to non-unit employees. The grievance proceeded to an

arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUES

Did the Employer violate the parties' collective bargaining agreement by unilaterally reassigning a portion of the work performed by a retired unit member to employees in a different bargaining unit?

RELEVANT CONTRACT LANGUAGE

ARTICLE I **RECOGNITION**

Section 1. The Commission recognizes the union as the exclusive representative of all office and clerical workers under the pertinent charter provisions, but excluding therefrom all employees having management or supervisory functions.

Section 2. Both parties acknowledge their rights and responsibilities as set forth in Public Employment Relations Act of 1973, with any amendments thereto, and anything in this agreement not in conformity with said act shall be null and void.

ARTICLE II **MANAGEMENT RIGHTS**

It is agreed that the Commission shall at all times maintain the right to manage the Utilities' properties and to retain the authority, as set forth in the City Charter, stipulating financial control, mechanical operations, enlargement of physical assets, government of employment, granting of promotions, maintaining discipline, and discharging employees.

ARTICLE VI **JOB REPLACEMENT**

Section 1. The General Manager will consider qualifications in dealing with promotions or filling vacancies. If more than one employee is qualified within an occupational group where a promotion is being made or vacancy filled, the most senior employee will prevail.

Section 2. In the event there are no qualified employees in the occupational group available for the position to be filled, then the remaining employees shall be given a second consideration, if qualified.

Section 3. If no such employees are qualified and available to fill the position, the employer will engage the services of other applicants.

ARTICLE XXII
WAGE RATES

OWATONNA PUBLIC UTILITIES
WAGE SCHEDULE

	Wage Eff. 6/1/2004	Wage Eff. 6/1/2005 2.5% Inc.	Wage Eff. 6/1/2006 2.5% Inc.	Wage Eff. 6/1/2007 3% Inc.
Accountant	\$26.55	\$27.21	\$27.89	\$28.73
Accountant Clerk	\$24.39	\$25.00	\$25.63	\$26.40
Billing Coordinator/CS	\$24.39	\$25.00	\$25.63	\$26.40
Credit/Cust. Serv. Rep.	\$24.39	\$25.00	\$25.63	\$26.40
Engineering Technician	\$25.29	\$25.92	\$26.57	\$27.37
Locator/Eng. Tech. Asst.	\$24.39	\$25.00	\$25.63	\$26.40
Programmer/Analyst	\$26.55	\$27.21	\$27.89	\$28.73
Purchasing Agent	\$25.29	\$25.92	\$26.57	\$27.37
Utility Custodian/Labor	\$20.71	\$21.23	\$21.76	\$22.41

FACTUAL BACKGROUND

The Employer is a public entity that provides heating, electrical, and water services. The Union represents two separate bargaining units with the Employer. The unit represented in this grievance includes “all office and clerical workers” and is commonly referred to as the “inside unit.” The other “outside unit” represented by the Union includes non-supervisory “employees engaged in the production and servicing of electric, water, and gas.” Joint Exhibit 2.

The facts giving rise to this grievance are essentially undisputed. They concern the Employer’s response to the retirement of long-term employee Karen LaFond from her

position as billing coordinator, an inside unit position. A major component of Ms. LaFond's job duties involved the process of reconciling computer-generated utility bills when those bills constituted a significant departure from prior usage levels for the customer in question. When Ms. LaFond retired in April of 2008, the Employer decided to eliminate the billing coordinator position and distribute those duties to other employees. Some of these duties were transferred to employees in the outside unit, while others remained with inside unit employees. An exhibit submitted by the Employer indicated that of fourteen daily tasks previously performed by Ms. LaFond, seven were assigned to employees in the outside unit and seven others were assigned to employees in the inside unit. Employer Exhibit 4. It is undisputed that the Employer did not negotiate with the Union prior to the distribution of these duties.

Becky Turnbull, Director of Information and Financial Services, testified that the reassignment of the duties previously performed by Ms. LaFond represented a reorganization of work methods that was designed to enhance efficiency. Thus, for example, outside unit employees now decide when to re-check meters and to make estimates for missed meter readings, both of which were tasks that Ms. LaFond previously performed. On cross-examination, Ms. Turnbull acknowledged that the specific tasks associated with the billing reconciliation process are unchanged as is the order in which those tasks are undertaken. She further testified that technological change did not eliminate or alter any of the tasks in question. Instead, the reorganization simply resulted in a redistribution of previously existing tasks.

The Employer submitted evidence showing that while the Employer's new organization chart eliminates Ms. LaFond's billing coordinator position, it adds a new

customer service representative position. The Employer asserts that when that position is filled, as it is in the process of doing, the end result is a net wash in the size of the inside bargaining unit.

POSITIONS OF THE PARTIES

Union:

The Union contends that the Employer violated the parties' collective bargaining agreement by unilaterally transferring unit work to employees outside of the bargaining unit. The Union bases this claim on the terms of the agreement's recognition clause which establishes the Union as the exclusive representative of all office and clerical workers, the agreement's wage schedule which includes the billing coordinator position, and Article VI which provides that qualified employees in the occupational group are to be given preference in the filling of vacancies. The Union denies the Employer's claim that the transfer of duties was the result of a change in work processes and asserts that the Employer simply is assigning the same work tasks to different employees. Finally, the Union maintains that the Employer's assignment of unit work to those outside the unit without negotiation constitutes an unfair labor practice under Minnesota's Public Employment Labor Relations Act.

Employer:

In arguing that the reassignment of Ms. LaFond's former duties does not violate the parties' contract, the Employer initially points out that the contract contains no language prohibiting it from reassigning job duties. Instead, Article II of the contract expressly retains for the Employer the inherent right to manage the utility's operations. In this instance, the Employer claims that the reassignment of job duties was the result of

a change in work methods and processes designed to enhance overall efficiency. In addition, the Employer maintains that the reassignment of job duties had only a *de minimis* impact in that it has not resulted in the net loss of inside unit positions.

DISCUSSION AND OPINION

A. The Decisional Framework

The terms of the parties' collective bargaining agreement provides the appropriate starting point for analysis. An agreement that either specifically authorizes an employer to contract out unit work or that specifically prohibits such conduct generally will be controlling. Here, however, the parties' agreement contains no provision that specifically addresses the topic of transferring unit work.

As a second layer of analysis, a leading treatise states that many arbitrators find that a contract's recognition clause may implicitly limit an employer's right to transfer bargaining unit work on a unilateral basis. This general rule is subject to various exceptions, including where:

1. The quantity of work or the effect on the bargaining unit is minor or *de minimis* in nature;

* * *

7. The transfer was caused by a reorganization or change in work method or processes.

ELKOURI & ELKOURI, HOW ARBITRATION WORKS 758-59 (Alan Miles Ruben, ed, 6th ed. 2003).

In this instance, the parties' contract recognizes the Union as the exclusive representative of a unit of "office and clerical" workers, and the contract's wage schedule expressly lists the billing coordinator position as encompassed within the scope of the

unit. In addition, it is undisputed that the Employer did not negotiate with the Union prior to transferring a portion of the unit work to outside unit employees. As such, the Union's grievance must be sustained unless the Employer can establish either of the two exceptions noted above.

B. Change in Work Processes

An employer may undertake a transfer of unit work that results from a change in work processes even in the absence of a negotiated agreement. The underlying notion is that the reassignment of duties in these circumstances is necessitated by an independent and beneficial alteration in the methodology of structuring work systems. The Employer argues that its reorganization falls within this exception since the redistribution of duties resulted in work being "done by different people at different times to enhance efficiency."

This argument misses the mark. A "change in processes" requires something more than an Employer's simple determination that it would be preferable to have members of a different unit perform the work in question. Instead, this exception contemplates an independent organizational change that no longer makes it feasible to maintain the work in the originating unit. That is not the situation in this case. As summarized in the Union's post-hearing brief:

The evidence of all witnesses was consistent that the process of reconciling the daily billing summaries and arranging to have the meters re-read or, in the alternative, sending out an estimated bill, has remained unchanged. The same computer turns out the same report. The tasks associated with that process are unchanged. The order in which the tasks are performed is unchanged. The purpose of the review is unchanged. It is also acknowledged that there had been no technological change of any kind with respect to the process.

Under these circumstances, the Employer has failed to establish the basis for a “change in processes” exception.

C. *Di Minimis Impact*

Arbitrators also generally find no violation when an employer’s reassignment of work duties has no deleterious effect on the bargaining unit. This exception essentially implements a “no harm, no foul” principle. In this instance, the Employer’s redistribution of job duties resulted in the elimination of one unit position (billing coordinator) coupled with the creation of another unit position (customer service representative). Even though the former action caused work duties to be assigned outside of the bargaining unit, the net effect of the overall reorganization resulted in no loss of unit positions. As such, the Employer has established that its unilateral reorganization is permissible in light of its *di minimus* impact on the bargaining unit.

Even though this determination denies the instant grievance, the Employer should be cautioned that this is a narrow ruling that does not generally sanction future unilateral transfers of bargaining unit work. In accordance with the existing contract language, the Employer generally may not reassign work outside of the unit in the absence of a negotiated agreement. This decision simply recognizes a narrow exception where the Employer’s reassignment of unit work causes no net diminution in bargaining unit work.

AWARD

The grievance is denied.

Dated: March 20, 2009

Stephen F. Befort
Arbitrator