

IN RE ARBITRATION BETWEEN:

METROPOLITAN COUNCIL

and

**UNITED ASSOCIATION OF STEAMFITTERS, PIPEFITTERS AND SERVICE
TECHNICIANS, LOCAL #455**

DECISION AND AWARD OF ARBITRATOR

BMS CASE # 09-PA-1019

JEFFREY W. JACOBS

ARBITRATOR

October 5, 2009

IN RE ARBITRATION BETWEEN:

Metropolitan Council, (Environmental Services), MCES,

and

DECISION AND AWARD OF ARBITRATOR
BMS CASE # 09-PA-1019

U.A. Steamfitters, Pipefitters & Service Technicians, Local 455

APPEARANCES:

FOR THE EMPLOYER:

Frank Madden, Attorney for the Employer
Sandi Blaeser, Asst. Human Resources Dir.
Jim Schmidt, Dir. of Maintenance. & Security
William Moeller, Assistant General Mgr. IS
William Moore, General Mgr. of Environmental Services

FOR THE UNION:

Paul Iversen, Attorney for the Union
Gary Erlander, Union Business Manager
Kenneth Judge, MCES General Lead Pipefitter
Dan Nordby, Union Steward

PRELIMINARY STATEMENT

The hearing was held on August 20, 2009 at the Bureau of Mediation Services in St. Paul, MN. The parties presented oral and documentary evidence at that time at which point the evidentiary record was closed. The parties submitted Post-Hearing Briefs dated September 21, 2009.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement dated May 1, 2008 through April 30, 2011. The grievance procedure is contained at Article 16. The arbitrator was selected from a list provided by the Bureau of Mediation Services. The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

ISSUES PRESENTED

The Union stated the issue as follows: Does the Metropolitan Council Environmental Services, MCES, program of requiring bargaining unit employees to work no more than 1770 hours in 2009, not because of lack of work but because the wage rate agreed upon in negotiations is higher than desired by MCES, while continuing to subcontract bargaining unit work, violate the collective bargaining agreement? If so, what shall the remedy be?

The Employer stated the issue as follows: Did the Metropolitan Council violate the Labor Agreement when it reduced the work hours of Pipefitters? If so what shall the remedy be?

The issue as determined by the arbitrator was as follows: Did the Employer violate the labor agreement when it reduced the work hours of bargaining unit Pipefitters in order to stay within its budget? If so what shall the remedy be?

RELEVANT CONTRACTUAL PROVISIONS

Section 2.01 – Right to Manage and Operate

The Employer retains the sole right to operate and manage all employees, facilities and equipment in whatever manner necessary to meet statutory requirements or resolutions of the governing body of the Metropolitan Council. This right shall be limited only to the extent that it is limited by this Agreement.

Section 2.02 – Right to Change Terms and Conditions of Employment

Any term or condition of employment not explicitly established by the Agreement shall remain with the Employer to modify or alter as it sees fit by written administrative or personnel policies or by Metropolitan Council resolutions.

Section 5.01 – Work Day and Work Week Defined (In relevant part)

The Normal work day shall be eight (8) consecutive hours of work, Monday through Friday. ...

The normal workweek shall be Monday through Friday.

Section 5.02 – Uniform Scheduling

Changes in an employee’s scheduled work day or normal work week, for other than a temporary assignment, shall be preceded by a seven (7) calendar day written notice to the employee, copy of which shall be sent to the Union. The Employer shall select only one start time for each shift at each primary location which shall conform to the shift starting times described by the provisions of this Article, unless starting times have been mutually agreed to by the parties at any primary work location.

Section 5.03 – No work Guarantee

This article shall not be construed as, and is no guarantee of, any hours of work per normal workday or normal workweek.

Section 8.01 – Wage Rates and Fringe Benefit Contribution – Subd. 1 Wage Rates

The basic hourly rate of pay for each bargaining unit job classification is set forth in Appendix “A” which is attached to and made a part of this Agreement.

APPENDIX “A” – BASIC WAGE RATES

<u>CLASSIFICATIONS AND RATES OF PAY</u>	<u>5-1-08</u>
General Lead Pipefitter	\$35.06
Lead Pipefitter	\$34.01
Pipefitter	\$31.41

Section 13.02 – Uses of Seniority – Subd. 2 – Layoff

In the event of a reduction in the work force, employees in temporary status will be laid off before regular employees. If it necessary to lay off employees, the order of layoff will be in inverse order of their date of hire.

Section 18.01 – Right to Subcontract

During the term of this Agreement, the Employer shall not unilaterally subcontract, reassign or transfer work performed by bargaining unit employees if the effect of such is to cause the termination of employment or layoff of the regular bargaining unit employees then employed.

Section 18.02 – Prevailing Wage

The subletting, assigning or transfer of work which would not reduce the normal work opportunities of employees, shall be awarded to employers paying less than the prevailing wage as established by the Department of Labor and Industry, State of Minnesota, in accordance with Minnesota Statutes 471.345, Subd 7, and Minnesota Statutes 177.43, Subd. 4.

Section `19.06 – Mutual Pledge

In consideration of the hours, wages and conditions of employment established by this Agreement and in recognition that the Grievance Procedure herein established is the means by which grievances concerning its interpretation or application may be peacefully resolved, the parties hereby pledge that during the term of this Agreement the Union will not engage in, instigate or condone any strike, work stoppage or any concerted refusal to perform work duties on the part of any employee covered by this Agreement and the Employer will not engage in, instigate or condone any lockout of the employees covered by this Agreement.

PARTIES' POSITIONS

UNION'S POSITION

The Union took the position that the Employer violated Article 1, Article 5.01, Article 8, Article 13.02, Article 18.01, Article 19.06 and wage Appendix A when it required bargaining unit pipefitters to take one day off per pay period starting in January 2009. In support of this position, the Union made the following contentions:

1. The Union noted that for many years the parties have negotiated a wage rate for the fitters that mirrored an outside rate set for private sector employers. This is done so that there is consistency in wage rates for all Union members performing pipefitting work. The negotiations for the current labor agreement were no different and the Union insisted on negotiating that rate for the fitters in this bargaining unit.

2. When faced with the Employer's assertion that it had 8% for wages and benefits, the Union proposed ways to potentially save money yet also grant the employees their prevailing wage. See Union Exhibit 1. These proposals would have potentially achieved the savings the Employer said it required and even gave MCES options to replace journeymen fitters with apprentices, who would have been paid at a lower rate. The Employer rejected these proposals however and they did not find their way into the contract.

3. The Union further noted in negotiations that Ms. Blaeser gave them the Employer's so-called last and final offer, See Union Exhibit 2, but did not make it clear that the unit employees would actually be required to take a day off per pay period. At best, the understanding was that MCES *may* reduce the hours but there was never any clear assertion that this *would* in fact happen. The Union noted that there is plenty of work and even a backlog of work available for fitters. The Union simply never believed that the Employer would make good on its threat to reduce work hours.

4. Moreover, there was no agreement that the Employer would or could cut the hours of the fitters in order to meet their arbitrary pre-set 8% budget. The Union left the negotiation tables believing that it had prevailed on this question and that they had achieved their desired result in getting the outside rate. No one believed for a moment that MCES would use a back door gambit to cut their hours in order to circumvent the agreements the Union believed had been reached at the table. The Union asserted that the Employer was not negotiating in good faith. MCES did not invite or accept any discussion from Local 455 with respect to MCES' interpretation of the agreement and did not even attempt to negotiate with Local 455 over whether Local 455 accepted that interpretation.

5. The Union noted too that they were stunned when MCES took the position that gave rise to this grievance and reduced the hours of the fitters to 1720 per year. Even though eventually that number was negotiated back up to 1780, it is clear that on an annualized basis, the fitters are losing money since their hours have been cut.

6. The Union further argued that the Employer has achieved cost savings by eliminating the positions of the temporary fitters that had been employed in 2008. Further, one full time fitter retired in July of 2009 and has not been replaced, which will also certainly save additional costs. The Union argued that there is currently no need to mandate the day off since these events have saved the Employer at least as much as could be saved by the day off requirement. The Employer could now quite likely continue to “manage to the 8%” as the Employer asserts it needs to and still allow the fitters to work as much as they want to. The fitters clearly want to work and are available to work more hours but are being disallowed from doing so by the Employer’s arbitrary budgetary constraints.

7. The Union pointed to the recognition clause and wage appendix of the labor agreement and asserted that the temporary employees worked more than 67 days per year and were therefore public employees within the meaning of PELRA. They were laid off as the result of the Employer’s action here and should therefore be entitled to all of the rights granted them under the terms of the labor agreement. The Union asserted that MCES should have negotiated these job eliminations and that the failure to do so violated both the letter and the spirit of the contract.

8. The Union asserted that the facts presented here belie that there was any real agreement between the parties given the statements made during negotiations. The Union never imagined that MCES would cut hours when there was so much work to do. Further, if MCES is allowed to “manage to the 8%” by fitting their costs to some predetermined target, there will be nothing to prevent them from “agreeing” to something in negotiations and then simply cutting the work hours of the Union employees while at the same time subcontracting their work at a lower wage rate.

9. After the contract was signed, MCES reduced pipefitter hours in order to meet its self-imposed budget. In an e-mail MCES set forth its reasoning for decreasing hours as follows:

“We have budgeted based on an 8% increase over a three-year period. Since the actual pipefitter raise has increased significantly above that, we need to reduce hours so that we can meet our budget. We are planning on 1720 hours per person. Bill Moeller and Jim Schmidt have been given the flexibility to achieve that in a way that best fits their operations.” See, Union Exhibit 3.

10. While eventually there was an agreement to increase the hours given the fitters, the hours have still been cut in comparison to their “normal hours” of 1850 per year. The Union also notes that while these hours have been cut, there is ample work to do and that MCES continues to subcontract certain work even though they have cut bargaining unit employees’ hours.

11. The Union first faced the issue of the language of Section 5.03 set forth above and argued that while it provides for “no work guarantee,” it cannot be read in isolation. That section must therefore be read in context with the rest of the agreement. Section 5.05 for example, section discusses pay if a person appears for work and there is no work to do. The Union asserted that the issue here is whether there are activities available to be performing, not whether MCES unilaterally decides to allow employees to perform services

12. The Union further argued that when this section is read in the context of the rest of the language as a whole, it cannot mean what MCES says it does. The Union asserted that all this section means is that MCES does not have to continue to pay pipefitters if there is not work for them to perform. It does not mean that MCES gets to cut hours in order to avoid a result negotiated at the bargaining table. If it were to be interpreted in that way, all MCES would have to do under those circumstances is unilaterally set the hours in order to meet a pre-set budget limit.

13. The Union further argued that MCES’ action violates Section 19.06 and asserted that it amounts to a lockout by the Employer in violation of the mutual pledge language. The Union reasoned that the employees could not simply decide to instigate a work stoppage by refusing to appear for work one day per pay period and that such an action would be construed as an unlawful strike. See PELRA, Minn. Stat 179A.03, subd. 16. Likewise, MCES’ action here is in effect an unlawful lockout in violation of Section 19.06. If MCES had simply sent the fitters all home at one time in order to meet its budgetary constraints there would be little question that this action would have constituted an unlawful lockout. The Union asserted that this action, whereby the budgetary goal is achieved more slowly, is no different and is a violation of the pledges found in Section 19.06

14. The Union then asserted that MCES' action here violates Section 18.01 and 18.02, set forth above. The Union reads these two provisions as prohibiting any subcontracting of work where the effect of such subcontracting would be to cause the layoff of any regular bargaining unit employee, or if it would reduce the normal work opportunities of employees. Here the Union argued that MCES' action has reduced the normal work opportunities for these employees; indeed that was its very intent. The Union further noted that MCES continues to use subcontractors to perform certain work even though these employees have had their hours cut and argued that these provisions prohibit MCES from cutting hours of the regular employees until all hours of the subcontractors have been eliminated.

15. The Union argued that the net effect of MCES' action here is in fact a layoff and that to assert otherwise exalts form over substance. There is little practical difference between being cut versus a layoff under these circumstances. If MCES had decided to lay off the least senior employee that action would certainly have violative of Section 18. Here there is virtually no difference between that and what occurred here; spreading the pain over the entire bargaining unit does not change what really occurred here – a layoff in violation of Section 18.1 and 18.02.

16. The Union further argued that MCES violated Article 8 by circumventing the clearly negotiated wage and benefit rates. Both Article 8 and Appendix A sets forth the wages and benefits to be paid to the unit employees. By cutting hours, MCES is in effect cutting the negotiated wage rate and may also be cutting the benefits as well. The Union countered the Employer's argument that MCES is still paying the negotiated wage rate by asserting that this again elevates form over substance. Had MCES negotiated a lower wage rate it would not have had to cut the hours of the fitters. Here MCES agreed to a wage rate as set forth in the labor agreement yet immediately turned around and in effect reneged on that agreement by cutting these employees' hours in order to cut costs. Indeed, the Employer's witnesses acknowledged that this was the sole motivation for the action – to cut costs.

17. The essence of the Union's argument is that MCES is simply seeing to gain something by arbitration that it failed to gain in negotiations. The Union further argued that MCES negotiated in bad faith by agreeing to something and immediately renegeing on it. The Union thus seeks a reversal of MCES action retroactive to May 11, 2009.

The Union seeks an award sustaining the grievance and ordering the Employer to cease the practice of requiring bargaining unit pipefitters to take a day off per pay period and to make all members whole for any lost time as the result of the contractual violation herein.

EMPLOYER'S POSITION

The Employer took the position that there was no violation of the labor agreement and that it had the right to reduce the hours of these employees under these circumstances. In support of this position the Union made the following contentions:

1. The Employer did not take serious issue with the underlying facts of the case but focused on the statements made by its negotiators, especially at the last session held on December 4, 2008. The Employer noted that the parties did have several discussions about the outside wage rate insisted upon by the Union during negotiations and discussed several ways to reach the MCES' stated goal of staying within an 8% budget for employee costs for these employees. The other units negotiated agreements' within the MCES stated budget. The Employer presented evidence regarding the budget constraints it had and the cuts from the State. MCES faced severe cuts in funding and was in the process of depleting its reserves in order to meet its financial obligations. These facts were made known to the Union at several negotiations sessions.

2. On the last day of negotiations, whether fortuitous or not, the Governor was about to announce a huge budget shortfall for the State. Faced with this, MCES negotiator Sandi Blaser presented a document to the Union entitled "Last and Final Offer." This document contained clear statements about the intent to "manage to the 8% budget" that had been given to the MCES negotiators.

3. In addition to the agreement to certain wage and fringe benefits, which were the wage rates insisted upon by the Union, that document contained the following statement:

For purposes of information only, the Employer notifies the Local that the four current temporary positions will be eliminated. Further, the Employer may exercise its right to leave current or future vacant positions unfilled in order to manage its budget. The Employer also notifies the Unions that it may exercise its right to reduce the working hours of remaining Local 455 Pipefitters in order to manage its budget. The actions outlined here are within the rights included in the contract and/or authorized as inherent managerial rights. Nothing in this statement shall be considered or deemed as negotiating away rights specifically or inherently conferred to the Employer to manage its operation.

4. The Employer pointed to this along with the testimony of Ms. Blaeser and asserted that she could not have been clearer when she gave this document to the Union in that December 4, 2008 session. In fact she said, “make no mistake, we will manage to the 8%. Temps will go, vacancies will remain unfilled and working hours will be reduced.” The Employer argued that the Union was well aware of the intention to manage to the 8% and that this clearly included the very real possibility that their hours would be reduced in order to meet the budgeted amount.

5. The Employer further argued that the stated intention made during negotiations is in many cases the best measure of the parties’ intent in negotiating and drafting certain language. Here, these statements along with the context – i.e. this was a take it or leave it proposition given the press conference the Governor was about to give regarding the 5 billion dollar State budget shortfall, make it abundantly clear that these parties both knew what was coming. The Union simply made a poor assumption about whether MCES would in fact do what it said it would do.

6. The Employer further argued that everything it told the Union it would do it did do and that all of those things were well within its managerial rights. The fact that there is work to do does not control this matter. There are many employers both public and private who have plenty of work to do but must make priority choices as to which projects to do and which to defer. Thus, it matters not at all that there is work to do; what does matter is that the Employer gets to make the decision as to which work to do and when.

7. The clear language of Section 2.01 reserves to MCES the inherent managerial right to manage the work force and the work itself. Nowhere in the Agreement is there anything that detracts from that. The Employer cited Elkouri and several arbitral decisions for the proposition that the employer retains any and all rights to manage the work force except as explicitly limited by the terms of the labor agreement.

8. Moreover, the clear language of Section 5.03 simply supports the Employer's view that there is no guarantee of work or of any particular hours. The Employer asserted that this could not be clearer either and explicitly states that there is no entitlement to any particular schedule nor of any particular number of hours per the normal workweek or workday.

9. In addition, the language of Section 5.01 that references the "normal" workday and workweek is inapplicable here. The Employer cited the Union witnesses own testimony that that section merely sets forth what the normal day and week will be but do not require that any hours are guaranteed. More importantly, there has in fact been no change in the normal workday nor in the normal workweek. Those have remained the same – all that has changed is that the hours have been cut. The hours remaining are still being worked pursuant to the "normal" workday and week. The normal day is still 8 hours and the normal week is still Monday through Friday.

10. Further, Section 5.02 provides that there can be changes in the schedule work day or work week and again supports the clear right of the Employer to make such changes. All that this language requires is that appropriate notice be given. That notice was given in February 2009 and in fact the Union does not assert a violation of that requirement.

11. The Employer cited a number of arbitration decisions and comments from Elkouri in support of its position on this question. The Employer asserted that clauses defining workday and workweek, like the one found in Article 5, are clauses that define entitlement to overtime and that the working hours set forth are not mandatory nor do they require a particular number of hours be worked.

12. With regard to the claim that MCES violated Article 8, the Employer asserted that the language of Article 8 and the wage appendix requires that certain hourly wages be paid for the hours worked. There is no dispute that the fitters are paid the appropriate hourly wages for the hours worked. There is neither a requirement nor any provision regarding an annual salary or wages. These clauses merely require that a certain wage be paid for those hours and this has in fact happened. There was no violation of either of these portions of the contract.

13. With regard to the allegation that there has been a layoff the Employer asserted most vehemently that the Union simply misconstrues what a layoff is versus a reduction of hours. A layoff implies a separation of employment either on a temporary or permanent basis, whereas a reduction in hours is simply that. There is no separation of employment – and thus no layoff - and the provisions of Article 13 do not apply here. A layoff implies a reduction in the workforce whereas what is occurring here is a reduction in hours. The Employer cited several commentators for the proposition that a reduction of hours is not a layoff. The Employer also pointed to the testimony of Union witnesses who acknowledged that the loss of one day per pay period does not constitute a layoff.

14. The Employer further asserted that both parties agree that the contract must be read as a whole but differed on the conclusions to be reached from that. The provisions of a labor agreement must be read to avoid absurd results and that reading the contract as the Union insists does just that. It further results in a situation where even a small reduction of hours results in triggering the layoff provisions. This is not and cannot be what the parties intended in negotiating this language.

15. The Employer countered the Union's claim that there has been unlawful subcontracting and noted that the provisions of section 18.01 prohibits the subcontracting where doing so causes the "termination of employment or layoff of the regular bargaining unit employees then employed." Simply stated, that did not happen. The temporary employees were let go but they are not considered regular employees and no regular bargaining unit member has been laid of, as noted above, nor have any of them been terminated. Thus, this provision does not apply either.

16. The Employer did not address the assertions with regard to Section 8.02 in its Brief but argued at the hearing that the provisions of Section 18.02 do not apply here as they were intended to cover an entirely different situation. Section 18.02 applies to require the payment of the prevailing wage to any subcontractors where the subcontracting causes the reduction of the normal work opportunities. Here that has been done and there is no allegation of a violation of that part of Section 18.02. Moreover, Section 18.02 applies only where the subcontracting causes the reduction of the work opportunities. That is not the case here; the reason the hours were reduced had nothing to do with the use of subcontractors but rather to meet a budget.

17. In addition, the Employer argued that the facts and evidence here demonstrate that the level of subcontracting has stayed the same or actually diminished over time. The MCES has used outside contractors for years without any objection from the Union.

18. Finally, the Employer asserted that there has been no violation of the mutual pledge language of Section 19.06. There was simply no lockout as that term is generally accepted. The Union completely misconstrues a lockout and confuses it with a reduction in hours. If this reading is allowed to go forward it would result in a nonsensical result. A reduction in hours is not a lockout under any rational definition of that term.

19. The essence of the Employer's argument is that it had a managerial right to reduce the hours of the employees whether there was a provision allowing it or not. Here not only is there no violation of any provision of the contract but there is also a clear provision specifically allowing it. There was further no violation of any other portion of the labor agreement.

The Met Council seeks an award denying the grievance in its entirety.

MEMORANDUM AND DISCUSSION

The Union is correct that the underlying facts are straightforward and largely undisputed. The evidence showed that the Pipefitters and MCES have negotiated multiple contracts and that historically the hourly wage rate insisted upon by the Union was known as the outside rate. This is the rate paid to Local #455 Pipefitters for work in the private industry. The Union desired this to avoid having multiple rates paid to Union fitters depending on where they worked and has been successful in negotiating this rate in MCES labor agreements for years.

The negotiations for the current agreement were no different. The Union sought again to negotiate the outside wage rate despite resistance from the Employer. The Employer made it known throughout the negotiations that it was facing severe budget constraints and would reduce costs to meet that budget. Employer negotiators were given strict parameters within which to negotiate this agreement and were told they had 8% for employee cost. The evidence showed that the other units within the Metropolitan Council all settled within the budgeted amount; some units settled for less than the outside rates those units insisted upon. In the one matter that went to interest arbitration, the arbitrator's award was within the parameter set by MCES. See, *Metropolitan Council and LELS (Police Supervisors) BMS #08-PN-1141 (Bognanno 2009)*. See, Employer exhibits 4 and 5.

The Union presented some alternative proposals to try to find resolution of this issue. See Union Exhibit 1. These were rejected by the MCES negotiators since there was no guarantee of the cost savings needed to meet the mandated budget.

The final negotiation session was a critical point in these negotiations and in the decision of this case. This session was held on December 4, 2008, which coincided with the date that the Governor was to make a major announcement regarding the State's multibillion-dollar budget shortfall. At that session the MCES negotiator, Sandi Blaeser, presented the Union with the Employer's Last and Final Offer, Union Exhibit 2, and told the Union representatives that the Employer would meet the hourly wage demands but that the Employer would "manage to the 8%" they had been mandated.

There was some evidence that the parties knew of the urgency to take that offer given the impending nature of the State's budget shortfall and that the economic forecast was getting considerably gloomier with each passing minute. The evidence further showed that Ms. Blaeser was crystal clear in her documents and in her statement to the Union that the Employer would manage to that 8% and would take whatever steps were necessary to do it. She was further quite clear in her statements that the Employer would not fill vacancies, that the temporary pipefitters would be laid off and that the Employer would reduce the hours of regular bargaining unit employees in order to meet the overall 8% budget figure.

It should be noted that there was some argument at the hearing about whether the first of those steps might have accomplished that goal but there was no clear evidence of that one way or the other. In this case it is not strictly material however since the ultimate issue is whether the Employer had the right under these facts and circumstances and with the language of this labor agreement to take that action. Whether that action accomplished the Employer's preset budget goal or not is therefore not strictly relevant. The question is whether they had the right to reduce the hours.

More to the point, the evidence showed that the Union negotiators were well aware of the Employer's position and the clear threat to reduce hours if they agreed to the outside wage rates and accepted the contract proposals with full knowledge of that eventuality. The Union claimed that they simply never imagined that the MCES would make good on this threat and that they assumed that since there was ample work for the fitters to do, MCES would not be able to reduce their hours. What the Union assumed about MCES' motivations do not control the case however unless there was some indication made at the bargaining table that would have induced the Union to think that MCES would not have done what they claimed they were going to do.

Certainly, if one party makes statements at the negotiating table that are designed to trick the other side or to induce them to accept an interpretation of language that later the party proposing such language says is different, that is a relevant factor in determining contractual intent. If too, a party indicates its understanding of language and the other party is silent, that can indicate assent.

Simply stated, that did not happen here. Ms. Blaeser indeed could not have been clearer with the Union. They understood exactly what the risks were and the need to take the Employer's final and last offer then or face the possibility that it would be withdrawn given the impending gubernatorial press conference coming literally later that day. There was nothing that would have led the Union to believe that MCES was less than completely serious about their intent to reduce the fitters' hours. On this record it cannot be said that the Union was lulled into a sense of security or that the MCES negotiators made statements during negotiations that would have led the Union to believe that MCES would not make good on its need to "manage to the 8%." As noted above, the evidence was quite the contrary. Thus, there was no evidence of bad faith bargaining on this record. Further, there was no evidence that the Employer is trying to gain something through grievance arbitration that it could not gain through negotiation.

The next question in any contract interpretation matter is whether the Employer's action violated any provision of the labor agreement. The Union acknowledged the language of Section 5.03 set forth above but argued that this language is limited to a situation where there is not enough work available for the fitters. The Union asserted that there is plenty of work to do and in fact even a backlog of projects and that this language does not apply.

The Employer made a dual argument in this regard and asserted that its inherent managerial right allows it to reduce hours as it sees fit, whether there is work to do or not. Secondly, the language of Section 5.03 clearly provides that there is no guarantee of a set number of hours. The employer pointed to the acknowledgement of this by Union witnesses at the hearing on cross-examination.

There is little question that the Employer's inherent managerial rights allow for it to determine what work is to be done and when. The management rights clause reserves to the Employer the right to manage and direct the workforce and this right certainly extends to the right to reduce the hours of the workforce if there is not the funding to do otherwise. The Employer cited Elkouri for the proposition that management reserves all rights it otherwise has "unless it has limited its right to manage by some specific provision in the labor agreement." Elkouri and Elkouri, *How Arbitration Works*, 6th Ed. at 640. (Citing Owen Fairweather, *American and Foreign Grievance Systems*, Proceedings of the 21st Meeting of the NAA BNA Books (1968)).

The employer further cited comments by Arbitrator Sergent in *Gates Rubber Co.*, 96 LA 445, 447-48 (1991) as follows:

"[T]he interpretation of a labor agreement starts from the point that such an agreement never gives the employer anything. Rather, the authority is there simply because of the Employer/ employee relationship. The agreement is simply a series of beginner-for limitations on the authority of the Employer to manage and to direct the work force. Thus a collective bargaining agreement is not analyzed from the perspective of what the Employer actions are to be allowed. Rather one looks to the Agreement to see if the Employer has been prohibited from performing in a certain way or is required to perform in a certain way or if the Employer's actions are unreasonable in that they interfere with employee rights protected by the agreement

There is considerable merit to the argument and the precedent cited by MCES' counsel in this regard. The inescapable reality here is that there is no contractual limitation on the right of the employer to reduce the workforce in order to meet its budgetary constraints.

The Union asserted most strenuously that there is considerable work to do and if the hours are reduced that work will either have to be subcontracted or it will go undone. As will be discussed more below, there was no evidence that the Employer is trying to undercut the bargaining unit work or the union security clause by contracting out bargaining unit work.

Indeed, the evidence showed that the MCES has been subcontracting certain work for many years without objection by the Union and that the amount of subtracting actually dropped slightly in 2008-09 due presumably to budget constraints. Frankly, all employers, including public sector employers, face the thorny problem of prioritizing what work to do given the amount of money available to do it. Anecdotally, it is clear that several State agencies and other public employers throughout the entire area are all in the process of making these difficult choices and that indeed some work might not get done as it has in the past or be deferred until there is money to pay for it. Simply because the employees believe in good faith that there is work to be done does not compel the Employer to do it especially in the face of a lack of funding for it.

Here though there is the added clause found in Section 5.03 that makes it even clearer that there is no guarantee of a certain number of hours. The Union argued that this clause is limited to only those situations where there is no work to be done. There was no evidence that this is what the parties intended nor that it has been applied in this way. The plain language supports the Employer's assertions as well and makes it clear that there is no right to a certain number of hours. While the "normal" work day and workweek are set forth, that too is only to define rights to overtime and sets the schedule. It does not guarantee that the employees will work that schedule. Union witnesses were forced to acknowledge this under cross-examination.

The Union asserted that the context of the language provides additional support for the view that Section 5.03 only applies in limited situations, i.e. where there is no work. The problem is that it does not say that. The Union asserted that Section 5.05 provides some context and supports the Union's view. Section 5.05 however refers to a minimum amount of pay where the employee reports and for whom no work is available. It is simply a different situation than that presented here. Here the question is whether the Employer has the right to reduce the hours even though there might well be work available. As noted above, nothing limits that right in this Agreement. Thus, the clear language of Section 5.03 further supports the Employer's argument.

The Union raised a number of very clever arguments in supports of its claims of a contractual violation here. Under some circumstances, the findings above regarding the management rights clause and the provisions of Section 5.034 would be enough and the case would end there.

Here however we must address whether there was a violation of any other provision of the labor agreement even though there is a managerial right to reduce the hours as set forth above. If there is another provision that has been violated, that would certainly have to be addressed and redressed. Moreover, the announcement made during negotiations would not in and of itself absolve the Employer if indeed there is another provision that has been violated by this action. Simply announcing during negotiations that the Employer is contemplating an action that violates the agreement does not absolve the Employer from such a violation. Thus the remainder of the Union's arguments need to be addressed.

The Union asserted flatly that the reduction of hours is a lockout in violation of Section 19.06 of the agreement. This was admittedly a very clever argument but which does not find sufficient support in the facts of this case. Simply stated, the reduction of hours under these circumstances did not rise to the level of a lockout in violation of the mutual pledge language of the Agreement. If the union's interpretation were to prevail it would quite literally prevent the reduction of hours for any employees subject to the same or similar language; language that is found in many labor agreements throughout the State of Minnesota. It is axiomatic that any interpretation of a contractual provision must be read so as to avoid an absurd result. Moreover, the argument that by analogy this would likely constitute a strike if the employees were doing it was not persuasive under the unique facts presented here. What is clear is that the Employer told the Union it would exercise its right to reduce hours during negotiations in order to meet the budget, the parties signed the agreement with full knowledge of that admonition and there is no provision limiting the right to so reduce the hours. Under these circumstances it cannot be said that the Employer violated Section 19.06.

The Union further argued that the employer's action constituted a violation of the subcontracting provisions of Section 18.01 and 18.02. First, the provisions of Section 18.01 do not apply since it provides that the Employer will not subcontract if the effect is to *cause the termination of employment or layoff of the regular bargaining unit employees then employed*. (Emphasis added). Here the evidence showed that the temporary employees were let go. See Employer exhibit 10. These employees are not regular bargaining unit employees though and therefore the provisions of Section 18.01 do not strictly apply.

The Union next asserted that Section 18.02 limits the subcontracting which "would reduce the normal working opportunities of employees." This was a more difficult argument for the Employer to rebut. Clearly, the normal working opportunities of the regular employees have been reduced. However, the evidence showed that this was due solely to the Employer's need to meet a budget and was not caused by the decision to subcontract their work. The evidence showed to the contrary and showed that MCES has subcontracted certain work without objection by the Union for years. The parties accept that some subcontracting is appropriate and there was no evidence to suggest that the Employer has sought to extend the scope or type of subcontracting since the signing of this Agreement. More to the point, there was evidence to suggest that the amount of subcontracting has actually diminished over the recent past. Further, the essence of Section 18.02 is to require that the prevailing wage be paid to any subcontractors; it is only by implication that the notion of a reduction in the normal working opportunities even comes into play here.

The evidence showed that this is not a layoff – it is a reduction of hours across the board to all affected employees. A layoff implies a separation of employment on a temporary or permanent basis. No such evidence is found here. Further, it is not, as the Union asserts, an elevation of form over substance, as any truly laid off employee would probably agree. There is no separation of employment here and is no different than the reduction of hours frequently mandated by Employers both private and public when economic times are difficult.

As noted by the Employer in its Brief, at page 14, Arbitrator Feinberg in *Bethlehem Steel Co.*, 16 LA 71 (1950), defined a layoff is “an actual severance from the Company’s payroll, and a break in continuous service.” The Employer also cited Arbitrator Grooms in *O’Neal Steel*, 6 LA 118 (1976), [A] reduction of hours to be worked does not constitute a layoff, according to many arbitrators. They are clearly two different things. When the Company went to a four-day work week, there was no layoff or decrease in the workforce.” There is thus, as the Employer noted, a reduction in the hours not a reduction of the work force. In summary, it was clear that the provisions of Section 18.02 do not prevent the reduction of hours under these circumstances.

The Union argued further that the reduction of hours violated Article 8 and the wage Appendix because it has the net effect of reducing the annualized wages the fitters have enjoyed in the past. The normal yearly hours had been 1850 in prior years whereas now those hours have been reduced to 1770 hours in 2009. This, the Union argues, is a *de facto* reduction in the hourly wage rates under a different name.

Once again, this is a very clever argument but one that did not find sufficient support in the facts or the contract. The provisions of the labor agreement calling for the payment of a certain hourly wage are just that – an agreement to pay a predetermined and agreed upon hourly wage for each hour worked. Those provisions do not express or imply a guarantee of a certain number of hours nor does it guarantee a yearly salary. This reading is consistent with the provisions of Article 2 and 5 set forth above. While the Union argued most strenuously that this exalts form over substance to do as the union suggests would be to read something into the labor agreement that just is not there. This I decline to do since the arbitrator is without jurisdiction to do it so.

Finally, there was the assertion that the reduction of hours was somehow the result of bad faith bargaining by the Employer by agreeing to pay the outside wage rate yet reducing the hours to essentially take that agreement away. Clearly, if this had been shown to be a negotiation by ambush or an agreement achieved through deception the result might well have been very different.

Such was not the case though. This was not an illusory promise as the Union suggests. It was achieved with eyes wide open and at arms length. There was no deception or disingenuous twisting of ambiguous language to achieve a private agenda. Moreover, this result does not negate or render meaningless the agreement hammered out at the bargaining table. It means only what it says and only what Employer and Unions have known for decades: that there is a finite amount of money available and that hard choices must be made about what work must be done now and what work can be deferred and what work can simply be left until such time as there is money for it. This case is an almost classic example of a reduction of hours in response to tightening budgets and a lack of money. The Employer's actions here were an exercise of the sometimes difficult process of dealing with that; nothing more and nothing less.

AWARD

The grievance is DENIED.

Dated: October 5, 2009

Jeffrey W. Jacobs, arbitrator

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