

In Re Interest Arbitration Between

**IUOE Local 70
and
SMDC Health System**

Decision and Award of Arbitrator

FMCS Case No. 100616-57556-3

**Carol Berg O'Toole
Arbitrator**

February 25, 2011

Representatives:

For the Employer:

**Joseph Mihalek, Attorney
Jerry Zanko, Director Employee and Labor Relations
Alison Zentz, Employee and Labor Relations Specialist**

For the Union:

**Kyle McCoy, Attorney
Sheldon Christopherson, Business Representative, Local 70
Ron Busse, Maintenance Engineer
Wyn Massey, Business Representative IUOE, Local 70
Dave Monsour, Business Manager, IUOE, Local 70
Gary A. Clafin, Maintenance Engineer**

Appearances:

For the Employer:

**Jerry Zanko, Director Employee and Labor Relations
Alison Zentz, Employee and Labor Relations Specialist**

For the Union:

Sheldon Christopherson, Business Representative, Local 70

Preliminary Statement

The hearing was convened at 10:00 AM at the offices of Joseph Mihalck, Fryberger, Buchanan, Smith & Frederick, PA, 301 West Superior Street, Suite 700, Duluth, MN 55802, on Monday, February 14, 2011. The parties involved are IUOE Local 70 (Union) and SMDC Health System (Employer). The Employer and the Union are parties to a Collective Bargaining Agreement (Agreement) which provides in Article 28 for impasse arbitration if the parties cannot agree by negotiation on the terms of a succeeding agreement. Employer Exhibit 1 and Union Exhibit 1.

The parties presented oral testimony, oral argument and exhibits. The arbitrator found the presentation of the respective positions by the Union and the Employer very clear and reasoned. The working relationship between the parties is mature, civil, and cordial. The constituencies of each side appeared to the arbitrator to be well served. No post hearing briefs were requested by either party. The hearing was closed on February 14, 2011, after closing arguments by both parties.

Contractual and Statutory Jurisdiction

The Union is the certified bargaining representative for all employees of the Employer, engaged in the operation of steam boilers, steam turbines, diesel engines, refrigeration devices and machinery, electric motors, dynamos, air conditioning devices and maintenance of same and any power-developing machines. Employer Exhibit 1 and

Union Exhibit 1. The Employer and the Union are signatories to an expired Agreement covering the period from July 1, 2006, through June 30, 2009. The parties started meeting prior to the expiration of the contract and met for twelve sessions. They participated in mediation. On August 13, 2009, the Union and Employer reached a tentative agreement that was subsequently voted down by the Union. Employer Exhibit 2. The Federal Mediation and Conciliation Service (FMCS) received a written request to submit contract negotiations to conventional interest arbitration. Pursuant to Article 27 of the Agreement, the parties selected the undersigned arbitrator. Employer Exhibit 3.

Issues

The parties agreed that there were three issues to be settled:

Issue One: Article 28, Arbitration of Contract, No Strikes or Lockouts, and Bargaining Group Section 28.1a

Issue Two: Article 10 Employment Conditions, Section 10.8, Part-time Employees

Issue Three: Article 11, Wages, Section 11.4 Longevity Pay (and step increases and lump sum)

Issue One: Article 28, Arbitration of Contract, No Strikes or Lockouts, and Bargaining Group Section 28.1a

Positions of the Parties:

The Employer's Position on Issue One:

The Employer states that the article speaks for itself. It states,

“Effective July 1, 2009, the parties shall negotiate the status of this Article 28 as to whether the provisions shall be continued, modified or eliminated following expiration of this Agreement. If the parties are unable to reach agreement with respect to this Article 28, the issue may be submitted to arbitration pursuant to the provisions of the Article. The Board of Arbitration may, in its discretion, delete the entire Article or continue it without modification for one additional contract term beginning July 1, 2009. [The article goes on to say in part b] Provided, however, that the arbitrator shall have no authority to change or eliminate the provisions of this Article 28 except as provided in paragraph 28.1(a).”

The position of the Employer was enunciated by Alison Zentz, (Zentz), the Employee and Labor Relations Specialist for nine years who just recently transferred to a new position, Training and Development Specialist. She testified she was involved in contract negotiations and contract administration including this contract, the Agreement.

She said she was at the table for the negotiation of the 2009 Agreement, sitting in second chair next to Jerry Zanko (Zanko). She stated that there were eleven or twelve sessions and that she kept notes on them including the tentative agreement.

Zanko testified as the second witness for the Employer. He has been the Director of Employee and Labor Relations since September 1985 and has twenty-four years

experience in negotiating labor agreements. Zanko testified that he was directly involved with all sessions of the 2009 round of negotiations with Local 70, the Union. Zanko stated that the first issue, involving the arbitration section, was submitted to the Union at the outset of negotiations. This issue was carried over from prior negotiations. Zanko testified the Employer offered the proposal on Article 28 because it compels both parties to come to the bargaining table. He said that for the Employer this proposal represents a paradigm shift. He implied that the scenery had changed when the Minnesota Nurses Association had come “close to striking”. The Employer proposal would act like the Sword of Damocles hanging over both heads. The Union having the right to strike or the Employer locking out is not “a bad idea”. Zanko said that only a couple of the other contracts of the twenty-eight other contracts he works with have interest arbitration. He said it was too easy not to give it “your best shot” with a provision for interest arbitration and that he has “a lot of respect for bargaining at the table”.

The Union’s Position on Issue One:

The Union proposes that Article 28, Section 28.1, be left in the contract because it works fine, just as it is stated. Sheldon Christopherson, the Local 70 Business Representative for the Arrowhead Region since 1998, testified for the Union. He stated that he has administered and serviced the contract since 1998. The Union believes the working relationship with the Employer has “always been a good one...things always seem to get worked out without going to a tenacious

relationship...that's what we were trying to avoid". The Union tried, when the facilities were merged, to take the best out of both contracts to insert in the merged contract. Christopherson stated that this provision was one of those best parts. On cross examination, Zanto agreed that the first interest arbitration in 2003, was with a merged unit. Christopherson stated that if there was a concern over lockouts and strikes, there is already language in the Agreement, Article 28, Section 28.2. Union Exhibit 1 and Employer Exhibit 1. Christopherson stated that the Employer has tried to negotiate this provision out of contracts but it is still in the United Food and Commercial Workers contract, Union Exhibit 7, and the St. Luke's agreement. Christopherson said this was the first time the interest arbitration has been used in this Agreement and it has been in the agreement since 1998.

Issues Two: Article 10.8 Part-time Employees

Positions of the Parties

The Employer's Position on Issue Two:

Zentz testified that the Employer favored changing the part-time worker provision in the contract because as workers age, some who are interested in retiring would like to work as part-time employees. She said it also makes sense in terms of training in a new person. Zentz testified that they negotiated with the Union to include restrictions on the number of part-timers. The Employer's initial position was to just have part-time

workers. Zentz said that with negotiations the part-time provision became a lot more restrictive than the original provision. The part-time provision became limited to .6 position positions, to employees with ten years of service, and to a total number of three part-time employees per year. Zentz testified that there were five other contracts with part-time provisions, leaving only one, which she was aware of, with no part-time provision.

The Employer contends that the modification of the part-time provision helps employees by curtailing how many can be used. Zanko testified that the Employer's proposal on part-time workers is a new provision in the Agreement. He stated that the current provision is really a temporary employee provision because it limits the number of hours to 160 per year. Zentz said that the new provision is a benefit to part-time workers. Zanka stated that they can't use such a provision to replace full time workers.

The Union's Position on Issue Two:

The Union objects to modification of the part-time provision in the Agreement because it will open the floodgates. Christopherson testified that the group has a fear this will open the door and will be exploited by the Employer beyond what the Employer now proposes.

Issue Three: Article 11, Wages, Section 11.4, Longevity Pay (and step increases and lump sum)

The Employer's Position on Issue Three:

The Employer argues that, in this tight economy and for purposes of consistency across employee groups, the lump sum should be given to all employees minus five who are receiving step increases or longevity increases. The Employer argues that they should not get both and that the longevity and step increases for those five employees will be about the same as the lump sum.

Zentz testified that the discussion at the negotiations table on the issue of wages was "pretty vibrant". The Employer initiated the \$595 lump sum proposal. Zentz testified that the proposal seemed reasonable based on the economy and considering consistency within the organization. She described three other groups that received zero per cent to the base and \$400 lump sum to one group and no lump sum or no lump sum to those who get a step increase. Zentz testified that the non-contracted employees received zero per cent to the base and a \$595 lump sum payment.

Employer's Exhibit 1. Zentz testified on both cross examination and re-direct examination that everyone "got something". She stated that the four to five people that did not get the lump sum payment were those that received longevity pay or a step increase. Christopherson acknowledged on cross examination that the two employees who would receive the longevity increase would receive 25 cents per hour or \$520 per year, which would be \$75 less per year than the lump sum proposal. He agreed that for

the three employees that were scheduled for a step increase of ninety cents per hour would receive \$1872 per year. The \$1.30 per hour step increase employees would receive \$2704 per year. The Employer argues that this is sufficient and the employees should not receive the lump sum also.

The Union Position on Issue Three:

The Union contends that there should be a lump sum for the five employees who are scheduled to receive steps or longevity. Christopherson states that only five people are affected by this. Union Exhibit 10. Two of the individual are scheduled to receive the longevity step for their twenty year service and thirty year service. The amount is 25 cents per hour and totals \$520 per person. The Union describes this as a “token” of appreciation for long-term employment. Three individuals are scheduled to receive step increases of ninety cents or \$1.30 per hour. The amount in dispute is not great and the employees have depended on this as part of their employment agreement for years. The Union views this as a benefit the individuals have earned and states that they should not be penalized by a new agreement. The Union argues that the Employer has not argued inability to pay, nor is pay equity at issue.

Discussion and Award

Issue One: Article 28, Arbitration of Contract, No Strikes or Lockouts, and Bargaining Group, Section 28.1a.

Discussion

Although parties frequently attempt to gain structural changes in the collective bargaining agreement in interest arbitration, such changes should be gingerly awarded in only rare circumstances. Neither compelling nor extraordinary circumstances exist here. A new or greatly modified or removed provision of the collective bargaining agreement should be achieved through exchanging proposals at the collective bargaining table.

This contract impasse provides an interesting variation of traditional positions. Here, the Employer is suggesting removing the No Strike/No Lockout/Interest Arbitration language, Article 28. The Employer seems to suggest that it has no trepidation about confronting a strike and commented during the hearing on the recent Minnesota Nurses Association action. The Union maintains that the No Strike/No Lockout/Interest Arbitration provision in the Agreement has not been overused and is a typical part of a number of agreements with which the parties are familiar. The Union also includes as Union Exhibit 9, the Minnesota Statutes 179.38 entitled Arbitration Mandatory. If this contractual provision is deleted from the Agreement, it should be deleted via negotiations.

Award on Issue Number One

The position of the Union, to continue and retain the current language of the Agreement, Arbitration of Contract, No Strikes or Lockouts, and Bargaining Group is awarded.

Issue Two: Article 10 Employment Conditions, Section 10.8, Part-time Employees

Discussion

Again we confront the issue of parties attempting to gain structural changes in the collective bargaining agreement in interest arbitration. Such changes should be infrequently awarded in exceptional circumstances. Neither compelling nor extraordinary circumstances exist here. No evidence was presented that there was a critical need for new part-time language. Training and transitions into retirement may be desired, but are not compelling. Part-time workers are a sensitive subject in a tough economy. Workers view the topic with great suspicion, noting the frequency with which employers use part-time workers to cut costs. A new or greatly modified or removed provision of the collective bargaining agreement should be achieved through exchanging proposals at the collective bargaining table.

Award on Issue Number Two

The position of the Union, to retain the current language of the Agreement, Article 10, Employment Conditions, Section 10.8 Part-time Employees is awarded.

Issue Three: Article 11, Wages, Section 11.4 Longevity Pay (and step increases and lump sum)

Discussion

Among the items considered by arbitrators in deciding interest arbitration disputes are external market conditions and the Employer's ability to pay as well as internal comparables and bargaining history. The external market conditions and the Employer's ability to pay were discussed very briefly in closing arguments. That is understandable, given the difference between the positions of the parties. The pessimistic outlook for the period this award covers cannot be ignored. The general recession in the state makes the likelihood of fiscal pressure for the Employer a very important consideration that is noted by this arbitrator. However, five employee's lump sums are at issue. This is a relatively small amount compared to the costs for the

entire bargaining unit. The arbitrator realizes in this economy that a lump sum payment for even five people puts some financial burden on the Employer.

The testimony and evidence presented suggests that the Employer is more concerned about internal equity among the bargaining unit members. These five people would have been treated differently under either proposal.

Award

The position of the Union is awarded. A lump sum of \$595 shall be paid to all employees, including those five employees who are also receiving a longevity increase or a step increase. The lump sum will not increase the base rate in the Agreement.

Dated this 25th day of February, 2011

Carol Berg O'Toole, Arbitrator