

IN THE MATTER OF ARBITRATION BETWEEN

AMALGAMATED TRANSIT UNION LOCAL 1005)	OPINION AND AWARD
)	
AND)	BMS Case No 10-PA-1646
)	
METRO TRANSIT)	Grievance re: BU Work
A Division of Metropolitan Council)	

ARBITRATOR: Charlotte Neigh

HEARING: December 16, 2010

POSTHEARING BRIEFS RECEIVED: January 31, 2011

AWARD: March 14, 2011

REPRESENTATIVES

For the Union:

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For the Employer:

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JURISDICTION AND PROCEDURE

Pursuant to the parties' Collective Bargaining Agreement and the procedures of the Minnesota Bureau of Mediation Services, Charlotte Neigh was appointed to arbitrate this matter. A hearing was held in Minneapolis at which time both parties had a full opportunity to offer evidence. Posthearing briefs were filed by the agreed deadline and the record was closed upon their receipt.

ISSUES

1. Whether the grievance is subject to arbitration in light of the provisions of Article 4 of the CBA.
2. If it is arbitrable, whether a supervisor's operation of a locomotive from the maintenance yard to the maintenance shop violates the CBA, and if so, what is the remedy.

PERTINENT AUTHORITY

AGREEMENT

Article 3 - Recognition and Maintenance of Membership

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Section 3. Except as provided herein, no bargaining unit work shall be done by employees who are not members of the ATU. It is understood that training of students and other training procedures will not be deemed bargaining unit work. All training of Operators will be deemed bargaining unit work unless mutually agreed to in writing. . .

Article 4 - Management Prerogatives

The ATU recognizes that all matters pertaining to the conduct and operation of the business are invested in Metro Transit and agrees that the following matters specifically mentioned are a function of the management of the business, including . . . rules and regulations requisite to safety. Metro Transit shall not be required to submit such matters to the Board of Arbitration provided by Article 13.

ATU Commuter Rail Implementation Agreement

Introduction

The purpose of this implementation agreement is to identify the additional provisions to the existing Agreement between (the Union and Employer) due to the development and implementation of Commuter Rail Transit. Except as otherwise noted in this implementation agreement all provisions of the Collective Bargaining Agreement between ATU and Metro Transit shall apply equally to Commuter Rail employees.

It is understood that there may be some issues in the Collective Bargaining Agreement, which were overlooked in negotiating this agreement. . . Should any such issue arise, or in the event that items in this agreement need to be modified, the parties agree to negotiate over same. However, nothing in this agreement can be changed or modified without the mutual agreement of Metro Transit and the Executive Officers of Local #1005.

BACKGROUND AND UNDISPUTED FACTS

Metro Transit operates a commuter rail line to downtown Minneapolis from Big Lake, where it has a maintenance facility for the locomotives and passenger cars. This facility is staffed by employees who are members of the bargaining unit (BU) represented by ATU Local 1005 and by management personnel. In October 2008 the Employer and the Union entered into an implementation agreement to identify provisions to add to the existing collective bargaining Agreement (CBA) due to this new commuter rail operation. Except as otherwise noted in the implementation agreement, the provisions of the existing CBA were to apply to the commuter rail employees.

Rail service operates during commuter peak hours from 5:00 to 8:15 a.m. and from 4:00 to 7:00 p.m. Typically 16 out of 18 cars and 4 or 5 out of 6 locomotives are used in service and remain at the downtown terminal between the morning and evening runs. The maintenance facility operates 24/7, 365 days per year. Each of the three shifts has a foreperson who is a BU member working as a mechanic, and a varying number of technicians (also called mechanics). The night shift, when all of the rolling stock is at the facility, has the most mechanics; the day shift, when the rolling stock is waiting at the downtown terminal, has the fewest.

All of the maintenance employees are licensed locomotive engineers, making it legal for them to operate the locomotives within the yard. This is also true for the supervisor and the superintendent. At the time of the event giving rise to the grievance, the Monday day shift had a couple of mechanics scheduled off and it was common for the foreperson to be the only mechanic at the facility. One supervisor and the superintendent usually were present for most of the day shift and into the afternoon shift.

It is required that a locomotive being moved within the yard must be operated by a licensed engineer, with another licensed engineer on the ground in radio contact with the driver to assure safety. At the end of the night shift on the morning of March 8, 2010, the outgoing foreperson (Grievant) advised the incoming foreperson that the locomotive in the yard needed to be moved into the shop for servicing by a contractor. The Grievant offered to stay past his quitting time to assist with moving the locomotive because the day foreperson was the only licensed BU engineer who was present for that shift. The day foreperson declined the Grievant's offer and the Grievant went home.

The Grievant later learned that the locomotive had been moved into the shop by the foreperson and the supervisor and filed a grievance claiming a violation of CBA Article 3, Section 3 relating to BU work. Throughout the steps of the grievance procedure, the Employer took the position that the train moves were not BU work because federal regulations required that supervisors operate trains. The issue of arbitrability was not raised until the day of the arbitration hearing.

The parties were unable to resolve this matter and it proceeded to arbitration.

SUMMARY OF THE PARTIES' ARGUMENTS

THE UNION ARGUES THAT:

Re: Arbitrability

- The Employer raised the issue of arbitrability at the last minute on the day of the arbitration hearing as a red herring.
- If the Employer is permitted to deny arbitration on the pretext that this grievance relates to a safety issue then any grievance could be argued to relate to a safety issue in this environment of operating trains and buses.
- The Employer's policies regarding drug testing and cell phone use can understandably be argued as safety issues and have been determined as such by arbitrators. This issue relates to a practice, not to a rule or regulation promulgated by the Employer.
- This is not a safety issue: it is a question of training a supervisor to meet qualifications required by federal regulation; there are multiple ways for the Employer to accomplish this without taking BU work away.

Re: Merits

- Operation of locomotives within the maintenance yard and shop is BU work; and the clear and unambiguous CBA language prohibits supervisors from performing BU work.
- It is clear that moving locomotives within the yard is BU work: mechanics who are licensed engineers have moved the locomotives since the inception of the commuter rail operation; the job description of a foreperson states: "Operates commuter rail equipment and support equipment within the confines of the maintenance yard"; and the supervisor's job description does not include such operation.
- The Employer's argument that federal regulations require allowing the supervisor to practice moving equipment does not justify taking hours of work away from members of the BU. This does not qualify as an exception to the job preservation clause.
- Although it would be more cost effective for the Employer to be able to qualify the supervisor as a DSLE (designated supervisor of licensed engineers), the practice that this requires could be obtained by other means: using the extra locomotive that is usually present in the yard; or having two BU employees work along with the supervisor while he is practicing.

Union Arguments (continued)

- In a prior arbitration case the arbitrator upheld the Union's challenge to the Employer's violation of Article 3, Section 3, stating that: the unambiguous language has been in the CBA since 1967 and was clearly designed to prohibit transfer of BU work to non-BU employees; and the "language cannot be clearer or more precise". In that case the Employer argued that the prohibition applied only to having supervisors do the work rather than members of other BUs, which is contrary to its position here.
- In the Employer's other two transit operations, bus and light rail, non-BU maintenance supervisors are prohibited from operating the buses and trains. This is strong precedent for interpreting the work preservation clause in the same manner in the commuter rail operation.
- Management's first proposal for the implementation agreement included allowing maintenance supervisors to operate equipment but that agreement was voted down by the Union membership for various reasons. The next and final draft did not contain that provision. The Employer should not be permitted to gain in arbitration what it failed to secure in bargaining.
- The fact that the supervisor had been operating locomotives in the yard without objection from the Union does not establish a past practice that trumps the CBA language. If the Union leadership had known of this a grievance would have been filed. A past practice cannot take precedence over clear contract language. Even if the language were ambiguous, the practice would have to be unequivocal, clearly enunciated and acted upon, and ascertainable over a reasonable period of time as a fixed, established practice accepted by both parties. The practice described by the Employer is none of those things.
- The Grievant was ready, willing and able to perform the work on March 8, 2010, which would have been at the overtime rate and taken approximately one hour and 59 minutes. He should be awarded back pay of two hours at the overtime rate and the maintenance supervisors should be prohibited from doing the BU work of moving locomotives from the maintenance yard into the maintenance shop.

THE EMPLOYER ARGUES THAT:

Re: Arbitrability

- Rules and regulations requisite to safety are not subject to arbitration under the CBA; and the policy allowing supervisors to move rolling stock when needed is a policy requisite to safety.
- The Federal Railway Act (FRA) governs the maintenance facility and sets forth numerous safety requirements related to moving rolling stock, including having designated supervisors of locomotive engineers (DSLE), who must be certified engineers. The FRA also requires procedures to determine that all engineers possess and "routinely employ the skills to safely operate locomotives". This means that routinely doing the work and performing the skills is a safety rule required by federal law.

Employer Arguments Re: Arbitrability (continued)

- Common sense dictates that in order for supervisors to be able to safely operate as certified engineers, they must regularly move the rolling stock in the ordinary course of business under routine work conditions, in all kinds of weather conditions and at different times of day.
- At times there are not two BU employees available when the rolling stock must be moved; circumstances may require a move as a matter of safety due possibly to an immediate repair needing to be made.
- This is similar to the drug and alcohol testing policy and the cell phone policy, both of which were arbitrated in the context of federal regulatory safety directives. The Employer's policy of having supervisors move locomotives is a safety rule, following a federal regulation; a prior arbitrator has indicated that a "policy related to safety" is clearly not arbitrable. The Union has admitted that the unwritten rule requiring two employees to make a move is a safety rule. The unwritten rule of allowing a supervisor to move rolling stock is no less a rule or policy.
- This FRA regulation, which is the basis of management's arbitrability argument, was cited by the Employer during the grievance process. In any event, the Employer has not waived its right to raise the issue of arbitrability under Article 4 of the CBA. Although the Union may file a grievance over a listed management prerogative and take it through the grievance procedure, the Employer is not required to submit it to arbitration. Following Step 3 of the grievance procedure the Union has the right to request arbitration and it is only at this point that management's objection to arbitrability need be raised.

Re: Merits

- Moving rolling stock never has been BU work under Article 3, Section 3 of the CBA. Where a CBA does not prescribe the manner in which work is assigned or the type of employees to do the work, and past practice has been for both BU and non-BU employees to do work together, the work cannot be considered BU work.
- This work was never intended to be exclusively for BU employees. Management explicitly discussed early on with the Union its intention to have all certified engineers, both mechanics and supervisors, moving rolling stock. From inception of operations, forepersons/mechanics and supervisors have consistently been involved in moving rolling stock around the yard.
- In October 2008 the parties negotiated the implementation agreement. Using as a template the previously negotiated implementation agreement for the light rail operation, various provisions were adjusted or eliminated to fit the commuter rail operation. Of particular note, one provision was eliminated: "only trained and certified bargaining unit maintenance personnel and/or Light Rail Vehicle Operators shall operate vehicles". The intentional exclusion of this provision was consistent with discussions in which the director of commuter rail expressed management's intention to certify supervisors as locomotive engineers and to have them routinely involved with moving rolling stock as needed.

Employer Arguments (continued)

- At no time did the Union object or indicate that there was any limitation to this stated course of action. This establishes that the parties intended to have supervisors move rolling stock.
- The three forepersons and the supervisor all went through training as locomotive engineers together and were certified May 1, 2009. The training included at least 80 hours of on-the-job movement, mostly to accomplish regular work rather than simply as training exercises. There was no objection to the supervisor moving trains during training. The majority of the other mechanics and the superintendent went through training together and were certified on October 8, 2009. He moved trains on every day he worked during the training period. There was no objection to the superintendent's being certified to move rolling stock.
- From May to September 2009 the supervisor moved trains on 21 days. From October 8 through February 2010 the supervisor moved trains on 12 days and the superintendent moved trains on 20 days, sometimes more than one per day. A large share of the moves occurred after revenue service began on November 16, 2009. In all moves the second engineer involved was a Union member. The many dozens of moves by supervisors have been performed in the open and with full knowledge of the Union: since the first employees arrived at the facility, through setup operations, and for numerous months after full revenue service commenced.
- All equipment operators are required to maintain a log that indicates on which dates the operator made a move. This log is available to all the certified engineers, including Union members who could readily have seen the days on which moves were being made by the supervisor and superintendent. There was no objection or rebuttal from the Union until the 3/8/10 grievance was filed, a full year after the rolling stock arrived at the facility.
- It is a fundamental principle of arbitration that BU work does not include work routinely performed by non-BU employees as well as by BU members, particularly when the work is merely incidental to the primary functions of BU employees, as is the case with the mechanics. Their primary function is to maintain the mechanical, electrical and hydraulic systems of the trains and locomotives. Moving the rolling stock is ancillary and de minimis. Moreover, no BU employee was displaced from regularly assigned work by the supervisor's making the move.
- Prohibiting supervisors from moving the rolling stock would significantly affect both safety and operations, creating substantial potential risk situations and inefficiencies.
- BU work cannot be interpreted to include work that: has for months been consistently and openly performed by non-BU members; explicitly discussed with and understood by the Union without objection as to be performed by non-BU employees; and is governed by federal regulations that require non-BU supervisors to routinely perform that very work.

ANALYSIS AND DISCUSSION

Arbitrability

The Union correctly points out that the practice of having supervisors perform the work of moving locomotives within the maintenance facility was never promulgated as a policy, rule, or regulation in the manner used for the drug and alcohol policy and for the cell phone policy. Both of these were formally announced and the subject of meet and confer meetings where the Union's input could result in modifications. That procedure gave the Union the opportunity to challenge the promulgation of both policies and although arbitrators ruled that promulgation of the policies was not arbitrable, the Union preserved the right to grieve and arbitrate the policies' application in specific cases.

Compliance with the FRA regulation does not necessarily require this practice. The Union correctly points out that supervisors could employ their locomotive moving skills by practicing with the extra locomotive usually left in the yard. The Union has also offered to allow a supervisor to make a move for servicing purposes if the team includes two BU members, thereby avoiding any loss of work for Union members; similar accommodations have been worked out in maintenance of buses and light rail trains. Although it is more efficient and cost effective for the Employer to allow supervisors to make moves in the usual course of operations, it has not shown that this is the only way of complying with FRA regulations.

Although the practice is indirectly related to safety, the connection is too tenuous to justify negating the contractual right to arbitrate a grievance that challenges it. It is concluded that: the Employer's practice of having supervisors move rolling stock in the usual course of maintenance operations is not requisite to safety; does not constitute the type of safety rule or regulation intended to be exempt from arbitration by Article 4 of the CBA; and the grievance is arbitrable.

Merits

It is undisputed that the CBA language clearly prohibits supervisors from performing BU work and the Union correctly points out that a past practice should not trump this language. However, it is not clear that moving locomotives within the maintenance facility is exclusively BU work: the CBA and the implementation agreement do not define it as such; and the consistent practice since inception of the commuter rail maintenance facility indicates otherwise.

The record supports the Employer's position that it was always its intent to have supervisors moving locomotives along with licensed BU engineers. Of particular import is the fact that the clause prohibiting operation by non-BU personnel in the light rail agreement was omitted from the implementation agreement for the commuter rail operation. The Employer's witnesses credibly testified that this was intentional and consistent with their discussions during negotiations with the Union, which distinguished between the two operations because light rail is not subject to the FRA requirement for a supervisor to maintain and demonstrate operator skills.

Analysis and Discussion (continued)

Union testimony suggested that it allowed this clause to be omitted at the time because things were moving fast and there was confusion and uncertainty about how its members' work would interface with work to be done by employees of BNSF, which operates the rail service. Although this may have been a factor in the Union's position, there is no evidence that it expressed this as a reservation or condition for omitting this clause. Nor did the Union ever exercise the option presented in the implementation agreement of requesting negotiations on this matter as an issue "overlooked in negotiating this agreement". The Employer reasonably concluded that the Union was acquiescing in the need to have supervisors moving trains.

The Employer's position is reinforced by the fact that from the time of the first training to license engineers, the supervisor worked along with the BU mechanics, participating in moving equipment. The superintendent was subsequently trained along with the second group of mechanics and likewise performed the work of moving equipment. For months both repeatedly performed this work paired with a BU engineer, and both regularly recorded their moves in the log that was open for BU members to read. The Union Steward worked the day shift and must have observed that this was happening. Nevertheless, the Union did not make any formal objection until the 3/8/10 grievance.

The Union misstates the evidence when it argues that the Union membership voted down the first proposed implementation agreement. There is no evidence that the implementation agreement was put to a membership vote. The agreement that was voted down was the proposed CBA to replace the one expiring July 31, 2010. That CBA continues in effect because the membership has voted down two tentative CBAs: the first one contained a management proposal allowing commuter rail maintenance supervisors to operate equipment; that provision was dropped from the second tentative CBA. The record shows that the Union also made a proposal related to this issue during negotiations. Both parties accuse the other of trying to achieve in arbitration something they tried and failed to achieve in negotiations. Proposals made and withdrawn by both parties during negotiations for a new CBA should not affect the analysis of this grievance, which arose under the existing CBA as modified by the 10/8/09 implementation agreement.

The Employer correctly points out that moving equipment is merely incidental to the primary function of the mechanics, and allowing supervisors to move equipment has not caused any loss of assigned work or scheduled time to BU employees. The director testified that it is not feasible to always have two BU engineers available to make necessary moves and sometimes it is not efficient to take a mechanic away from servicing equipment to make a move. The Union did not counter the director's testimony that: there is insufficient time for supervisors to just practice moving equipment; financial constraints prohibit hiring additional mechanics so that two are always available for a move; and not being able to have a supervisor make a move could result in loss of trips.

It is concluded that: operating commuter rail equipment within the confines of the maintenance yard is not exclusively the work of the BU employees; and allowing maintenance supervisors to do this work does not violate Article 3, Section 3 of the CBA.

SUMMARY OF CONCLUSIONS

1. The grievance is arbitrable.
2. Operating commuter rail equipment within the confines of the maintenance yard is not exclusively the work of the BU employees.
3. A supervisor's operation of a locomotive from the maintenance yard to the maintenance shop does not violate the CBA.

AWARD

The grievance is denied.

March 14, 2011

Charlotte Neigh, Arbitrator