

IN THE MATTER OF THE ARBITRATION BETWEEN:

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 320

And

ST. LOUIS COUNTY

BMS Case No. 11PA-1099

DECISION AND AWARD OF ARBITRATOR

**RICHARD A. BEENS
ARBITRATOR
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APPEARANCES

For the Union:

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For the Employer:

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**Date of Award:
June 27, 2012**

JURISDICTION

This arbitration arises pursuant to a collective bargaining agreement (“CBA”)¹ between IBT 320 (“Union”) and St. Louis County, Minnesota (“Employer”).

The undersigned neutral arbitrator was selected by the parties to conduct a hearing and render a binding arbitration award. The hearing was held on June 7, 2012 in St. Louis County, Minnesota. Neither party raised procedural objections to the matter being properly before the arbitrator. Both were afforded the opportunity for the examination and cross-examination of witnesses and for the introduction of exhibits. Written final arguments were submitted on June 22, 2012. The record was then closed and the matter deemed submitted.

ISSUE

It was left to the arbitrator to formulate the issue, which is found to be:

Did the Employer violate the collective bargaining agreement when Highway Department Supervisors operated county snowplowing equipment on Saturday, January 15, 2011?

FACTUAL BACKGROUND

The Employer, St. Louis County, is a political subdivision of the State of Minnesota. It is, in geographical area, also the largest county in the state and contains several thousand miles of roads. Pike Lake is one of 17 Highway Department Districts. It contains over 900 miles of public roads that are maintained by the county. The Pike Lake campus lies about 10 miles northwest of Duluth and covers several acres. It contains numerous buildings, including engineering facilities, supervisory offices, salt

¹ Joint Exhibit 1.

and sand storage structures, garages, a vehicle maintenance shop, and equipment storage sheds. The Minnesota Department of Transportation also maintains some facilities and buildings on the Pike Lake Campus. All these buildings are surrounded by a network of access roads and parking lots.

The Union, International Brotherhood of Teamsters Local 320, represents approximately 185 Highway department employees. The department is divided into four segments, road crew, bridge crew, sign crew, and shop mechanics. About 119 Union members are Heavy Equipment operators who are qualified to, among other things, operate snowplows. Approximately 17 Heavy Equipment operators are based at Pike Lake.

A Deputy Director of Public Works is in charge of maintenance for the entire county. Under him are Division Superintendents who have charge of several districts. Patrick McCarthy is the Division Superintendent for Pike Lake and two other districts. Next, there is a supervisor for each district. Kevin McConnell was the Pike Lake supervisor in January, 2011. Steve Tverberg was the supervisor of an adjacent district. Uniquely, virtually all Highway Department supervisory personnel worked their way up through the ranks and were former IBT 320 members.

Maintenance of county roads in northern Minnesota during the winter months is a perpetual challenge. St. Louis County encompasses over 6,800 square miles and stretches from Duluth northward more than 100 miles to the Canadian border. It is approximately 50 miles wide. Snowfall amounts can vary greatly in different areas. While Duluth may get 2 inches from a given storm, 10 inches might fall a few miles north. The amounts might be reversed in a later snow event. Consequently, the decision of when and where

to order snowplowing is left to Division Superintendents in conjunction with their district supervisors. County snow removal policy directs that snowplows won't be called out until there is at least a 2 inch accumulation on paved roads or a 4 inch accumulation on gravel roads.² Operators are required to have a commercial driver's license and run a wide variety of snow clearing equipment, including trucks with plow blades and sanders, graders, and front-end loaders.³ Except under limited circumstances, all equipment operations are performed by bargaining unit members.⁴

During or shortly after a snow event, the Division Superintendent patrols his responsible area and, in cooperation with the district supervisors, determines what roads need to be plowed and how many operators are needed to perform the work. During major snow events, it is not uncommon for all road crew heavy equipment operators to be called to work. The Pike Lake campus parking lots are only plowed when 8 inches or more of snow has fallen. If all road crew operators are busy plowing public roads, qualified bridge crew workers would be called in order of seniority to plow the Pike Lake campus access roads and parking lots.⁵ If done outside normal work hours or on weekends, they would be paid at overtime rates.⁶

County budgetary considerations precipitated changes in late 2008. The County administration ordered that, henceforth, Division Superintendents should only call out the minimum manpower needed to safely plow the roads following a snow event. Further,

² County Exhibit 2.

³ Union Exhibit 4.

⁴ Joint Exhibit 1, Article 11, Section 13.

⁵ On occasion, MNDOT workers have plowed the Pike Lake parking lots. However, there is no formal agreement in place and they were not involved in the incident at issue.

⁶ Joint Exhibit 1, Article 11.

with the exception of fire stations, they ordered that no county parking lots would be plowed on overtime.⁷

A concatenation of unusual events occurred in January, 2011. First, the Employer and Union had been in the midst of negotiating a new collective bargaining agreement for several months. On January 7, 2011, the Employer received a notice from the Bureau of Mediation Services indicating that the Union intended to strike on January 19, 2011.⁸ During the winter months, and particularly in January, snow falls every day on some portion of St. Louis County. If the Union strike proceeded as anticipated, the Employer's only option was to have supervisory personnel clearing snow from public roads. In preparation for this eventuality, the Employer ordered all Highway Department supervisors who still had the requisite commercial driver's license to receive instruction and re-familiarization in the operation of snowplowing equipment. As previously indicated, many Highway department supervisors had, prior to their promotions, been equipment operators and Union members. However, they had rarely, if ever, operated the snowplowing equipment since becoming supervisors.

During the night of January 14th and early morning of the 15th, approximately 4 inches fell in the vicinity of the Pike Lake campus. At about 4:00 AM on Saturday, January 15, the Division Superintendent, Patrick McCarthy reconnoitered the area and determine that the entire Pike Lake road crew would be called out to commence snowplowing at 5:00 AM. However, since less than 8 inches had fallen and since January 15th was a Saturday and the following Monday was the Martin Luther King holiday, he

⁷ This policy was unwritten, however, no one disputed that it has been following from 2008 to the present.

⁸ Union Exhibit 1.

saw no need to plow the Pike Lake campus parking lots. They could be cleared during normal working hours on the following Tuesday. Consequently, he saw no need to call out the bridge crew.⁹ Some campus access roads would be plowed in the normal course of events by road crew truck plows leaving their garage or later returning for fuel, sand, and salt.

Deputy Public Works Director, Robert Martimo, arrived at the Pike Lake campus in the morning of Saturday, January 15th. He encountered District Supervisors Kevin McConnell and Steve Tverberg on duty at the facility. Both Tverberg and McConnell would have worked the entire day under any circumstances. As supervisors they were present to oversee the call-out of the road crew workers. Normally, they would busy themselves with paperwork once the crews were dispatched. Since they had already dispatched the road crew, Martimo ordered the supervisors to spend some time familiarizing themselves with new snowplowing graders in anticipation of the upcoming Local 320 strike.

In response, Tverberg spent about 2 ¼ hours plowing snow on the Pike Lake campus. Since he had not previously operated plows, the first hour was spent with McConnell instructing and observing him, the remainder of his time in practice. McConnell had not operated snowplowing equipment for about five years. Consequently, he spent about ¾ of an hour familiarizing himself with a new road grader plow recently acquired by the county.

Local 320 Union steward, Sam Haddad, was called out for snowplowing starting

⁹ County Exhibit 6.

at 5:00 AM on January 15th. At 8:45 AM, while still on his plowing route, Haddad began receiving phone calls from other Local 320 members indicating that supervisors were plowing snow on the Pike Lake campus. Haddad returned to the campus at about 10:30 for fuel and road sand. He observed supervisor Kevin McConnell plowing snow with a motor grader in the northwest corner of the campus. Believing that to be bargaining unit work, Haddad confronted and photographed McConnell and indicated he would file a grievance. Later that day, Haddad did file the grievance at issue in this case.¹⁰ He contends that under CBA Article 11, the bridge crew should have been called out and paid overtime to plow the Pike Lake campus.

APPLICABLE CONTRACT PROVISIONS

ARTICLE 3 MANAGEMENT RIGHTS

The Employer has and retains the right to operate, manage and control its properties and facilities, to establish functions and programs, to set budgets, to determine the utilization of technology, to establish or modify its organizational structure, to maintain order and efficiency, determine the number of personnel and the amount of supervision, to hire, promote, transfer, assign, suspend, demote, discharge or retain the employees in this unit, and to take whatever action necessary to carry out the mission of the County in situations of emergency. Such rights and responsibilities are limited only as specifically stated in this Agreement.

ARTICLE 11 WORK WEEK, OVERTIME, EMERGENCY CALL-OUT

Section 4. *The normal work day shall be 7½ hours and normal work week shall be 37½ hours. The Employer retains the right to assign hours of work as may be required, in the judgment of the Employer, to accomplish the goals of the St. Louis County Highway Department...*

¹⁰ Joint Exhibit 2.

Section 6. *Overtime shall be offered on a continuous rotating basis. The classification seniority list for the work reporting station shall be the basis for the initial distribution of overtime at the work reporting station, with all permanent employees in the classification given first opportunity to any overtime before any other employee...*

Section 13. *Some examples of when operation of equipment can be performed by highway supervisors include the following:*

1. *For instructional purposes,*
2. *When all other available personnel are previously assigned and the work required is of very short duration but is necessary to keep the operation moving.*
3. *When the work is required to keep other units moving and the supervisor is waiting for an operator to take over.*
4. *Under emergency situations which require immediate attention and no qualified operator is available.*

Under normal circumstances, a supervisor should not operate equipment when qualified operators are available except to demonstrate the use of the unit or to perform a task for instructional purposes. These instances should not be for prolonged periods of time.

OPINION AND AWARD

The instant case involves a contract interpretation in which the arbitrator is called upon to determine the meaning of some portion of the collective bargaining agreement between the parties. The arbitrator may refer to sources other than the CBA for enlightenment as to the meaning of various provisions of the contract. The essential role of the arbitrator, however, is to interpret the language of the CBA with a view to determining what the parties intended when they bargained for the disputed provisions of the agreement. Indeed, the validity of the award is dependent upon the arbitrator drawing the essence of the award from the plain language of the agreement. It is not for the arbitrator to fashion his or her own brand of workplace justice nor to add to or delete

language from the agreement.

In undertaking this analysis, an arbitrator will first examine the language used by the parties. This objective approach "...holds that the meaning of the language is that meaning that would be attached to the integration by a reasonably intelligent person acquainted with all the operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration."¹¹ If the language is clear and unambiguous, that is the end of the inquiry. A writing is ambiguous if judged by its language alone and without resort to parol evidence, it is reasonably susceptible of more than one meaning.¹²

In the first instance, McConnell and Tverberg were clearly not ordered to plow snow for the purpose of avoiding payment of overtime to Union members. Under an unwritten County policy followed since 2008, the Pike Lake campus would not have been plowed on overtime in any event. Less than eight inches had fallen and the next workday was three days off. Had Division Superintendent McCarthy ordered supervisors to plow, we might well have a different case. However, there is no dispute that Deputy Public Works Director Martimo ordered the supervisors to get "hands on" experience with the new graders in anticipation of the upcoming Union strike. The fact that the strike ultimately did not occur is irrelevant. As of January 15th, 2011, County officials believed it would happen. They had a duty to prepare for that eventuality. Snow would continue to fall in St. Louis County even if the Union was on strike. The overriding duty of the Highway Department is to keep public road safe for public travel. The question then

¹¹ Elkouri & Elkouri, *How Arbitration Works*, Sixth Edition, (2003), Chapter 9.1.B.I.

¹² See *Metro Office Parks Co. v. Control Data Corp.*, 205 N.W.2nd 121 (1973).

becomes whether or not this unique situation is covered by the CBA.

In the first instance I do not find this to be a situation involving a mandatory offer of overtime to Union personnel that would be covered by Article 11, Section 6. As Superintendent McCarthy testified, parking lots weren't plowed at all unless eight inches or more of snow covered them. Second, there was no immediate need to plow the lots. The lots didn't need to be available for general use until three days later. January 15th was a Saturday and the following Monday was a county holiday. Next, McCarthy had made the decision against calling out the bridge crew hours before the incident leading to this grievance.¹³ Further, the order to get "hands on" equipment experience came from Martimo, not McCarthy, the person who would normally authorize a bridge crew call-out. As Martimo testified, Tverberg and McConnell were going to be present at Pike Lake until the road crew finished their work under any circumstances. Having them get "hands on" experience with the new graders was simply making a different productive use of their time. It was a diversion from their normal duties triggered solely by the anticipated strike. Absent the exigency of the pending Union strike, Martimo's might have been a violation of CBA Article 11, Section 6. However, it is not a violation on the facts before me.

Ultimately, this case turns on an analysis of the language in Article 11, Section 13 of the CBA. The wording of the section indicates that the parties knew they could not anticipate every instance when it might be appropriate for a supervisor to operate equipment. Critical phrases are left vague and open-ended. Presumably, this was

¹³ County Exhibit 6.

intentional. For instance, Section 13 begins, “*Some examples of when operation of equipment can be performed by supervisor include the following...*” The first two words indicate the list following is not comprehensive. There may well be other examples not specifically enumerated in the contract. The second paragraph of Section 13 states, “*Under normal circumstances, a supervisor should not operate equipment when qualified operators are available except to demonstrate the use of the unit or to perform a task for instructional purposes. These instances should not be for prolonged periods of time.*”

The phrase, “*Under normal circumstances..*” implies the parties recognized that “abnormal circumstances” might also occur. However, since abnormal circumstances cannot be accurately foreseen, the parties left those to be handled as they arise. Had they intended otherwise, the phrase “Under any circumstances” would have been more appropriate.

Twice using the phrase “*should not,*” rather than “shall not,” conveys the same message. If the parties wished to foreclose supervisors for ever operating equipment when Union members are available or to permanently limit operations for prolonged periods, the phrase “shall not” would better express that intent.

Last, the word “*prolonged*” is left undefined. No precise time limit is set. Its meaning is left vague -- and, again, I assume this was done intentionally. “[P]rolonged” could mean five minutes in one context and five days in another. The parties deferred argument to a later date and to an, as yet, unknown context. Under the unique set of facts before me, I do not think a reasonable person would find $\frac{3}{4}$ of an hour in the case of McConnell or $2\frac{1}{4}$ hours in the case of Tverberg to be ‘*prolonged.*”

Finally, do the unique facts of this case constitute a “normal circumstance?” I

think not. Public employee strikes are not an everyday occurrence. Bureau of Mediation Services data indicates an average of only four public employee Notices of Intent to Strike were filed in annually from 2006 through 2010. Only two public employee strikes occurred during the same period.¹⁴

No evidence was presented indicating County experience with prior strikes. Similarly, no evidence was presented showing the Union had sent out a previous Notices of Intent to Strike. Consequently, both Union and Employer were dealing with a new and unfamiliar situation. It would have been a derogation of the County's public duty to be unprepared for a strike. They were left with no choice but to prepare for snowplowing with supervisory personnel. Further, it would be patently negligent to put supervisors behind the wheels of snowplows on public roads in adverse weather conditions without some minimal "hands on" training. Significantly, the Union did not complain when supervisors received similar training during regular business hours on January 12, 2011. The only difference is that the bridge crew members would have received overtime pay had they been called out on January 15th.¹⁵ However, no bridge crew would have received an emergency call-out even if the supervisors had not been ordered to get "hands on" experience. The lot would have been plowed the following Tuesday by bridge crew members working at their regular hourly wage. There is no evidence that the supervisor's actions on January 15th caused any bridge crew member to lose work the following week.

While the Union has the duty to protect the interests of its members, the County has the duty to preserve the public health, safety and welfare. The Union is rightfully and

¹⁴ See www.bms.state.mn.us/documents/Statistics.pdf

¹⁵ Under CBA Article 11, Section 2, they would have been paid time and one-half for the hours worked or four hours straight time, whichever is greater.

understandably sensitive to preservation of contractual rights. The right to work overtime hours can mean significant pecuniary gain to bargaining unit members. Nevertheless, the CBA does not give the Union the right to create overtime hours where none are required. The right to assign hours of work is left to the Employer.¹⁶

Under the CBA language and unique set of facts before me, I find no CBA violation on the part of supervisors for familiarization operation of snowplowing equipment on January 15, 2011. The actions were not prohibited by any precise language in Article 11, Section 13.

AWARD

The grievance is DENIED.

Dated: 6/27/12

/s/ Richard A. Beens

Richard A. Beens, Arbitrator

¹⁶ See CBA, Article 11, Section 4.