



## BACKGROUND

This case has been brought by United Auto Workers, Local 867 (hereinafter “Union”) on behalf of the Grievant, who is acting in his representative capacity on behalf of the members of his bargaining unit. Affected members of the bargaining unit are employees of the Austin, Minnesota, Street Maintenance and Sewer Maintenance Department. The Union is their exclusive representative.

The dispute which gives rise to this arbitration stems from the Union’s discovery that on Saturday, October 29, 2011, a City employee who is not a member of this bargaining unit was operating a machine that these members regularly operate, a 906 loader. The Union submits that the City violated the parties’ collective bargaining agreement when it assigned a person from outside the bargaining unit to operate this equipment, and it seeks a remedy whereby the Grievant, whom it claims should have been assigned this work as the most senior employee, shall be compensated 8 hours overtime pay. The Employer submits that this matter is not arbitrable.

The essential facts in this case are not in dispute. On the day in question, Saturday, October 29, 2011, the City teamed with a private company to host the first ever “Community Electronics Collection.” This was a community event and members of the bargaining unit were working as volunteers when they saw another City employee, not a member of the bargaining unit, operating the 906 loader. The loader is a piece of heavy equipment and one of the volunteer bargaining unit members took over its operation as a volunteer. The Union later learned that the original driver was paid for his time that day, including the short amount of time he spent operating the 906 loader.

The Union submits that the City violated the parties’ Agreement when it assigned the 906 loader to a person outside the bargaining unit, and has filed a timely grievance protesting that assignment. The City in turn asserts that bargaining unit members do not have an exclusive right

to operate the 906 loader, or any other piece of equipment, and that the challenged assignment represents the exercise of an inherent management right which is supported by Minnesota law and the parties' Agreement and past practice. The City therefore asserts that this matter is not arbitrable.

**RELEVANT STATUTORY AND CONTRACT LANGUAGE**

Minn. Statute. 179A.07, subd. 1, **Inherent managerial policy.** A public employer is not required to meet and negotiate on matters of inherent managerial policy. Matters of inherent managerial policy include, but are not limited to, such areas of discretion or policy as the ...selection of personnel, and direction and the number of personnel.

The Parties' current Collective Bargaining Agreement provides in relevant part:

ARTICLE II. Recognition.

2.1 The Employer recognizes the Union as the exclusive representative for the collective bargaining purposes and to have a representative of their choosing for all employees of the Street Maintenance and Sewer Maintenance defined as follows:

Street:...

Machine Operator II (2)...

(2) Small loader, joint filling machinery, sweeper, seaman pulverizer, self propelled roller, asphalt loader, and flusher.

ARTICLE III. Employer Authority

3.1 The Employer retains the full and unrestricted right to operate and manage all manpower, facilities, and equipment; to establish functions and programs...to select, direct, and determine the number of personnel, to establish work schedules; and to perform any inherent managerial function not specifically limited by the Agreement.

Any term and condition of employment not specifically established or modified by this Agreement shall remain solely in the discretion of the Employer to modify, establish, or eliminate.

ARTICLE XV. Premium pay

15.2 Time and one-half will be paid:...

C. For work done on Saturday for other governmental units, or for private concerns, the time shall be credited to the yearly work budget and one-half time will be paid weekly.

#### ARTICLE XVI. General

16.3 Chauffeurs and machine operates shall be held responsible for the operation of their respective trucks and machines, inasmuch as it will be the duty of the chauffeurs to check their truck before leaving the garage on the beginning of their tour of duty as to water, gas, oil and tires. On return of the truck to the garage, they will report all defects of operations to the mechanic in charge.

#### ARTICLE XVII. Pay Plan

17.1. Wage Agreement for 2008-2010

### **DISCUSSION AND DECISION**

In this case the Employer has had the burden of proving that this matter is not arbitrable. If it is arbitrable, the Union has had the burden of proving that the Employer's assignment of the 906 loader to a non bargaining unit member violated the parties' collective bargaining agreement. For the following reasons I find that this grievance shall be denied.

At the outset it may be helpful to acknowledge that the issues of arbitrability and decision of this dispute on its merits are entwined. The Union protests that the Employer did not question the arbitrability of this dispute until this hearing; this was the first time the Union has heard of that challenge. The Employer in turn notes that throughout the grievance process it has repeatedly denied the Union's grievance directly, and indirectly, on the grounds that assignment of the loader represented an exercise of its inherent managerial rights.

Whether this matter is treated as one of arbitrability or one of violation of contract, I find that the grievance must be denied for the following reasons:

First, Minnesota law grants a public employer the unfettered discretion to determine the "...selection of personnel, and direction and the number of personnel." Minn. Statute. 179A.07,

subd. 1. The selection of a non-bargaining unit member to operate the 906 loader on the day in question would appear to reflect "...selection of personnel, and direction and the number of personnel."

In language that replicates and expands upon Minnesota law, the parties' collective bargaining agreement also recognizes that the Employer has the authority

...to operate and manage all manpower, facilities, and equipment; to establish functions and programs...to select, direct, and determine the number of personnel, to establish work schedules; and to perform any inherent managerial function not specifically limited by the Agreement.

Any term and condition of employment not specifically established or modified by this Agreement shall remain solely in the discretion of the Employer to modify, establish, or eliminate. Article 3.1.

Again, the selection of a non-bargaining unit member to operate the 906 loader on the day in question would appear to reflect the Employer's exercise of its right "...to operate and manage all manpower, facilities, and equipment: ...to select, direct, and determine the number of personnel, to establish work schedules."

Notwithstanding the above provisions, Article III also recognizes that a public employer can agree in negotiations to waive a management right, and the Union has cited the following provisions as evidence that the City has done so in this case.

First, the Union notes that the parties' Agreement specifically references not only its members by title, but also specifically references the equipment that they use:

2.1 The Employer recognizes the Union as the exclusive representative for the collective bargaining purposes and to have a representative of their choosing for all employees of the Street Maintenance and Sewer Maintenance defined as follows:

Street:...

Machine Operator II (2)...

(2) *Small loader*, joint filling machinery, sweeper, seaman

pulverizer, self propelled roller, asphalt loader, and flusher.  
(Emphasis added).

The Union notes that the City employee who improperly operated the 906 loader on October 29 was covered by a contract which did *not* contain this express language. As such, the Union submits that specifically identified equipment should have been assigned to the most senior employee who is specifically identified with that equipment.

Second, the Union cites the premium pay language of the parties' Agreement to support its claim that the Grievant should be awarded eight hours of overtime pay:

For work done on Saturday for other governmental units, or for private concerns, the time shall be credited to the yearly work budget and one-half time will be paid weekly. Article 15.2.C.

I have considered the above provisions but find that they do not overcome the strong management rights language found in Minnesota law and in Article III. First, it is too much of a stretch to read the above general language to mean that the Employer has agreed that bargaining unit members "own" the equipment to which they are regularly assigned, and only they may be assigned to it. Rather, it is more reasonable to interpret Article II as identifying the equipment to which identified bargaining unit members *may* regularly be assigned.

Second, the Premium Pay provision upon which the Union relies, Article 15.2.C, more reasonably is interpreted to set the compensation for a bargaining unit member when its conditions are met. In this case the conditions are not met in that no bargaining unit member performed assigned work on the day in question.

Third, the Employer offered persuasive evidence that it has consistently engaged in a past practice of assigning equipment regularly used by bargaining unit members to persons outside the

bargaining unit. Such persons include supervisors and temporary and seasonable employees. The Union has not previously grieved this practice.

Finally, Articles 16.3 and 17.1 similarly apply only after a bargaining unit member has been assigned to work. In this case, no bargaining unit member was assigned to work on the 906 load on Saturday, October 29, 2011.

### **AWARD**

For the above reasons this grievance is hereby denied.

August 20, 2012

A handwritten signature in black ink that reads "Christine Ver Ploeg". The signature is written in a cursive, flowing style.

Christine Ver Ploeg, Arbitrator