

STATE OF MINNESOTA
BUREAU OF MEDIATION SERVICES

IN THE MATTER OF GRIEVANCE ARBITRATION BETWEEN:

CITY OF AUSTIN, MINNESOTA,

EMPLOYER

-and-

INTERNATIONAL UNION, AUTOMOBILE, AIRCRAFT
AEROSPACE, AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW), LOCAL 867,

ARBITRATION AWARD
BMS Case No. 12-PA-0925
Contract Interpretation

UNION.

ARBITRATOR:	Rolland C. Toenges
DATE OF GRIEVANCE:	April 28, 2011
DATE ARBITRATOR NOTIFIED:	May 21, 2012
DATE OF HEARING:	September 20, 2012
DATE POST HEARING BRIEFS RECEIVED:	October 20, 2012
DATE OF AWARD:	October 29, 2012

ADVOCATES

FOR THE EMPLOYER:

Cyrus F. Smythe, Jr.

FOR THE UNION:

Mike Krumholz, Int'l Rep.

ISSUE

Whether the Employer violated the Collective Bargaining Agreement by discontinuing two (2) hours minimum pay for callbacks after regular work hours or on days off, that do not fall between 7:00 p.m. and 7:00 a.m.?

WITNESSES**FOR THE EMPLOYER:**

Tricia Wiechmann, H.R. Director

FOR THE UNION:

Steven Scott, Sewer Maintenance.

Raymond Wigant, Sewer Maint.

ALSO PRESENT

Jim Hurm, City Administrator

David Hoversten, City Attorney

JURISDICTION

The matter at issue, contract interpretation, came on for hearing pursuant to the Grievance Procedure in the Collective Bargaining Agreement (CBA) between the Parties. Relevant CBA provisions are as follows:¹

ARTICLE V – EMPLOYEE RIGHTS – GRIEVANCE PROCEDURES

“5.1 DEFINITION OF A GRIEVANCE: A grievance is defined as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of the AGREEMENT.”

“Step 3. A grievance unresolved in Step 2 and appealed in Step 3 shall be submitted to arbitration. The EMPLOYER and the UNION representative shall endeavor to select a mutually acceptable arbitrator to hear and decide the grievance. If the parties cannot agree on an arbitrator the selection of an arbitrator shall be made in accordance with the Rules established by the Bureau of Mediation Services”

“ARBITRATOR AUTHORITY

A. The arbitrator shall have no right to amend, modify, nullify, ignore , add to, or subtract from the terms and conditions of this AGREEMENT. The arbitrator shall consider and decide only the specific issue(s) submitted in writing by the EMPLOYER and the

¹ Joint Exhibit #1.

UNION, and shall have no authority to make a decision on any other issue not so submitted.

- B. The arbitrator shall be without power to make decisions contrary to, or inconsistent with or modifying or varying in any way the application of laws, rules or regulations having the force and effect of law. The arbitrator's decision shall be submitted in writing within thirty (30) days following the close of the hearing or the submission of briefs by the parties, whichever be later, unless the parties agree to an extension. The decision shall be binding on both the EMPLOYER and the UNION and shall be based solely on the arbitrator's interpretation or application of the express terms of this AGREEMENT and to the facts of the grievance presented.
- C. The fees and expenses for the arbitrator's services and proceedings shall be borne equally by the EMPLOYER and the UNION provided that each party shall be responsible for compensating its own representatives and witnesses. If either party desires a verbatim record of the proceedings, it may cause such a record to be made, providing it pays for the record. If both parties desire a verbatim record of the proceedings the cost shall be shared equally."

ARTICLE XV – PREMIUM PAY

"15.5 Employees who are recalled to work after their regular work day hours, or on days off, shall receive a minimum of two (2) hours call-in pay. Any employees working up to one and one quarter hours will be paid two (2) hours pay at regular rate. If the employee works more than one and one-quarter hours, they shall be paid time and one-half for the length of the time spent on the job. This will apply to hours worked from 7:00 p.m. to 7:00 a.m., Monday through Saturday."

ARTICLE XXII – DURATION

"22.1 This Contract shall remain in full force and effect from January 1, 2008, to December 31, 2010, and from year-to-year thereafter unless ninety (90) days written notice is given by either party hereto of their intention to terminate this Contract."

CHAPTER 179A. – PUBLIC EMPLOYEMENT LABOR RELATIONS

179A.20 Contracts,

"Subd. 6. Contract in effect. During the period after contract expiration and prior to the date when the right to strike matures, and for additional time if the parties agree, the terms

of an existing contract shall continue in effect and shall be enforceable upon both parties.”

The Parties stipulated that the instant matter was properly before the Arbitrator and there are no procedural or substantive objections.

The Parties selected Rolland C. Toenges as the Arbitrator to hear and render a decision in the interest of resolving the disputed matter.

The arbitration hearing was conducted as provided by the terms and conditions of the CBA and the Public Employment Labor Relations Act (MS 179A.01 – 30). The Parties were afforded full opportunity to present evidence, testimony and argument bearing on the matter in dispute. Witnesses were sworn under oath and were subject to direct and cross-examination. The Parties submitted post-hearing briefs.

There was no request for a verbatim record of the hearing.

BACKGROUND

The City of Austin (Employer) has a population of approximately 25,000 and operates typical city utilities, including street, sewer and water services.

The UAW (Union) represents employees of the Public Works Department, including those in street and sewer services.

The Employer and Union are parties to a Collective Bargaining Agreement (CBA) covering the period January 1, 2008 through December 31, 2010.² The Parties are in the process of negotiating a successor CBA, but had not yet reached agreement as of the date of the arbitration hearing. Pursuant to State Statute, the terms and conditions of the 2008 through 2010 CBA continue in effect until the Parties reach a successor CBA or reach impasse.

² Jonit Exhibit #1.

The instant dispute involves payment for call-in time that falls outside the regular workday. Under the terms and conditions of the CBA, call in time that falls outside the regular workday hours or on days off requires a minimum of two (2) hours pay. Whether this applies only to hours worked between 7:00 p.m. and 7:00 a.m., Monday through Saturday is the nature of the instant dispute.³

Prior to January 2011, the callback time employees reported on their time card was the actual time worked, but did include starting time and ending time. Effective January 2011, the Employer required employees to include the starting time and ending time. This enabled the Employer to determine if the call back occurred between 7:00 p.m. and 7:00 a.m. Where prior to January 2011 employees had been paid two (2) hours minimum for *all* callback time, after January 2011 employees were paid two hours minimum *only* if the callback time fell between 7:00 p.m. and 7:00 a.m.

On November 19, 2010 the Employer informed the Union's that its assertion of two (2) hour minimum call back pay, for all hours worked outside the regular schedule, constituting a binding past practice was expressly and directly repudiated. The Employer further informed the Union that the existing CBA language was thereafter binding and if the Union desired different language it would need to successfully negotiate such change.

The Union filed grievances in January, March and April 2011 alleging that the Employer had established a binding past practice of paying a minimum of two (2) hours for all callbacks and could not now unilaterally discontinue the practice. The Employer denied all grievances on the basis that call back time worked must be between 7:00 p.m. and 7:00 a.m. as set forth in the CBA. Thereafter the matter was processed through the grievance procedure, but without resolution.

Accordingly, the matter now comes before the instant arbitration for resolution.

³ CBA, Article XV, Premium Pay, 15.5.

EXHIBITS

JOINT EXHIBITS:

J-1. Collective Bargaining Agreement, January 1, 2008 through December 31, 2010.

UNION EXHIBITS:

U-1. Opening Statement

EMPLOYER EXHIBITS:

E-1. Ramsey v. AFSCME, Supreme Court of Minnesota, No. 51227.

E=2. City of Austin Repudiation Letter, dated 11/19/2010.

E-3. City of Austin CBA offer, 2/16/2011.

E-4. Scott Grievances and Employer Responses, January, April & May 2011.

E-5. Scott Second Step Grievance and Employer Response, June and July, 2011.

E-6. Klingfus Grievances and Employer Response, January and March, 2011.

E-7. Scott Grievance, March 2011.

POSITION OF THE PARTIES

THE UNION SUPPORTS ITS POSITION WITH THE FOLLOWING:

- The Union is requesting that the remedy is to pay the grievant two (2) hours minimum call-in pay in accordance with CBA, 15.5, sentence one.
- The Employer arbitrarily changed a long-standing practice of paying employees two (2) hours minimum call-in pay when called back to work any time outside their regular hours or on days off.
- The Employer for many years has interpreted Article 15.5 of the CBA based on the first sentence.

- The past practice of paying employees two (2) hours of call-in pay after their regular shift is not unreasonable.
- The notion that the Employer expects employees to come back to work for 44 minutes and not receive two (2) hours call-in pay is ridiculous to say the least.
- The Union's position not to pursue the grievance of Mr. Klingfus is not an admission of agreement with the change.
- The Klingfus situation was not quite the same as the Scott grievance. Klingfus should have received two – two hour call-ins for two separate occasions, which is a whole different argument.
- Mr. Scott's position not to pursue his grievance when called back to work on March 2, 2011 is not an admission by the Union that it is in agreement with the change.
- Scott's grievance #DC 299945, filed on April 28, 2011, was filed to make sure the grievance was in the system while negotiations continued.
- When the Employer notified employees to document starting and ending clock time, for record keeping purposes, it did not inform employees that it was changing the two (2) hour call-in pay practice.
- In fact the city continued the two (2) hour call-in practice until the first grievance by Klingfus on January 24, 2011.
- The Employer and Union began negotiations for a new CBA in November 2010, which to date has been unsuccessful. An obstacles to reaching a new CBA is the call-in pay issue.
- The Union position is that the Employer should not change the long standing practice of paying two (2) hours call-in pay, even though the call-in is not between 7:00 p.m. and 7:00 a.m.

THE EMPLOYER SUPPORTS ITS POSITION WITH THE FOLLOWING:

- The Union witnesses were unfortunately plagued by fading memories when they testified that they were only told to enter starting and ending times.
- The Union witnesses failed to remember that the Employer specifically informed them in 2010 that employees neglecting to report start and end time would prevent the Employer from making correct call-in payments.

- Employer witness, Tricia Weichmann, testified that Union Representative, Krumholz and Union Employee, Wigant were told orally and in writing on November 19, 2010 that call-in payment would be based on the start and end times reported on time cards.
- The change in practice communicated to the Union and employees by Weichmann on November 19, 2010 for payment of call-in pay, to be in accordance with the CBA, 15.5, was not contested by the Union.
- The evidence shows that the Union waited until January 24, 2011 to question the Employer's call-in payments. The Union's grievance alleged the Employer failed to provide the correct payment required by CBA, 15.5 for four (4) separate call-ins.
- The Employer denied the grievance on March 7, 2011, citing the changes in reporting and payment practices for call-ins that was communicated to the Union on November 19, 2010.
- Based on the Employer's denial of the grievance, the Union dropped the grievance and thereby mutually agreed with the Employer's application of the whole language of CBA, 15.5.
- The mutual agreement of the Union with the Employer's application is reinforced by the acceptance from employee Scott for a call-in on March 2, 2011.
- The Employer's position is consistent with the language of the Minnesota Supreme Court in Ramsey v. AFSCME, Council 21, Local 8, S-9, p793.
- The mutual intent of the Employer and Union, with regard to the payment of call-in, is clear and unambiguous based on the action of the Parties and consistent with the CBA, 15.5.
- The change in practice was agreed to by the Union when it failed to object to the changes announced by the Employer in November 2010 and was specifically legitimized by the Union when it:
 - Withdrew a grievance filed by an employee in January of 2011 challenging the change in practice; and,
 - Confirmed the acceptance of the change with the action of employee Scott on March 2, 2011, allowing the change in practice.
- The Arbitrator should deny the grievance on the same issue that it was denied by the Employer on March of 2011.

DISCUSSION

The threshold issues in the instant case are:

- Is the payment of a minimum two (2) hours for call-ins, other than between the hours of 7:00 p.m. and 7:00 a.m., a binding past practice?
- If a binding past practice exists, may one party unilaterally change it without submitting the matter to negotiations?
- Has the Union waived its right to grieve the change in practice?

With respect to the first question, what constitutes a binding past practice? Does the practice in the instant case meet these requirements? If the instant case does constitute a past practice, what is required to change it?

A commonly accepted definition of a binding past practice is found in Elkouri and Elkouri:⁴

“. . . to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both Parties.”

Another definition of a binding past practice can be found in a National Academy of Arbitrators Forum published by the Michigan Law Review:⁵

“A course of conduct that is the understood and accepted way of doing things over an extended period of time, and thus, mutually binding and enforceable.”

In the instant case it is unequivocal that employees were paid a minimum of two (2) hours for call-ins, even though the call-ins were not between the hours of 7:00 p.m.

⁴ Elkouri & Klkouri, *How Arbitration Works*, Fifth Ed., pp.632.

⁵ Past Practice and the Administration of Collective Bargaining Agreements, Richard Mittenthal, 59 Michigan Law Review (1961).

and 7:00 a.m. It is also clear that the Employer initiated these payments to which the Union voiced no objection and that they have consistently taken place over a considerable period of time. The Union refers to the practice as “long standing.” Although from the record it cannot be determined how long the practice has existed it has been at least the three-year duration of the 2008-2010 CBA.

It is also commonly accepted that changing a binding past practice requires notice and negotiations, or voluntary acquiescence. In the instant case the Employer put the Union on notice during negotiations that it repudiated the past practice in favor of limiting the two (2) hour minimum call-in payments to those falling between 7:00 p.m. and 7:00 a.m. The Employer further notified the Union that it must negotiate for any changes in the current language, during the current CBA negotiations.⁶ The Employer’s position being that to continue the existing practice, the Union would need to negotiate a modification in the CBA language or achieve an mutual agreement that the existing CBA 15.5 is to be interpreted to continue the past practice.

It is generally accepted that either party can terminate a past practice during negotiations following *expiration* of the CBA by giving notice that it will no longer abide by the practice. However in the instant case, the previous CBA does not *expire*. Pursuant to statutory requirements, the CBA remains in force until the Parties reach agreement on a new CBA or the right to strike matures.⁷

The record shows the Parties are engaged in negotiations for a successor CBA and continuation of the past practice and application of 15.5 language is an issue. The

⁶ Employer Exhibit #2.

⁷ MS 179A.20 Contracts,

“Subd. 7. Contract in effect. During the period after contract expiration and prior to the date when the right to strike matures, and for additional time if the parties agree, the terms of an existing contract shall continue in effect and shall be enforceable upon both parties.”

record shows that the Employer's proposal to the Union of February 16, 2011 includes a proposed change in 15.5 to provide a two (2) hour minimum call-in pay window from 4:00 p.m. to 7:00 a.m.⁸ The record shows that the regular day shift is 7:00 a.m. to 3:00 p.m.⁹ Therefore the Employer's compromise would leave only one hour not subject to the two (2) hour minimum call-in pay.

The Employer argues that the Union has acquiesced to the Employer's change in administering 15.5 by failing to file a grievance in all instances where a minimum two (2) hour payment was not made. The record shows some eight (8) instances when employees were not paid a two (2) hour minimum where they would have been under the past practice. The record shows some were grieved and some not. All were prior to the Scott grievance at issue in the instant proceeding. The Union's pursuit of this matter to the instant arbitration is sufficient evidence that the Union has not acquiesced.

Arbitrators differ on the question of whether a past practice should modify CBA language that is clear and unambiguous. An analysis of CBA 15.5 for clarity and ambiguity shows that the first sentence is clear, unambiguous and fully consistent with existing practice:

"Employees who are recalled to work after their regular work day hours, or on days off, shall receive a minimum of two (2) hours call-in pay."

The second and third sentences provide time and one-half pay, for time worked more than one and one-quarter hours. Although this does not appear to be in conflict with the first sentence, neither does it seem to add any clarity. A review of Article XV, Premium Pay, 15.2 shows that the conditions under which time and one-half is paid are already set forth therein:

⁸ Employer Exhibit #3.

⁹ Testimony of Union Witness Steven Scott.

“15.2, Para. A. All hours worked between 7:00 p.m. and 7:00 a.m. are to be credited to the yearly work budget and one-half time to be paid weekly.”

The fourth sentence in CBA 15.5 appears inconsistent with the first sentence.

“This will apply to hours worked from 7:00 p.m. to 7:00 a.m., Monday through Saturday.”

The first sentence does not limit when the two-hour minimum pay is paid other than for work after the regular workday, or on days off. Second, third and fourth sentences essentially restate the provisions of 15.2, Paragraph “A,” which refers to time and one half pay for hours worked between 7:00 p.m. and 7:00 a.m. Based on an analysis of both 15.2 and 15.5, it is clear that the fourth sentence applies to the second and third sentences, but leaves a question whether it also applies to sentence one.

It is axiomatic that there is a reason why the past practice exists. Although the record provides no explanation, it is safe to speculate that whoever was acting on behalf of the Employer in the past did not interpret the language the same way the Employer now interprets the language.

In retrospect, the language would have been a clear and unambiguous representation of how the Employer now interprets it if the first sentence read as follows:

Employees who are called to work after their regular work day hours, or on days off, shall receive a minimum of two (2) hours call-in pay, *if the call-in falls between 7:00 p.m. and 7:00 a.m.*

The record does not explain what prompted the Employer to stop the past practice and interpret CBA 15.5 to allow two (2) hour minimum pay only between the hours of 7:00 p.m. and 7:00 a.m. Since this occurred at the onset of negotiations for a new

contract it is likely that attention to the practice occurred when preparing for bargaining.

Remaining is the issue of whether the Employer can unilaterally stop following the past practice, or must any change be accomplished through negotiations. As noted earlier some arbitrators are reluctant to uphold a past practice as binding when the CBA language is clear and unambiguous. In the instant case, the Employer's past application of the language, which established the practice, strongly suggests that the language is less than clear and unambiguous.

Introduced into the record is a case decided by the Minnesota Supreme Court where an arbitrator upheld a past practice as binding that conflicted with clear and unequivocal language in the CBA.¹⁰ This case is instructive as it has similarities with the instant case. The facts of the referenced case are that employees had been provided a greater vacation benefit than the clear and unequivocal language of the CBA language provided. The practice had been in effect for some time when the Employer unilaterally discontinued the practice in favor of the CBA language. An Arbitrator found the practice binding on the parties as a condition of employment, notwithstanding the conflicting language in the CBA. The Employer appealed the arbitrator's decision and Ramsey District Court overturned the arbitrator's award. The matter was further appealed to the Minnesota Supreme Court. The Supreme Court reversed the District Court and reinstated the arbitrator's award.

FINDINGS

¹⁰ Ramsey County v. AFSCME, Council 91, Local 8, Minn. 309 N.W.2d785.

Payment of employees at a minimum of two (2) hours during call-ins, as set forth in the first sentence of Article XV, 15.5, has been established as a binding past practice having satisfied the criteria of mutuality, specificity, duration and reliance.

The past practice, being binding, takes precedence over any conflicting language in the CBA and remains in force until the Parties mutually agree to a change in the practice, or a new CBA is settled with no change in the language of 15.5.

Due to the delay in pursuing objection to the change in payment, and the fact that the Parties are engaged in good faith negotiations to resolve the matter, back pay is not warranted.

AWARD

The grievance is granted.

The existing practice shall remain in force until such time as the parties mutually agree to a change the practice, or a new CBA is settled with no change in the language of 15.5.

The provisions of Article XV, 15.5, *sentence one* shall be reinstated effective the second full payroll period following the date of this Award, except if the Parties reach mutual agreement to change the practice in the interim.

No back pay is to be provided from the Employers unilateral change in the practice to the beginning of the second full payroll period following the date of this Award.

The Arbitrator will maintain jurisdiction for 90-days from the date of this Award, should any questions arise as to the its implementation.

CONCLUSION

The Parties are commended on the professional and thorough manner with which they presented their respective cases. It has been a pleasure to be of assistance in resolving this grievance matter.

Issued this 29th day of October 2012 in Edina, Minnesota.

ROLLAND C. TOENGES, ARBITRATOR