

IN THE MATTER OF ARBITRATION BETWEEN

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS
and its Affiliated Local 1426
Moorhead, Minnesota
Union

and

MOORHEAD PUBLIC SERVICE COMMISSION
Moorhead, Minnesota
Commission/Employer

OPINION AND AWARD

Water Department
Employee-in-Charge Pay
Contract Interpretation Grievance

BMS Case No. 13 PA 0936

Award Dated November 25, 2013

Date and Place of Hearing:

October 10, 2013
Offices of the Employer
Moorhead City Hall
Moorhead, Minnesota

APPEARANCES

For the Union: Daniel E. Phillips, Esq.
Solberg, Stewart, Miller Law Office
1123 5th Avenue South
Fargo, ND 58107-1897

For the Employer: Benjamin E. Thomas, Esq.
Wold Johnson, P.C.
400 Gate City Building
500 Second Avenue North
Fargo, ND 58107

ISSUE

Did the Employer violate Rule VII, Working Provisions, Section 5 of the Labor Agreement between the parties by denying Employee-in-charge pay to a Water Department employee who was in charge of a work crew consisting of himself and one other employee? If so what shall the remedy be?

WITNESSES TESTIFYING

Called by the Union

Eric John, Lineman
Shop Steward

Matt Andvik,
Water Construction Foreman

Called by the Employer

Kristofer J. Knutson,
Water Division Manager

Nancy Lund,
Administration and Finance Manager

Bill Schwand,
General Manager

ALSO PRESENT

On Behalf of the Union

Tim Hughes,
Business Manager Local 1426

Randy Olson,
Assistant Business Manager
Local 1426

On Behalf of the Employer

No others were present

JURISDICTION

The issue was submitted to the Arbitrator for a final and binding resolution under the terms of Rule V - GRIEVANCES, Section 1 of the Labor Agreement between the parties [Joint Exhibit 1] and under the rules of Minnesota Bureau of Mediation Services. The Arbitrator was mutually selected by the parties from a list of names of arbitrators submitted to them by the Bureau of Mediation Services. The parties stipulated that the Arbitrator had been properly called, and that the issue was properly before him for a decision.

The Arbitrator inquired at the hearing if the parties had any objection to the award in this case being offered for publication by either the Bureau of Mediation Services or recognized organizations that publish arbitration awards. No objection was raised and the representatives of the parties signed an appropriate release form.

At the hearing the parties were given full and complete opportunity to examine and cross-examine witnesses and present their proofs. They made their closing arguments orally at the hearing. At the conclusion of the hearing the record in this case was closed. The issue is now ready for determination.

STATEMENT OF THE ISSUE

The parties presented somewhat different versions of the issue to be resolved. The Union framed the issue as:

Did the Employer violate the collective bargaining agreement when it refused to pay Water Department employees the “Employee-in-Charge” pay? If so what shall the remedy be?

The Employer framed the issue as:

Whether or not a Water Department employee is entitled to “Employee-in-Charge” rate of pay when in charge of only one other employee?

The parties deferred a final framing of the issue to be resolved to the arbitrator. After reviewing all the evidence and testimony adduced at the hearing the issue to be resolved is framed by the Arbitrator as follows:

Did the Employer violate Rule VII, Working Provisions, Section 5 of the Collective Bargaining Agreement between the parties by denying Employee-in-charge pay to a Water Department employee who was in charge of a work crew consisting of himself and one other employee? If so what shall the remedy be?

On May 2, 2013 the Union filed the initial grievance in this matter [Joint Exhibit 2]. It takes the form of a memo sent by Eric John, Union Steward to Mr. Knutson, and reads as follows:

“Because the grievance filed on behalf of Phil Shequen on Monday, April 29th, 2013 was denied, consider this the second step in the grievance procedure for Moorhead Public Service’s failure to pay Mr. Shequen the employee-in-charge rate of pay as applicable.

As I stated to you before, per our labor agreement, an employee will receive the employee-in-charge rate of pay when in charge of two or more employees. In light of this agreement, we insist that Mr. Shequen shall be made whole [sic] for his losses. Further, we insist that in any similar instances in the future, Water Division employees shall receive this rate of pay.”

On May 20, 2013 the Union filed a supplemental grievance [Joint Exhibit 3]. It also takes the form of a memo from Union Steward John to Mr. Knutson. It reads as follows:

Please accept this notification that IBEW Local 1426 continues to object to Moorhead Public Service’s refusal to pay the employee-in-charge rate of pay for Water Division employees. Further, IBEW Local 1426 will continue to object to this practice until a settlement is reached on a previous grievance or a ruling is made by an arbitrator from the Bureau of Mediation Services.”

Rule VII – WORKING PROVISIONS, Section 5 of the Labor Agreement [Joint Exhibit 1] between the parties provides the contract language that bears on the merits of the issue as follows:

“Sec. 5. A Water Division employee will receive the employee-in-charge rate of pay when in charge of two or more employees, but only for the time actually spent.”

Rule V – GRIEVANCES, Section 1 provides language limiting the authority of the Arbitrator as follows:

Sec. 1. All disputes or grievances which arise as to the interpretation of, or the adherence to, the provisions of this agreement shall be settled in the following manner and filed with the division manager.

* * * *

e. The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of the agreement. ...

* * * *

The Labor Agreement became effective January 1, 2012 and continues in full force and effect through December 31, 2014. For all relevant times the employees involved in this grievance were covered by its provisions.

FACTUAL BACKGROUND

The facts in this case are largely undisputed. The issue pertains to payment of “employee-in-charge” supplemental pay to a Water Division employee who is the senior employee assigned to a work crew consisting of himself and one other employee.

The Employer is a public employer under Minnesota Statutes and provides electrical and water supply services to the Moorhead, Minnesota community. It operates through two primary divisions: the Electrical Division and the Water Division. The Union is the exclusive bargaining representative for those employees in both Divisions whose job titles appear at page 23 of the Labor Agreement [Joint Exhibit 1]. The parties have maintained a collective bargaining relationship for many years.

The grievance arose when a Water Division employee [Phil Shequen] was denied “employee-in-charge” supplemental pay while working as the senior employee on a two-

man Water Division work crew. The crew consisted of Mr. Shequen and one other employee. The job title of that other employee was not found in the record of this hearing. Accordingly, it is not definitively known if the other employee was another Laborer/Equipment Operator or was a Heavy Equipment Operator. Testimony does indicate, however, that the other employee was not likely to have been a Heavy Equipment Operator. The nature of the work the crew was performing at the time of the incident that gave rise to the grievance was also not described in the record of this hearing. Accordingly, it is not known if excavation or traffic control measures were involved in the work that crew was performing. Mr. Shequen has since transferred out of the Water Division and now works in the Electrical Division of the Employer. He was not present at the arbitration hearing.

The Water Division is a relatively small organizational unit, currently composed of six employees as follows: one Foreman, one Heavy Equipment Operator and four Laborer/Equipment Operators. In 2000 when the language of Rule VII, Section 5 was placed in the Labor Agreement, the Water Division staffing consisted of only four employees: one Foreman, one Heavy Equipment Operator, and two Laborer/Equipment Operators. With that staffing Water Division employees were commonly dispatched together to a job site, and two-man crews were not used.

By early 2013 the staffing of the Water Division had been changed to one Foreman, one Heavy Equipment Operator, three Laborer/Equipment Operators, and one Meter Service Worker. It is not disputed that the Meter Service Worker was paid \$0.80 per hour more

than the Laborer/Equipment Operator. Prior to the instant grievance in 2013 the Water Division was restructured such that the Meter Service Worker position was eliminated and a fourth Laborer/Equipment Operator was added. That resulted in a staffing complement of one Foreman, one Heavy Equipment Operator and four Laborer/Equipment Operators. That staffing made it possible for the Employer to dispatch separate two-man crews to job sites.

It is not disputed that some of the Water Division job sites involve excavation work. Normally the Heavy Equipment Operator was present at such sites, but there are occasions when the Heavy Equipment is not at work, and operating the heavy equipment for the excavation is done by a Laborer/Equipment Operator. Those circumstances would be unusual, but not unheard of, and under those circumstances one of the Laborer/Equipment Operators would be upgraded on a temporary basis to operate heavy equipment, and receive the Heavy Equipment Operator rate of pay. The upgraded Laborer/Equipment Operator would not, however, receive the supplemental employee-in-charge pay under those circumstances because the pay rate for the Heavy Equipment Operator was higher than that of the Labor/Equipment Operator with the employee-in-charge supplement applied.

It was not disputed that when excavation work was involved at the job site the Heavy Equipment Operator was usually present and in charge of the crew consisting of a total of at least three employees. Ms. Nancy Lund, Administration and Finance Manager, testified that the Heavy Equipment Operator was paid the employee-in-charge

supplemental pay about 60 percent of the time based on payroll records she reviewed. It is also not disputed that there is no evidence showing a past practice wherein the employee-in-charge supplemental pay was paid to a Water Division employee who was working as part of a two-man crew during the period from 2000 to the present time.

The record shows that the language of Rule VII, Section 5 was submitted in contract negotiations by the Employer and first agreed to in the 2000 Labor Agreement between the parties. It is also not disputed that there have been no changes to that language since it was first placed in the Labor Agreement. It is noted that Rule VII, Section 5 provides for a Water Division employee receiving an employee-in-charge supplemental pay under certain circumstances, but does not describe what that supplement would be. It is necessary to read Rule VII, Section 4, which pertains to Electrical Division crews, to find that the employee-in-charge supplemental pay is defined there as five percent (5%) above the employee's regular rate of pay. It is not disputed that the supplement would also be five percent in the Water Division.

It is also apparent that the language of Rule VII, Section 5 does not specify the nature of the work during which the employee-in-charge pay would be provided. Record testimony shows that the Occupational Safety and Health Administration [OSHA] of the United States Government requires an employee to be designated as in charge of any electrical crew of two or more employees. Undisputed record testimony also shows that for Water Division jobs involving excavation or traffic control OSHA would require an employee to be designated as either in charge or as a "competent" person at the site when

a crew of two or more is performing the work. For other Water Division work, such as locating and servicing curb boxes, hydrant maintenance or removing and installing meters OSHA would not require an employee to be designated as in charge or as a competent person.

The language of Rule VII, Section 4 and Rule VII, Section 5 varies. The language of Rule VII, Section 4, which applies to Electrical Division employees, states in relevant part:

When an Electric Division crew of two or more employees of the same job classification is sent to work without a regular foreman present, the senior employee will act in charge, and shall receive the corresponding rate of pay of five (5) percent above the employee's regular rate of pay. ...

The language of Rule VII, Section 5, which applies to Water Division employees, states:

A Water Division employee will receive the employee-in-charge rate of pay when in charge of two or more employees, but only for the time actually spent.

The matter in dispute in this grievance is whether the parties intended the meaning of Rule VII, Section 5 to be different from the meaning of Rule VII, Section 4. In particular it is not disputed that for a two-man Electric Division crew operating without a Foreman present the senior employee would receive the employee-in-charge supplemental pay. The dispute in this case is whether the senior employee on a two-man crew from the Water Division operating without a Foreman present would receive the supplemental pay. Evidence of the substantive bargaining history of Rule VII, Section 4 or 5 was not entered into the record of this hearing.

The instant grievance was filed and processed through the steps of the grievance procedure without resolution. It was heard in arbitration on October 10, 2013.

POSITION OF THE PARTIES

Position of the Union

It is the position of the Union that the grievance be sustained. In support of that position it offers the following arguments:

1. There is ambiguity in the controlling contract language found in Rule VII, Section 5. The Union agrees with the Employer that the issue posed is relatively simple, but the controlling contract language is reasonably subject to different interpretations.
2. The intent of the parties was to pay the Water Division senior employee on a two-man crew with no Foreman present the employee-in-charge supplemental pay just as had been done for the Electrical Division crews.
3. There is no substantive difference between the language of Rule VII, Section 4 and Section 5.
4. There are hazards present at both Electrical Division and Water Division work. The OSHA requirements are similar, and require both to have an employee in charge. A “competent person” as that term is used by OSHA equates to someone being in charge.
5. A five percent increase is appropriate because duties of the senior employee present are increased.
6. There is no past practice in the Water Division of the senior employee present being paid the employee-in-charge supplemental pay on two-man work crews because prior to the addition of a fourth Laborer/Equipment Operator two man crews were not dispatched.
7. The Employer’s argument that an employee does not supervise himself fails to consider that any employee is responsible for his or her work and hence does supervise his/her actions. Accordingly, when two employees are at a work site functioning as crew of two, one must be in charge and receive the employee-in-charge supplemental pay under the terms of the contract.

Position of the Employer

It is the position of the Employer that the grievance should be denied. In support of this position the Employer offers the following arguments:

1. The issue in this case is a simple one. Namely, what does “in charge of two or more employees” mean. A reasonable person would find that language to mean that an employee is not supervising himself, and he would not count as one of the two employees being supervised in order to qualify for the employee-in-charge supplemental pay.
2. There are different duties for Water Division employees than for Electrical Division employees, with different OSHA requirements. At the end-of-the-day, however, this case comes down to a matter of interpretation of contract language.
3. The Employer has never paid the employee-in-charge supplemental pay for Water Division employees who are part of a two-man crew. There is no past practice that the employee-in-charge pay was ever paid in the Water Division when two employees were on a work crew.
4. It is illogical to think that an employee supervises himself. Accordingly, the contract language that states the employee-in-charge pay would be paid when in charge of two or more employees must be taken to mean that there must be two other employees present beside the employee who would be considered the employee-in-charge.
5. The plain ordinary and popular interpretation of the contract language must be used to give meaning to the language. The intent to the contract language is obvious.
6. OSHA does not require employee-in-charge pay. It only requires that under some circumstances one employee must be in charge. It is only the Labor Agreement that mandates employee-in-charge rate of pay.
7. Carrying the Union’s argument to its logical conclusion would mean that all employees are supervisors of their own efforts. That is simply not logical.
8. The Employer asks that the plain and ordinary meaning of the contract language be applied, and that the employee-in-charge supplemental pay would be paid only when the senior employee would supervise two other employees at the work site.

ANALYSIS OF THE EVIDENCE

All of the evidence adduced at the hearing along with the thoughtfully made arguments of the parties was carefully considered in the analysis of this case and rendering this award. This grievance pertains to the application and interpretation of Rule VII, Section 5 of Labor Agreement between the parties. The facts in this case are not seriously disputed. What is disputed is the proper interpretation of the above contract language.

Both parties assert that the case is simple, and involves interpretation of contract language that they regard as plain and clear. The percentage involved in the employee-in-charge supplemental pay is not defined in Rule VII, Section 5. There is no evidence in the record, however, to indicate that it would be any different for Water Division employees than the five percent (5%) paid to Electrical Division employees. As to the conditions that would provide for payment of the employee-in-charge supplemental pay the contract language in Rule VII, Section 5 provides the phrase “when in charge of two or more employees”. This is the language that is at the core of this dispute. The Employer reads that phrase to mean that in order to receive employee-in-charge supplemental pay a Water Division employee must be supervising two or more employees beside himself. The Union reads the phrase to mean that a Water Division employee would be entitled to employee-in-charge supplemental pay if he supervised himself and at least one other employee. Clearly, the contract language does not define who the “two” employees are. As such the contract language is susceptible to more than one meaning. The interpretations of either party could be considered reasonable. Accordingly, the language is found to be ambiguous.

In resolving such ambiguity an arbitrator must attempt to discern the intent of the parties when they negotiated the language. In this case the substantive bargaining history of the language of Section 5 was not adduced at the hearing. What is found is the language of Rule VII, Section 4 which deals with employees in the Electrical Division receiving the employee-in-charge supplemental pay. That language is somewhat clearer inasmuch as it provides that the senior employee in the Electrical Division would receive the employee-in-charge supplemental pay when a crew of two is sent out to the job site. The parties agree that language clearly requires payment of the supplemental pay to the senior of two employees sent to an Electrical Division job site. The language of Section 4 pertaining to Water Division employees is different. It states that the supplement would be paid when an employee is “in charge of two or more employees”. The question then becomes: did the parties intend a different meaning in the Water Division from that agreed to in the Electrical Division.

In discerning the intent of the parties an arbitrator must not resort to “contract-making”. He must limit his or her consideration to only “contract interpretation”. Indeed the Labor Agreement between the parties at Rule V, Section 1(e) specifically limits the Arbitrator from modifying the agreement in any manner. If contract language is clear in the literal sense an arbitrator must give it the clear and popular meaning expressed. Here, however, the language is found to be literally ambiguous. In particular does “in charge of two or more” mean one additional employee as the Union argues or two additional employees as the Employer argues?

It is worth noting that in Rule VII Section 4 the language provides in the Electrical Division that the employee-in-charge supplement is paid for a crew of two. The language in Section 5 is different, utilizing the phrase of “in charge of two or more”. It does not appear to this Arbitrator that the parties have clearly expressed their intent to require an employee-in-charge to be in charge of two other employees. It is clearly reasonable to find that they intended that the employee-in-charge would be in charge of two employees including himself as they intended for the Electrical Division. To apply the meaning sought by the Employer in this case would require the Arbitrator to insert the word “other” into the language Rule VII, Section 5 such that it would provide for a Water Division employee to receive the employee-in-charge supplement “when in charge of two or more other employees, ...”.

Pursuant to Rule V the Arbitrator does not have authority to make that addition to the contract. Moreover, it is noted that the parties have had a collective bargaining relationship for a long time. It is reasonable to believe negotiations on both sides were led by skilled professionals in labor relations who carefully crafted the language. Had the parties intended to have the language say “two or more other employees” they could easily have written that language into the agreement. Since they did not, it is reasonable to believe that was not their intention. If their intent was and remains to have Rule VII, Section 5 provide for “two or more other employees” they can bargain such a change into the Labor Agreement.

It must also be noted that it is undisputed that the Employer proposed the contract language at issue in this grievance. It is a well established principle of contract interpretation that any ambiguity in contract language should not be construed to the benefit of the drafter.

The record shows that the Employer had not paid the employee-in-charge supplement to any Water Division employee in the past when there were only two employees in the crew assigned to a job site. The Union argued that until the Water Division was restructured it was not possible to dispatch two employee crews. When that became possible and such two employee crews were dispatched, the grievance arose. That is found to be a credible reason why the supplement had not been paid in the past.

The Employer placed considerable emphasis on its argument that an individual employee does not supervise himself. Actually, the language of Rule VII, Section 5 does not use the word "supervise". It uses the phrase "in charge". It would seem altogether reasonable that an employee working in the field on a Water Division project is "in charge" of his own work. When a second employee is on the crew then it would seem reasonable that one of the two of them must be in charge of their collective work. If no one is in charge, confusion as to how the work is to proceed would seem likely.

There was considerable testimony at the hearing about OSHA requirements. It is clear from the record that OSHA does not dictate compensation for the employees involved. It requires that someone be a "competent person" performing the work or in charge of the

site where certain types of work are being performed. There was not sufficient evidence adduced at the hearing to find that there is a meaningful difference between the term “competent person” and being “in-charge” of the work. Accordingly, the record compels a finding that those terms can be used interchangeably until such time as a definitive distinction can be made.

It is important to note that the language of Rule VII, Section 5 does not limit the employee-in-charge pay based on the nature of the work being done. What the contract does say, however, is that the employee-in-charge pay would be paid “only for the time actually spent”. That would lead a reasonable person to conclude that there may be some work that qualifies for the employee-in-charge supplemental pay and some other kind of work that does not. Testimony at the hearing showed that excavation and work where traffic control measures are needed may be such work where an employee must be in charge of a crew and hence eligible for the supplement. The record shows that there is other work, however, including opening or closing curb boxes, installing or removing meters, or servicing hydrants that may not require an employee to be in charge. Indeed such work may not even have two employees present. The contract language does not limit eligibility for the employee-in-charge supplement based on the nature of the work performed. Yet, the record of this hearing suggests that the parties may, through their practices, have made such a distinction. The practices of the parties found in the evidence of this hearing, however, do not permit a definitive ruling on the nature of the work that would be eligible or ineligible for employee-in-charge supplemental pay. No ruling is made on that issue. If a limitation is to be placed on eligibility for employee-in-

charge supplemental pay based on the nature of the work involved, the place for that limitation to be made is at the bargaining table.

The Union did not describe at the hearing what it sought as specific remedy. In the grievance [Joint Exhibit 2] the Union expressed the remedy sought as “in any similar instances in the future, Water Division employees shall receive” the supplement. That requested remedy did not specifically address what the “similar instances in the future” would be. As such it is regarded as incorporating the practices of the parties, if any, in regard to the nature of the work they consider as eligible for employee-in-charge pay [i.e. excavation, or traffic control measures vs. curb boxes, meter work, or hydrant maintenance] as well as the exclusion for when a Foreman is present.

For all the above cited reasons the grievance is sustained.

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AWARD

Based on the evidence and testimony taken into the record in this case, the grievance is sustained. Rule VII, Section 5 of the Labor Agreement requires the payment of employee-in-charge supplemental pay to a Water Division employee who is in charge of a work crew consisting of himself and one other worker.

November 25, 2013

James L. Reynolds

Dated: _____

James L Reynolds
Arbitrator