
IN THE MATTER OF ARBITRATION

OPINION AND AWARD

between

CITY OF AUSTIN, MINNESOTA

**BMS Case No. 14 PAO812
(Grievance No. LP 005812-
Chainsaw Work)**

and

**UNITED AUTO WORKERS
LOCAL 867**

Gil Vernon, Arbitrator

APPEARANCES:

On Behalf of the City: Cyrus F. Smythe, Jr. – Consultant, David Hoversten – City Attorney and Tricia Weichmann – Human Resources Director

On Behalf of the Union: Mike Krumholz – International Representative

I. BACKGROUND AND FACTS

The employees of the City’s Street Maintenance Department in certain job classifications are represented by the Union for purposes of collective bargaining.

The contract outlines the covered classifications in Article II Section 2.1 as

follows:

The Employer recognizes the Union as the exclusive representative for 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 –Regular Job (1)
Machine Operator II (2)
Chauffeur; Leaf Loader
Mechanic
Common Laborer

- (1) Drag line, loader 1.5 cubic yards and larger, graders, cat tractor-dozer, asphalt paver, chipper, part-time drag line, graders, loaders 1.5 cubic yards and larger, cat tractor-dozer, asphalt distributor and backhoe.
- (2) Small loader, joint filling machinery, sweeper, seaman pulverizer, self-propelled roller, asphalt loader, and flusher.

Sewer Maintenance:

Machine Operator
First Class Maintenance (3)
Licensed Sewer Maintenance – Boiler Operator

- (3) Classification of Sewer Maintenance Job:

First Class Maintenance Worker Scope of Work:

To oversee the work of the gang when necessary, to do the general work connected with the work of laying and maintaining the sewers of the City (such as cleaning sewers, laying pipe, checking lift stations, driving truck) and performing such other work as is required to keep the City's sewers operating in an efficient manner.

On December 24, 2012 Tony Hill and Joe Mattice, both classified as “Operator II”, filed separate grievances claiming they should get paid (per Section 7.12 of the Collective Bargaining Agreement) a higher rate of pay because on December 13, 2012 and into January, 2013 (a total of approximately 100 hours). They operated chainsaws in the Parks Department. They each seek the rate of pay of the Tree Trimmer/Chipper Operator classification. The differential in the classification

mentioned in their grievance is \$1.10 per hour. The Tree Trimmer/Chipper classification is not only in a different department, it is in a different bargaining unit (but is also represented by the UAW Local 867). This cross utilization is provided for in Article VII (Seniority) Section 7.13 which reads:

7.13 In order to promote efficiency in the utilization of City employees, the Employer may assign employees from the Street and Sewer Maintenance Department or the Park and Recreation Department to work in the other department to perform the work as directed and scheduled by the Employer in the other department within their qualifications to the best of their ability.

The grievance is based on Section 7.12 of the CBA which reads:

7.12 The Employer may direct the employee to perform any other job including a job of higher classification provided, however, that if they work in the higher classification they shall be entitled to the rate for the higher classification provided further that they work a minimum of one (1) hour. They will be paid for work in addition to the first hour in one-half hour increments.

When the grievance couldn't be resolved it was appealed to arbitration. A hearing was held June 23, 2014. Post hearing briefs were resolved and exchanged August 1, 2014.

II. OPINION AND DISCUSSION

While the grievance is based on Section 7.12—which provides that when an employee does the work of a higher classification for at least one hour he is entitled to the higher rate—the critical question is whether the use of chainsaws is

indeed work that is part of and reserved to the Tree Trimmer/Chipper Operator classification in the Parks Department.

It is the position of the Union that the operation of a chainsaw in the Parks Department is Trimmer work. They also rely on past practice noting the Grievants' testimony that in the past when employees were operating the larger chainsaws they would indeed receive the higher rate of pay, even though their Street and Sewer Maintenance Department Collective Bargaining Agreement does not have a classification for chainsaw operation. They also note testimony of the Supervisor of the Park and Recreation Department. If the Grievants (from the Street and Sewer Maintenance Department) had not been assigned the work it would have been completed by employees from the Park and Recreation Department, specifically employees from the Tree Trimmer/Chipper Operator classification.

The City's position is that the use of a chainsaw is not work reserved to the higher classification of tree trimmer. The evidence shows that Grievants (members of the Streets Department) often use chainsaws without additional compensation. The chainsaw is merely an aid to assist the Streets Department in the performance of their regular and routinely assigned work duties as outlined in their job description. These duties include using a chainsaw to do ditch and waterway cleanup duties. These are duties which are regularly performed by members of this

bargaining group when the winter snowfall is light. The Grievants' assertion that they always get paid the higher rate is not true. There have only been isolated occasions where they have been paid the higher amount for unusual events such as storm clean-up after tornados, as they did in 2009, clearing "boulevard trees" while working with the Tree Crew from the Park and Recreation or because of a payroll error. This last example was a mistake committed by the City when an employee received a premium for four days by mistake in the fall of 2009. Thus, the City argues there is no uniform practice.

The Arbitrator observes, as is well established, the burden is on the Union to establish the essential elements of its grievance. In this case, they must establish that the use of a chainsaw under the circumstances evidenced in this record is by written contract or by binding custom and practice mutually recognized by the Parties as work done by the Tree Trimmer/Chipper Operator classification.

It is the conclusion of the Arbitrator that the evidence presented by the Grievants falls short of the consistency necessary to establish a unwritten contract.

It is true as Grievants testified that on several occasions in 2009 they were paid the Tree Trimmer rate. There are several dates in June and November that this occurred. However, there also appear to be as many, and probably more, where operation of a chainsaw did not result in the higher rate. Moreover, there were special circumstances in the June payments.

Parties go to great pains to negotiate written contracts and there should be caution in subscribing binding status to simple occurrences in the manner in which work gets done. Arbitrator Jaffe stated it this way in his chapter on “Past Practice in Labor and Employment Arbitration (Bornstein, Gosline and Greenbaum General Editors – Matthew Bender), Volume 1, Section 10.02:

The party asserting a past practice has the burden of proving that the past practice exists largely because a past practice represents implied agreement by mutual conduct. An approach that readily inferred mutuality without strong evidence would undermine the significance of written collective bargaining agreements. If applied in a case in which the union asserts a past practice, such an approach would also contravene the “reserved rights” doctrine, which recognizes the right of the employer to manage its business except as restricted by law or contract. Finally, arbitrators handling grievance cases wish to avoid “legislating” new contract terms. Thus, the party asserting a past practice bears the burden of proving not only the existence, but also the scope, of any alleged past practice.

Nonetheless, there are indeed circumstances where a way of doing things becomes so well understood and recognized between the Parties that it doesn’t need to be put in writing. One of the many criteria in evaluating whether this is the case is consistency. It is not sufficiently present in this case.

In addition, a practice is only as meaningful as its underlying circumstances. The City pointed out that the June 2009 payments were in conjunction with storm clean-up on boulevards where the Grievants worked side-by-side with the Tree Trimmer. The City articulated a commitment to pay the rate in similar future circumstances. Yet the facts in this case do not show those circumstances were present in the December 2012 – January 2013 work.

As for the November 2009 payments, the City says those were in error. Whether that is true or not misses a more fundamental point. It all comes back to consistency and this element has not been satisfied.

AWARD

The grievances are denied.

(Signature on Original)

Gil Vernon
Arbitrator

Dated this 31st day of October, 2014.