

In Re the Arbitration Between

ISD 112, Chaska

and

The International Union of Operating Engineers, Local 70

Decision and Award of Arbitrator

BMS Case 07 PA 0893

**Carol Berg O'Toole
Arbitrator**

September 9, 2007

Representatives:

For the Employer:

**Pat Maloney, Attorney
Dr. Jim O'Connell, Director of Administrative Services
Paul Schlueter, Supervisor Building and Grounds**

For the Union:

**M. William O'Brien, Attorney
Meg Luger-Nikolai, Attorney
Jannell Nelson, IUOE Local 70 Business Representative**

Appearances:

For the Employer:

**Larry McClay
Roger Therres**

For the Union:

Jannell Nelson

Preliminary Statement

The hearing in the above matter commenced at 9:57 AM on June 28, 2007, at the Chaska School District offices. The parties presented pre-hearing briefs, oral testimony, oral argument and exhibits. Post hearing briefs by both parties and a reply brief by the union were received by the arbitrator. The arbitrator closed the hearing simultaneously with receipt of the last brief by U.S. Mail on August 18, 2007.

Issue Presented

1. The parties were not able to agree on a statement of the issues. The arbitrator formulated the issues as follows: Whether the arbitrator has jurisdiction over the issue?
2. Whether the employer violated the contract by laying off the Head Engineers, who were in the bargaining unit and creating Building Operations Coordinators, who were outside the bargaining unit?

Contractual Jurisdiction

Independent School District No 112, Chaska, (Employer), has thirteen buildings and a fourteenth, a new high school, in the offing. The International Union of Operating Engineers, Local 70 (Union), represents the sixty maintenance and custodial employees in the bargaining unit, certified by the Minnesota Bureau of Mediation Services. The parties are signatories to a collective bargaining agreement (CBA) which provides in Article XVI, Section 9, that disputes which the parties cannot resolve may be submitted to arbitration. The parties agreed to skip preliminary steps of the grievance

procedure and bring the dispute directly to arbitration. Employer disputes the jurisdiction of the arbitrator and brings a motion to dismiss.

**Issue Number 1-
Whether the arbitrator has jurisdiction over the issue?**

Employer's Position

1. Employer brings a Motion to Dismiss for lack of jurisdiction contending that the grievance is not arbitrable because no employee signed it.
2. Employer claims that the language of the grievance procedure in Article XVI is clear. The language requires Union to find an employee willing to sign the grievance. "A grievance shall mean an allegation by an employee . . . "
3. Employer raised this issue first on March 12, 2007, and claims that Union never sought an amendment.
4. Employer also contends that the arbitrator has no jurisdiction because the Public Employment Labor Relations Act (PELRA) and the CBA give Employer the inherent management right to determine the organizational structure, selection, direction and number of workers.
5. 5 Further, Employer under PELRA has the inherent management right to discontinue the Head Engineer position and implement a new supervisory position, Building Operations Coordinator (BCO).
6. Employer claims that BOC position is supervisory in nature and that PELRA has no requirement that a position be 100% supervisory to be outside the unit.

7. Finally, Employer contends that the right to assign work among job classes includes the right to assign bargaining unit work to supervisors. Employer cites PELRA, specifically 179A.03, Subdivision 17 as allowing such action.

Union's Position

1. Union argues that a grievance may be filed by Union without an individual employee's signature on the grievance form.
2. Union points to Article XVI, Section 2, of the CBA which states that Union may represent employees at "any step" of the procedure.
3. The CBA, in Article IV, Section 1, permits Employer to determine its organizational structure, but in Section 2 of the same article, requires observation of its legal limitations.
4. Union argues that the unit certification bars the removal of the Head Engineer job because, in essence, it would be sanctioning supervisors to perform bargaining unit work; that is, they would be working supervisors.
5. Union cites the same provision of PELRA, 179A.03, Subdivision 17, as Employer cited. The provision is permitted if both Union and the Commissioner of the Bureau of Mediation Services (Commissioner) agree to it in writing or Commissioner makes a separate determination. Union contends that neither has occurred.

Discussion

Article XVI, Section 2 of the CBA provides that both Union and Employer may be represented at any step of the grievance procedure by any person or agent designated by such party to act in his/her behalf. The filing of a written grievance form is a step of the procedure, Level I. Article II provides that Union is the exclusive representative of the custodial and maintenance workers. It follows that Union can file a grievance at Step 1 on behalf of the custodial and maintenance workers.

There is ample support for this proposition. Elkouri and Elkouri's *How Arbitration Works* (Ruben 2003) citing *Cyprus Emerald Res. Corp.*, 101 LA 1053, 1055 (Ipavec, 1993) states, "It is widely accepted that a union has standing to file a group grievance that affects a significant portion of the bargaining unit." Further, arbitration will be compelled even if a grievance is not signed by an employee member of the union. *Teamsters Local 744 v Skokie Valley Beverage Co.*, 644 F. Supp. 213 (N.D. Ill. 1986).

In addition, the dispute is arbitrable under PELRA. Both parties cite the same provision as supporting their position. PELRA provides in 179A.03, subdivision 17,

The removal of employees by the employer from a nonsupervisory appropriate unit for the purpose of designating the employees as "supervisory employees" shall require either (1) the prior written agreement of the exclusive representative and the written approval of the commissioner or (2) a separate determination by the commissioner before the redesignation is effective. (Numbers in parentheses added.)

Removing employees from a nonsupervisory bargaining unit and placing them in a supervisory, nonbargaining unit designation requires some action by the Commissioner, in either case. Employer argued that the Head Engineer/BOC issue had been addressed in a petition for clarification to the Commissioner. That request for clarification was denied for lack of ripeness. No evidence was presented at the hearing

that there was prior written approval of Commissioner or a separate determination by Commissioner regarding this issue. Nor was any evidence presented regarding prior written approval of this action by the exclusive representative, which was a requisite to the written approval of Commissioner.

Without these actions, the dispute becomes a matter of interpretation of the management rights provision of the CBA as well as the provisions designated in the grievance. The issue is arbitrable and properly before the arbitrator.

Decision

The Employer's Motion to Dismiss is denied.

Issue Number 2

Whether the employer violated the contract by laying off the Head Engineers, who were in the bargaining unit, and creating Building Operations Coordinators, who were outside the bargaining unit? Union's Position

1. Janelle Nelson (Nelson), testified that she is the Union Business Representation who has worked the bargaining unit for nine to ten years. She stated that the bargaining unit had 13 Head Engineers, who worked first shifts alone in the 13 buildings, except at the middle school level and the high school level.
3. Nelson represents the bargaining unit in negotiations for the CBA.
4. The prior CBA expired on June 30, 2007. The negotiations for a new CBA started on June 21, 2006, are "on hold" until the dispute over the Head Engineer/BOC is resolved.

5. During the negotiations for a new contract, the parties exchanged proposals. Employer raised the issue of removing the Head Engineer from the bargaining unit and offered to negotiate the matter.
6. Nelson testified that she was surprised at the job description for the BOC that she thought it was "identical" with the Head Engineer position with "very few extra things added."
7. Among those things added were "adjusting grievances" and "fir[ing]" employees.
8. Nelson testified that, when exercising those additional duties, BOC would have to consult with the supervisor, Larry Dvorak.
9. Employer's comparison list of the Head Engineer and BOC listed "no supervisory authority" for the Head Engineer, but that they did have some supervisory authority.
10. After the first negotiating session Employer set up a meeting for February 7, 2007, with the Head Engineers. Nelson attended the meeting.
11. At the meeting, the present Head Engineers were told that they would have the same benefits if they applied for BOC positions as they currently had and that any Head Engineer that applied would get the new BOC position. Nelson said that there was a "fear facto" present with Head Engineers.
12. The School Board implemented the nonbargaining unit position, BOC, on February 22, 2007, and notified the Head Engineers that their positions were terminated effective March 30, 2007.
13. On April 1, 2007, BOC positions started.

14. Nelson testified that when Employer sent the new position to Fox Lawson & Associates, LLC, the consultant, to do "decision banding," which analyzed each job tasks. Both the new and the old position were in the same band, Band B. This told her that there was no substantial change.
15. Nelson stated she objected to the arbitrary withdrawal of the Head Engineering position and the implementation of the BOC saying that they (Employer) "don't have the authority to just do what they want."
16. In comparing the job functions of the two positions, Nelson argued that the supervisory responsibility for adjustment of custodial grievances at Step 1 was meaningless as there had been no grievances, HR "makes the response," and that the BOC's "aren't the ones making the decision."
17. Nelson concluded that Employer's action "undoes the negotiated agreement."

Employer's Position

1. Roger Therres, a ten-year employee, including three and one-half years as Head Engineer and now a BOC, testified for Employer regarding the duties of BOC.
2. He stated that the "majority of the time [of the BOC] was maintenance duties."
3. Therres described that bonus and salary "upgrade" given to BOC's.
4. He described the role of the Head Engineer as to "hear the grievance" and "no involvement unless something minor . . . kick it up to Larry." He said now BOC can resolve it.
5. Paul Schlueter, an eight-year veteran of Employer, testified as to his position as Supervisor of Building and Grounds. He stated that recently four new facilities had been added and that much of his time lately had been spent overseeing the

construction of a new 2000 student high school. He indicated that one of his two direct reports, Larry Dvorak, was "stretching pretty thin," supervising 55 people.

6. BOC position wasn't "negotiated," but just brought up at the negotiation session in June 2006, as an "FYI." At the same session, it was announced that additional weekend positions added were union positions. The previously worked weekend overtime would be eliminated.
7. Schlueter testified that Employer's Exhibit 6, entitled "Position Comparison/Talking Points Building Operations Coordinator vs. Head Engineer," showed a significant difference in the positions. He testified that when BOC positions were posted all Head Engineers applied and were appointed. Currently BOCs are all the former Head Engineers and one outsider.
8. Schlueter described the training, which included how to perform performance reviews and said the form used for performance reviews "hasn't changed."
9. The decision banding for the position of Head Engineer was between B23 and B31 with the number depending on the size of the facility. The new BOC was rated at B31 for buildings less than 100,000 square feet and B32 for buildings more than 200,000 square feet.
10. Schlueter described BOC as having new supervisory duties, but that they "do essentially the same thing as before."
11. Larry McClay , BOC for Victoria Elementary which is the most recently completed school, testified that he works 1st shift. Victoria Elementary has two and one-half custodians working the second shift, including one "night lead."

12. McClay agreed that there were substantial new duties for BOC's including giving verbal rewards to custodians and that he has, since April 1, "talked" to one employee, for disciplinary purposes. He indicated that as Head Engineer he assigned and directed work and that as BOC, he still does, as well as handling first step grievances. He indicated, in regard to transfers, that he, as a Head Engineer, had not been involved and that there had been no involuntary transfers since he has worked for the Employer.
13. McClay testified that he still performed Head Engineer duties the "substantial majority of [the] time" and that he was no longer entitled to overtime.
14. Dr. Jim O'Connell, a former high school principal, now Director of Administrative Services, testified that he did the contract negotiations for Employer with twelve employee groups.
15. O'Connell termed the relationship with Local 70 as "great" and said Employer had been talking about the change in organizational structure for "a couple of years."

Discussion

There is no doubt that employers, under PELRA and the CBA, have the right to change their organizational structures by adding supervisory positions. A span of control of 55 employees would be unworkable in most situations, including this one. Up until now, Employer has utilized three supervisors with one supervisor being responsible for the 55 custodians. The unit certification covers "[a]ll custodial and maintenance employees," but makes no mention of working supervisors. CBA provides that there are Night Leads and Head Engineers who are paid according to

square footage of building. Article VII-Rates of Pay provides the following pay designations:

- Custodian
- Delivery Driver/Grounds Maintenance Helper
- Custodian/Groundskeeper
- Custodian/Maintenance over 200,000 sq. ft.
- Night Lead-less than 100,000 sq. ft.
- Night Lead-100,000-200,000 sq. ft.
- Night Lead-over 200,000 sq. ft.
- Maintenance/Grounds
- Maintenance Specialist
- Head Engineer-less than 100,000 sq. ft.
- Head Engineer-100,00-200,00 sq. ft.
- Head Engineer-over 200,000 sq. ft. (hourly rates for all positions omitted)

Lead Worker is a common position in many custodial bargaining units and they are usually, if not always, in the union. From the testimony it is clear that the Head Engineers operated like Lead Workers. Similarly, the newly created positions, BOC's operate like Lead Workers. They are described as having "significant overlap in the tasks that were performed by the Head Engineers" (Joint Exhibit D).

It is apparent that Employer attempted to resolve this dispute amicably. Employer took extraordinary steps to determine whether this was a position in the unit or out of the unit. At the hearing, Employer's counsel described the efforts to obtain a clarification of BOC from Commissioner. That attempt was met with the response that the issue was not yet ripe.

In addition, Employer broached the subject presently in dispute in at least one negotiation session. Understandably, with the sheer numbers involved, Union felt it was fighting for its very existence. No resolution occurred.

Although none of these efforts obviated the need for this arbitration, Employer has displayed a cordiality that is exemplary and not often seen, even in sophisticated

bargaining relationships as these parties have. Such actions are not futile and will carry dividends to be reaped in another way, at another time in the bargaining relationship in the future. The thoughtful and positive approach has not gone unnoticed by this third party and, hopefully, by others.

This might have been a different case and different award if Employer had not finally, after all its other efforts, taken all the Head Engineers and made them BOC's. All Head Engineers applied and all were hired to the new nonunit position. Union lost approximately one-fourth of its membership.

The decision might have been different had Employer had not discontinued/terminated the Head Engineer position and all the incumbents. This action was taken by the School Board on February 22, 2007. The meeting summary states, "At its regular meeting on February 22, 2007, the District 112 School Board: ...[a]pproved] an administrative recommendation to discontinue/terminate the head engineer positions at each school and to replace them with a building operation coordinator."

The decision might have been different had if the BOC's had not operated in essentially the same way as the former Head Engineers. The testimony was consistent from those who had actually done the jobs. The BOC position was essentially the same as the Head Engineer position. Much attention was given to the promotion decisions. The language of CBA gives little discretion in promotion. Article XI, Section 4, provides that, "Seniority will apply in the filling of vacancies provided an employee has the qualifications to perform the duties and responsibilities of the position." For promotion, Section 5 provides in Subdivision 1, Promotion, "In filling positions involving a promotion . . . the position shall be filled by the District with the senior qualified candidate. In making its determination, District 112 shall consider the employee's qualifications,

aptitude for the position as well as his/her length of service with the School District along with other relevant factors . . . " It appeared from the testimony that the most senior applicant was usually the one promoted.

The decision might have been different had if the elementary BOC who testified had the responsibility of actually supervising other custodians on the same shift. Most of the custodians work the second shift, which is supervised by the Night Lead. Exhibit 1, Custodial Support per Building and Shift, showed the Night Lead, a position in the bargaining unit, directly supervising on the same shift more custodians in every building than the BOC's supervised. There was a single exception, the DEC where there was only one person, either the BOC or the Night Lead, on two shifts.

The decision might have been different had if the decision banding consultant had found the BOC's held major new responsibilities. The decision banding appeared to have been based on square footage, a difference already used in paying custodians in the CBA. BOC was placed in the same band as the Head Engineers.

The decision might have been different had if the change was perpetrated by a new technology, instead of simply more buildings and greater square footage. Elkouri, *supra* at 717, 718, states:

"[W]here the union proved that foremen were persistently performing the work that would have been done by the eliminated crew member may be pertinent in determining whether a reduction in the crew was in fact justified. The weight to be accorded such a factor would depend on the amount and frequency of work performed by personnel outside the crew in question . . . where the union proved that foremen were persistently performing the work that would have been done by the eliminated crew member, the arbitrator considered that the company by such action tacitly recognized that the crew was short-handed. The introduction of new technology may justify reduction of crew size and reassignment of job responsibilities to nonunit employees. (Cites omitted)

No evidence of new technology was introduced at the hearing.

Award

Based on the above and the entire record, a violation of CBA has occurred. The grievance is sustained. The custodial and maintenance work is restored to the bargaining unit.

Carol Berg O'Toole

September 9, 2007