

**IN RE ARBITRATION BETWEEN:**

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**IBEW LOCAL 160**

**and**

**XCEL ENERGY**

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**DECISION AND AWARD OF ARBITRATOR**

**AAA # 65-300-00036-11**

**JEFFREY W. JACOBS**

**ARBITRATOR**

**September 20, 2011**

IN RE ARBITRATION BETWEEN:

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IBEW Local 160

and

Xcel Energy.

DECISION AND AWARD OF ARBITRATOR  
AAA Case # 65 300 00036-11  
Pool cars grievance

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**APPEARANCES:**

**FOR THE UNION:**

M. William O'Brien, Attorney for the Union  
James Murzyn, grievant  
Thomas Cassidy, Union Steward

**FOR THE EMPLOYER:**

Michael Moberg, Attorney for the Company  
Warren Birgel, retired Xcel Manager  
Paul Karolevitz, Control Center Leader  
Krissann Nelson, Sr. Labor Relations Consultant  
Craig Hayman, Dir. of Control Centers and Trouble

**PRELIMINARY STATEMENT**

The hearing in the matter was held on June 28, 2011 at the office of Briggs and Morgan, in Minneapolis, Minnesota. The parties submitted Briefs that were received by the arbitrator on August 29, 2011 at which point the record was closed.

**CONTRACTUAL JURISDICTION**

The parties are signatories to a collective bargaining agreement covering the period from January 1, 2008 through December 31, 2010. Article II provides for submission of disputes to binding arbitration. The arbitrator was selected from a permanent list administered by the American Arbitration Association. The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

**ISSUES PRESENTED**

The Union stated the issues as follows:

Whether the Company violated the collective Bargaining Agreement, including but not limited to Article I, section 1, and Article VII, Section 18 and or practice established thereunder by unilaterally dictating that Trouble Department Foremen must use pool vehicles rather than personal cars on their relief shifts? If so what shall the remedy be?

The Company stated the issues as follows:

Did the Company abide by the West Region Labor Agreement when it assigned Trouble Foremen to drive a Company vehicle when the Trouble Foremen were on their relief shift? If not what shall the remedy be?

The issue as determined by the arbitrator is as follows:

Did the Company violate the collective bargaining agreement or established practices when it assigned the Trouble Foremen to use pool cars rather than their own personal vehicles? If so what shall the remedy be?

**UNION'S POSITION:**

The Union's position was that the Company violated the CBA when it unilaterally forced employees to use pool cars for their relief/out shifts instead of their cars in violation of past practice in this matter. In support of this position the Union made the following contentions:

1. The Union asserted that since approximately 2000 the Trouble Foremen have been allowed to use their personal cars and receive mileage reimbursement from the Company when they were required to work in the field on their relief shift. While there was one short period in 2005-2006 when the Company unilaterally changed that policy, the Union raised objections to the attempt to change the prior practice and the parties agreed to allow the Trouble Foremen to continue the practice of using their personal vehicles on relief shifts. A relief shift occurs two weeks out of every ten weeks and Trouble Foremen work in the field assisting with switching operations by field crews.

2. The Union cited the history of this department and noted that from the early 1970's until 1993 these employees were bargaining unit members. In 1993 pursuant to a unit clarification petition filed before the NLRB, the Trouble Foremen were considered supervisors and were out of the unit. Upon appeal they were reinstated to the unit in 2000. Since that time they were allowed to use their personal vehicles, with the exception of the one short period, which was vigorously objected to by the Union, in 2005-06, when they used their personal vehicles for relief shifts.

3. The Union cited the history in 2005 and asserted that when the Company sought to change the practice of allowing these employees to use personal vehicles, the Union objected, even though there was no grievance filed. The Union noted that given the long and generally peaceful relationship between these parties it is not uncommon for the Union to raise an objection but seek to resolve it short of a formal grievance. This was what occurred in 2005 and the parties sat down in labor management committee and worked out a solution.

4. The Union noted that the Company agreed to reinstate the practice that had been in place for approximately 5 years prior to 2005 and allowed the Trouble Foremen to continue using their personal vehicles and argued most strenuously that there was a quid pro quo for that agreement. The Union noted that about this same time there was an incident involving the Wilson Substation, which was aging and had older equipment there. The East Metro operators called to that site were unfamiliar with it and refused to work there citing safety concerns, which is their right under the contract. In exchange for the agreement to allow the Trouble Foremen to continue using their personal vehicle, the Union argued that the agreement was for the Trouble Foremen to provide emergency back up for the Wilson Substation.

5. The Union argued that these two issues were not separate, as the Company contended and introduced testimony from the representatives of the Union who were involved in those discussions who indicated that there was an agreement and that there was a quid pro quo/give and take for those two items. The Union further noted that even though there was no formal writing about this, there does not necessarily have to be and that an oral agreement of this nature, coupled with a clear past practice for the ensuing 4 years, fully supports the Unions claim that there was an agreement to allow the Trouble Foremen to use their vehicles in exchange for the agreement to provide back up for West Metro substations including Wilson. Thus there is both an actual agreement as well as a longstanding practice that underlies the Union's claims here.

6. The Union cited several arbitral commentators and awards for the proposition that the CBA is far more than mere words on a piece of paper but in fact reflect a living document and a set of relationships that can and do change over time based on the agreements and understandings reached by those responsible for dealing with the contract. Further, an arbitrator's source of "law" is not confined to words in the CBA but include the "law of the shop." Here the clear understanding was that Trouble Foremen were allowed to use their personal vehicles for relief shifts and that this clear and binding practice cannot now be changed absent negotiations between the parties.

7. Further, the Union argued in response to the Company's claim that there was no quid pro quo that it makes no sense that the Company would suddenly decide in 2006 out of the goodness of its heart to reinstate a practice without any sort of concession from the Union. Why else the Union posited, would the Company agree to reverse its decision unless there was some sort of agreement? The Union further noted that the Company also wanted the Union to participate in labor management committee meetings, which had waned by that time, and part of the quid pro quo was to return to the labor management committee meetings so the parties could resolve these very types of issues.

8. The Union further noted that the practice of allowing Trouble Foremen to use their personal vehicles had been in place for at least 5 years (actually it was in place prior to that as well during the period from 1993 until 2000 when the Trouble Foremen were not considered part of the unit), and that this constitutes a binding past practice.

9. The Union asserted that since 2006 until the Company tried again to unilaterally change the practice, the Trouble Foremen consistently used their personal vehicles for relief shifts. The Union argued that all the elements necessary to establish a binding past practice are present. It has been consistent, and with the one minor time period in 2005-06 discussed above, since 2000. It was longstanding and mutually accepted as the agreed upon way of doing things and was not merely an exercise of managerial discretion – it was part and parcel of an agreement to return to the Labor Management Committee meetings and was the direct result of agreement reached at those discussions.

10. The Union countered the claim that the Trouble Foremen did not use their personal vehicles prior to 1993. While it is true that they did not for perhaps 20 years, they certainly did from 1993 until 2000 and again thereafter for another 5 years and have ever since the agreement reached in 2006. The Union asserted that the obvious fact that interrupts this time line was the unit clarification petition. The Union argued that the operative time frame is thus post-2000 and asserted that since then, with one short exception, the practice has been entirely consistent.

11. The Union countered the claim by the Company that upper management and Union leadership may not have been formally involved in the discussions surrounding the agreement to allow personal vehicle use in exchange for the Trouble Foremen covering certain emergency call outs and argued that frankly this is many times how past practices evolve.

12. The Union cited Article 1 (1) and Article 7 (18) and argued that the unilateral change in the practice violated those sections of the agreement. Those sections provide as follows:

ARTICLE 1 (1) - The Company and the Local Union agree to negotiate and deal with each other, through the duly accredited officers and committees representing the parties hereto exclusively, for all employees of the Company covered hereunder, on matters relating to hours, wages and other definite conditions of employment, included within the application and interpretation of this Agreement affecting said employees.

ARTICLE 7 (18) – There shall be no change in job performance unless so determined by the established method of negotiation as provided for in this Agreement.

13. The Union asserted that this is a matter that falls within the purview of both of these provisions and relates to conditions of employment and job performance. The issue of vehicles is a matter of “job performance” and must be negotiated as provided by Article 7.

14. Moreover, if a Trouble Foreman is required to drive the whole way to the shop and get a Company vehicle that will take far more time and take away from the actual switching or other duties as may be required in the field. The while purpose of the relief shift is to assist the operators in the field, not drive around getting to a Company provided vehicle.

The Union seeks an award sustaining the grievance and restoring the parties to the status quo ante of allowing the Trouble Foremen to use their personal vehicles on their relief shifts.

## COMPANY'S POSITION

The Company's position was that there was no violation of the contract or of any binding past practice in the matter. In support of this position the Company made the following contentions:

1. The Company asserted that one must look much farther back into the history of this issue to fully understand it. The Company noted that in the 1970's the Trouble Foremen drove Company vehicles on relief shifts and that this practice continued for decades. The Union never objected to this nor filed a grievance over it until the instant grievance. Further, there was not evidence that the practice of requiring these employees to use Company provided vehicles ever changed from the early 1970's until 1993. The Company put on several witnesses who testified that everyone understood that and there was no countervailing evidence introduced by the Union on this point.

2. The Company noted that the decision of the NLRB taking the Trouble Foremen out of the unit in 1993 was reversed in 1999 and they were again placed back into the unit. The parties executed an agreement to this effect in 1999 but that agreement is silent on the question of whether they are to be allowed to use personal vehicles. In fact, the Company asserted repeatedly that there is literally nothing in writing supporting the Union's claims here despite their assertion that there was a specific quid pro quo over it.

3. The Company asserted most strenuously that it makes no sense either that such an important agreement would literally never be reduced to writing anywhere. Typically there is such a writing, frequently called an "Exhibit B" to the agreement, and the parties sign it. No such writing exists on this supposedly crucial issue.

4. Further, the Company asserted that the so-called "practice" was an exercise of managerial discretion and that even the main Union witness acknowledged that the practice of mileage reimbursement for personal vehicles existed only so long as management "allowed it." As noted below, the exercise of discretion does not and cannot provide the basis of a binding past practice and the Union's claim on that point must fail.

5. The Company also asserted that when it decided it would be more efficient and cheaper to return to the former practice of requiring Company vehicles, as had been the case prior to 1993, the Company changed the practice in 2005-06. The Company acknowledged that the Union and its members were not happy with this change but that no grievance was ever filed at that time, despite the fact that the Union filed hundreds of such grievances every time it objected to anything the Company did. The Company further asserted that there was no specific negotiation over this is and certainly no agreement or quid pro quo as the Union suggests.

6. The Company asserted that in 2006, when there was new management, the Company wanted to see if they could engage the Union in discussions about West Metro Trouble department employees. The Company desired to have the Union re-engage in labor management meetings and that the Company was aware of the dissatisfaction by Trouble department employees in the then recent change in policy regarding the use of personal vehicles. Accordingly, in order to get the Union to engage in those meetings it was decided to entice the Union to those meetings by allowing Trouble Foremen to once again use their personal vehicles and be reimbursed when they worked a relief shift. The Company asserted though that this was the sole reason for that change and that there was never an agreement to make this permanent nor was there a quid pro quo in exchange for the West Metro Trouble Foremen to cover certain West Metro substations.

7. The Company questioned whether there was a “handshake” agreement and noted that no Union business agent was a party to this nor was there anyone from upper management who was identified as having agreed to this. The Company noted that the Union’s witnesses were inconsistent and evasive about who from the Company really agreed to this and noted that a Mr. McCormick was identified as the person from management who was party to this but the Union witnesses indicated that the “deal” was struck in 2005. Mr. McCormick was not even there until 2006.

8. In 2009, the Company decided to exercise its inherent managerial right to return to the longstanding practice of requiring Trouble Foremen to use Company provided vehicles on relief shifts. The Company asserted that the Union does not get to question the wisdom of this or whether it is more efficient. That is for management to decide – the sole question is whether there is a violation of the contract and none has been identified on this record, according to the Company.

9. The Company further noted that this was a cost savings measure as well as to make sure that there was adequate insurance carried by the employees. Further, the Company decided it would be better to have marked vehicles so the general public and other employees would know that Xcel crews were there. Having random vehicles parked in and around a site may lead to confusion in that regard.

10. The Company distinguished other employees, i.e. RAFT Operators, and noted that they have a specific Exhibit B covering their department. There is no similar agreement for these employees and the Company asserted that the reference to the RAFT operators is simply inapposite.

11. The Company relied on the management rights clause for the ability to make this change. That provides as follows:

ARTICLE 1 Section 2 – The right, in accordance with the provisions of the Agreement, to employ, promote, discipline and discharge employees and the management of the property are reserved by and shall be vested in the Company. The Company shall have the right to exercise discipline in the interest of good service and the proper conduct of its business. It is agreed, however, that promotion shall be based on seniority, ability and qualifications. Ability and qualifications being sufficient, seniority as defined in Article VIII shall prevail.

12. It further asserted that there is no consistent practice if one looks at the full history of this practice. For years, decades in fact, the practice was the opposite of what the Union wants. The Trouble Foremen used Company vehicles from the early 1970's until 1993. It was only after their removal from the bargaining unit that they used their personal vehicles. Once they came back, the Company decided as an exercise of discretion to continue that practice until 2005 when it became more beneficial to the Company to change that practice. As noted above, the practice was discontinued without a grievance even being filed at that time nor any writing formalizing its reinstatement.

13. The Company argued that this sort of almost 40 year history can hardly be said to support a binding past practice as the Union asserts. The history is sporadic at best and has clearly changed back and forth without objection by the Union for decades. Further, this case falls far short of the compelling evidence necessary to establish and binding past practice outside of the labor agreement. Such proof is generally required and here, the Company argued, there was little if any evidence of consistency or unequivocal mutual acceptance of the practice.

14. The Company further noted that even the Union witnesses acknowledged that the “practice” was nothing more than an exercise of managerial discretion. The grievance itself filed in this case indicates that the policy was with “supervisory approval.” Further, Mr. Murzyn acknowledged on cross-examination that they had “permission of Trouble Management,” for the use of their personal vehicles. These words are more than mere happenstance, according to the Company and demonstrate a clear understanding that the practice was only through the permission of management. Such an exercise of discretion is not a basis for a binding past practice and such permission can be withdrawn as management sees fit – as here.

15. The essence of the Company’s case therefore is that there was no agreement in 2006 or at any other time to allow personal use of vehicles and insufficient evidence of any binding past practice that would operate to require it in the absence of such an agreement.

The Company seeks an award of the arbitrator denying the grievance in its entirety.

## **DISCUSSION**

Many of the operative facts of the matter were undisputed. From the early 1970’s until 1993 the Trouble Foremen were bargaining unit members. In 1993 the NLRB ruled that they were supervisory and were thus excluded from the unit. In late 1999 that ruling was reversed and pursuant to an agreement between the parties they went back into the unit. They have remained members of the unit ever since.

It was also clear that Trouble Foremen typically work in the control center and are responsible for monitoring and managing the electrical distribution system, switching and other related activities. Two weeks out of every ten weeks they work what is known as a relief shift, aka outshift, and may be assigned to work either in the Control center or in the field assisting operators with switching or to observe operations there. They are required to drive to these remote locations and sites. The dispute centers over the vehicle they are to use to do that.

The evidence was also clear that from the early 1970's until 1993 the Trouble Foremen used Company provided vehicles to drive to the field during their relief shifts. There was no indication that they were allowed to use their own personal vehicles for this purpose during that time frame. Commencing in 1994, following the unit clarification decision by the NLRB, the Trouble Foremen were no longer in the unit and were allowed to drive their personal vehicles on their relief shifts. There was no negotiation on this issue in 1994 and the Trouble Foremen were allowed to drive their personal vehicles and receive reimbursement.

After the NLRB decision was reversed in 1999 and in October 1999, the parties executed an agreement regarding the return of the Trouble Foremen back into the unit. See Company Exhibit 1. That agreement is silent on the question of vehicles. The Company continued the practice of allowing the Trouble Foremen to drive their personal vehicles from their reinstatement into the unit in 2000 until 2005. The evidence showed that during this period, the practice was consistent and well established – the Trouble Foremen and the management of their department were all well aware of this practice and it appeared to continue for approximately 5 years unabated.

In 2005 the Company changed the policy and required the Trouble Foremen to use a Company provided vehicle. The evidence showed quite clearly that the Company was aware of the Union's dissatisfaction with the decision. There was no formal grievance filed at that time.

The evidence did however show that these parties have a long and generally cooperative relationship and that there are often times when they attempt to resolve issues without resorting to formalized grievances. This was one such instance.

The factual dispute centered squarely over whether there was any sort of quid pro quo here. Several things were important. First, it was clear that the Company knew of the Union's objection to the change in the vehicle policy at that time. While there was no formal grievance filed both Company witnesses as well as counsel acknowledged as much, see Company Brief at page 7. Tr. at page 133, 136. This was consistent with the testimony of both Union and Company witnesses. It is the outward manifestations made during such negotiations and the reasonable inferences to be reached based on the context of negotiations of this nature that many times governs the determination of contractual intent. Here the fact that the objection to the change in vehicle policy, which had by that time been in place for more than a dozen years for these employees including the five since they returned to the unit, was known to both sides is of some significance.

Second, the parties did discuss it at labor management meetings. It was clear that the parties sat down as a part of their ongoing effort to resolve mid-term issues such as this and discussed this very issue. While there were no notes kept of these the testimony from both sides was instructive as to whether there was any sort of quid pro quo. The Union certainly felt there was and noted that the vehicle policy changed at the very same time as the policy reading emergency call-outs did. Mr. Murzyn testified credibly that this was a "very big give" by the Company. It was clear that this was true and there was very little evidence to the.

Third, the vehicle policy changed at virtually the same time as the parties agreed to recommence labor management committee meetings; which had apparently languished and the Company wanted to "entice the Union" to re-engage in that process. There was thus substantial evidence to suggest that the Union was led to believe, purposely or not, that the change in vehicle policy was very much tied to that other change in policy. Tr. at page 124-125.

Thus, while the Company may well have believed the two issues were entirely separate, the clear evidence was that the Union did not and that it was in fact quite reasonable for them to infer that they were not based on the above facts. The fact that the Company offered the change of the vehicle policy to entice the Union to the labor management meetings again is the operative fact here. The obvious import is that the company offered something in exchange for something else. See, Company Brief at page 7 and Tr. at 128. In this context it was clear that the Union and its members were led to believe that they had given up something to get the vehicle policy back.

On this record, even though there was no formalized writing memorializing the agreement reached to change the vehicle policy in exchange for the enticement to return to the labor management meetings and/or to change the call out procedure, although it certainly would have been better if there had been, such an agreement given the evidence of action based on it is enough.<sup>1</sup> It is also frequently the case that practices of this sort arise in just this way. The fact that neither upper management nor Union leadership was involved does not necessarily determine the result. What is important is that those affected by it on the shop floor *are* and apply it on a routine basis. It is from that very sort of scenario that many such practices are born. Here there was an agreement to change the vehicle policy as a way to entice the Union to the labor management meetings or for the change in the duties of responding to emergencies, and those affected by it applied it on a routine basis for several years.<sup>2</sup>

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<sup>1</sup>The Union asserted that there was a specific discussion tying these two items together. This was disputed evidence by the Company. Obviously, if one believes that there were specific discussions tying the vehicle policy to the change in emergency call-out policy the case is over at that point. Here though, the evidence showed that the Company offered the change in vehicle policy at the very least as a way to entice the Union to return to labor management committee meetings. This fact alone was sufficient to support the Union's claim that there was a quid pro quo. The agreement reached in 2005-06 in this regard necessarily is part and parcel of the relationship between these parties and thus "draws its essence" from the collective bargaining agreement.

<sup>2</sup> Both may well have actually been true here. In either case it was the consideration given in exchange for something in return that is significant. It is also the case on these facts that this issue may well have been a matter of management rights but for the specific agreement reached regarding the vehicle policy. As noted, it is on this basis that the decision rests.

Fourth, the clear evidence was that after the vehicle policy was changed it remained in place unabated and unchanged for another several years until the Company again attempted to alter it in 2009. As discussed more below, while there may or may not be sufficient evidence to warrant a finding of a binding past practice, this case does not proceed exclusively on that analysis. This is a somewhat different case from one involving past practice alone; this case is based on the finding that there was a specific agreement between the parties to change the vehicle policy in 2006 as a part of labor management meetings and the practice that grew out of it simply served as evidence of what the parties intended by that agreement.

Finally, the Company argued that this was merely an exercise of managerial discretion based on its management rights clause and the right to direct the workforce. In any case involving past practice that question must be examined – is this merely a change in a discretionary policy, alterable at the discretion of management or is it based on something that binds management to a certain result?

Elkouri notes as follows:

Arbitrators are often hesitant to permit unwritten past practice or methods of doing things to restrict the exercise of legitimate functions of management. For example, such hesitance was evidenced by Arbitrator Whitely McCoy: But caution must be exercised in reading into contracts implied terms, lest arbitrators start remaking the contracts which the parties themselves made. The mere failure of the Company, over a long period of time, to exercise a legitimate function of management, is not a surrender of the right to start exercising such right. ... Mere non-use of a right does not entail a loss of it.” Elkouri and Elkouri, *How Arbitration Works*, 5<sup>th</sup> Ed. at P. 635.

Further, Elkouri cites the admonition of Arbitrator Harry Shulman as one of the most cogent statements published regarding the binding force of custom and past practice as follows:

“But there are other practices which are not the result of joint determination at all. They may be mere happenstance, that is methods that developed without design or deliberation. Or they may be choices that developed by Management in the exercise of managerial discretion as to the convenient methods at the time. In such cases there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things. The relevant item of significance is not the nature of the particular method but the managerial freedom with respect to it. Being the product of managerial determination in its permitted discretion such practices are, in the absence of contractual provision to the contrary, subject to change in the same discretion.” Elkouri, *supra*, at p. 636.

On this record, the evidence did not support the assertion that this was merely the use of managerial discretion. The evidence showed that there was an agreement, supported by later action and practice by the parties that takes this out of the purview of the exercise to managerial discretion alone and into the realm of an agreement by the parties. It is on that basis that this decision proceeds; without it the result would have been quite different.

There was further some merit to the Union's assertion that this issue is tied to the language of Article 7(18). As noted above, the language requires that "there shall be no change in job performance unless so determined by the established method of negotiation as provided for in this Agreement." It should be noted that this decision is limited to these facts and that no decision is made interpreting the term "job performance" beyond this matter.

As noted above, the result here is largely determined by the findings related to the discussions in 2005-06. There was an element of past practice here as well that serves to support the Union's case. It is certainly true that the 40-year history of this policy shows that it has changed on several occasions. It was not however a moving target, as the Company suggested. It was entirely consistent from the 1970's until 1993. It was again consistent from 1993 until 2005. It changed for a short time until 2006 and has been again consistent from 2006 until this grievance was filed. A truly inconsistent practice might well manifest itself very differently, changing from week to week or from instance to instance. Here the Union demonstrated that this practice has been consistent for a sufficiently long enough period of time and that the parties understood why it was in place and what was given up to get it.

Perhaps the best known case in Minnesota was Ramsey County v AFSCME, 309 N.W.2d 785 (Minn. 1981). There the arbitrator found that the parties' practice with respect to vacation accrual rates differed from the clear language of the contract. The matter arose when it was discovered that employees had for years been receiving vacation accruals and payments upon their departure from the County that were very different from what the clear language of the contract indicated. The County had argued that the clear language of the contract (and it was) indicated that the County had been paying the incorrect accrual rates for years and that it was simply done in error. The County also argued that the language of the contract where clear must always govern lest the whole process of negotiations be threatened with too liberal a use of past practice.<sup>3</sup>

The Minnesota Supreme Court in held in *Ramsey County* as follows:

“[p]ast practice has been defined as a ‘prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances.’ Certain qualities distinguish a binding past practice from a course of conduct that has no particular evidentiary significance: (1) clarity and consistency; (2) longevity and repetition; (3) acceptability; (4) a consideration of the underlying circumstances; (5) mutuality. 709 N.W.2d at 788, n. 3 (Citing from Mittenhal, *Past Practice and the Administration of Collective Bargaining Agreements*, in *Arbitration and Public Policy* 30 (S. Pollard ed. 1961).

Elkouri stated the elements slightly differently: In the absence of a written agreement, ‘past practice,’ to be binding 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.” Elkouri & Elkouri, *How Arbitration Works*, 5<sup>th</sup> Ed. P. at 632 citing to *Celanese Corp. of America*, 24 LA 168 (Justin 1954). The general requirements are much the same however.

The evidence here showed that for years the parties regarded the vehicle policy as mutually acceptable and an established practice accepted by both parties. It was certainly clearly enunciated as apparently everyone affected by it knew about it and applied it consistently. As noted above, there was evidence of mutuality based on the way in which it was changed in 2005-06.

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<sup>3</sup> Does the faintest ink trump the clearest memory? Or, as it is sometimes stated, do actions speak louder than words? That is always the question in cases of this sort. Here the latter analysis, especially when coupled with the evidence of a quid pro quo, carried the burden for the Union on this record.

Thus on this record, the practice itself adds considerable weight to the Union's case in that the practice changed only after new management took over in 2009. While the case does not proceed on a strict past practice analysis, the practice that has existed since 2006 supports the notion that there was an agreement reached to reinstate the vehicle policy as it had existed from 2000 to 2005 based on mutual consideration as a result of the labor management committee meeting process.

Accordingly the Union's grievance is sustained and the Company ordered to reinstate the vehicle policy allowing the Trouble Foremen to use their personal vehicles with reimbursement unless and until the parties modify or alter that policy through negotiations.

**AWARD**

The grievance is SUSTAINED.

Dated: September 20, 2011

IBEW 160 and Xcel Energy – Murzyn - award

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Jeffrey W. Jacobs, arbitrator