

IN THE MATTER OF THE ARBITRATION BETWEEN

**International Brotherhood of Electrical
Workers, Local #23 [Timothy Pearson]**

And

Xcel Energy, Inc.

OPINION AND AWARD
American Arbitration Association case #
01-14-0001-7275 [Grievance #3634]

ARBITRATOR

Joseph L. Daly

APPEARANCES

On behalf of IBEW, Local #23
M. William O'Brien, Esq.
Emily L. Marshall, Esq.
Miller, O'Brien, Jensen, PA
Minneapolis, MN

On behalf of Xcel Energy, Inc.
Michael J. Moberg, Esq.
Jackson Lewis P.C.
Minneapolis, MN

JURISDICTION

In accordance with the labor agreement between Metro East Region of Northern States Power Company d/b/a Xcel Energy and International Brotherhood of Electrical Workers, Local #23, January 1, 2014-December 31, 2016; and under the jurisdiction of the American Arbitration Association, the above grievance arbitration was submitted to Joseph L. Daly, Arbitrator, on June 2, 2015, June 3, 2015, and June 23, 2015, in Minneapolis, Minnesota. Post-hearing briefs were submitted by the union on September 24, 2015; and by Xcel Energy on December 1, 2015. The post-hearing brief submitted by Xcel Energy was delayed due to the attorney for the company transitioning into a new law firm. The delay was with agreement of the arbitrator and the attorney for the union.

ISSUE AT IMPASSE

The parties agree that the issues are:

1. Did the employer have just cause to terminate the grievant, Timothy Pearson?
2. If not, what remedy is appropriate?

RELEVANT CONTRACT AND POLICY LANGUAGE

ARTICLE I

METHOD OF NEGOTIATION

Section 2. The right, in accordance with the provision 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.

Section 3. The employees, through the representatives of the Local Union, shall have the right to a hearing on any differences of opinion as to the competency of any employee to fill a new position or vacancy, of promotion or demotion, of discipline administered, of layoffs, of discharge, or of discrimination.

Section 4. It is agreed that an employee who has attained seniority shall be presented with written notice of discharge at the time of discharge and the Company shall within fifty-six (56) hours furnish the Local Union with specific written reasons for such discharge.

Section 5. In the matter of suspension, demotion, or discharge, if after hearing witnesses, the charges are not sustained, the employee shall have his/her record cleared of such charges and the arbitration board may rule that the employee shall or shall not receive full or partial wages from the Company. No discipline by suspension shall be administered to any member of the Local Union which shall impair his/her seniority rights.

ARTICLE V

WORKING HOURS

Section 10.

(a) When it is necessary that employees work overtime and such work interferes with the regular meal time, they shall be furnished a meal at the Company's expense at reasonable intervals while working.

(b) When employees work one or more hours overtime and such work interferes with regular meal time, they shall be furnished a meal at the Company's expense, except as provided for in Subsection (c) of this section, and at reasonable intervals thereafter while they continue working. Employees who are called to work two (2) hours or more before the regular starting time shall be furnished a meal, and if employees receive a call to report to work immediately, in which case they would not have the opportunity to prepare a lunch, the Company shall furnish a meal at the established meal time in accordance with their schedule of work.

(c) When an employee is not released at the expiration of his/her work day and works overtime for a period of one or more hours but not in excess of two and one-half (2 ½) hours and is entitled to a meal under the terms and conditions of this Section, the Company may at its option pay to the employee involved Nine Dollars (\$9.00) instead of actually furnishing the meal. Where it has been the practice of the Company in the past to pay a cash sum instead of actually furnishing the meal to an employee who is not released at the expiration of his/her shift and works overtime for a period in excess of two and one-half (2-1/2) hours, that such practice is not to be changed except that the Company instead of the various cash meal allowances that have been made in the past shall now pay Nine Dollars (\$9.00) for such cash meal allowances, if the employee is entitled to a meal under this Section. The evening meal referred to in this Subsection shall not be paid to employees working out of town on Company expense allowance.

(d) When the Company actually furnishes the meal, the expense allowance for such meal shall not exceed Nine Dollars (\$9.00). The aforementioned expense allowance also applies to the evening meal furnished to employees working out of town on Company expense allowance.

CODE OF CONDUCT

Responsible by Nature

Our values are to:

- Work safely and create a challenging and rewarding workplace.
- Conduct all our business in an honest and ethical manner.
- Work together to serve our customers

Legal and Ethical Standard

You must be honest, fair and trustworthy in all company activities and relationships. You must know and comply with this Code of Conduct, other company policies, laws and regulations. We will not tolerate any unlawful or unethical activity or any activity that may appear unlawful or unethical.

Safety

Safety is a core value at Xcel Energy. We must consider safety as our primary responsibility. You need to work in a manner to prevent personal injury to yourself and others, and damage to company or customer property and equipment. You must comply with all applicable safety policies and with federal and state safety regulations.

Leaders are required to enforce policies and procedures and support a reward and recognition system that fosters a safety culture.

Be responsible. Read and follow corporate policy 12.1, Safety.

Security

Xcel Energy is committed to compliance with requirements for security regulations and protecting company assets, including people, property, products and information.

Employees are required to take appropriate steps to: 1) protect assets, people, property and products from injury, loss and damage; 2) ensure the safety of employees, contract workers, visitors and customers; 3) protect information from loss or unauthorized access and 4) preserve company revenue.

Consequences of Violating the Code of Conduct

Employees who violate the law, Xcel Energy's Code of Conduct or any other company policy will be subject to disciplinary action or termination. Additional action may include reassignment of work duties and limitation in future job opportunities. Violations of law may be referred to law enforcement authorities for prosecution.

Discipline Guidelines/Positive Discipline (Uniform Policy)

Summary

Positive Discipline is a system that emphasizes employees' responsibility for their own behavior. It focuses on communicating an expectation of change and improvement in a positive way while, at the same time, maintaining concern for the seriousness of the situation. Key aspects of this system include correcting performance, attendance or conduct issues through communication of expectations and building commitment to high work standards and safe work practices. If an employee has a conduct, attendance or work performance problem, corrective action may be appropriate. Positive Discipline is a means by which management may seek to correct problems and build commitment, not merely compliance, for all employees. Each type of discipline is a reminder of expected performance. Positive Discipline focuses on communication and individual responsibility.

Based on the infraction or performance problem, the type of discipline will be determined at the discretion of Xcel Energy management, in consultation with Workforce Relations. The Positive Discipline policy is not intended to create a contract; it is merely a tool to be used at the discretion of supervision, which may or may not be followed in any given situation. In determining the appropriate type of corrective action, the company will consider previous actions for similar issues, the employee's record and the impact on the company, the customer and/or coworkers, the nature of the issue itself and any other pertinent factors. Based on the seriousness of the issue, management may bypass Positive Discipline and take more serious action, such as demotion or termination. Employees do not have the right to Positive Discipline. The company retains the discretion to determine whether Positive Discipline is appropriate in given circumstances and whether any or all forms of Positive Discipline will be administered.

Decision Making Leave (DML):

The DML is the most serious type of Positive Discipline. The DML involves a day off with pay for the employee to decide if he/she wishes to continue working for Xcel Energy.

Termination

Termination of employment is the permanent removal of an employee from service. When the disciplinary process has failed to bring about a positive change in the employee's behavior, termination is likely to occur. Termination may result from a failure to meet the expectations of a Decision Making Leave, Unpaid Suspension or a lesser type of discipline.

Termination also may occur in those instances where a single offense is so severe or where performance shortcomings are of such a nature that the application of the Positive Discipline System is unwarranted or inappropriate in the judgment of management. The following examples (this list is not all inclusive) illustrates some situations that may result in immediate termination of employment:

- Criminal acts on or off Xcel Energy properties
- Violation of the Fitness for Duty/Drug and Alcohol Policy
- Violation of the Corporate Code of Conduct
- Violation of the Corporate Discrimination, Harassment and Other Unacceptable Behaviors Policy
- Violation of the Violence in the Workplace Policy
- False statements or responses on application, physical examination, medical claims, expense statements or any other company records, or given during company investigations
- Stealing either from fellow employees, customers, vendors or contractors or the company
- Unauthorized use of company resources, including time, for personal benefit
- Insubordination (refusal to obey instructions or perform work assigned)
- Possession or use of fireworks, explosives, unauthorized firearms or any other weapon in violation of Xcel Energy policy or state law
- Willful destruction or defacing of property of Xcel Energy
- Failing to report to work

Exhibit B: Meal Agreement – May 5, 1980

[...]

This schedule is designed to calculate to total number of eligible meals in any given work period. It does not dictate that an employee should eat the meal at the time stipulated.

The schedule is as follows:

1) Pre-arranged overtime and/or overtime in conjunction with the regular eight hour day.

[...]

c) **When an employee works overtime at the completion of his regular day's work, he is eligible for a meal after the ninth (9) working hour and each four (4) hours thereafter.[...]**

3) When a crew has completed an overtime assignment, they will return to headquarters before proceeding to eat meals they are eligible to eat. They will be credited with any additional hour's time on their timesheet. This additional hour will not be applicable towards another meal.

Exhibit B: GPS Agreement – Excerpt from 2006 Letter

- The parties mutually agree that the purpose of utilizing the GPS is for safety and to facilitate timely response for dispatching trouble and work assignments.
- The Company will not use the technology and resulting information for disciplining bargaining unit employees unless an inappropriate behavior has been separately identified from the computer technology.
- The company will not assign personnel to analyze the system information solely to find an employee to discipline.

INTRODUCTION

Timothy Pearson was terminated in July 2014 for failure to follow company safety rules and for failure to meet the company's expectations in his work performance while he was on an active Decision Making Leave [DML]. When an employee is on an active DML, the employee is told that he has to follow all company policies and meet the company's expectations for work performance, and if he fails to do so, he/she will be terminated.

On June 11-12, 2014, Mr. Pearson was the crew foreman on a voluntary overnight assignment involving an outage caused by an underground cable fault. He had worked on June 11th his regular shift from 7 a.m. to 3:30 p.m. He and his crew volunteered to work the overtime shift which ultimately ran from 3:30 p.m. to 6:00 a.m. June 12, 2014. The company alleges that during the course of the evening, Mr. Pearson's crew took multiple paid breaks, disregarded the company's expectations for locating and identifying a faulty cable, failed to take steps to obtain materials needed for the job, failed to tell management about problems they encountered on the job or notify management that they would not finish their assigned job, and quit one hour early while still claiming an additional hour of pay on their time sheet even though the job was not completed.

The union contends that Mr. Pearson and his crew spent all night working in the rain and mud to repair a faulted feeder cable. Mr. Pearson and his crew did the best they could, but the mud, along with a number of other factors outside Mr. Pearson's control, made the job take longer than everyone had hoped. Mr. Pearson went home thinking he had done as good a job as the difficult circumstances allowed. He had no idea, nor reason to believe, that his work in the mud would later become a catalyst for his termination.

Further, the company alleges that while the June 11-12, 2014 was being investigated, the company discovered that on July 8, 2014 Mr. Pearson was the crew foreman on another job involving the replacement of a broken pole at a busy intersection. At the end of his work day, the company alleges that Mr. Pearson failed to secure the job site as is expected of a foreman. One of his crew inadvertently left a truck unattended and running at the job site that was holding up a broken pole with an energized power line attached. When the crewmember notified Mr. Pearson of the problem, Mr. Pearson chose to return to the Newport Service Center rather than drive two or three minutes back to the job site to secure the job site and the truck as required by company safety rules. The company contends that Mr. Pearson's misconduct as the foreman on June 11-12 and on July 8th while on an active DML, combined with his prior disciplinary history involving safety violations, is more than enough to sustain his termination.

The union contends that Mr. Pearson has been made a scapegoat for all the problems Xcel Energy faced in the June 11-12, 2014, outage. There is nothing about Mr. Pearson's work performance that night to justify termination. Xcel Energy cannot rely on Mr. Pearson's DML to alleviate its burden of proving misconduct, nor to claim termination as its only option. Xcel Energy has failed to prove that Mr. Pearson failed to follow any clear procedures regarding cable verification. It has also failed to prove that Mr. Pearson committed any wrong doings on June 11-12, 2014 in regard to the July 8th incident involving a truck that may have been left running. The union contends that Xcel has completely failed to prove that Mr. Pearson has ever been dishonest, much less clearly and convincingly shown intentional deception of any of the alleged subjects. Xcel has failed to prove that Mr. Pearson's work on the June 11-12, 2014 outage was deficit, since he was rightly entitled to take meal breaks, his relied in good faith trust on his supervisor's instructions, and he was entitled to complete the night's work with available materials. All his decisions were entirely reasonable and contractually permitted. Rather than revealing support for Mr. Pearson's harsh discipline, the hearing revealed a troubling list of due

process errors. The company's investigation was unfair, inaccurate, and unreliable. The company relied on GPS data that the parties have long understood cannot be used for discipline. The company failed to provide a precise statement of charges, as required by both due process and the parties' contract. And the company is, in effect, attempting to enforce purported policies that prior to Mr. Pearson's discipline did not exist. Consequently, the company does not have and did not have just cause for his discipline.

POSITION OF XCEL ENERGY

On July 30, 2014, Timothy Pearson, a long-term company employee, was terminated. The July 30 letter of termination stated:

Dear Mr. Pearson:

Effective immediately, your employment with Xcel Energy has been terminated. The Company's decision to terminate you is based on the fact that you not only violated Xcel Energy's Code of Conduct, but you also failed to comply with the terms and conditions of your December 6, 2013 Decision Making Leave. The numerous violations include, but are not limited to the following:

- Violation of Xcel Energy Safety Rules by failing to follow the underground cable verification process on June 11 & 12, and failing to turn off company equipment (Safety Manual – E.1-g and E.5-d) when leaving a work site on July 8, 2014.
- Failure to comply with Xcel Energy's Code of Conduct by being dishonest during the Company investigation
- Failure to meet/exceed management's expectations pertaining to your work performance

Sincerely,

Karly Gilman
Principal Workforce Relations Consultant
Workforce Relations

Mr. Pearson had a history of recent significant disciplinary problems. In October 2013, Mr. Pearson received a written warning for a safety violation when he was working as a crew foreman on a fault and did not follow standard safety protocol for logging grounds, obtaining proper holds and clearance for the crew to work. He also allowed his crew to work without proper personal protective equipment. While he was still on an active written warning, Mr. Pearson received a Decision Making Leave in December 2013 for another safety violation. Mr. Pearson was driving in a company truck and was stopped by police for not wearing a seatbelt.

The refusal to wear a seatbelt violates one of the central safety tenants of the company's policies, and is a violation of state law. Despite Mr. Pearson's claim that he got dog excrement on his clothes while working and did not want to get the feces on the seat belt, that is not an excuse for not complying with Minnesota law and company policy. During the investigatory interview, Mr. Pearson claimed he was simply preoccupied and forgot to put on his seatbelt. He later contradicted himself during the hearing when he claimed that the reason he did not put on a seatbelt was because he was covered in dog feces and was only a few minutes away from the service center and wanted to get there so he could clean up. If Mr. Pearson could clean himself up enough to get in his cab and drive his truck, he could and should have taken the time to clean himself up, or find another way to ask for assistance, so that he did not violate Minnesota law or company safety rules by refusing to wear a seatbelt.

A DML is the most serious form of discipline short of termination in the company policy. While an employee is on a DML, the employee is expected to comply with all company policies, practices, and expectations, and the employee is told that he may be terminated for any violation. Mr. Pearson admitted that he knew that he was required to follow all company policies and procedures, or else he would likely face termination while he was on an active DML. Additionally, the union business manager admitted at the hearing that he was well aware that if an employee is on an active DML and commits some kind of misconduct that violates the company policies, the employee is likely to be terminated. Moreover, company management explained that while the company typically tries to correct behavior and performance problems by using progressive discipline, if an employee is on an active DML but commits misconduct, the company's usual response is to terminate the employee since the employee has demonstrated that a progressive disciplinary approach has not worked and the employee has not corrected his/her behavior or conduct.

A. The June 11-12, 2014, on the Rogers Lake 66 Feeder. On the morning of June 11, 2014, there was an outage involving the Rogers Lake 66 Feeder. Approximately 2400 customers lost power. Over the course of the next several hours Metro East Trouble, Relay and Underground bargaining unit members and management worked to access the cause of the outage and take the necessary steps to restore service as quickly and safely as possible. Ultimately, the company determined that there were two problems on the Rogers Lake 66 Feeder – 1) a problem between the substation and the switch in the underground tunnel commonly known as a “cattle

pass,” and 2) a problem with some buried cable between switches four and five. Metro East management and underground crews worked until 11 p.m. the night of June 11 to attempt to fix the problem in the “cattle pass”. Eventually, the crews were sent home because management determined it would take more than a day to do the necessary repairs in the “cattle pass,” and the problem between switches 4 and 5 would take far less time to repair and restore power to customers. The “cattle pass” repairs were significant enough that the repairs required underground crews to work on June 11 and 12 to complete the work.

Once it was determined that there was a problem between switches 4 and 5, Newport manager Mr. Wishard used the low overtime list to solicit volunteers for an overhead crew to work overtime on June 11 to fix the problem. Mr. Pearson volunteered to work as the crew foreman along with journeymen Mr. Matthees and Mr. Schroeder. Mr. Pearson’s crew worked from 3:30 p.m. on June 11 until they left the job site at 5:28 a.m. on the morning of June 12, without having completed the job or restoring power. Mr. Pearson’s crew took multiple paid breaks on overtime that night, including two meal breaks, one for an hour and twenty minutes and one at a Perkins at approximately 2:30 a.m. The crew finished work and left the Newport Center at 5:44 a.m.

Even though the crew was done working at 6:00 a.m., the crew put in for an extra hour of pay for the “hour in lieu of” and sought to be paid overtime until 7 a.m. on June 12, 2014. The crew then went home on paid rest time for the normal eight hour shift that they would have had from 7 a.m. to 3:30 p.m. on June 12, 2014. Mr. Pearson did not notify anyone in the control center or management that the job was not finished before ending his shift. Instead, he simply left a note for supervision to find and placed on the scheduler’s chair, which Mr. Pearson flippantly titled “My fault – your fault – nobody’s fault, but fault not done”.

When Mr. Wishard arrived at the service center between 6:15 and 6:30 a.m. on June 12, 2014, Mr. Wishard learned that Mr. Pearson’s crew had not finished the work and customer’s were still out of power. Another crew and foreman were assigned the work, and after getting the needed materials, that crew arrived at the site at approximately 8 a.m. and completed the job at 12:30 p.m. on June 12, 2014.

Unfortunately, due to the problem with Rogers Lake 66, power was out for approximately 30 hours for some customers, most problematic including customers at a nursing home. The unusually long outage and customer problems caused management and workforce

relations to investigate why there was such a delay in getting power restored. Management had expected that the job would be completed by Mr. Pearson's crew and management was never alerted otherwise by Mr. Pearson before he finished working on June 12, 2014.

Mr. Wishard initially talked to Mr. Matthees and Mr. Schroeder on June 13, 2014, to get a sense of what they had done on the night of June 11-12, 2014. Mr. Wishard was unable to talk with Mr. Pearson as he was on vacation.

Mr. Matthees told the company that he was not aware that customers were out of power at the time that he and the others had accepted the overtime assignment. Mr. Matthees and Mr. Schroeder learned, however, from Troubleman Mr. Peterson, who was already at the scene, that customers were out of power.

Mr. Pearson's crew dug a trench around where the locators had indicated the cable was buried to attempt to identify and expose the problem. Although they encountered some trouble due to flooding in the trench and rainy conditions, eventually they were able to expose the cable, find the fault, and measure the cable so they could make the appropriate splices to fix it. However, the crew failed to notice that the wire on each of the faulted cable was not the same size. One end was 750, and the other was 500. The crew assumed that both ends were 750 without using all of the resources available to identify the different cable sizes. When the crew went back to the shop to make up the splices to take back into the field to repair the cable, the crew used 750 splice packs for both ends. When the crew returned to the job site and attempted to repair the cable, they were only able to splice the 750 side of the cable. Mr. Matthees admitted that the crew took multiple paid breaks during the night, including a one hour and 20 minute break at the Moose Restaurant and a 45 minute paid break at Perkins, all on overtime. When the crew returned to the service center at 5:28 a.m., the crew put in an extra hour in lieu of payment even though the last meal break for the crew started at 2:30 a.m.

The "hour in lieu" is a payment made to an employee when the employee is unable to take a meal break during an overtime assignment, completes the assigned job, and then quits work an hour early to go eat a meal. This payment is not specifically referenced in any agreement between the parties, but rather is a practice that has developed over the years. In contrast, the labor agreement refers to meal payments and provides that the company will pay a fixed amount of money to an employee working overtime at certain intervals as a meal money payment. When an employee continues working overtime at the end of his normal shift and does

not go home, the employee is entitled to a meal payment at two and one-half hours of work and then additional meal payments every four hours after that. The payment of meal money at regular intervals does not mean that an employee is entitled to take a break at those intervals to leave the job site and sit down in a restaurant to eat a meal.

Mr. Pearson claimed he did not know that customers were out of power. He admitted that he talked with one of the troublemen on the scene, Mr. Mitch Growth, but claimed they talked about non-work issues and not about customers being out of power. Mr. Pearson confirmed what Mr. Schroeder said about the crew not picking up the cable to examine it. The crew did not realize that the ends of the faulted cable were different sizes until after they had gone to the shop to make 750 splices for both ends and returned to the jobsite and tried to repair the cable. He admitted that the crew did not use the Timco equipment they were trained on and required to use according to safety policies to test the cable prior to cutting it. Mr. Pearson further admitted that the crew took several breaks during the night and said his practice was that whenever someone was hungry, thirsty or needed a bathroom, the entire crew took a break and left the job site. Mr. Pearson also claimed that the hour in lieu of payment at the end of the night and quit working around 6 a.m. even though the crew had just taken a meal break at Perkins at 2:30 a.m. only three and a half hours before he ended his shift. Mr. Peterson told management that he talked to all three members of Mr. Pearson's crew about the job and the system configuration. Mr. Peterson said that he told the entire crew that customers were without power until one of the cables was repaired either the "cattle pass" or the faulted cable buried in the ground. Mr. Peterson told Mr. Pearson's crew that it was a bad situation and that ambulances were going back and forth to a nursing home nearby.

B. The July 8th incident with Mr. Pearson. While investigating Mr. Pearson's conduct on the June 11-12, 2014 outage, the company had also learned about another issue with Mr. Pearson on July 8, 2014. On that day, Mr. Pearson was the foreman on a crew that was working to repair a broken pole at a busy intersection just a few miles from the Newport Service Center. The crew used a digger-derrick truck to hold a broken utility pole in place while they were putting up a new pole to support the overhead wires so that the pole would not fall down in a busy intersection with an energized line. Near the end of the workday, manager Mr. Wishard checked in with the crew to see if they wanted to work overtime to finish the job. Mr. Pearson and his crew chose not to work overtime. Because the work area had been cordoned off and

there were multiple company vehicles there, including the truck holding up the broken pole, Mr. Wishard did not want the crew to break down the jobsite. Instead, he sent another employee with a company car to pick up Mr. Pearson's crew and bring them back to the service center. Mr. Wishard intended to use the low overtime list to find volunteers to work overtime to finish the job, and it would be easier to do if the equipment was left intact at the jobsite. When the car arrived to bring Mr. Pearson and his crew back to the service center, Mr. Pearson got into the car with the rest of the crew. One of the crew members was Journeyman Jason Axlerod, who apparently waivered about whether he wanted to work overtime. At first he told Mr. Pearson he would work overtime and stay. But as the rest of the crew was about to drive away, Journeyman Axlerod changed his mind and got into the car. While driving back to the service center, Mr. Axlerod told Mr. Pearson that he thought he might have left the truck attached to the broken pole running with the keys inside. Management expects the crew foreman to be responsible for the crew and the safety and security of the jobsite. Mr. Pearson and Union Business Manager Mr. Hoppe both admitted that the jobsite safety and security are part of a foreman's duties. Also a foreman is paid a higher wage than a journeyman, in part, because a foreman has greater duties and responsibilities. Despite being the crew foreman, Mr. Pearson chose not to tell the driver to turn the car around and drive just a few miles back to the jobsite and secure it. Instead, Mr. Pearson returned to the service center. Upon his return, Mr. Wishard found Mr. Pearson and asked him what the status of the job was so Mr. Wishard would know what to tell an overtime crew. After explaining the status of the jobsite to Mr. Wishard, Mr. Pearson then told him that a truck might still running with the keys in it at the jobsite. Mr. Wishard asked about this and Mr. Pearson responded with words to the effect, "I suppose you are going to tell me that is my responsibility too?" Mr. Wishard told Mr. Pearson in no uncertain terms that as the crew foreman, it is his responsibility to make sure the jobsite was safe and secure. Mr. Axlerod then changed his mind about working overtime and volunteered to go back to the jobsite. Mr. Wishard talked with Mr. Axlerod about checking to see if the truck was running, and report back to him. The next day, Mr. Axlerod told Mr. Wishard that the digger-derrick truck attached to the broken pole was running with the keys in it. When Ms. Gilman and management interviewed Mr. Pearson on July 9, 2014, Ms. Gilman asked Mr. Pearson about leaving the jobsite on July 8th with the truck running with keys inside while the truck was attached to a broken pole. Mr. Pearson admitted that he went back to the service center rather than drive 2-3 minutes to return

to the jobsite to secure the truck. Basically, Xcel Energy determined to terminate Mr. Pearson because:

1. Mr. Pearson's crew had been informed by Troublemens Peterson that customers were without power;
2. The crew failed to follow the process that they had been trained on by Mr. Browen to identify and isolate a faulted cable since no one used a Timco device;
3. The crew did not inspect the cable or utilize the online Field Smart Map tool to determine that cable ends were different sizes, causing delay in completing the work;
4. The crew took numerous breaks during the night, including two meal breaks at a restaurant, one of which was an hour and twenty minutes;
5. The crew put in an hour in lieu of payment even though the crew had taken a meal break at 2:30 a.m. to eat at a Perkins and then stopped working at 6 a.m.;
6. The crew failed to stay on the jobsite until being relieved by a new crew at 7 a.m. or otherwise notified management in advance that Mr. Pearson's crew had not finished the job;
7. And Mr. Pearson failed to follow safety policies and secure the jobsite on July 8th, 2014, when he returned to the Service Center after being told by one of his crew that a truck holding up a broken pole was left unattended and running with the keys in it.

When questioned by Mr. Wishard about why he left the truck running at the jobsite with the keys in it rather than securing the jobsite, Mr. Pearson claimed it was not his responsibility even though he was foreman on the job. After reviewing these findings, the company management decided to issue a written warning to Mr. Matthees for work performance/safety issues since he was currently on oral reminder, and a DML to Mr. Schroeder for the same issues since he had been on the written reminder that had just expired on June 30, 2014. The union did not pursue its grievances to arbitration over the disciplines issued to Mr. Matthees and Mr. Schroeder, so these disciplines were not modified in anyway.

As for Mr. Pearson, the company reviewed his conduct, his recent disciplinary history and his service with the company. Although Mr. Pearson was a long-term employee with over 30 years of experience, Mr. Pearson had recent, significant discipline. He was on an active DML for a safety violation, which came on the heels of a written warning for a safety violation. Mr. Pearson knew that his DML required him to make a total commitment to the company

concerning his performance and that he was required to follow all company policies and procedures. Mr. Pearson was also well aware that if he failed to do so he would likely lose his job. Based upon Mr. Pearson's poor performance in a variety of ways as a crew foreman on the night of June 11-12, 2014, his utter refusal to ensure that the broken pole jobsite was safe and secure on July 8, 2014, and his two recent safety violations which included being on an active DML, the company decided to terminate Mr. Pearson's employment.

The company argues:

- A. There is no heightened standard for just cause.
- B. The company followed its policies to terminate Mr. Pearson.
 - a. The management's right to clause Article 1, Section 2 gives the company the right to discipline and discharge employees. The Positive Discipline Policy further provides that the company may consider deactivated past discipline when deciding the level of discipline to impose for misconduct. In the case of Mr. Pearson, he was on an active DML at the time of his termination. Mr. Pearson and his crew failed to use Field Smart to help them identify that the faulty cable had different sizes on each end, and they admitted that they failed to inspect the cable and just assumed the cable ends were the same size. If they had inspected the cable and used Field Smart, they would have learned that the cable was not the same size on both ends. Mr. Pearson acknowledged that even though he knew by 2:30 a.m. the crew had the wrong size splices, he could not get the job done without the correct splices, still he did not attempt to contact anyone to get a Stores employee to come to the Service Center and provide the crew with the correct size splices nor did he attempt to notify management or the Control Center that the crew was not going to finish the job.

With respect to the July 8, 2014, incident, Mr. Pearson's error was even more glaring. Even though Mr. Pearson admitted that ensuring safety and security of a job was one of his essential duties as a foreman, he deliberately chose not to return to the jobsite to secure it when Mr. Axlerod told him that Mr. Axlerod might have left a truck running with the keys in it. When Mr. Pearson learned this, he was only 2-3 minutes away from the jobsite. Rather than instruct the driver to turn around and drive a short distance back to the jobsite and secure

it, he chose to return to the Service Center a few miles away in the opposite direction. Once Mr. Pearson arrived at the Service Center, Mr. Wishard had to find him to inquire about the status of the job. After answering Mr. Wishard's questions, Mr. Pearson casually told Mr. Wishard that a truck might be running at the jobsite. Mr. Pearson's conduct was unacceptable.

- C. There was no disparate treatment of Mr. Pearson. The union has not offered any evidence to show that the company customarily and routinely gives employees lesser discipline than termination when an employee is on a DML and engages in poor performance or misconduct. Other past arbitration cases involving the union show that the company is consistent in terminating even long-term employees when an employee is on an active DML.
- D. The union's complaints about the actions of other employees on June 11-12, 2014, are irrelevant and do not exclude misconduct by Mr. Pearson. The union's complaints about what other employees, including management employees, did or did not do is a red herring and does not excuse the misconduct of Mr. Pearson and his crew on June 11-12, 2014. Even assuming for the sake of argument that the union is correct about some of its criticisms, none of these issues are relevant to Mr. Pearson's poor performance on June 11-12, 2014. Moreover, the union has no good way to excuse Mr. Pearson's failure to return to the jobsite and secure it on July 8, 2014, when Mr. Pearson learned that the truck was left unattended and running. Mr. Pearson's suggestion that another crew might have been in route to the jobsite to work overtime, even though he had no way of knowing and did not bother to check with management, does not excuse him. Mr. Pearson admitted he had a judgment call to make. Mr. Pearson exercised poor judgment and chose not to do what he knew was expected of him.

Mr. Pearson has been given second chances already for his disregard of safety rules, including his recent warning and DML. Mr. Pearson's conduct on June 11-12, 2014, and on July 8, 2014, demonstrates that he did not modify his behavior and under the Positive Discipline policy his termination is justified. He does not warrant yet another second chance to correct his behavior. This grievance should be denied.

POSITION OF THE UNION

On June 11 and 12, 2014, Timothy Pearson spent all night working in the rain and mud to repair a faulted feeder cable as the foreman of an Xcel Energy line crew. He and his crew did the best they could, but the mud, along with a number of other factors outside Mr. Pearson's control, made the job take longer than everyone had hoped. He went home thinking that he had done as good a job as the difficult circumstances allow. He had no idea, no reason to believe, that his work in the mud would later become the catalyst for his termination. In figurative ways this is a case about mud as well. Once the company decided to pin responsibility for the outage on Mr. Pearson (responsibility that plainly rested with a series of misguided management decisions and steps) it initiated a remarkable campaign of mud-throwing, hoping something would stick to Mr. Pearson. The company sloppily picked apart every facet of Mr. Pearson's work on June 11-12, 2014, and, in the process, refused to give him a single benefit of the doubt. What started as an investigation into the June 11-12, 2014, job spiraled into an unrestricted examination of his whereabouts via GPS technology (where, we should note, no meaningful issues of concern were uncovered). It came to encompass a totally unrelated mishap with a company truck. And once it became clear that Mr. Pearson's purported crimes couldn't justify any sort of discipline on their own, it turned to an assault on Mr. Pearson's integrity. Xcel Energy has put a remarkable amount of time and effort into terminating this 34-year employee. After an even-handed assessment of the facts (something Mr. Pearson did not receive prior to his termination), it becomes quite clear that not one fleck of mud has stuck.

On June 11, 2014, Mr. Pearson and two journeymen linemen Mr. Brandon Matthees and Mr. Dan Schroeder, began their normal shifts at 7 a.m. After returning to Xcel's Newport Service Center shortly before their shifts ended at 3:30 p.m., Mr. Tony Wishard (manager of Electric Operations of the Newport Service Center) asked them if they wanted to take an overtime assignment. They agreed to continue working. Mr. Wishard provided them with a Feeder map and a job sheet, told them the problem was a Feeder fault at "Rogers Lake 66", and that they would need size 750 cable splices for the repair work. The Feeder map Mr. Wishard provided plainly indicates that only 750 cable was implicated in the fault. Someone other than Mr. Pearson's crew, and likely others on the day shift, set out 750 splices and 750 connectors on a tray for the overtime crew.

The faulty cable resulted in a power outage which began at 6:22 a.m. on June 11, 2014. Neither Mr. Wishard nor any other manager communicated to Mr. Pearson or his crew that customers were out of power. Mr. Wishard himself was unaware of the outage at this time. Rather the crew was told only that there was a Feeder fault. Feeder faults rarely result in customer power outage because Feeder cables are constructed in a closed loop, whereas the Trouble Department typically switches around the fault so that the work is completed on the damaged cable while power in the area is temporarily rerouted. Nothing about the assignment implied to the crew that there was an outage, that there was an emergency, or, for that matter, that a nursing home was out of power. After receiving the assignment the crew loaded their trucks with materials they believed they would need.

At 4:46 p.m. Mr. Pearson's crew left the Newport Service Center and set out for the RLK066 jobsite in Mendota Heights, Minnesota. At around 4:15 p.m. a "relay crew" had identified the precise location of the fault, and marked and put an "X" adjacent to where Mr. Pearson's crew would find the faulted underground cable. Before they could dig, Xcel's "locators" had to identify if it was safe to dig and "where there are buried underground utilities". This was completed at 6:30 p.m. From 5:04 p.m. to 6:50 p.m. Mr. Pearson's crew performed a number of necessary preliminary tasks.

Shortly after they had arrived, Mr. Pearson's crew observed an Xcel "trouble truck" that was likely investigating the fault, so they decided to consult with them. They had not been directed to seek out these troublemen and weren't certain they were even looking at the same problem. It was a happenstance encounter. Mr. Pearson went to speak with troublemen Mitch Groves, who Mr. Pearson had worked with years ago. They did not discuss an outage. Meanwhile, Mr. Matthees and Mr. Schroeder talked with the other troubleman Mr. Paul Peterson. Mr. Peterson mentioned a local outage to Mr. Matthees and Mr. Schroeder, but said nothing about the source or scope. Mr. Peterson did not explain whether the outage had any relation to the crew's Feeder fault job. Nor did he put any urgency on the outage. Because Mr. Matthees recognized that their Feeder fault job would take a minimum of 10 hours repair, he assumed that Xcel could not possibly be relying on him, Mr. Pearson and Mr. Schroeder to restore power. Mr. Pearson and Mr. Groves were standing out of earshot, about 15-20 feet away from the other three. Mr. Pearson also has very poor hearing. He wears hearing aids and it can be difficult for him to pick up conversations.

After the troublemen left, Mr. Pearson called the Control Center to request a different switching pattern. The new switching pattern improved the crew's efficiency, since they could now use the bucket trucks to set up their grounds, rather than manually climbing poles in a swamp. They tested and grounded all the cable they would be working on.

Mr. Pearson also spoke with the locators, requesting that they carefully inspect a 30 foot circle around the area where the relay team had marked the fault to ensure that there were no utilities or unexpected cables anywhere near the spot he had been instructed to dig. Mr. Pearson knew from experience that it was best to make this type of request at the outset of a job so that he wouldn't need to waste time recalling the locators if questions came up later. Shortly before 7 p.m., as he and his crew were setting up the last set of grounds, Mr. Pearson received his "hold", which is an authorization from the Control Center that the faulty cable was de-energized and safe to work on, and that responsibility for the line was being turned over to him. This meant that the crew had finally received permission to start digging and exposing the fault they had been assigned to repair.

Because Mr. Pearson's crew had worked all day and not had dinner, and expected a long night of digging and repair, they thought it best to take a meal break at that time. At this point they were three hours and 20 minutes in to their overtime, which had begun at 3:30 p.m. The crew chose to go to the Moose, a nearby restaurant that served "decent food" where they thought they would be able to have "a sit-down real quick and get out." On the way to the restaurant, Mr. Matthees and Mr. Schroeder stopped by a hardware store to purchase a mosquito fogger while Mr. Pearson went straight to the restaurant to get a table. They ate their meals and did not order appetizers or desserts. It was Friday evening and the restaurant was crowded. It took a bit longer than usual to be served. Their meal was not atypical of the types of meal break they had taken in comparable overtime assignments on various crews.

At 8:19 the crew left the Moose restaurant, and at 8:30 p.m. they resumed their work at the Mendota Heights jobsite. With a combination of manual and mechanical digging, they eventually dug a pit that was about 7-8 feet wide, 12-14 feet long and 5 feet deep. The task was complicated by their location in a swamp. As they dug, water continually seeped into the pit. Mr. Matthees attempted to dig a culvert to divert water out of the pit. Around 10 p.m., just as the crew had nearly finished exposing the cables, it began to rain torrentially, which compounded the

drainage problem. When lightning began, the crew from their training knew that they had to stop digging because it is unsafe to work on power cables during an electrical storm.

When it became apparent that the rain was going to continue, Mr. Pearson held a brief “tailgate” and made the decision that it would be more efficient for the crew to return to the shop to get a water pump to drain the trench and to perform some of the cable preparation in the shop. Mr. Matthees and Mr. Schroeder quickly returned to the pit and measured the existing cable so they could prepare the new cable in the shop. At this point, the crew was not yet able to cut into the cable and, therefore, could not visually confirm it as a 750 cable. It would have been highly irresponsible to cut the cable as that time, since the pit was flooded and open cables are highly susceptible to damage, thus increasing the likelihood of future faults and outages.

At 11:30 p.m. the crew left the worksite and returned to the Newport Service Center. There Mr. Pearson searched the shop for a functional pump and cut up several wooden pallets with a chain saw to make a boardwalk for the pit’s swampy floor. Mr. Matthees and Mr. Schroeder prepared the cables. They used splice kits to prepare both ends of new stretches of cable, which meant they prepared six ends for the three cables in the 3-phase system. If it had not been for the weather, the crew could have prepared the cable in the field. But it is delicate work requiring a variety of tools, and it was more efficient to prepare the cable in the dry, well-lit shop than outside in the pouring rain.

At 1:02 a.m. on June 12, the crew returned to the worksite with the water pump, a high-powered floodlight, wooden pallets and the prepared cable splices. There they started pumping out water, since the hole had completely filled in.

At some point during this period, they cut into the cable using a “hot cutter.” They did not use the “Timco cable identifier”, since the entire crew understood it to be useless. A Timco cable identifier is used to identify energized cables so that they are not mistaken for the de-energized cables to be cut. The device sends a pulse on the conductor and then a return. Therefore, it does not work on faulted cables. Xcel linemen have never used cable identification devices on faulted cable. On this particular job, all three of the three-phase cables were visibly burned open and faulted. There was a four-inch gap between two ends of the cable, so the circuit was obviously incomplete. On a three-phase cable, the Timco requires a minimum of two good cables and here they had none.

The crew also had independent verification from the 30-foot sweep that Mr. Pearson had requested of the locators. The cables about to be cut were safe, the three-phase in their pit was the only cable in the area, and they had confirmation from the command center that the cable had been de-energized. Mr. Pearson, an experienced lineman, was 100% sure that the cable they were about to cut into was their intended target and that it was fully safe to do so.

Once the pit was drained, Mr. Matthees and Mr. Schroeder cut the existing wire and started preparing cable-ends so they could splice in the new cable they had prepared in the shop. Only then, and for the first time, they understood there was 500 cable coming from one direction in the pit. Mr. Schroeder confirmed that there was 750 coming from the other direction and, at that point, the crew realized they needed additional splices, which they did not have and which they could not make without the splice kits that were behind locked storeroom doors.

The storeroom is locked after hours and from past experience it typically takes 1-3 hours for a storeroom clerk to arrive from the time someone calls the foreman. Because the crew wouldn't have access to the necessary materials for a couple hours and would have to spend another hour or so preparing these new materials, and only then be able to pick up where they left off with the installation, the crew knew they would not be able to finish the job before morning. Mr. Pearson concluded it made more sense to continue performing all the work they could until it was time to return to the shop at 6 a.m. Up to this point they had fully expected to finish the job before daybreak, and had planned to work without taking a second meal break. But upon the discovery that the job could not be finished and because the crew was exhausted (and now quite frustrated), Mr. Pearson thought it not only appropriate but wise to break for a meal that they were entitled to.

So at 2:32 a.m., with the worksite secured and the exposed cable safely protected, the crew drove to Perkins. At 2:32 a.m. on a weeknight, most restaurants are closed. Mr. Pearson knew that the Woodbury Perkins was open and that it served food that would not upset his Crohn's Disease. They drove 13 minutes to Perkins, took a 43-minute meal break. This was their first meal break since they had returned from the Moose Restaurant six hours earlier.

The crew then returned to the Newport Service Center. There, they got three new pieces of 750 cable and prepared new splices, but with different measurements to account for the 500 cables. At 4:11 a.m. they drove back to the Mendota Heights jobsite and pieced together the splices that they could, and prepared for the worksite for the next crew. At 5:30 a.m., they

departed for the Newport Service Center. They arrived at 5:44 a.m. Mr. Matthees and Mr. Schroeder went home shortly after 6 a.m. Mr. Pearson remained at the shop for a bit longer. He wrote a detailed note for the next crew and for Heather Carp, the scheduler. He spoke to John Jacobson, the foreman who would be taking over the job, and wrote out a handwritten order for the splices that the next crew would need. All three crew members put in for an “hour in lieu” since they understood they were entitled to meal breaks at 6 p.m., 10 p.m., 2 a.m. and 6 a.m., and had only taken two breaks. Thus from their understanding of the “hour in lieu” they were entitled to that payment for the 6 a.m. break.

When the crew went home that morning, none of them had any idea that management had been relying on them to restore a power outage, or that a nursing home had been affected by an outage. Mr. Pearson left work unaware that there had been an outage at all.

On the morning of June 12, 2014, Tony Wishard arrived to work also unaware that customers were out of power as a result of the RLK066 faults. There is discrepancy about when Mr. Wishard actually learned of the outage. John Jacobson, the foreman assigned to continue the work of Mr. Pearson’s crew, testified that he received Mr. Pearson’s note and the general instruction from Mr. Wishard to finish the Feeder fault repair, but he learned of the outage, not from Mr. Wishard, but from a customer on the way to the job.

Mr. Wishard gave contradictory testimony, that he found out about the outage first thing on June 12, 2014, and that he immediately informed Mr. Jacobson of the outage. Even in daylight, the messy job took many hours to complete. At approximately 12:30 p.m. the power was restored. Mr. Pearson, Mr. Matthees, and Mr. Schroeder did not work their regular day shifts on June 12, 2014, since they had been working close to 24-hours straight. Mr. Matthees and Mr. Schroeder returned to work on June 13, 2014. They talked with Mr. Jacobson and learned that he hadn’t finished the job until about 12:30 p.m. Mr. Jacobson informed them, to their surprise, that there had been a nursing home out of power. Mr. Matthees and Mr. Schroeder also spoke with Mr. Wishard and gave him a brief account of the work. Mr. Pearson was on vacation at this time and was not asked about the June 11-12 Feeder fault job until sometime later.

With respect to the July 8, 2014, truck incident, on that day Mr. Pearson had been involved in an unrelated repair job involving a rotten pole on Southview Boulevard, a six-minute drive from the Newport Service Center. Another crew had been assigned to fix that pole, and Mr.

Pearson was called in midway through his regular shift to assist. The pole was located on a very busy road. Near the end of his regular shift, Mr. Pearson told Mr. Wishard that he did not wish to volunteer for overtime. As the end of his shift got closer, Mr. Pearson called the scheduler multiple times for directions on how to proceed. He did not hear back until Ryan Seewick, a shop apprentice, appeared on the job site to drive Mr. Pearson and the crew back. Mr. Wishard testified that he had assigned Mr. Seewick to bring everyone in and secure the worksite until the relief crew arrived. On the site Mr. Seewick told Mr. Pearson and others that, if they were not working overtime, they should lock their trucks and ride with him to the shop. Mr. Pearson locked the truck he had driven to the jobsite, and walked with Mr. Seewick back to the car. He also took stock of the jobsite and noticed that lineman Jason Axelrod was still on the site. Mr. Axelrod said he was going to continue to work on the job. Mr. Pearson does not recall whether the truck was running, but would not have been concerned since Mr. Axelrod was remaining on the site.

Mr. Pearson got into Mr. Seewick's car with a few of the lineman, but at the last minute, just as Mr. Seewick was about to start the quick drive back to Newport Service Center, Mr. Axelrod hopped into the car, apparently having changed his mind about working overtime. When the car was just a few minutes from the shop, Mr. Axelrod said to Mr. Pearson, "I am not sure if that truck is running," referring to the spare digger truck that was propping up the rotten pole. Mr. Pearson understood that the truck should be secured. Because another crew would be heading out to the jobsite shortly and because he was only minutes away from the shop, Mr. Pearson made a judgment call that it would make more sense to continue to the shop and alert a manager to the situation, rather than returning to the jobsite, which he believed would have taken longer.

Normally, at the end of shift, Mr. Pearson would first go to a timekeeper to deposit his paperwork. But on this day, he headed straight to the foremen's room, where he approached Mr. Wishard. Mr. Wishard asked Mr. Pearson about the job, and Mr. Pearson said that there may be a truck running. It remains unclear whether there was actually a truck left running. Mr. Axelrod had only expressed that he "didn't know if that truck is running or not", and Mr. Pearson's brief conversation with Erik Dorschner, the foreman on the relief crew, indicated that everything had been fine at the worksite, that there was not a truck running. Mr. Axelrod was never disciplined.

Nor did the employer ask Ryan Seewick about the incident. Mr. Pearson was the only employee disciplined for this matter.

With respect to the employer's investigation of the June 11-12 outage, Xcel Energy received numerous claims about residents of a nursing home who were negatively affected by the outage. Xcel was concerned that the nursing home would bring a complaint with the Minnesota Public Utilities Commission [PUC], but a formal complaint was never filed with the PUC. During the course of the investigation, Xcel uncovered many causes for the extended outage. Managers concluded that it took unusually long for the locates to be completed. They were concerned that proper alerts and notifications were not made. They noted that the stretch of cable between the 4-5 switch should have been replaced earlier, as it had experienced numerous splice failures in past years. Two particularly significant causes of the extended outage were the failure to set up a "drag cable" (in effect "an extension cord between two pieces of equipment") to restore power while the repair is being completed, and the decision to send home the underground crew working on the second fault near the substation at 11 p.m. on June 11, 2014. Xcel's distribution engineer, Steve Koski, concluded that there were "two places in which one/zero drag cables could have been used to pick up these customers." One was over Dodd Road, which two company managers (both non-engineers) claimed would have been too difficult. The other was "between two three-phase [transformers] that were 475 feet away from each other." Union Business Manager Michael Hoppe, an experienced troubleman, later visited the site and concluded that the latter option would have been easily accomplished. Mr. Pearson noted it would have taken about three hours to temporarily restore power using that option.

Despite the many contributing factors, Xcel Energy came to focus its inquiry on Mr. Pearson's crew. On July 9th, nearly a full month after the outage, Mr. Pearson, Mr. Matthees and Mr. Schroeder were interviewed by management employees Troy Browen, Tony Wishard and Karly Gilman. Union Business Agent Michael Hoppe and Steward John Jacobson were also present.

The focus of most of the investigation was the June 11-12, 2014 outage. But Mr. Pearson was asked about three additional unrelated subjects. First, they asked him about whether he ever conducts personal business during work hours. He explained that he does not. Management apparently believed that the GPS telematics data from Mr. Pearson's truck showed him stopping at a TCF Bank in Woodbury for 33 minutes after 8 p.m. Management did not tell Mr. Pearson

that they had “cross-referenced the telematics to a map to figure out that [his] truck was in the TCF parking lot”, or show him the data. But Mr. Pearson ascertained what they were asking, and he explained to them that he does not have an account at TCF Bank or even an ATM card, and that he was, in fact, taking a meal break at the Old Country Buffet next door. He explained at that time that the TCF Bank, which was closed at that time, had a better parking lot for the large truck he was driving.

Second, Mr. Pearson was asked whether he ever stops at home during work hours. At first he responded that he did not. But immediately – even before another question was asked – he said that he had once stopped by his house for a few minutes to let out his dog while his wife was out of town. Ms. Gilman claims that Mr. Pearson did not inform her that he once let out his dog or that he does not have a TCF Bank account until the next day, and that he was thus “dishonest” during the investigation. Both Mr. Hoppe and Mr. Jacobson testified that they clearly recall Mr. Pearson explaining these two things during the July 9th interview.

Third, after he already left the interrogation, Mr. Pearson was asked about the truck that had been left running on a jobsite the prior day. He explained the facts as they had been described above.

On July 21, 2014, several weeks after interviewing Mr. Pearson, Mr. Matthees and Mr. Schroeder about the June 11-12 outage, Troy Browen interviewed Mr. Paul Peterson and Mr. Mitch Groves, the two troublemen in the RLK066 area. When Mr. Browen interviewed Mr. Peterson, “he didn’t recall the long outage at first when [Mr. Browen] mentioned Rogers Lake 66.” It had been nearly six weeks at that point. But after being reminded of the details, Mr. Peterson told Mr. Browen that he thought he had spoken with Mr. Pearson, Mr. Matthees and Mr. Schroeder about the system configuration and the outage. The company relied heavily on Mr. Peterson’s six-week old recollection that he had informed all three crew members of the outage, rather than just one or two of them, to conclude that Mr. Pearson must have known about the outage and was therefore “dishonest” when he said he didn’t know. At the conclusion of the Workforce Relations’ investigation into the June 11-12, 2014 outage, Ms. Karly Gilman drafted an investigation report. The report contains a number of errors. Ms. Gilman’s report recommended a written reminder for Mr. Brandon Matthees and a Decision Making Leave for Mr. Dan Schroeder for “work performance/safety.” The company issued the recommended discipline to both Mr. Matthees and Mr. Schroeder. The union grieved both, but for reasons

unrelated to the merits, opted not to pursue the grievances to arbitration. For Mr. Pearson, however, Ms. Gilman's report recommended termination. Ms. Gilman's termination letter of July 30, 2014, stated:

Effective immediately, your employment with Xcel Energy has been terminated. The Company's decision to terminate you is based on the fact that you not only violated Xcel Energy's Code of Conduct, but you also failed to comply with the terms and conditions of your December 6, 2013 Decision Making Leave. The numerous violations include, but are not limited to the following:

- Violation of Xcel Energy Safety Rules by failing to follow the underground cable verification process on June 11 & 12, and failing to turn off company equipment (Safety Manual – E.1-g and E.5-d) when leaving a work site on July 8, 2014.
- Failure to comply with Xcel Energy's Code of Conduct by being dishonest during the Company investigation
- Failure to meet/exceed management's expectations pertaining to your work performance [Union exhibit #3]

As a result of his termination from a job he had held since he was 22 years old, Mr. Pearson has experienced a drastic impact to his retirement benefits. Mr. Pearson turns 55 years old in April of 2016, and had he remained employed at Xcel Energy, would have hit 35 years of employment. This would have satisfied the "Rule of 90" under the pension plan's eligibility rules, and Mr. Pearson could have taken a full pension. As a result of his termination in 2014, he suffered an enormous reduction to his pension benefit, i.e. up to an over 50% reduction over the course of his anticipated retirement.

Basically the union argues:

- A. The employer bears a heightened burden of proof in demonstrating just cause because Mr. Pearson worked as lineman for 34 years; arbitrators frequently conclude that employees' long-term service justifies a heightened burden of proof. Many arbitrators apply a "clear and convincing evidence" standard and some arbitrators even impose a "beyond a reasonable doubt" standard in such cases. Allegations of dishonesty are undoubtedly stigmatizing for an employee, and as a result arbitrators routinely use the "clear and convincing" standard for such charges.
- B. Mr. Pearson's Decision Making Leave does not abrogate the employer's burden of proving just cause. Xcel Energy bears the burden of proving misconduct, even where the employee is on a DML.

C. The termination must be overturned because the employer has not met its burden of proving any specific misconduct much less established just cause. Xcel Energy failed to meet the heightened burden - clear and convincing evidence - of proving that Mr. Pearson committed any misconduct that could justify discharge for a position he has held for 34 years. In Mr. Pearson's termination letter, Xcel lists two specific rule violations, one general allegation of dishonesty, and one vague reference to deficit work performance as the purported causes for Mr. Pearson's discipline. There is no specific reference to many of the issues raised by the employer for the first time in arbitration, such as the alleged lie about seeking out Mr. Wishard on July 8, 2014 or the alleged responsibility to check Field Smart. Because of the due process implication of the company's failure to provide clear notice of the specific for termination, the union believes the arbitrator is free to ignore, and should ignore, every alleged infraction raised at arbitration that was not referenced in the July 30, 2014 termination letter. Nevertheless, if these issues are to be considered they still do not show just cause for termination.

1. Mr. Pearson and his crew did not fail to follow the underground cable verification process on June 11-12, 2014. It is remarkable that the company even raised this issue. Its own internal investigation data confirms that the Timco cable verification device does not work on faulted, burned open cable. [Company Exhibit 29]. All the linemen were trained concerning this limitation on the device. The crew's decision to avoid using the Timco did not violate any known policy. Nowhere does the training outline state that the linemen should use the device on a visibly faulted cable. Even someone with a basic understanding of electric currents can tell that it is technologically impossible for a Timco to work. The safety manual provides no explanation of what linemen are supposed to do if the "approved equipment" is technologically incapable of providing positive identification. All cable verification instructions rest on the premise that the cable is either good cable or at least is not obviously burned-through bad cable. There are no rules for situations like the one Mr. Pearson and his crew faced. Openly the purpose of electric cable verification is safety. Mr. Pearson's conduct was safe. There is no dispute that the cable the crew had been assigned to repair was de-energized and grounded before it was cut. Mr. Pearson knew that the cable on

their Feeder map was safe to cut. He and his crew with absolute certainty that the visibly faulted cable that they saw at the bottom of their muddy pit was the cable they saw on their Feeder map and which they were supposed to cut and repair. Mr. Pearson wisely had asked the locators to do a 30-foot sweep of the area around the “X” where he had been assigned to dig. The locators told them that there were no other electric cables in the area. He was assured that the cable he was looking at was the one on his Feeder map, which he knew had been properly switched, grounded, and de-energized and that he could proceed to cut with a “hot cutter.” Because of his thoughtful planning (a product of his 34 years of experience), there was no conceivable safety risk.

2. Mr. Pearson did not fail to turn off company equipment on July 8, 2014. The second specific rule violation listed in Mr. Pearson’s termination letter is “failing to turn off company equipment (Safety Manual – E.1-g and E.5-d) when leaving a worksite on July 8, 2014.” First, when Mr. Pearson left the job site on July 8, 2014, he had taken appropriate measures to ensure the safety of the site. As he was preparing to leave, he noticed that lineman Jason Axelrod was still on site. Mr. Axelrod had told Mr. Pearson he was going to stay and continue working on the job. Under such circumstances a running truck would not have registered as a concern since Mr. Axelrod would be present to keep an eye on it. Second, once Mr. Axelrod jumped into the car as they were leaving, and as they drove to the service center, only then did Mr. Axelrod tell Mr. Pearson he may have left the truck running. Mr. Pearson took reasonable steps in addressing the problem. When Mr. Axelrod announced that he wasn’t sure if he turned off the truck, the car was only 1.5-2 minutes away from the service center. Mr. Pearson knew another crew would be arriving on the jobsite shortly, if it hadn’t already arrived. Mr. Pearson made a judgment that the fastest way to check the jobsite was to complete the short drive to the service center and notify Mr. Wishard so Mr. Wishard could direct the relief crew to check on the truck. As a foreman, this was Mr. Pearson’s best judgment on how to handle this situation. Even if, hypothetically, it would have been faster to turn around, then Mr. Pearson’s conduct may be viewed simply as a judgment error. But a mere error in judgment,

even simple negligence, absent gross negligence, bad faith, or ill will toward the company, should not be grounds for termination. Third, the company has not even proven that there was actually a truck running. This entire incident came to the company's attention through Mr. Pearson's own self-reporting. Mr. Pearson still doesn't know whether a truck was actually running. Aside from the fact there is no factual foundation for this account and that it is the purest form of hearsay, Mr. Wishard does not make sense. Since Mr. Axelrod was the one who told Mr. Pearson that a truck could be running on the drive back to the shop, why would Mr. Wishard give direction to Mr. Axelrod to find out whether a truck was running and report back to him? Given that Mr. Wishard's hearsay account that the truck had been running is the only evidence the company identified, we urge the arbitrator not to base a termination of a 34-year employee on hearsay. The company cannot meet its burden of clear and convincing evidence. Fourth, Xcel Energy did not talk to, much less discipline, the two other employees who were involved: Mr. Ryan Seewick and Mr. Jason Axelrod. To be clear, the union is not arguing that discipline was warranted for anyone. If a truck was running on the jobsite, it was an inadvertent error made on a hectic job site. In so far as the company viewed this as a danger to the public, it is perplexing that the company never spoke with others involved, that Mr. Pearson was the only one disciplined, particularly where Mr. Seewick, as Mr. Wishard testified, had been directly ordered to "secure [the trucks] safe". There is no dispute that, if the truck was left running, it was because Mr. Axelrod changed his mind about working overtime and failed to shut it off. Even knowing of Mr. Axelrod's primary involvement, Ms. Gilman, during her investigation, never spoke with Mr. Axelrod.

3. Mr. Pearson was not dishonest during the company investigation. Mr. Pearson did not lie about his knowledge of the outage. Since Mr. Pearson wears hearing aids, which can make it difficult to separate conversations from other background noise, it is entirely understandable that he would have missed Mr. Peterson's mention of the outage. Ms. Gilman's conclusion that Mr. Pearson was lying about his knowledge primarily comes from Mr. Browen's interview with Paul Peterson. Paul Peterson's then six-week old recollection of his conversation with Mr.

Pearson's crew is inherently unreliable. Mr. Peterson's divergent recollection, on its own, cannot stand as "clear and convincing" proof that Mr. Pearson was told about the outage. Mr. Pearson never learned there was an outage while he was working on June 11-12, 2014. Mr. Pearson did not lie when he sought out Mr. Wishard on July 8, 2014, to inform him of the running truck on Southview Boulevard. This is a case of one man's word against another's on the issue of who found whom on July 8th. Xcel Energy relies entirely on the word of a manager against the word of an employee. Nobody disputes Mr. Pearson's self-reported possible running of the truck. Mr. Wishard's story is that he approached Mr. Pearson in the crew quarters at which point Mr. Pearson mentioned the truck. Mr. Pearson, however, clearly recalls that he actively sought out Mr. Wishard. Although Mr. Pearson ordinarily would have dropped off his paperwork first, Mr. Pearson immediately sought Mr. Wishard in the foremen's room, and approached him. Mr. Pearson testified that Mr. Wishard spoke first, but he wasted no time in mentioning his concern about the truck. The company presented no witnesses to corroborate Mr. Wishard's contention that he had to seek Mr. Pearson out. There are certainly insufficient facts that suggest that Mr. Pearson's account was inaccurate. Mr. Pearson did not lie when he responded to Ms. Gilman's question about stopping at home and doing personal business. First when Ms. Gilman asked Mr. Pearson if he stops at home while working, he said initially "no". But before Ms. Gilman could ask another question, he said "oh, wait, no, my wife was out of town last week in Denver and I stopped to let the dog out." This converted his inadvertent omission into the full truth. Upon cross examination, Ms. Gilman revealed that she did, in fact, recall Mr. Pearson clarifying, albeit in her recollection Mr. Pearson called her the next day to report the one incidence where he let out his dog. But Union Business Agent Michael Hoppe and Steward John Jacobson clearly recall Mr. Pearson mentioning letting his dog out during the July 9, 2014, interview and thus giving an honest answer to the question he was posed in the interview. The company has presented no credible evidence that Mr. Pearson's answer was dishonest. Ms. Gilman testified she based her conclusion that he was doing personal business on telematics data that indicated that Mr.

Pearson's truck was parked at the Woodbury TCF Bank lot from 8:03-8:36 p.m. The bank was not open at 8:00 p.m. Mr. Pearson parked at the open bank lot because the Old Country Buffet lot right next door was too small. Mr. Pearson's work performance was satisfactory and reasonable under the circumstances. Xcel Energy contends that the job just took too long. Ignoring all the other contributing factors and poor decisions by managers that contributed to the length of the outage, the company argues that Mr. Pearson's actions and inactions were to blame. Particularly, the company argues Mr. Pearson should have checked Field Smart to ensure that his crew had the right materials for the job and should have contacted the storeroom as soon as he realized that they didn't have the right materials. Notably, none of these issues were identified in Mr. Pearson's termination letter of July 30, 2014, as the Collective Bargaining Agreement requires. Mr. Pearson's meal breaks were permissible and reasonable. The company admits that the Collective Bargaining Agreement and the 1980 Meal Agreement control this issue. The most natural reading of the CBA and Meal Agreement provisions is that employees are eligible for money for meals and the opportunity to obtain those meals. First, the structure of the CBA language means that "furnishing a meal" means more than paying a sum of money to be used for food. If "furnishing a meal" was synonymous only with "providing meal money payments," then the Subsection C (c) option line for payment "instead of actually furnishing" a meal would be nonsensical surplusage. Instead, the company's obligation to "furnish" a meal must mean something more than paying money for a meal. It can only mean that employees must be provided with an opportunity to eat a meal. Second, the language in the Meal Agreement clearly contemplates that employees will not only be provided with meal allowances, but they will be permitted to eat the meal at a time of their choosing once "eligible". The provision that the four-hour eligibility schedule "does not dictate that an employee should eat a meal at the time stipulated" implies that employees become "eligible for a meal" on their ninth hour and every four hours thereafter, but they retain discretion as to when they actually choose to eat it once they have become eligible. Someone who is "eligible" for a meal can get a meal at his/her option –

they are not obligated to immediately eat that meal. In other words, the Meal Agreement defines when employees are minimally “eligible” to eat, but leaves them some discretion as to when they actually chose to eat. In addition to the written agreements, there is firmly established past practice regarding employees’ schedule for overtime meals, and it is clear that Mr. Pearson and his crew operated within the parameters of that practice. The long-time interpretation has been that such an employee is “not eligible” until two and a half hours after the overtime began because of CBA Art. V §10 (c). Union Business Agent Michael Hoppe testified that Mr. Pearson and his crew would have been eligible to take a meal at 6 p.m., two-and- a-half hours after their overtime started, then every four hours after that per the Meal Agreement. In total they were eligible to take meals at 6 p.m., 10 p.m., 2 a.m., and once again at 6 a.m. From a common-sense stand point, it makes perfect sense that employees who have extended their workday on overtime should be able to take a meal approximately every four hours, much as the rest of us do even without the governance of a Meal Agreement. Mr. Hoppe further testified it was “not uncommon” for employees to take two meals during the course of an all-night overtime assignment. For Mr. Hoppe, there is nothing “aberrant or uncommon” about Mr. Pearson’s two meal breaks. Mr. Hoppe further explained that this practice does not significantly change in an outage. The meal-break practice in an outage, as in a non-outage, depends on the job and what opportunities the job presents for the crew to eat. Even “in a multiple day storm situation,” Mr. Hoppe testified, the practice is for employees to “stop for a decent meal” as the crew needed and work permitted. Furthermore, past practice also permits employees to leave the jobsite to eat meals. It has been the practice of Xcel line crews to temporarily secure and leave the jobsite so they can take a proper meal break. Employees understand that they cannot take an inordinate amount of time to take their breaks, but the past practice has never established a strict time limit for overtime meal breaks. Friday evenings, restaurants are busier and in the early morning hours very few restaurants are open. Finally, one cannot lose sight of the fact that meal breaks during long overtime jobs are an important benefit. There are two very good reasons why employees get this benefit:

incentives and safety. The company has opted not to create a permanent night-shift of linemen. So if the work must be done at night, someone needs to work overtime. Who in their would volunteer to work 24-hours straight without the right to take a proper dinner and breakfast break between mid-afternoon and morning? Further, encouraging employees to take meal breaks on long overtime jobs is a safety issue. Indeed Xcel Energy's own publications note that taking frequent rest breaks are essential to safety in hot weather, and that eating a good diet is key to fighting fatigue when "working extra shifts." [Union Exhibit #19]. An experienced foreman like Mr. Pearson recognized this. And OSHA further recognizes this. Mr. Pearson's reliance on Feeder maps was reasonable under the circumstances. Mr. Pearson's reliance on the Feeder map provided by his own supervisor is not a violation of any known or implied company policy nor has the company proved that Field Smart would have shown 750:500 cable issue as of June 11-12, 2014. Employees are under no standing orders to use Field Smart. Field Smart is just another tool if you choose to use it. Since Field Smart was neither a general nor a specific requirement of the job, Mr. Pearson committed no misconduct by opting to rely on other sources to inform him and his crew about the job he had been assigned. Mr. Pearson made a good faith judgment call in not contacting the storeroom. Mr. Pearson's work performance was not the cause of the extended outage and his discipline is highly disproportional. It is not clear why Mr. Pearson's crew was singled out, rather than managers who opted not to utilize temporary fix solutions, who opted to not address the faulty cable after multiple prior faults and who failed to communicate crucial information about the outage to workers. Nor did the employer offer any meaningful explanation for this singular focus on Mr. Pearson and to the exclusion of so many others. Really, the power was out because Xcel Energy neglected to replace a stretch of cable that was prone to faulting. It was out because Xcel Energy did not properly communicate the existence to either key management employees or those working on the outage in the field.

- D. Due process and basic fairness were sorely lacking in both the investigation and discipline and Mr. Pearson's discharge therefore lacks just cause. The employer's

investigation was unfair because it was inaccurate and/or unreliable and utilized investigatory methods that were expressly prohibited by agreement. The decision to terminate Mr. Pearson was not the result of a fair investigation. Far from it. The unfair manner in which the investigation was conducted, the disturbingly inaccurate investigation, and the wrongful reliance on GPS technology all suggest this investigation was deliberately designed to heap as many half-baked charges on to Mr. Pearson as it took to justify his termination. The investigation was deeply flawed. A fair investigation process requires that the employer interview witnesses to the alleged misconduct. Here a number of key witnesses were never interviewed, i.e. Mr. Jason Axelrod or Mr. Ryan Seewick. The results of the investigation were inaccurate and/or unreliable. The nursing home did not actually file a complaint with the Minnesota Public Utilities Commission, contrary to the printed assertion on page one of the investigation report. The report contains other indicia of unreliability. Multiple witnesses recall Mr. Pearson explaining to the company investigators during the interview that he does not have a TCF Bank account and that he once stopped by his house to let his dog out for a minute while his wife was out of town. Additionally, the investigation report leans heavily on the recollections of Troubleman Paul Peterson to uphold the allegation that Mr. Pearson must have been dishonest when he said he never knew about the outage. The investigation unfairly relied on GPS information, contrary to the parties' agreement. Xcel Energy and IBEW local unions bargained over the proper role of technology on company vehicles and employee discipline as early as 2002. As Ms. Gilman explained in a April 24, 2006 letter to former Union Business Agent Joseph Polumbo:

The company will not use the technology and the resulting information for disciplining bargaining unit employees unless an inappropriate behavior has been separately.

Here it is undisputed that Xcel Energy reviewed GPS data from the truck Mr. Pearson was driving on both June 11-12, 2014, and that the company then reviewed Mr. Pearson's whereabouts for weeks on either side of the June 11 date. The company's reliance on the June 26th GPS was not prompted by a "separately identified" behavior, but rather, was an unjustified and overbroad into non-relevant information. The employer failed to provide Mr. Pearson and the union with a precise statement of charges, as required by due process and the parties'

Collective Bargaining Agreement. The July 30, 2014, termination letter makes no reference to meal breaks, the cable size issue, or personal business on company time. The company failed to provide notice of the purported “policies” regarding reasonable meal breaks during overtime and of the cable identification procedures, much less consequences associated with violations. Multiple witnesses testified about their understanding of the proper use of Timco cable identifiers. They testified it does not work on faulted cable. Xcel linemen have never used cable identification devices on faulted cables. Further, multiple witnesses testified about their understanding of the overtime meal break policy. They testified that there is a long-standing past practice that employees working on extended overtime are eligible to take a meal break two-and-a-half hours after their overtime shift starts, and every four hours thereafter. The policy has always permitted them to leave the jobsite to eat that meal at a sit-down restaurant, even during an outage.

In conclusion, Mr. Pearson has been made a scapegoat for all the problems Xcel Energy in the June 11-12, 2014, outage. However, there is nothing about his actual work performance that night to justify termination. Xcel Energy has completely failed to prove that Mr. Pearson has ever been dishonest, much less clearly and convincingly showed intentional deception of any of the alleged subjects. Xcel Energy failed to prove that Mr. Pearson’s work on June 11-12, 2014, outage was deficient, since his decisions to take the meal breaks he was ingreatfully entitled to, his good faith trust in his supervisor’s instructions, and his time management decisions to complete the night work with available materials were all entirely reasonable. Rather than reviewing support for Mr. Pearson’s harsh discipline, the hearing revealed a troubling list of due process errors. The company’s investigation was unfair, inaccurate and unreliable. The company relied on GPS data the parties have long understood cannot be used for discipline. The decision regarding the July 8th incident was a judgment call by Mr. Pearson which does not constitute just cause for termination. The company is in effect attempting to enforce purported policies that prior to Mr. Pearson’s discipline did not exist. The company failed to provide a precise statement of charges, as required both by due process and the parties’ collective bargaining agreement. Xcel Energy has not met its burden of proving that Mr. Pearson has committed any misconduct, or that it has just cause for his discipline for these reasons, he should be reinstated and made whole.

DECISION AND RATIONALE

There were many issues presented during the arbitration hearing and in the post-hearing briefs of the employer and the union. Issues such as:

1. Policies regarding the use of Timco;
2. Meal breaks;
3. Meaning of “in lieu of”;
4. Reliance on GPS information;
5. Investigation and due process;
6. Judgment calls;
7. Specificity of the termination letter.

The employer in its 31-page post-hearing brief dealt with many of these issues. The union in its 59-page post-hearing brief dealt with every one of these and other issues. However, the agreed upon issues are: 1) Did the employer have just cause to terminate the grievant, Timothy Pearson? [See post-hearing brief of employer at 2; post-hearing brief of union at 20]. 2) If not, what remedy is appropriate?

While the above issues are important issues that help determine the exact meaning of the contract, and probably need to be dealt with in future negotiations in order to avoid future conflict, this arbitrator has not been asked to determine what the contract has to say about the required use of Timco, the meaning of “in lieu of”, the meaning of meal breaks and some of the other CBA disagreements that have arisen as a result of this very specific just cause for termination arbitration issue. Many of the above issues were not fully argued during the arbitration hearing or in the post-hearing briefs. This case is about whether the company has proven just cause to terminate Timothy Pearson, a 34-year employee who was on a Decision Making Leave when he was terminated.

Heightened Burden of Proof

The burden of proof in a termination case is carried by the employer. The employer argues that it does not have a “heightened burden of proof.” The union contends the burden of proof in this matter is “heightened” because it involves allegations of dishonesty and it involves a 34-year employee. The union contends the burden on the employer is to show proof by “clear and convincing evidence”. The traditional burden of proof in arbitration matters is proof by a

“preponderance of evidence” to show just cause. This case involves allegations of dishonesty of a 34-year employee. “[I]n cases involving criminal conduct or stigmatizing behavior, many arbitrators apply a heightened burden of proof, typically a ‘clear and convincing’ standard, with some arbitrators imposing the ‘beyond a reasonable doubt’ standard.” Elkouri and Elkouri, **How Arbitration Works**, Ch. 15.3.D.ii.a (Kenneth May, 7th ed. 2012). Allegations of dishonesty are stigmatizing for an employee. Further, this is a 34 year employee. His length of service with the company is a factor both in the burden of proof carried by the employer and in consideration of the appropriateness of a penalty. See, Elkouri and Elkouri, **How Arbitration Works**, Ch 15.3.F.viii (Alan Rubens, 6th ed. 2003).

Mr. Pearson, a 34-year employee, has been accused among other accusations, of “being dishonest during the Company investigation.” See, Termination Letter of July 30, 2014. Consequently, the clear and convincing standard is applied in this case.

Termination Letter of July 30, 2014

The termination letter of July 30, 2014 states:

“The Company’s decision to terminate you is based on the fact that you not only violated Xcel Energy’s Code of Conduct, but you also failed to comply with the terms and conditions of your December 6, 2013 Decision Making Leave. The numerous violations include, but are not limited to the following:

- Violation of Xcel Energy Safety Rules by failing to follow the underground cable verification process on June 11 & 12, and failing to turn off company equipment (Safety Manual – E.1-g and E.5-d) when leaving a work site on July 8, 2014.
- Failure to comply with Xcel Energy’s Code of Conduct by being dishonest during the Company investigation.
- Failure to meet/exceed management’s expectations pertaining to your work performance.”

The parties’ Collective Bargaining Agreement states that the employer shall furnish “specific written reasons” at the time of discharge. Article IV §2. Where the employer is expressly obligated to give notice of all grounds for discharge at the time of discharge, “Arbitrators typically hold that only evidence bearing on the charges made at the time of discharge should be considered in determining the existence of cause”. Elkouri and Elkouri, **How Arbitration Works**, Ch.15.3F.vi (Kenneth May, 7th ed. 2012) Even without such a

provision, arbitrators typically hold that “the discharge must stand or fall upon the reasons given at the time of discharge.” Id.

Mr. Pearson’s letter of July 30, 2014, states he was “dishonest” during the company investigation and “failed to meet/exceed management’s expectations pertaining to...work performance.” One may rightly ask when was I dishonest? What did I say that was dishonest? Why do you say I am dishonest? What was wrong with my work performance? When was my work performance a failure? Specificity is sorely lacking to understand these two very general non-specific allegations.

The first allegations that Mr. Pearson violated Xcel Energy’s safety rules by failing to follow the underground cable verification process on June 11-12 and he failed to turn off company equipment after he left a worksite on July 8, 2014 are more specific. At least he has some understanding of the July 8th incident. But where did he fail to follow the underground cable verification process on June 11-12? At the arbitration hearing, it became clear that the use of the Timco has never been mandatory when a cable is clearly burned through and verification has been made that the power has been de-energized. Both of these situations were absolutely clear to Mr. Pearson and his crew on the night of June 11-12, 2014. Numerous witnesses testified that there is no policy requiring the use of the Timco when a cable has been de-energized and is currently burned through. No policy was introduced by the company to prove by clear and convincing evidence that the Timco is always required.

With regard to the July 8, 2014, power pole incident, Mr. Pearson made a judgment call. The company argues he made a poor judgment by not immediately turning around to go back and see if a truck was actually left running. Mr. Pearson testified he was just a few minutes away from the service enter. He made a judgment all to proceed to the service center and tell Mr Wishard that the truck might be running. Rather than immediately turning in the paperwork, which he typically would do, he went looking for Mr. Wishard to inform him of the fact that a truck might be running. He made the judgment not to go back to the work site because he thought another crew was probably on the way.

Mr. Wishard testified he had to look for Mr. Pearson. Mr. Pearson testified he immediately went looking for Mr. Wishard. There is no question that Mr. Pearson self-reported the possibility that a truck was still running. Based on this evidence it is held that the company has not by clear and convincing evidence proven that Mr. Pearson violated any safety rules. He

made a judgment call based on the best facts he had. He wasn't sure even if a truck was running. He felt that another crew might be on the way. Despite the differences in the testimony between Mr. Wishard and Mr. Pearson related to who was looking for whom, there is no question that Mr. Pearson self-reported to Mr. Wishard the concerns that Mr. Axelrod expressed. The only evidence that the truck was, in fact, still running is hearsay evidence reported by Mr. Wishard as to what Mr. Axelrod told him. To rely on hearsay evidence such as this to support the termination of a 34-year employee would violate the substantive and procedural fundamental fairness required to prove just cause for termination by clear and convincing evidence.

With respect to "being dishonest during the company investigation" the company did not by clear and convincing evidence prove any dishonesty. The facts show that Mr. Pearson answered each and every question to the best of his memory. When he forgot he had stopped to let the dog out, he was not lying when he said "No" to the initial question. Testimony indicated from two witnesses that he immediately changed and clarified when he remembered that he had stopped at his home to let the dog out while his wife was out of town. He told Ms. Gilman the truth as soon as he remembered it.

Parking in the TCF Bank lot was prudent. He was not doing business at the bank. He does not even have an account at Twin Cities Federal nor does he have an ATM card. He was taking a meal break per the Collective Bargaining Agreement and simply parked in the Twin Cities Federal lot because the Old Country Buffet lot was too small for his truck.

The allegation of "being dishonest during the Company investigation" is simply too general to fulfill the Collective Bargaining requirement to furnish "**specific** written reasons" [emphasis added] at the time of discharge. This alone is cause to hold the contract has been violated and just cause cannot be upheld under any standard of proof for this general allegation.

The same can be said for allegations of his "[f]ailure to meet/exceed management's expectations pertaining to your work performance." This is extremely vague and does not satisfy the Collective Bargaining Agreement that the employer furnish "specific written reasons" at the time of discharge. The vagueness of this allegation at the time of his discharge did not permit Mr. Pearson to respond in any knowledgeable or meaningful manner to this allegation. Such a vague and non-specific reason for termination not only violates the Collective Bargaining Agreement, it also violates the concept of fundamental fairness/industrial due process which is required for the termination of a 34-year employee.

Nothing in the evidence proves that Mr. Pearson and his crew failed to meet/exceed management's expectations. They had been working overtime (ultimately almost 24 hours nonstop) in extremely difficult conditions. i.e. torrential rain in a swamp trying to locate and fix a broken, burned out cable. The information they had received from management showed that the cable was 750. They did not learn until they visually saw the cable that it was 750 on one end and 500 on the other. While Mr. Matthees and Mr. Schroeder may have been told there was an outage somewhere, the evidence shows that Mr. Pearson never knew while he was working on the job that there was an outage, especially at a nursing home. His manager, Mr. Wishard, did not know there was an outage at a nursing home until he came to work on June 12, 2014, at 6 a.m. Mr. Pearson was working with the best information he had at the time. There is no policy at that time that required him to use the Timco. In fact, using the Timco would have been a waste of time since it does not work when a cable is burned out. He had also received notification that the cable was de-energized. He made the extra step to make sure the locators checked to see if there were any live wires nearby. The employer has not shown by clear and convincing evidence, or for that matter, by any evidence, that Mr. Pearson "fail[ed] to meet/exceed management's expectations pertaining to [his] work performance."

It is not necessary for this arbitrator to determine the other issues such as the meaning of "in lieu of", meal time issues, or several other issues presented during this arbitration hearing and presented in the post-hearing briefs by both parties. The only issue this arbitrator has been asked to resolve relates to whether the company proved by clear and convincing evidence just cause to terminate the grievant, Mr. Timothy Pearson. Based on the evidence presented at the hearing and the post-hearing briefs, it is held that the company did not prove by any standard of evidence – "clear and convincing" or "preponderance of the evidence" – that Mr. Pearson violated any Xcel Energy Safety Rules on June 11-12, 2014, nor any Safety Manual expectations on July 8, 2014; or failed to comply with Xcel Energy's Code of Conduct by being dishonest during the company investigation; or failed to meet/exceed management's expectations pertaining to his work performance. The grievance is sustained. Mr. Pearson shall be made whole, including but not limited to reinstatement, full back pay and benefits, together with restoration of all rights under the collective bargaining agreement.

December 15, 2015

Date

Joseph L. Daly

Arbitrator