

IN THE MATTER OF THE ARBITRATION BETWEEN

International Brotherhood of Electrical Workers,
Local 160,
Union

-and-

AAA Case No. 01-14-0001-9880
Grievance #7233

Northern States Power Company, a Minnesota Corporation,
d/b/a Xcel Energy, Employer.

Employer

ARBITRATOR:	Christine D. Ver Ploeg
DATE AND PLACE OF HEARING:	December 15, 2015 Jackson Lewis P.C. Minneapolis, Minnesota
DATE OF RECEIPT OF POST-HEARING BRIEFS:	February 22, 2016
DATE OF AWARD:	March 10, 2016

ADVOCATES

For the Employer
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For the Union
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ISSUE:

Has the Company's method of offering routine weekend overtime to employees breached the parties' collective bargaining agreement? If so, what shall be the remedy?

BACKGROUND

This case has been brought by the International Brotherhood of Electrical Workers, Local 160 (hereinafter “Union”) as a Union grievance on behalf of its members who are employed by Xcel Energy (hereinafter “Company”).

The dispute which gives rise to this arbitration stems from the Company’s method of offering routine weekend overtime to employees. The Union submits that the Company’s practice of offering that overtime to all employees on a “mixed crew” violates a Construction Department Labor Agreement which became effective January 1, 2011, and is incorporated by reference into the current collective bargaining agreement. The Company submits that its method of offering overtime is supported by both the collective bargaining agreement and long-standing past practice.

The following facts in this case are not in dispute. The Company provides utility services to customers in numerous states. The Union represents gas and electrical workers in the Upper Midwest, including employees who perform major infrastructure construction, repair and maintenance on substations and transmission lines. Those employees are covered by the “Construction Department Agreement,” and within that Agreement there is a Substation Construction Department and Transmission Construction Department. The present issue arises in the Transmission Construction Department.

The Company has long employed two different kinds of employees: “Benefit” employees and “Non-Benefit” employees. Both groups work side-by-side on “mixed crews” on major transmission line construction and repair projects. The Company determines how to staff jobs, including determining a crew’s Benefit/Non-benefit employee composition.

“Benefit” employees covered by the Construction Department Agreement are entitled to all of its benefits. By contrast, “Non-Benefit” employees, sometimes referred to as “supplemental workers,” are not covered by that Agreement. Although they are also “employees,” they are covered by a different statewide labor agreement. They receive different pay, different benefits, no paid vacation, no paid sick time, no seniority accrual, and no grievance rights. Non-benefit employees are referred through Local 160’s hiring hall, based on how many Benefit employees the Company has and its additional needs. Many employees have worked as both Non-Benefit and Benefit employees. Employees will often start their careers as Non-Benefit workers and progress into the more coveted Benefit jobs.

Unlike most of the Company’s bargaining unit employees, the transmission construction crews do not have a reporting headquarters or a standard work location. Instead, crews are scattered throughout the utility’s service, working wherever the work is located. Accordingly, these crews have job site reporting, which is common in the construction industry.

Historically, whenever the Company has planned overtime on a job, all members of the crew assigned to that job have been offered the first opportunity to work the overtime. This includes both the Benefit and Non-benefit crew members assigned to the job. If not enough crew members assigned to the job volunteer for the planned overtime, or if additional resources beyond the assigned crew are needed, the Company then uses an overtime list to seek volunteers among other Benefit employees not assigned to the job.

The Construction Department Agreement contains two provisions relevant to overtime priority:

Art. V § 5, which is been in the parties’ Agreement since 1948, provides that **“overtime is to be as equally distributed as is practicable in the classifications of work among the**

employees employed on each job where such overtime is worked or to be worked.” It further requires the Company to produce an overtime list from which to offer these opportunities.

The Terms and Conditions Addendum, ¶19, was added to the parties’ Agreement sometime after a 1990 arbitration decision (FMCS#90-03337). In exchange for the Union’s agreement not to enforce that decision, the parties agreed **“that during the performance of routine daily work, which includes normal overtime situations and weekends, the Company will offer to utilize the NSP benefit regular bargaining unit workforce within the respective IBEW Local Union’s jurisdiction, prior to using other options whenever practical.”**

In applying Article V § 5, the parties utilize an “overtime callout list” that tracks the overtime worked by Benefit and Non-benefit employees. Overtime is determined by calculating how many persons a foreman needs for an overtime job. The list is then utilized to solicit enough employees to fulfill that need.

In applying this procedure the parties have developed clear practices for some, but not all, overtime scenarios. There is no dispute that Management does use the overtime callout list (which includes both Benefit and Non-benefit employees) for emergency overtime and pre-planned discrete projects, and does not use it for short periods of afterhours weekday work on ongoing projects. However, the parties disagree regarding the assignment of pre-planned weekend overtime for ongoing projects. That is the issue in this case.

In mid-2014 the Union began filing grievances regarding the Company’s weekend overtime callout procedures for ongoing projects. The first grievance related to an alleged violation on June 12–13, 2014. Since then, the Union has filed nearly 30 additional grievances alleging improper call-out procedure for scheduled overtime. Specifically, the grievances allege that the Company has failed to use the low-overtime callout list and has instead offered planned,

weekend overtime to Non-benefit employees without first offering that work to Benefit employees who should have priority.

The parties were unable to resolve their differences concerning this matter in earlier steps of the grievance process, and have agreed that this dispute is now properly before the arbitrator for resolution. The parties and the arbitrator met for a hearing on this matter on December 15, 2015, and the parties submitted post-hearing briefs which this arbitrator received on February 22, 2016. At that time the record was closed.

RELEVANT CONTRACT LANGUAGE

The Parties' current Collective Bargaining Agreement provides in relevant part:

Article V, Section 5:

The overtime is to be as equally distributed as is practicable in the classifications of work among the employees employed on each job where such overtime is worked or to be worked.

Terms and Conditions of Settlement effective January 1, 2011:

19. The Company's commitment is that during the performance of routine daily work, which includes normal overtime situations and weekends, the Company will offer to utilize the NSP benefit regular bargaining unit workforce within the respective IBEW Local Union's jurisdiction, prior to using other options whenever practical.

DISCUSSION AND DECISION

In this case the Union has had the burden of proving that the Company's method of offering routine weekend overtime to employees has breached the parties' Agreement. For the following reasons I find that the Union has met that burden.

1. Contract language, Article V, Section 5

In any dispute regarding a claimed violation of contract, it is self-evident that we must begin with the contract language. In this case the Company places its primary reliance upon Article V, Section 5. That provision, which has been in the parties' Agreement since 1948, states:

The overtime is to be as equally distributed as is practicable in the classifications of work among the employees employed on each job where such overtime is worked or to be worked.

The Company typically uses mixed crews consisting of both Benefit and Non-benefit employees to perform transmission construction work. Unlike most bargaining unit employees at the Company, the transmission construction crews do not have a reporting headquarters or a standard work location. Instead, the crews are scattered throughout the utility's service territory, working wherever the work is located. Accordingly, these mixed crews have job site reporting. From this the Company defends its long-standing practice of offering weekend overtime to *all* mixed crew employees—both Benefit and Non-benefit—who are “employed on each job.”

The Union rejects the Company's interpretation of Article V, Section 5, on the grounds that this provision, like the entire Agreement, applies only to the Benefit employees. This means that the directive regarding equal distribution of overtime extends only to bargaining unit members, not to Non-benefit employees on the same job site. That is, Article V, Section 5 is largely irrelevant to the current dispute because the issue is not *which* Benefit employees should be called for overtime on a particular job, but instead that Benefit employees *throughout the classification* must be called first for any weekend overtime. The Union submits that Article V,

Section 5's only relevance to this case is found in its directive that the Company maintain and provide an overtime list to the Union upon request.

Decision

It is true that the parties' Construction Department Agreement covers only Benefit employees. Non-benefit employees, while also Union members, fall under a different collective bargaining agreement and do not receive the benefits of this Agreement. They are simply referred through the Union's hiring hall based upon Company needs and they receive different pay, different benefits, no paid vacation, no paid sick leave, no seniority accrual and no grievance rights. Employees frequently start their careers as Non-benefit workers and then progress to the more coveted Benefit jobs. Overtime is a desired perk and Article V, Section 5's distribution of it extends only to one category of employees: Benefit employees. The Union's interpretation of Article V, Section 5, is the more reasonable.

2. *Contract language, Paragraph 19*

In this case the Union relies primarily upon the Terms and Conditions addendum, ¶19, that was added to the parties' Agreement sometime after a 1990 arbitration decision (FMCS#90-03337). In exchange for the Union's agreement not to enforce that decision, the parties agreed in Paragraph 19:

...that during the performance of routine daily work, which includes normal overtime situations and weekends, the Company will offer to utilize the NSP benefit regular bargaining unit workforce within the respective IBEW Local Union's jurisdiction, prior to using other options whenever practical.

The heart of this provision is found in its directive that "the Company will offer to utilize the NSP benefit regular bargaining unit workforce" with respect to, among other things, weekend

overtime. To the extent that Article V, Section 5, may be unclear regarding who falls within its terms for purposes of allocating that overtime, the first portion of Paragraph 19 clearly resolves the question in favor of Benefit employees. Indeed, the Company accepted this reality in 2007 when it responded to a grievance by paying Benefit employees for Saturday work performed by Non-benefit employees.

However, just as the Union denies that Article V, Section 5, governs the award in this case, the Company denies that Paragraph 19 is determinative given the final portion of that provision which expressly grants it the ability to use “other options whenever practical.” The Company notes that its acquiescence to the Union’s position in the 2007 grievance was based on the inadvertent failure to include this language in the then applicable Agreement. Following that grievance, the parties did reinstate the “other options whenever practical” proviso which the Company claims has justified offering weekend overtime to all members of a “mixed crew” since then.

Decision:

I have considered the parties’ arguments regarding Paragraph 19 and find that the evidence supports the following findings of fact and conclusions:

First, the Terms and Conditions addendum, Paragraph 19, represented a concession on the part of the Company in return for the Union’s agreement not to enforce an arbitration decision it apparently had won.

Second, at least for a period of time, that concession – an obligation to first offer “normal overtime situations and weekends” to Benefit employees – was unqualified. With the inclusion of language whereby the Company would extend those offers “prior to using other options whenever

practical,” the Company gained discretion that would not otherwise have been the case. However, that discretion is not unfettered.

Third, Paragraph 19 creates a presumption that weekend overtime will first be offered to the “benefit regular bargaining unit workforce within the respective IBEW Local Union’s jurisdiction.” The Company can overcome that presumption, but it is the Company that bears the burden of demonstrating that adhering to it would be impractical.

Fourth, general arguments that offering overtime to Benefit employees who must travel to a job site rather than to Non-benefit employees who are already at that site fall short of meeting the Company’s burden. “Whenever practical” does not mean the most efficient or convenient or even most sensible possible option. Overtime is a valuable negotiated benefit. The Company must be able to identify a specific and persuasive reason to disregard Paragraph 19’s language and intent.

Fifth, examples of reasons that might demonstrate impracticality include, but are not limited to, evidence of a need for continuity on a job for safety or technical or other good reasons. However, in this respect it is noteworthy that the Union has already specifically stated it will not contest the overtime priority of Benefit employees who are already on a job over other Benefit employees, regardless of where they fall on the overtime call out list. Thus, concern for job continuity can be presumed to already largely be addressed. In the event that no Benefit employee on an ongoing job opts to continue into the weekend, job familiarity and safety concerns may then justify first offering the overtime to a suitable number of Non-benefit existing crew members. However, those decisions must be based upon a case-by-case evaluation.

3. *Past Practice*

The above analysis of the Agreement's terms has been undertaken in recognition that the overwhelming evidence demonstrates that the Company has nevertheless had a 30+ year practice of offering weekend overtime to *all* employees "employed on each job," both Benefit and Non-benefit. The Union's evidence of a contrary past practice has been minimal, nonspecific and distinguishable.

Thus, this case has presented a difficult question: should persuasive evidence of a long standing past practice defeat persuasive evidence regarding the interpretation of negotiated contract language? For the following reasons I find that under the circumstances presented in this case, it does not.

First, while it is true that past practice is highly relevant in interpreting ambiguous language, for the reasons explained above the contract language on its face favors the Union.

Second, although a practice of 30+ years is, indeed, impressive, the more relevant time frame by which to measure it is the parties' more recent adoption of Paragraph 19. Paragraph 19 represented a concession by the Company and is the mainstay of awarding decision in this case to the Union.

Third, the fact that the Union largely failed to grieve the Company's practice until 2014 did not negate its ability to do so then and from that point forward, given the strength of its contractual position. It is also true that the Union's perceptions, real or imagined, may have altered over time so that this issue has become more meaningful and urgent. Union witnesses testified regarding their concerns that overtime opportunities may greatly decline following completion of some major projects.

AWARD

For the above reasons this grievance is hereby sustained. Absent evidence that it is impractical to do so, the Company shall cease assigning planned weekend overtime work to Non-benefit employees unless it has first offered such work to “the NSP benefit regular bargaining unit workforce within the respective IBEW Local Union’s jurisdiction.” The Company will make the bargaining unit whole pursuant to this award. This arbitrator shall retain jurisdiction in the event that the parties cannot agree upon the appropriate remedy.

March 10, 2016

A handwritten signature in black ink, reading "Christine Ver Ploeg". The signature is written in a cursive, flowing style.

Christine Ver Ploeg, Arbitrator