

IN THE MATTER OF THE ARBITRATION BETWEEN

**International Brotherhood of Electrical
Workers, Local 23 [Vacant Shift – Garage
Section – Grievance #3654**

And

Xcel Energy, Inc.

**OPINION AND AWARD
American Arbitration Association
Case No. 01-15-0003-9717**

ARBITRATOR

Joseph L. Daly

APPEARANCES

On behalf of IBEW, Local 23
M. William O'Brien, Esq.
Miller O'Brien Jensen PA.
Minneapolis, Minnesota

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

JURISDICTION

In accordance with the Labor Agreement, January 1, 2014 to December 31, 2016, between Metro East Region of NSP Northern States Power Company and the International Brotherhood of Electrical Workers, Local 23; and under the jurisdiction of the American Arbitration Association, the above grievance arbitration was submitted to Joseph L. Daly, Arbitrator, on January 14, 2016, in Minneapolis, Minnesota. Post-hearing briefs were received by the arbitrator on April 4, 2016. The decision was rendered by the arbitrator on May 3, 2016.

ISSUES AT IMPASSE

The union states the issues as:

1. Whether the company violated the Collective Bargaining Act and/or related "Exhibit B" amendments, when it failed to fill temporary vacancies in the Metro East garage section, and as a result left garages without staffing?
2. If so, what is the appropriate remedy?

Xcel Energy, Inc. states the issues as:

1. Did the company violate the Metro East Region Labor Agreement when it decided not to fill a temporary vacancy in 2015 in the Metro East garage section just as it has done in the past?
2. If there is a violation, what is the appropriate remedy?

POTENTIALLY RELEVANT CONTRACT LANGUAGE AND EXHIBIT B

Article I

METHOD OF NEGOTIATION

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

Section 2. The right, in accordance with the provisions of this 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 food 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.

ARTICLE IV

CLASSIFICATIONS

Section 2. After signing of this Agreement, the representatives of the parties hereto shall meet for the purpose of drawing up sectional working rules, to be known as Exhibit "B" and to become a part of this Agreement. After the signing of this Agreement if through error any employee or classification is omitted in Exhibit "A", such employee or classification shall be considered included in Exhibit "A" provided it had previously been agreed between the parties hereto that such employee or classification was included in Exhibit "A".

ARTICLE V

WORKING HOURS

Section 9.

(a) The overtime is to be as equally distributed as is practicable among the employees employed on the classification of work where such overtime is worked or to be worked. Each month the Labor Relations Department of the Company will supply to the Local Union an overtime list showing the actual additional hours paid and credited (as provided for in Subsection (e) in this section) each employee for overtime in each department during the payroll periods ending in the previous month. The Company shall also post on its

bulletin boards an up-to-date overtime report in order that the employees involved will be fully acquainted with their individual overtime standing.

(b) Except as otherwise provided for in Paragraph (c) of this Section, in the event the Company calls to work for overtime work employees of a different classification than the classification of work for which such overtime is worked without having exhausted all reasonable attempts to call employees within the classification of work where such overtime is to be worked, the Company shall pay at the overtime rate the employee with the least amount of overtime in the classification of work where such overtime is worked in addition to the employee who did work at the regular overtime rates.

(c) Employees contemplating absence from work shall make every reasonable effort to notify the Company as quickly as possible of such contemplated absence and the provisions as contained in Paragraph (b) of this Section shall apply only in the event overtime work is performed for relief of an absent employee who has notified the Company four (4) hours or more in advance of his/her established starting time. It is understood and agreed between the parties hereto, that the Company shall have exhausted all reasonable attempts to call an employee within the classification of work where overtime is to be worked when an attempt is made to call an employee and through no fault of the Company the effort has been unsuccessful.

(d) Any employee either temporarily or permanently assigned to another classification of work shall be given the highest accumulative overtime figure in the classification in which they enter. This figure shall be taken as of the day on which an employee is assigned to another classification.

(e) Employees low in overtime, shall, in accordance with Subsection (a) of this Section, normally be the first ones contacted for overtime work. If an employee turns down overtime, he/she shall, for the purpose of determining his/her overtime status, be credited with the amount of overtime involved. This shall apply only to overtime in the employee's regular classification. It is agreed, however, that an employee who is on sick leave, and whose time is being charged to sick leave, an employee who is on vacation or who is absent from work because of a death in his/her immediate family, shall not be called for overtime during the period involved.

(f) No employee shall be called for overtime work during his/her vacation period. For the purposes of this Section, the vacation period shall include not only the vacation proper, but shall also include (1) any holiday defined in this Agreement, (2) any day off in lieu of a holiday worked, subject to the provisions of Article V, Section 15, or (3) any day or days which such employee would normally have off if not on vacation, as provided by Article V, Sections 1-3, inclusive, provided that any such day or days enumerated herein

shall immediately precede, immediately follow, or run consecutively with the vacation proper without interruption.

(g) For the purpose of equally distributing overtime, an employee taking a day off in lieu of a holiday shall not be called to work overtime on this day off or on his/her regular days off which run consecutively with the day taken off in lieu of a holiday.

(h) Any employee who has accepted a scheduled overtime assignment shall receive a minimum of two (2) hours at the applicable overtime rate if the overtime assignment is canceled less than twelve (12) hours prior to the scheduled assignment or after the expiration of his/her previous normal work period.

ARTICLE VII

GENERAL WORKING RULES

Section 18, There shall be no change in job performance unless so determined by the established method of negotiation as provided for within this Agreement.

ARTICLE XI

Section 2. Sectional working rules, which have been agreed to by the company and the Local Union, shall be made a part of this Agreement and shall be known as Exhibit "B".

Terms and Conditions

All terms, conditions and practices of the labor agreements, severance Pay Agreements and Procedural Agreements between IBEW, Local unions 23, 160, 949, 953 & 1426 and Northern States Power Company, and its subsidiaries, expiring December 31, 2010 are to remain unchanged except as stated below.

Exhibit B

Letter dated February 5, 1992

No staffing discussed and understood as intended operation at this time shall be regarded as committing the Company to a specific number of employees in any classification or on any shift at all times either now or in the future.

Exhibit B

Letter dated February 15, 1995

No staffing discussed or understood as intended operation at this time shall be regarded as committing the Company to a specific number of employees in any classification or at any shift at all times either now or in the future.

INTRODUCTION

There are a number of operational sections covered by the Metro-east Collective Bargaining Agreement, including the Garage Section. The Garage Section consists of three garages or services center – the Rice Street, Newport, and White Bear Service Centers. There are two shifts at each garage, a day shift (7 a.m. – 3:30 p.m.) and an afternoon or evening shift (3:30 p.m. to midnight). Typically, each shift is staffed by a foreman working as a mechanic and a mechanic. In some instances there is a floor man on shift who will perform garage cleanup and light mechanical work. The bargaining unit employees are responsible for the maintenance and repair of the fleet of approximately 600-700 vehicles operating in the Metro-East Section of the company.

On February 4, 2015, both the foreman and the mechanic at the Newport Service Center were absent due to illness or vacation. The employer neither transferred a mechanic from another garage, nor called in a mechanic from the overtime list. Consequently, the Newport garage was left vacant for a full shift. When the union learned of this it filed a grievance dated February 17, 2015. The grievance stated:

Subject: Vacant shift – Garage Section _ Newport – Grievance #3654

Dear Mr. Quackenbush:

It has been brought to the attention of the Local Union that on February 4, 2015, the Company left the Foreman and Mechanics positions vacant without exhausting the overtime list.

This unilateral action by Management is in violation of the following articles and sections of the Labor Agreement:

- Article IV, Section 2
- Article V, Section 9
- Terms & Conditions September 5, 2013, Item #12

Please arrange a grievance meeting per the Labor Agreement to address this issue to the appropriate member is made whole for the hours in question.

Respectfully,
Local Union No. 23, I.B.E.W.
Michael H. Hoppe
Business Manager

Later on June 15, 2015, the union amended the grievance to read:

Subject: Vacant Shift – Garage Section – Grievance #3654 – Arbitration Resolution

Dear Mr. Quackenbush:

The Local Union is not in agreement with the correspondence from your office dated April 22, 2015, concerning the above subject and will resolve the issue in accordance with Article III of the Labor Agreement and the American Arbitration Association agreement dated May 3, 1996.

Statement of Issue

The Local union maintains that the Company is in violation of the Labor Agreement between the parties by virtue of their unilateral decision to leave the foreman and mechanics positions vacant at the White Bear Lake and Newport Service Center Garages, without exhausting the overtime lists. This action by Management is in violation of the following articles and sections of the Labor Agreement.

- Article I, Section 1
- Article IV, Section 2
- Article V, Section 9
- Terms and Condition – September 3, 2013, item #1

As a result of this arbitration, the Local Union asks the Company be ordered to make whole all members of the Garage Section who were denied the upgrade in pay and lost overtime pay.

Respectfully,
Local Union No. 23, I.B.E.W.
Michael H. Hoppe
Business Manager

POSITION OF I.B.E.W., LOCAL #23

The Collective Bargaining Agreement language together with past practice evidence establishes the obligation that temporary vacancies must be filled to avoid unstaffed garages. The Collective Bargaining Agreement language, unique to these parties, preserves the parties' practices from one CBA to the next. These parties have many decades of collective bargaining history between them. Over the decades the IBEW locals, including Local 23 and Xcel, have fashioned a protocol for the negotiations from one CBA to the next. Upon conclusion of negotiations for succeeding CBA, the parties prepared a term sheet, called "Terms and Conditions of Settlement" on the changes they have bargained for. Through the Terms and Conditions of Settlement, the parties expressly preserve all Collective Bargaining Agreement

terms that have not been negotiated, changes then itemized in the Terms and Conditions of Settlement document, while also preserving all practices followed by the parties under the Collective Bargaining Agreement. In this regard, the Terms and Conditions of Settlement language for the current three-year collective bargaining agreement (2014-2016) between the parties reads as follows:

All terms, conditions and practices of the Labor agreements, Severance Pay agreements and Procedural Agreements between IBEW Locals 23, 160, 949, 953 and 1426 and Northern States Power Company and its subsidiaries, expiring December 31, 2013, are to remain unchanged except as stated below. [Union and Company exhibits #1]

The intent of the parties is clear. All Collective Bargaining Agreement terms and practices between the parties are preserved from one Collective Bargaining Agreement to the next, unless changed through negotiations and expressly identified in the Terms and Conditions of Settlement.

It is undisputed that for the current Collective Bargaining Agreement there was no bargaining whatsoever concerning changing the staffing practices existing in the garage section. The arbitrator's task is to determine whether the evidence supports the union's position that there is a well-established practice of filling temporary vacancies in order to avoid an unstaffed garage.

The great weight of the arbitration evidence corroborates the long and consistent practice of filling temporary vacancies in order to avoid unstaffed garages. Michael Hoppe, Business Manager of the IBEW Local 23 for nine years, testified he has not been aware of a single instance where a garage has been left unstaffed due to a temporary vacancy. Frederick Hennagir, an eight-year mechanic at the Rice Street garage, testified there hasn't been a single instance in the last eight years where a shift has been left vacant at the Rice Street garage. He also testified he is unaware of any other garage being left unstaffed for a shift. Further, Mr. Hennagir testified that on several occasions he has been transferred to another garage to fill a temporary vacancy in order to avoid a garage being unstaffed. Mr. Hennagir testified his first awareness of a garage left vacant due to a temporary absence was in connection with the present grievance.

In order to rebut the union's evidence, the Company presented several witnesses ostensibly to demonstrate that there is a history of leaving garages unstaffed due to temporary vacancies. Even cursory view of their testimony, however, reveals that the rebuttal evidence was

ineffective; in fact, the company's witnesses largely corroborated the past practice articulated by the union.

For example, Tom McDonald, now retired from the company, worked initially in bargaining unit positions in the garages, and served as steward and executive board member of Local 23 before moving into various management positions including a fleet manager position from May 2013 until his retirement in 2014. Mr. McDonald only recalled instances where the midnight shift was left vacant. The midnight shift, by all accounts, did not exist before 1992 and was disbanded after that due in part because the bargaining unit members did not want to work the midnight shift and because the company ultimately concluded there was not enough work to sustain the shift. Mr. McDonald's testimony proves there is an established practice of not leaving shifts vacant.

The company's other witnesses did not stray far from Mr. McDonald's recollection. Mr. Theidemann, a supervisor/manager since 2010, testified that he believed that shifts were "not regular, but on occasion" left vacant. However, when pressed on this point, Mr. Theidemann could not give the particulars of any such incidents and he acknowledged that he was not prepared to offer any records to support his recollection of occasional vacancies. Mr. Theidemann further conceded that the union likely knew nothing of shifts left vacant.

Company witnesses Gary Tucker, Director of Fleet Operations, and Ken Clements, current supervisor over the Metro East garages, largely tracked Mr. McDonald's and Mr. Theidemann's testimony. Specifically, Mr. Clements offered that "except for a very few and rare circumstances, shifts were staffed by at least one person" [Clements Tr. 159]. Mr. Tucker's testimony largely mirrored Mr. Clements.

There is a long established history in the garage section of bargaining over staffing issues, which also reflects the parties' intention to fill temporary vacancies in order to avoid unstaffed garages. The evidence in this case demonstrates that the parties have a long history in the garage section of bargaining over staffing issues. Moreover the record from that bargaining proves that the parties intended not to leave negotiated shifts vacant. Specifically, the evidence includes an "Exhibit B" amendment to the Collective Bargaining Agreement related to staffing in the garage section. The Collective Bargaining Agreement at Article XI, section 2, expressly provides for the incorporation of section working rules into the CBA, as "Exhibit B" amendments, and with all the force of the Collective Bargaining Agreement. The cover letter to

Union exhibit #6 confirms that the proposal was accepted by the union and implemented as an “Exhibit B.” This is instructive in a couple critical respects. It demonstrates that as early as 1978 the parties negotiated over staffing issues in the garage section, and particularly about the shift schedules at each of the service centers. These were not issues left to management to decide unilaterally. Implicit, is not explicit, in the negotiations between the union and the company of garage shift schedules is that the parties intended that bargaining unit employees would work such schedules. Otherwise such negotiation would be a pointless exercise. Union Exhibit G reveals as well, the parties intention that shifts would not be left vacant. It establishes the garage foreman as a working foreman who is to perform the same work as the mechanic, while also serving as the person in charge. The point of the agreement that garage foremen would be working foremen, who would be required to perform all the duties of a mechanic, was, self-evidently to give the company the flexibility to staff a garage with a single working foreman who would be in charge and work on the vehicles. In short, the working foreman agreement allowed the company to reduce staffing in a garage to one person, but not less than one person. Since reaching this agreement in 1978, the parties’ practice has been to ensure at least a foreman’s presence on each shift and achieved by transferring a mechanic from another garage. With the parties’ expressly listed management’s discretion with respect to staffing and reassignment, and there is no mention of the right to leave shifts entirely vacant, it can be concluded that the parties did not intend such discretion to rest with management. Similarly, Union exhibit #5 is an “exhibit B amendment to the Collective Bargaining Agreement from 1992” [Post-hearing brief of union at 11] concerning the negotiation and implementation of the midnight or third shift in the garage section.” Embedded in Union exhibit #5 is reference to the parties’ practice of filling temporary vacancies in the garages. This language is a clear reference to the practice of ensuring that each shift was staffed by at least one foreman. The conclusion can only be that the evidence reveals that the parties negotiated and agreed to shifts in the garage, but also signaled their intent that the shifts would be staffed by at least one working foreman and not left vacant. In view of this bargaining and practice history, and when combined with the unique preservation-of-practice Collective Bargaining Agreement language applicable here, the union’s position – that negotiated shifts in the garage may not be left vacant – and the grievance here should be sustained.

The union requests that the arbitrator: 1) Sustain the grievance; 2) Direct the company to comply with the established practice of filling temporary vacancies in order to avoid unstaffed garages (unless otherwise negotiated); and 3) Direct the company to make whole losses sustained by any employee as a result of breach of this practice.

POSITION OF XCEL ENERGY

For more than 30 years, the company has staffed its three Metro East garages based upon management's discretion in reviewing the workload. When a shift in the garage is temporarily vacant due to illness or vacation, the company decides whether to fill the shift using overtime based upon the workload and the business need. Sometimes the company has chosen to fill a temporary vacancy, and sometimes it has chosen not to fill the vacancy when there was no pressing need to do so. This is the manner in which temporary vacancies have been filled for over 30 years. There is no contractual language that requires the company to fill a temporary vacancy; and for more than 30 years the union never grieved the company's decision not to fill a temporary vacancy.

After more than 30 years of the company managing temporary vacancies in the same manner, the union chose to grieve the company's refusal to fill a temporary vacancy in the Newport garage in February 2015. The union cannot identify any particular contract language or "Exhibit B" that requires the company to fill a temporary vacancy, yet the union insists that the company must do so. The union's grievance is contrary to the contract language and it is contrary to how the company has managed temporary vacancies in the Metro East garages for over 30 years, without any union grievance.

Historically, the company has left shifts vacant when management determined that the workload did not necessitate filling the temporary vacancy. No grievance filed from the union until this grievance filed in February 2015.

Tom McDonald, a retired employee who worked in the Metro East garages for 30 years, and then managed Metro East garages for 16 months before his retirement, testified it was not uncommon for various shifts, in particular the midnight shift at Rice Street and at Newport, to be temporarily left vacant due to vacation or illness. In fact, Mr. McDonald, when he was a union member, did not like the fact that the company did not always fill temporary vacancies in the Metro East garages. He testified he spoke with the union's business manager, Joseph Plumbo, at

that time about his concerns. Even though Mr. McDonald and Mr. Plumbo knew about the company not filling temporary vacancies, the union never filed any grievance over the company's refusal to fill temporary vacancies in the Metro East garages. Further, Mr. McDonald testified that he recalled a couple of occasions when he was a foreman where he sent a mechanic from a garage to deal with a problem at another garage where there was a temporary vacancy on the shift, again without any grievance.

Mr. McDonald testified that once he became a manager, he continued the practice that was in place for his 29 years as a bargaining unit employee in the Metro East garages. When a shift was temporarily vacant due to illness or a vacation, management would assess the workload to determine whether there was a need to fill a shift. Mr. McDonald testified that when he managed Metro East he would assess the workload and decide whether he needed to fill a temporary vacancy, or whether he could leave the shift unstaffed for the day and cover any issues that arose with a mechanic from another location. Sometimes management filled the vacancy, and sometimes management did not. Mr. McDonald testified there is no real risk to leaving the shift temporarily vacant. If a shift at a particular garage was vacant, and a problem arose, management would call a mechanic in a different garage to deal with the issue.

Werner Theidemann was a long-time bargaining unit member in Metro East garages before he became a supervisor. Mr. Theidemann began working in the Metro East garages in 1982. He worked either as a journeyman mechanic or a foreman for approximately 25 years. Mr. Theidemann has been a supervisor or manager since 2010. Mr. Theidemann testified he was well aware of various occasions when the company chose to leave a shift in one of the Metro East garages temporarily vacant. He explained that there were multiple instances when as a foreman, he was instructed by a supervisor to send one of the mechanics on his shift to take care of a problem in another garage when a shift was left vacant. Additionally, Mr. Theidemann testified that he was occasionally sent to another garage as a mechanic to deal with a repair issue when a shift was temporarily vacant. At no time, Mr. Theidemann testified, did the union to his knowledge ever file a grievance over the company deciding to leave a shift vacant in the garage, even though it was not an uncommon occurrence.

Gary Tucker, Director of Fleet Operations, testified he has worked for the company since May 2008. From May 2009 until the end of 2012, Mr. Tucker was directly responsible for the management of Metro East garages. Consistent with the experiences of Mr. McDonald and Mr.

Theidemann, at various times when Mr. Tucker managed the Metro East garages, he left shifts temporarily vacant. Mr. Tucker further explained that even though management chooses on occasion not to fill a temporary vacancy in the Metro East garages when the workload does not necessitate it, the Metro East garages are doing an excellent job of getting all the work done and meeting management's expectations of all required maintenance and repair work. Mr. Tucker testified it is one of management's duties to prioritize which tasks are important and need to be done promptly, and which are less important and can be completed on another day or at another time. Management exercises its discretion in prioritizing the workload and determining when it makes sense to fill a shift that is temporarily vacant, and when it is not necessary to do so.

Ken Clements, current supervisor over the Metro East garages, testified he has worked for the company since August 2013. He testified, like other managers and supervisors, he evaluated the workload and needs each day when there was a vacancy. He testified that he used his discretion and judgment to prioritize the workload and decide whether to fill a shift that was temporarily vacant. Sometimes he chose to fill the shift, and sometimes he determined that it was not necessary. At no time was a grievance filed between August 2013 and January 2015. Mr. Clements testified he believed his decision not to fill a temporary vacancy is based on his evaluation of the workload and is consistent with what his manager and his predecessors had been previously doing. The union filed a grievance over Mr. Clements' decision not to fill a temporary vacancy in the Newport garage on February 4, 2015. Mr. Clements testified he checked all the timesheets for all the Metro East garages on that date, and there were no shifts in any of the garages that were left temporarily vacant. [Tr. 154]. The union offered no proof otherwise. The union has offered no testimony or documents proving that there was ever a grievance filed over the last 30 years about the company's decision not to fill a temporary vacancy.

There is no language in the Collective Bargaining Agreement which requires the company to fill a temporary vacancy in the Metro East garages using overtime. The company's Management Rights clause, Article I, Section 2, provides that the company has the right to manage the property. Management retains its right to decide how to fill shifts and determine appropriate staffing unless the company has given up its right in negotiations with the union. The company has not done so.

The union's arbitration demand focuses on Article V, Section 9 and item #12 of the Terms and Conditions of Settlement. It does not take a lengthy review of these sections to decide that there is no contractual language which supports the union's position and no requirement that the company fill a temporary vacancy in the Metro East garages. Article V, Section 9, and its various subsections a-h, deal with how overtime is distributed and who is normally offered the opportunity to work overtime. But the important part of Section 9 for this matter is that nowhere does Section 9 mandate or otherwise require that the company offer overtime to employees in the garages. Section 9 is applicable when the company decides to make overtime available, but there is nothing in this section of general applicability which states that the company must always fill a temporary vacancy in garages using overtime. Union Business Manager Michael Hoppe admitted that there is no contractual guarantee that bargaining unit employees will receive overtime. Employees are only guaranteed 40 hours per week. Mr. Hoppe also admitted that there is no specific language in Item #12 of the current Terms and Conditions which governs this dispute. There is simply no contractual support for the union's grievance.

The company's long history of leaving shifts temporarily vacant without any grievance from the union demonstrates that there is no past practice contractual requirement to fill temporary vacancies in the Metro East garages. Mr. McDonald and Mr. Theidemann have 55 years of combined experience working in the Metro East garages. Both were longtime bargaining unit employees who worked in all three Metro East garages. Both testified they were aware of many times throughout their careers as bargaining unit employees working garages where management chose not to fill a temporary vacancy. At no time did the union ever file a grievance over management's decision not to fill a temporary vacancy, even though the union was well aware of the company's actions. Only on February 2015 did the union file a grievance. Simply put, the company's long-standing history from at least 1979, when Mr. McDonald began working in Metro East garages, of deciding whether there was a business-need to fill a temporary vacancy, without any grievance from the union, demonstrates that there is no contractual requirement to fill temporary vacancies in the Metro East garages.

The union witnesses have little first-hand knowledge of the Metro East garages and their testimony involved filling temporary vacancies in the garages cannot be relied upon. Mr. Hoppe has only been the business manager since 2009. He never worked in the Metro East garages, and

his understanding of the past history in the garages is limited to what he has read in correspondence between the parties. He has no first-hand knowledge of work practices in the garages, or the negotiation of any contract language that is specific to Metro East garages. Mr. Hoppe admitted in testimony that there is no language in Union Exhibit 5- the 1992 “Exhibit B” – which requires the company to fill a temporary vacancy. Further, the “no staffing” language in Union Exhibit 5 has been used for many years by the company to ensure that the company has not committed itself to any particular mandatory staffing level of any kind. Mr. Hoppe himself acknowledged that Union Exhibit 5 was not intended to govern the dispute the union complained of in the instant matter. [Tr. 46].

The 1997 arbitration award by Arbitrator Jeffrey Jacobs further supports the company’s position that there is no contractual obligation to fill a temporary vacancy in the Metro East garages. [See *IBEW, Local 23 and Northern States Power Company*, AAA Case number 56-300-00016-97].

In conclusion, the union’s grievance is not supported by the language of the Collective Bargaining Agreement. The company has a long history of exercising its discretion in deciding whether to fill a temporary vacancy in the garage based on its assessment of the workload. The union has admitted that there is no contract language which supports its grievance, and the past history in the Metro East garages demonstrates that the company has left shifts temporarily vacant, with the knowledge of the union and without any grievance, for more than 30 years. The company’s practice has been consistent. Nothing changed in February 2015 when the union filed its grievance. The union’s position is contrary to collective bargaining language, contrary to more than 30 years of history in the Metro East garages, contrary to the union’s own position as evidenced by the refusal of its prior business manager to file any grievance over this issue when Mr. McDonald brought it to his attention. The union lacks contractual support and lacks past practice support for its grievance. The union’s grievance should be denied.

DECISION AND RATIONALE

The thrust of the union’s argument is based on past practice i.e. the “Terms and Conditions of Settlement” Term Sheet, that past CBAs “are to remain unchanged except” those changes made in the present CBA. On this contractual basis the union contends “there is a well-established [past] practice of filling temporary vacancies in order to avoid an unstaffed garage.”

The company's contention is that "[f]or more than 30 years, the company has staffed its three Metro East garages based on management's discretion in reviewing the workload." Combining this actual past practice [as opposed to the union's incorrect contention that past practice was to fill temporary vacancies in the Metro East garages] with the language of Exhibit B Letter of February 5, 1992 and Exhibit B Letter of February 15, 1995 ["No staffing discussed or understood as intended at this time shall be regarded as committing the Company to a specific number of employees in any classification or any shift at all times either now or in the future"] proves that the union's grievance is contrary to the contract language and it is contrary to how the company has managed temporary vacancies in the Metro East garages for over 30 years. Further, the company highlights the testimony of Mr. McDonald and Mr. Theidemann, both long time bargaining-unit members before becoming supervisors, which shows that it has been common practice to leave it to management discretion whether to fill a temporary vacancy in the Metro East garages. In fact, Mr. McDonald testified that when he was a bargaining unit member he spoke with the union's former Business Manager about such temporary vacancies and no grievance was filed.

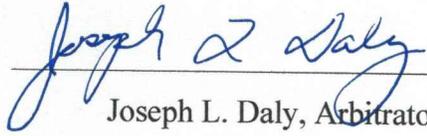
There is no language in the CBA which requires the company to fill a temporary vacancy in the Metro East garages using overtime. The company's Management Rights Clause, Article 1, Section 2, provides that the company has the right to manage the property. Management retains the right to decide how to fill shifts and determine appropriate staffing unless the company has given up its right in negotiations with the union.

Consequently, the entire thrust of the union's grievance boils down to whether past practice proves by a preponderance of the evidence that the company has given up its management right to fill temporary vacancies in the Metro East Garages.

The union has not proven by a preponderance of the evidence such a past practice. Mr. McDonald's testimony makes clear that the union knew about the fact that sometimes temporary vacancies were left unfilled and no grievance was filed. Arbitrator Jeffrey Jacobs has already decided that there is no contractual obligation to fill a temporary vacancy in the Metro East garages [See, *IBEW, Local 23 and Northern States Power Company*, AAA Case No 56-300-00016-97]. With the lack of proof that a past practice of filling temporary vacancies exists at the Metro East garages, the union's grievance is denied. The company did not violate the CBA or related "Exhibit B" amendments when it decided not to fill a temporary vacancy in 2015 in the

Metro East garage section. The union did not prove by a preponderance of the evidence that a past practice existed of filling temporary vacancies in the Metro East garage section

May 3, 2016


Joseph L. Daly, Arbitrator
