

IN THE MATTER OF THE ARBITRATION BETWEEN

International Brotherhood of Electrical Workers,  
Local 160,  
Union

and

**OPINION AND AWARD**

Grievance of IBEW, Local 160  
(Unilateral Change to Disciplinary  
Policy)

Minnesota Valley Electric Cooperative  
Employer.

FMCS Case No. 06-58865

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ARBITRATOR: Janice K. Frankman, Attorney at Law

DATE OF AWARD: April 20, 2007

HEARING SITE: FMCS Offices  
1300 Godward Street  
Minneapolis MN 55413

HEARING DATE: February 14, 2007

RECORD CLOSED: April 6, 2007

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## **JURISDICTION**

The hearing in this matter was held on February 14, 2007. The Arbitrator was selected to serve pursuant to the parties' collective bargaining agreement and the procedures of FMCS. Both parties were afforded a full and fair opportunity to present their cases. Witnesses were sworn and their testimony was subject to cross-examination. The parties submitted post-hearing briefs which were received on April 5 and 6, 2007, from the Employer and the Union respectively. The record closed on April 6, and the matter was taken under advisement.

## **ISSUE**

The parties submitted differing statements of the issue as follows:

### Union Statement of the Issue:

Whether the Employer violated its collective bargaining agreement with IBEW Local 160 when it unilaterally implemented new discipline policy and procedure mid-contract.

### Employer Statement of the Issue:

Did the Cooperative's November 1, 2005 Safety Policy, which provided that violations would remain on an employee's record for five years, constitute a unilateral change to discipline under the Labor Agreement?

The arbitrator believes an accurate statement of the issue is as follows:

Whether Management violated the parties' Collective Bargaining Agreement when it changed disciplinary provisions included in its Safety Policy and, if so, what is the proper remedy?

## **BACKGROUND AND SUMMARY OF THE EVIDENCE**

The parties have had a sixty year collective bargaining relationship which began when the Cooperative was formed in the late forties. At the time of the hearing of this matter, they were in contract negotiations. The term of the applicable existing Contract expired on December 31, 2006. The Contract includes grievance procedures at Article I, Section 3 and Article IV, Section 12 and sets out management rights at Article IV, Section 11. Its Safety Policy provides Enforcement provisions which set out progressive discipline and the "shelf life" of imposed discipline. The parties expressly agreed at Article XI that changes could be made to their agreement at any time by mutual agreement.

## Safety Policy

The parties have recognized a Safety Policy ("Policy") which includes provisions for employee accountability through discipline since at least 1989, when reference to the Policy was included in the Union's letter detailing ratification of the parties' agreement that year. The Policy has been revised over the years. An October, 1986 revision includes essentially the same disciplinary provisions as the July 29, 2002, Safety Policy which was in effect when Management requested that Safety Director Kirk Wulf review it in July, 2005. The 2002 "Enforcement" provisions and the 1986 "Recommended Guidelines for Disciplinary Procedures" detail non-serious and serious violations, provide five and three step progressive discipline schemes based upon the nature of the violation, and provide for one year and two year "shelf life" for non-serious and serious violations respectively. See, Union Exhibits 2 and 8.

## Policy Review, Change Process and Changes

Mr. Wulf has been Safety Director for the Cooperative since September, 1999. He is not a part of the bargaining unit. In September, 2005, he presented his "Discipline Policy Evaluation" which included a review of the current Policy disciplinary detail. He noted "of interest" the one and two year shelf life limits and that there was no policy language that permitted management "to skip steps if (sic) situation warrants". Management Exhibit 5, page 1. He reported comparisons with the policies of other utilities noting no consistent trends. Based upon his review, he made the following recommendations to the Board of the Cooperative:

- Going to a single category progressive step disciplinary policy.
- Use a 4 or 5 step system (verbal, written, 3 days off, discharge). For 5 steps add 1 day off after written.
- Violations remain on record for 2 years (maybe 3 years for a 5 step system).
- Isolated property damage incidents should not be an automatic write-up, however, multiple incidents such as the 2<sup>nd</sup> in a 12-month period should begin the process.
- Evaluate the Decision Making Leave used by Xcel Energy. At a certain step, the employee is asked to provide a written statement on what behavioral changes need to take place that will prevent future occurrences.

Management Exhibit 5, page 4

Marvin Denzer, Vice President of Services, has been employed by the Cooperative for 15 years. He teamed with Mr. Wulf in reviewing the Policy. He manages grievances and recommended that the Board adopt a unified five step progressive discipline scheme with a five year shelf life. His main concern was having two categories of violations leaving decision-making with supervisors or the Safety Director as to which category a particular violation would be included. The Board adopted Mr. Denzer's recommendation on September 26, 2005. The Policy which was

to become effective on November 1, 2005, also included a new provision giving management discretion as follows:

At the discretion of management where a life threatening infraction or severe disregard of Cooperative property occurs due to a violation of safety rules, disciplinary procedures may be advanced which may include termination.

Union Exhibit 3, page 3

### Communication with Union

By letter dated September 28, 2005, Mr. Denzer sent Dan Kieffer, Union Business Representative, a copy of the new Policy. He noted that the Policy would become effective on November and asked Mr. Kieffer to "(p)lease contact (him) before then if you have any comments on the content of the policy." Union Exhibit 3. Mr. Denzer did not distribute the Policy to the unit members including the three Union stewards because he wanted to wait for Union comment.

The Union did not respond in writing to Mr. Denzer's request until November 17, 2005, following a Labor-Management Meeting on November 8, 2005, when Thomas G. Koehler, Union Business Manager wrote to Mr. Denzer:

The Local Union has recently learned that the Company has issued a new discipline policy to become effective November 1, 2005. As you know, discipline is a mandatory bargaining subject and already covered in our agreement. Therefore, we cannot recognize your unilateral policy change and will oppose any attempt to discipline under that policy.

Please contact Business Representative, Dan Kieffer at 612-78-3126 if you should have any questions.

Union Exhibits 4 and 4a.

The Executive Board of the Union approved the letter on November 23, 2005. It is customary to review and approve Union business including grievances at the end of each month. Mr. Denzer testified that he did not receive the Union letter until he requested a copy in early August, 2006, following receipt of Union correspondence, discussed below at page 5, which referred to the letter.

### Labor Management Meeting; Union Position Letter

On November 8, 2005, Mr. Denzer convened a Labor-Management Meeting. It was the first meeting following his letter to Mr. Kieffer enclosing the new Safety Policy. Mr. Denzer created the Agenda for the meeting which was amended at the Union's request to include the new Safety Policy as a topic for discussion. The Meeting was attended by Dave Beckius, Operations Manager; Bill Heimkes, Line Superintendent; Steve Volek, Lee Hoese and Jim Schwalbe, Line Foremen and Union Stewards; and

Dan Kiefer. The Union asked how the Policy got to the Board without the Union Stewards' knowledge. In response to additional Union questions, Management advised that the Policy would not be retroactive and that Management would not consider reducing the five year shelf life to three years referring to the fact that the new Policy had been approved by the Cooperative Board. Mr. Denzer's recall of the discussion was vague. He did not prepare Minutes of the meeting or keep notes.

Mr. Wulf did not attend the meeting. He knew following the meeting that the Union did not agree with the changes in the Policy. He presented the new Policy to the employees on November 14, 2005. None of the employees who attended that meeting would sign the Policy. Three days later, Mr. Koehler sent his letter to Mr. Denzer stating the Union's position.

#### Discipline under New Policy

Several employees received discipline under the new Policy in 2006. The Union was not aware that Jeremy Denzer, Lineman, had been disciplined on March 3, 2006. Others who were disciplined included Howie Brinkman, Kent Schmitt and Lee Hoeser for an incident which occurred on June 2, 2006; Mike Otteson on October 12, 2006; and Jeremy Denzer on October 24. On June 12, Mr. Koehler sent a letter to Mr. Denzer referring to Grievance #6448 filed on behalf of Mr. Brinkman. He requested a meeting after addressing the issue:

The issue is the change in the duration period levied on Mr. Brinkman's safety violation. This change was not negotiated and is viewed by the Local Union as a unilateral change of a Term and Condition of employment, without negotiation. This is in violation of the Recognition Clause, Paragraph 3 under Article 4, Section 12, but not limited to.

Union Exhibit 6

On July 20, following a meeting on July 13, 2006, which did not result in resolution of the Grievance, Mr. Koehler wrote to Mr. Denzer confirming the Union's position that the new Policy had been improperly and unilaterally adopted by the Board and warning that any discipline under the new Policy would be challenged. He provided the history of the issue:

The history on this is that you told the Union in September 2005 that the MVEC Board had revised the safety policy. Nobody consulted the Union before Board approval. When we reviewed the policy, we noted the new discipline piece and advised you in our Labor Management meeting on November 8, 2005 and in our discussions after that, as well as a letter dated November 17, 2005, that the Union was not consulted about the new discipline piece, that our contract covers discipline and that we do not agree to a mid-contract change to the discipline terms and conditions.

Union Exhibit 7

## Collective Bargaining Agreement Provisions

Article IV, captioned GENERAL WORKING RULES addresses management and employee rights at Sections 11 and 12:

Section 11. The right to employ, promote, discipline or discharge employees shall be vested in the Cooperative, subject only to such limitations as are contained in this Agreement.

Section 12. The aggrieved employee shall have a right to a hearing on promotions, demotion, discipline, discharge, or any discrimination, or any differences of opinion as to the interpretation or adherence to the provisions of this Agreement.

### **POSITION OF THE UNION**

The Union argues that Management has violated the parties Agreement by unilaterally changing a term and condition of employment. It argues that Management's action was a *fait accompli* when the Union learned about the new Safety Policy. It argues that Management did not provide a genuine opportunity for the Union to object to the changes, that the Union had no obligation to bargain mid-contract and that it did not agree with the changes to the disciplinary policy which has been operative for a long period of time, at least back to its settlement of their agreement in 1989. It argues that there is no basis to support a conclusion that it waived its right to bargain the change in the Policy provision relative to discipline or consented to the changes.

The Union asserts that it had no obligation to respond to Mr. Denzer's September, 2005, notice of the Policy change and that it made its position clearly known at the first Labor Management Meeting which was held following receipt of his letter. It argues that there can be no credible assertion that Management did not understand the Union's position or that the Union did or said anything that could be construed as agreement with the change. The Union points to the employee meeting held to brief them about the Policy change which they all refused to sign and to its November 17, 2005, letter which Management claimed was not received until it was requested in August, 2006, and which was provided by email attachment to Mr. Denzer the same day.

The Union has provided citations to cases in support of mandatory bargaining of work rules, especially those where disciplinary provisions are embedded in them; cases which address the effective date of rule change implementation from which a grievance may be taken; and the appropriate filing of a grievance following application of new disciplinary provisions. The Union asserts that there is no basis for application of the doctrine of laches, that it did not delay in conveying its objection to the new Policy or in filing a grievance following Management's application of it. It points to the fact that Management has not asserted that it has been prejudiced or harmed in any way by the timing of the Union's actions.

The Union seeks an Award which reverses the Board's adoption of the new Policy without Union participation and which conforms the effective time for discipline imposed on members, disciplined since November, 2005, with the provisions of the 2002 Policy.

## **POSITION OF MANAGEMENT**

Management argues that the parties' Agreement does not and never has included a discipline policy. It argues that the Union knows how to have documents attached to their Agreement and that it has never requested attachment of the Safety Policy to the CBA. Consequently, it argues, the Union has no right to bargain the disciplinary provisions contained within the Safety Policy. It agrees that discipline is a term and condition of employment and argues that the parties have bargained discipline as set forth in their Agreement. Management points to the management rights provision at Article IV and argues that it had the right to change the Safety Policy without bargaining or Union consent.

Management argues that by failing to respond to Mr. Denzer's September, 2005, letter which included the new Policy adopted by the Board, it waived its right to bargain the issue. It argues that the Union asked only two questions both of which were answered at the Labor Management Meeting on November 8, 2005, after the effective date of the new Policy. It argues that it believed that it had answered all of the Union's questions, asserts that it did not know that the Union opposed the Policy and that any objection came too late. It argues that it did not receive or know about the Union's November 17, 2005, letter until it received Mr. Koehler's July 20, 2006, letter in which he referred to it.

Management seeks denial of the Union's Grievance.

## **OPINION AND FINDINGS**

It is appropriate to sustain this Grievance based upon Management's violation of its long-standing Agreement with the Union. It unilaterally changed the disciplinary scheme embedded within its Safety Policy. It did not seek the Union's input as it studied potential changes to the Policy nor did it seek its consent prior to Board approval. There is no dispute that discipline is a term and condition of employment and that terms and conditions of employment are subject to mandatory bargaining. This record reflects apparent misunderstanding and misinterpretation of basic tenets of labor law and the specific impact of the provisions of the parties' CBA and Safety Policy which had been in effect for at least two decades. While Management admitted to knowing that the Union was entitled to bargain discipline and would need to be provided with the changes for comment, it proceeded in a manner which precluded input or opportunity for serious comment, and it apparently believed that bargaining should occur at the Union's request mid-contract or, in the alternative, that its response to Union questions

at a Labor-Management meeting following Board approval of the changes constituted bargaining or implicit consent. The facts in this record firmly support the Union's case.

Specific disciplinary provisions are frequently found in work rules set out in manuals and handbooks. Properly adopted, they are enforceable by employers and subject to challenge and interpretation as they are implemented. Work rules serve to define the parties' day to day relationship, and where they include provision for "accountability", as the disciplinary scheme has been characterized in this case, the rules are at the heart of the continued success of individual employment relationships. In this case, through long-term practice, accepted and followed by both parties, and early reference to the Safety Policy in their bargaining process, the work rules, including the embedded disciplinary scheme, have become a part of their Agreement. There has been no evidence with regard to development of the first Safety Policy sometime before 1986. It is unknown whether the parties collaborated in the Policy's promulgation or whether there have been earlier grievances relevant to this matter.

The express provisions of the CBA relative to grievance procedures and employee rights to challenge discipline and interpretation of Contract provisions further support the Union's case. Changes in the embedded disciplinary scheme are clearly the subject of mandatory bargaining. Management seeks a result which would leave unit members with an empty promise and potentially stripped of job security. Taking Management's argument to its logical and most extreme conclusion, it could unilaterally adopt a discipline scheme embedded in its Safety Policy which permitted termination for an employee's first violation of a safety rule without just cause.

Management's framing of the issue in this case suggests that it believes a narrow analysis of the Grievance is appropriate. It appears to focus upon the nature of the change which the Union challenges, as opposed to the principle of mandatory bargaining of all aspects of discipline. It concedes that discipline is a topic of mandatory bargaining and argues that the Union has no such right in this case because the disciplinary provisions are not included within the four corners of their CBA. Nonetheless, it appears to hedge its argument by directing attention to the nature of the change, apparently urging a surgical approach in deciding whether changing the shelf life of all discipline constitutes a unilateral change in the discipline policy.

Management has argued for an overbroad and unsupported interpretation of the management rights provision which permits discipline of employees. The management rights clause in this CBA is shorter than most. It generally states that Management can hire, fire and discipline employees "subject only to such limitations as are contained in this Agreement." Union Exhibit 1, page 9. The evidence and testimony provided by Management witnesses supports a conclusion that Management knew the Union necessarily had a role in the process resulting in any change in the disciplinary scheme. Mr. Wulf became aware of the Union's rights as he gathered information and prepared his recommendations to the Board. Mr. Denzer manages grievances for the Cooperative and knew that discipline was a subject of mandatory bargaining. He teamed with Mr. Wulf in developing the recommendations, presented Mr. Wulf's Report

to the Board then sent the results of the Board action to the Union for comment. However, neither of them contacted the Union throughout the process except to report the Board action to the Business Representative who did not know until the day of the regularly scheduled Labor-Management Meeting on November 8, that bargaining unit members including the Union Stewards were unaware of the change in the Policy. The Policy changes became effective on November 14, 2005, when Mr. Wulf met with employees to discuss the new Safety Policy.

Management has implicitly argued that the Union waived its right to bargain the changes by failing to object to them or to seek bargaining. The onus was not upon the Union to seek mid-term bargaining. This record is replete with evidence and testimony that Management knew early on that the Union and the unit members objected to the changes in the Policy. The Union placed the topic on the Labor-Management Meeting agenda to ask questions including whether Management would consider a reduction in the shelf life of discipline. It was told that changes in the Board-approved Policy would not be considered. Management witnesses had vague recollection of the Meeting discussion. Union testimony supported by cryptic notes made at the meeting was entirely credible. It is as likely as not that the Union's November 17, 2005, letter was received by Management shortly after it was sent. There is no question that Unit employees refused to sign acknowledgement of the new Policy when it was presented to them on November 14, 2005, based upon their objection to the Policy changes following Union objection at the Labor-Management Meeting.

Management should have met with the Union in an attempt to reach agreement and, absent agreement, noted the topic for bargaining as the CBA expired in December, 2006. It did not have the right to unilaterally make changes in the Policy. The Union properly waited to file a grievance until the issue was ripe as a result of imposition of discipline under the new Safety Policy. This Grievance was properly perfected and is sustained.

### **AWARD**

The Grievance is sustained. Management violated its Agreement with the Union when it failed to obtain Union consent to or note for mandatory bargaining a change in its disciplinary policy. Management shall reinstate the Safety Policy approved July 29, 2002, which was in effect when it unilaterally replaced the Policy on September 26, 2005. It shall alter the terms of discipline imposed upon bargaining unit members per the latter Policy consistent with the terms of the 2002 Policy.

Dated: April 20, 2007

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Janice K. Frankman, Attorney at Law  
Arbitrator