

IN THE MATTER OF GRIEVANCE ARBITRATION BETWEEN

**XCEL ENERGY, INC d/b/a NORTHERN
STATES POWER COMPANY**

“EMPLOYER”

And

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL NO. 23,
LOCAL NO. 160, LOCAL NO. 949, LOCAL
NO. 953 AND LOCAL NO. 1426**

“UNION”

)
) **FMCS CASE NO. 52759-3**
)
)
) **DECISION AND AWARD**
)
)
) **RICHARD R. ANDERSON**
) **ARBITRATOR**
)
)
)
) **October 8, 2009**

JURISDICTION

The hearing in the above matter was conducted before Arbitrator Richard R. Anderson on July 29, 2009 in Minneapolis, Minnesota. Both parties were afforded a full and fair opportunity to present their case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced by both parties and received into the record. The hearing closed on July 29, 2009. Timely briefs were received from the parties by regular mail by the Union and Employer, respectively, on September 19 and 21, 2009 at which time the record was closed and the matter was then taken under advisement.

This matter is submitted to the undersigned Arbitrator pursuant to the terms of the parties' collective bargaining agreement which is currently effective from January 1, 2008 through December 31, 2010.¹ The relevant language in Article III of this agreement [GRIEVANCE PROCEDURE] provides for the arbitration of a grievance including the appointment of a five member Board of Arbitration to resolve all grievance arbitration

issues. The parties waived this requirement and stipulated that the instant grievance is properly before the undersigned Arbitrator for final and binding decision. The parties further stipulated that this matter does not involve substantive or procedural arbitrability or any other procedural issue.

APPEARANCES

For the Union

Bill O'Brien, Attorney
Tom Koehler, Business Manager Local 160
Arlin Ziemann, Business Manager, Local 953
Steve Biegler, Business Representative, Local 1426
Tim Hughes, Business Manager, Local 1426
Joe Plumbo, Business Manager, Local 23
Mark Kaufman, Business Representative, Local 949
Bob Boogren, Business Representative, Local 160
Bob Lanti, Assistant Business Manager, Local 953
Shawn Daly, Business Representative, Local 160

For the Employer:

Michael Moberg, Attorney
Ed Lutz, Vice President Safety
Eric Bachman, Director Workforce Relations
Brenda Peterson, Manager Meter Reading
Nicole Elmasry, Workforce Relations Consultant
Bill Magrogan, Director Meter Reading
Tim Kiser, Workforce Relations

BACKGROUND

Xcel Energy, Inc d/b/a Northern States Power Company, hereinafter the Employer, is a utility supplier of electric power and natural gas service in Colorado, Michigan, Minnesota, New Mexico, North Dakota, South Dakota, Texas and Wisconsin. The operations involved herein are located in Michigan, Minnesota, North Dakota, South Dakota and Wisconsin. Since 1938, the International Brotherhood of Electrical Workers (IBEW)

¹ Joint Exhibit No. 1. The Exhibit proffered was the agreement between the Employer and Local 23.

Locals 23, 160, 949, 953 and 1426, hereinafter the Union, has represented a unit of approximately 2,200 employees in their respective jurisdictional areas that contains the classification of Meter Reader. There were approximately 113 full-time bargaining unit Meter Readers employed in the five Local jurisdictions in March 2007.

Meter Readers are full-time employees who walk dedicated routes reading gas and electrical meters. The meters, which are the instruments that register the gas and electrical usage of commercial and residential customers, are critical to the Employer's billing function. The Meter Reader walks his/her route once a month and records the gas/electricity usage to an electronic recording device. The billing department turns the electronic read from this device and then bills the customer.

The five Locals bargain jointly; and although the agreements are very similar, each signs a separate agreement with the Employer. The parties stipulated at the hearing that the Local 23 agreement entered into evidence contained similar terms and conditions of employment relevant herein.

After coalition bargaining is completed, the parties enter into a supplemental agreement known as the Terms and Conditions of Settlement.² This agreement is the offshoot of Arbitrator Stephen Bard's arbitration decision wherein he restricted the Employer's right to subcontract.³ This agreement became a part of the parties' collective bargaining agreement in every period subsequent to the Bard decision. In this agreement, the Union agreed not to enforce the Bard Decision. Instead, it spelled out under what circumstances the Employer was permitted to subcontract bargaining unit

² Union Exhibit No. 3. Hereinafter unless otherwise noted, the term "agreements" will mean both the Local agreements and the Terms and Conditions of Settlement.

³ Union Exhibit No. 2. *Northern States Power and IBEW Local Union 160*, October 16, 1990 (Bard).

work. The last supplemental agreement was executed by the parties in September 2007 effective from January 1, 2008 through December 31, 2010.

In March 2007, the Union negotiated an additional supplemental agreement known as the Meter Reader Agreement.⁴ This agreement, which is effective from March 27, 2007 through December 31, 2010, contains terms and conditions of employment exclusively covering Meter Reader employees during the meter reading automation transition period. Once the automation is complete there will be no need for manual meter reading, which will eliminate the Meter Reader classification in the Agreement.

On or about August 28, 2008, the Employer notified the Union of its intent to contract out meter reading work during the current automation period. The Union through its five Local Business Managers subsequently filed a Step 2 joint grievance on September 10, 2008 alleging that said subcontracting violated the “agreements” as well as the Meter Reader Agreement.⁵ [Local 23 filed a separate grievance alleging the same violations on June 15, 2009, which has been consolidated for this proceeding.⁶] Employer Workforce Relations Consultant Nicole Elmasry responded to the Union’s grievance by joint letter to the Business Managers on September 30, 2008.⁷ In her 2nd Step letter Elmasry stated,

While the Company understands your concern, the Company continues to maintain its right to contract out work. There were no discussions about the Company relinquishing its right to contract out work during the negotiations that resulted in the March 27, 2007 Meter Reading Automation Agreement. Furthermore, there is no reference in that agreement that the temporary meter reading position created was the only option available to the Company. Lastly, there were no prohibitions regarding the Company’s right to contract out work in the previous Temporary Helper Agreements, similar to the current Agreement, and the Company did in fact have Contractors on the property performing meter reading work.

As we discussed, the Company will maintain the current temporary Meter Readers. Through the attrition of full-time benefit Meter Readers and temporary Meter Readers,

⁴ Union Exhibit No. 4.

⁵ Union Exhibit No. 5, Pgs 1-2.

⁶ Union Exhibit No. 5, p. 5.

⁷ Union Exhibit No. 5, pgs 3-4.

the Company will replace with a Contractor or a temporary Meter Reader, as the business need requires.

Thereafter, on an unknown date, the Union filed for arbitration. The undersigned was notified on January 30, 2009 by e-mail from the Employer that I had been selected as the neutral Arbitrator in this matter.

THE ISSUE

The parties stipulated to the following issue, *“Whether the Employer violated the Meter Reader Agreement reached in 2007 and/or the Terms and Conditions of Settlement between the parties by subcontracting work to outside contractors that had been performed by Meter Readers, and if so, what is an appropriate remedy?”*

RELEVANT CONTRACT PROVISIONS

LOCAL AGREEMENTS

ARTICLE I — METHOD OF NEGOTIATION

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 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 6. *Should any difference arise affecting the provisions of this Agreement the President of the Company, or someone delegated by him to represent him in the matter, and the Business Manager of the Local Union, or someone appointed by him to represent him, who may be accompanied by a committee of the Local Union shall meet and endeavor to settle such differences, and in case of failure to agree, the matter in dispute shall be submitted at the request of either party to a board of arbitration to be selected in a manner as specified hereinafter. The Company and the Local Union agree that the majority decision of such board shall be final and binding on both parties.*

ARTICLE III — ARBITRATION

Section 1. *All differences that may arise which cannot be agreed upon by the representatives of the Company and the Local Union shall be submitted in the manner hereinbefore provided at the request of either party to an arbitration board as follows:*

(h). *In reaching an award, the Arbitration Board shall not go beyond the evidence submitted and shall interpret only the signed Agreement between the parties hereto, and it shall not be the right of the Arbitration Board to render decisions which have as their effect the enforcement on either party of new rules or regulations covering the conduct of either the Company or the employees covered herein.*

ARTICLE VIII — SENIORITY

Section 6. Layoff due to curtailment of work shall be made according to the following rule:

(a). *Employees who have not established seniority within a classification where a layoff occurs shall be laid off first.*

(b). *Thereafter the employee with the least classification seniority within each classification shall be the first laid off. When adding to the forces in any classification, the last employee laid off in the classification involved shall be the first to be re-employed if available, and physically qualified to return to work. In the event apprentices are being trained for work in a classification affected by a layoff the apprentices shall be laid off first.*

SEVERANCE PAY AGREEMENT⁸

5(f). *An employee receiving Severance Pay shall forfeit all seniority rights and any other privileges, rights or benefits to which such an employee may now or hereafter be entitled except nonforfeitable service credits under the Company's tax-qualified retirement plans.*

6. *An employee who has more than twenty (20) years of service or is at least age sixty (60) on the date the employee is scheduled for layoff and has exercised all seniority rights to the fullest extent in accordance with the terms and conditions of the Labor Agreement after receiving notice of layoff, will be assigned by the Company to another position.*

An employee who has more than twenty (20) years of service or is at least age sixty (60) on the date the employee is scheduled for layoff may, in writing received by the Company prior to that date, decline the benefit of the preceding paragraph and be laid off on the scheduled date.

⁸ This Agreement is part of the collective bargaining agreement and attached to each Local Union contract.

Upon being laid off, any employee shall have the right to elect not to receive Severance Pay and thereby retain all seniority rights and any other privileges to which such an employee may be entitled

TERMS AND CONDITIONS OF SETTLEMENT⁹

15. *(All Agreements except Metro East Locators and Metro West Locators). This provision will be in effect for the term of this Agreement.*

The IBEW Local Unions agree that during the term of this Agreement, IBEW Local Unions will not enforce the Stephen A. Bard arbitration decision (FMCS # 90-03337). The Company would not be required to work employees' overtime to match contractor hours.

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.

The following conditions also apply:

No employee in a given Section covered under this Labor Agreement shall be laid off or suffer a reduction in wage rate, classification or regular working hours due to lack of work as a result of the Company contracting out work normally and customarily performed by employees in that given section.

No work normally and customarily performed by employees in a given Section shall be contracted out if there are qualified employees in that given Section on lay-off status unless such employees are not readily available to the Company without unreasonable delay and expense.

METER READER AGREEMENT [March 27, 2007 LETTER OF AGREEMENT]

1. *The Company will be automating meter reading systems and retrofitting and replacing meters within an expanded geographic area. Cellnet by and through their agents will be performing the work associated with this project. This expansion will include the automation, retrofitting and replacement of meters in all areas in Minnesota, North and South Dakota, and Wisconsin. Once the automation, retrofitting and replacement of meters in the expansion area is complete, Cellnet will be responsible for all automated meter readings. Manual meter readings on automated and non-automated meters shall be done by full-time benefit bargaining unit employees in their respective jurisdiction in accordance with the Collective Bargaining Agreement. The Company can use point # 8¹⁰ of this agreement to do such reads*

⁹ This Agreement is part of the collective bargaining agreement and attached to each Local Union contract.

¹⁰ The reference to point #8 is a typographical error. The reference point the parties are referring to is point #7.

until December 31, 2010. The Company will notify the Union of the scheduled implementation.

2. The Company will make every attempt to have Cellnet or Cellnet subcontractors give the first opportunity to reach an agreement with IBEW for installation and maintenance work on meters prior to going to another union affiliation.

3. The Company agrees that Meter Reading is the only bargaining unit position subject to lay off as a result of this automation.

4. As a result of the above and the resulting curtailment of work in the different meter reading jurisdictions, the Company will provide the following (some of which is in the respective Labor Agreements):

a. Before placing a temporary Meter Reader at a headquarters, the Company will post for a full-time benefit regular Meter Reader, to allow for seniority bumping rights per the Labor Agreement prior to hiring a temporary meter reader. The posting process will be by local union jurisdiction first, then across 23, 160, 949, 953, and 1426 by Company seniority.

d. All Full-time benefit Meter Readers will be offered the opportunity to volunteer for severance at specific reduction points, the number and timing will be every other month or in accordance with the automation schedule. Employees who volunteer to be severed will be eligible for one half (1/2) of the Severance Pay Allowance specified in #15 of the Severance Pay Agreement. A Waiver and Release will be required from employees for this severance option.

e. In the event that a full-time benefit employee is unsuccessful in obtaining a job or elects not to take the severance in accordance with 4d, when management determines they are no longer required, they shall be eligible for severance in accordance with the Collective Bargaining agreement in seniority order.

f. A Waiver and Release will be required from employees for all severance options.

7. The parties also agree to create a Temporary Meter Reader classification. The Temporary Meter Reader Classification would be in effect from January 1, 2007, and continue until the meter automation project is completed — approximately December 31, 2010. Employees could work all or any part of this time period without accruing seniority. In no event will temporary employees be eligible for a severance.

a. Employees in the Temporary Meter Reader classifications would be eligible for an annual negotiated wage adjustment and will receive the a wage rate equal to the Exhibit A wage for the Meter Reader classification in Exhibit A.

b. Temporary personnel covered under this agreement will not be eligible for health and welfare benefits but will be eligible for additional pay for the purpose of

purchasing their own benefits. When temporary employees show proof of benefits coverage, and that they are responsible for payment of said coverage, they shall be eligible for additional pay as follows:

*Health Insurance - \$ 2.50 additional per regular hours paid
Dental Insurance \$ 0.70 additional per regular hours paid*

c. Unless changed or modified herein all other terms and conditions of the agreements between the Company and the Local Union shall remain unchanged.

8. If problems surface as a result of the implementation of this proposal, meetings between the parties will be held as soon as practical to the end that mutual satisfaction is achieved.

FACTS

The Employer attempted to automate its meter reading function during mid-1990 and the beginning of 2000 without much success. In late 2006, the Employer approached the Union to discuss a renewed automation effort. The Employer had a contract with a firm, Cellnet, to install automated meter reading equipment and have this automation operational by the end of 2010. Cellnet would be installing module transponders in various urban and rural areas that would collect customer meter data. As stated earlier, this would eliminate the need for the Employer to employ Meter Readers (MRs). MRs were to be phased out beginning in St. Cloud where the anticipated completion date was October 31, 2007 for the urban customers and September 29, 2009 for the rural customers.¹¹ The automation would be complete in all of the Union's jurisdictions by December 31, 2010.

The automation would create wholesale lay offs by seniority and the concurrent exercising of contractual "bumping rights" under the parties Local agreements. This would be costly and delay the automation process making it difficult, if not impossible, to

¹¹ The rural automation would take longer because of the technical problems resulting from customers being separated by greater distances than urban customers.

complete the automation by the Employer's Cellnet contractual deadline of December 31, 2010 unless it received contractual relief. This was achieved when the Union elected to pursue a course of collective bargaining rather than try to impede the inevitable meter reading automation. As a result, the parties finalized a Meter Reader Agreement, hereinafter the Agreement, on March 27, 2007. The Agreement resulted in the creation of a new classification of employees called Temporary Meter Readers (TMRs). The TMRs would be full-time bargaining unit employees with the same wage structure; however, they would not accrue seniority or receive severance pay or have any of the other benefits that MRs enjoyed.¹²

Each party profited from this Agreement. The Employer would enjoy a more orderly, less costly and more efficient automation process. The Employer could now automate without having to follow the seniority provisions in the "agreements" and layoff MRs out of seniority. This was a critical provision since it allowed the Employer to automate without incurring the "bumping rights" contractual procedures and the high costs associated with this under the seniority provisions of the various agreements that could have seriously impeded the automation process.

The Employer could also avoid the contractual 20-year MRs' job guarantee provisions that could also seriously impede the automation process. Under the 20-year seniority provision, MRs could not be laid off; rather, the Employer had to find them a position within the organization. With these seniority provisions removed for the MRs, the Employer was free to automate by geographical area rather than by seniority. This also allowed the Employer to honor its contracting agreement with Cellnet to have the automation completed by the end of 2010. The Employer was also allowed to hire TMRs,

¹² They did receive some health insurance benefit relief as outlined in the Section 7(b) of the Agreement.

and benefit from the lower costs associated with their employment, to back-fill vacancies that would be created when MRs took other jobs or opted for half severance. Finally, TMRs could be eliminated at any time without the Employer suffering the consequences of either the lay off or severance pay provisions in the parties' other "agreements".

The Union also gained concessions with this Agreement. The Employer agreed to create approximately 50 new positions enabling the MRs, if they wanted continued employment, to move into jobs without having to go through the contractual bidding process. The MRs could also move into these new positions immediately instead of having to wait for their jobs to be eliminated through automation. Without the Agreement, MRs would have been laid off if they did not have sufficient seniority to retain employment. The Agreement also created a new half severance package for those MRs who either wanted to retire or voluntarily sever their employment. Finally, the TMRs, who were to be hired to back-fill the vacant MRs' positions, would be accreted into the bargaining unit, albeit with less benefits.

Before the Agreement was reached, the Employer was restricted in subcontracting. It could only subcontract bargaining unit work if it paid the equivalent wages and benefits to contract employees that it paid to bargaining unit employees.¹³ Further restrictions were contained in the Terms and Conditions of Settlement, which was negotiated in every contract period after the Bard decision. Under this agreement, the Employer was free to subcontract if it adhered to the restrictions in paragraph 15 which states,

No employee in a given Section covered under this Labor Agreement shall be laid off or suffer a reduction in wage rate, classification or regular working hours due to lack of work as a result of the Company contracting out work normally and customarily performed by employees in that given section.

¹³ Local agreement p. 2. Union Exhibit No. 1.

No work normally and customarily performed by employees in a given Section shall be contracted out if there are qualified employees in that given Section on lay-off status unless such employees are not readily available to the Company without unreasonable delay and expense.

It took 8-10 bargaining sessions held in late 2006 and early 2007 where the parties exchanged several proposals before a final agreement was reached. The biggest issue that arose during negotiations was who would do the meter reading work during the automation period.

The first proposal entered into evidence was the Employer's proposal dated January 17, 2007. This proposal contained the following language in paragraph 1 and 3 of the Agreement,¹⁴

1. The Company will be automating meter reading systems and retrofitting and replacing meters within an expanded geographic area. Cellnet by and through their agents will be performing the work associated with this project. This expansion will include the automation, retrofitting and replacement of meters in all areas in Minnesota, North and South Dakota, Wisconsin and Michigan. Once the automation, retrofitting and replacement of meters in the expansion area is complete, Cellnet will be responsible for all automated meter readings. The Company will notify the union of the scheduled implementation.

3. In the event manual meter readings are required for normal monthly billing, such reading shall be done in accordance with the Labor Agreement. Readings taken for replacement, repair or verification of modules (operational reads) are not considered normal monthly meter readings and such readings may be used for billing purposes.

Koehler testified and the Union's handwritten notes reflect that the Union proposed the following modifications to the Employer's March 5, 2007 proposal as follows,¹⁵

*3. In the event manual meter readings are required for normal monthly billing, such reading shall be done ~~in accordance with the Labor Agreement~~ **by full-time Meter Readers in their respective Locals jurisdiction.** ~~Readings taken for replacement, repair or verification of modules (operational reads) are not considered normal monthly meter readings and such readings may be used for billing purposes~~*

¹⁴ Union Exhibit No. 7.

¹⁵ Union Exhibit No. 9.

The Employer then counter-proposed the following language in a March 27, 2007 proposal,¹⁶

3. In the event manual meter readings are required for normal monthly billing, such reading shall be done by fulltime benefit bargaining unit employees in the respective jurisdiction to the extent that fulltime benefit employees are still employed. In the event that all fulltime benefit employees have taken other jobs or elected severance the company can use other methods of accomplishing work in accordance with the Collective Bargaining Agreement.

Koehler testified that at a later bargaining session on March 27, the Union offered the following counter proposal,¹⁷

~~3. In the event m Manual meter readings are required for normal monthly billing, such reading shall be done by fulltime benefit bargaining unit employees in the respective jurisdiction to the extent that fulltime benefit employees are still employed. In the event that all fulltime benefit employees have taken other jobs or elected severance the company can use other methods of accomplishing work in accordance with the Collective Bargaining Agreement #8 of this agreement to do that work.~~

Koehler further testified that the Union then offered to consolidate its proposed language from paragraph 3 with the language in paragraph 1 as follows,¹⁸

1. The Company will be automating meter reading systems and retrofitting and replacing meters within an expanded geographic area. Cellnet by and through their agents will be performing the work associated with this project. This expansion will include the automation, retrofitting and replacement of meters in all areas in Minnesota, North and South Dakota and Wisconsin. Once the automation, retrofitting and replacement of meters in the expansion area is complete, Cellnet will be responsible for all automated meter readings. Manual meter readings on automated and non-automated meters shall be done by full-time benefit bargaining unit employees in their respective jurisdiction. In the event that all full-time benefit employees have taken other jobs or elected severance the company can use point # 8 of this agreement to do such reads until December 31, 2010. The Company will notify the union of the scheduled implementation.

The Employer countered with a 7:40 p.m. proposal that eliminated the following language in the first part of the second to last sentence, “*In the event that all full-time*

¹⁶ Union Exhibit No. 10 and Employer Exhibit No. 1.

¹⁷ Union Exhibit No. 11.

¹⁸ Union 6:00 p.m. proposal. Union Exhibit No. 12.

benefit employees have taken other jobs or elected severance".¹⁹ It also left in language from its previous proposal, "*in accordance with the Collective Bargaining Agreement*", after the phrase "*in their respective jurisdiction*".²⁰

The Union agreed to this proposal and the final language incorporates paragraph 1 of the Employer's January 17, 2007 proposal with the additional language agreed to in the final March 27, 2007 bargaining session highlighted is as follows,²¹

*1. The Company will be automating meter reading systems and retrofitting and replacing meters within an expanded geographic area. Cellnet by and through their agents will be performing the work associated with this project. This expansion will include the automation, retrofitting and replacement of meters in all areas in Minnesota, North and South Dakota and Wisconsin. Once the automation, retrofitting and replacement of meters in the expansion area is complete, Cellnet will be responsible for all automated meter readings. **Manual meter readings on automated and non-automated meters shall be done by full-time benefit bargaining unit employees in their respective jurisdiction in accordance with the Collective Bargaining Agreement. The Company can use point # 8**²² **of this agreement to do such reads until December 31, 2010.** The Company will notify the union of the scheduled implementation.*

Koehler testified that after the Agreement was signed the Employer notified the Union that it had begun converting contract employees to TMRs. One individual who was a Local 160 member and had been working as a contract employee in the St. Cloud area, which was outside Local 160's jurisdiction, declined to convert. According to Koehler, he declined employment as a TMR because he did not want to switch his Local membership.

Meanwhile, Meter Reading Manager Brenda Peterson testified that the Employer used contract employees to perform meter reading duties in the Sioux Falls service area before the Agreement was negotiated. She also employed contract meter readers in the Fargo

¹⁹ Union Exhibit No. 13.

²⁰ Employer Exhibit No. 2.

²¹ Union Exhibit No. 14 and Employer Exhibit No. 4.

²² As stated earlier the reference to paragraph # 8 is actually a reference to paragraph # 7. This language was labeled paragraph # 8 in all proposals before the final agreement was reached.

and Grand Forks, North Dakota service areas both before and after the Agreement was reached. Peterson further testified that these contract employees, who often worked side by side with MRs, were never employed while a bargaining unit member was on lay off status nor did their employment cause a bargaining unit member to be laid off.²³ Koehler affirmed in his testimony that there were no TMs on layoff status during the period the subcontracting occurred precipitating the grievance.

Evidence adduced at the hearing disclosed that then Local 1426 Business Manager Seth Thompson sent a letter to Elmasry dated September 22, 2008 that was copied to Peterson.²⁴ The letter stated,

Local 1426 recently learned that Xcel Energy utilized contract meter readers in our jurisdiction after the negotiation of the March 27, 2007 Meter Reading Automation Letter of Agreement. .This letter is to serve as notice that if Local 1426 had any knowledge of such violation, it would have been grieved at the time.

Evidence also adduced at the hearing disclosed that an employee who is laid off has the right to elect not to receive severance pay and thereby remain as a laid off employee who retains all seniority rights and other privileges under the “agreements”. Employees who opt to take severance are no longer employees. The Severance Pay Agreement specifically states, “*An employee receiving Severance Pay shall forfeit all seniority rights and any other privileges, rights or benefits to which such an employee may now or hereafter be entitled except nonforfeitable service credits under the Company’s tax-qualified retirement plans*”. This agreement also specifically provides that monthly severance payments “*shall cease if the employee is reemployed by the Company or is hired to perform work for the Company as an independent contractor or otherwise.*” TMs

²³ There was a lay off of four TMs in St. Cloud during this period; however, all opted for severance and were no longer employees.

²⁴ Union Exhibit No. 16.

that elect the half severance option also give up seniority rights and are no longer employees. Paragraph 5(d) of the Agreement states, "*A Waiver and Release will be required from employees for this severance option.*"

The evidence further adduced at the hearing disclosed that 41 full-time TMRs and 37 contractors, some of whom were part-time, were employed after the Agreement was executed. It also appears that the Employer did not gain any financial advantage when it employed contractors versus TMRs; in fact, it may have been more expensive according to the testimony of Vice President Safety Ed Lutz.²⁵

UNION POSITION

The Union's position is that the Employer violated the Agreement when it contracted out meter reading work. The Employer is attempting through arbitration to obtain rights that were rejected during collective bargaining. The Union argues that the plain language of the Agreement prohibits the Employer from subcontracting meter reader work. The language is direct, clear and free of ambiguity. The contract language at issue here provides succinctly that, "*Manual meter readings on automated and non-automated meters shall be done by full-time benefit bargaining unit employees in their respective jurisdiction in accordance with the Collective Bargaining Agreement*". In support of this the Union states:

- The contract language is only susceptible to one interpretation that the "*meter readings...shall be done by full-time benefit bargaining unit employees.*" The language clearly spells out the work in question, "*meter readings*", and how it is to be performed, "*shall be done by full-time benefit bargaining unit employees*". The

²⁵ Lutz was the Director of Work Force Relations at the time and responsible for Agreement negotiations.

language does not say “could” or “may” be performed; rather it succinctly states “shall”, which unambiguously forecloses on the Employer’s discretion to assign meter reading work.

- The Employer’s interpretation that the term “*in accordance with the Collective Bargaining Agreement*” gives it discretion to assign meter reading work to other than bargaining unit employees is in direct conflict with the plain language that precedes it. The purpose of the Agreement was to address how the meter reading would be done during the automation period in order to foster a smooth transition. While the parties sought clarity and certainty about meter reading work during the transition period, the Employer’s interpretation offers inconsistency and only introduces ambiguity and uncertainty. On the other hand, the Unions interpretation provides consistent answers to how the work will be performed.
- The Employer’s interpretation wholly ignores the language in Section 7(c) which states, “*Unless changed or modified herein all other terms and conditions of the agreements between the Company and the Local Union shall remain unchanged.*” This language demonstrates the parties’ understanding that the more particular terms of the Agreement are intended to modify the more general terms of the other “agreements”. Thus, where the Agreement specifically addresses the manner in which the meter reading work shall be performed, Section 7(c) reveals that the parties intended the Agreement to prevail.
- Paragraph 2 of the Agreement states that, “*The Company will make every attempt to have Cellnet or Cellnet subcontractors give the first opportunity to reach an agreement with IBEW for installation and maintenance work on meters prior to going to another*

union affiliation.” Thus, The Agreement demonstrates that they were clear about where the parties intended subcontracting to occur during the automation process. The clarity in paragraph 2 cannot be reconciled with the Employer’s position that the parties intended to subcontract meter reading work even though there are no words evidencing that intent.

The Union further argues that while this Arbitrator need not look beyond the plain language of the Agreement, he may choose to find interpretive guidance by looking at “*all the relevant circumstances surrounding the transaction.*”²⁶ “Relevant circumstances” to the dispute include the extrinsic evidence associated with the bargaining history. This evidence proves that the parties intended to preclude the Employer from subcontracting meter reading work. In support of this argument the Union states:

- During bargaining the Union consistently communicated to the Employer that their objective was to ensure that the diminishing meter reading work would be performed by bargaining unit employees. Consistent with this objective, the Union sought and secured a work preservation mandate in the Agreement. It is undisputed that the Employer’s early proposals did not include the mandate language [*“meter readings...shall be done by full-time benefit bargaining unit employees.”*] that the Union crafted, demanded and secured.
- It is a well-settled arbitration rule that *“[i]f a party attempts, but fails, in contract negotiations, to include a specific provision in the agreement, arbitrators will hesitate to read such provision into the agreement through the process of interpretation.”*²⁷

Normally the plain inference of the omission is that the intent to reject prevailed over

²⁶ Elkouri & Elkouri, HOW ARBITRATION WORKS, at 447 (6th Edition 2003).

²⁷ Citing Elkouri, supra, at 454 & fn 111.

the intent to include. In the instant matter, the proposals made, accepted and rejected are not in dispute.

- The Employer attempted and failed in bargaining to secure the right to subcontract meter reading during the transition to automation. During the extended negotiating session on March 27, the Employer proposed language that would allow it to use “other methods of accomplishing” the meter reading work. The Employer admitted that by this language they intended to subcontract. The Union rejected the “*other methods*” language and it did not end up in the Agreement.
- The Union’s goal during bargaining was to establish the clear rule that the diminishing meter reading work would be performed by bargaining unit employees and to reject any alternative. They were so successful in accomplishing this goal that the Employer must now hinge its case on the wholly innocuous phrase, “*in accordance with the Collective Bargaining Agreement,*” which appears at the end of the work preservation mandate. With the mandate clear and in hand, the Unions accepted the “*in accordance*” language for the purpose of making clear that terms and conditions of employment not addressed in the Agreement for the residual meter readers and for the newly created class of temporary readers would be covered by the Agreements. The Unions never intended this language to alter the declarative mandate.
- “Relevant circumstances” to a dispute also include the extrinsic evidence associated with an employer’s conduct after an agreement was reached. The Employer’s conduct after ratifying the Agreement supports the plain language that meter reading work could not be subcontracted. Shortly after reaching the Agreement, the Employer

affirmatively notified the Union that it had converted subcontractors to bargaining unit employees under the new Temporary Meter Reader classification.

The Union summarizes its position that the Employer violated the Agreement by subcontracting bargaining unit work as follows:

- 1) The Employer admits that the Union articulated at bargaining that its objective was to preserve the remaining meter reading work for bargaining unit employees until that work disappeared in the transition to automation.
- 2) The Employer admits that its early bargaining proposals neglected to identify who would perform the remaining meter reading work, and that the Union insisted that the Agreement provide that the work “shall be performed by bargaining unit employees.”
- 3) The Employer admits that the “shall be performed” language constitutes a contractual mandate.
- 4) The Employer admits that it attempted to secure language in the Agreement that would allow it to use subcontractors (“other methods of performing” the meter reading work), but that the Unions rejected that language.
- 5) The Employer admits that, after reaching the Agreement, it removed subcontractors from its property that had been performing limited meter reading under earlier agreements, and converted them to bargaining unit employees.
- 6) The Employer must admit that the phrase, the seven words upon which its entire case hinges (in accordance with the Collective Bargaining Agreement), conveys nothing whatsoever on its face about the subcontracting subject.
- 7) The Employer must admit that its interpretation of that phrase cannot be reconciled with the context of the Agreement, other express terms of the Agreement (Section 7c) or with well-settled rules of contract construction.

EMPLOYER POSITION

The Employer’s position is that it did not violate the Terms and Conditions of Settlement or the Agreement when it contracted out meter reading work after March 27, 2007. The Employer argues that it maintained its right to contract out meter reading work

under certain conditions after the Agreement was reached pursuant to the parties' Terms and Conditions of Settlement. In support of this, the Employer states:

- Lutz testified that he made it clear to the Union that they did not want to give up any rights that they already had under existing agreements including the right to contract out meter reading work.
- Lutz further testified that the term "*in accordance with the Collective Bargaining Agreement*" preserved the Employer's right to contract out meter reading work so long as there were no TMs on lay off or subcontracting would cause a lay off. The Employer insisted that this phrase be in the Agreement, and without it, Lutz testified there might not have been an Agreement. He also testified that this language ensured the Employers right to subcontract meter reading work as it had in the past or hire TMRs.
- The Evidence clearly established that there were no TMs on layoff when the work was contracted out or that the subcontracting caused any lay offs.
- The Employer needed flexibility to continue to use contractors during the automation, particularly in the rural areas. It was more difficult to automate in rural areas and there was the likelihood that there would not be any full-time meter reading work available during the automation process in a given geographical area. This is what happened and why some of the contractors were part-timers paid on a unit price rather than an hourly basis.

The Employer also argues that it never waived its right to use subcontractors to perform meter reading work during the automation process. In support of this the Employer states:

- It is a fundamental principle of labor law that a waiver of any right must be clear for the waiver to be effective. Black's Law Dictionary defines waiver as, "*The voluntary relinquishment or abandonment — express or implied — of a legal right or advantage*". The party alleged to have waived a right must have both knowledge of the existing right and the intention of foregoing it."²⁸ Elkouri's seminal treatise on arbitration recognizes the Black's Law Dictionary definition of waiver that a party alleged to have "waived a right" must have had both knowledge of the existing right and the intention of foregoing it.²⁹
- Both the National Labor Relations Board and arbitrators have long held that a waiver of a contractual right must be clear and unequivocal.
- There is no clear and unequivocal evidence that the Employer waived its right to use contractors for meter reading work.
- The Employer consistently maintained that the meter reading work would be done "*in accordance with the Collective Bargaining Agreement*". The Employer insisted on the language to ensure that it maintained the rights that it had under the "agreements", namely the right to use contractors.
- At no time did the parties consciously and specifically discuss the Employer waiving its right to use contractors. Also the Union never expressed a belief that the Employer was waiving this right.

In summation, the Employer argued that:

- (1) The Employer complied with the requirements in the Terms and Conditions of Settlement for the use of contractors to perform meter reading work.

²⁸Black's Law Dictionary, (9th Ed. 2009) at 1717.

²⁹ Elkouri, supra, p. 540.

- (2) No MR employees were laid off as a result of contracting out meter reading work, nor did the Employer contract out meter reading work while there were MR employees on lay off status.
- (3) The Agreement did not alter the Employer's right to use contractors under the Terms and Conditions of Settlement.
- (4) The Employer included language in the Agreement to ensure that it maintained its rights under the Terms and Conditions of Settlement to contract out meter reading work.
- (5) The Employer never waived its rights to contract out meter reading work.

OPINION

The issue before the undersigned is whether the Employer violated the Agreement or the Terms and Conditions of Settlement when it subcontracted meter reading work after the parties reached the Agreement on March 27, 2007. Both parties allege that the Agreement supports its position regarding the interpretation of the phrase, "*Manual meter readings on automated and non-automated meters shall be done by full-time benefit bargaining unit employees in their respective jurisdiction in accordance with the Collective Bargaining Agreement*". The Union argues that the Agreement mandates that all meter reading work be done by full-time benefit employees while the Employer argues that it has the right to contract out work as it had previously done under paragraph 15 of the Terms and Conditions of Settlement.

There are a number of undisputed facts that are listed below:

- The Employer wanted to complete the meter reading automation process in a timely and orderly fashion and the Union wanted to preserve the meter reading work for its bargaining unit members during the automation process.
- The Employer benefited by not having to lay off MRs by seniority and be faced with the ensuing “bumping rights” that lay offs cause or being saddled with the huge labor costs associated with severance. The Employer could use the newly created TMR position to back-fill vacated meter reading work. With the elimination of these concerns, the Employer could then automate the meter reading company wide by geographical area rather than by Local union jurisdiction. It also enabled the Employer to ensure that it could complete the automation by December 31, 2010.
- The Union gained new jobs that the MRs could transfer into without going through the established bidding procedures. They could also move into these new jobs without having to wait for the automation to be completed in their assigned geographical area. The Union also gained a new half severance package for the MRs who did not qualify for the newly created jobs or retirement or did not want to be on lay off status. Finally, the Union gained new bargaining unit (TMR) positions.
- The Terms and Conditions of Settlement gave the Employer the right to subcontract meter reader work if (1) No MR employees were on lay off status and (2) If the subcontracting did not result in the layoff of MR employees.
- The Employer used contract employees to perform meter reading work both before and after the Agreement was reached. When it did so, there were no MRs on lay off status nor were any MRs laid off because of the subcontracting. The Employer

also used TMRs, some of whom were converted contract employees, to perform meter reading work after the Agreement was reached.

- It appears that the Union was not aware that contract employees were back-filling for MRs who took other jobs, retired or opted for severance after the Agreement was reached.
- Finally, according to paragraph 7(c), the Agreement only modifies the existing “agreements” to the extent conveyed by the language contained therein.

The Union is correct that the language, “*Manual meter readings on automated and non-automated meters shall be done by full-time benefit bargaining unit employees in their respective jurisdiction...*” is clear and unambiguous. Reading this phrase in isolation mandates that the meter reading work during the automation shall be performed by full-time benefit bargaining unit employees. However, this phrase cannot be taken out of context because there is more to the mandated assignment language than this initial phrase. The remaining phrase, “*in accordance with the Collective Bargaining Agreement*” has to be considered. This phrase clearly modifies the initial mandated assignment language to incorporate meter reading work assignments. Thus, the parties’ “agreements” have precedent in situations not encompassed by the Agreement.

As stated earlier, the Union interpreted the language to mean that all meter work during the automation period belonged to bargaining unit employees while the Employer avers that the language gives it the right to subcontract the work pursuant to the Terms and Conditions of Settlement.

The evidence clearly established that during negotiations the Union wanted to retain the meter reading work throughout the automation process and the Employer understood this goal. The following is a dialogue between Lutz and Union Counsel Bill O'Brien³⁰:

Q *And we are in agreement, are we not, Mr. Lutz, that it was the Union's insistence that there is an affirmative declaration about who was to perform that work?*

A *Yes.*

Q *And they proposed that affirmative declaration?*

A *Yes.*

Q *And they proposed it in the mandate format shall be performed by?*

A *They proposed it the way it's written.*

Q *That wasn't the Company's suggestion, that was the Union's?*

A *I think I said yes.*

The Employer's January 17, 2007³¹ proposal contained the language, "*In the event manual meter readings are required for normal monthly billing, such reading shall be done in accordance with the Labor Agreement*". It maintained this language in its February 21st and March 5th proposals.³² The Union then struck out the language, "*in accordance with the Labor Agreement*" from the March 5th proposal and inserted the following language, "*by full-time benefit Meter Readers in respective Local jurisdictions*".

The Employer's counter offer of March 27th accepted the Union's modification but maintained its right to subcontract with the additional language after "*Local jurisdictions*", "*to the extent that fulltime benefit employees are still employed. In the event that all fulltime benefit employees have taken other jobs or elected severance the company can use other methods of accomplishing work in accordance with the Collective Bargaining Agreement*".³³ The Union's March 27th 6:00 p.m. counter offer struck out the phrases, "*to the extent that fulltime benefit employees are still employed*" and "*other methods of*

³⁰ Transcript 175:12-25.

³¹ Hereinafter, all dates are in 2007.

³² Union Exhibit Nos. 8 and 9.

³³ Union Exhibit No. 10 and Employer Exhibit No. 1.

*accomplishing work in accordance with the Collective Bargaining Agreement” and inserted after “can use” the phrase “#8 of this agreement to do such reads until December 31, 2010”.*³⁴

After further bargaining that evening, the parties dropped the language *“In the event that all fulltime benefit employees have taken other jobs or elected severance the company can use other methods of accomplishing work”* from the Employer’s earlier proposal. The parties also mutually agreed to eliminate the phrase, *“to the extent that fulltime benefit employees are still employed”* from the provision. Finally, the parties agreed to retain the language, *“in accordance with the Collective Bargaining Agreement”* from the Employer’s earlier proposal.

The final agreed to language became, *“Manual meter readings on automated and non-automated meters shall be done by full-time benefit bargaining unit employees in their respective jurisdiction in accordance with the Collective Bargaining Agreement. The Company can use point # 8 of this agreement to do such reads until December 31, 2010.”*

This evidence clearly established that the Union insisted during negotiations that the meter reading work during the automation process must be performed by bargaining unit Meter Readers. The Employer contends that it never waived its right to subcontract meter reading work by virtue of the language *“in accordance with the Collective Bargaining Agreement”*. I disagree. If the Employer had meant to use contract employees to do the meter reading work rather than MRs or TMRs, why did it not say so explicitly in paragraph 1 so there could be no doubt as to the meaning of *“in accordance with the Collective Bargaining Agreement”*? The Employer attempted to do this during negotiations when it proposed in its initial March 27th proposal that stated, *“In the event that all fulltime benefit*

³⁴ Union Exhibit No. 12.

employees have taken other jobs or elected severance the company can use other methods of accomplishing work in accordance with the Collective Bargaining Agreement” {Emphasis added}.

The Union rejected this according to the testimony of Koehler. His testimony is corroborated by future proposals which are devoid of any language that could be explicitly implied to allow subcontracting of the remaining meter reader work during the automation process. The only mention of subcontracting in the Agreement is the language in paragraph 2 of the Agreement wherein the Employer, “*will make every attempt to have Cellnet or Cellnet subcontractors give the first opportunity to reach an agreement with IBEW for installation and maintenance work on meters prior to going to another union affiliation*”.

Further evidence that supports the Union’s position is that in the Employer’s initial proposal there is no mention of who would do the meter reading work, only that it would be done “*in accordance with the Collective Bargaining Agreement*”. The subsequent Union proposal eliminated the aforementioned Employer language and mandated that the work “*shall be done by full-time benefit bargaining unit employees in their respective jurisdiction*”. Clearly, this demonstrates that the Union was against having anyone other than bargaining unit employees doing the meter reading work during the automation process.

There is also evidence that mitigates against the right of the Employer to subcontract meter reading work under the Terms and Conditions of Settlement. This evidence is contained in the following language in paragraph 1 of the Agreement. “*The Company can use point #8 of this agreement to do such reads until December 31, 2010. Paragraph 8,*

which became paragraph 7 in the final Agreement allowed the Employer to hire TMRs to back-fill the positions vacated by MRs.

The record is devoid of when the TMR classification in paragraph 7 was established. It first showed up in the Employer's January 17th proposal and was never modified thereafter leading one to believe it was agreed to prior to January 17th. The genesis of the TMR position is not known; however, it appears the Employer proposed it because the creation of the TMR position was a benefit to the Employer according to the testimony of Lutz.³⁵ However, if the Union proposed the TMR position, it reinforces its position that the remaining meter reading work would be done by the new generation class of meter reader bargaining unit members.

In any event, the creation of the TMR position gives credibility to the Union's position that TMRs, rather than subcontract employees, would be employed to back-fill vacated MR positions. If the classification had not been created, the Employer would be free to subcontract pursuant to the Terms and Conditions of Settlement. If it had the unfettered right to subcontract out the meter reading work left vacant by a departing MR, why would it need a new classification of meter readers to do the meter reading work? Obviously, it was to back-fill the vacated MR positions created by the Agreement. Further evidence to support the Union's position can be found in the Employer's actions in converting contract employees to TMRs after the Agreement was executed. Why would it need to convert these contractors if it had the right under the Agreement to employ them? Finally, if the Employer wanted the right to subcontract meter reading work, why did it not insist on it in the final Agreement? This strongly implies that the Employer's use of contractors after the

³⁵ TR 144:1-3 and 169:22-25

Agreement was negotiated was an after thought rather than a right strongly argued for during negotiations.

Based on all the evidence adduced, the record evidence including the Agreement language, the bargaining history and the Employer's actions in converting contract employees to TMRs after the Agreement was executed supports a finding that the Employer violated the Agreement when it subcontracted meter reading work that bargaining unit (TMRs) could perform.

This finding, however, does not mean that the Employer is prohibited from ever using subcontractors to perform meter reading work. Since the Employer employs no part-time bargaining unit meter readers, the Agreement would not restrict it from employing subcontract employees where there is no need for a full-time meter reader. However, this does not give it carte blanche to bifurcate the work load of the full-time MR or TMR positions and create multiple part-time positions to perform the same work.

Having found that the Employer violated the Agreement in subcontracting meter reading work, an appropriate remedy will be formulated. At the hearing, the Union proposed that contract employees be converted to TMRs and be made whole for any difference in wages and the limited health care benefits that TMRs enjoy. Pursuant to this Arbitrator's request, the Union clarified its hearing requested remedy to also include, (1) Payment to each of the Local Unions an amount which represents "back dues" for each contractor hired in lieu of a temporary until such time as that position is filled per the Agreement; and (2) Lost time wages paid to each Local Union at the TMR rate for each

hour worked by a contractor since March 27, 2007 in the respective jurisdictions of the Locals.³⁶

Pursuant to this Arbitrator's request, the Employer responded to the Union's requested relief. The Employer stated that it believes that the Unions' requested remedy is not appropriate. First, as the testimony of Employer's witnesses explained at the hearing, many of the contract meter readers being used are part-time, and some are paid pursuant to a flat, unit-price contract and are not paid on an hourly basis. Thus, any payment for "back dues" as requested by the Unions for each contractor hired is not appropriate as the Company has not hired full-time contractors who are paid on an hourly basis.

Additionally, the Unions' request to be paid "lost time wages" for each hour worked by a contractor as damages is not supported or allowed by the Labor Agreements between the parties. The Labor Agreement, Article III, Section 1(h), prohibits any award from imposing new rules or regulations on the parties. Damages payments are not provided for in the Labor Agreement, nor are they provided for in the 2007 Meter Reading Agreement. And as explained above, the Employer does not have any records of the hours worked by contractors who are paid pursuant to a unit price contract. Finally, the Unions do not receive any wage payments made by the Employer to the employees. Any damages award would be a windfall to the Unions and result in the Unions earning a financial profit that they otherwise would not, which is not allowed by the Labor Agreement.

After reviewing each party's position I have determined as a result of my finding that the Employer subcontracted bargaining unit work in violation of the Agreement, the appropriate remedy will be one that arbitrators and the National Labor Relations Board

³⁶ This Arbitrator sought clarification because the Employer's brief identified additional requested relief.

traditionally impose for subcontracting violations. This does not include “back dues”, damages or other payments the Union has requested. It will also not include payments not authorized by the Collective Bargaining Agreement that the Employer appropriately objected to.

Therefore, the Employer will be ordered to (1) cease and desist from using contractors to perform meter reading bargaining work during the automation process; (2) be required to convert all contractors hired after March 27, 2007 who were performing the meter reading work of a full-time meter reader to a TMR position; and (3) make those affected contract employees whole for the monetary difference associated with TMR wage rates and health insurance supplemental payments contained in paragraph 7(b) of the Agreement and what they received as a contract employee from the date they were employed until they are or decline to be converted to a TMR position. This remedy does not apply to those contractors who were employed pursuant to subcontracting allowed by the Terms and Conditions of Settlement prior to March 27, 2007 or to subcontractors employed on a legitimate part-time basis.

AWARD

IT IS HEREBY ORDERED that the grievance be and hereby is sustained for the reasons set forth herein.

IT IS FURTHER ORDERED that the Employer cease and desist from employing contract employees in violation of the Meter Reader Agreement.

IT IS FURTHER ORDERED that the Employer immediately convert contractors who are employed full-time in violation of the parties' Agreement to bargaining unit Temporary Meter Reader positions.

IT IS FURTHER ORDERED that those contractors who were employed contrary to the terms of the Meter Reader Agreement be made whole for any monies received while employed as a contractor that were less than the wages and health benefit supplemental payments received had they been employed as a bargaining unit Temporary Meter Reader employee.

The undersigned Arbitrator will retain jurisdiction in this matter for a period of forty-five (45) days from the receipt of this Award to resolve any matters relative to implementation.

Dated: October 8, 2009

Richard R. Anderson, Arbitrator