

THE ARBITRATION HEARING

The grievance submitted herein was heard in arbitration on January 21, 2004 at Los Angeles, California. Throughout the course of the proceeding, both parties were afforded full opportunity to present sworn testimony, cross-examine witnesses and introduce documentary evidence. Thereafter, a verbatim transcript of the proceeding was prepared. Finally, argument in the form of post-hearing briefs was submitted on behalf of both parties.

THE APPEARANCES AT ARBITRATION

The Company was represented at the hearing by Mr. Larry I. Stein from the Office of the General Counsel at Sempra Energy. The appearance on behalf of the Union was made by Mr. Bernhard Rohrbacher of Rothner, Segall & Greenstone, Attorneys at Law.

THE MATTERS AT ISSUE

At the outset of the hearing, counsel for the parties orally stipulated to the following statement of the issues submitted herein:

- 1) "Whether Technical Specialist Scott Kysar performed bargaining unit work on February 1, 2001 at the Company's La Goleta facility.
- 2) If so, what the remedies should be."

FINDINGS OF FACT

In the year 1995, the FIX DMAC software program was introduced as a component of the Supervisory Control and Data Acquisition (SCADA) system then in place at the La Goleta storage facility of the Company. The FIX DMAC program was implemented as a replacement for the outmoded KAYE VIEW system then in place. SCADA is utilized to monitor and control the operations at the La Goleta location.

Instrument Specialist Dennis Zukowski was instructed to accomplish the replacement of the KAYE VIEW system with the FIX DMAC programming. In that effort, Zukowski, a member of the bargaining unit and the current President of Local 483, was not provided any assistance or specific instructions from management. Thereafter, Zukowski, who had been assigned to the La Goleta facility since 1998, devoted his full time efforts for a period of three months to accomplish the introduction of the FIX DMAC programming into full service as a component of the SCADA system.

Following the integration of the FIX DMAC computer system and software, the programming was maintained by Zukowski and Instrument Specialist Kevin Frederick essentially without supervision. Over the five to

six years that followed, Zukowski devoted approximately thirty percent of his time to that effort while Frederick worked on SCADA about twenty percent of his time.

Late in the year 2000, Technical Specialist – Instrumentation Scott Kysar, a member of management, was assigned to accomplish a modernization and upgrade of the SCADA system at La Goleta. Kysar carried out his assignment without assistance from Zukowski or Frederick. It occurred, however, that on February 1, 2001, Zukowski observed him working on a SCADA display screen making changes to the layout of the screen. Zukowski protested to Kysar asserting he was intruding upon bargaining unit job functions performed over the preceding five years by himself and Frederick. Kysar told Zukowski he was carrying out an assignment given to him by his supervisor and he would continue to do so. Later in that same day, the grievance that here brings the parties before the Board of Arbitration was filed by Zukowski.

Technical Specialist – Instrumentation Kysar completed the upgrade and modernization of the SCADA system over a period of approximately five months. Zukowski and Frederick have thereafter been assigned to only occasional and more fundamental programming and repair duties on the SCADA.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE II

MANAGEMENT/UNION RIGHTS, RELATIONSHIPS, RESPONSIBILITIES

2.1 – Management Rights

- (A) **General Statement:** The Company has and will retain the unquestionable and exclusive right and power to manage its business and direct the working forces, including the right to hire, classify, grade, suspend, discharge, promote, demote or transfer its employees, provided it does not conflict with the provisions of this Agreement. Nothing in this Agreement is intended to or is to be construed in any way to interfere with the recognized prerogative of the Company to manage and control the business.

2.2 – Union Rights

(A) **Recognition:**

The Company recognizes the Union for those units where the Union, through National Labor Relations Board certification, has been designated as the exclusive bargaining agency for employees of the Company covered by this Agreement . . .

ARTICLE V

WORK FORCE FLEXIBILITY/WORK SCHEDULES

5.11 – Job Profiles

The Company agrees to prepare and issue a revised index of job classifications and summary of duties for the purposes of assisting employees in determining the nature of duties to be performed in any job for which they may bid. Where pertinent, the index will list the principal minimum qualifications for the Indicative Duties Descriptions, with the understanding that such lists may not be all inclusive and may be subject to change. However, the Company agrees to notify the Union immediately if it intends to modify the minimum qualifications for any job. Furthermore, any minimum qualifications must be reasonable and necessary to indicate probable success in the classification.

THE CONTENTIONS OF THE PARTIES

The Union contends that programming functions performed on the SCADA system on February 1, 2001 by Scott Kysar, a member of management, constituted bargaining unit work. In support of that assertion, the Union points out that Instrument Specialists Zukowski and Frederick installed the FIX DMAC software programming without direct supervision and over the some five years that followed they maintained and, when necessary, upgraded the system. The Union notes that the Job Profile for Instrument

Specialist specifically identifies the installation, programming, calibrating and repair of the SCADA automatic control system as elements of that classification. The Union also cites the "Job Description Questionnaire" forms completed by Zukowski and Frederick along with their Performance Appraisals as documentation of the fact that prior to February 1, 2001 Zukowski and Frederick spent a substantial proportion of his working time on SCADA programming assignments. The Union insists Technical Specialist – Instrumentation Kysar was then assigned such bargaining unit work in violation of the representational rights of Local 483 as set forth in the collective bargaining agreement. Thus, the Union here seeks an award of eight hours of overtime pay on the theory that if Zukowski or Frederick had been assigned to the work at issue on February 1, 2003, they would have carried out that task on an overtime basis.

The Company responds by stating that the duties performed by Kysar on February 1, 2001 constituted but one element of a four million-dollar design and installation undertaking initiated as one element of a modernization project. The Company argues no bargaining unit work was performed by Kysar because the Instrument Specialist Job Profile does not identify the installation of major capital improvements as a job duty of that classification. The Company asserts the modernization of the equipment here at issue initiated in 2001 has seen the introduction of programming technology of increasing complexity so that a precise division between bargaining unit work and supervisory responsibilities is no longer present in technical/professional job disciplines. The Company notes that in any event

the collective bargaining agreement does not incorporate a provision precluding management employees from performing bargaining unit work. In sum, it is said that the assignment of Kysar to the upgrading and modernization of SCADA constituted no more than the exercise of a retained managerial prerogative to direct the workforce and as such an act permitted by Article II, Section 2.1 (A) of the collective bargaining agreement. The Company thus requests that the grievance here before the Board of Arbitration be denied.

DISCUSSION BY THE ARBITRATOR

It is correct, as argued by the Company, that Article II, Section 2.1 (A) of the collective bargaining agreement states in unequivocal terms that management has retained "the unquestionable and exclusive right and power to manage its business and direct the working forces". It must be noted, however, that this same provision recites that such discretionary acts of management may not conflict with the other provisions of the collective bargaining agreement. One such provision is found in Section 2.2. (A) wherein the Union is recognized as the exclusive collective bargaining agent for employees covered by the terms of the labor contract. The clear import of that recognition is to confine the assignment of bargaining unit work to members of the bargaining unit. As stated by Arbitrator William S. Rule in a matter involving the performance of bargaining unit work by a supervisor at Southern California Gas Company, "the Company does not have an unlimited

right to use supervisors to do bargaining unit work". Beyond that, in settling earlier grievances than the one at hand the Company has recognized the reality that management employees may not perform bargaining unit work. In that regard, I cite the language of the settlement of an earlier grievance dated September 8, 1990 filed by Zukowski, a grievance dated August 29, 1991 that arose at the South Basin Instrument Department, a grievance protesting the operation of a forklift by a supervisor for a period of four hours on August 19, 1992, a grievance protesting the performance of the work of Field Operators on June 13, 1994, the settlement of Grievance No. 3270 on February 10, 1997 and the settlement of Grievance No. 3264 on June 19, 1997. Against this understanding and practice of the parties, the Company may not here avoid possible liability simply because the collective bargaining does not expressly state a proscription against management employees performing bargaining unit work.

Was the work performed by Technical Specialist – Instrumentation Kysar on February 1, 2001 as observed by Instrument Specialist Zukowski bargaining unit work? The Company suggests that it was not because the Instrument Specialist profile states the work performed by incumbents is related to the operation and maintenance of electronic control instruments and Kysar was then engaged in the design and installation of a major modernization project. The record made before the Board of Arbitration discloses, however, that bargaining unit members Zukowski and Frederick, with only minimal supervision, installed the FIX DMAC computer programming and thereafter not only maintained but

upgraded the SCADA system. All of this work they alone performed until Kysar was assigned at the outset of 2001. While it must be recognized that the equipment and technology involved in the SCADA programming has become more complex with the passage of time, the reality remains that the work here at issue has been assigned to Zukowski and Frederick thereby demonstrating a recognition that it constitutes bargaining unit work.

Article III, Section 3.10 of the collective bargaining agreement vests in management the responsibility of interpreting and applying the Job Profile Index "on the job". That same provision, however, reserves to the Union the right to resolve any conflict that thereby arises through the grievance procedure. That is precisely what Local 483 has done in the present case.

The Job Profile for the bargaining unit Instrument Specialist classification identifies as an essential duty and responsibility of an incumbent the programming and repair of devices used for automatic control and for telemetric indication and control. It then specifically refers to "SCADA". Beyond that, the Job Profile identifies as a desired qualification to serve as an Instrument Specialist an "Understanding of data communications (SCADA) theories and applications". Furthermore, the "Job Description Questionnaire" forms completed by both Zukowski and Frederick throughout the time period leading up to February 1, 2001 reflect SCADA programming on their part as a substantial proportion of their regularly assigned duties. While it may well be that the activities of Kysar observed by Zukowski on February 1, 2001 constituted display screen programming

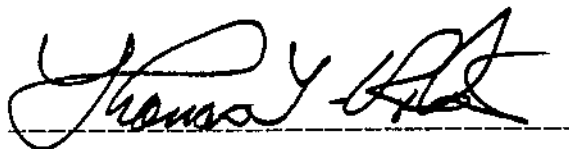
incidental to the integration of a modernization of the SCADA system, those functions nevertheless included bargaining unit work properly within the duties and responsibilities of the Instrument Specialist classification.

At the time Technical Specialist – Instrumentation Kysar performed bargaining unit work on February 1, 2001, both Zukowski and Frederick were available to carry out the assignment in addition to their other duties albeit on an overtime basis. In an Award involving these same parties and dated January 29, 2004, Arbitrator Edna E. J. Francis found that even in the presence of this type of contractual violation occurring for but a short span of time the granting of overtime pay as a remedy is appropriate. As was true in her case, there was here no emergency situation. Additionally, arbitral precedent in the form of an Award rendered by Arbitrator Thomas Christopher on January 29, 1988 involving Southern California Gas Company further confirms that a lost overtime opportunity cannot be recovered so that a monetary award is proper. I therefore find that in the present case Dennis Zukowski is entitled to an award of four hours of overtime pay at the rate applicable on February 1, 2001 and Kevin Frederic is entitled to an identical payment.

AWARD OF THE BOARD OF ARBITRATION

1. Technical Specialist Scott Kysar performed bargaining unit work on February 1, 2001 at the Company's La Goleta facility.
2. The Company shall pay Dennis Zukowski four hours of overtime wages at the contractually provided rate in effect on February 1, 2001.
3. The Company shall pay Kevin Frederick four hours of overtime wages at the contractually provided rate in effect on February 1, 2001.

Dated: January 4, 2005



THOMAS T. ROBERTS, Arbitrator

DAVID JOHNSTONE (I Dissent)

ROY BOSARTH (I Concur)