Opinion and Award

In the Matter Between

Southern California Gas Company

- and -

Utility Workers Union of America Local 483, AFL-CIO

G 01-0089, G01-0090

Mei L. Bickner, *Arbitrator*

APPEARANCES

FOR THE COMPANY:

Larry I. Stein, Esq., Counsel
Sempra Energy

FOR THE UNION:

Bernhard Rohrbacher, Esq.
Rothner Segall & Greenstone

DATE OF HEARING

December 10, 2003

DATE OF AWARD

April 10, 2004

ISSUE:

Supervisor Performing Bargaining Unit Work

A hearing in the above-captioned matter was held before the Arbitrator with both parties being provided full opportunity to present evidence, to examine and cross-examine witnesses, and to argue their contentions.

ISSUE

At the hearing the parties stipulated to the following formulation of the issue:

What is the appropriate remedy, if any, for bargaining unit work performed by management employees?

STIPULATIONS

1. On August 16 and 22, 2001, Supervisor Todd Tuttle performed bargaining unit work by operating a backhoe and forklift, respectively, for a total of one hour at the Company's Goleta facility.

2. On August 23, 2001, the Union timely filed Grievances Nos 5884 (forklift) and 5885 (backhoe) – [collectively, "Grievances"].

3. On October 11, 2001, the Company issued its First Step Grievance Response. The Company found that Todd Tuttle had performed bargaining unit work. The Company, however, did not agree with the Union-proposed remedy of providing overtime pay.

4. On October 16, 2001, the Union requested Second Step Grievance Hearings.

5. On December 10, 2003, the Company issued its Second-Step Response. The Company came to the same result discussed in Paragraph 3 above. Specifically, the Company stated: "We do not agree with the Union's remedy to pay overtime to employees who did not actually perform the work. The Company has counseled the Supervisor involved in these . . . . grievances regarding performing bargaining unit work."

6. On December 14, 2002, the Union requested arbitration.

BACKGROUND

On August 16, 2001,Supervisor Todd Tuttle operated a backhoe for approximately 30 minutes to dig a trench. He testified that it was to maintain access to the maintenance shop enabling an electrical contractor to perform its tasks. Operating a backhoe is bargaining unit

work. Instrument Specialist Dennis Zakowski, who was present, testified that there were a number of bargaining unit employees present at the site who could have performed the work. All had been given a full eight hour day's work assignment. Supervisor Tuttle testified that the work was not urgent and could have been performed the following day.

On August 22, Supervisor Tuttle operated a forklift for approximately 30 minutes to remove a large spool of wire from the back of a contractor's truck. The contractor's task was to pull wire into new conduit that it had just installed. The Supervisor testified that he attempted to find bargaining unit employees but determined that they were all fully engaged in assigned tasks. He did not ascertain if those tasks could have been postponed or interrupted.

The Union filed grievances to protest Supervisor Tuttle's actions on the two days claiming that he had performed bargaining unit work in violation of the collective bargaining agreement. The Company acknowledged the violation, sustained the grievance, but denied the Union's proposed monetary remedy in the form of overtime pay. It counseled the Supervisor not to perform bargaining unit work in the future. Having been unable to resolve the remedy issue through its various steps of the grievance procedure, the grievance has been properly appealed to arbitration and is now before me.

RELEVANT PROVISIONS OF THE CONTRACT

Section 4.2

(C) Overtime Calculation: Overtime will be paid for all time worked in excess of scheduled hours, computed to the nearest quarter hour.

UNION POSITION

Where, as here, bargaining unit work was performed by a management employee, the only appropriate remedy is a monetary award. The Company acknowledged that the Agreement had been violated. Arbitrator Francis, in a case involving the same parties and the same Agreement, has recently issued a monetary award in similar circumstances, in which she concluded that "*the Company's mea culpa and counseling of managers, while laudable steps, do not negate the case for a monetary remedy.*" Two Arbitrators in cases involving the Company, a different Local of the Union, and a predecessor Agreement have

also issued monetary awards in these circumstances. These two decisions, by Arbitrator Christopher and Arbitrator Rule, deserve "great weight". Arbitrators in cases involving other parties have also consistently issued monetary awards in these circumstances.

The Company's own past practice, reaching back more than ten years, has consistently been to pay bargaining unit members for improperly assigned bargaining unit work. The Union is therefore entitled to the remedy it seeks here.

The Company has failed to prove any of its defenses. No emergency conditions were present that would have justified performance of bargaining unit work by a management employee, rather than wait fifteen minutes until a represented employee could be found to perform the work.

Bargaining unit members suffered monetary harm. Testimony established that there were bargaining unit employees on the site who could have performed the work at issue. Since these employees normally have work assignments for the entire shift, any additional work assignments would have resulted in overtime. Had a bargaining unit employee performed the work at issue, that employee would have had to work overtime to complete his/her regularly assigned duties.

Contrary to the Company's contention, the work was not '*de minimis*'. The parties stipulated that the work in question totaled one hour. One hour of work exceeds the fifteen minutes that arbitrators have found "tolerable" under the *de minimis* doctrine, and each of the half hour incidents exceeds the seven and a half minutes that the parties have contractually agreed constitutes *de minimis* work. Section 4.2 of the Agreement provides that "*overtime will be paid for all time worked in excess of scheduled hours, computed to the nearest quarter hour.*" Thus, a represented employee must work at least seven and a half minutes to receive one quarter hour of overtime. Supervisor Tuttle performed bargaining unit work 30 minutes each day – well over seven and a half minutes. Otherwise, a bargaining unit employee would have been given that work. The appropriate remedy is therefore one hour of overtime pay to the employee or employees who would have performed the work.

There is no question that Supervisor Tuttle was a management employee.

The Company does not have the right to assign bargaining unit work to management employees even in the absence of an explicit prohibition. Such assignment violates the

recognition, seniority, or other contract clause. These provisions would be undermined, if not nullified, if Supervisors were allowed to perform bargaining unit work.

The proper remedy is to award one hour of overtime pay, leaving it to the parties to agree to whom this overtime should be paid.

EMPLOYER POSITION

No monetary damages should be awarded where, as here, the Union has failed to show a monetary loss by any represented employee. Arbitral law is virtually unanimous in holding that represented work done by a Supervisor or others does not give rise to a monetary remedy absent monetary damages to individual employees. An action based on a contract, such as a collective bargaining agreement, should only permit an award of contractual damages.

The Union has made no showing of monetary loss by any employee or employees. There is no showing that any represented employee lost any pay by virtue of Supervisor Tuttle using the backhoe on August 16, since that job could easily have been put over until the next day, or that overtime was inevitable or even likely on August 22.

Even if damages were to be awarded, they should only be at the straight time rate.

A monetary award is inappropriate because the work performed by Supervisor Tuttle was *de minimis*. Absent past practice to the contrary, it is hard to contend that a Supervisor performing one-half hour of work in each of the two separate grievances violated the Agreement. Past practice does not support an award of monetary damages where a management employee has only performed approximately one-half hour of work. None of the grievance resolutions cited by the Union provide an award of overtime for a period of less than 4 hours for a Supervisor performing bargaining unit work.

Sufficient operative circumstances existed for Supervisor Tuttle to perform the work on August 22. Three contractors each making over $60 an hour were waiting for wire to be removed from a truck. Under those circumstances it was appropriate for the Supervisor to perform the work rather than wait even 15 minutes for the possible assignment of a represented employee to perform the work.

An appropriate remedy has already been imposed through the grievance procedure, i.e. the instruction to management employees not to perform bargaining unit work.

The sole remedy should be that already imposed through the grievance procedure.

ANALYSIS AND FINDINGS

The facts in this case are not in dispute. Supervisor Tuttle performed bargaining unit work on August 16 and August 22, 2001 for a combined total time of one hour. The Company has acknowledged that a Supervisor operating a backhoe and operating a forklift constituted a violation of the collective bargaining agreement and it has sustained the grievance. The only issue the parties were unable to agree on is an appropriate remedy given the violation. Is admonishing the Supervisor not to perform bargaining unit work in the future sufficient, as the Company contends, or is a monetary award in the amount of one hour of overtime pay a more appropriate remedy, as the Union contends.

Let me first dispose of a preliminary issue. The parties agree that there was no emergency on either August 16 or 22 that would have permitted the Supervisor to perform bargaining unit work. Supervisor Tuttle testified that the trench could easily have been performed the following day instead of on August 16 and, while there was some urgency that the wire be moved so the contractor could perform its task, the situation on August 22 could not be characterized as an emergency. The Supervisor's actions on those two days, therefore, do not fall under the emergency exception which would have allowed Supervisors to perform bargaining unit work.

The Company argues that no monetary award is appropriate when the Union has failed to show a monetary loss by any represented employee. In its Second Step Response to the grievances, the Company stated: "*We do not agree with the Union's remedy to pay overtime to employees who did not actually perform the work. .*" I do not find the Company's argument persuasive. No bargaining unit employee actually performed the work at issue since no bargaining unit employee was given the opportunity to perform the work. Supervisor Tuttle performed the work instead. Had he not done so, a bargaining unit employee would have performed the work and would have earned compensation for performing the work. There were, therefore, monetary damages.

The Company next argues that overtime pay was neither likely nor inevitable. This may or may not be the case, but the fact remains that no bargaining unit employee was asked to perform the work at issue and, as a result, it is impossible now to establish that the work could have been performed along with a bargaining unit employee's assigned tasks, within an eight hour day. We do have testimony that all bargaining unit employees were given a full day's worth of assignments on the days in question. Consequently, the Union's contention that any additional work assignments would have resulted in overtime has merit.

The Company contends that the work could easily have been postponed until the next day, and thus incur, at most, monetary damages at the straight time rate. Whether the work at issue could have been postponed is not necessary for me to decide. The fact is that the work was not postponed until the next day. The Supervisor made the decision to have the work performed that day and he performed it himself. The grievance in the instant case arose as a direct result of his decision not to postpone the work until the next day.

The Company next argues that the work performed by the Supervisor was *de minimis*. I must reject this argument also. One hour, or even one half hour, of work is generally not considered so insignificant that it should be overlooked. However, in the instant case, the parties contractually defined how much time they considered *de minimis*. As the Union points out, Section 4.2 (c) clearly provides that in calculating overtime work, it "will be paid for all time worked in excess of scheduled hours, *computed to the nearest quarter hour*." [emphasis added]. Contractually, the parties have agreed that, if an employee worked at least seven-and-a-half minutes of overtime, the employee is entitled to fifteen minutes of overtime pay. In the instant case 30 minutes of work were performed on each day at issue.

Even though the Company argued earlier that the work could have been postponed to the next day, it next argues that sufficient operative circumstances existed for the Supervisor to perform the work on August 22. Three contractors each making over $60 an hour were waiting for wire to be removed from a truck. Under those circumstances it was appropriate for the Supervisor to perform the work rather than wait even 15 minutes for the possible assignment of a represented employee to perform the work. The parties, however, negotiated an agreement that the work he was performing, absent an emergency, could only be performed by a bargaining unit employee, and the Company has already acknowledged that

his actions constituted a violation. The Arbitrator must apply the provisions of the parties' negotiated agreement.

It might be noted that the Company has argued in essence that monetary damages for the August 16 violation should be denied because the work could easily have been postponed, and that monetary damages for the August 22 violation should be denied because the work could not be postponed. If these two principles were accepted, it is not easy to perceive any circumstance in which similar violations could justify monetary damages.

The Company's final argument is that the instruction to management employees not to perform bargaining unit work is an appropriate remedy and that it is not necessary to award monetary damages. I agree with Arbitrator Francis when she concluded in a similar dispute between the parties that "*the Company's mea culpa and counseling of managers, while laudable steps, do not negate the case for a monetary remedy.*" Arbitrator Stephen Goldberg cites several reasons why monetary damages are appropriate, even in those instances when the Union is unable to show monetary loss to any employee:

> "Initially it can be argued that unless management is subject to a monetary penalty for a knowing breach of the agreement relating to the assignment of work, it will be free to ignore those provisions whenever all employees in the disfavored classification are working a full forty hour week. Conversely, a damage award for a knowing breach of contract will encourage a good faith effort to abide by the contract . . . . [T]he vice of an unremedied misassignment of work, at the very least a knowing misassignment, is that it reflects adversely on the Union and injures the Union's standing among the employees. . . ."
> Mallinckrodt Chemical Workers, 68-2 ARB 8511 (1968)

Finally, Arbitrator Christopher in a award involving the parties makes a compelling case for a monetary award:

> "Arbitrators generally agree that whether a make-up or monetary remedy is appropriate depends on whether the overtime assignment was made within the overtime equalization unit or group or was made to an employee outside such unit. As the Elkouris state the problem: "If the overtime was assigned within the entitled unit or group, it is possible to make it up since the employee who received the improperly assigned overtime is charged with it and will receive that much less future overtime within the unit or group; however, if the improper assignment of overtime was made to employees outside the unit or group, it is impossible to make it up since it can never be recovered and the only logical remedy is a monetary award."

AWARD

Having carefully considered all of the evidence and arguments and for all of the reasons stated above, I find that the appropriate remedy in this case is one hour of overtime pay, and the parties shall seek in good faith an agreement to whom this overtime should be paid. I will retain jurisdiction to resolve any questions.

Mei L. Bickner, Arbitrator

Newport Beach, California
April 10, 2004