In the Matter of the Interest Arbitration Between

NORTHWEST CENTRAL DISPATCH SYSTEM

And

METROPOLITAN ALLIANCE OF POLICE,
NWCDS CHAPTER # 540

APPEARANCES:

Clark Baird Smith LLP, by Mr. James J. Powers, appearing on behalf of the Employer

Steven Calcaterra & Associates, by Mr. Steven Calcaterra, appearing on behalf of the Union

ARBITRATION AWARD

The Northwest Central Dispatch System, hereinafter the Employer or NWCDS, and the Metropolitan Alliance of Police, NWCDS Chapter #540, hereinafter Union or MAP, reached impasse on several items in their negotiations for an initial collective bargaining agreement. Hearing in the matter was held on June 26, July 11 and July 20, 2012. The parties thereafter filed post-hearing briefs the last of which were received on October 4, 2012.

BACKGROUND:

Northwest Central Dispatch System (NWCDS) was formed in 1972 to provide emergency communication services to various police, fire, and emergency medical services departments. NWCDS serves 21 agencies covering approximately 486,000 residents in 126.6 square miles within portions of Cook, DuPage, Kane and Lake counties. The system averages over 294,009 911 phone calls, and 54,000 other emergency calls for service annually, or an average of 953 calls per day. The NWCDS member entities are Mount Prospect, Arlington Heights, Palatine, Elk Grove Village,

Buffalo Grove, Rolling Meadows, Hoffman Estates, Inverness, Streamwood, Prospect Heights, Palatine Rural Fire Protection District, and Schaumburg.

NWCDS employs three different classifications of dispatchers. Telecommunicator 1s, commonly called "alarm operators" primarily monitor fire or burglar alarms and can also answer 9-1-1 calls, but are not authorized to dispatch fire and police personnel to an emergency scene. NWCDS employs only two Telecommunicator 1's. The remainder of the NWCDS dispatcher workforce consists of Telecommunicator 3's and 4's. NWCDS operates three shifts per day, dayshift, afternoon shift, and midnight shift. It currently has 21 dispatchers assigned to the midnight shift 21 dispatchers assigned to the dayshift and 23 dispatchers assigned to the afternoon shift. Although 21 to 23 dispatchers are technically assigned to these shifts, many less dispatchers typically work on any given shift due to regular days off, the use of other accrued leave time, and the rotating day off system in which dispatchers work five consecutive days on, two days off, followed by another five consecutive days on with three days off. Regular days off, therefore, are rotated or flowed throughout a workweek and dispatchers do not receive the same two or three-day time off block from one week to the next.

On February 5, 2009, the Illinois Labor Relations Board certified the Union as the exclusive collective bargaining representative for all full-time and part-time Telecommunicators employed by the Northwest Central Dispatch System. Subsequently, the Union and Employer met in an effort to negotiate their first collective-bargaining agreement. On September 28, 2011, the Union filed a notice of Intent to Strike with the Illinois Labor Relations Board, and shortly thereafter the parties reached agreement on an initial collective bargaining agreement, except for seven items that remained in dispute. The parties agreed to implement the agreed upon provisions of the contract whose term is from November 28, 2011, through April 30, 2014. The parties also agreed to submit the remaining seven items to voluntary interest arbitration pursuant to the procedures and standards outlined in Section 14 of the Illinois Public Labor Relations Act.

The seven collective bargaining agreement items remaining in dispute and presented to the undersigned for resolution have been identified as Section 9.11 – Blackouts, Section 10.2 – Vacation/Holiday Leave Scheduling, Section 11.3 – Longevity Awards, Section 14.6C –"Forced on Pager" Extra-Duty Assignments, Section 14.6D –

"Forced Not on Pager" (FNOP) Extra-Duty Assignments, Section 14.6F – Remedy for Extra Duty Assignment Violations, and Section 15.2 – Acting Operations Manager and Training Officer Pay.

The undersigned, in resolving the seven items set forth above, is required by Illinois law (ILCS 315/14) to apply the following criteria:

"Sec. 14. Security Employee, Peace Officer and Fire Fighter Disputes.

* * *

(h) Where there is no agreement between the parties, * * * and wage rates or other conditions of employment under the proposed new or amended agreement are in dispute, the arbitration panel shall base its findings, opinions and order upon the following factors, as applicable"

(1) The lawful authority of the employer.

(2) Stipulations of the parties.

(3) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.

(4) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally.

(A) In public employment in comparable communities.

(B) In private employment in comparable communities.

(5) The average consumer prices for goods and services, commonly known as the cost of living.

(6) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment and all other benefits received.

(7) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

(8) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment."

The parties stipulated and are in agreement that items Section 10.2 – Vacation/Holiday Leave Scheduling, Section 11.3 – Longevity Awards, and Section 14.6D –"Forced Not on Pager" (FNOP) Extra-Duty Assignments are economic items and that Section 14.6C –"Forced on Pager" Extra-Duty Assignments, and Section 15.2 – Acting Operations Manager and Training Officer Pay are non-economic items. The parties were not able to agree upon whether Section 9.11 – Blackouts and Section 14.6F – Remedy for Extra Duty Assignment Violations were economic or non-economic items.

DISCUSSION:

The first matter to be addressed is identifying the appropriate external comparables that are to be utilized in analyzing the parties' final offers. Among the listed statutory criteria to be applied by the undersigned in resolving the issues in disputes is Section 14(h)(4). It provides,

(4) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally.
(A) In public employment in comparable communities.
(B) In private employment in comparable communities.

This is the parties initial collective bargaining agreement and, thus, the first time this bargaining unit has been engaged in interest arbitration; and the parties are not in agreement regarding which external represented bargaining units should be deemed comparable to this Telecommunicators bargaining unit for purposes of this interest dispute. The Employer argues that the only external bargaining unit that is comparable to this Telecommunicators bargaining unit is the DU-COMM bargaining unit. The Union contends that there are six (6) comparable dispatch bargaining units. It also believes the municipal police departments within the NWCDS service area should be found

comparable because the NWCDS Telecommunicators perform the functions that would be provided by the municipal dispatchers of these local communities if NWCDS was not operational. It also argues that because the NWCDS Board has in the past examined the wage increases granted by those municipalities and applied similar wage increases to the NWCDS Telecommunicators they are appropriate comparables and should be utilized by the undersigned in this proceeding.

Comparables:

The Union argues that arbitrator Larney in City of Markham vs. Teamsters, S-MA-96-14 (1997) stated,

> Of all the enumerated factors under subsection (h) bearing a direct relationship to economic issues at impasse, the panel deems comparability to be the most important since the types of comparisons being made serve as a guiding anchor evaluating the costs and worth of the service being provided * * * as measured by both the market mechanism in the private sector and by quasi-governmental regulation in the public sector."

The Union cites other interest arbitration decisions for the same proposition to establish that other arbitrators have concurred that "comparability is probably the most important standard relied on in deciding interest arbitration disputes", and that "comparisons can provide a precision and objectivity that highlight the reasonableness or lack of it".

The Union has proposed six dispatch bargaining unit comparables and nine municipal comparables. The six represented dispatch bargaining unit comparables are CENCOMM 9-1-1 Dispatch, MAP Chapter #591; Cook County Telecommunications, MAP Chapter #261; DU-COMM, FOP Chapter; Northern Suburban Dispatch, MAP Chapter #546; QUADCOMM 9-1-1, MAP Chapter #498; and, TRI-COMM Central Dispatch, MAP Chapter #531. The nine represented municipal police department bargaining units it proposes as comparables are Arlington Heights Police, MAP Chapter #510; Elk Grove Village Police, MAP Chapter #141; Hoffman Estates Police, MAP Chapter #96; Mount Prospect Police, MAP Chapter #84; Palatine Police, FOP Chapter; Prospect Heights police, MAP Chapter #252; Rolling Meadows police Association Chapter; Schaumburg Police, MAP Chapter #195; and Streamwood Police, MAP Chapter #216.

The Union argues that it is appropriate for the arbitrator to consider the municipal police departments within the service area of NWCDS in evaluating the parties' final offers. It asserts that the members of the NWCDS bargaining unit perform the functions that would be performed by municipal dispatchers in these communities if NWCDS was not in operation. The Union also contends that historical evidence demonstrates that the NWCDS Board has examined the average wage increases of the member communities and applied similar wage increases to this bargaining unit.

However, the Employer argues that it is well established among Illinois interest arbitrators that disparate governmental entities should not be used for external comparability purposes under Section 14 of the Illinois Public Labor Relations Act. It contends that a party seeking to compare disparate entities has the burden of establishing why the finances and other revenue streams of the two groups are sufficiently similar such that a direct comparison can be made. It cites the undersigned to arbitrator Briggs' decision in University of Illinois at Chicago case number S–MA–96–240 (1988) (Briggs, Arb) wherein he stated,

> "* * * in public sector interest arbitration generally, external comparables have been limited to organizations similar in nature to the focal one. That is, counties have been compared to counties, cities to cities, and four-year universities to four year universities. Comparing police command staff at the University to those of the municipality not only conflicts with that approach, but it also makes little sense when considering their respective jobs * * *. In addition, universities and municipalities are funded differently."

The Employer contends that NWCDS is a creature of an intergovernmental agreement with a group of municipalities and one county, and its revenue and finances are much different than a municipality's or county's revenue and finances. NWCDS argues that it must rely on an award of money from its member communities in order to operate, and its own administrative staff members have no independent ability to generate revenue by simply raising taxes on the citizens of NWCDS' surrounding communities. This contrasts with Illinois municipalities and counties that have varying degrees of independent taxing authority, depending to a large extent on whether the municipality/county is a home rule or not a home rule unit of local government.

NWCDS also argues that MAP's proposed comparison of its Telecommunicators to the sworn police units of nine surrounding municipalities with such disparate job duties is highly inappropriate for interest arbitration purposes. It contends the job duties of police officers and dispatchers are dramatically different because police officers are sworn personnel who engage in law enforcement activities subject to special hiring, as well as over time provisions under the Fair Labor Standards Act, whereas dispatchers do not qualify for this partial overtime exemption. The Employer concludes that these significant differences establish that there is no legitimate basis for comparing the parties' final offers to collectively bargained contract provisions of sworn public safety personnel.

The Employer also contends that MAP, in defense of its proposed inappropriate comparables, introduced NWCDS Board meeting minutes from March 2007, January 2008, and January 2009. NWCDS argues that the excerpts from those meeting minutes in no way suggest that it once deemed its member communities to be relevant comparables for interest arbitration purposes, much less that they should now be used for comparability purposes in this case. It asserts that those minutes simply note for the record that wage increases are "consistent" or "comparable" to increases witnessed by NWCDS member communities. It also argues that these meeting minute excerpts do not explain how much weight, if any, the NWCDS Board of Directors gave to the statistical data. Thus, the Employer concludes that in isolation these facts have no relevance to whether police officer bargaining units from those member communities should be used for external comparability purposes, and instead raise a host of questions which remain unanswered and highlight the inherent risk of drawing conclusions from out of context statements like those included in the Board meeting minute excerpts. Furthermore, the Employer argues that even if those member communities' wage data did play some unidentified role in the development of dispatcher wages and salaries, such an informal role predated MAP's certification. And, it claims that does not justify using member communities as external comparables in the interest arbitration context, much less the sworn police personnel who work in those communities.

The Employer also insists that only one of MAP's proposed consolidated dispatch centers should be used as an external comparable in this interest arbitration. It argues that during the hearing MAP did not present any comparison data between NWCDS and its

proposed consolidated dispatch centers, and at most MAP justified the selection of these dispatch centers as comparables because they're all unionized and located within 20 to 25 miles of NWCDS. MAP admitted during the hearing that it did not look at call volume, number of employees and other demographic factors in selecting the proposed dispatch centers. NWCDS, on the other hand, asserts it did attempt such a comparison and examined a variety of factors, including the number of residents served, number of employees, minimum staffing standards, annual call volume, and annual budgetary information. It claims MAP never questioned the accuracy of the information and data summarized in Employer Exhibit 33 or the supporting e-mails. NWCDS asserts that even a cursory review of these factors reveals that only DU – COMM, out of MAP's proposed comparable dispatch centers is in any way comparable to NWCDS. None of MAP's proposed dispatch center comparables fall within plus or minus 25% of the number of residents served by NWCDs and only DU – COMM falls within plus or minus 5% of the remaining four demographic criteria. The Employer concludes that, based upon its unrebutted statistics and MAP's own admission during the hearing, that "DU – COMM is probably the best comparable of all of them due to its size, call volume, and the number of agencies it dispatches for" and, therefore, the arbitrator should use only DU – COMM as a comparable when evaluating the parties' final offers.

Analysis:

Obviously, because this is the parties' first collective-bargaining agreement and necessarily the first time the parties have utilized interest arbitration, they have never previously litigated the issue of what constitutes the appropriate external comparables for this bargaining unit. The undersigned agrees that when evaluating parties' final offers in interest arbitration proceedings comparability is a significant factor, and in many instances is the predominant and controlling factor. It also is one of the statutorily enumerated factors under the Illinois law. ILCS 315, Sec. 14(h)(4) provides,

> "Where there is no agreement between the parties, * * * and wage rates or other conditions of employment under the proposed new or amended agreement are in dispute, the arbitration panel shall base its findings, opinions and order upon the following factors, as applicable:
>
> (4) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages,

hours and conditions of employment of other employees performing similar services and with other employees generally.

(A) In public employment in comparable communities.

(B) In private employment in comparable communities.

In this case, the Employer has argued that DU-COMM is the only appropriate comparable to be utilized by the undersigned because it is the only one of the Union's comparables that is comparable in the following categories: number of agencies served, number of residents served, full-time Telecommunicators employed, minimum staffing levels per shift, 2011 call volume, revenues and expenditures. The record evidence establishes that the yardsticks the Employer believes should be considered in evaluating what other agencies are comparable to NWCDS show that the two agencies are strikingly similar. DU-COMM serves 38 agencies and 800,000 residents as compared to NWCDS' 21 agencies and 486,000 residents. DU-COMM employees 68 Telecommunicators whereas NWCDS employees 69 Telecommunicators. Minimum staffing levels per shift of Telecommunicators at the two agencies are almost identical and, both agencies' annual budgets differ less than $100,000 per year. DU-COMM's call volume on a daily and annual basis is approximately 30% higher than NWCDS. Clearly, even as the Union acknowledged at hearing, DU-COMM, when compared using the yardsticks advanced by the Employer is more comparable to NWCDS than the other dispatch centers proposed by the Union.

While the undersigned agrees those are appropriate and significant yardsticks to be utilized in evaluating the appropriateness of any particular bargaining unit as an external comparable, the fact that other external bargaining units are significantly smaller than NWCDS in most, if not all, of those yardstick categories does not necessarily mean they should be entirely excluded. In the undersigned's opinion there can be both "primary" and "secondary" pools of external comparables. So while in this case particular external dispatch bargaining units may be dissimilar in terms of certain of the yardsticks, as the Employer argues, the external dispatch bargaining units can be considered as "secondary" comparables because they perform the same or similar duties as the employees in this bargaining unit. The undersigned is persuaded that because the Union's proposed external dispatch bargaining units are comprised of employees performing similar or the same duties as the Telecommunicators in this bargaining unit they should be at least

considered secondary comparables. How the disparity(s) in terms of any of the yardsticks impacts whether a wage, condition of employment or fringe benefit can be relied upon, and to what extent, can be argues and evaluate. Therefore, either party can rely upon the secondary comparables to support its final offer, and a determination will necessarily need to be made concerning whether the differences in any one or all of the yardstick categories impacts the probative value of the utilization of any secondary comparable.

The Employer also wants to exclude from consideration the municipal bargaining units advanced by the Union as comparables because they are dissimilar in composition in that all of them are police bargaining units, which by statute necessarily exclude non-law-enforcement employees such as a dispatchers. Illinois law provides,

> (5 ILCS 315/1)
> (k) "Peace officer" means, for the purposes of this Act only, any persons who have been or are hereafter appointed to a police force, department, or agency and sworn or commissioned to perform police duties, except that the following persons are not included: part-time police officers, special police officers, auxiliary police as defined by Section 3.1-30-20 of the Illinois Municipal Code, night watchmen, "merchant police", court security officers as defined by Section 3-6012.1 of the Counties Code, temporary employees, traffic guards or wardens, civilian parking meter and parking facilities personnel or other individuals specially appointed to aid or direct traffic at or near schools or public functions or to aid in civil defense or disaster, parking enforcement employees who are not commissioned as peace officers and who are not armed and who are not routinely expected to effect arrests, parking lot attendants, clerks and dispatchers or other civilian employees of a police department who are not routinely expected to effect arrests, or elected officials.
>
> (s)(1) "Unit" means a class of jobs or positions that are held by employees whose collective interests may suitably be represented by a labor organization for collective bargaining. * * * A bargaining unit determined by the Board to contain peace officers shall contain no employees other than peace officers unless otherwise agreed to by the employer and the labor organization or labor organizations involved. * * *"

Because the Union's proposed municipal comparables' collective bargaining agreements' recognition clauses contain exclusively sworn law enforcement personnel, who are not subject to the same hiring rules or FLSA overtime requirements, I am persuaded that that it would be inappropriate to compare the wages, hours and conditions of employment of law enforcement personnel whose duties also differ substantially from civilian dispatchers and whom the State of Illinois has concluded should be in a bargaining unit

comprised exclusively of law enforcement personnel, unless agreed otherwise. Thus, these are not even bargaining units of non-sworn law enforcement employees that include Telecommunicator and/or Dispatcher classifications.

Also, the undersigned agrees, as the Employer argues, that because this bargaining unit is a creature of an intergovernmental agreement with a group of municipalities it presents a significant difference in terms of financing capabilities from a municicpality. This Employer does not have the same independent ability to raise revenues that a County or Municipality has because its funds are derived through monies provided by its member municipalities. Again, as was discussed regarding the secondary comparables, were the Union to propose municipal bargaining unit(s) containing Telecommunicator and/or dispatcher classifications as external comparables it would necessarily need to be determined what impact the Employer's lack of an independent ability to raise funds vis-à-vis a municipality or County has on the probative value of any such comparable offered in support of its final offer.

The Union has also argued that if the NWCDS member municipalities had dispatchers those dispatchers would be performing the duties that this bargaining unit's Telecommunicators perform and, therefore, they should be considered appropriate comparables. The facts, however, are that these municipal bargaining units are not comprised of dispatchers, and has already been discussed, it would be inappropriate to compare police officer bargaining units with bargaining units of non-sworn and civilian dispatchers. Also, the Union's contention that these municipalities should be deemed comparable because this Employer's Board's meeting minutes reflect that it looked at wage increases granted by these member municipalities is insufficient, in the undersigned's opinion, to clearly establish that the Employer has historically deemed these member municipal police officer bargaining units appropriate external comparables for interest arbitration. More evidence is required regarding NWCDS' deliberations regarding what consideration was given to what member municipalities were doing concerning their wage and fringe benefit packages for employees

DISPUTED PRPOSALS:

The parties presented seven disputed proposals in interest arbitration. They stipulated that three proposals were economic, two proposals were non-economic, and

they were unable to agree on whether two proposals were economic or not economic in nature.

The stipulated economic proposals are Section 10.2 Vacation/Holiday Leave Scheduling, Section 11.3 Longevity, and Section 14.6 D Forced Not On Pager (FNOP) Overtime Assignments. The stipulated non-economic proposals are Section 14.6(C) Forced On Pager Overtime Assignments, and Section 15.2 Acting Operations Manager and Training Officer Pay. The two proposals over which the parties could not agree as to whether they were economic or non economic are Section 9.12 Blackout Dates and Section 14.6 (F) Remedy for Overtime Assignment.

Economic Proposals:

1. Section 10.2 Vacation/ Holiday Leave Scheduling

UNION FINAL OFFER

Section 10.2 Vacation/Holiday Leave Scheduling

A total of three (3) T3's and/or T4's may be on vacation on any one shift at the same time. T1's are not considered in the maximum of 3 off per shift requirement and may select vacation at their discretion. Exceptions in unusual circumstances will be considered by the Director of Operations.

EMPLOYER FINAL OFFER

"A total of two (2) T3's and/or T4's may be on vacation, pre-scheduled comp time or AOM-Training leave on the same shift at the same time. T1's are not considered in the maximum of two-off per shift limitation. Exceptions in unusual circumstances will be considered by the Director of Operations."

Argument:

The Union's final offer is to permit a total of three (3) Telecommunicators 3 and 4 per shift to be on vacation at any one time, rather than the current allowable limit of two per shift The Union contends the dispatch center has doubled in size without changing the number of employees that can take vacation at any one time. It argues that based upon the size of the bargaining unit it is unreasonable to deny the Union's proposal that three Telecommunicators 3 and/or 4 per shift be permitted to be on vacation at any time. It asserts that its external comparables also favor its proposal and specifically that DU – COMM permits five of its employees per shift to be on vacation at any one time.

Consequently, the Union believes that its proposal is reasonable and allows for the employee use of accumulated benefit time that does not create a hardship for the Employer and is supported by the external comparables.

The Employer argues that starting in 2005 it allowed 4 total dispatchers to be off on any one particular day with no more than two off per shift. This 4 per day 2 per shift standard remained in existence until 2008 when it increased to the current six per day and three per shift standard. The Employer contends that this increase in the number of dispatchers allowed to be off per shift and per day was increased commensurate with the increase in total number of Telecommunicators 3and 4 from 2007 to the present. The Employer also contends that in any given calendar year Telecommunicators do not select each and every available shift for vacation leave - meaning a large number of day, afternoon and midnight shifts go on selected. It argues that the evidence shows that 43% of the potential vacation bids remained available in calendar year 2011, and that most of the shifts with less than two Telecommunicators scheduled off appeared to occur in the winter months and in June.

NWCDS argues that MAP is attempting to obtain through interest arbitration what it could not achieve at the bargaining table, which is to change the status quo by increasing the total number of dispatchers from 2 to 3 who can simultaneously be off on each shift. As such, it contends the Union bears the burden of proving why such a change is needed in the first instance, and it has failed to present any credible reason for this dramatic change. It also contends that while the Union argues for its proposed change because of the maximum number of vacation days that an employee can accrue per year, that does not reflect the actual amount of accrued vacation leave that each employee has in his or her bank. It argues the evidence shows that most employees did not come anywhere close to maxing out their accrued leave time and in fact 29% of bargaining unit dispatchers had negative vacation leave balances, meaning that as of April 30, 2012, they already had used more vacation than they had accrued. The Employer also asserts that the evidence shows that Telecommunicators 3 and 4 had leave balances of less than 50% of their potential accrual amount. The Employer, therefore, concludes that the Union's final offer "is a solution in search of a problem".

The Employer also argues that the Union has failed to explain why the bargaining unit should receive an additional benefit increase, which is additional overtime that will likely occur because of additional leave time staff will be permitted to take. It contends that overtime is a reality so much so that shifts often run at or close to the pre-established minimum staffing standard, and if the Union's final offer is selected it is likely much more overtime will result. It argues that that using the actual amount of overtime assigned for April and July of 2012 under the two off per shift standard, and assuming an additional dispatcher would have to be assigned overtime to cover one additional dispatcher off on vacation, will result in a significant increase in its overtime costs. It asserts that by extrapolating the assumed costs for April and July of 2012 on a calendar year basis, were an additional dispatcher to be allowed off on vacation it would increase its overtime costs by $138,180 if it is assumed every month is similar to April 2012 or $283,752 if one assumes every month is similar to July. It argues that blending those two extrapolated figures together results in a $210,964 projected annual increase in overtime payments. The Employer also contends that the Union never challenged its assumptions in connection with these extrapolated overtime calculations and, regardless of what assumptions are used it will incur additional overtime expenses if the Union's final offer is awarded.

Discussion:

Arbitrators generally are reluctant to award changes to the status quo without demonstration of a compelling need and an accompanying *quid pro quo* to help offset the effects of the change. Here the Union bears the burden, as the proponent of a change in the status quo, of establishing that there is a compelling need to increase the existing cap on the number of employees allowed off on vacation per day and per shift. The Union foots its case for change in the status quo on the fact that its primary comparable, DU-COMM, permits more employees off per shift/per day than NWCDS, and that NWCDS' dispatch center has doubled in size (number of employees) without any increase to the vacation caps.

The evidence shows that the Employer, since 2007, has increased the caps from 4 per day/2 per shift to 6 per day/2 per shift while at the same time the number of authorized T3s and T4s has increased from 51 to 71. Aside from the primary comparable, DU-

COMM, permitting more employees off per day and per shift than NWCDS there has been no identification of any specific problem area, rather just a general belief that the limits need to be increased. For example, it has not been established that in certain weeks/days/shifts more than the allowable number of requests per shift or per day than could be granted were submitted and were denied or that there are periods when historically call volume is low and thus operational needs would permit a higher limit. Further, Employer records show that employees are not reaching the maximum allowable carryover (accrued) vacation days each year, which would imply that employees were unable to select preferred vacation days. Also, the Union's proposal does not address that there will be other paid absences on any given day and how, if at all, that is taken into account in establishing the maximum allowable vacation days permitted to be taken per week and per shift. Nor has it been shown that historical staffing levels at certain times would permit additional employees to be off during those periods.

A review of the secondary comparables' contracts shows that the number of employees that can be off on vacation during any day and on any shift varies. These contracts, in some instances, also speak to concerns raised by NWCDS regarding overtime costs and minimum staffing levels. CENNCOM allows one employee per day to be on vacation. The Cook County Telecommunications contract provides that when two or more employees in the same department performing the same job request vacation on the same day, and all the employees cannot be released at the same time, then the vacation requests shall be granted in the order of the employee's seniority. In the case of requests for time off with less than 48 hours notice the Cook County Telecommunications contract provides that the on-duty Watch Commander will approve the time off requests where manpower levels exceed the minimums. The North Suburban Dispatch contract provides that leave including vacation will be approved for up to three employees per day and a fourth employee will only be approved if the absence can be filled by voluntary overtime or straight time, and that as the department's needs permit additional employees beyond the fourth employee may be approved for leave provided there is no additional cost to the employer. Also, in a 2009 side letter North Suburban Dispatch agreed that leave requests including vacation, holiday, personal or other leave will be approved for up to three employees per day with a maximum of two employees

on anyone shift and an additional fourth and fifth employee will only be approved if it can be filled by voluntary overtime or straight time. The QUADCOMM contract provides no more than two operations personnel may be on vacation at one time. SEECOMM provides that no more than two employees from anyone shift may be on vacation at the same time. The TRI-COMM contract states that at least 16 hours of prescheduled vacation time shall be permitted to be taken within a 24-hour day, and that if the number of bargaining unit telecommunicators and supervisors remaining who have completed training exceeds 15 then the number of hours of prescheduled leave time shall be increased to 20 hours per day additional vacation time beyond the 16 hour limitation shall be approved, provided that it is not required that TRI-COMM fall below the minimum staffing requirements.

While I am mindful of the fact that accommodating employee vacation requests is important, that need must be balanced against the Employer's operational needs and costs. As exemplified by some of the external comparable contract language, they have reached agreements that take into account staffing variables and were able to articulate exceptions to their caps. In this case, the Union's final offer merely proposes an across the board increase in the existing caps and does not address NWCDS' overtime cost concerns, among others. Also, in the undersigned's opinion, compelling evidence supporting a change in the current caps on the number of employees allowed off per day and per shift has not been presented. If there is a vacation scheduling problem the Union needs to identify where the problem lies, offer targeted proposals to address the problem area(s), and take into account the minimum manning requirements as well as the Employer's concern that increasing the caps would significantly increase its overtime costs.

Therefore, the Employer's final offer language on this item is to be included in the parties' 20011-2014 collective bargaining agreement.

2. <u>Section 11.3 Longevity</u>

<u>UNION FINAL OFFER</u>

The Union's final offer proposal regarding Longevity mirrors the Employer's final offer language in all respects, but for the Employer's proposed additional last sentence

referencing NWCDS System Directive I-A- 255-2.

EMPLOYER FINAL OFFER

The Employer's final offer contains the following language to be added at the end of the schedule setting forth the lump sum payment amount employees receive based upon their years of service to the Employer.

"The foregoing performance award shall be paid annually on the payroll following the employee's anniversary date. Employee eligibility for the longevity awards outlined above will be determined pursuant to NWCDS Systems Directive I-A-255-2 (effective date 5/1/2009)"

Argument:

The Union contends that "longevity" is a benefit that should not be tied to performance, and none of its external comparables longevity plans contain a performance component. The Union asserts that a longevity fringe benefit is a reward for extended service that encourages employees to remain with the Employer and is not something that should be tied to the use of sick time or having received an unsatisfactory rating on a performance review. Deficiencies and unsatisfactory performance that are noted by the Employer should be dealt with by other means, such as training or discipline. The Union further contends that the Employer's proposal does not require that there be evidence of a continuing performance deficiency in any one category, but instead allows the Employer to consider deficiencies in different categories in different years in denying a longevity payment. Furthermore, the Union insists that in the past the Employer has not given advance warning to employees in any year that they are not meeting standards, and there are no published standards that exist, which would allow an employee to determine if he/she is meeting the Employer's required standards. The Union also contends that the Employer's proposal does not contain a provision allowing an employee to grieve his/her performance evaluation, and a grievance cannot be filed until a longevity increase has been denied. Therefore, an employee cannot challenge his/her first performance evaluation that identifies a deficiency, but must wait until a longevity increase has been denied. The Union concludes that external comparability and arbitral standards of reasonableness support its final offer on this issue and not the Employer's.

NWCDS argues that the Union relies primarily upon external comparability as proof that tying longevity payments to performance is unusual or unreasonable. The Employer also contends that DU-COMM is the only consolidated dispatch center that comes close to resembling and NWCDS in terms of total workforce size, budget and call volume. And, it asserts that DU-COMM ties annual salary step increases to performance and requires that employees meet standards in the majority of the categories in which they are rated. Thus, the Employer believes its longevity program is more lenient than DU-COMM's when it comes to pay for performance and, therefore, DU-COMM's collective bargaining agreement actually supports its final offer.

The Employer also argues that without any external comparables on which to rely MAP is left to quibble over the theoretical fairness of the employer's current performance system. It claims the evidence establishes that Telecommunicators were denied fewer longevity awards in fiscal year 2010-2012 than in fiscal 2008--2009, and concludes that if the Employer's performance criteria were inherently unfair one would assume that a greater percentage of dispatchers would annually be losing their longevity awards. NWCDS also argues that the Union's fairness argument is undercut by the fact that bargaining unit employees will be able to challenge an unfavorable performance rating under its final offer by filing a grievance. Thus, it asserts that a mechanism is in place for the employee to challenge the propriety of a particular unsatisfactory rating that leads to the denial of a longevity award. The Employer concludes that the Union has failed to justify why the Employer's longevity award practice should be modified by eliminating the performance component.

Discussion:

NWCDS has provided employees with a longevity award fringe benefit since 1997. Originally, the payments were automatically granted to employees for 5, 10, 15, and 20 years of service, but in 2006 the Employer, for the first time, tied longevity payments to certain performance standards and added that longevity payments would also be granted after 25 and 30 years of service. System Directive 1-A-255-2 governing longevity payments provides that in order to be eligible for a longevity award

> "Any employee whose work is rated unsatisfactory in any category by an Operations Manager or the Assistant Director – Operations during his/her past two consecutive performance evaluations will not receive a longevity award for the

years that the second unsatisfactory rating was given. The Assistant Director – Operations will retain a list of employees who have received an unsatisfactory rating and will advise the Financial Assistant of employees who receive the second unsatisfactory rating prior to the annual payment of their longevity award".

Any employee receiving unsatisfactory performance ratings two years in a row will be disqualified from receiving a longevity award in the second year. The Employer's performance evaluation grades an employee's performance in 14 different categories, and there are five different levels of performance – "superior, exceeds expectations, meets expectations, needs improvement, and unsatisfactory". In fiscal year 2008-09 six of 39 dispatchers or 15% of the eligible employees were denied longevity awards. In fiscal year 2009 – 10 three of 37 or 8% of dispatchers were denied longevity awards, and in fiscal year 2010 – 11 six of 47 dispatchers or 13% were denied longevity awards.

Performance evaluations are not discussed anywhere in the collective bargaining agreement as a separate topic and are not grievable. But, testimony at the hearing further established that they can be grieved if they are used to deny an employee a longevity payment. During the hearing, in response to questions from Union counsel regarding whether an employee is permitted to file a grievance challenging his/her first unsatisfactory performance evaluation, Employer counsel responded that the Employer did not believe an employee has been aggrieved after receiving their first unsatisfactory rating because they haven't lost their longevity payment at that point in time. Counsel went on to state that once the employee is actually denied the longevity payment that is when a grievance would ripen. When Union counsel inquired if an employee received disciplinary action for any of the 14 categories enumerated in the performance evaluation could that disciplinary action also be used in the evaluation process resulting in denial of a longevity payment, Employer's counsel responded that there is the potential that disciplinary action will be reflected in the employee's performance evaluation.

The difference between the two final offers is that if the Union's final offer is adopted employees will receive their annual longevity awards without having to meet any particular performance standard, which would be the case if the Employer' final offer is awarded. The Employer wants to maintain the status quo with respect to performance being utilized as a factor in determining an employee's eligibility for a longevity

payment. Initially, the only prerequisite to receiving a longevity payment was having the requisite years of service, but that changed in 2006 when a performance criteria was added.

A review of the external comparables collective bargaining agreements reveals DU – COMM, the primary comparable, does not tie longevity awards to performance, even thought it does tie salary step increases to performance. And, none of the secondary comparables offering longevity benefit payments condition eligibility for the payment upon the employee's performance.

The Employer makes the case for conditioning longevity payments upon performance, and argues that its primary comparable conditions salary step increases upon performance. However, the longevity payment is a lump sum one time payment as a reward for continuous service to the Employer, whereas wage rate step increases are not one time lump sum payments, but increase the base wage and continue for the duration of the employee's employment. More importantly, under the Employer's longevity program an employee's ability to grieve an unsatisfactory performance rating can only occur after two consecutive unsatisfactory performance evaluations. This I find to be a substantial flaw in the Employer's final offer and presents a compelling need to move away from the status quo. It's one thing to condition the payment upon satisfactory performance. But, quite another to deny an employee the ability to timely grieve an unsatisfactory evaluation, that can be the basis for denying a longevity payment more than one year later, because the Employer's final offer only permits an employee to grieve after receiving a second consecutive unsatisfactory performance rating. That necessarily means that the grievance would be potentially contesting an assessment of performance dating back as much as two years. Memories will fade, possibly the supervisor/rater may no longer be with the Employer, and what documentation and records will be available to support the rating. There are any number of issues that could arise that will diminish the employee's ability to effectively challenge the propriety of the unsatisfactory rating. Also, because of the possibility that an employee can be disciplined for the same performance issue giving rise to the rating presents the potential of placing the employee in double jeopardy.

Thus, I am persuaded that for these reasons a longevity payment, whose purpose is recognizing an employee's length of service to the Employer, should not be conditioned upon performance. If the Employer concludes an employee has performance issues those issues should be dealt with timely, as they arise, through counseling, instruction, and progressive discipline, which can be timely grieved.

I am, therefore, persuaded that the Union has made the case that a change is needed. And, that the change that will result if the Union's final offer is adopted also finds support among both the primary and secondary comparables.

Therefore, the Union's final offer language on this item, which eliminates performance as a criteria for eligibility to receive a longevity payment, is to be included in the parties' 20011-2014 collective bargaining agreement.

3. Section 14.6 D Forced Not On Pager (FNOP) Extra Duty Assignments

UNION FINAL OFFER

"Forced not on pager (FNOP) applies to all employees that are required to remain on duty or called in to work in order to achieve minimum staffing levels and shall be compensated for two hours, in addition to the actual time worked. The hours of work and the two additional hours shall be paid at one and one half times their regular rate of pay. In the event that FNOP will be ordered by NWCDS, another employee may voluntarily accept the FNOP time in accordance with past practice. Calculation of the time worked for off duty personnel shall start at the time that the employee reports to NWCDS.

Employees cannot be required to remain on duty for more than 12 consecutive hours. Employees can volunteer to stay past the 12 hour mark up to a maximum of 16 hours. An employee who has already worked 12 hours and volunteers to work overtime up to 4 additional hours is ineligible for the two additional hours of FNOP pay, but shall receive compensation in accordance with the overtime provision of this agreement."

EMPLOYER FINAL OFFER

"When the Employer in its discretion decides to make an additional work assignment, and the employees who were originally on "pager" duty have already been assigned to work pursuant to the procedures outlined in paragraph C above (or no employee timely responded to the employer's FNOP request), the qualified employee

with the least seniority who has the least number of FNOP assignments pursuant to this paragraph D within the current calendar year will be forced to work the extra-duty assignment. In this regard, the Employer will maintain a list of full-time employees in order of seniority, which lists how often an employee has been mandated to work pursuant to this paragraph D within the last calendar year. The list will be refreshed every January by "zeroing" out all employees. Failure to work an FNOP assignment may result in discipline for the employee assigned. In the event the employee does not comply with an assignment made pursuant to this paragraph D, the Employer will assign employees at its discretion to work the extra-duty assignment.

When an employee is required to work an FNOP assignment pursuant to this paragraph D, the employee will be paid at the appropriate straight or overtime rate of pay (whichever is applicable) for all hours actually worked, plus two (2) additional hours at the time-and-a-half rate.

Employees are permitted to volunteer for an FNOP assignment that covers the second half of a vacant shift. If an employee volunteers for and works an FNOP assignment that covers the second half of a vacant shift, the employee shall receive the aforementioned two (2) additional hours of pay at the time-and-a-half rate. If an employee volunteers for and works an FNOP assignment but covers the first half of a vacant shift, the employee shall not receive the aforementioned two (2) additional hours of pay at the time-and-a-half rate. An employee who works an FNOP on a volunteer basis shall not be considered as having worked in FNOP for FNOP-List tracking purposes."

Argument:

Both parties spent little time in their briefs advancing arguments in support of their final offers. In their briefs regarding FNOP premium pay they devoted most of their discussion/argument to the Union's unfair labor charge arising out an August 25, 2009, meeting between management and Union representatives. That meeting resulted in the Employer changing its practice regarding when it paid an FNOP premium to those employees volunteering to take an FNOP assignment. Prior to the meeting, it had been paying the FNOP premium whenever an employee volunteered to take a declared FNOP assignment, even though its System Directive 1-A-122-8 only required payment to

employees who were forced not on pager (FNOP) to work an overtime assignment involuntarily.

The Union argues that its final offer restores the *status quo* existing prior to the September 2, 2009, memo that management issued following the August 25, 2009, meeting with Union representatives. The Employer argues that it never had a practice of paying employees the FNOP premium when an employee volunteered to work two declared FNOP overtime assignments, covering the start of the shift and the end of the shift. NWCDS argues that its offer preserves the payment of FNOP premium to an employee who volunteers to take an FNOP declared overtime assignment covering the second half of a shift. Thus, the Employer contends the Union's claim that the Employer is creating a hardship for employees by changing its practice is unpersuasive. The Employer argues that the Union has offered no rationale for allowing a dispatcher to decline to volunteer for an overtime assignment initially prior to an FNOP being declared and reaping a windfall by volunteering for the assignment once an FNOP overtime assignment has been declared. And, it asserts its final offer only prohibits the FNOP premium from being paid to an employee who is on site and declines the initial volunteer overtime opportunity and later volunteers for the opportunity once management has declared it to be an FNOP opportunity.

Discussion:

It is clear from NWCDS System Directive 1-A-122-8 promulgated on July 19, 1999, that the FNOP premium pay was to be paid to employees who were not on pager duty and were forced on short notice to work overtime.

> "In a situation where the employee on pager is already assigned to work and another slot needs to be filled on an emergency basis, the shift supervisor shall have discretion and authority to assign an employee currently working to hold over to cover all or part of the slot or to force an employee who was scheduled to work to report early. Such assignments shall be made on a reasonably fair and equitable basis. Two hours of additional overtime shall be awarded to the employee in such short notice force situations."

The record evidence indicates that NWCDS was paying the FNOP premium to employees who volunteered to fill FNOP declared overtime slots both at the beginning and end of a shift. The case that precipitated the Employer in August 2009 to change when it was paying the FNOP premium to volunteers, arose out of employee Pfeil's

claim he should have been paid two FNOP premiums. On the day in question he was not on duty and volunteered and worked two four hour FNOP slots at the beginning and end of a shift. NWCDS told him it would not pay him two FNOP premiums for working the two declared four hour FNOP slots.

The Union's final offer reference to past practice ("another employee may voluntarily accept the FNOP time in accordance with past practice") would require the Employer to pay not only pay FNOP premiums in such a situation, but also return to the prior practice of paying an FNOP premium to employees who had gamed the system by not initially volunteering for the overtime when it was offered pursuant to Section 14.6.B and then later volunteer for the assignment after the employer declared the assignment to be an FNOP. However, the Union has not demonstrated a need for doing so, and also has not explained why, in the first place, employees who decline to volunteer for an overtime assignment when it is initially offered pursuant to Section 14.6.B, and for which no FNOP premium would attach to working the assignment, but subsequently volunteer to take the assignment after the Employer is required to declare it an FNOP assignment pursuant to Section 14.6.D should be entitled to the FNOP premium.

And, the Employer's final offer, reinstates the practice of paying the FNOP premium to an employee who volunteers to take an FNOP assignment that covers the second half of a vacant shift, rather than being forced to do so, even thought it is contrary to the originally expressed purpose of the premium as explained in System Directive 1-A-122-8, which it reinstituted after the August 25, 2009 meeting via its September 2, 2009 memo to employees. Obviously, it believes operational considerations warrant the change and it also will, apparently, eliminate what it perceived as employees gaming the system regarding receipt of FNOP premium pay. The only part of the prior practice its final offer does not reinstate is paying an FNOP premium to employees who volunteer to take a declared FNOP covering the first four hours of a shift.

Therefore, the Employer's final offer language for Section 14.6.D is to be included in the parties' 20011-2014 collective bargaining agreement.

Non-economic Proposals:

1. Section 14.6(C) Forced On Pager Extra Duty Assignments

UNION FINAL OFFER

"Employees shall select mandatory pager" days in accordance with the Employer's past practice. The Employer will publish a monthly list of employees who are on mandatory pager duty (not to exceed two days per month).

When an employee is performing "pager" duty, an employee is responsible for carrying an NWCDS – provided pager and/or receiving pages on his personal wireless device. Employees performing pager duty for a particular day are responsible for working a four (4) our overtime assignment immediately prior to or after the regularly scheduled shift when no employee has volunteered to cover the overtime assignment pursuant to the procedures outlined in paragraph B above, and there are less than 24 hours before the overtime assignment is scheduled to begin, in accordance with past practice. Pager trades between employees are acceptable. In the event no employee has volunteered for overtime assignment pursuant to the procedures outlined in paragraph B above, the Employer will contact an employee assigned to pager duty either verbally (if he is on duty) or via the Employer's paging system (if he is off duty) to notify him of the available overtime assignment. The employee assigned to "pager" duty must acknowledge the overtime assignment within (30) minutes (whenever possible) of the Employer's message, and report for the overtime assignment by its scheduled start time, or within one (1) hour from the time of acknowledgment, whichever is later, unless arrangements have been made for call-in by the employee at a designated time (special instructions which are listed/notated by the employee on the pager list). Failure to comply with these time frames may result in discipline for the employee assigned to "pager" duty.

When employees on "pager" duty are required to work the four (4) hours before or after the regularly scheduled shift, the employees will receive one (1) additional hour of pay at time-and-a-half rate. Employees must be given notice by the completion of the regularly scheduled shift if they will be required to work after that regular work shift. The employee is relieved from pager duty after the following shift has reported for duty and begun."

EMPLOYER FINAL OFFER

Section 14.6C Forced on "Pager" Extra Duty Assignments

"The Employer will publish a monthly list of employees who are on mandatory "pager" duty. Employees will be limited to no more than two (2) "pager" days per month. Employees shall select mandatory "pager" days in accordance with the employers past practice.

When an employee is on "pager" duty, an employee is responsible for carrying an NWCDS – provided pager and/or receiving pages on his personal wireless device. Employees performing pager duty for a particular day are responsible for working a four (4) our overtime assignment immediately prior to or after the regularly scheduled shift when no employee has volunteered to cover the overtime assignment pursuant to the procedures outlined in paragraph B above, and there are less than 24 hours before the overtime assignment is scheduled to begin. Pager trades between employees are acceptable as long as the trade is documented on the "pager list". In the event no employee has volunteered for overtime assignment pursuant to the procedures outlined in paragraph B above, the Employer will contact an employee assigned to pager duty either verbally (if he is on duty) or via the employer's paging system (if he is off duty) to notify him of the available overtime assignment. Special contact instructions from the employee will not be honored, other than the preferred contact methodology (i.e. pager vs. telephone call) and the designated contact telephone number.

The employee on "pager" duty must acknowledge the extra-duty assignment within (30) minutes of the Employer's page or contact, and report duty within the ninety (90) minutes from the time that the Employer first paged or contacted the employee. Failure to comply with these time frames may result in discipline for the employee assigned to "pager" duty. In the event an employee does not comply with these time frames, the Employer will assign employees to work the assignment in accordance with Section 14.6. D.

When employees on "pager" duty are required to work the four (4) hours before or after the regularly scheduled shift, the employees will receive one (1) additional hour of pay at time-and-a-half rate."

Argument:

The Union contends that under its proposal the Employer would be required to notify the employee who has the pager responsibility for the four hours after the end of their shift before leaving work that he/she would need to stay after the and of the his/her shift. It argues that under its proposal once the next shift reports for duty the person on pager duty is no longer eligible to be called back to work. It contends that historically once the pager person has left the facility for the day that person is no longer eligible to be called back on pager duty. The Union asserts that under the Employer's proposal the person on pager duty could be required to come back to work two hours after their shift had ended. The Union also contends that currently the Employer allows employees to designate a different phone number and provide special instructions for contacting them, but the Employer's final offer eliminates an employees opportunity to designate special instructions in order for them to receive an uninterrupted complete sleep period. Under the Employer's current practice employees can designate a time for them to be called to come into work, but that long standing practice would be eliminated under the employer's proposal when there is not a noticeable need for change. Thus, the Union believes that its final offer on this subject is clearly more reasonable than the Employer's.

The Employer argues that the difference in the parties position regarding this issue is the extent to which the Employer should be required to honor "special instructions" from Telecommunicators as to how they will be contacted in the event that a "forced on pager" assignment becomes necessary. It contends that the special instructions can take a variety of forms and often involve ambiguous messages from employees including, for example, "call ASAP". Historically those instructions have been tolerable, but take on added significance once referenced in the parties' collective bargaining agreement, and the Employer's failure to follow special instructions presumably could expose it to grievances. The Employer asserts that in the past the situation has occurred where an employee has noted on the pager list that he/she will call by a certain time to acknowledge an FOP assignment, yet has failed to do so. The Employer asserts its primary concern is the burden of following special instructions that require an Operations Manager to contact an employee at a specific time of day and due to the press of business on any particular day that may forget to make the call. Operations Manager, Rogers,

testified that typically the Employer likes to call employees 90 minutes before they actually need to come in to work because that's when people call in sick, and that gives them as much time as possible to come in. With an Operations Manager is supervising 12 to 14 dispatchers and he/she realizes that additional help is necessary it is much easier for the Operations Manager to immediately contact the dispatcher on the pager list in order to notify him/her about an impending pager assignment. Any delay in notification of the dispatcher could result in the Operations Manager forgetting entirely to call the dispatcher or calling after it is too late. The Employer argues it is sensitive to employees' concerns about not having their sleep pattern interrupted, but that the additional overtime hour of pay compensates the employee for any inconvenience, and its final offer fairly balances its interest in avoiding mistakes in the FOP callback process with preserving dispatcher convenience. By honoring only those special instructions involving a dispatcher's contact methodology and telephone number the Employer believes it has preserved a fair amount of flexibility for the dispatcher while at the same time reducing the potential for mistakes by Operations Managers who are tasked with the burden of interpreting sometimes ambiguous special instructions.

The Employer asserts that there are two other differences between the parties' final offers, which are significant. First, the Union's final offer does not require pager trades to be listed on the master pager list. While the Union doesn't believe this is a significant difference the Employer believes it is. It argues that it needs to know which employees are available for FOP assignment, and it is vital that pager trades be recorded on the pager list, otherwise Operations Managers risk wasting critical time in tracking down the wrong dispatcher for an FOP assignment. Second, the Union's final offer includes the words "whenever possible" in the requirement for dispatchers to respond within 30 minutes from when they first are notified of an FOP assignment. The Employer believes such a qualifier is unnecessary and needlessly confuses a grievance arbitrator's analysis when evaluating whether an employer's failure to timely respond warrants discipline. According to the Employer, presumably, most grievance arbitrators will take into consideration any mitigating circumstances when considering whether the Employer's punishment fits the crime. And, as part of any just cause analysis an arbitrator will consider whether it was possible for the dispatcher to call within the designated 30

minutes. Thus the Employer asserts that the Union's phrase, "whenever possible", is unnecessary and should be eliminated from whatever final contract provision the arbitrator decides upon.

Discussion:

When a FOP extra-duty assignment becomes necessary the Employer contacts Telecommunicators who are listed on the pager list, either through an employer provided pager or the employee's personal cell phone. The Employer permits employees to trade their pager days in the event they do not want to be available on a particular day or shift. Once an employee is paged to work the forced on pager assignment, the employee has 30 minutes to respond that he/she has received the page/message. In both parties final offers a failure to timely respond to the page or report for the assignment could result in discipline of the employee. When an employee is selected for a forced on pager assignment for either the 4 hours before or after their regularly scheduled shift hours the employee is entitled to an additional hour of pay at their time and one-half rate of pay. Currently, the Employer permits dispatchers to list special instructions next to their name on the pager list. These instructions can take various forms, including for example, "call ASAP", special contact telephone numbers, and/or specific times when the Employer should contact the dispatcher.

The underlined language in each of the final offers set out above identifies language that is different from the language contained in the other party's final offer. There are significant differences in the parties' proposals, but in the undersigned's opinion an overriding consideration in evaluating the proposals is that an employee is only required to be on pager duty two days per month. Both final offers maintain the past practice regarding selection of those days and permit the employee to select the method of contact by the Employer – either by Employer provided pager or personal phone. Consequently, the employee should be able to plan their day accordingly, in terms of uninterrupted sleep, and other routine daily activities, such that being on pager duty with its attached responsibilities will not be unnecessarily disruptive.

One difference in the parties' offers pertains to the practice of permitting employees to trade pager days, but there is no practice requiring that the employees show the trade on the pager list. Both final offers provide for language that permits pager

trades among employees, but the Employer's final offer requires that any trade be noted in writing on the pager list. The Employer has expressed a meritorious concern that not requiring pager trades among employees be noted in writing on the pager list can result in Operations Managers wasting critical time in tracking down the wrong dispatcher for an FOP assignment. Clearly, the Employer should be knowledgeable as to which employees are on pager duty and available for FOP. Also, the employer's requirement is less onerous than existed in System Directive 1-A-122-8 which, although permitting employees to trade pager days, required them "to request permission, via written memorandum to their respective Shift supervisors". The Union has not offered any compelling rationale for why employees should not be required to give written notice of pager trades on the pager list. Consequently, I am persuaded the Employer's proposal requiring as much is reasonable and should be adopted.

Another difference in the parties' offers concerns the requirement that employees must acknowledge having received the page of an FOP assignment within 30 minutes of it being sent out. The Union's final offer requires acknowledgement "whenever possible". However, the Union has not advanced any persuasive argument to establishing that qualifier is necessary. The Employee knows they are on pager duty and as stated earlier because it is only for two days per month the employee should be able to anticipate the possible page and be able to acknowledge receipt within 30 minutes of being paged. Not doing requiring that leaves the Employer in the untenable position of not knowing if the page has been received and/or if it can expect the employee to report for the FOP assignment. Clearly, from an operational standpoint this is an unacceptable situation. If an employee fails to respond within 30 minutes it will be up to the Employer to determine if the failure to respond will be excused. Depending upon what action the Employer takes in response to failure to respond within 30 minutes and/or a no show or late report for the extra duty assignment, if any, the employee has access to the grievance procedure if he/she believes the Employer's action(s) violated the contract.

Another difference in the final offers relates to how soon after being paged for an FOP assignment must the employee report for duty. The Employer's final offer requires the employee to report, "within ninety (90) minutes from the time the Employer first paged or contacted the employee". The Union final offer provides that the employee

report for the FOP assignment "by its scheduled start time, or within one (1) hour from the time of acknowledgment, whichever is later, unless arrangements have been made for call-in by the employee at a designated time (special instructions which are listed/notated by the employee on the pager list)". In this case, the Employer has not advanced any reason why the employee must report for work prior the FOP extra-duty assignment starting time. The employee, under NWCDS' final offer language is required to acknowledge the page, and thus, once the Employer knows the employee will be reporting for the FNOP assignment what need is there to have the employee report within 90 minutes of the page if that is prior to the start of the assignment. The Employer has advanced no compelling rationale for such a requirement.

Another difference in the final offers concerns whether the Employer must notify an employee who is on pager duty of an FOP extra-duty assignment following the end of his/her regularly scheduled shift hours before the employee leaves the facility at the end of his/her regular work shift. The Union argues that under the Employer's final offer an employee on pager duty could be called back to work two hours after they had left work at the end of their regularly scheduled shift. While there apparently is no history of the Employer doing so, the language could be clarified to prohibit it. Inasmuch as the Employer has not identified any circumstance when it would be necessary to do so, or why prohibiting it from doing so would present a significant operational concern, the language should be clarified to prohibit calling the employee on pager duty back to work after they have left the facility following the end of their regular work shift.

The final difference in the parties' final offers concerns whether the practice of permitting employees to note, for example, special contact instructions and/or when the employee will respond to the page on the pager list. The Union's final offer contains language that will continue the current practice of permitting employees to note such special instructions on the pager list. The Employer's final offer language states that no "special contact instructions" will be honored "other than the preferred contact methodology (i.e. pager vs. telephone call) and the designated contact telephone number". Examples of the type of special contact instructions employees have noted on the pager list in the past are, "page ASAP & will call @ 9:30", "call at 0900", and "ASAP".

The Union believes permitting an employee to require the Employer to adhere to such special instructions regarding being paged for an FOP assignment permits the employee to "have a complete period of sleep", and that by proposing the elimination of such special instructions the Employer is "demonstrating serious disrespect" for its employees. The Employer argues its proposal balances the employees' convenience with its operational needs. The undersigned is persuaded that most of the instructions employees put on the pager list reference a time for the Employer to page and/or a time when the employee will respond to the page, which times are not necessarily related to when the need to page arises or the need for confirmation is operationally efficient in filling the FOP assignment. Consequently, I am not persuaded of the reasonableness of requiring the Employer to adhere to such special instructions of the employee.

For all of the above reasons the undersigned directs the parties to include the following language in their contract at Article 14.6.C.

"The Employer will publish a monthly list of employees who are on mandatory "pager" duty. Employees will be limited to no more than two (2) "pager" days per month. Employees shall select mandatory "pager" days in accordance with the employers past practice.

When an employee is on "pager" duty, an employee is responsible for carrying an NWCDS – provided pager and/or receiving pages on his personal wireless device. Employees on " pager " duty for a particular day are responsible for working a four (4) hour extra-duty assignment immediately prior to or after their regularly scheduled shift when no employee has volunteered to cover the extra-duty assignment pursuant to the procedures outlined in paragraph B above, and there are less than 24 hours before the extra-duty assignment is scheduled to begin.

In the event no employee has volunteered for the extra-duty assignment pursuant to the procedures outlined in paragraph B above, the Employer will contact an employee assigned to pager duty either verbally (if he/she is on duty) or via the employer's paging system (if he/she is off duty) to notify him/her of the available extra-duty assignment. Special contact instructions from the employee will not be honored, other than the preferred contact methodology (i.e. pager vs. telephone call) and the designated contact telephone number.

The employee on "pager" duty must acknowledge the extra-duty assignment within (30) minutes of the Employer's page or contact, and report for the extra-duty assignment by the assignment start time or within sixty (60) minutes from the time that the Employer first paged or contacted the employee, whichever is later. Failure to comply with these time frames may result in discipline for the employee assigned to "pager" duty. In the event an employee does not comply with these time frames, the Employer will assign employees to work the assignment in accordance with Section 14.6. D.

The Employer must notify the Employee on pager duty that he/she will be required to work the extra-duty assignment immediately following the end of his/her regularly scheduled shift. The employee is relieved from pager duty following the end of his/her regularly scheduled shift when the following shift has reported for duty and begun working.

Pager trades between employees are acceptable as long as the trade is documented on the "pager list".

When an employee on "pager" duty is required to work the four (4) hours before or after their regularly scheduled shift, the employee will receive one (1) additional hour of pay at his/her time and one-half rate hourly rate of pay.

2. Section 15.2 Acting Operations Manager and Training Officer Pay

UNION FINAL OFFER

"Employees may volunteer to serve as an Acting Operations Manager ("AOM") or Training Officer during a particular shift. An employee so assigned will receive one (1) hour of his straight time pay for every eight (8) hours that the employee spends as an AOM or training another Telecommunicator (or a pro rata share if the employee spends less than eight (8) hours as an AOM or training another Telecommunicator). The employee may alternatively request to accept the aforementioned one (1) hour of AOM/Training Officer pay in the form of one (1) hour of paid leave time, which will be tracked in a separate but combined leave bank. Notwithstanding the foregoing, an employee cannot earn AOM and Training Officer pay for the same hours worked on a particular shift. The Employer reserves the right to decide the number and identities of employees selected for such AOM and/or Training Officer assignments. Employees may

decline AOM and/or Training Officer assignments, absent an emergency. The Employer may require the most senior employee to serve as an AOM during the employee's shift, only if no other qualified employees (as determined by the employer) on the particular shift have accepted the AOM assignment. If an employee is forced to act as an AOM or Training Officer, they shall not be disciplined for any deficiency related to the performance of the AOM or Training Officer Duties."

EMPLOYER FINAL OFFER

"When the Employer, in its discretion, decides to assign an employee to serve as an Acting Operations Manager ("AOM") or Training Officer during a particular shift, the employee will receive one (1) hour of his straight time pay for every eight (8) hours that the employee spends as an AOM or training another Telecommunicator (or a pro rata share if the employee spends less than eight (8) hours as an AOM or training another Telecommunicator). The employee may alternatively request to accept the aforementioned one (1) hour of AOM/Training Officer pay in the form of one (1) hour of paid leave time, which will be tracked in a separate but combined leave bank. Notwithstanding the foregoing, an employee cannot earn AOM and Training Officer pay for the same hours worked on a particular shift. The Employer reserves the right to decide the number and identities of employees selected for such AOM and/or Training Officer assignments. The Employer may require an employee to serve as an AOM during the employee's shift, only if no other qualified employees (as determined by the Employer) on the particular shift have accepted the AOM assignment."

Argument:

The Union believes there is a mutual benefit to the Employer first requesting volunteers interested in the new job assignment before forcing an employee to perform duties that he/she did not request. The Union claims that in the past the Employer has typically solicited for volunteers for AOM or Training Officer, but the Employer's final offer does not require that it seek volunteers before resorting to ordering employees to perform this task. Employees in the bargaining unit have been hired to perform the job of Telecommunicator, not Acting Operations Manager or Training Officer, and if they do not wish to perform those tasks, they should not be ordered to do so. If they are so

ordered then they should not be held responsible for deficiencies in the performance of those duties.

The Employer asserts that it has two concerns with the Union's proposed final offer. The first sentence of the Union's proposal suggests that dispatchers normally volunteer for a particular AOM assignment, but this does not accurately reflect how the AOM program works. Rather, dispatchers volunteer for the AOM program at the beginning of the calendar year, and are scheduled to work as an AOM when NWCDS deems it appropriate. The Employer argues that the Union's proposal should be rejected to the extent that it suggests otherwise. Second, the Employer contends that the last sentence of the Union's proposal goes overboard in that it seeks to insulate even experienced AOM's and call Training Officers from poor performance. NWCDS asserts that as best it can tell the Union is attempting to avoid a situation where an inexperienced dispatcher has been required to work as an AOM or Training Officer who then makes a mistake while performing those unfamiliar duties. It argues that it does not have an objection to this concept, but the that the plain language of the last sentence of the Union's final offer broadly applies even to more experienced AOM's and Training Officers, and exempts them from discipline if they improperly perform their AOM or Training Officer duties. The Employer concludes that because of those concerns, the arbitrator should either award NWCDS' final offer in its entirety or modify the Union's final offer accordingly.

Discussion:

The Acting Operations Manager (AOM) is similar to a shift supervisor. Currently employees annually submit a written statement stating they want to be an Acting Operations Manager and/or Training Officer (TO) and if they accept such assignments they receive additional compensation. The differences between the Employer and Union final offers are underlined in the quoted language appearing above, and there are several differences.

One difference in the final offers is that the Union's proposed language does not make it clear when an employee can volunteer to be an AOM or TO, and NWCDS argues that the Union language infers that an employee can volunteer for a particular assignment rather than sign up (volunteer) at the beginning of the calendar as is currently done. Another difference is that under the Union's proposed language an employee can decline

an assignment absent an emergency, and the Employer can only assign the most senior employee "as an AOM during the employee's shift, only if no other qualified employees (as determined by the employer) on the particular shift have accepted the AOM assignment". Also, under the Employer's proposed language it has the discretion to assign an employee to be an Acting Operations Manager or Training Officer only if no other "qualified employees (as determined by the Employer) on the particular shift have accepted the AOM assignment".

After reviewing both party's proposed language and their arguments I am persuaded they are both in agreement that the intent of their language is to allow employees to volunteer to be considered for such assignments and that when an assignment becomes available employees working on that shift who are on the volunteer list and are deemed qualified by the Employer will be given the opportunity to take the assignment. It is only when none of the employees who volunteer for such assignments at the beginning of the calendar year take the assignment that the Employer can "require" a qualified employee on that shift to serve as an AOM or TO. In the undersigned's opinion this process should be written in clear and unambiguous language, which neither party has done.

Additionally, the Union's proposed language states that employees have the right to decline the assignment unless there is an emergency, and that if an employee is required to act as an AOM or TO the employee should not be disciplined for deficiencies related to the performance of the Acting Operations Manager or Training Officer duties. I can appreciate that a less experienced employee may not want to assume responsibilities over and above their Telecommunicator duties if doing so might result in discipline for a deficiency in their performance as an AOM or TO. And the Employer states it does not object to the concept of not disciplining less experienced dispatchers when they act as TO or Operations Manager, but argues the Union's discipline language also applies to even more experienced AOM's and TO's. The obvious difficulty in crafting language to accommodate both parties' interests is how to unambiguously articulate the Employer's standard of having "more experienced dispatchers serving as AOM's and TO's" subject to discipline for performance issues while serving as AOM or TO.

The undersigned is persuaded the italicized language below accomplishes the objectives identified by both parties in their final offers and is to be incorporated in their 2011-2014 collective bargaining agreement.

Employees may annually volunteer to serve as an Acting Operations Manager (AOM) or Training Officer (TO) at the beginning of each calendar year. When the Employer needs an employee to serve as an AOM or TO and an employee who has volunteered accepts or is assigned as an AOM or TO, that employee will receive one (1) hour of his/her straight time pay for every eight (8) hours that the employee spends as an AOM or training another Telecommunicator (or a pro rata share if the employee spends less than eight (8) hours as an AOM or training another Telecommunicator). The employee may alternatively request to accept the aforementioned one (1) hour of AOM/TO pay in the form of one (1) hour of paid leave time, which will be tracked in a separate but combined leave bank. Notwithstanding the foregoing, an employee cannot earn AOM and TO pay for the same hours worked on a particular shift. The Employer reserves the right to decide the number and identities of volunteer employees to be considered for such AOM and/or TO assignments.

The Employer may require an employee to serve as an AOM or TO during the employee's shift only if no other qualified volunteers (as determined by the Employer) on the particular shift have accepted the AOM or TO assignment. Discipline for a performance deficiency while being required to serve as AOM or TO is appropriate only in those instances where the employee's prior experience and training would lead a reasonable person to conclude the employee should have been able to satisfactorily perform the required task(s).

Disputed economic or non-economic items:

1. Section 9.11 Blackout Dates

UNION FINAL OFFER

"Absent an emergency, there shall be no blackout dates for any leave provision within this agreement. For purposes of this provision, an "emergency" shall include riots,

civil disorders, tornado conditions, floods or other catastrophes. A staffing shortage does not constitute an emergency."

EMPLOYER FINAL OFFER

9.11 Leave Blackouts

"The Employer may "black out" certain days in order to accommodate (a) training initiatives in connection with major operational system changes, including but not limited to the installation or modification of computer aided dispatch systems, 9-1-1 telephone systems, public safety radio systems and operational protocols such as EFD, EMD or EPD; and (b) staffing needs in connection with major multi-jurisdictional events.

Employee leave requests, including but not limited to vacation, duty trades, prescheduled comp time, short notice days, and part-time substitutions, will not be approved during "black out" periods. The Employer will provide reasonable advance notice before a "black out" is scheduled. In the event a "black out" is scheduled, the Employer will not cancel previously scheduled and approved leave time. Individual employees may request that exceptions be made during a "black out" period for unusual or unexpected circumstances, which NWCDS will consider on a case-by-case basis. Such requests will not be unreasonably denied."

Argument:

MAP argues that blackout dates are a significant impairment upon the ability of bargaining unit employees to utilize their leave time. It asserts there is a compelling need to permit the employees to be able to take their vacation time, compensatory time or other leave time provided for in the collective bargaining agreement. It acknowledges there may be times when an emergency arises, such as a tornado, civil disorder or riot that prevents leave time usage, and that its proposal would allow NWCDS to utilize blackouts in case of emergency. As Telecommunicator Metz testified, the Employer should not be allowed to utilize blackout dates for its failure to hire enough Telecommunicators. MAP also asserts that the most recent blackout that occurred in February of 2012 resulted from an agreement reached between the Union and Employer on a non-precedential basis which shows the parties have a history of being able to cooperate and deal with unusual circumstances without the need for the Employer to have full discretion to unilaterally implement blackout dates without first bargaining with the Union. MAP also contends

that external comparability overwhelmingly favors its proposal inasmuch as there are no bargaining units in its proposed comparability group where an employer has the right to unilaterally implement blackout periods as NWCDS is proposing in this case.

The Employer asserts that prior to the certification of MAP as the collective-bargaining representative for dispatchers it had a past practice of instituting blackout periods when dispatchers are restricted from using various types of accrued time off. Some of those blackouts involve total prohibition of any type of leave, whereas in other cases the Employer only prohibited use of certain types of leave. The Employer states that it has only instituted blackouts in connection with the institution of a new computer or operational system or in response to anticipated events that might involve some type of civil unrest, e.g. the G8/NATO summit. In the case of a blackout involving operational or computer changes the blackout can last anywhere from several days to several weeks during which time Telecommunicators attend various training classes on how to use and/or implement the new system. The Employer argues that without blackouts in place training for over 70 Telecommunicators would take much longer to complete, and the classes would be much smaller and spread over a longer period of time because it would have multiple leave requests. It contends it would also incur additional expenses in connection with the use of third party vendors retained to train dispatchers, because delays in training due to employee use of vacation and other leave time would require additional travel and training time for vendors.

NWCDS argues that in the past it has not canceled already scheduled leave time when it was determined that a blackout was necessary, and has granted employee requests for time off during a blackout period for major life events e.g. marriages, births etc., but not for common occurrences such as little league games. The Employer states that it has scheduled six blackout since 2005 with some of the blackouts occurring after MAP was certified as the Telecommunicators bargaining representative, yet MAP neglected to make its first bargaining proposal regarding blackouts until September 29, 2011, on the eve of its threatened strike.

The Employer also contends that each party's contract proposals regarding blackouts constitute economic proposals limiting the arbitrator to the selection of one or the other proposal in its entirety. It argues that the commonly accepted test for what constitutes an

economic item was articulated by arbitrator Nathan in Village of Elk Grove, S-MA-93-164 at 6 (November 29, 1993). In that case, arbitrator Nathan stated that he had

> "long taken the position that any issue the outcome of which has a measurable impact on the cost of funding the unit is an economic issue".

In support of its argument the Employer relies upon other decisions where arbitrators concluded that work scheduling was an economic issue because of its measurable impact upon the employer's budget and that a secondary employment indemnification requirement was an economic issue because of its potential future impact on the employer's finances. NWCDS contends that blackouts in this case involve its inherent ability to staff its communication center when employees are required to attend training, which by extension can increase NWCDS's overall payroll costs. It argues if blackouts were not allowed additional salaries and leave time would have to be spread out over an extended time frame, and it would be deprived of the dispatchers' operational productivity.

The Employer also argues that the primary reason for blackouts has been to ensure the presence of dispatchers during training classes in connection with major operational system changes, whereas the Union proposes limiting the scope of blackouts to "emergencies", which the Union defines as "riots, civil disorders, tornado conditions, floods and other catastrophes". NWCDS contends that any party seeking to change the status quo must establish a need for its proposed change. The Employer asserts that the test for determining whether a proposed change to the status quo should be adopted is,

> "whether there is a substantial and compelling need for the proposed change, whether the union has demonstrated that the status quo has failed to work, whether the status quo has operated in such a way that it is causes inequities for the bargaining unit, whether the employer has resisted attempts to bargain changes to the status quo, and whether the union has offered a quid pro quo for the proposed change".

It argues that in this case MAP has failed to offer any credible justification for its proposed change.

The Employer further asserts notes that the Union did not complain or provide a reason for the need to limit blackouts until the eve of the Union's threatened strike. The Employer argues that was because MAP did not perceive a problem with the Employer's blackout practice during the previous two years of its representative status, and

presumably its members were comfortable with the blackout frequency and protocols. NWCDS contends this suggests nothing is broken with the current system that requires it to be changed. It argues that during the hearing in this case the Union's primary argument for limiting blackouts was the extraordinary difficulty bargaining unit members incur in using all of their accrued leave time. The Employer contends that the record evidence establishes that most bargaining unit dispatchers had very little leave time on the books as of April 30, 2012, yet one would expect if blackouts were preventing employees from using their full complement of leave time there would be many employees with vacation in their bank. The Employer avers that another Union assertion regarding this issue was that the Employer fails to provide reasonable advance notice to dispatchers before a blackout is scheduled, but argues that it has historically provided anywhere from 4 to 8 months advance notice of the need for a blackout and its final offer contains a "reasonable advance notice" requirement.

The Employer asserts that its proposal is imminent in its fairness and largely tracks the status quo, the two types of events for which blackouts would be imposed will occur infrequently, and includes several built-in procedural protections for employees. It also contends that its final offer requires reasonable advance notice before a blackout can occur and that vacations already scheduled and approved before the announced blackout will not be canceled, and dispatchers will have the ability to request exceptions be granted in "unusual or unexpected circumstances". It argues the Union's proposal, on the other hand, limits blackouts to a very narrow set of circumstances, i.e., "emergencies", and defines an emergency by simply quoting the language already contained in the parties' collective bargaining agreement at Section 3.1,which grants the Employer the right to temporarily suspend the collective bargaining agreement's provisions regarding leaves, vacations and hours of work in the event of civil emergencies. NWCDS, therefore, believes that the Union's language is surplusage as well as inherently illogical because the Employer does not know when an emergency will occur as it is an unforeseen circumstance. Consequently, the Employer argues that under the Union's proposal there could never be a prescheduled blackout because the emergency would be unknown until immediately prior to its occurrence.

The Employer also contends that it's offer is more favorable than its only comparable, DU-COMM's, whose contract permits the employer the right to deny paid time off requests, "based on factors such as training, special events and severe weather". It also argues that its final offer is consistent with the statutory criteria Section 14(h)(3)'s emphasis on the "interests and welfare of the public".

Discussion:

NWCDS has been utilizing blackouts since 2005 in cases of major communication system or operational changes and in response to events that might involve civil unrest like the G8/NATO summit. And, when it has instituted blackout periods, and there've only been six in the past seven years since 2005, the Employer has given reasonable advance notice, and has not canceled already scheduled and approved leave time. Clearly, blackout periods have occurred infrequently. The Union's principal concern with the Employer's use of blackouts is that it impairs employees' ability to utilize leave time. However, inasmuch as pre-approved leave time is not impacted by the blackout periods and the Employer has in the past permitted employees to take leave during a blackout for significant life events, it's not clear what the impact of the blackouts has been on taking previously unscheduled leave. As was discussed regarding the Union's proposal to increase the number of employees permitted to be on vacation per day and per shift, it has not established that employees have been unable to utilize their earned vacation and other leave days during the calendar year and were necessarily required to accrue/bank them for later use. Thus, the Union has not established that NWCDS' use of blackouts has so detrimentally impacted bargaining unit members ability to utilized their contractual leave benefits that there is a need to make changes in the prior practice. While it may be the case, the record evidence does not persuade me that is the case.

I also concur in the Employer's analysis that if the blackout periods were impairing employees ability to utilize their earned vacation and other leave time, and it was a significant and priority issue with bargaining unit members, the Unions initial bargaining proposals to the Employer would have included a proposal regarding blackouts. That was not the case, and the Union's proposal didn't surface until much later in negotiations. The Union has not advanced an explanation for why that occurred.

Additionally, there has been an established practice of the NWCDS unilaterally establishing a blackout period in the past and record evidence of only one situation when the parties mutually agreed to a blackout. The Union, is proposing elimination of that practice, and instead proposing that the Employer can only unilaterally impose a blackout in the case of an emergency. However, it is not clear that the Union's proposal is anything more than a grant of authority to NWCDS that it has already retained in Section 3.1. Under that contract provision the Employer has

> "the right to take any and all actions as may be necessary to carry out its mission in the event of civil emergency * * * which may include, but are not limited to, riots, civil disorders, tornado conditions, floods or other catastrophes. In the event of such emergency action, the provisions of this agreement pertaining to Article IX 'Leaves', Article X 'Vacation', Article XIV 'Hours of Work', and Article XVI 'Holidays', may be suspended, provided that all the provisions of this agreement shall be immediately reinstated once the local disaster or emergency condition ceases to exist."

I concur with the Employer's assessment that the Union's proposal is mere surplusage in light of the language of Section 3.1. I presume the Union has proposed language that a "staffing shortage" doesn't constitute an emergency because of the blackout that the Employer declared in 2005 due to what has been described as "unprecedented sick leave usage". However, NWCDS' final offer limits its ability to black out dates "to accommodate training initiatives in connection with major operational system changes", and "staffing needs in connection with major multi-jurisdictional events". Thus, the language of the Employer's final offer addresses that Union concern, and under the Employer's final offer language it would only be authorized to blackout dates due to "staffing needs" in the case of "major multi-jurisdictional events".

Also, contrary to the Union's assertion, DU-COMM, while not referring to blackout dates, does permit the employer to deny PTO requests due to such factors as "training, special events and pending severe weather". However, DU-COMM's ability to deny vacation requests is not included therein because vacation is characterized as GPTO, or "guaranteed paid-time off". Thus, it appears that the DU-COMM contract does allow the employer to deny leave, excluding vacation, for occurrences similar to what NWCDS is proposing in this case. And, here, NWCDS is not proposing to cancel already scheduled

and approved vacation time and will make exceptions in some circumstances for other leave requests.

Thus, because of the infrequent occurrences in the past when NWCDS has utilized blackouts, the prohibition against canceling already approved leave time, and the requirement to provide reasonable advance notice that the Employer has included within its final offer, the Union has not established a need to change existing practice, which the Employer's final offer contractualizes.

In light of the above analysis it is unnecessary to determine whether this is an economic or non-economic item.

The Employer's final offer language on this item is to be included in the parties' 2011-2014 collective bargaining agreement.

2. Section 14.6 (F) Remedy for Extra Duty Assignment Violations

UNION FINAL OFFER

"UNION REJECTS THIS PROVISON"

EMPLOYER FINAL OFFER

"If the Employer's found to have violated any of the overtime assignment procedures outlined in this Section, the remedy will be for the aggrieved employee to receive preference for the next overtime assignment of equal hours listed on the overtime list that accompanies a monthly work schedule. If the employee declines the aforementioned overtime work assignment, the employee is entitled to no further remedy. If the employee works the aforementioned overtime assignment, the employee will receive compensation for the worked hours in addition to any pay that would attach to a lost FNOP or FNOP opportunity.

In the event the Employer intentionally violated an overtime assignment procedure outlined in this Section for arbitrary or capricious reasons, an arbitrator is authorized to award the aggrieved employee the monetary equivalent of the missed overtime opportunity without requiring the employee to actually work the missed hours."

Argument:

The Union believes the arbitrator should be the one to decide the appropriate remedy in the case of an Employer's improper overtime assignment, rather than having a

predetermined contractual remedy. It asserts that the arbitrator should have the authority to craft a remedy without being bound by a limiting provision such as proposed by the Employer in its final offer. It claims the most frequently utilized remedy when an employee's contractual right to overtime work has been violated is a monetary award. It cites arbitrator Larkin's award in John Deere Dubuque Tractor 35 LA 495(Larkin, 1960) wherein he stated,

> "Offering an employee an opportunity to make up improperly lost hours at a later date is not an adequate remedy. He is entitled to work those hours at a time they are available, to know when he may expect his turn, and not be expected to work at some time more convenient to the employer, or at the personal whim of the foreman."

The Union also argues that when determining the appropriate remedy for overtime violations, arbitrators often consider matters such as the amount of overtime opportunities, interference with other employee rights to overtime, and seniority, but those factors could not be considered under this Employer final offer. The Union also contends that none of the external comparables have such a provision in their collective bargaining agreements and including such a requirement in this agreement would act as a disincentive for the Union to arbitrate an alleged violation of the contractual overtime requirements. It further asserts that such a provision would allow the Employer to manipulate the overtime process. For these reasons MAP believes the arbitrator should not select the Employer's final offer for inclusion in the collective bargaining agreement.

NWCDS contends the undersigned should consider this to be an economic proposal because it clearly has an economic impact upon its finances. As arbitrator Nathan opined if it has a measurable impact financially it is an economic item. It argues that if the Union's offer is selected then an arbitrator will be empowered to award an aggrieved employee pay for time not worked, even though another employee was paid for the overtime work performed. This result will cost NWCDS more money than if the remedy for the Employer's mistake is that the aggrieved employee will be offered a future overtime assignment. The Employer also asserts that its final offer is fully consistent with external comparables and is narrowly tailored to avoid adverse consequences of inadvertent errors. The Employer also contends the DU-COMM contract provides as a remedy that

> "the soul remedy shall be to provide such employee with the next opportunity to work an unfilled shift shortage in those cases in which it is demonstrated that an employee was not given an opportunity to work an unfilled shift shortage to which they were otherwise entitled".

NWCDS contends the DU-COMM contract language is evidence of the norm for large dispatch centers like NWCDS, and is understandable because more employees means more overtime and more overtime creates the potential for overtime errors. It argues that it is reasonable for large dispatch centers to have such an overtime limitation in contrast to smaller bargaining units of 10 to 20 employees where overtime is presumably less frequent and more manageable. The Employer also asserts that there are two police collective bargaining units with similar language, even though it does not believe these municipalities constitute proper external comparables.

Regarding the Union's contention that if the Employer's final offer is selected it will deter the Union from pursuing overtime grievances to arbitration, the evidence establishes that the Union advanced 16 separate grievances to arbitration during the first nine months the parties' collective bargaining agreement was in effect. Second, the Employer argues that MAP erroneously suggests that the only remedy available to an aggrieved employee under the Employer's final offer in the event of a contractual overtime violation is securing the next overtime assignment. The Employer argues that its final offer clearly demonstrates additional remedies are available in those cases where the grievant can prove that the Employer denied an overtime assignment for arbitrary or capricious reasons.

NWCDS also contends that it has never had a practice of paying employees for a missed overtime opportunity without requiring that employee to work the underlying overtime hours. Consequently, MAP is seeking a potential remedy that does not currently exist at NWCDS and, therefore, it is incumbent upon MAP to introduce evidence showing why its proposed overtime remedy is necessary, and it has failed to do so.

Last, the Employer asserts that the arbitrator should also consider that the parties are still in the early stages of their collective bargaining relationship because they've only operated under their first contract for less than 12 months. If during the next 17 months the evidence suggests that the Employer has somehow abused or mishandled the parties

negotiated overtime procedures MAP will have every opportunity during the next round of negotiations to propose eliminating Section 14.6F from the parties contract.

The Employer believes its final offer strikes a reasonable balance between the need to make employees whole for contractual overtime violations while avoiding unduly burdening itself in the event inadvertent errors occur in an overtime process that the Union's attorney described as being "quite a bit different than any unit I've seen".

Discussion:

The parties have a disagreement as to whether the Employer's final offer is an economic or non-economic item. The Employer believes that its final offer is economic because it "clearly has an economic impact upon its finances". The Union disagrees arguing that the Employer's proposal deals with the authority of the arbitrator.

The undersigned agrees with the Employer that the complexity of the contractual overtime provisions presents opportunities for error on the Employer's part in implementing those procedures and causing employees to be inadvertently denied overtime assignments to which they are entitled. However, notwithstanding that fact, the Employer has not established that if the undersigned does not select its final offer, which contractually limits the remedy available to an employee inadvertently passed over to the next overtime opportunity, not doing so will have a measurable financial impact upon NWCDS. While the Employer adduced evidence of the number of assigned overtime occurrences, forced on pager occurrences (FOP) and forced not on pager (FNOP) occurrences in 2011, no evidence was adduced regarding the number of Employer mistakes that resulted in make-up overtime opportunities in the past, and what the cost would have been had the Employer been required to compensate employees for the missed overtime opportunities even though the employee would not have been required to work any overtime hours. Thus, there is no way to know to what extent there would be a financial impact upon NWCDS if its proposal is not adopted. Consequently, the record evidence or lack thereof persuades me that NWCDS' final offer is non-economic item.

The DU-COMM collective bargaining agreement contains language at Article 8.7C Remedy, providing

> "In the event an employee demonstrates that he was not given an opportunity to work an unfilled shift shortage to which they were otherwise entitled under this Agreement, the sole remedy shall be to provide such employee with the next

opportunity to work an unfilled Shift Shortage (Secondary), above, notwithstanding any other provision of this Agreement."

As with NWCDS' final offer, DU-COMM's contract also limits an employee's remedy to an offer of the next overtime assignment. Thus, clearly NWCDS' final offer is not out of line with its primary comparable.

Equally as important is the fact that the NWCDS apparently had, prior to MAP becoming the certified representative of it Telecommunicators, a practice of not awarding overtime pay to an employee for a missed overtime opportunity without requiring that employee to work the overtime hours. Thus, the Employer's final offer is a contractualization of an existing practice, which the Union has not disputed. The Union argues the Employer's final offer, which deprives employees of a monetary award that it asserts arbitrators apply most frequently in such situations will also act as a disincentive to arbitrating alleged violations of the overtime procedures. I don't find that Union argument persuasive, even though I do believe there are numerous reasons why restricting the remedy to solely the "next" overtime opportunity may be inadequate. Furthermore, the Union has presented no evidence of actual instances where an employee was unable to work the next overtime opportunity, and consequently the Employer's error was not remedied. There could be numerous reasons why an employee would be unable to work the next overtime opportunity. Also, what impact does offering the employee the next overtime opportunity have on other employees and their contractual rights to overtime assignments?

Thus, I believe a more equitable remedy would allow for make-up overtime in a way that the employee's relief is not restricted to only the next overtime opportunity and exceptions to that being the sole remedy are identified. However, even though I have the authority to fashion alternative contractual language providing for such exigencies in the Employer's remedial proposal, I am reluctant to do so for fear of creating a more complex and problematic situation. It would be better if the parties were able to agree to an alternative and/or that the in the next round of negotiations the Union, with its knowledge of the intricacies of the Employer's operation, proposes language dealing with possible circumstances preventing an employee from working the next overtime opportunity, and/or doing so in a way that doesn't unduly infringe upon other employees'

contractual rights. The parties will be opening negotiations for a successor agreement shortly, and if the Union is unable to persuade NWCDS to agree to language addressing those issues in the future it can then submit the issue to interest arbitration.

For these reasons the undersigned selects the Employer's final offer regarding Section 14.6 (F) Remedy for Extra Duty Assignment Violations for inclusion into the parties' 2011-2014 collective bargaining agreement.

Unfair Labor Practice Case No. S-CA-10-163:

On December 23, 2009, the Union filed an unfair labor practice "Charge" with the Illinois Labor Relations Board (Case No. S-CA-10-163). The parties entered into a Memorandum of Agreement that they executed on November 28, 2011, as part of their bargain for a initial collective bargaining agreement, providing that

> "7. The parties agree to request that the Illinois Labor Relations Board ("ILRB") hold unfair labor practice charge S-CA-10-163 in abeyance pending the resolution of the FNOP issue in interest arbitration. The parties agreed to authorize the interest arbitrator to make all necessary legal and factual findings regarding whether NWCDS violated Section 10(a)(4) and (a)(1) of the IPLRA, as alleged in Case No. S-CA-10-163. After the arbitrator's findings are issued, either party may then make a referral argument to the ILRB (assuming Case No. S-CA-10-163 has not been previously withdrawn or otherwise resolved)."

Urry, Assistant Director of Operations, testified regarding the development of the undisputed practice in existence prior to August of 2009 of permitting employees to volunteer for an FNOP assignment after they did not volunteer when the assignment was offered pursuant to the Section 14.6.B solicitation, and then being awarded the two hours at time and one half premium granted to an employee not on pager duty who is forced to take the assignment (FNOP). Urry testified that the practice probably arose out of a situation where a group of employees were in a room and an Operations Manager offered an overtime assignment pursuant to the procedure outlined in Section 14.6.B and no employee volunteered. So then an employee was involuntarily assigned to cover the assignment, FNOP'ed, the employee so ordered had a problem with staying for the assignment, for whatever reason, and one of the other employees present who had not

volunteered when the Operations Manager initially announced the overtime opportunity volunteered to accept the FNOP assignment so the other employee would not be required to work it. Then, the employee who volunteered to take the FNOP was awarded the two hour premium at time and one half, even though he/she had volunteered to take the overtime assignment after it was declared to be an FNOP overtime assignment, but had not been forced to take the assignment. Had that employee volunteered for the overtime assignment when it was first offered under Section 14.6.B he/she would not have been eligible for the FNOP premium, but because an FNOP assignment had been declared the Employer paid the employee who volunteered to take that FNOP assignment the FNOP premium.

Urry said that over time the employees began gaming the system and not volunteering to take the overtime offered under Section14.6.B, counting on the fact that an FNOP would have to be ordered, and then they would volunteer to take the assignment and receive the premium pay for an FNOP assignment, which they volunteered for. They would not have received the two hour premium pay had they volunteered when the overtime was offered under Section 14.6.B. Urry gave an example of how employees would game the system:

> "two employees called in sick, so the following shift needs two slots of overtime to be covered. Volunteers are requested, so no one volunteers cause they're kind of holding back because they know that the pager person is probably going to be employed. So no one volunteers for either slot. The operations manager forces the pager person and now in order to cover that other slot, since no one's volunteered, we essentially have a forced not on pager situation. At that point the operations manager would say okay, we have a forced not on pager situation, does anybody want it, and somebody who had declined it in the first round now says, oh well, now I'll take that."

On August 25, 2009, after the Union had been certified as the exclusive collective bargaining representative of NWCDS' Telecommunicators, but prior to the parties' reaching agreement upon an initial collective bargaining agreement, a meeting between Urry, Barbera-Brelle, Union President, DeLaCerda, and Union Treasurer, Metz was held to discuss issues that the Metz and DeLaCerda had. Urry testified that one of those issues involved a situation where an employee, Pfeil, had worked 8 hours of overtime. Urry described the incident as being:

"there was a situation where eight hours of overtime was needed, uhm, people had been contacted and paged to volunteer for it and it had not been covered, so a page was put out saying that there was a voluntary FNOP available for these – for this shift. Those FNOP's were normally taken in 4-hour blocks. One person would take four hours, another person would take four hours. In this case, the person that volunteered for those hours was off that day, so they volunteered for the whole eight hours. On their time sheet they had indicated that they had – should be receiving two hours of FNOP pay for the first four hours and two hours of pay – FNOP pay for the last four hours, so four extra hours of overtime pay. It had never been our practice to pay the same person double bonus FNOP hours when they work consecutive hours, so he had only been paid for the eight hours that he worked plus 2 hours of FNOP pay, and that was the first situation that they were talking about."

Urry further testified,

"my recollection is we were talking about FNOPs in general and saying that, you know, at some point when overtime was crazy, that you know, to try and save people from being forced when they didn't want to be forced, that this situation had evolved where people were allowed to volunteer for it, but that it had really kind of gone far afield from that, and now people were, I don't know, let's call it playing the system where they wanted the overtime, they wanted it right from the beginning, but they were going to hold back to see if it became a voluntary FNOP and then they would volunteer for it at that point. And that really wasn't the intention of the, you know, two-hour forced not on pager stipend, it was really to give people, you know, a bonus for being inconvenienced and not give people a bonus for, hey, I'll wait it out and see if it comes to that."

Urry also testified that

"you know, I know we tossed it around for a little bit, and then at one point Jennifer said, so do you want to go back to the old way, which my impression was, meaning go back to the way it is in the directive and not allow volunteers for this, but to actually, you know, follow a procedure to force people if they weren't going to – if nobody was going to volunteer for it."

Urry stated that she was surprised by DeLaCerda's question. She testified

"it would definitely go back to the directive. It would make it easier to administer for the operations manager and would prevent people from playing the system, but I didn't know how the people on the floor would react to it, so I was surprised that she had said that".

Urry said she responded to DeLaCerd and Metz,

"yeah, that would definitely be easier for, you know, our operations managers to administer. It would make the situation move a little faster of assigning over time or having people volunteer for overtime, and it would just be, I don't know, a little

more fair, instead of playing the game they would kind of go back to the reason FNOP was intended for".

She testified that at point in the conversation she believed DeLaCerda and Metz had agreed to "prohibit volunteers for FNOPs". Urry testified that she had made a note to herself to remind her to put out a note to staff so that staff was aware of it. She said she also wrote in her notes taken during the meeting, "Decision is no more voluntary FNOP".

Urry also testified that neither DeLaCerda nor Metz said anything during the meeting "to the effect that they wanted to bargain over the issue". She said the parties then moved on to other topics in the meeting.

Urry testified that she then drafted a Personnel Memo to staff that was sent out on September 2, 2009 to staff regarding "FNOP Guidelines" that stated,

> "A meeting was held at the request of Union President DeLaCerda. At this meeting President DeLaCerda accompanied by Treasurer Metz brought items of concern to management's attention including forced not on pager situations, overtime as it relates to Telecommunicator 1s and language translation. At the meeting a consensus was reached as to how these items would be handled:
>
> Force not on pager (FNOP) - we discussed how FNOP pay is handled when a TC works two or more overtime slots in a row on his or her regular day off. * * * Our discussion then turned to the practice of soliciting volunteers for overtime assignments. Currently, NWCDS first solicits volunteers for overtime assignment before forcing a TC to work a particular assignment. Supervisors have also offered a "second chance" for volunteers after announcing that an FNOP was imminent. After further discussion, President DeLaCerda suggested to us that NWCDS simply go back to the "old way" of soliciting only one round of volunteers before an FNOP is invoked, as it would help clear up some of the gray area raised in recent months. We agreed to her offer. Therefore, based on the agreement reached with Union President DeLaCerda and Treasurer Metz, NWCDS will proceed as follows when an overtime assignment becomes available. There is and FNOP list in the Scheduling Book. As always, available overtime will be offered to TC's on duty first and then the part-timers via pager, Telecommunicators 1's via pager (if the OT is due to a Telecommunicator 1 absence) and two off-duty TC's via pager. If the overtime is not taken voluntarily by any of these employees, the OM will consult the Scheduling Book's FNOP list in order to determine which TC's on duty (or about to report for duty) are available to be FNOP'd. The available TC with the lowest seniority who has not yet been FNOP'd will be required (forced) to stay at or required (forced) to come in early. By extension, that TC who was required to stay or come in early will receive two extra overtime hours of FNOP pay.
>
> * * *"

Urry testified that the Employer thereafter implemented the change that had been discussed in the August 25th meeting regarding FNOP premium pay.

On cross-examination, Urry testified

Q. What was Jennifer DeLaCerta's intention during the meeting of August 25, 2009?

A. I don't know. Offering to go back to the old way, and I said yes.

Q. Question how do you know that was her intention?

A. Because she didn't say anything else in the meeting after that to say, that isn't what I intended.

Q. Did she ever say the Union agrees with you, you should go back to the – to the prior practice?

A. She didn't use the words the Union.

Q. Did she use the word agree?

A. I reiterated, so we're going to go back to the way we did it according to the directive, and it is my remembrance that she agreed to it, or did not say no, that's not my intention."

Metz testified that in the August 25, 2009, meeting he and DeLaCerda raised Pfiel's situation with Urry and Barbera-Brelle telling them that "the employee had voluntarily accepted the FNOP * * * they (sic) had fulfilled the Employer's (sic) obligation of the overtime", and he was entitled to the premium because, "[I]t was offered to him in an FNOP." Pfeil had worked two consecutive FNOPs and did not receive the two hour FNOP premium for his 2nd four hour FNOP that day. Metz also testified that as the parties continued to discuss the Pfeil situation "their decision was going to be that this employee was not going to receive FNOP pay". He said "we were told that they were going to discontinue the practice then if – if that was the case, if we insisted on this employee receiving FNOP pay". He testified that Urry said they were going to discontinue the practice. When asked on direct examination, "did you agree to that change?" Metz testified, "we did not". He testified if the Employer went ahead with no longer allowing employees to voluntarily accept the FNOP that would be a change from the Employer's past practice.

On cross examination Metz when asked if in August 25th meeting, "did DeLaCerda ever ask a question or pose a question to Northwest's management, something to the effect of, 'do you want to go back to the old way?' Metz responded, "not to my knowledge". When asked what does that mean "not to your knowledge", Metz responded, " No, no. She wouldn't have said that". Metz testified on cross examination, when asked if after Urry announced during the meeting that management was going to discontinue the practice of allowing employees to volunteer for an FNOP, did either you or Jennifer DeLaCerda verbally protest or object?

> "No. I – we were resting on the laurels of our – of our future contract and the ability to use the grievance process. We at no time thought we were even in a type of negotiation session. We were there simply to establish why this employee hadn't gotten his FNOP pay".

On September 5, 2009, attorney Clacaterra, representing MAP, wrote to Employer Attorney Powers, and in his letter stated, among other things, in reference to the Employer's above quoted September 2nd memo to employees that

> " * * * this memorandum goes to great lengths in an attempt to suggest that our chapter leadership had acquiesced in permitting a change from the *status quo*. * * * It was absolutely not suggested by Ms. DeLaCerda or any of our members that NWCDS change its practice. The Chapter had simply acknowledged that management will make the changes that it sees fit and advised that NWCDS does not need to inform employees in writing as to any changes. In fact it was Ms. DeLaCerda who later advised Ms. Barbera-Brelle of several problems that will be created by this management decision.
>
> I assure you that there has been no agreement between the union and management to deviate from the status quo in regards to the wages, terms or conditions of employment as they exist at NWCDS, without complete bargaining being engaged in at the table. * * *
>
> In the future, NWCDS should be advised that changes to the status quo need to be made at the bargaining table. If changes are implemented on a mandatory subject of bargaining, the appropriate legal actions will be taken by the Metropolitan Alliance of Police."

On September 25 attorney Powers responded to Mr. Calcaterra in writing stating, among other things,

> "* * * contrary to your letter, NWCDS did not make any unilateral change to terms and conditions of employment. Instead, as will be explained below, and

NWCDS acted only after reaching an agreement with MAP's authorized bargaining representatives. * * *
In fact, at the end of the meeting, Ms. Urry repeated the agreement that the attendees had reached regarding the offering of only one round of volunteer solicitations. Ms. DeLaCerda and Mr. Metz never once objected that agreement had not been reached; nor did they ever tell Ms. Urry and Ms. Barbera-Brelle that MAP objected to having only one round of volunteers before an FNOP is invoked.
* * *
From NWCDS perspective, two official MAP representatives (cloaked with both actual as well as apparent authority) proposed and agreed to a modification in the way NWCDS solicits volunteers for overtime assignments. * * *

From NWCDS perspective, a MAP President and Treasurer are cloaked with both actual as well as apparent authority to enter into binding agreements on behalf of MAP. It is our understanding that such agreements are binding whether reached in the context of negotiations for collective bargaining agreement, or during informal labor-management meetings as occurred here. * * *"

Discussion:

5 ILCS 315/10 Sec. 10(a). Unfair labor practices provides,
"It shall be an unfair labor practice for an employer or its agents:
* * *
(4) to refuse to bargain collectively in good faith with a labor organization which is the exclusive representative of public employees in an appropriate unit, including, but not limited to, discussing of grievances with the exclusive representative;"

The meeting on August 25, 2009 was, among other things, to discuss Pfeil's grievance/complaint over being denied two FNOP premiums for volunteering and working two FNOP overtime assignments back to back on his day off. It was during the discussion of management's refusal to pay Pfeil two FNOP premiums that FNOP premium payments in general, as well as the matter of returning to "the old way" of awarding FNOP premiums was discussed. The "old way" was in reference to the intent of the FNOP premium as stated in System Directive 1-A-122-8, which was that the Employer would pay an FNOP premium only when an employee not on pager is forced to take an overtime assignment. It was not intended as a reward to an employee who was not forced, but rather volunteered, to take an FNOP overtime assignment, like Pfeil did.

I have reviewed the testimony regarding what took place at the meeting and what was allegedly said and by whom, and have concluded to credit Urry's testimony, not

Metz's. Urry's notes, taken contemporaneously during the meeting, lend credibility to her testimony and undermine Metz's recollection of what was said and by whom in the meeting.

According to Urry's testimony, it was DeLaCerda that asked management, during the discussion of FNOP premium payments and to whom they were being paid, that DeLaCerda said to the Employer representatives, "so do you want to go back to the old way?" Urry testified that she responded that doing so would be easier and faster for Operations Managers to administer, it would be more fair, and instead of game playing to qualify for the FNOP premium it would return to the original intent behind the FNOP premium. Thereafter, on September 2nd management sent out the memo to staff, which stated,

> "President DeLaCerda suggested to us that NWCDS simply go back to the "old way" of soliciting only one round of volunteers before an FNOP is invoked, as it would help clear up some of the gray area raised in recent months. We agreed to her offer. Therefore, based on the agreement reached with Union President DeLaCerda and Treasurer Metz, NWCDS will proceed as follows when an overtime assignment becomes available."

The Union has offered no explanation for why management would misrepresent what took place in the meeting and state that it was DeLaCerda who suggested returning to the "old way". Furthermore, I do not find credible Metz's assertion that DeLaCerda never asked management, as Urry testified, if the Employer wanted to go back to the "old way". Also, Metz testified that neither he nor DeLaCerda ever objected to or protested after hearing Urry state that management was going return to the "old way", permit one round of volunteers for the overtime assignment, and not pay the FNOP premium to employees who volunteered for the assignment after the FNOP was declared. When asked to explain why, Metz testified the Union was "resting on the laurels of our – of our future contract and the ability to use the grievance process". However, that explanation does not explain why the Union did not, at that stage, advise management in the meeting that it did not believe the Employer could unilaterally change the practice and that it would grieve if it did so, particularly since there is no evidence that the Union representatives disagreed with management in the meeting, or for that matter in the hearing before me, that there had been instances when bargaining unit members had

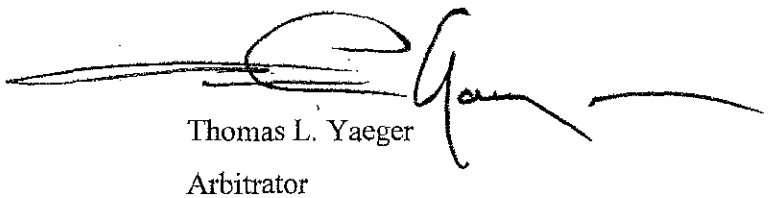
gamed the system and declined to volunteer for the overtime assignment when it was initially offered only to later volunteer after management had declared the assignment to be FNOP assignment. In fact the evidence and testimony leads me to conclude the Union concurred with management's assessment that the Employer, in its administration of the FNOP premium, had gotten far afield of the original intent of the FNOP premium, as reflected in the System Directive. Thus, the evidence and testimony persuade me that it was the Union, not the Employer, who suggested during the meeting that the Employer might want to go back to the "old way". And, that the Employer did not advise the Union in that meeting that it intended to unilaterally end the practice of paying an FNOP premium to any employee who volunteered for an FNOP overtime assignment.

This meeting took place only a few months after the Union was certified to represent the Telecommunicators on February 5, 2009. There is no record evidence that Metz and/or DeLaCerda had prior experience in dealing with management before the certification of the Union as the exclusive representative of bargaining unit employees. They no doubt did not necessarily appreciate what their Union advocacy on behalf of Pfeil signaled to the Employer representatives, i.e. that they had authority to commit the Union to a resolution of Pfeil's complaint involving the FNOP premium, as well as agreeing to changes to the Employer's practice regarding the payment of FNOP premiums. In other words, their official capacity as Union officers, as the Employer argues, cloaked them with apparent authority to bind the Union and the bargaining unit to whatever was agreed to with management, absent some reservation or statement that whatever they agreed upon in the meeting with management would require a vote of the membership, or would have to be approved by the membership, or some such words. There was no reason for management to suspect that Metz and DeLaCerda did not have authority to agree to management ending its practice and returning to the, "old way", particularly since the Union had been the one to raise the issue of returning to the "old way", and thereafter, did not object or protest when Urry stated that was what management was going to do. Under these circumstances, it was not incumbent upon management to offer to bargain over a change to the practice when the meeting clearly constituted bargaining with authorized Union representatives as part of resolving an employee complaint/grievance. Management, in good faith, determined the Union

officers were in agreement to end the practice of paying the FNOP premium to volunteers and return to the intent underlying the FNOP premium payment as stated in System Directive 1-A-122-8. And, then on September 2nd issued its memo to staff advising staff of the change that had been bargained and agreed to by Union officers DeLaCerda and Metz .

Thus, I am persuaded that the two parties were engaged in a discussion of Pfeil's complaint/grievance prior to there being a negotiated contractual grievance procedure and reached agreement that the Employer would end its practice of awarding FNOP premium pay to employees who volunteer to cover an FNOP overtime assignment. Therefore, the Employer did not unilaterally terminate its undisputed past practice of paying the FNOP premium to employees who volunteered to cover an FNOP overtime assignment without first bargaining with the Union in violation of Section 10(a)(4) of the Illinois Public Labor Relations Act.

Dated this 10th day of March, 2013.



Thomas L. Yaeger
Arbitrator