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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NorthWestern Corporation d/b/a
NorthWestern Energy,

Employer

-and-

International Brotherhood of Electrical
Workers, Local 44,

Petitioner.

Case 19-UC-261685

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL 44's BRIEF ON REVIEW**

Pursuant to 29 CFR § 102.67(h), Local 44 of the International Brotherhood of Electrical Workers ("Local 44") submits this brief on review of Region 19 Regional Director's Decision and Order Clarifying Unit.

Local 44 filed the instant unit clarification petition on June 15, 2020, seeking to clarify an existing bargaining unit at NorthWestern Corporation d/b/a NorthWestern Energy ("NorthWestern") to include the newly-created classification

of controller. On September 23, 2020, the Region 19 Regional Director found that the relevant bargaining unit should be clarified to include the controller classification. On October 7, 2020, NorthWestern filed a Request for Review of the Regional Director's Decision and Order Clarifying Unit based on its assertion that the controllers are managerial employees and that the Regional Director erred in concluding that the controller position performs the same basic functions as the outage management systems (OMS) dispatcher bargaining-unit position which the controller position replaced. On January 14, 2021, this Board granted review on the sole issue of whether the controller position performs the same basic function as the OMS dispatcher position.

Unit clarification is the appropriate method "for resolving ambiguities concerning the unit placement of individuals who... come within a newly established classification of disputed unit placement." *Union Electric Co.*, 217 NLRB 666, 667 (1975). This Board refuses to clarify a unit midterm of a contract when the objective is to change the composition of a contractually agreed-to unit by exclusion or inclusion of employees. Granting the petition at such time has been held to be disruptive to the bargaining relationship voluntarily entered into by the parties when they executed the existing contract. *Edison Sault Electric Co.*, 313 NLRB 753 (1994). However, if a new classification is performing the same basic function as unit employees have performed historically, the new

classification is properly viewed as remaining in the unit rather than being added to the unit by accretion. *Premcor, Inc.*, 333 NLRB 1365 (2001),

This Board has applied the *Premcor* doctrine in various types of scenarios. First, in *Premcor* itself, the employer operated an oil refinery at which six unit employees known as "operator 1 s" monitored various functions on six control boards. The employer took advantage of new technology to establish a new control room where monitoring could be performed more efficiently. The employer then hired six former "operator 1 s" to fill the monitoring positions in the new control room, placing them in a newly created non-unit position, with the plan of phasing out represented "operator 1" positions. *Id.* Although the responsibilities of the employees in the new positions differed in some respects from those of "operator 1s," the Board found that those in the new positions were "essentially performing bargaining unit work." *Id.* at 1366. Thus, the Board found that they should properly be viewed as, "remaining in the unit," rather than being added to it by accretion. *Id.*

Similarly, in *Developmental Disabilities Institute*, 334 NLRB 1166 (2001), the employer created a new classification that performed the same type of work performed by unit employees at the same location, and the new classification was arguably encompassed by a broadly-worded unit description. *Id.* The Board found that the new classification simply remained or belonged in the unit without the

need for an accretion analysis, even though the employees in the new classification were granted more autonomy than unit employees. *See also, Brockton Taunton*, 174 NLRB 969, 970–971 (1969) (gas load supervisors are part of the unit since they performed the same basic functions that had been historically performed by bargaining unit employees even though they had additional duties and authorities).

The same reasoning applies when the new classification is performing work that is simply a natural outgrowth of unit work. *Southwestern Bell Telephone Company*, 222 NLRB 407 (1976).

By comparison, in *AT Wall Co*, 361 NLRB 695 (2014), the employer created a new department and four new job classifications for the new product line. The Board found that since the new employees produced an entirely different product and used different equipment and processes than any of the unit employees, the new employees were not performing the same basic functions that unit employees performed. The Board found significant, in distinguishing *Premcor*, the fact that the new employees were in a different department than were any unit employees and none of them "have either displaced any unit employees or performed their work." *Id.* at 697-98.

Here, the record reflects that NorthWestern is a gas and electric utility serving customers in Montana, South Dakota and Nebraska. *Tr.* 17:13-14. NorthWestern divides its service area into eight divisions, six of which are in

Montana. *Tr. 18:12-14*. Local 44 represents a broad unit of NorthWestern's gas and electric service field personnel (gas and electric linemen, electricians, groundmen, town managers, meter readers and technicians, servicemen), office technicians, and warehouse staff located throughout Montana. *Jt. Ex. 1*.

At some point in around 2011, NorthWestern made the internal decision to establish a central electric distribution control center for Montana where none had existed before, *Tr. 73:23 – 74:22*, so that over the long-term, decisions that were made historically at the division level would be made in the future from a centralized control center. *Tr. 50:6-14*.

In 2014, NorthWestern, which until then was a "paper company" where work orders were sent out via fax. *Tr. 50:2-4*, purchased a software product called InService. *Tr. 29:21-23*. The InService product provided NorthWestern the ability to send orders directly to field employees in their service trucks. *Tr. 5-:15-18*. NorthWestern then created two new job classifications: the mobile dispatchers and the OMS dispatchers. *Tr. 29:18-24*.

The mobile dispatchers' primary duty was to provide electronic communication directly from the employer to the field staff. *Tr. 50:15-23*. As its name implies, the OMS dispatchers' job centered around power outages. While some of the OMS dispatchers were cross trained so they also performed work as mobile dispatchers, *Tr. 179:15-19*, the primary function of the OMS dispatcher

position was to gather and centralize information on power outages -- to receive and record (map) information concerning outages; communicate that information to the field personnel and to customers; receive and update information from the field personnel working on the issues related to the outage and provide that updated information to customers; and, receive, update and communicate to customers information concerning plans to restore power. *Tr. 42:4 – 44-16*. Thus, according to the Employer’s chief witness, NorthWestern’s general manager of operations Jason Merkel, the central function of the OMS dispatcher position was to gather information --keep abreast of -- and record what was occurring in the field during outages – “to describe the state of the advancement of the resources,” *Tr. 42:17-18* – “so that not only internally we understood where everybody was and what was being worked on, but then somebody internally could look at that and then communicate to our customers.” *Tr. 42:22-15*. Plans to restore power (“switching plans”), in both planned and unplanned outages, were devised by field personnel (represented journeyman electricians) or, when the outage was widespread or complex, by supervisors, engineers, planning engineers and management. *Tr. 46:2-6*.

The eight mobile dispatchers and eight OMS dispatchers, originally unrepresented, organized in 2017 in Case 19-RC-207108. *Jt. Ex. 2*. NorthWestern and Local 44 then negotiated in a Memorandum of Understanding whereby the

mobile and the OMS dispatchers were covered by the existing collective-bargaining agreement and included in the existing broad bargaining unit. *Jt. Ex. 3*. The Memorandum of Understanding contains two articles – one for the mobile dispatchers and one for the OMS dispatchers. *Id.* During the initial negotiations and thereafter, NorthWestern asserted that the work of the OMS dispatchers would change at some point in the future; the work they performed would be automated; the position was “interim” in that it would be replaced by controllers who would have new job functions and use new systems and processes; the controllers would perform neither the work nor the function of the OMS dispatchers; and thus, the controller position would be a new job and not be part of the bargaining unit – controllers would be “unrepresented” because the OMS dispatchers’ work would “go away.” *Tr. 30:18 – 32:2*.

In August and September 2019, NorthWestern hired eight controllers -- four of whom had previously been OMS dispatchers, and four of whom were new hires -- and eliminated the eight OMS dispatcher positions. *Tr. 75:11-21*. In mid-October 2019, a new computer system that NorthWestern intended to be used by the controllers, the Advanced Distribution Management System (ADMS), was not

up and running and functioning as had been planned, so NorthWestern continued to consider the controllers as being in the bargaining unit. *Emp.Ex. 3.*¹

On January 30, 2020, NorthWestern notified Local 44 that the ADMS was finally in operation and the controllers were no longer in the bargaining unit.² *Emp.Ex.4.* Local 44 asked specifically if the OMS dispatcher function was no longer being done “by people” and instead was being performed “by technology” and NorthWestern responded that “people” were no longer performing that function and “technology” was doing so. *Emp.Ex. 10.* In fact, that was not the case.³

When Local 44 discovered that was not the case, it filed a grievance contesting the removal of the controllers from the bargaining unit. *Emp.Ex. 5.* NorthWestern responded that the matter was not grievable and Local 44 should instead file a unit clarification petition. *Tr. 194:25 – 195:4.* Local 44 did so and a virtual hearing was held on that petition on August 10, 2020.

¹ The “go live” date for the ADMS was delayed -- had “slip[ped] -- a number of times before October 2019. *Tr. 83:5-7.*

² The eight controllers who replaced the eight OMS dispatchers work in the same location, have the same schedule and are supervised by the same individuals as were the OMS dispatchers. *Tr. 167:4 – 168:1; 147: 15-16; 172:7- 24; 174:5-10; Cf, AT Wall, 361 NLRB at 698* (in which the Board found it significant that the Employer had “a separate line from its traditional production, and maintained separate work hours”).

³ The CBA was set to expire at the end of April 2020. The process of renegotiating it was cut short by restrictions due to COVID-19. On April 9, 2020, the parties agreed to extend the CBA to April 30, 2021 with an across-the-board 2.7% increase in wages. *Jt.Ex.4.* During those shortened negotiations, the controller position was not discussed. *Tr. 194:12 – 18.*

The record of the hearing established that NorthWestern has undertaken a long and detailed process to establish a control center, a process that includes new technology, equipment and training and changing some of the functions formerly performed by OMS dispatchers. *See, e.g. Emp.Ex. 6.* Whereas that job consisted of monitoring and mapping power outages, using a computer program that had some ability to predict the location of the cause of the outage and working with field (represented) staff to direct them to the source and cause of the outage, when new systems, processes and training are finally and fully completed, implemented and operating as planned, the controllers will have the ability to pinpoint the exact location of outages, to devise switching plans (that, to the extent possible, will route power around the cause of the outage and thus restore power to as many customers as possible while repairs are being made, work currently being done by supervisors, engineers and journeymen electricians) and to direct field staff to the exact location and source of issue causing an outage. *Tr. 59:13- 60:19; Tr. 152:3-6.* The transition to functioning control center – “an actual control center” -- is “years out and there had to be a lot of technology invested in by the company.” *Tr. 51:7-11.* When NorthWestern eventually installs computer-controlled switches in the field, controllers will also have the ability to control some of the switches (a task now done manually and almost exclusively by represented field staff). *Tr. 131:10 – 132:10.*

The long and detailed process to change some of the functions performed by the OMS dispatchers is far from complete. The plan provides for a four-phase process, of which only the first phase has been accomplished. *Emp. Ex. 6; Tr. 72:4-6; Tr. 61:21-15.* The second phase is scheduled to be completed in the second quarter of 2021 and the complete plan is scheduled to be completed “Late 2021/Early 2022???” *Emp. Ex 6; Tr.62:3-7.* NorthWestern’s general manager of operations Merkel was asked if the plan’s training and technology development was “on schedule, or behind schedule or ahead of schedule,” and his response was, “I’ve got to answer that yes.” *Tr. 123:15-17.* When Merkel was asked if he knew precisely what was going to happen – whether the plan would be successful at each of its future phases – the response was that at the time of the hearing, he did not know how the new systems would function eventually. *Tr.123:19-23.* In making unit-determination type of decisions, present duties and interests are determinative, not future assignments. *Heckett Engineerig Co., 117 NLRB 1395, 1398 (1957).*

What is very clear from Merkel’s testimony is that when the ADMS was first up and running at the end of January 2020 (when the controllers were removed by the Employer from the bargaining unit and Local 44 was informed that their jobs has changed considerably), the controllers’ experienced “very little difference between what they were doing with OMS versus ADMS.” *Tr. 111:17-18.* At the time of the hearing (August 10, 2020), when Merkel was asked

specifically what duties the controllers were performing that were different than what they performed previously as OMS dispatchers, the answer was twofold.

First, “they have a functional understanding of what's being performed by the field representative and how it impacts the system electrically.” *Tr. 112:13-15*. In other words, they had no additional functions or duties related to outage management, but through training they had a greater understanding of the electrical system so that they were “actually engaging and intellectually engaging and understanding the methods of the field.” *Tr. 113:2-3*.

Kelly Howery, a controller who was formerly an OMS dispatcher, agreed. She was asked specifically about the difference between her job duties as an OMS dispatcher and a controller. She responded, “So pretty much the duties are the same, we're just doing that in a new software program, our A -- what we call our ADMS program. So that now talks to InService, because InService is the component that talks to the servicemen's tablets. So the three systems between ECIS⁴ and ADMS and InService we're using all those programs to get the information to the servicemen.” *Tr. 159:17-22*. “(N)ot much has changed in my job functions.” *Tr. 160:8-9*⁵

⁴ ECIS is the system that tracks the calls from customers to the call center. *Tr. 159:15-18*.

⁵ Howery testified that as a controller, she calls 811 to have someone locate any underground facilities. *Tr.171:24 – 172:6*

Second, the controllers who were formerly OMS dispatchers and who were cross trained to work as mobile dispatchers no longer perform any mobile dispatching. *Tr. 113:11-15*. Controller Howery, who initially was hired as a mobile dispatcher and then six months later became an OMS dispatcher, *Tr. 157:9-13*, was obviously one of the OMS dispatchers who was cross-trained. She testified that in December 2019 and January 2020, when “we were still short-staffed, so those of us that were previously OMS dispatchers as opposed to the four new hired folks that were coming on as just controllers, we were still doing a lot of mobile functions as well . . . so we were kind of doing double duty at that time.” *Tr. 173:7-14*. Howery testified that at that time, when she was doing “double duty,” she spent 60% of her day doing mobile dispatching. While she also testified that throughout her tenure as an OMS dispatcher, “I also mobile dispatched,” *Tr.179:5-7*, she did not say specifically that throughout her career as an OMS dispatcher, 60% of her work involved mobile dispatching. There is no evidence that the other OMS dispatchers did as much mobile dispatching.

While the elimination the responsibility to work as a mobile dispatcher provides Howery time during the workday to learn the new systems and technologies, *Tr. 181:6-16*, the function she serves when working with those systems and technology is the same as the function she served as an OMS

dispatcher – keeping track of, and ensuring that the centralized systems in the control center reflect accurate and up-to-date information concerning outages. *Tr. 168:15-24*(as a controller “we’re just replicating” what is occurring in the field in “our system”); *Tr. 169:2-5*(as outages occur, she works with mobile dispatchers and lets the field crews “know to check out those trouble calls or outages.”); *Tr. 169:16-17*(she monitors planned outages); *Tr. 170:6-11*(her controller position involves “importing files here and exporting files there to get everything in the right format” in the centralized computer systems); *Tr. 170:17-21*(as a controller she makes sure that all of the computer programs show that an outage is “complete”); *Tr. 171:14-17*(she insures that the “timestamps” are accurate by “look[ing] at when the first call came in and mak[ing] sure that that's the actual start of the outage time”); *Tr. 174:24 - 175:1*(“the work is very similar, you know, as far as just the OMS component and my controller component currently”). While the plan is for the controllers to do more in the future, that has not yet occurred. *Tr. 160:3- 13*.

In conclusion, NorthWestern is modernizing and as part of that effort it is creating a central control center for its electric distribution network across a wide swath of Montana. Not surprisingly, it has detailed plans for the future, which plans included creating OMS dispatcher position and then the new position of

controller. It asserted to Local 44 that when the controller position was created and when the people in that position were trained and operating new systems and technology, the work formerly done by the OMS dispatchers would be totally automated; the OMS dispatcher position, duties and functions would no longer exist; and, the controllers would be performing an entirely new job with new functions.

That is not what has actually happened. As of the date of the hearing, and as properly determined by the Regional Director, the controllers, while training to take on additional duties, are continuing to do the work formerly done by the OMS dispatchers – they are ensuring that the systems used by the central control center accurately reflect what is occurring in the field during an outage. As of the date the hearing, the only changes in that central function have been in title and computer software. Other changes are planned, but those plans are not yet realized. Thus, at this time there is no record evidence showing what the actual job and functions of the controllers will be at some point in the future. And even if the current plans are fully accomplished, the controllers will perform the functions of the OMS dispatchers, plus they will be able to do more. Exactly how much more - - what that job will be, what skills it will take, what discretion controllers will have – has not been established.

For these reasons, Regional Director's Decision and Order Clarifying Unit should stand.

Dated this 12th day of February, 2021:

/s/ Karl J. Englund
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