Arbitration

National Grid	Gr: Mark-out Work
And	
United Steelworkers, L. 12012-04	Award: December 24, 2015

Arbitration Panel:	Roberta Golick, Esq., Chair Maria Marotta, Esq., Labor Manager, Company Panelist James Marioles, 12012 Committee Chair, Union Panelist
Hearings:	June 23, 2015; August 10, 2015
Appearances:	<u>For the Company</u> Patrick M. Collins, Esq. McCarter & English, LLP <u>For the Union</u> Alfred Gordon O'Connell, Esq. Pyle Rome Ehrenberg PC

<u>The Issue</u>

The parties framed the issue as follows:

> Did the Company violate the collective bargaining agreement by allowing its own gas construction contractors to locate and mark out gas facilities on their own gas construction worksites?
>
> If so, what shall be the remedy?

The Agreement

The March 26, 2012 to March 20, 2016 collective bargaining agreement provides, in relevant part:

CONSTRUCTION AND MAINTENANCE AGREEMENT

5.1 A new Damage Prevention group has been created to encompass Dig Safe locates and follow-ups, inspection services, pre-marking, and verifying and correcting gas facility data.

Background

This case comes to arbitration based on Local 12012-04's complaint that the Company assigned or allowed Dig Safe "locate and mark-out" work to be performed by outside contractors or their designees. While the parties apparently disagree as to whether the Union's allegation is accurate, and in any event, whether the activity amounts to a contract violation, the facts leading up to the time frame of the grievance are not in dispute.

For decades, Massachusetts has had what is familiarly known as a Dig Safe law – Massachusetts General Laws Chapter 82, Section 40. In brief, Dig Safe is a centralized call center that receives information from excavators about intended digging, and disburses that information to Dig Safe member utility companies so that the member companies will locate and mark out their underground facilities. As its name indicates, the purpose of the Dig Safe process is to protect underground utilities (e.g. gas, electric, phone, television) from damage by excavators who might otherwise be unaware of the pipes or lines below ground where they intend to dig. Other than in emergency circumstances, excavators (which could include home owners, their hired contractors, or others) are required to provide notice to Dig Safe within 30 days prior to the commencement of an excavation. The excavator is also required to "pre-mark" in white paint the area where the digging will occur. The excavator's notice to Dig Safe generates a Dig Safe ticket, which is immediately sent out to the member utility companies, who respond as

required.[1] Public utilities who receive Dig Safe notifications of a proposed excavation must timely mark out their facilities in their pre-designated color (yellow for gas; red for electricity) in compliance with the statute and in accordance with each company's internal policies.

From National Grid's perspective, there are three types of entity falling under the heading of "excavator." First, there are third-party contractors, such as the phone or electric company, or a construction company doing a public works project, or a private contractor hired by a homeowner. Second, there is National Grid itself, which might plan to excavate an area to install new service or repair existing service. And third, there are outside contractors *hired* by National Grid to perform gas-related work *for* National Grid.[2]

Prior to the events in question here, there is no dispute that for all third-party-contractor Dig Safe notifications received by National Grid, the job of "locate and mark-out" of the Company's facilities was the responsibility of the Damage Prevention group.[3] The mechanisms for locating gas facilities and some of the steps required by National Grid were enhanced through the years, but the fundamental task remained the same – i.e., to properly locate and mark in yellow paint the company's underground facilities so as to prevent damage during excavation.

There is also no dispute that prior to the events in question here, National Grid supervisors (and employees under their direction) purposely disregarded Dig Safe tickets that came through for the

[1] In the "old days," Dig Safe tickets were received by utility companies on teletype machines. Damage Prevention employees would take the paper sheets from the teletype machines. Today, Dig Safe tickets are transmitted electronically, and employees receive them on their computers.
[2] There is no issue in this case relative to the Company's subcontracting out of gas-related work.
[3] The collective bargaining agreement refers to a "new" Damage Prevention group, but that language has simply been carried over, unchanged, through a series of contracts.

Company's own planned excavation work and for excavation work to be performed by their own outside contractors. The Company's rationale was that since it knew where its own facilities were located below ground, Dig Safe did not require the Company to locate and mark out gas facilities in the manner required for third-party excavation. In the case of National Grid projects, employees would make markings on the ground to indicate where their gas facilities were, but the marks were not intended to and did not comply with the State's statutory and regulatory requirements for Dig Safe. Similarly, when employees in Damage Prevention oversaw the work of contractor crews doing excavation for National Grid, they made markings on the ground to indicate where the work was, but did not perform "locate and mark-out" functions as described in the Dig Safe procedures or the Company's internal mark-out policies. During a period from the late 1990's to 2000's when the National Grid classification that monitored outside contractors was eliminated, gas company construction contractors made their own markings on the ground where they intended to excavate. These markings did not follow Dig Safe procedures.[4]

Such was the undisputed state of affairs as the parties met to negotiate a successor to the 2009-2012 collective bargaining agreement (expiration date March 25, 2012). On March 25, 2012, the Company presented the Union with a "Final Contract Offer." Among its terms was a provision advanced by the Company and applicable to the Damage Prevention group, designed to allow for "a phased implementation of the use of outside contractors to perform locating. Such use will be outside the scope of the Use of Outside Contractor language on page B-19 of the CBA." The so-called "Final" offer also included a 9.75% across-the-board increase over four years and an increase in the pension multiplier by $6.00. The Union brought the offer to its members.

[4] If another excavator was scheduled to be in the area at the same time and filed a Dig Safe ticket, National Grid did send out a Damage Prevention Inspector to perform the formal locate and mark-out procedures required by statute.

The Union membership rejected the Company's "Final" offer on March 25, 2012, and the parties returned to the bargaining table the next day. Based on the Union's opposition to outside contractors performing Damage Prevention's locate and mark-out work, the Company ultimately withdrew its proposal to phase in such outside contractor usage. However, in exchange, the Union agreed to move the locate and mark-out work from the higher paid Inspector B title to the Inspector C title, and to lower the wage schedule for the Inspector C title. The Union further agreed to a significantly lower across-the-board wage increase (5% over four years rather than 9.75%) and a lower pension multiplier ($4.00 rather than $6.00). The Union bargaining committee recommended this so-called "Final Contract Offer" to the membership, and the deal was ratified.

One month after the new agreement, on April 25, 2012, Union Representative Rocco Leo filed the instant grievance complaining that the Company was using contractors to locate and mark out gas facilities at gas company contractor work sites. The grievance progressed, unresolved, to arbitration in 2015.

While the grievance was pending, the Commonwealth of Massachusetts Department of Public Utilities issued a Notice of Probable Violation (NOPV) to National Grid dated February 7, 2013. The NOPV indicated that "the Division has reason to believe that the Respondent may not have followed its operating and maintenance procedures with respect to locating and marking out sub-surface facilities." A DPU inspector had visited sites in March 2012. He noted at three locations that on either its own or its contractors' excavation sites, the Company's employees had placed white dashes on the street surface over its existing buried pipes, had painted the valves white and painted white offset arrows, and had failed to note the gas main size and did not locate and mark out its facilities 15 feet beyond the white pre-marks. The NOPV alerted the Company:

> In conclusion, the Division has reason to believe that National Grid did not follow its own procedure, DAMG-5020 MA [Company Procedure for Locating and Marking out Sub-Surface Facilities] for 1) marking out its own facilities in yellow paint; 2) identifying the size of its underground facilities; and 3) marking out its own facilities 15 feet beyond white pre-marks. These omissions may be violations of [49 Code of Federal Regulations] Part 192, Sections 192.13(c), 192.605(a), and 192.614(a).

The record at arbitration contains no information as to what, if anything, occurred in connection with the NOPV following its issuance by the Department of Public Utilities in February 2013.

Positions of the Parties

The Union argues that the contract language, on its face, preserves mark-out work for Local 12012 employees. There are no provisions in the collective bargaining agreement allowing for contractors to perform statutorily required Dig Safe work, and the negotiations leading to the current agreement demonstrate that the Company tried unsuccessfully to achieve that flexibility. Having abandoned its efforts at the table, the Company cannot now claim the right it forfeited in exchange for significant Union concessions. The Union clearly preserved the locate/mark-out work for its members, and the Company's assigning or sanctioning of such work by its contractors violates the contract.

The Company asserts that the work at issue is not bargaining unit work, and thus the Union has no claim. The work being performed by the Company's contractors is not Damage Prevention work and is in no sense actual Dig Safe locate and mark-out work. The duties of locating and marking out gas facilities for third-party contractors – pursuant to a Dig Safe ticket – are entirely different in both substance and purpose from the duties undertaken by Company contractors on Company projects. The Union reads too much into the bargaining history. The Company never sought to bargain over mark-outs being performed by Company contractors on Company jobs. What the Union preserved for its members was Dig Safe work in the Damage Prevention area – not the work at issue here.

Discussion

Notably, there is no dispute about what Section 5.1 of the Construction & Maintenance Agreement says, i.e., that Damage Prevention employees are responsible for Dig Safe locates and mark-outs. There is no dispute that at bargaining for the current Agreement, the Company sought an inroad into that blanket declaration by proposing a "phased implementation of the use of outside contractors to perform locating." There is no dispute that the Union rejected that proposal, and the parties worked out an eleventh-hour tradeoff wherein the outside contractor proposal disappeared in exchange for significant economic concessions by the Union. And there is no dispute that until approximately April 2012 – after the current agreement was in place – neither bargaining unit employees nor contractors hired by National Grid made any pretense of following Dig Safe statutory procedures or the Company's even stricter Dig Safe policy when the excavation was for the Company's own jobs. When it came to the Company's own excavation jobs, both bargaining unit members and contractors hired by the Company made their pre-excavation markings in white paint, essentially to indicate where to dig. If a Dig Safe ticket was somehow generated for the Company's own job, it was ignored or signed off as "completed."

It is fair to say, then, that when there is "actual" Dig Safe locate and mark-out work to be done, it is to be done by bargaining unit employees.

The disagreement here seems to center on the facts, not the contract. The Union contends that starting in or about April 2012, the Company expanded the circumstances under which it assigned or permitted Dig Safe locates/mark-outs to be performed. The Union states that (whether causally related to the DPU Inspector's February findings of Dig Safe non-compliance on Company or Company contractor

excavation sites or not[5]), the Company's contractors began following Dig Safe requirements in their excavation preliminaries. That work, the Union argues, is bargaining unit work.

The Company says no. The Company contractors are not performing Dig Safe work. They are not completing Dig Safe tickets. They are not adhering to any Dig Safe response time requirement. They are not filling out Dig Safe paperwork. They do not alert anyone about what they are going to do on the job. They are simply marking out the facility for themselves.

There are no details on the record as to what the "actual" work performed by a Company contractor was that led to the April 2012 grievance. And no clear picture of what, in fact, the Company is having its contractors do or permitting them to do in advance of Company-directed excavation work.[6] But this may be one situation where, glib as it sounds, the color of the paint does matter. If what the contractors are now doing is locate and mark-out work in yellow paint that, as far as the markings go, appear to be for the purpose of passing muster under a potentially watchful eye of a Public Utility Inspector, then yes, the contractors are performing bargaining unit work.

This case does not turn on whether Dig Safe tickets are generated at all these days, generated and disregarded, or are legally required for the Company's own work to be performed by the Company's own contractors. Nor does it turn on whether the contractors do every single thing set forth in the statutory scheme and as set forth in the Company's internal locate and mark-out policy manual. This is not a past practice case, but rather one where a hard-fought contractual limitation on the Company's

[5] The record does not indicate whether the Company was aware of the Inspector's finding prior to his formal report in February 2013.

[6] The Company-hired contractors work under the direction of National Grid. Thus, I agree with the Union that the Company is responsible for the contractors' work, whether expressly assigned or merely permitted.

discretion is arguably being flouted. If the Company is confident that the Dig Safe law does not apply to work performed by Company contractors for National Grid, it can instruct its contractors to return to the white paint markings that it believes are sufficient for the Company's own work. If, however, the color of the paint matters to National Grid, then it is fair to infer that the new way of doing things that led to the instant grievance was to comply, at least facially, with the dictates of the Dig Safe law. In that case, the work belongs to the Damage Prevention group.

The evidence presented at arbitration is sufficient to support a finding that the Company violated the contract by assigning or allowing Dig Safe locate and mark-out work to be performed by contractors or their designees. An order directing the Company to restore the work to the bargaining unit is warranted. As for a monetary remedy, neither the scope of the violation nor the harm, if any, suffered by bargaining unit members can be ascertained at this point. For that reason, the panel will reserve jurisdiction over the matter of remedy and will direct the parties to attempt to resolve any remedial issues beyond restoring the work to the bargaining unit going forward.

Award

The Company violated the collective bargaining agreement by allowing its own gas construction contractors to locate and mark out gas facilities on their own gas construction worksites.

The Company is directed to restore the work to the bargaining unit.

The parties are directed to attempt to resolve any further remedial issues. The Panel will reserve jurisdiction for 60 days over the matter of further remedy, if any, pending the parties' efforts to resolve remaining issues on their own. Jurisdiction may be extended upon request by either party.

For the Panel:

Roberta Golick

Roberta Golick, Esq.
Chair

Maria Marotta (in dissent)

Maria Marotta, Esq., Labor Manager
Company Member

Jim Marioles

James Marioles, 12012 Committee Chair
Union Member

Date: December 24, 2015