Before
MARC D. GREENBAUM
Arbitrator

In the Matter of Arbitration Between:

UNITED STEELWORKERS OF AMERICA, LOCAL 12004

And **OPINION AND AWARD**

EVERSOURCE ENERGY
Grievance No. 019-150-001D
(Critical Valve Replacement)

APPEARANCES

For the Union:
Alfred Gordon O'Connell, Esq.

For the Company:
Keith H. McCown, Esq.
Angela L. Ruggiero, Esq.

INTRODUCTION

On July 31, 2019, United Steelworkers of America, Local 12004 ("the Union") filed a grievance alleging that Eversource Energy ("the Company") violated the parties' 2017-2020 collective bargaining agreement ("the Agreement") by having contractors perform bargaining unit work while replacing a critical valve on Fairmount Ave. in Hyde Park, Boston. When the parties could not resolve the grievance, the Union demanded arbitration and the undersigned was selected as arbitrator.

Hearings on the grievance was held before the undersigned on a video conference platform on March 2 and June 25, 2021. At those hearings, both parties were present and represented by counsel. Following presentation of the evidence, both parties sought leave

to submit post-hearing briefs. Upon the arbitrator's receipt of those briefs, the dispute was ripe for resolution.

THE ISSUES

1. Whether the Company violated Article IV, Section 1 and/or Appendix F, Section 2 of the collective bargaining agreement by allowing a subcontractor to perform certain critical valve work on Fairmount Avenue in Hyde Park?

2. If so, what shall be the remedy?

RELEVANT PROVISIONS OF THE AGREEMENT

ARTICLE IV
WORKING CONDITIONS

SECTION 1

CONDITIONS NOT COVERED

Working conditions which were in operation on the effective date of the Agreement and which are not covered by this Agreement shall remain in effect unless changed by mutual consent of both parties to this Agreement. The Union agrees to not unreasonably withhold such consent when the change in question may interfere with the efficient operation of the Company; provided, however, that such change is not detrimental to the employees involved.

APPENDIX F

OUTSIDE CONTRACTORS

2. It is agreed that the use of outside contractors will not be extended into areas where they are not presently being used.

FACTUAL BACKGROUND

The Company operates a gas distribution system in Eastern Massachusetts encompassing the Boston and Worcester metropolitan areas among others. The system is composed of underground pipelines off which run individual gas services. The employees in its Distribution Department perform maintenance, repair and replacement

work on that system, supplemented by outside contractors. The boundary lines between where Company employees have the exclusive right to perform work and where those efforts may be supplemented by outside contractors is a source of frequent and continuing disagreement between the parties. Based on this arbitrator's experience, they do not have a monopoly on such disagreements. Instead, such disagreements are common in the electric, gas and telecommunications industries.

This controversy concerns a discrete portion of the gas distribution system – valves. Valves come in at least two varieties. Basic valves control the flow of gas to individual streets. This case concerns so-called critical valves which control entire sections of the distribution network and thus impact the flow of gas to far more customers than do the basic valves. Because they control entire sections, the number of critical valves in the distribution system is far smaller than the number of basic valves. Critical valves are identical to basic valves, with their critical designation being evidenced by their covers being painted yellow.

Critical valves are scheduled to be inspected by Company employees every year, but as many as fifteen months may else between those valves being inspected. Sometimes, those inspections reveal problems with the valve. If problems are discovered Company guidelines require that those problems be remedied within ninety days of its discovery, although the Company tries to do so within thirty days.

Those problems can be resolved in either of three ways. The existing valve can be repaired. Sometimes, albeit not frequently, another valve can be redesignated to perform the work of the defective critical valve. If neither option is feasible, the existing valve must be replaced. When a critical valve's replacement entails only the replacing of one

valve with another, without more, it is considered a replacement. If, as here, the defective valve must be bypassed, thus requiring the installation of new lengths of main to reroute the gas, it is called a redesignation.

Critical valves may also be replaced (using the term colloquially) in other circumstances. On some occasions, critical valves are replaced when the Company is relaying sections of gas main or installing new main and the valve is replaced as part of that replacement or installation project. Critical valves may also be replaced when so-called regulator pits are replaced or rebuilt. The record supports finding that the Agreement permits the Company to use outside contractors in both instances. The replacement of critical valves as a repair is a relatively infrequent occurrence, with one Company witness testifying that it occurs about every other year.

The critical issue in this case is defining the boundary between replacing a critical valve as part of a main relay project and redesignating a defective when that requires laying new main to reroute the gas around the defective valve. The issue is posed by the Company's decision to contract out the replacement of a defective critical value on Fairmount Ave. in the Hyde Park section of Boston.

The way the Company discovered the need to replace the valve is disputed by the parties, but that dispute is ultimately immaterial to the disposition of this grievance. According to the Union, the most senior gas technician in the Distribution Department learned from a foreman that there was a so-called Abnormal Operating Condition in the valve. For the lay people among us, that means simply that the valve would not turn, thus precluding its being turned off to stop the flow of gas in case of an emergency. A Company witness testified that the same flaw was discovered as the result of an

inspection by its Instrument and Regulation Department. There is a dispute, also immaterial, about whether a Company crew was dispatched to cut through the sidewalk and remove the concrete prior to the necessary hole being dug. The Company witness testified that there was no record of a crew being dispatched prior to the excavation.

What is not disputed is that the excavation required a so-called vacuum truck and that the Company does not own such equipment. It must, therefore, engage outside contractors to perform excavations requiring a vacuum truck and the Company did so in this instance. The senior gas technician in the Distribution Department was pulled off his crew assignment and assigned to perform the Inspector function for the excavation. The inspection revealed that the valve could not be repaired. Due to an ongoing construction project, the one valve which could have served as a backup was inaccessible. Thus, the Company's Maintenance Department determined that the valve required replacement or in Company terms, redesignation.

The replacement process required the building of stick shoring and the use of a vacuum excavator. Both tasks are performed by contractors because the bargaining unit lacks the equipment and skills to do that work. These factors did foreclose the Company from having the valve replacement performed by bargaining unit employees.

The redesignation project required bypassing the defective valve. That entailed installing new gas main so that, upon the project's completion, gas could be rerouted to the new valve, while the old valve was removed from the system. The arbitrator's lay understanding is that two then foot lengths of new main were required to effectuate the bypass. Other than the rerouting necessary for the bypass, the flow of gas to the area controlled by the critical valve continued through preexisting main.

At this time, the Company's crews were fully occupied and were described as being "straight out." A Company witness acknowledged that a Company crew could have been reassigned to perform the work in dispute. The Company was also using contractors at the time. Much of their work appears to have been on the Gas System Enhancement Program ("GSEP"). As a result, the Company was already incurring overtime expenses pursuant to the so-called penalty overtime provisions of the Agreement. A crew from one of the Company's established contractors was, however, "between permits" and thus available to perform the work and the Company engaged the contractor to lay the new main necessary for the bypass and install the new valve. The contactor's crew took three days to complete its work.

Company employees were not left out of the process The senior gas technician served as the Inspector during the replacement phase. Company crews removed the failed valve, performed welding, and did all of the live gas work and did some, if not all of the backfilling of the excavation. Company employees worked some sixty-two hours on the project. Some portion of this work, notably the live gas work, would always have been performed by Company employees. The Inspection work was the primary work generated for Company employees by having the contractor perform the critical valve's replacement. It is not clear from the record whether the project generated additional penalty overtime in addition to that which was already being paid because of contractor work on the GSEP project.

The critical issue in this case, of course, is whether the work performed by the contractor was exclusively reserved for the bargaining unit. A Company witness testified that "any valve replacements….that were not part of larger projects would

probably been done by Company crews." Although this was a rough description, it helps us identify the boundary that must be identified.

Both parties claim to find support in the history concerning the assignment of work when it comes to replacing critical valves. Critical valves are not replaced with great frequency. If one includes the Fairmount Ave. project, there were thirteen such critical valve replacements between 2004 and June 2019. Six of those replacements were performed by bargaining unit personnel. One of those projects, the Whiting Ave. extension in Dedham, entailed installing a new critical valve that was thirty or so feet away from the one being bypassed.

Five of the cited projects were a component of a main relay project or were part of regulator pit replacements. Two of the projects involved the use of 12" plastic pipe. Neither the regulator pit jobs nor those entailing the use of 12" plastic pipe appears to be work exclusively reserved for the bargaining unit. The Company records indicate that the new main laid in on these jobs did more than bypass the old valve. It appears that the contractor laid new main in addition to whatever main, if any, may have been necessary to bypass the old valve. As a result, the gas flowed both through any necessary bypass and the newly laid main. There was also evidence of two additional critical valve projects performed by contractors after the work in dispute that were completed prior to the filing of this grievance. One of those, on Vassar Street, Cambridge does not appear to have been part of a "larger project." The other, on Concord Ave., Cambridge was new construction and thus all new main. [1]

[1]As will be evident from the Opinion, the Company's ability to rely upon these two projects under either section of the Agreement is highly questionable since the contracting out occurred subsequent to the effective date of the Agreement.

POSITIONS OF THE PARTIES

Union Position:

The Union first claims to have demonstrated the Company's violation of Article IV, Section 1 of the Agreement. That provision, the Union avers, has been repeatedly construed by arbitrators under this Agreement as barring the Company from transferring having bargaining unit work. Those prior awards follow the reasoning of the 1998 Award by Arbitrator Bornstein. Arbitrator Bornstein held, the Union argues, that Article IV, Section 1 deems bargaining unit work on the Agreement's effective date to be a working condition and thus protects such work from being performed by contractors.

That the Company violated this provision, the Union argues, cannot be doubted. The evidence demonstrates, it says, that all critical values have been replaced by the Union, unless it the valve replacement was incidental to a main relay or the bargaining unit lacked the tools to perform the work.

The Union also claims to have demonstrated that the Company violated Appendix F, Section 2 of the Agreement prohibiting the Company from extending the work of contractors into areas where they have not been previously utilized. The evidence demonstrates, it contends, that contractors were not performing the work in question unless it fell within one of the two exceptions described above. By assigning the singular replacement of a critical valve to a contractor, the Union argues, the Company was thus improperly extending their utilization into areas they were not being used.

The Union claims there are multiple available remedies for the Company's violation of the Agreement. In addition to a cease and desist order, it argues, a compensatory remedy is appropriate to make employees whole for the loss of work.

Because it says, contractors were working on the GSEP program during the relevant time period, the Company was already incurring the overtime penalties provided by the Agreement. Thus, it says, the Agreement's penalty overtime provisions are irrelevant. The Union also contends that the penalty overtime provisions apply only when the contractors' performance of the work is permissible, unlike the present case. Thus, it argues, the Company would receive a windfall if those provisions were deemed to foreclose any additional compensatory remedy.

The Union thus requests a traditional make whole remedy making employees whole for lost overtime opportunities. Based on the record, it argues, that would be a sum equal to three days of lost overtime, with the Union left to identify the employees affected by the contracting out.

The Union thus requests that the grievance be sustained. As a remedy it requests that the arbitrator order the Company to cease and desist from further such violations of the Agreement and make the affected employees whole in all respects.

Company Position:

The Company contends that the Union failed to demonstrate that it violated the Agreement because the Company's decision to contract out the work in question was not shown to contravene a binding past practice. Each of the provisions relied upon by the Union, the Company avers, require the Union to demonstrate a past practice that supports finding that the work in question has been exclusively reserved for performance by bargaining unit employees. Such an inquiry is necessary it avers to determine whether the work in question is a "working condition" or whether it involved an area where contractors "are not presently being used."

The work in question, the Company continues, cannot be deemed covered by either provision because it occurred on a very infrequent basis. It thus fails to satisfy so much of past practice analysis as requires that an action be open, repeated, and consistent. The critical valve replacement disputed in this case cannot pass that evidentiary threshold, it says, given the infrequency of its occurrence over the parties' history.

The Union's efforts to avoid this result, the Company continues, must be rejected. The evidence demonstrates, it argues, that contractors have consistently installed critical valves and related gas main. The Union's attempt to distinguish this case by citing this valve as having been defective does not change the outcome. The Union's claim, it argues, is a contrived past practice, designed to avoid the obvious conclusion that the work in question has never exclusively been bargaining unit work.

In this instance, the Company continues, as was true in the past, the contractor was assigned to replace the critical valve and install new gas main. It does not make a difference, the Company argues, whether the work was prompted by a critical valve needing replacement or as part of a main relay project. The work is the same in all respects, it avers, and contractors have been performing this kind of work over an extended time period.

The Company also contends that the Union's claim is barred by a decision of Arbitrator Golick. Arbitrator Golick held, the Company avers, that the penalty overtime provisions govern situations covered by both Article IV, Section 1 and Appendix F and thus provides the exclusive remedy for violations of the Agreement.

The Union, the Company continues, received all the benefits provided by the Agreement when contractors are assigned to perform work. Company employees, it says,

performed the inspections, the required welding work and received the penalty overtime provided by the Agreement. The Agreement, the Company avers, effectively provides a form of liquidated damages in cases like this, and that compensation has been received by bargaining unit members. Because the Union is thus barred from getting relief, the Company concludes, the grievance must be denied.

OPINION

We are here to determine whether the Union demonstrated the Company's violation of Article IV, Section 1 and/or Appendix F, Section 2 of the Agreement. If so, the grievance must be sustained, and an appropriate remedy formulated. If not, the grievance must be denied.

Article IV, Section 1, the Maintenance of Benefits provision, provides in relevant part, that that "[w]orking conditions which were in operation on the effective date of the Agreement, and which are not covered in this Agreement shall remain in effect unless changed by mutual consent of both parties to this Agreement." It appears that at least three arbitrators have accepted the view that the term "working conditions" includes bargaining unit work. Thus viewed, Article IV, Section 1 prohibits the transfer of bargaining unit work, as it existed on the effective date of the Agreement, during the term of the Agreement, absent the parties' mutual agreement.

Appendix F, Section 2 is more explicitly concerned with protecting bargaining unit work from incursion by outside contractors. It thus provides that the "use of outside contractors will not be extended into areas where they are not presently being used."

Both sections of the Agreement protect bargaining unit work from incursion. Determining whether either or both sections have been violated requires a retrospective

examination of the parties' history in this area.[2] Article IV, Section 1 requires looking at the scope of bargaining unit work as of the date of this Agreement. Appendix F requires an arbitrator to determine "where [contractors] are not presently being used."

The retrospective examination required by both sections has prompted the Company to argue that the arbitrator must apply traditional past practice analysis in determining whether the work at issue is, in fact, bargaining unit work. Thus, the Company says that the Union must demonstrate that the practice governing the work assignment in question was, among other things, frequent, unequivocal and ascertainable over a reasonable time period. The arbitrator disagrees.

None of the cited arbitral jurisprudence between the parties utilizes such an analytical framework. This is not surprising.

Article IV, Section 1 preserves working conditions "in effect" on the effective date of the Agreement. That language suggests the parties envisioned taking a snapshot of the working conditions on the Agreement's effective date. The image captured by that snapshot defines the status quo against which the question of whether there was a change in those conditions must be determined. This likely prompted Arbitrator Bornstein to describes this section as a "*maintenance of benefits* clause, not a conventional past practice clause." *USWA, Local 12004 and Commonwealth Gas Co.*, AAA Case No. 11 300 02089 97 (Bornstein, Arb. 1998) at page 23 (italics in original).

Appendix F, Section 2 is similar. It sets the baseline for determining whether there has been an impermissible extension of the use of outside contractors by reference

[2] It is not clear whether a violation of Article F, Section 2 automatically requires a finding that the Company violated Article IV, Section 1. Conversely, it is also not clear whether a transfer of bargaining unit work to contractors, in violation of Article IV, Section 1, automatically establishes a violation of Appendix F, Section 2. The issue need not be decided and nothing in this Opinion should be understood as expressing any views on the issue.

to "area where they are not presently being used." Like Article IV, Section 1, the language seemingly envisions taking a snapshot of the areas where contractors were "presently" being utilized and using that as the baseline for determining whether there has been an impermissible extension of their utilization. For purposes of this case, we can consider "presently" as referring to the effective date of the Agreement.

Taking a snapshot is inconsistent with past practice analysis, since a snapshot is, by definition, static. Past practice analysis is dynamic, more like a video than a snapshot. The linguistic barriers to accepting the Company's suggested framework make it difficult to conclude that utilizing past practice analysis has been mutually accepted by the parties as the basis for applying the relevant provisions of the Agreement.

Consider the implications of accepting the Company's argument. It argues that its challenged decision was a reasonable exercise of its management rights. It also says that the Union cannot prove otherwise because over time there have been relatively few replacements of critical valves. Under the Company's view, the Union would not be able to establish a claim under either provision of the Agreement unless the work in question had happened on far more occasions. Given the relatively small number of comparable cases, under past practice analysis the Company could continue having this task performed by contractors. When the number of such occasions reached some critical mass, under the Company's theory, the Union's claim to the work would go "Poof" because there was a binding past practice to the contrary. It is unlikely that both parties intended an arbitrator to apply an analytical framework leading to such a possibility.

So viewed, we must look at the totality of the evidence and see whether it fits within the class of work governed by the relevant sections of the Agreement. When one

looks at the evidence, the boundaries become reasonably clear. As of the April 1, 2017 date of the Agreement, if the only work in question was the replacement of the valve, with no new main work or regulator pit replacement and the bargaining unit had the capability to perform the work, it's bargaining unit work. If, the valve was replaced as part of a main relay or regulator pit replacement or the bargaining unit lacked the capability to perform the work, the Company could decide to have the work performed by a contractor without violating the Agreement. This is fully consistent with the testimony of a Company witness that the replacement work is usually bargaining unit work unless it's part of some "larger project."

The valve replacement in this case was not part of some "larger project." The replacement of this critical valve required the installation of new main to bypass the old valve. The only main work involved was that required to bypass the old critical valve and route the gas through the new valve once it became operational. In all other respects, the gas flowing through the replacement valve continued flowing through preexisting main.

What the Company has characterized as a main relay is more akin to a slight main detour, with the new main limited to that necessary to perform the required bypass. This distinction, which the Company has characterized as illusory is consistent with the record evidence. If we envision the snapshot of the relevant work on the Agreement's effective date, it would show that contractors replaced critical valves when the new main laid was more extensive than what would be necessary to bypass a preexisting valve. In the cases where contractors replaced the critical valve, the gas flowed through new main serving the entire area in addition to whatever new main was necessary to bypass the old valve. The boundary is not illusory, it is readily ascertainable.

Thus viewed, the Company's decision to have contractors perform the critical valve replacement on Fairmount Ave. violated Appendix F, Section 2. This is so because contractors were not "presently" (judged by the Agreement's effective date) being utilized to replace critical valves where the only new main was that necessary for a bypass. This is exemplified by the 2014 Whiting Ave. Extension project in Dedham. Under these circumstances, we need not determine whether Article IV, Section 1 was also implicated since such a finding would not appear to make any difference in formulating the applicable remedy. We now turn to that question.

The Union is clearly entitled to a cease and desist order. It's claim for make whole relief is more problematic. It appears likely that the Company was already paying penalty overtime because contractor crews were performing GSEP work during the relevant time period. The arbitrator cannot, however, ignore the testimony of the Company witness acknowledging that it could have assigned a Company crew at straight time to perform the work.

Conversely the arbitrator cannot readily accept the Company's that make whole relief is unwarranted because the Union did all right anyway since Company employees performed sixty-two hours of work on the project. The Company's argument ignores the fact that the unit would have performed a portion of that work, notably the live gas work, even if there was no question about the Company's right to contract out the work. It appears that the Inspector's work and any other inspection work was the primary "new" work performed by Company employees due to the contracting out. That does not cover all sixty-two hours cited by the Company.

More difficult, is the Company's claim that the operation of the Agreement's penalty overtime provisions made the Union whole and that it has no further financial exposure. That proposition is based on Arbitrator Golick's award in *NSTAR Gas Company d/b/a Eversource Energy and United Steelworkers, Local 12004* (Accelerated Use of Contractors) (December 13, 2018). Arbitrator Golick effectively says that the Agreement's penalty overtime provisions are a form of liquidated damages that effectively preclude the Union from gaining make whole relief for claims governed by Appendix F, Section 4. The Company suggests that her rationale is equally applicable to Section 2. There is considerable force to the Company's argument.

The resolution of the Company's claim would require the arbitrator to consider whether the Golick award was, as claimed by the Union, limited to cases where the Company's use of contractors was permissible, rather than in violation of the Agreement. The arbitrator would also have to consider the likelihood that the Company was already paying penalty overtime because it was using contractors on other endeavors.

The parties' conflicting views about the proper application of the Golick award are both interesting and persuasive in their own way. Notably she wrote that the penalty overtime provisions are the "built in antidote" for "any increase in contractor usage." Her case involved the alleged impermissible "acceleration" of contractor utilization by the Company. Her reference to an "increase" seems to encompass the prohibited acceleration, not the use of contractors per se, which is otherwise wise permitted. On balance, her language is somewhat favorable to the Company's view than the Union's.

The arbitrator need not resolve that issue however, because a more substantial obstacle to ordering a make whole remedy is raised by the evidence that the Company

could have reassigned a Company crew to do the work. Had it done so, the work would have been performed on straight time. If the Company did so, there would have been no lost overtime opportunity and a make whole award in this case would not be prudent. Even though the Company did not make such a reassignment, its acknowledgement that it could have done so raises doubt as to whether the bargaining unit lost any overtime opportunities because of the Company's violation of the Agreement. Those doubts require the arbitrator to conclude that a make whole remedy is not a necessary component of the remedy for the Company's violation of the Agreement.

An appropriate Award shall enter.

AWARD

The Company violated Appendix F, Section 2 of the Agreement by allowing a contractor to perform certain critical valve work on Fairmount Ave. in Hyde Park.

As a remedy, the Company shall cease and desist from further such violations of the Agreement.

Marc D. Greenbaum, Arbitrator
Dated: October 21, 2021