AMERICAN ARBITRATION ASSOCIATION

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In the Matter of the Arbitration

between

UA LOCAL 855

and

PUBLIC SERVICE ELECTRIC & GAS COMPANY

Case No. 01-21-0002-1101
(pay increase for utilizing PPE)

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OPINION AND AWARD

Pursuant to the terms of a collective bargaining agreement, the undersigned Arbitrator was selected in accordance with the rules of the American Arbitration Association to hear and decide a dispute between the parties. The Arbitrator held hearings by Zoom videoconferencing on October 25, November 1, November 30, and December 22, 2022, at which both parties appeared through counsel who presented evidence and made arguments. The Union was represented by Leonard Schiro, Esq., and the Employer was represented by Frank Romano, Esq. The parties also submitted post-hearing briefs and reply briefs. Based on the evidence presented and arguments made, the Arbitrator renders this Opinion and Award.

Issues

At the outset of the hearing, the parties agreed to the following issues:

> Whether the Employer violated the collective bargaining agreement in failing to provide a two (2) step pay increase to unit members utilizing protective clothing and equipment to prevent COVID-19 exposure and/or contamination? If so, what shall be the remedy?

Facts

Most of the facts of this case, many of which the parties stipulated, are not in dispute. To the extent testimony of witnesses differed, the Arbitrator makes these findings of fact based on his assessment of all the evidence. The Employer is the largest electric and gas utility in the State of New Jersey. The Union represents approximately 1600 employees who work in the Gas Operations Department, which consists of two primary operational work groups. Employees in the "Street Department" construct, maintain and repair the Employer's underground network of gas pipelines, and employees in the "Service Department" perform customer work including gas leak/no heat investigations, appliance repairs and HVAC work. The Union also represents unit employees who perform electrical work and dispatch support. The Employer and the Union are parties to an Agreement effective May 1, 2011, through April 30, 2017, which the parties have extended through April 30, 2023.

During the 1996 negotiations, the parties agreed to a payment to unit employees who performed "Hazwopper Work," and in 2005, the parties increased the payment from one pay step to two pay steps. The term "HAZWOPER" is an acronym for "Hazardous Waste Operations and Emergency Response," and refers to a set of Occupational Safety and Health Administration (OSHA) guidelines that

regulate hazardous waste operations and emergency services in the United States. The provision of the Agreement at issue in this case is in Schedule D, entitled "LETTERS OF INTENT." In this provision, the parties spelled the pertinent word as "Hazwopper," which is how the Arbitrator spells the word in this Opinion, except the Arbitrator spells the word as "HAZWOPER" when there is a reference to OSHA. The Hazwopper Work provision in Schedule D reads as follows:

> **PAY TREATMENT FOR PERFORMING HAZWOPPER WORK**
>
> This is to confirm that during negotiation of the Agreement it was agreed to revise "Schedule A" of the Agreement to reflect the following footnote:
>
> ***Volunteers will receive two pay steps above his/her individual rate when assigned to perform hazwopper work.***
>
> Hazwopper work is defined as work in areas requiring the handling of hazardous/contaminated materials identified by the appropriate State and/or Federal agencies requiring the usage of additional personal protective clothing and equipment to prevent contamination.
>
> **Explanation of Revision:** Letter 5/01/96 revised to reflect increase from one to two pay steps.

During early March of 2020, before the spread of COVID-19, the Employer and the Union met to discuss the potential impact of COVID on the Employer's operations. Early on, in recognition that COVID might be a serious health concern, the Employer also began to communicate with its employees about COVID, and it continued to update employees throughout the pandemic. On March 9, 2020, New Jersey's Governor Murphy issued an executive order declaring a state of emergency due to the COVID virus, and on March 17, the Employer published a "Job Hazard Analysis" (JHA), setting forth internal safety procedures related to COVID, which the Employer updated based on information from the Centers for Disease Control and Prevention (CDC). On March 21, Governor Murphy issued an executive order which included a stay-at-home order for New Jersey. Meanwhile, the parties were meeting regularly to discuss COVID.

At a meeting on or about March 16, 2020, the Employer informed the Union that it was temporarily suspending all "non-essential" utility work. In late March, the Employer issued a JHA requiring employees in its offices to wear a face covering when working indoors, which was not lifted until March of 2022.

On April 7, 2020, the Employer issued a revised JHA setting forth various safety protocols that employees were required to follow when performing work in customers' premises, that included a pre-screening questionnaire. Before entering a customer's premises, employees were required to ask three questions to ascertain whether anyone at the premises had COVID in the last 14 days, or had close contact with someone who had COVID, or was feeling ill in any way. A fourth question was later added to ascertain whether anyone at the premises had returned "from travel to a designated (quarantine) state." If a customer gave a "no" answer, the employee was required to wear additional designated "basic" PPE while working at the customer's premises, but if the answer was "yes," and the employee had to enter the customer's premises, he/she was required to wear additional designated "upgraded" PPE. In the JHAs, the Employer recognized the seriousness of the pandemic, acknowledged COVID as a biological hazard, and required employees to utilize PPE which included face coverings, both masks and respirators, single use coveralls, disposable boot covers, and goggles or safety glasses. After the restrictions on in-premises work were lifted on May 20, 2020, the Employer resumed the "non-essential work" that it had previously suspended.

For two years, the Employer issued updated JHAs, and continued to require employees to wear additional PPE, either basic and upgraded, until the JHA dated March 16, 2022, downgraded PPE for all departments. By this time, Governor Murphy, on March 4, 2022, had ended the state of emergency in New Jersey. As noted, the parties met regularly during COVID to discuss the safety aspects of COVID, and they entered into several agreements related to COVID.

In the many discussions about safety, the parties had a special concern about employees who were required to enter premises of customers who had answered "yes" to the questions becoming infected with COVID. As a result of this concern, the Employer, in March 2020, provided a two step pay increase, which the Union considered to be Hazwopper pay, to employees in the Service Department who performed work in the premises of customers answering "yes" to the questions.

In response, the Union advised the Employer of its position that pursuant to the Hazwopper Work provision of Schedule D, all unit employees who, during the state of emergency, were required to wear additional PPE while working, were entitled to the two step pay increase. The Employer disagreed, asserting that a pay increase was not required under the Hazwopper provision of the Agreement to employees simply for performeding their work, and it refused to pay the two step increase to employees other than to those who were required to work in customer's premises where the risk of COVID was high. Thereafter, the Union filed a grievance dated April 24, 2020, alleging that the Employer had violated the Hazwopper Work provision of Schedule D, and seeking payment for all unit employees required to wear additional PPE. The Employer denied the grievance, and this hearing occurred.

At the hearing, Gregg Murray, the Union President, testified that unit employees in several departments were required to wear additional PPE that they had not been required to wear before the pandemic, that they did not receive the two step pay increase under the Hazwopper Work provision, and that they were entitled to the increase during the declared state of emergency between March 9, 2020, and March 4, 2022. Richard Moeller, who had worked for the Employer in its labor relations department before he retired in 2012, testified that he was present during the 1996 negotiations when the parties agreed to the Hazwopper Work provision, that the agreement for additional pay was to provide an incentive

for employees to report to work at HAZWOPER sites, that employees who applied to perform Hazwopper work had to complete training to perform this work, and they had to wear additional PPE when performing this work, that there were no discussions about applying this provision beyond the HAZWOPER work sites, and that he had drafted the Hazwopper Work language that was added to Schedule D of the Agreement.

Positions of the Parties

The Union argues that the Hazwopper Work provision in Schedule D, not the OSHA HAZWOPER provisions, applies to this case because the parties negotiated their own definition of Hazwopper Work into the Agreement. The Union maintains that it has always relied on the language of Schedule D as the basis for its grievance, that the Employer did not mention OSHA HAZWOPER in its response to the grievance, and that it was not until the arbitration that the Union learned the basis of the Employer's position. The Union contends that the Employer's "attempt to distance itself from the contract language of Schedule D is their best if not only chance" of prevailing since the Employer violated the clear language of Schedule D by failing to give the two step pay increase to the unit members who utilized additional PPE to avoid exposure and contamination from COVID-19. The Union argues that the OSHA HAZWOPER definition is irrelevant, that the language of the Hazwopper provision is clear and unambiguous, that the Arbitrator should not consider parol evidence but must give the ordinary meaning to the contract language, and that the ordinary meaning requires a finding that the Employer violated the Agreement by failing to give the two step pay increase to unit employees who wore additional PPE during the COVID state of emergency.

The Union asserts that the Employer is relying on an external source, the Code of Federal Regulations, which is not mentioned in Article D, and has

ignored the plain language of the Agreement. The Union maintains that the reference to other laws in the Agreement without providing definitions indicates that the Hazwopper provision of the Agreement, and not the OSHA provisions, applies, and that it would have been unnecessary to define the word Hazwopper in the Agreement if the parties had intended the OSHA definition of HAZWOPER to apply. The Union finds it noteworthy that the Employer provided the two step pay increase to unit employees who entered the premises of customers who had answered "yes" to the COVID questions, and that the Employer did so without discussing the payment with the Union. According to the Union, the only sensible explanation for the Employer paying this increase to unit employees from the outset of the pandemic is that the Employer "deemed that the two step increase applied pursuant to the agreement," not that the OSHA HAZWOPER definition applied, and the Union notes that the Employer never consulted its OSHA expert with respect to the definition of HAZWOPER under OSHA.

The Union asserts that the Employer acknowledged that all of its work locations were a potential source of COVID, which is why the Employer required the additional PPE for employees at all times, and the Union contends that the Employer's testimony, and evidence, fail to explain why the Employer provided the two step pay increase to certain bargaining unit members, something the Employer had never voluntarily done before. As noted above, the Union contends that the only explanation for this is that the Employer was following the express terms of the Hazwopper Work provision of Schedule D of the Agreement. In addition, the Union contends that the four corners of the contract "unequivocally defines when ... unit members are entitled to a two (2) step increase," and, consequently, unit members are entitled to the two step pay increase under the "plain meaning rule" of contract interpretation which requires that a contract ambiguity be determined without the use of extrinsic evidence. The Union

maintains that the Agreement expressly requires payment of the two step pay increase when, as here, employees work in "areas requiring the handling of hazardous/contaminated materials identified by the appropriate State and/or Federal agencies requiring the usage of additional personal protective clothing and equipment to prevent contamination."

Finally, the Union maintains that it has met all of the elements of the Hazwopper Work provision of Schedule D, that employees (1) worked in "areas requiring the handling of hazardous/contaminated materials," (2) "identified by the appropriate State and/or Federal agencies" and (3) as "requiring the usage of additional personal protective clothing and equipment to prevent contamination." The Union contends that unit members worked throughout the entire state of emergency declared by the Governor of New Jersey, they were required to wear additional PPE in all work areas, and they were required to handle materials in areas the Employer recognized as a "biological hazard" where COVID could spread "person to person" and by "contact with infected surfaces or objects." For all the reasons explained, the Union submits the Employer violated the clear and unambiguous language of the Agreement by failing to pay the two step increase in the Hazwopper Work provision of Schedule D to all unit employees who worked during the state of emergency, and had to don additional PPE, and the Union asks that the Employer be ordered to compensate all the unit employees who donned additional PPE during the state of emergency with a two step pay increase.

The Employer argues that it is the Union's burden to establish that the Hazwopper provision applies to work performed during the COVID pandemic, and that the Union has failed to meet this burden. The Employer contends that the Hazwopper provision is applicable only to HAZWOPER work under OSHA, that "it is entirely illogical to read an agreement uniquely entitled 'hazwopper work' as intended to apply beyond 'HAZWOPER' work," and that had the parties intended

to enter into an agreement covering hazard pay, the title of the provision would not have been limited to "hazwopper work." The Employer further argues that the provision applies to "volunteers," i.e., to employees who "volunteer ... to perform hazwopper work," that the words "hazwopper work" have "a specific and narrow meaning," and that it is not routine work that can be assigned under this provision, but is OSHA HAZWOPER work for which employees have to volunteer and for which they have to be trained and qualified to perform. The Employer maintains that it is clear that the unit employees who were assigned to perform the regular day-to-day work during the pandemic did not volunteer for that work, and that they were not performing work covered by the Hazwopper provision.

The Employer contends that the Union is taking the one sentence in Schedule D that defines Hazwopper work "completely out of context" in an effort to "transform the agreement into a sweeping mandate to provide two steps of pay any time an employee is required to don additional PPE because of a state or federal requirement," and that "such a reading is entirely inconsistent with the plain reading of the letter." In addition, the Employer argues that any doubt about the meaning of the Hazwopper provision in Schedule D is removed by the unrebutted bargaining history testimony that the Hazwopper provision was intended to incentivize unit employees to become trained and qualified to perform OSHA HAZWOPER work, and that there was no discussion in the negotiations about applying the provision beyond HAZWOPER work. The Employer maintains that the plain meaning of the language of the Hazwopper provision, as confirmed by the unrefuted bargaining history from the person who drafted the provision, requires a finding that the Hazwopper provision does not apply to the work performed by unit employees during the COVID state of emergency.

The Employer also contends that the parties' past practice confirms the limited scope of the Hazwopper Work provision in Schedule D, that the Union

was unable to cite a single example where the Hazwopper provision was applied to work outside the scope of the HAZWOPER OSHA regulations, that in each non-HAZWOPER example where unit employees received additional pay, the parties "entered into a new and distinct agreement," and that new agreements would not have been needed if the Hazwopper Work provision was applicable. In addition, the Employer contends that the fact that it paid the two step increase to employees who entered the premises of high risk customers does not establish that the Hazwopper provision was applicable. The Employer asserts that when the Union sought Hazwopper pay, the Employer maintained its position that the essential work necessary to be performed at the premises of customers, although potentially risky, was not Hazwopper work, that an additional payment was not required under the Agreement for this work, and that the Employer paid the two step increase as a "gesture to employees in the narrow situation when they had to enter a customer premise and exposure to COVID was confirmed or likely."

Finally, the Employer argues that even if the Hazwopper Work provision was applicable, the Union has failed to establish that employees were required to handle hazardous or contaminated materials. The Employer asserts that for the Union to prevail in this case, it has to demonstrate that employees were required to handle "the COVID virus," but that simply working during the declared public health emergency of the pandemic in the proximity of someone who has the virus does not establish that employees were required to handle hazardous or contaminated material. The Employer points out that the purpose of its safety measures during COVID was to insure that its employees were not exposed to COVID. For all these reasons, the Employer submits that the Union's claim for additional pay is not supported by the evidence, that the Union failed to meet its burden of proving a violation of the Agreement, and that the grievance should be denied in its entirety.

Discussion

As is true, generally, in a contract interpretation case, it is the Union that has the burden of establishing that the Employer violated the Agreement. And in a contract interpretation case, the Arbitrator must determine what the parties intended when they negotiated the disputed language. Usually the best expression of what the parties' intended language to mean is the language itself, which is the starting point of the inquiry. The heading of the disputed provision reads, "PAY TREATMENT FOR PERFORMING HAZWOPPER WORK." In 2005, the parties increased the payment under the provision from one step to two steps, to state, "Volunteers will receive two pay steps above his/her individual rate when assigned to perform hazwopper work." From the time the parties negotiated the provision in 1996, this provision has stated, "Hazwopper work is defined as work in areas requiring the handling of hazardous/contaminated materials identified by the appropriate State and/or Federal agencies requiring the usage of additional protected clothing and equipment to prevent contamination."

There can be no dispute that whatever the parties may have intended the words "Hazwopper work" to mean, the parties defined the words "Hazwopper work" as "work in areas requiring the handling of hazardous/contaminated materials identified by State and/or Federal agencies requiring the usage of additional personal protective clothing and equipment to prevent contamination." As the Union argues, if this language was clear and unambiguous, the Arbitrator would be required to enforce the language as written by the parties, and not consider any outside evidence such as bargaining history or past practice. There is also no dispute that in March of 2020, after COVID-19 was recognized as a serious health issue, the Governor of New Jersey declared a state of emergency. Nor is there any dispute that in or around that time, unit employees in the Street Department and in the Service Department, as well as office employees in the

Dispatch Group, and warehouse workers in the Storeroom Group, were required to wear additional PPE while performing their work, and that this was PPE that they had not been required to wear prior to the pandemic.

Thus, the Union established that two of the required elements for employees to receive Hazwopper pay were met, i.e., the State identified COVID as a serious health issue, and employees were required to utilize PPE to prevent contamination. However, other language in the Hazwopper Work provision raise questions as to whether the language of the provision is clear and unambiguous. First, the provision is headed, "PAY TREATMENT FOR PERFORMING HAZWOPPER WORK," at least suggesting that by using the unique word "HAZWOPPER," a word almost identical to the OSHA word HAZWOPER, the parties intended to reference the OSHA HAZWOPER provisions. If the use of the word "Hazwopper" was the only uncertainty in the provision, that would not be enough to conclude that the language of the provision was not clear and unambiguous, but the Hazwopper Work provision also states that, "volunteers" will receive the pay increase when "assigned" to perform Hazwopper work. The unit employees who performed their work during the pandemic wearing PPE were not "volunteers." These employees were required to wear PPE to protect against the COVID virus, but they were performing their regular duties, not volunteering for assigned work, another indication that the parties might have been referencing the OSHA HAZWOPER provision when they agreed to the Hazwopper Work provision in Schedule D.

Moreover, there is also a question as to what the parties intended in the Hazwopper Work provision with respect to the language that requires "the handling of hazardous/contaminated materials" by employees for them to receive the pay increase. The parties may have intended the Hazwopper Work provision to apply to a pandemic, but the language in the provision does not clearly and unambiguously state that unit employees are entitled to a pay increase simply

because they wear PPE during a pandemic to perform their work. The language of the Hazwopper provision requires "the handling of hazardous/contaminated materials" by unit employees for them to receive the increase, but the evidence does not clearly and unambiguously establish that unit employees were "handling hazardous/contaminated materials." As a result, the existence of these unclear circumstances require the Arbitrator to consider any relevant bargaining history and/or past practice that might determine the intent of the parties at the time they agreed to the disputed language in the Hazwopper provision of Schedule D.

The evidence reveals that the Employer has made agreements with the Union in the past to provide pay increases to unit employees working under hazardous or contaminated conditions that was not HAZWOPER work, but that COVID was the first situation that involved a pandemic. Neither the previous situations cited by the Employer, nor the fact that the Employer provided a two step increase to unit employees who wore PPE during the COVID pandemic, provide a basis for finding a binding past practice, i.e., the evidence does not establish a clear and consistent practice, over a period of time, agreed to by the parties. However, the credible testimony of Mr. Moeller, the person who drafted the Hazwopper Work provision, established that the parties had agreed to the language of the Hazwopper Work provision to provide an incentive to employees so they would agree to volunteer to perform OSHA HAZWOPER work, which also included training that enabled them to perform this work.

The evidence also established that there were prior instances where the Employer paid a one or two step increase to employees for performing work that involved hazardous or contaminated materials other than for HAZWOPER work, but, as mentioned above, the parties agreed to an increase of pay for this specific non-HAZWOPER work. Furthermore, the Employer informed the Union that the work requiring employees to wear PPE during COVID was not Hazwopper

work, and that the Employer was paying the two step increase as a gesture in recognition of the risks involved in performing work in the premises of customers who had COVID or had been exposed to COVID. In sum, although it may be hard to disagree with the proposition that the unit employees performing their jobs during the COVID-19 pandemic, and enabling customers to receive their gas and electric service, should be entitled to a pay increase for their dedication during these difficult times, under the language of the Hazwopper Work provision in Schedule D of the Agreement, these employees are not entitled to additional pay.

Therefore, based on the facts and circumstances of this case, and for the reasons explained, the Arbitrator issues the following

Award

The Employer did not violate the Agreement by failing to provide a two (2) step pay increase to unit employees utilizing protective clothing and equipment to prevent COVID-19 exposure or contamination during the COVID state of emergency. The grievance is denied.

Richard Adelman
RICHARD ADELMAN

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, RICHARD ADELMAN, do hereby affirm upon my oath as Arbitrator, that I am the individual who executed the foregoing instrument, which is my Opinion and Award.

Dated: April 10, 2023

Richard Adelman
RICHARD ADELMAN