OPINION AND AWARD OF THE ARBITRATION BOARD

IN THE MATTER OF ARBITRATION

BETWEEN

FLORIDA POWER & LIGHT COMPANY,
EMPLOYER

And

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, SYSTEM COUNCIL U-4
UNION

FMCS No. 17-50347
(Contractors performing substation switching work)
Date of Hearing: 3/8/18
Briefs Received: 6/1/18
Date of Decision: 6/20/18

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IN THE MATTER OF ARBITRATION BETWEEN

FLORIDA POWER & LIGHT COMPANY,

EMPLOYER

And

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, SYSTEM COUNCIL U-4,

UNION

(Contractors performing bargaining unit work)

I. STATEMENT OF THE CASE

Florida Power & Light Company (FPL or Company) and the International Brotherhood of Electrical Workers (IBEW or Union) are parties to a collective bargaining agreement ("MOA") which governs the wages, hours and other terms and conditions of employment of all the members of the bargaining unit. It also provides for a grievance procedure culminating in final and binding arbitration as the mechanism to be used to resolve any disputes concerning the interpretation or application of its terms.

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The instant dispute involves four separate grievances which were filed by the Union in 2011 and 2012 pertaining to the Company's alleged violation of the MOA by using contractors and other non-bargaining unit personnel to perform switching orders. The first grievance, which is

representative of the other grievances, was filed on December 9, 2011, and sets out the nature of the complaint as follows:

> ***First step – Statement of Request***
>
> Request the Company cease and desist allowing non-bargaining FPL representative's (CCR's) and contractors to perform switching orders that are the usual and normal practice of the Bargaining Unit except in cases of emergency when qualified Bargaining Unit employees are not readily obtainable. Request eight hours make-up overtime to be offered to the appropriate Restoration Specialist at GSO on 11/22/2011 for the SO# 593506 which was executed and completed by the Contractor and CCR.
>
> **Statement by Local Committee**
>
> The local committee agrees. This work has typically and usually been performed by the bargaining unit Restoration Specialist except under an emergency situation when bargaining unit employees were not readily obtainable.

The Company's response to the grievances was that they were denied on the grounds that there was no violation of the MOA.

When the parties were unable to resolve the issues in dispute through the grievance procedure, the Union invoked arbitration. Following the selection of the undersigned as arbitrator from a panel provided by the Federal Mediation and Conciliation Service, a hearing was conducted at Palm Beach, Florida on March 8, 2018. In the course of the hearing both parties were afforded ample opportunity to present evidence and to cross-examine witnesses called by the opposing party. The hearing was recorded by a stenographer and a copy of the transcript was provided to the arbitrator and to the parties. Upon receipt of post-hearing briefs in

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accordance with the arrangements that were made at the conclusion of the hearing, the record was closed pending the issuance of this opinion and award.

II. THE ISSUE

At hearing the parties stipulated to the following statement of the issue: Did the Company violate the MOA by assigning non-bargaining unit workers to perform switching inside Company substations? If so, what is the appropriate remedy?

III. RELEVANT CONTRACT PROVISIONS

Article I, Paragraph 1 – Recognition and Representation

The Company recognizes the rights of its employees to organize and to bargain collectively through representatives of their own choosing. The Union is hereby recognized as the exclusive bargaining representative with respect to rates of pay, hours of work, and other conditions of employment for all employees of the Company working in classifications listed in Exhibit "A" attached hereto, except as otherwise provided in Paragraph 3 hereinafter. The Company agrees to meet and deal with the duly accredited officers, committee or representatives of the Union on all matters covered by the terms of this Agreement.

Article I, Paragraph 4 – Management in Company

The right to hire, promote, suspend, layoff, demote, assign, reassign, discipline, discharge and re-employ employees and the management of the properties of the Company shall be vested exclusively with the Company, and the Company shall have the right to determine how many employees it will employ or retain in the operation and maintenance of its business, together with the right to exercise full control and discipline over its employees in the interest of proper service and conduct of its business, subject to any applicable terms of this Agreement.

Article II, Paragraph 21(a) – Layoffs-Demotions-Offers of Reemployment

The use of contractors during the term of this agreement shall not directly result in the layoff of Bargaining Unit employees.

***

Article IV, Grievance – Conferences – Arbitration

26. Grievances Defined

A grievance is hereby defined as a violation of the terms of this Agreement or any type of Supervisory conduct which unjustly denies to any employee the employee's job or any benefit arising out of the employee's job and notice of which has been given in writing within four (4) calendar weeks after its occurrence.

28. Arbitration Board – Powers

b) The Board of Arbitration shall be governed wholly by the term of this Agreement and shall have no power to add to or change its terms, nor shall the Board of Arbitration be authorized to pass on matters which are not properly grievances as defined herein.

Article V, Hours of Work – Working Conditions – Rates of Pay

38. Call Outs – Prearranged – Overtime

a) When an employee is required to report for work at a time other than the employee's regular work schedule, it shall be considered:

1. A call out if the employee has less than twelve (12) hours' notice, or

2. Prearranged overtime if the employee has twelve (12) hours' or more notice.

Any applicable Bargaining Unit employees will be called out or prearranged for overtime before any contractors are called into work. If FPL employees are being released from duty on FPL facilities, the contractors will also be released. Contractors will be allowed to complete the specific job that they are assigned to do at that time; no other work will be assigned.

TROUBLEMAN (Job Description)[1]

Answers trouble calls, repairs trouble on distribution circuits in the street lighting circuits or equipment and makes them safe against possible damage to life or property pending permanent repairs. He must be able to judge whether work to be done can be handled alone safely or whether additional help should be called. Patrols street lighting circuits when required and must perform switching on distribution/transmission circuits. Must be able to prepare all associated paperwork.

IV. SUMMARY OF THE EVIDENCE

System Council U-4 of the IBEW is composed of eleven different local unions. The Company is an investor-owned electric power company which provides electrical services to customers in most of the state of Florida. It has approximately 3,000 employees. The collective bargaining relationship between the Company and the Union dates back some seventy years. The parties customarily have three-year agreements which are in the form of a "Memorandum of Agreement", or "MOA."

The instant dispute involves what the Union has characterized as a work preservation issue. The work in question involves distribution switching inside substations that are owned and operated by the Company. In order to give meaning and context to this discussion, it was explained at the arbitration hearing that there are different kinds of switching involved the transmission of electrical power. There is a distinction between "substation switching" and "distribution switching"

[1] Troubleman was the job title prior to 1997 when it was changed to Restoration Specialist.

inside of a substation. Substation switching is the process of transmitting heavy voltage, upwards of 138,000 volts, from the power plant into a substation transformer. This is referred to as the "high side" of a substation. These voltages are much too high for residential and commercial purposes so the substations are designed specifically for transforming the power into lesser voltages. Distribution switching is the process of directing and distributing these lesser voltages, around 23,000 volts, out of the substation transformer via the feeder lines to an FPL local/regional service area. This is referred to as the "low side" of switching and is commonly said to take place "inside the fence."

Oftentimes when there is construction or repair work to be done that work cannot be accomplished while there is electricity flowing through the lines. Therefore, certain switches must be thrown in the substation to de-energize the lines "down line" so that someone can safely work on it. Switching involves the physical task of moving certain switches or blades in order to divert power off of, or direct power onto, a particular line while work is being performed.

The work in question involves the distribution switching or "low side" switching which takes place inside the substation and it involves two aspects. The first relates to obtaining switching orders and the second involves operating the switches. It is the Union's contention that such work is exclusively within the jurisdiction of the bargaining unit.

Consequently, the instant grievances were filed when members of management and employees of outside contractors performed this work. As a remedy, the Union has requested that a cease and desist order be issued to prohibit non-bargaining unit employees from performing the substation switching work in question and that the bargaining unit employees who should have been assigned the work be compensated for lost earnings.

The first witness called by the Union was Kenneth Sims, who has served as the Senior Assistant Business Manager for the Union since January 2000. His responsibilities include assisting in the grievance process and maintaining records. His testimony focused on a series of grievances which were filed in the past concerning non-bargaining unit employees performing switching work. The exhibits which were filed in connection with his testimony included some eleven grievances which were filed during the period from 1959 through 2006. Each of the eleven grievances involved supervisors or non-bargaining unit employees performing switching work in substations. All of the grievances were resolved in the Union's favor based on the Company's recognition that it did not intend to have supervisors perform such work and the promise that they would not perform switching work in the future.

On cross-examination Sims stated that he was not directly involved in any of the grievances which were introduced in connection with his

testimony. He stated that most of the grievances involved supervisors performing bargaining unit work and that in most instances the Company indicated that it did not intend for them to perform such work. He also acknowledged that none of the grievances involved contractors performing bargaining unit work. In contrast, the grievances at issue in the present case involved both contractors and supervisors performing switching work.

Dennis Russell is the Recording Secretary for the Local Union and a member of the System Committee. He is a Journeyman Lineman by trade but currently serves as a Distribution Dispatcher. As such he must maintain a switching certification in order to serve on the statewide distribution switching list. He has held the Distribution Dispatcher position since 1987. As a Dispatcher he sends technicians to deal with customer problems and complaints. He also writes switching orders.

Russell testified regarding a tailboard sheet that he completed on February 18, 2018 as an example of an instance where crew switching work is being performed. He noted that all employees listed are members of the bargaining unit. He added that in 2011 when the grievances arose, bargaining unit employees were likewise assigned to do the switching work.

In connection with Russell's testimony a switching order that is the subject of one of the grievances was introduced into evidence. Russell

testified that he processed the grievance in that case and he questioned Supervisor Joe Perelezzo as to why he was allowing contractors to perform switching work in the field. The work to be performed was described in the switching order as follows:

> "Need UG feeder DIP deenergized to trans OH FAC - - -not transferring riser just the OH FAC. Riser on UG job."

The order also shows that the clearance to perform the work was granted to Matt Cavileri, a contractor. Russell testified that he filed a grievance concerning the assignment of this work to a contractor and contesting the Company's right to have Supervisor Perelezzo pick up the switching orders. He stated that he was not aware of any other contractors performing the switching work at that time.

On cross-examination Russell explained that in the grievance that he filed he requested eight hours pay for the bargaining unit employee who was affected by the Supervisor picking up the switching order. However, he conceded that if the employee were already on duty the time involved to complete the switching could be as little as twenty or thirty minutes. On the other hand, he stated that it could be as much as twenty or thirty hours.

Russell stated that did not do any investigation to find out who would have been the Restoration Specialist to be called out for the job. He added that he did not know who actually performed the switching tasks. He recognizes that supervisors are on the switching list but stated

that he does not allege that Perelezzo operated the switches. He added that he relied on Paragraph 1 of the MOU, the Recognition Clause, to support his grievance.

Mario Manier is employed by the Company as a Restoration Specialist and is certified to be on both the substation and distribution lists. He is also certified in CPR and various other functions relating to emergency and rescue. Manier is President of the Local Union and also serves on the System Committee.

Manier testified that as a Restoration Specialist he gets instructions from dispatchers regarding work on street lights. He also does switching work on substations which involves picking up an order, going to the substation, checking the switching order and operating diaphragms. The work generally involves energizing or deenergizing the station for a clearance.

Manier testified that contractors are not permitted to perform his work as the switchman of record. He stated that he is on both the substation and distribution lists and can operate both high (transmission) and low (distribution) voltages. Individuals who are not on the list are not permitted to do switching inside the substation. He added that a person must complete a two-week training course in order to qualify to perform work on voltage at the substation. He noted that he has not seen any

supervisors or contractors performing work inside the fence surrounding the substation.

On cross-examination Manier testified that he was in the meetings concerning the grievances at which the Union expressed concern about supervisors picking up orders for contractors to perform work at the substation. He confirmed that picking up the order requires making a phone call or talking with the dispatcher via the radio. The "switching" involves the actual physical tasks of moving the switches. He stated that he did not personally observe such work being performed.

Dwight Mattox began working for the Company in 1981 as a Helper and after completing an apprenticeship program he became a lineman in 1984. He subsequently transferred to a Troubleman (now known as a "Restoration Specialist" or "RS") job and held it until 2017 when he became a Distribution Dispatcher. He testified that he served as Chief Job Steward and later became President of Local 359 in Miami for sixteen years. He then held the position of Council President for sixteen years up until 2017.

Mattox testified that he served as a Distribution Switching Instructor for around thirty-two years. As a switching instructor he taught both distribution switching and substation switching. He designed course criteria for safe work practices and procedures in order to ensure that the work was performed in a safe manner. He explained that the distribution

training involves a course that extends over seven days, eight hours per day, and the students must pass a test at the end. He stated that it is very important from the standpoint of safety and efficiency.

Mattox further testified that the Distribution Joint Safety Committee must approve all of his training criteria before the course can move forward. He stated that no contractors are involved in the training but that the training does involve FPL supervisors, production leads and contractor compliant reps. He explained that they were included so that they could properly oversee the crews that they supervise. Once they complete the training they are placed on the distribution switching list.

The first witness called by the Company was Mike Bryce, who was employed by the Company from 1985 until his retirement two years ago. After working as a Lineman for several years he transferred to management in 1994 and worked in the Human Resources Department. He was Vice President of Human Resources in charge of labor relations when the grievances in question were filed. It was his understanding that they all related to contractors performing switching work on jobs and projects that they had been assigned.

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Bryce testified that during bargaining in 2001 the parties had discussions concerning the Company's right to use contractors. The discussion focused around the Union's desire to place limitations on that right. He testified that the discussion ultimately led to the language which

appears in Paragraph 21 of the Memorandum of Agreement which was negotiated at that time and reads as follows:

> "(a) The use of contractors during the term of this agreement shall not directly result in the layoff of Bargaining Unit Employees."

Bryce explained that this was the first time such language appeared in a MOA.

Bryce further testified that a decision that was issued by Arbitrator David Beckman on October 3, 1991, found that there was no contractual restriction on the Company's right to use contractors. He added that a similar decision by Arbitrator Sandra Furman known as *Tech 21* was issued on August 27, 2010 and likewise rejected the Union's argument that the Company did not have the right to contract out work. He indicated that in that case the Union made an argument similar to the one it makes in these four grievances regarding an alleged violation of the Recognition Clause. It was his recollection that in the *Tech 21* decision the arbitrator rejected the Recognition Clause as a promise of work. He stated that this decision as well as that of Arbitrator Beckman refutes the Union's claims that the contracting out of the work in question violated the Recognition Clause. He added that it would be very inefficient if the Company were required to call in another crew to do the switching aspect of the work.

On cross-examination Bryce acknowledged that the Company has never disputed the fact that each of the grievances involved contractors performing switching tasks under the supervision of an FPL supervisor.

Randy Curtis has been employed by the Company since 1983 and has served as a Production Leader for the past fifteen years. One of his responsibilities involves overseeing contractors. He is responsible for the management of any jobs to which contractor crews might be assigned, some of which may require considerable switching. He gave an example of an underground cable which runs from the substation to an overhead pole. When that cable needs to be replaced it requires a lot of field switching as well as switching inside the fence to clear the cable. He stated that he would pick up the switching order and hold the clearance and then supervise the contractor performing the switching. Curtis stated that he had been handling the work in this manner for the last fifteen years. He also noted that if he had to bring in bargaining unit employees to perform such work, it would be very costly and inefficient. The Company would be paying a bargaining unit employee and a contract employee to be working at the same time.

Curtis testified that he does not do any of the switching himself as his role is strictly supervisory. He stated that he received training for distribution switching in the seven-day class taught by Dwayne Mattox and he is currently on the statewide distribution list. He is not on the

substation switching list and stated that he has never picked up a substation switching order.

On cross-examination Curtis stated that it was his understanding that the grievances arose because contractors are being assigned to perform distribution switching inside substations.

Dave Fite has been employed by the Company thirty-eight years. He is currently a Production Lead and he is responsible for overseeing construction work and emergency work performed by contractors in downtown Miami. The work which he must manage involves considerable switching inside substations. He stated that after he obtained an order he would supervise the execution of it by contractors. He added that if he had to call in bargaining unit employees to do the switching it would create substantial delays.

He noted that contractors had been doing this work since he became a supervisor in 2003. While he agreed that some of the work performed by the contractors involves the same job that the restoration specialists can do, he noted that they also do construction work. He added that most of the time they do not know when they will be finished and sometimes they work around the clock. He explained that it would be a problem if they had to wait for someone to come out to do the switching before they could complete the job.

Mark Depass has been employed by the Company thirty-eight years and is General Manager of Central Maintenance and Construction. He is responsible for overseeing major maintenance and large construction projects. On occasions he has been responsible for managing and assigning work to construction crews. Supervisors working under him have responsibility for obtaining the switching orders, assigning and coordinating the switching work for the contractors, and being present in the substation when the contractor is doing the switching phase of the work. He explained that it is more efficient to have the crew that is performing the work to do the switching because that crew is the most familiar with the job and it also helps continuity. He added that they often have a restricted time frame within which to work and the crew needs to be in full control of the progression of that work.

According to Depass, the Company has used contractors to perform such work since at least 1989 when he was working in the Central Yard. Under the direction of an FPL supervisor contractors were performing their own switching work inside the substations in connection with the jobs that they were performing.

William Pflug has been employed by the Company since 1987 and held the position of Switching Coordinator between 2005 and 2007. He stated that the switching is performed on the basis of a document known as "Guidelines for Switching Qualifications" and that he is responsible for

maintaining and observing such guidelines. He noted that the current guidelines as well as the guidelines that previously existed specifically allow the use of outside contractors to perform the switching work in question, so long as it is under supervision of a qualified switch person. That person may be a FPL Supervisor, a production lead, or another individual who is qualified in switching. He also noted that the Union was fully aware of the guidelines based on the fact that they were distributed to all employees on the Distribution and Switching List, which included some members of the bargaining unit. He stated that no one raised any objections when the Guidelines were published. Although Pflug was unsure when the guidelines were originally implemented, he stated that they went back to at least 2002.

Bruce Martinez is employed by the Company as the Senior Director of the Reliability Task Force. He has been employed for thirty-four years. He explained that there is a difference between substation switching, distribution, and distribution switching inside the substation. He stated that no bargaining unit employee has ever been laid off as a result of the use of contractors to perform work at switching stations.

Martinez explained that the basis of the grievance was that contractors were doing distribution switching in the substation. He stated that the parties discussed this during numerous meetings between the

Company and the Union and that Dennis Russell was fully aware of the Company's position on the issue.

In rebuttal for the Union Dennis Russell testified that he was responsible for writing all of the grievances that are at issue in this case. He stated that the work that led to them concerned a supervisor, Perezello, picking up a switching order. In that case Perezello took the order and then supervised the contractors who performed the work. To his knowledge Perezello did not actually do the switching work.

IV. DISCUSSION AND DECISION

As a beginning point in this analysis, it is important to point out that as the moving party in this case, the Union has the burden of proving that the Company violated the MOA when it assigned non-bargaining unit workers to perform switching inside the Company substations. As the arbitrator explained in *Johnston-Tombigbee Manufacturing Company,* 113 LA 1015, 1020 (Howell, 2000):

> ...The general rule, followed by most arbitrators in non-disciplinary proceedings, is that the grieving party, typically the union, bears the initial burden of presenting sufficient evidence to prove its contention. It is therefore usually up to the union to demonstrate that the action taken by management is inconsistent with some limitation, contractual or otherwise, in the labor agreement .... The doctrine of burden of proof simply means that the party who asserts a claim or right against another party has the burden or responsibility of proving it.

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This arbitrator remains mindful of the principles generally applied when the issues involve the interpretation of the provisions of collective

bargaining agreements. In *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), the Supreme Court explained that, "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement."

It is well-settled that an arbitrator's authority derives solely and exclusively from the parties' contract. As stated by the arbitrator in *Lorriland, Inc.,* 87 LA 507 (Chalfie, 1986):

> An arbitrator in a labor arbitration matter is confined to the interpretation and application of the collective bargaining agreement; he has the task, responsibility and limitation of interpreting and applying the pertinent terms and provisions of the bargaining agreement between the union and the company.
>
> His function is not to rewrite that agreement and certainly it is not to suggest, imply nor to inform the parties of what changes should be effected, renegotiated or changed even if his sense of justice and fairness should so dictate, or even if he believes the agreement contains inequities.
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> * * *
>
> It is an established arbitral rule of construction, as well as a legal rule, that when the contract language is clear and unambiguous, the intent of the parties is to be found in its clear language....
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> * * *
>
> For an arbitrator to interpret the unambiguous language of a contractual provision, instead of as it is written, will be clearly to change the parties' contract under the guise of construing it.

In *East Liverpool Board of Education and East Liverpool Education Association,* 113 LA 1127, 1129 (Fullmer, 1999), the arbitrator explained:

> As with any contract interpretation case the first reference is to the specific terms of the parties' agreement. If they unambiguously resolve the point at issue, the arbitrator has no choice but to apply them as written.

In a case decided by this arbitrator many years ago, *Gates Rubber Company and United Rubber Workers of America, Local 780,* 96 LA 445, 446 (Sergent, 1991), I stated:

> It is well-settled arbitral principle that where the language of a contract is clear and unambiguous in the sense that it is not susceptible to plausible but conflicting interpretations, there is no need for interpretation and an arbitrator will not ordinarily give it a meaning other than that expressed. Stated more succinctly, if the language at issue is unambiguous it should be applied rather than construed.

In sum, arbitral precedent makes it abundantly clear that arbitrators are bound by the clear and unambiguous language of the contract. Moreover, any terms negotiated by the parties must not only be recognized, but also strictly enforced by arbitrators.

When these concepts and principles are applied to the present case, especially with reference to the unambiguous language of the Agreement, the bargaining history, and established past practice, the only conclusion that can properly be drawn is that the Union's efforts to have this arbitrator declare the Company's practice of allowing supervisors to pick up switching orders and direct the switching tasks to be performed by the contractors to be in violation of the MOA are misguided.

By way of background, each of the four grievances in this case arise out of an instance where a contractor crew performed distribution switching inside of a substation at the direction of a trained and qualified FPL Supervisor. Union witness Dennis Russell authored each of the grievances but admitted that he knew few details concerning the underlying facts. Russell did no investigation regarding the amount of time involved with the switching work or who allegedly performed the work. He also could not identify the employee(s) who would receive the eight hours of overtime pay requested in the grievances. Although the Union undoubtedly failed to fully develop the underlying factual background for each of these instances, it is undisputed that the Supervisor did not perform any of the physical work associated with the switching. Rather, the FPL Supervisor is alleged to have made a phone call to a Dispatcher to obtain a switching order and then proceeded to supervise the contractor crew, who was already working on the job, as they performed the opening and closing of switches. Although FPL Supervisors are trained and qualified to do the work, in these instances the supervisor was acting purely in a managerial capacity when overseeing the contractor crews.

As a starting point for this discussion, there is simply no question that FPL has the right to have their supervisors act in a managerial capacity to oversee and direct the work of its contractor crews. It is long-

established and widely accepted in the realm of industrial relations that the employer has an inherent and reserved right to manage its operations including the assignment and direction of work. In fact, the right of an employer to manage its business is so engrained in the legal fabric of labor-management contracts that even in the absence of an express management rights provision in the contract, it is well-understood that the employer retains the inherent right to operate its business unless and until a specific provision of a contract places a limitation on that right. This reserved rights doctrine has particular application to the case at hand, and it underscores the heavy burden the Union bears to prove a contract violation by the Company. In *Voss Steel Corp,* Arbitrator Allen explained:

> The majority of arbitral authority supports a view that the Employer has retained all the managerial rights necessary to manage the plant, direct the workforce, schedule the days of work, and operate its business in a manner it deems necessary to maintain the most efficient results. Those managerial rights remain in the possession of management until a specific provision of a contract limits such rights. The Agreement does not grant management a right to operate its enterprise, but rather it is a specific limitation upon the Employer's right to manage all aspects of its business. See *Detroit News,* 69 LA 52, (Volz, 1977), where it was held:
>
> "First, it must be recognized that a collective bargaining agreement generally is not be viewed as a grant of authority to the employer; rather, it is to be regarded as a restraint upon the authority which it would have in the absence of agreement. Therefore, as a general proposition, the burden is upon the Union to point to some contractual restraint limiting the Company in doing what it did and not upon the latter to find affirmative contractual authority to support its decisions.

The Union's burden is perhaps even more onerous in this case because the Company has expressly reserved those certain rights via the management rights clause in the MOA. Article 1, Paragraph 4 documents the explicit understanding and agreement of the parties that all matters pertaining to the conduct and management of the Company's business are vested exclusively in the Company unless there is some other limitation on that authority provided for in the Agreement. A plain reading of the clause shows that the assignment and direction of work is among those fundamental managerial rights which the parties have agreed the Company has reserved to itself. Because there is can be no doubt that the Company has the right to have their supervisors oversee and direct the work of the contractor crews, the only remaining question is whether FPL has the right to allow the contractor to perform the switching tasks on the repair job that they have been assigned.

In that regard it should be noted that the Union does not challenge the Company's right to use contractors generally, but rather challenges the practice of allowing contractors to perform the switching work which it claims is the exclusive province of the bargaining unit. In each of the four grievances at issue, the Union contends that the MOA was violated by the Company in allowing non-bargaining unit workers to do switching in the substations.

It should be pointed out that in each of the grievance forms, as well as at the arbitration hearing, the Union's sole stated basis for the alleged contractual violation is Article I, Paragraph 1 of the MOA. However, any fair reading of that provision shows that the language is nothing more than routine "recognition clause", which, even when viewed in the light most favorable to the Union, is entirely unrelated to the issue before the Arbitration Board. Indeed, not a single Union witness was able to articulate precisely how or why the Company's actions are in violation of Paragraph 1.

Perhaps recognizing that its reliance on Paragraph 1 was gravely misplaced, in its brief the Union takes a different tack and poses several alternative arguments as to how the Company has violated the MOA. First, according to the Union the distribution switching being performed by the contractors is the exact work defined as bargaining unit work in Paragraph 5 of Article I "Continuity of Work" in which the Company has agreed to do nothing that would prevent the continuity of performance of its employees. Second, the Company has violated Article 38 which mandates that bargaining unit workers must be called out or prearranged for overtime before any contractors are called into work. As a third alternative, the Union claims that the Company improperly assigned the work of substation switching in violation of the relevant job description which states, in part, that the RS "must perform switching on

distribution/transmission circuits." Finally, the Union has presented eleven "precedent setting" past grievances between the parties which the Union claims to have settled based on the parties' mutual recognition that operating the switches is exclusively the work of bargaining unit employees. On any or all of these grounds the Union urges the Board to find that FPL violated the contract by permitting contractors to perform the switching work. After due consideration of the record, the Union's arguments are found to be without merit for several reasons.

First and foremost, the bargaining history shows that since 2001 there has been language in the MOA which governs the right of the Company to assign work to subcontractors. The language of Paragraph 21 of the Agreement is fairly typical of that found in labor agreements and recognizes the Company's right to use contractors subject only to one restriction – "[t]he use of contractors during the term of this agreement *shall not directly result in the layoff of bargaining unit employees.*" (emphasis added). The evidence presented by the Company shows that this language was the product of collective bargaining during the 2001 negotiations for a new contract and became the contractual standard by which contractors may be utilized. The language makes it crystal clear that the Company has retained the right to make assignments to non-bargaining unit employees, except where such assignments "directly result in the layoff of bargaining unit employees." Accordingly, in order to

sustain its burden of proof the Union would have to show that a bargaining unit employee suffered a layoff as a direct result of the switching tasks which gave rise to these four grievances.

As aptly pointed out by the Company, similar subcontracting language which grants the employer broad discretionary power to subcontract has been the subject of a number of arbitration cases including *Eaton County Road Comm.*, 110 BNA 198 (Allen, 1997). In that case the arbitrator noted that:

> [t]here are many labor arbitration awards requiring the employer to justify its decision to contract out bargaining work, by showing there was a reasonable necessity for subcontracting. But, if the parties have expressly agreed, by contract, to grant broad discretionary subcontracting rights to management, such as in the instant case, that language must control.
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> * * *
>
> As to the merits, the Agreement expressly grants to the employer discretionary rights to subcontract, after giving notice to the Union. The only significant restriction on management is no employee can be laid off as a direct result of the subcontracting. If there is no evidence of the employer's bad faith in making the decision to subcontract, and if the subcontracting did not destroy, or weaken the bargaining unit, then an arbitrator should not overrule management's judgment to subcontract.

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As aptly stated by Arbitrator Cohen, "[w]here the contract specifically sanctions subcontracting, either outright or subject to certain stated conditions, the arbitrator is precluded from engaging in weighing the equities of the situation. The arbitrator cannot disregard the clear and

unambiguous contract language and dispense his brand of industrial justice." *EG & G Sealol, Inc.*, 81 BNA 1157 (Cohen, 1983).

In the instant case, the record is utterly devoid of any evidence which would establish that any FPL employee has been laid off or discharged, much less that any employee was laid off or discharged *as a result of* the work assignments complained of. To the contrary, Union witnesses were forced to concede that no employees had been laid off. Because the Union has not demonstrated that a layoff occurred as a result of the assignment of the switching tasks to contractors, it clearly has not met its burden of proving a violation of the MOA.

Second, even if the unambiguous language of the agreement did not dispense with the issue the evidence in this case clearly shows that there is a long-standing and well-established practice of using contractors to perform switching tasks inside the substations. Company witnesses testified that the practice of using contractors to perform switching jobs at the direction of an FPL Supervisor and as a part of a larger job already assigned to them has been in place since at least 1989 – decades before the grievances in this case were filed. Mark Depass, the General Manager of Central Maintenance and Construction, has been with the Company for thirty-eight years and he testified that the Company has used contractors to perform such work since at least 1989 when he was working in the Central Yard. David Fite, who is responsible for overseeing construction

and emergency work performed by contractors in downtown Miami, stated that contractors he manages perform considerable switching inside substations. He noted that contractors had been doing this work since he became a supervisor in 2003. Similarly, Randy Curtis has been employed by the Company since 1983 and has served as a Production Leader for the past fifteen years. He testified that during his time in that role he has routinely picked up switching orders and held the clearances while supervising the contractors as they performed the switching. The Union offered no evidence to refute this testimony.

Furthermore, former Switching Supervisor Bud Pflug testified that the Company implemented written Guidelines for switching which allowed for and contemplated this practice. It is noted that these "Guidelines for Switching Qualifications" contain two complete subsections of guidelines which are "primarily for contractors." It is clear from reading the guidelines that the Company clearly envisioned and provided for the practice of contractors performing their own switching. These sections grant contractors specific permission to operate certain enumerated switches and equipment on both the "URD Switch List" and the "Overhead (OH) Switch List." Furthermore, the final paragraph of the guidelines is a catch-all provision which addresses contractors operating other types of switches, including the same distribution switching which is at issue herein. It reads as follows:

> For contractors switching on Distribution Facilities that fall outside of the URD and OH Guidelines, an FPL representative (WHO IS CURRENT ON THE **DISTRIBUTION SWITCHING LIST**) will personally direct the contractors in the switching operation and hold all clearances issued.

Pflug testified that these written switching guidelines were implemented as far back as 2002 and that they were "common knowledge." Moreover, the Union had direct knowledge of the guidelines as they were sent to members of the bargaining unit and the Union did not object. Based upon the overwhelming weight of the evidence herein, FPL has clearly established the existence of a past practice of using outside contractors to perform switching work which firmly negates the Union's contention that this work is reserved for the bargaining unit.

Third, even if the issue concerning the use of contractors was not resolved by the unambiguous language of the MOA, it would nonetheless have to be concluded that the practice at issue in this matter is entirely reasonable and consistent with sound business practices. In a decision many years ago, I set forth a series of factors to be considered in the absence of contractual standards related to the use of contractors.

> In sum and in short, all of the relevant factors considered in evaluating the decision to contract out the work at issue herein support the Company. First, there is no dispute that the Company has the right to contract out work provided that the decision is in compliance with the terms of the labor agreement. Second, the past practice reveals a history of using outside contractors to perform similar work in the past. Third, it is evident that the Company acted in good faith in exercising its authority to contract the work in question as a sound business decision in the interest of

efficiency and cost. Fourth, contracting out such work had a minimal effect on the bargaining unit.

Samuel Strapping Systems, Inc., 2000 BNA LA Supp. (Sergent, 2000); *see also Mead Corporation,* 1995 BNA LA Supp (Sergent, 1995) ("In the absence of contractual language related to the contracting out of work, the general arbitration rule is that Management has the right to contract out work as long as the action is performed in good faith, it represents a reasonable business decision, it does not result in subversion of the labor agreement, and it does not have the effect of seriously weakening the bargaining unit or important parts of it.") *Florida Power & Light Company,* FMCA No. 08-54181, at p. 18 (Wilson, 2009) ("This arbitration board agrees with the findings of arbitrators Morris, Edgett and Dworkin in the prior cases that efficiency of operations is a justifiable management purpose.")

In this case the Company has clearly demonstrated that the decision to allow the contractors to perform the switching on the jobs to which they are already assigned was made in good faith and is a sound and reasonable business decision. It goes without saying that time is of the essence when FPL's electrical system requires repairs. Yet while the Union does not protest the assignment of the larger repair work and construction projects to the contractor crews, the Union nonetheless suggests that the contractor crew must stop performing their work when it is time for the relatively small task of switching. The Union requests

that the Company call in a bargaining unit crew to perform the switching work while the contractor stands idle. According to the Union, once that switching work is completed then the contractor can continue the job for which it was hired.

Clearly, this would create an absurd result. As Mike Bryce explained, if you have a job assigned to a contractor crew to do maintenance and repairs and the RS's are not available, that will undoubtedly cause delays. The contractor crew will need to simply stand by while the Company tries to arrange for an RS, whether it is someone on duty or the Company is forced to call somebody in to do it. Furthermore, if there is an overload on an electrical line, the timing and coordination of the work undoubtedly will be a factor when it comes to switching the load in and switching it back out. Not only would an unnecessary interruption suspend the completion of the repair work, there would also be delays in the restoration of service to customers of FPL. Bryce explained that customers will certainly be affected if a circuit is overloaded for too long and the load gets out of range. Even if nothing goes wrong, it is not difficult to envision customers without power who must then wait even longer simply because the Company was forced to suspend work while it finds a bargaining unit crew to do the simple task of switching. It simply does not make sense.

The Company has also demonstrated that there are many unique situations which can and do arise in which it would be nearly impossible and certainly unproductive to suspend the work of the contractor. Mark DePass, who manages the work of contractors statewide, gave an example of work being performed in downtown Miami in connection with special events. He explained that because the City of Miami often plays host to sporting events, concerts or other large public gatherings there is often a finite time to get the job done and it is very important to be in full control of the progression of that work. Oftentimes there are multiple crews on a site that need to be coordinated, or the contractor crews may be coordinated with several sub-vendors which makes the timing and sequence of their respective jobs critical to successful and timely completion of the project. Particularly in such situations as these, incurring delays is simply not something that the Company can tolerate, much less invite.

The evidence shows that suspending the work of the contractor crew so that bargaining unit crew may be called in to operate the switches would also be costly. In two of the four grievances the Union requests that eight hours of overtime pay be paid to an unknown Restoration Specialist to compensate him or her for the pay they would have earned if they had performed the switching. While the Union did not dispute that the switching that led to these particular grievances may have only taken

as little as 20 minutes, the Union asks for the full eight hours because this is what the Company would have to pay a bargaining unit employee who was called in for a full shift. Moreover, in addition to the eight hours of overtime pay, the Company would have to pay the contractor crew for its idle time while the Company identifies and calls a bargaining unit crew to come to the substation to perform solely the switching tasks of the job. It should go without saying that paying the bargaining unit crew a full shift wage for what might be 20 to 30 minutes of work is wasteful and this profligacy is compounded by the costs of paying a contractor crew to do nothing while the switching work is being performed.

With respect to the impact on the bargaining unit, it is noted that the Union presented no virtually evidence concerning how the bargaining unit has been impacted by the practice of having contractors perform the switching on their own contract jobs. Although several Union witnesses alluded to concerns about safety because contractors allegedly had not received the requisite FPL training to get on the "distribution switching list," there is absolutely nothing in the record which would substantiate or lend credence to those concerns. To the contrary, the evidence shows that the switching work is performed under the direct supervision and direction of an FPL supervisor who is trained and qualified to do the work. The Union's claim that the practice presents a safety threat to other employees is simply unsubstantiated. There was also no evidence of any

employee who had been laid off or who had suffered decreased hours or loss of any other job benefit due to contractors performing switching.

In sum, in light of the evidence presented there is no doubt that acceding to the Union's request that the switching work to be performed exclusively by the bargaining unit would be both costly and grossly inefficient. The practice of allowing contractors to perform their own switching also has not been shown to have any adverse effect on the bargaining unit. Therefore, the Company's decision to utilize contractors to perform switching inside substations is found not only to be a good faith exercise of its authority under the MOA but also a sound business decision reasonably calculated to increase efficiency and manage costs. As such the practice is found to be an entirely reasonable and proper.

Fourth, in support of its position the Union also relies on Paragraph 38(a) of the MOA. The Union claims that the call out procedures of Paragraph 38(a) are a condition precedent to contracting out the work in question. The relevant portion of Article 38 reads as follows:

38. Call Outs – Prearranged – Overtime

a) When an employee is required to report for work at a time other than the employee's regular work schedule, it shall be considered:

1. A call out if the employee has less than twelve (12) hours' notice, or

2. Prearranged overtime if the employee has twelve (12) hours' or more notice.

Any applicable Bargaining Unit employees will be called out or prearranged for overtime before any contractors are called into work. If FPL employees are being released from duty on FPL facilities, the contractors will also be released. Contractors will be allowed to complete

the specific job that they are assigned to do at that time; no other work will be assigned.

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In the Union's view, this provision of the MOA mandates that before contractors are permitted to *perform* bargaining unit work, available off-duty bargaining unit workers must be called out and offered the opportunity to work overtime to perform the job. This is a complete misreading of the provision. Paragraph 38(a) deals exclusively with "Call Outs" and requires the Company to *call out* bargaining unit employees before it *calls out* any contractors to come into work. By its very definition, "call outs" under Paragraph 38 are "trouble calls and unscheduled overtime." Further, call outs occur when employees "are required to report for work at a time other their regular work schedule." That clearly is not the case here. The switching that has been assigned and is being performed by the contractors in this instance is not the result of them having been "called out" – they have been assigned and contracted to perform a certain job *as part of their regular work schedule.* The contractors were not called in for trouble calls nor are they working unscheduled overtime. The switching in question is but one insular task to be performed by the contractor crew in the course of completing the work for which they already have been properly contracted and assigned. As such, the Union's reliance on Paragraph 38(a) is found to be utterly without merit.

Sixth, the Union alternatively relies on the Continuity of Work provision of the agreement. Article I, Paragraph 5 of the MOA reads as follows:

> It is expressly understood and agreed that the services to be performed by the employees covered by this Agreement, pertain to and are essential to the operations of a public utility, and to the welfare of the public dependent thereon, and in consideration thereof, and of the agreements and conditions herein by the Company to be kept and performed, the Union agrees that the employees covered by this Agreement will not be called upon or permitted to cease or abstain from the continuous performance of the duties pertaining to the positions held by them with the Company, in accord with the terms of this Agreement. The Union further agrees that it will take every reasonable means which are within its powers to induce employees who are members of the Union and subject to its discipline who may engage in a strike or work stoppage in violation of this Agreement to return to work promptly. The Company agrees, on its part, to do nothing to provoke interruption of, or prevent such continuity of performance of said employees, insofar as such performance is required in the normal and usual operation of the Company's properties. Any dispute over matters in violation of the terms of this Agreement must be handled in the manner provided by the Grievance and Arbitration Procedure as set forth in Article IV below.

In essence this verbose provision provides two mutual promises between the parties: the Union agrees not to strike, and in return the Company agrees to do nothing that would interrupt the continuity of performance of the employees. According to the Union's interpretation, however, the Company's promise is far more substantial and far-reaching – that it will prevent non-unit workers from doing bargaining unit work. As the Union's argument goes, bargaining unit employees (specifically "Restoration Specialists" or "Troublemen") have been performing the work

of operating switches for decades. Here, FPL breached this promise when it prevented these bargaining unit workers from continuing to perform their work by assigning contractors to operate the substation switches. By allowing this practice FPL prevented the continuity of performance of this work by bargaining unit workers and thus violated of the MOA.

Again, the Union's interpretation of the agreement is woefully misguided. First, the Company's agreement to do nothing to interfere with the employees' work performance is expressly limited *insofar as such performance is required in the normal and usual operation of the Company's properties*. As explained above, in the absence of some other contractual limitation, the right and discretion to determine the performance required for normal and usual operation of the properties is expressly reserved to the Company via the Management rights clause. There is no such contractual limitation on the Company's right to use contractors, unless of course the work in question results in the lay-off of bargaining unit employees as expressed in Paragraph 21.

Furthermore, while there is no question that the work of restoration specialists, along with the work of all other bargaining unit employees, is the type of work encompassed by FPL's continuity of work promise, there is no fair reading of this provision which would grant the RS's the *exclusive* right to operate the switches. The same is true of the Union's reliance on the RS job description. Although the job description clearly

states that the RS "must perform switching on distribution/transmission circuits," there is absolutely nothing in the record to support the Union's argument that the Company cannot use anyone other than an RS to perform the switching. Therefore, the Union's argument that the practice in question violates Paragraph 5 of the MOA is also found to be without merit.

Seventh and finally, as noted above the Union has presented eleven historical grievance settlements which it claims are binding and precedent-setting authority determinative of the outcome in this case. According to the Union all the grievances were settled based on the Company's promise and understanding that obtaining switching orders and operating switches was the work of the bargaining unit. While this may be true, the Union's reliance on these historical grievances is nonetheless woefully misplaced for two important reasons. First and foremost, none of the eleven grievances offered by the Union to support its position involved the use of contractors. Instead, the grievances involved switching work being performed by FPL supervisors, FPL engineers and other non-bargaining unit FPL employees. Thus, the cases clearly are both factually and legally distinguishable and therefore they are not binding nor determinative of the outcome in this case. Second, while the Company acknowledged that the switching work that was the subject of those grievances should properly have been performed by bargaining

unit employees, nowhere in grievance settlements did the Company agree to recognize switching as *exclusively* bargaining unit work. Accordingly, the Union's contention that these settled grievances prohibit the Company from utilizing contractors to do switching on the jobs to which they have been assigned is also found to be without merit.

In sum and in short, the legitimate business interests behind the Company's decision to allow contractors to perform their own switching under the direction of a qualified FPL supervisor cannot be legitimately disputed. The practice has been shown to be a reasonable assignment of work calculated to improve productivity and increase the overall operational efficiency of the business. It has also been shown to have had minimal effect on the bargaining unit. Moreover, because the Union has failed to produce evidence of a contractual or other limitation on the Company's managerial right to do so, the Union has failed to prove that the Company violated the MOA by allowing contractors to perform switching inside Company substations. Accordingly, the grievances are without merit and must be denied.

AWARD OF ARBITRATION BOARD

In accordance with the foregoing opinion and for the reasons set forth therein, each of the four grievances must be denied.

Stanley H. Sergent, Neutral Member
June 20, 2018

Jennifer Proctor,
Company Member

___ Concur

___ Dissent

Kenneth R. Simms,
Union Member

___ Concur

___ Dissent