FEDERAL MEDIATION AND CONCILIATION SERVICE
UNITED STATES GOVERNMENT
WASHINGTON, DC

JEROME H. WOLFSON, ARBITRATOR

IN THE MATTER OF ARBITRATION BETWEEN

Florida Power & Light Company

And Issue: 35C Scheduling - #10-0234

International Brotherhood of
Electrical Workers

FMCS CASE NO. 12-55768-3

Pamela M. Keith, Esq, for Florida Power & Light
Noah Scott Warman, Esq, for IBEW

AWARD & OPINION

This arbitration came on to be heard before the undersigned, with proper notice and in accordance with the grievance procedure of the employment agreement existing between Florida Power and Light Company and International Brotherhood of Electrical Workers covering the applicable period 2009-2011. A hearing commenced in a timely fashion in a conference room provided at the Doubletree Hotel, 4431 PGA Boulevard, Palm Beach Gardens, Florida. The hearing was held on April 25, 2013 and commenced at 8:30 a.m. The parties stipulated to various exhibits which were properly marked. Objections were noted as concerns the evidence submitted and to certain testimony. Argument was had as to each objectionable item. The aforementioned exhibits were appropriately marked and accepted into evidence. The parties agreed and stipulated that jurisdiction was proper over both the parties and the subject matter along with notice, and that the undersigned was sitting properly as the Neutral Arbitrator in this cause. Kelly Tveter was appointed the Company Arbitrator and Kenneth R. Sims was the Union Arbitrator. The Grievant

offered its position by way of opening statements and submitted a brief on July 18, 2013. The Employer submitted its brief on July 19, 2013. Said date is also the date the parties rested their respective cases. Witnesses who testified included John Schantzen, past Business Agent (Utility System Commercial) U-4. and President of LOCAL 1908, IBEW, now retired, Gary Aleknavich, current Business Manager for the System Council, Chuck Scott, Senior Manager of Labor Relations for Nextera (FPL), and Robert Costello, the supervisor who created the work schedules upon which the instant Grievances are based.

The Grievant(s) offered the position that in instances where the Employer finds need to utilize/invoke Section 35(c) of the Collective Bargaining Agreement, the Employer is constrained to utilize the overtime roster and is prohibited from using the "split weekend" formula. The Employer herein offered the position that it did not violate the Collective Bargaining Agreement when it failed to utilize the overtime list to assign weekend overtime work to maintenance workers under 35(c) of the contract in the instant cause, and that the Management Rights provision of the Collective Bargaining Agreement further allowed for the overtime assignments in the manner it was given inasmuch as the terms of the Contract did not prohibit such action. The Employer further defended on grounds that directives from Nuclear Regulatory Commission (NRC) concerning fatigue must be followed as concerns fatigue and maximum hours that workers can engage in thereby creating the situation that utilizing the overtime list is contrary to adhering to the NRC fatigue rule(s). The Employer also contends that the method they seek to utilize maintains that overtime is distributed equally, and that even though the method of not "splitting weekends" and using the overtime list may be a past practice, there is justification for abandoning said practice.

FINDINGS OF FACT AND CONCLUSION

The findings of fact made in this cause are based upon my consideration of all the testimony and evidentiary exhibits along with observations as concerns the demeanor and credibility of all witnesses who have appeared before the Arbitrators. Any and all evidential conflicts have been weighed and resolved by this Arbitration Panel. Based upon the foregoing we make the following findings of fact:

1. The Arbitrators have jurisdiction of the parties and the subject matter.

2. The stipulations entered into between the parties are accepted.

3. The Bargaining Unit has properly processed its appeal/grievance entitling it to this hearing and has submitted argument as concerns this cause along with all evidence and documentation it sought fit to submit. The employer Florida Power and Light, Company, has offered its case and position. Argument was offered at the inception of this cause, during the cause and at the conclusion the parties agreed to submit written memorandums or briefs, which were filed in a timely manner.

4. The current/applicable Collective Bargaining Agreement includes two (2) crafted sections that must first be considered, to wit:

Included in the Nuclear Supplemental

Section 35(c)

> For prearranged repair or maintenance jobs, or emergency repairs or maintenance jobs, employees may be re scheduled per the following provisions:
>
> When one or more units are scheduled under either paragraph 35(c) (1) or 35 (c) (2), they may be defines on one posting. This posting will define the work performed, employee's hours and days of work, and under which subparagraph 35 (c) the work is being scheduled. Employees under this condition will be allowed to work on any of the posted units on heir posted scheduled.

Where only one unit is posted either under Paragraph 35 (c) (1) or 35 (c) (2) and subsequently a new unit(s) requires work to be performed under either Paragraph 35 (c) (1) or 35 (c) (2), a new schedule will be posted. This posting will define the scope of work, the hours and days of work, and under subparagraph 35 (c) the work is being performed.

The overtime list will be used to make assignment unless the entire classification is being assigned equivalent hours, or no overtime work is planned. Such rescheduled employees may be assigned to any shift needed, and will be paid the equivalent of the operator shift differential. All hours worked for the next twenty-four (24) hours following a change in schedules, where the twenty-four 924) hours notice was not given, shall paid for one and a half time (1-1/2) times the regular straight-time hourly rate until the expiration of the twenty-four (24) hours notice. Such reschedules employees will be paid at their respective overtime rates plus appropriate shift differential for any work done on their respective normal days off.

(c) (1) Employees may be rescheduled to work on two (2) or three (3) shifts pay day basis (by giving at least twenty-four (24) hours' prior notice) to handle jobs which will require more than four(4) days for completion on a rush basis. For the purpose of this paragraph, "rush basis" means the work will be scheduled at least six (6) days per week.

(c) (2) Employees may be rescheduled to work on two (2) or three (3) shifts pay day basis (by giving at least twenty-four (24) hours' prior notice) for a minimum period of two (2) days and a maximum of four (4) days. An individual will not be required to work an assignment of this type more than one time during a pay period.[1]

Section 44(a)

Overtime will be distributed equally by classification in each regular working headquarters to the best ability of the supervisor's in charge, using the biweekly posted overtime list as a guide for such distribution. [2]

Interpretation and application of those paragraphs are required in this instant cause. Said interpretation is guided by the dictates of the Supreme Court of the United States to wit:

> Arbitrators...are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level... disputes that require for their solution knowledge of the custom and practices of a particular factory or a particular industry as reflected in particular

[1] Those provisions have not appreciably changed over the approximate seventy (70) years that the parties have had Collective Bargaining Agreements between them in an uninterrupted manner

[2] The entire section has been considered but not reprinted

> agreements. ...an 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 look for guidance to many sources, yet his award is legitimate only as long as it draws its essence from the collective bargaining agreement. United Steelworkers of America v Enterprise Wheel and Car corp., 363 U.S. 591, 1960.

It goes without saying that there are cases and causes that do arise which were not totally foreseen by the draftsmen. Nevertheless, the contract is considered clear if the decision maker can discern its meaning by reference to only the simple facts upon which the agreement depends as opposed to an ambiguous contract which lends itself to more than one interpretation. In the same instance if there is any one principal of contract interpretation upon which arbitrators agree, it is that where no ambiguity exists in the language of the contract, then the obvious intent of the contract language governs and must be enforced. Parole evidence cannot be relied upon to defeat the obvious intent of clear and unambiguous contract language; and when the language of the agreement is sufficiently clear to enable the arbitrator to reasonably ascertain the intent of that contract language, that ends the arbitrator's inquiry and he must enforce the apparent intent of the words of the Agreement. Georgia-Pacific Corporation and Pace Local 369, 1999 WL 704987 (Arb) (BNA), 1999. See also Goodyear Tire & Rubber Co., 3 LA 259, 1946 and Weil-McLain, 86 LA 785, 1986, and Technocast Inc., 91 LA 164, 1988.

5. Section 35(c) is included under the Schedule of Work provision. It is specific and includes the Employers right to reschedule workers in instances of pre arranged repairs, maintenance or emergency situations. It includes the prerequisite posting and scheduling. It also includes reference to the use of the overtime list and rates of pay for various scenarios.

Article 44 includes the crafted agreement(s) of the parties as concerns overtime, assignments, distribution of same, lists and the record keeping.

To discern the meaning of Sections 35(c) and 44, there is no need to rely on parole evidence. The terms and conditions of those Sections as contained in the instant contract are clear and not ambiguous. The Sections, as they appear within the Collective Bargaining Agreement, remain within the "four corners" of the contract between the parties.

6. The differences that have arisen, and remain the issue in this Grievance(s) is the manner in which the overtime is assigned. The Grievant(s) are firm in their position that the sole manner of assigning overtime work/hours is, and should be, by utilizing the overtime list as included/crafted in Section 44 of the Collective Bargaining Agreement. The Employer relies on the most recent inclusion of Section 35(c) in the contract between them and offers that said Section allows for the dividing the work force in half (1/2) and assigning half (50%) to Saturday work and assigning the other half (50%) to Sunday work; and by doing so the Employees are not being placed at a disadvantage, being deprived of any monetary benefits, or being subjected to the fatigue rule.

The Union rejects the Employer's interpretation and argues that the manner of assigning overtime is inconsistent with the long established past practice of not "splitting weekends". Live testimony and parole evidence documents have been offered into evidence to further the position that the parties have utilized the overtime list as opposed to "splitting weekends".

When the parties herein memorialized their agreement(s) in the Collective Bargaining Agreement they included Article IV, Section 28(b) Arbitration. By doing so

they mutually agreed that it was the Arbitrator who was to determine the construction and meaning of any areas that they might not be able to agree on in the future. By stipulating/agreeing, they acknowledged that they expected possible situations might arise that were not foreseeable or anticipated at the time the contract was crafted; and that responsibility for interpreting the contract would lie with the Arbitrators. United Steelworkers of America v. Enterprise Wheel and Car Corp., Supra. As stated above, when the agreement is not clear, the Arbitrator may look to outside sources. Nevertheless, such evidence cannot be relied upon to defeat the obvious intent of clear and unambiguous contract language.

7. The practice of utilizing the Overtime List and not "splitting weekends" is not included in the crafted Collective Bargaining Agreement; there is mention of same in renditions of bargaining sessions, resolutions of prior grievances, and a prior Award and Opinion; those references/submissions are parole evidence.[3] Parole evidence is best defined as evidence that comes from outside the written contract. The general and accepted rule is that a written agreement may not be varied or altered by use of parole evidence. The underlying rationale relates to the sanctity of labor contracts; the purpose of an enforceable labor contract is to enable parties to bind themselves to certain obligations and to accept the consequences of breaching those commitments. To allow parties to vary or change a written agreement based upon outside evidence or circumstances would totally undermine the goal of that which they set out to accomplish, i.e., to bind themselves and each other on specific terms and agreements concerning material aspects of a labor agreement. Fors Farms, Inc. and Teamsters, Chauffeurs, Warehouseman and Helpers Union Local 313 and Warehouse, Automotive, Food, Public

[3] The prior Award and Opinion considers the issue herein but is not relied on as controlling.

Employees, Drivers Sales and Special Service Union Local 599, 112 LA (BNA) 33 (1999). LGE Community Credit Union and Aeronautical Machinists #709, 127 LA 849 (2010). The parole evidence offered herein has been given due consideration but is not what this Arbitrator relies on in his decision making. It is supportive, but not controlling.

The practice of utilizing the overtime list when it becomes necessary for the Employer to invoke/utilize Section 35 (c) was created in a peaceful manner without prejudice to the Employer or the Grievant/Union. It was a process/practice that did not merely evolve as a matter of happenstance. In the same instance it was not a practice that fell within a silent area of the Collective Bargaining Agreement. As such, it evolved as a past practice not inconsistent with the verbiage as is contained in Section(s) 35(c) or 44 of the Collective Bargaining Agreement existing between the parties. It did not replace or obviate a crafted portion of the Collective Bargaining Agreement. It became a practice that cannot be changed in a unilateral manner. Although the contract language as contained in Section(s) 35(c) and 44 of the Collective Bargaining Agreement is clear, plain, and not ambiguous, the parties have acted in a manner that their respective conduct as concerns the practice/process of utilizing the overtime list in assigning overtime during periods the Employer utilizes Section 35 (c), is considered a modification to the actual written contract.[4] It has been followed on a regular uninterrupted basis for over seventy (70) years. The Employees/Grievant came to expect on a regular, uninterrupted basis that when Section 35(c) would be utilized by the Employer, the overtime list would be the assignment process. They further came to expect on an uninterrupted basis that they

[4] Q. From 2006 to the events that led to the grievances that you are involved in that occurred in 2010, how many times did you divide this schedule up the way that happened in these grievances were you said some people will work Saturday and some Sunday?
A. Prior to 2010?
Q. Yes
A. Never
(TR pg 229. Robert Costello)

would not be given overtime assignments through a "split week end" manner. As such it became part of the contract between them; it too is within the "four corners" of the Collective Bargaining Agreement between the parties. This Arbitrator finds that there is a definite assent of the parties and their minds to the practice of utilizing the overtime list when Article 35 (c) is invoked by the Employer herein. In so determining this Arbitrator accepts and relies on the testimony of Gary Aleknavich and John Schantzen. See Fruehauf Trailer Co, 29LA372,1957, International Minerals and Chemical Corp., 36 LA 93, 1960, Lithonia lighting, 89 LA 781, 1987 and Elkouri, How Arbitration works, Fifth Edition, Page 651-654, 1997, Department of the Navy FUSE/NAGE R1-144 & NAGE R1-134, (2008) 64 FLRA no. 199, (2010). The (past) practice evolved into the agreement between them. Any changes or abandoning the use of the overtime list in favor of the "split week end" plan (during instances where Section 35(c) is invoked by the Employer) requires conferring and negotiating between the parties bound by the Collective Bargaining Agreement; Collective Bargaining is necessary/required to change/abandon the established past practice that has become incorporated into the Collective Bargaining Agreement.

8. The Management Rights provision in the Collective Bargaining Agreement is clear and not dissimilar from such clauses regularly included in labor contracts. It states clearly that:

> General Conditions Article I, Section 4
>
> Management In Company: The right to hire, promote, suspend, lay off, demote, assign, reassign, discipline and re-employ employees and the management of the properties of the company shall be vested exclusively in the Company, and the Company shall have the right to determine how many employees it will employ or retain on the operations 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 its business, subject to any applicable terms of this Agreement.[5]

For the reasons stated above/herein, the method of utilizing the overtime list when assigning overtime in instances where the Employer finds need to invoke Article 35(c), has evolved into a past practice, and as such has come to fall within the "four corners" of the Collective Bargaining Agreement. As such, it is a provision that is an applicable term and condition of the agreement; the "split weekend "method is not. The Management rights argument of the Employer is rejected/denied. It cannot be utilized to overcome the contract clause that has evolved.

9. The fatigue rule existed prior to 2009 and allowed flexibility to the parties as to hours, required time off, and overtime. After 2009, the Employer was faced with additional limitations as to how many hours an individual can work on a daily, weekly and continues basis (Union exhibit #12). Said rule come into existence well after the parties created and perfected the past practice of utilizing the overtime list in instances where section 35 (c) is announced by the employer. During all times that the fatigue rule has existed and in all forms it applied, the past practices herein remained part of the Collective Bargain Agreement in a continuous uninterrupted fashion; for the reasons stated herein. In various instances during the existence of the contractual relationship between the Employer and the Collective Bargaining Unit, grievances (alleged violations) have been resolved as to the issue of utilizing the overtime list and not utilizing the split week end method. Memorandums have been crafted during the existence of the fatigue rule. Administration and compliance with the fatigue rule does

[5] This article is included in the main contract, not the Nuclear supplement

not interfere with the continuation of the past practice of utilizing the overtime list in instances where the Employer finds need to invoke Section 35(c). The fatigue rule is not within the essence of the Collective Bargain Agreement. It does not present situations whereby the Employer or the Grievant is prejudiced in any manner when the overtime system is utilized and not the split weekend plan. The Employer's position that the past practice should be abandoned on the basis that it prejudices or affects the Employer in a negative fashion is denied, Department of the Navy FUSE/NAGE R1-144 & NAGE R1-134, (2008) 64 FLRA no. 199, (2010).

10. The issue of assigning overtime by way of either the overtime list or the "split weekend" method in instances the Employer invoking Section 35(c) has been a constant issue during collective bargaining sessions for an extended period of time. During said time, the parties consistently utilized the overtime/past practice method. They have not been able to agree on a crafted inclusion as to the actual method. Why each party is seeking to either maintain or change that practice in the Collective Bargaining Agreement is not clear. Why the Union will not give up the past practice is not apparent, nor has it been brought forth by either party.[6] Similarly, why the Employer wants to "split week ends" and to have the Grievant abandon the past practice of utilizing the overtime list is not apparent. To change the past practice of utilizing the overtime list and commencing the "split weekend" method remains an issue that belongs within the bargaining/negotiation sessions between the parties. To order the parties to negotiate is not within the powers of this Arbitrator. What is within the domain of this Arbitrator is to interpret the contract.

[6] Q. It says that neither you nor Rick agreed that that could be done, it had to be handled on a higher level?
A. 35 (C) has been an issue over the years, and its I guess as sacred to us as anything, as it is seniority.
(TR pg 86. Gary Aleknavich)

11. The documents that have been offered into evidence include eighteen (18) grievances filed by the Collective Bargaining Unit on behalf of two (2) individual employees, Mark MacNichol, and Wendell Mixon. The parties shall determine whether those two Grievants are entitled to makeup overtime in accordance with Section 44(a). This finding relates only to the two (2) employees noted above.

12. The audio tape (U-30) submitted by the Grievant is inaudible. It has not been considered in any decision making.

13. FPL and IBEW shall share equally in expenses and fees of the Arbitrator in the instant arbitration under Article IV Section 30 of the contract between them. Therefore, the costs and fees of the Arbitrator shall be shared equally between the Employer and the Collective Bargaining Unit.

WHEREFORE, IN ACCORDANCE WITH THE BINDING ARBITRATION CLAUSE AS INCLUDED IN ARTICLE IV, SECTIONS 28, (a) (b) (c), 30, OF THE CONTRACT EXISTING BETWEEN FLORIDA POWER AND LIGHT COMPANY AND INTERNATIONAL BROTEHRHOOD OF ELECTRICAL WORKERS.

IT IS THE ORDER OF THE UNDERSIGNED THAT:

A. Section 35 (c), as crafted is clear, concise, and understandable without the necessity of having to refer to parole evidence.

B. Section 44 is clear, concise, and understandable without the necessity of having to refer to parole evidence.

C. The parole evidence that has been submitted and remains in the record has been considered; however, this Award and Opinion is not based on said parole evidence.

D. Utilizing the overtime list in instances where the Employer invokes Section 35(c) has evolved into a past practice for the reasons stated herein.

E. Utilizing the overtime list in instances where the Employer invokes Section 35(c) has evolved into part of the contract between the Grievant(s) and the Employer for the reasons stated herein.

F. Utilizing the 'split weekend" formula of assigning overtime in instances where the Employer chooses to utilize Section 35(c) is not a past practice, nor is it included in the Collective Bargaining Agreement.

G. In further/future instances where the Employer invokes Section 35(c), the method of assigning overtime shall be in accordance with Section 44 (Overtime), and not the "split weekend" method.

H. The Management's Rights position and proposition of the Employer is denied for the reasons stated herein.

I. The parties shall determine any entitlement that Wendall Mixon and Mark MacNichol may have to make up overtime under Section 44(a) of the Collective Bargaining Agreement.

J. The audio tape (UI-30) is rejected and not consider for the reason stated herein.

K. There is no justification for abandoning the past practice method of assigning overtime for the reasons stated herein.

L. FPL and IBEW shall share equally in expenses and fees of the Arbitrator in the instant arbitration under Article IV Section 30 of the contract between them.

Therefore, the costs and fees of the Arbitrator shall be shared equally between the Employer and the Collective Bargaining Unit.

DONE AND ORDERED on this 2nd day of September, 2013, in Miami, Dade County, Florida.

/s/ JEROME H. WOLFSON

JEROME H. WOLFSON
ARBITRATOR
FMCS

FEDERAL MEDIATION AND CONCILIATION SERVICE
UNITED STATES GOVERNMENT
WASHINGTON, DC

JEROME H. WOLFSON, ARBITRATOR

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AWARD & OPINION

KELLY TVETER	KENNETH R. SIMS.
ARBITRATOR	ARBITRATOR
FLORIDA POWER AND LIGHT	IBEW
DISSENT _____	DISSENT _____
AGREE _____	AGREE _____
DATE _____	DATE _____