FEDERAL MEDIATION & CONCILLIATION SERVICE
ARBITRATION HEARING
HELD BEFORE
ARBITRATOR LEROY R. BARTMAN, Ed.D.

IN THE MATTER OF ARBITRATION	§	FMCS CASE NO. 12-01328-3
	§	
BETWEEN	§	Grievance: Distribution of Overtime
	§	
FLORIDA POWER & LIGHT COMPANY	§	Hearing Date: OCTOBER 11, 2012
	§	
AND	§	Briefs Received: DECEMBER 11, 2012
	§	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, SYSTEM COUNCIL U-4	§	Hearing Closed: DECEMBER 11, 2012
	§	
	§	Award Date: JANUARY 31, 2013

On 11th day of October 2012, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Arbitrator, LeRoy R. Bartman, Presiding, held in Palm Beach Gardens, Florida:

APPEARANCES

ON BEHALF OF THE COMPANY:

Pamela M. Keith, Esquire
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 33408

ON BEHALF OF THE UNION:

Noah Scott Warman, Esquire
Sugarman & Susskind, P.A:
100 Miracle Mile, Suite 300
Coral Gables, Florida 33134

ALSO PRESENT:

Kelly Tveter, Company Arbitrator
Kenneth R. Sims, Union Arbitrator

WITNESSES

UNION:

Gary Aleknavich
John Porter
Shannon Johnson
Mike Pedrianes

COMPANY:

Chuck Scott
Richard Wright
Charles Sizemore
Sam Shafer
Brian Stamp

EXHIBITS

JOINT:

No. 1	Entered into Evidence
No. 2	Entered into Evidence

COMPANY:

No. 1	PTN License Operating Meeting
No. 2	Objectives and Criteria for accreditation of training in the Nuclear Power Company (Dec. 93)
No. 3	Guidelines for training of non-licensed operators NAPUT-2110
No. 4	Guidelines for initial training and qualifications of licensed operator, February 2010
No. 5	TPNP Administrative training
No. 6	Guidelines for initial training and qualifications
No. 7	Licensed operators meetings on grievance

UNION:

No. 1	2008 Negotiations FPL/SC U-4 IBEW/Company Proposal 1:00 PM 6/3/08
No. 2	FPL Nuclear Proposals Mike Delowery 11/4/08
No. 3	2011 Negotiations FPL/SC U-4/Company Proposals 5/5/11
No. 4	Nuclear Proposal #4 Overtime While in Training 5/11/11
No. 5	Company 21 Nuc-4 Operator Overtime in Training TA Date 6/14/11
No. 6	Operations Night Order
No. 7	0-ADM-312 Revision Approval Date: 6/28/07
No. 8	0-ADM-312 Revision Approval Date: 8/4/08
No. 9	0-ADM-312 Revision Approval Date: 11/12/09
No. 10	0-ADM-312 Revision Approval Date: 3/24/10
No. 11	0-ADM-312 Revision Approval Date: 11/10/10
No. 12	PTN 0-ADM-311

No. 13	John Porter Payroll Records 7/4/05 through 1/31/07
No. 14	PTN Payroll Ending Reports 8/05/05 through 12/22/06
No. 15	State. Lucie Plant ADM-18.11 Revision 5
No. 16	Shannon Johnson Payroll Records 2008
No. 17	Shannon Johnson Payroll Records 2009
No. 18	PSL Operations Department Overtime List PPE 3/14/08 through 4/10/09
No. 19	PSL Operations Department Overtime List PPE 4/24/09 through 10/23/09
No. 20	E-mails from Garcia, Juan to Operators

INTRODUCTION

The parties were all present and ably prepared to present the record, their proofs and witnesses on October 11, 2012 for the referenced case. They were given a broad opportunity to examine and cross-examine witnesses and to raise objections.

Neither party raised procedural issues at the hearing. Both parties agreed and acknowledged that the issue(s) were properly before the neutral Arbitrator selected from a list provided by the Federal Mediation and Conciliation Service.

The hearing was held at the Doubletree Palm Beach Gardens at 4431 PGA Boulevard, Palm Beach Gardens, Florida: The proceedings were recorded by a court reporter and transcribed. An official transcript was received by the undersigned. The parties had elected to close by submission of briefs. The briefs, timely postmarked December 5, 2012, were received on December 11, 2012 and the hearing was declared closed as of that date.

ISSUE

UNION:

Did the Company violate the Memorandum of Agreement by denying overtime opportunities to Non-Licensed Operators during their training to become Licensed Operators? If so, what shall be the remedy?

COMPANY:

Did the Company violate the Contract when it denied students in Initial License Classes 24 and 25 overtime assignments because it determined that they were not qualified to perform Non-Licensed Operator watch duties? If so, what is the appropriate remedy?

FACTS AND BACKGROUND

The Florida Power & Light Company (Company) is a large entity that creates and distributes power to residential and commercial throughout much of the State of Florida: The Company operates two (2) nuclear power plants. The Turkey Point nuclear facility is located in Southeastern Miami, Dade County. The other is in St. Lucie along the east coast of Florida: The grievance before the undersigned arose at the Turkey Point nuclear power plant.

The International Brotherhood of Electrical Workers (I.B.E.W.) System Council U-4 is an organization composed of eleven (11) different constituent I.B.E.W. Locals throughout the Company system. Historically, the parties have had a long bargaining relationship that dates back to World War II. Local 359 which covers Miami, Dade County, timely filed the grievance that is before the Arbitrator. The St. Lucie nuclear facility is located north of the Turkey Point nuclear facility and is represented by Local 627.

The collective bargaining agreement between the parties in this instance is called "The Memorandum of Agreement". The entire agreement is made up of the Corporate Section and Supplemental Sections -- one of which is the Nuclear Supplement.

In the grievance filed by the Union, it is alleged that the Company, at its Turkey Point nuclear plant, denied overtime opportunities to non-licensed operators (NLO's) while they were in training to become licensed operators (LO's). Specifically, the Union alleged that Classes 24 and 25 were denied overtime as required by the Memorandum of Agreement in force (Jt. Ex. 1, pages Nuclear 57-58).

The Union alleges that prior to January 2007 NLO's while in training in an Initial License Class (ILC) 23 to become LO's, were allowed to work overtime. Class ILC 24, the Union alleges, initially were allowed to work overtime. The Company stopped, however, allowing them to work overtime at Turkey Point while the NLO's at St. Lucie continued to work overtime.

It is alleged by the Union that the Company, while engaged in bargaining a new contract in May 2008, did not notify the Union that it was changing the overtime practice at Turkey Point. In June 2008 the Company submitted a proposal during negotiating a new agreement to eliminate operator overtime during initial and continuing training (Un. Ex. 1 at 10, Item 38). The proposal was not addressed until November 21, 2008 (Un. Ex. 2). During the November 2008 negotiations session the Company expressed its rational for not allowing NLO's overtime. They stated that by working overtime, the trainees would have their attention adversely affected. The parties did not engage in any further negotiations over the Company proposal. The Union did not counter or accept the Company's proposal and no changes to the language of the MOA resulted.

On January 8, 2009, the Union filed a grievance which was summarily denied at Steps 1 - 3. The third step denial being on August 25, 2010.

The grievance states as follows:

" . . . Request make up overtime for all hours bypassed, including meals for ILC 24 and ILC 25 bargaining unit students. The Company has declared all of these students not qualified to stand watch and therefore ineligible for overtime. The Memorandum of Agreement allows for these students to be included in the non-licensed operator's overtime list and should be eligible for all overtime. . . . ." (Jt. Ex. 2)

RELEVANT AGREEMENT AND OTHER LANGUAGE

NUCLEAR SUPPLEMENTAL

ARTICLE V - Hours of Work -- Working Conditions -- Rates of Pay

44. DISTRIBUTION OF OVERTIME

(a) Overtime will be distributed equally by classification in each regular working headquarters to the best ability of the Supervisor in charge, using the biweekly posted overtime list as a guide for such distribution.

Overtime records at each regular headquarters shall be reviewed every four (4) weeks by the Supervisor and the Job Steward to determine whether all overtime assignments during the period were made in accordance with the terms of the Agreement. If the Supervisor and the Steward agree that all overtime assignments in the period were made in accordance with the terms of the Agreement, they shall sign the overtime record as being correct. A matter concerning an overtime assignment may become a grievance only after the review and providing it is reduced to writing and taken up with the Supervisor within four (4) weeks after such review.

If at any time it is determined that an overtime assignment was not made in accordance with the terms of the Agreement, the remedy shall be makeup overtime work which would not ordinarily be performed on overtime, to take place within thirty (30) days of such determination. Failure to provide such work after such determination shall subject the Company to payment.

The Company will have no obligation to provide makeup overtime work to any employee as a result of the call-out, with less than one (1) hour's notice, or holdover of another employee. The Company shall have no obligation to provide makeup overtime work as a result of an assignment to an employee who was not the low overtime available employee in the employee's classification, if at the end of the review period the employee claiming the overtime is the high employee in the classification or is within ten (10) hours or ten (10) percent (whichever is higher) of the high overtime employee in the classification

Exhibit "A" - Hourly Wage Schedules Nuclear Division - Notes:

1) Employees selected for licensed operator training and licensed operator direct hires will be paid at the bottom of the licensed operator pay scale. Upon receiving an NRC license, the individual will be advanced to middle of the licensed operator pay scale. After receiving the license, the hourly wage of licensed operator (LO's) will increase by fifteen cents ($.50) per hour every twelve (12) months, until the individual is paid at the top of the LO pay bracket.

Licensed operator candidates who have not yet obtained an NRC license will be included on the NLO overtime list provided they have the appropriate qualifications for the overtime assignment. It is the Company's intent to ensure that direct hire licensed operators be provided the opportunity to train in all watch stations; licensed requirements and non-licensed requirements.

Direct hire training inclusive of non-licensed watch station requirements will be completed in 30 months or less. The Business Manager shall appoint two bargaining unit employees to assist with the program development and conduct periodic reviews to ensure NLO watch station training is conducted in a timely and efficient manner during the license operator training.

Jt. Ex. 1, Exhibit "A" Hourly Wage Schedules Nuclear Division, Notes at page Nuclear 28.

MEMORANDUM OF AGREEMENT - ARTICLE IV
Grievances -- Conferences -- Arbitration

1. Board of Arbitration shall consist of (MOA Paragraph 28A) excerpted
   A: Jointly Selected Neutral Member
   B. Company Selected Member
   C. Union Selected Member

2. Jointly selected panel members, expense are borne equally by the Company and Union (MOA Paragraph 30).

3. A Court Reporter will be utilized to record the Proceeding. This expense will be borne equally by the Company and Union.

4. Upon completion of the proceeding, a decision is made after the following sequence:

   A: Court Reporter transcripts are received by the Company/Union Advocates.
   B. Thirty (30) days after transcripts are received; the post-hearing briefs are submitted to the jointly selected neutral member of the arbitration panel, who sends copies to the opposing advocates.
   C. Forty-five (45) days following receipt of post-hearing briefs, the Board of Arbitration's jointly selected neutral member renders a decision.
   D. An executive session may be required to clarify award, if requested by either the Company or Union member.

Night Order 12/27/08 - ILC Students in the Watchstander Out-of-Service Book

Recently a Nuclear System Operator enrolled in Initial License Class assumed an NSO Watchstation while out-of-service. There has been some confusion on this topic. O-ADM-312, NSO Initial and Continuing Training, requires that NSOs that miss continuing training and do not make up the training within two requalification cycles be placed in the Watchstander Out-of-Service book. Once ILC NSO students have missed two NSO requalification cycles, Training has notified Operations, and these Operators have been listed as out-of-service for NSO watchstations. The Shift Manager, Unit Supervisors, and Field Supervisor are responsible for ensuring Operators placed on the shift watchbill are in service for the watchstations they're assigned (ref: 0-ADM-202). Additionally, NSOs should also be aware of their status and notify the Field Supervisor if assigned a watch in which they do not meet the qualifications.

The NSO Training Review Committee is evaluating alternatives to permit ILC students to remain in service while pursuing their license, but this has not been approved.

POSITION OF PARTIES

UNION:

The language of the MOA favors the Union.

The MOA provides that:

"Licensed Operator candidates who have not yet obtained an NRC license will be included on the Non Licensed Operator (NLO) overtime list provided they have the appropriate qualifications for the overtime assignment. It is the Company's intent to ensure that direct hire Licensed Operators be provided the opportunity to train in all watchstations; licensed requirements and non-licensed requirements. Direct Hire training inclusive of non-licensed watchstation requirements will be completed in 30 months or less.

Jt. Ex. 1, page 28. The language of the MOA thus favors the Union. It clearly states that NLOs presumptively remain on the overtime list while they are in training. They are entitled to overtime work provided that they have the appropriate qualifications for the assignment. Note too that they remain the list, singular, not "lists". The same overtime list is used for all types of overtime that the Company has.

The parties shared the same interpretation of the MOA's terms.

"Qualifications" has a distinct meaning, referring to the type of NLO work to be performed. There are three levels of non-licensed operators: ANPO, NPO, and SNPO. As the Union's business manager, Gary Aleknavich, testified, when this language was included in the Collective Bargaining Agreement as a result of the 2004 negotiations, qualification referred to the type of NLO at issue. T. 289. Company manager Shafer confirmed this understanding: "they do have three discrete classifications -- I'm sorry -- qualifications within the non-licensed operator [position]." T. 255.

Similarly, Company manager Chuck Scott testified that "ANPO, NPO, SNPO that you heard about, those are different qualifications but they are all in the non-licensed operator classification." T. 130. Scott further elaborated on the meaning of assignment when asked by Company counsel to explain the meaning of "provided they have the appropriate qualifications for the overtime assignment.":

> Q: Let's just go through an example. Let's say that the overtime assignment was the reactor area for non-licensed operator and there was a person on the overtime list who was an ANPO, an associate nuclear plant operator. He was the first guy on the overtime list but the assignment was in an area for which he was not qualified. How would the Company deal with that?
> A: If we were in the overtime list and the first person was only qualified associate nuclear plant operator and the vacancy we were trying to fill which is senior nuclear plant operator, that person is not qualified, we would move on to the next person to see if they were qualified for that watchstation. If they were, he or she would be offered that overtime assignment.

Scott's testimony only confirms the Union's position. By definition, a trainee who has previously worked for the Company is a SNPO, and thus qualified to work as an ANPO, a NPO, or a SNPO. However, an ANPO cannot work overtime as a SNPO. *See also* T. 259-60 (testimony of Company manager Shafer).

This shared understanding between Scott, Shafter and Aleknavich in their use of the term "qualifications" and even "assignment" is notable for all three are long term Company employees. All three have worked at the Company's nuclear power plants. All three meant precisely the same thing when referring to qualifications.

Wright, however, worked for another entity at another plant for more than 15 years before arriving at Turkey Point. He used qualifications in a different context altogether without regard for the parties' own bargaining history and past practice. His understanding and use of the term varied from the settled and previously shared understanding of the term. Therefore, it merits no deference, particularly when contrasted with the actions of St. Lucie, which continued to comply with the MOA throughout Wright's tenure with the Company by offering overtime to LO trainees.

The MOA's references to direct hires confirm the Union's claim.

The commonality between Aleknavich's, Scott's and Shafer's testimony is also notable in considering the following sentences:

> It is the Company's intent to ensure that direct hire licensed operators be provided the opportunity to train in all watchstations; licensed requirements and non-licensed requirements. Direct Hire training inclusive of non-licensed watch station requirements will be completed in 30 months or less.

Without these two sentences the Company might be able to contend that qualifications or assignments meant something other than the differences between ANPO, NPO, and SNPO duties. With them, the MOA itself substantiates the Union's case. A "direct hire" is an individual who had not previously worked for the Company in any capacity, certainly not as a Turkey Point NLO, and would not be qualified to perform any of their functions, as Company labor relations manager Chuck Scott testified. *See, e.g.,* T. 154-55. That individual thus could not work overtime as a NLO while in training.

However, as that directly-hired individual received the "opportunity to train" in all watch stations and non-licensed requirements, he would be able to perform the duties of an ANPO, then a NPO, then a SNPO. Indeed, the parties expressly agreed that the direct hire would receive training in NLO duties -- "in 30 months or less" -- even as he was training to become a LO. As he did he would become qualified to work in those positions. He would be thus able to work overtime as a NLO while in training to be a LO.

As Union Business Manager Aleknavich testified, in 2004 the parties agreed to raise the pay of NLOs in training to become LOs in order to give them wage parity with direct hires. Otherwise a long term employee would have been paid at a NLO rate below the initial LO rate that would have been paid to a brand new employee. Likewise the parties added language to provide those direct hires the opportunity to earn additional compensation by working overtime as NLOs as those direct hires acquired -- through the LO training! -- the knowledge and skills needed to act as ANPOs, NPOs, then SNPOs. Had there been no direct hires, there would be

no reason to even reference "appropriate qualifications for the assignment" since, by definition, SNPOs, the only NLOs who could participate in training to become licensed operators, would be qualified to work any NLO overtime opportunities.

Achieving parity between direct hires and incumbent NLOs was the goal of the language found in Exhibit A and quoted above. If the Company's interpretation of the MOA were to stand, it would actually destroy that parity.

The express language of the MOA obligates the Company to train the direct hires "in all watch stations" and "non-licensed" requirements -- the very thing it claims the NLO trainees are no longer qualified to perform. This training by definition would have to occur at the same time as the direct hires are engaged in LO training -- the very thing the Company claims is impractical, costly, and too slow. This training would then entitle the direct hires to work overtime as NLOs, since they have been qualified to perform watch duties and other non-licensed tasks, while the incumbent NLOs, no longer sent to requalification classes, would be barred from such overtime opportunities.

The Company's argument thus turns the very premise of this language on its head and puts it at odds with the Company's own claims, for the MOA would favor newly-hired employees over incumbent NLOs and required the Company to train them in such a way that they alone, not the incumbent NLOs, would be given overtime opportunities to work as NLOs during their LO training.

Past practice substantiates the grievance, and the Company knew that it had to bargain any changes to the distribution of overtime.

Any ambiguity in the MOA's language has long been clarified by the parties' actual practice. There is no dispute that at both plants for decades prior to December 2008 NLOs in training to become LOs remained on the NLO overtime list, performed NLO duties on overtime, turned down overtime opportunities, and were at times actually compelled to work overtime. There is no dispute that this remained the practice at St. Lucie to and through the day of the arbitration! That a single manager at a single plant decided to adopt his own, novel interpretation of INPO guidelines fails to justify the Company's break from this well-established and shared understanding of the MOA:

This is all the more outrageous because the Company knew it had to bargain over any changes to the manner of distributing and paying overtime to NLOs. Many times at arbitration an employer contends that a Union is attempting to get something through arbitration that it could not get at the bargaining table. In this case, the shoe is on the other foot: the Company, not the Union, is attempting to validate through arbitration a change in working conditions it

could not secure through negotiation. The Company knew in 2008 that LO trainees were working overtime, and it made proposals to change that practice. As Chuck Scott testified, its proposals would not be necessary if they were not working overtime. T. 135-36. Those proposals were rejected by the Union. T. 149. Then, without any notice to or bargaining with the Union, the Company simply changed its practice, but only at Turkey Point, with respect to trainee overtime. The Company has made a compelling case that it violated its duty to bargain with the Union in good faith; it has failed to make a valid case to justify its unilateral actions.

The Company consciously chose to bar trainees from working overtime; it was not required to do so.

If the NRC had directed the Company to stop allowing trainees to work overtime, or if INPO itself had threatened to rescind accreditation because the Company allowed trainees to work overtime, this would be a very different case. However, the Company was not obligated by either entity to stop its decades-old and collectively-bargained practice. To the contrary, even Wright himself (as did other Company witnesses) admitted that the Company could structure its LO training to comply with Wright's own interpretation of INPO guidelines and simultaneously to provide NLO overtime opportunities for trainees.

It is remarkable that even after the night order terminating overtime for ILC 24, Turkey Point changed its ADMs to authorize the very thing the Union seeks through this grievance. Effective November 2009 it modified the Turkey Point training ADM to outline how trainees would maintain proficiency in watch standing during the course of their LO training. *See* Union Ex. 10 at 22.

Wright testified that the 2009 revision to the training ADM, 0-ADM-312, was intended to "clarify" how the rules of the training program would apply. T. 190. As it turned out, that "clarification" provided that NLOs training to become licensed operators would receive the skills necessary to continue to stand watch: "NSOs attending an Accredited Licensed Operator Program will maintain proficiency for watch standing duties as a NSO . . ." Union Ex. 10 at 21. (NSO is another acronym for a non-licensed operator. T. 101). In other words, after issuing the December 2008 night order barring trainees from overtime opportunities standing watch, ostensibly because their LO training did not enable them to qualify to stand watch, the Company actually changed the training ADM to provide that those trainees *will* maintain proficiency to stand watch.

Astonishingly, Wright confirmed that the night order, which expired by its own terms after thirty days, was not renewed; that the training ADM then in place, Union Ex. 9, itself did not bar trainees from working overtime; and that the first revision of that ADM after the night order

issued actually provided for NLOs to be proficient in all watch standing duties in the course of their training to become a licensed operator. Not only did Wright utterly ignore the MOA, he failed to follow even the Company's own policies and procedures regarding night orders and ADMs.

Another Company witness, Sam Shafer, truly provided clarity on the meaning of the 2009 revision to the training ADM. In attempting to rebut the testimony of Gary Aleknavich the Company introduced its notes of the parties' grievance meetings. *See* Company Ex. 7. On June 8, 2010, "SS" -- Sam Shafer -- noted that with respect to the grievance "we have gone both ways on this." *Id.* At 2, entry marked "06/082010." This likely refers to the disparity in overtime practices between the two nuclear power plants.

Shafer came to management through the ranks and had served at one time as a Union steward, explaining his next comment, that "I have filed grievances on this when in the bargaining unit." *Id.* After outlining the back and forth over qualifications and the HLC -- the same thing as an ILC -- Shafer confirmed the Union's understanding of the 2009 training ADM. In a statement conveniently highlighted on the Company's own document with a star, Shafer stated that "*[o]your procedure has been changed to say if your [sic] in HLC or higher training will make you qualified.*" *Id.*, emphasis added.

In the course of attempting to rebut the Union's case, the Company thus only confirmed it. The Company's was an act of volition, not legal obligation. Its change at Turkey Point was utterly at odds both with its past practice there -- even as it rewrote its training ADM to expressly authorize that past practice -- and its ongoing practice at the sister nuclear power plant in St. Lucie.

The Company presented no other valid defense to the grievance.

To justify its actions, other than a change in Management at Turkey Point, the Company also cited concerns of cost and duration of training. Wright asserted that if trainees were to attend NLO requalification every five weeks or if that training was incorporated Into the LO training, the process could take as long as 24 months. *See, e.g.*, T. 241. This argument makes no sense, since the Company expressly, contractually agreed to take up to *thirty* months to train direct hires.

As for increased costs, if any, those do not justify abrogation of one's collective bargaining agreement. Instead they may merit more collective bargaining. If the Company feared increased costs due to Wright's novel interpretation of INPO guidelines, bargaining -- not self-help -- was the means to address those concerns, as it very well knew.

Conclusion

The Company violated the parties' MOA when it denied trainees at Turkey Point the opportunity to work overtime as NLOs during their training to become licensed operators. It ignored the plain language of the MOA, the parties' previously shared interpretation of that language, two decades of past practice, and even its own ongoing practice at St. Lucie, where trainees continue to receive overtime.

What emerges from the Company's defense is an enterprise that has little regard for the collective bargaining agreement or the collective bargaining process. The nuclear power industry is, rightly so, one of the most heavily regulated and reviewed industries in this nation. Accordingly, for the Company to advance an argument that for more than twenty years it was "just plain wrong" in interpreting the rules and regulations to allow trainees to work overtime, a practice that was never challenged or called into question despite repeated NRC reviews and multiple INPO audits, is disingenuous. On the other hand, if true, this "just plain wrong" claim reflects an incredible level of incompetence on the part of Company Management across two decades at two separate nuclear power plants.

The Company offered no rational explanation for allowing one plant to continue to offer overtime opportunities to trainees -- as required by the parties' MOA and settled past practice -- and barring identically-situated employees at the other plant, working under the same agreement, the same regulations, the same accreditation guidelines, in the same bargaining unit and job classification performing the very same functions, from working overtime. There is no valid explanation. Rather than comply with its contractual obligations or achieve change through negotiation, it acted unilaterally at Wright's direction and allowed its Turkey Point manager to enact his own interpretation of INPO guidelines. Wright was wrong to do this, the Company was wrong to support him, and the grievance should be sustained.

The Union requests that the panel sustain the grievance, find that the Company violated the MOA when it barred trainees in Turkey Point ILCs 24 and 25 from working overtime opportunities during their training to become a licensed operator, direct the Company to remedy that violation by either offering or paying overtime in accord with Article 44, and retain jurisdiction for a period of time not less than 90 days from the issuance of its award should the parties have a dispute over the interpretation or application of the Award.

COMPANY:

The grievance in this case states: "The Memorandum of Agreement allows for these students to be included in the Non Licensed Operator's overtime list and should be eligible for

all overtime." JX 2. But that is ***not*** what the contract says. The contract states: "Licensed Operator candidates who have not yet obtained an NRC license will be included on the Non-Licensed Operator (NLO) overtime list ***provided they have the appropriate qualifications for the overtime assignment***." JX 1, p. Nuclear 17 (emphasis added). As the party that bears the burden of proof, it was up to the Union to prove that a) the grievants were denied overtime assignments; b) for which ***they were qualified***.

To meet this burden, the Union presented four witnesses. Mr. Porter and Mr. Johnson established that at some point in the past, ILC students were allowed to stand NLO watches. This fact was never in dispute. The testimony of Messrs. Aleknavich and Pedrianes had no bearing on the issue of qualifications. In short, the Union presented no evidence that proved that the grievants were qualified to perform the overtime assignments grieved herein. By contrast, the Company presented a clear case that demonstrated who made the decision that ILC students were not qualified to stand NLO watches, when the decision was made, why the Company began looking at the issue and how the Company came to its conclusion. Rather than presenting a similarly clear and cohesive case to establish that ILC students are, in fact, qualified to stand NLO watches, the Union did no more than try to poke holes in the Company's case. The Union failed, and in this, not only failed to show any real issues with the Company's case, but also revealed that it could not establish any breach of the contract.

I. THE UNION FAILED TO PROVE THAT THE COMPANY CIRCUMVENTED THE COLLECTIVE BARGAINING PROCESS.

First, the Union tendered two documents (UX 1 and 2) showing that the parties were engaged in bargaining over elimination of <u>all</u> overtime for employees in training. Union witnesses Aleknavich and Pedrianes testified that UX 1 and 2 were rejected by the Union and asserted that the change in policy in 2008 was an attempt by the Company to unilaterally implement something it could not obtain in bargaining. The Union's argument fails. UX 1 and 2 pertain to elimination of <u>all</u> overtime for students in training. *See* Tr. 257-58. But as the record shows, the Company has not eliminated all overtime for students in training. Indeed, the testimony establishes that ILC students continue to participate in departmental overtime and have for many years.

Moreover, Mr. Wright testified that he was not involved in creating UX 1 or 2 and had no role in bargaining the proposals regarding elimination of <u>all</u> overtime. *See* Tr. 187-89. He further debunked the notion that the Company was trying to work an end-around the bargaining process:

Q: I would like to digress for a moment and talk a little bit about what was going on at the collective bargaining table in 2008. Were you aware that the Company and Union were involved in bargaining at that time?
A: Yes, I was aware of the bargaining.
Q: Did you participate in that bargaining?
A: I participated late in the process around -- at the bargaining table, around the nuclear watch engineer discussions and that nuclear bargaining agreement. I also was -- as part of that, late in the process I was given briefs on things that were being brought to the table. But I did not directly negotiate anything else other than the nuclear watch engineer.
Q: Was what was going on during that bargaining, did that influence you in any way in terms of this assessment that you were doing of your training programs?
A: No, it did not.
Q: If you were to be asked whether your assessment was just an end around something going on in bargaining, how would you answer the question?
A: I would say absolutely not. The qualifications -- this was about qualifications and the integrity of the non-licensed operator training program. That's what the decision was built on. That's why we proceeded with it.

More importantly, collective bargaining at PTN certainly played no role in the decisions of INPO or the other 50+ nuclear operators whom Mr. Wright testified reached the same conclusions as he did. *See* Tr. 215. Mr. Wright, Mr. Sizemore and Mr. Stamp all testified that the industry standard is not to allow ILC students to stand NLO watches. To rebut this testimony, the Union presented . . . . nothing.

There was nothing nefarious about the Company's decision to re-examine its training and qualification practices. The INPO requirements highlighted in CX 2 establish that the Company has an obligation to assess its training programs and to improve its compliance with INPO guidelines. Once the PTN management realized it was not in compliance with those guidelines, it was obligated to fix the problem. This was not only reasonable, it was necessary.

The Union failed to prove that the Company's decision not to allow ILC students to stand NLO watches was an attempt to circumvent the bargaining process. The Company's decision was based on an assessment of training program materials and was applicable to all NLO watch standing duties, regardless of when such work took place. In short, the PTN's qualification determination had nothing to do with the Company's proposals on overtime. The Union failed to meet its burden in advancing this argument.

II. THE UNION FAILED TO ESTABLISH THE EXISTENCE OF A BINDING PAST PRACTICE

Second, the Union asserted, without any factual development, that the past practice doctrine bound the Company to continue allowing ILC students to stand NLO watches. In order to establish a binding past practice the Union must demonstrate that the supposed "past

practice" was the result of some clear understanding between the Union and the Company, and not the result of mere happenstance, or as in this case, an assumption made by the Company in the exercise of its management direction:

> The critical difference between mere prior conduct and past practice is the concept of mutuality. Unless it can be established that the alleged past practice represents a mutually agreed upon response to a particular situation, the prior conduct will not be treated as a past practice, but rather will be considered a mere, non-binding 'present way of doing things.'

Past Practice, Maintenance of Benefits and Zipper Clauses, Ira Jaffe, in *Labor and Employment Arbitration,* (Pub 443, undated) pp. 18-4 to 18-6. According to *Elkouri & Elkouri,* this is the kind of managerial decision that should not be characterized as a binding practice:

> But there are other practices which are not the result of joint determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to the convenient method at the time. In such cases there is no thought of obligation or commitment to the future. Such practices are merely present ways, not prescribed ways, of doing things. The relevant item of significance is not the nature of the particular method but the managerial freedom with respect to it. Being the product of managerial determination in its permitted discretion such practices are, in the absence of contractual provision to the contrary, subject to change in the same discretion.

See id. At 636, *quoting Ford Motor Co.,* 19 LA 237, 241-42 (Shulman, Arb. 1952). The Union failed to produce a single witness to establish that the practice of allowing ILC students to stand NLO watches was the result of mutual agreement between the Company and the Union.

Both Mr. Aleknavich and Mr. Pedrianes have long histories as Union representatives, and neither testified that the Union was involved in any way in the decision to allow ILC students to work watch standing overtime. Indeed, the practice prior to December 2008 was not the result of any deliberate decision or process. According to Mr. Stamp, it was the result of an erroneous assumption made by Management personnel. *See* Tr. 272. The Union played no role in the decision to allow ILC students to stand NLO watches, and similarly played no role in the decision to change course.

Qualification decisions are the prerogative of Management. Not only does the contract vest Management with the right to make qualification decisions, *see* JX 1, Article 4, but the NRC mandates that qualification decisions be vested solely in the license holder:

> Q: I want to shift gears a little bit to talk about qualifications in general. Can you explain to the Arbitrator the role of the Company has in determining who is and who is not qualified to operate?
> A: Yes. We are the license holder so that -- to operate the plant. And that's solely invested in us to determine who will operate the plant and qualified to

operate the plant. That's our practice.
Q: How that authority enacted on a day-to-day basis?
A: On a day-to-day basis, we use our procedures and processes to govern that, specifically like the one I talked about with the watch standard out of service book and determining qualifications for putting your hands on the plant.
Q: When it comes to determining whether an individual is or is not qualified, has the Company ever bargained that with the Union?
A: No, not to my knowledge.

[Wright, Tr. 181-82}.

Q: Who determines who is qualified to be in the reactor area or who is qualified to be in the auxiliary area?
A: That's up to the Management team using all of the guidance and regulations that put force in all of our administrative procedures.
Q: Is that something that is bargained with the Union?
A: No. That's regulation.

[Shafer Tr. 259-60}

Importantly, the Company's first and most sacred obligation is to adhere to industry rules and guidelines regarding the safe operation of the plant. When INPO or NRC guidelines change, so too must the Company's practice, regardless of what the previous practice was. The Company does not have the option to simply ignore guidelines from INPO. It is one thing for the Company, in good faith, to mistakenly interpret or apply INPO guidelines. It is another thing altogether for the Company to willingly ignore them. FPL will not ever do the latter. The Company's willingness to adhere to rules, regulations, guidelines and best practices is a non-negotiable part of its obligation to all of the stakeholders in its business.

III. THE UNION FAILED TO PROVE THAT COMPANY POLICIES SUPPORT ITS POSITION

Third, the Union presented two versions of a Company internal document to establish that a year after the policy change in December 2008, the Company still believed that ILC students were qualified to stand NLO watches. The problem with this avenue of attack was that the Union misunderstood what UX 9 and 10 were actually saying. Rich Wright explained how those documents came to be and further explained what they meant. *See* Tr. 191. According to Mr. Wright, Section 5.6 of the ADM stated that an employee could maintain his or her NLO qualification if he or she satisfactorily completed ILC requirements, and also completed all requirements under Step 3.6.5 and maintained all NLO watch station qualifications. *See* Tr. 191.

But in this, the Union was barking up the wrong tree. The ADMS do no establish Company practice, they reflect it. There is no dispute that in December 2008, PTN ceased

allowing ILC students to stand NLO watches, and that such students were placed in the out of service book to ensure that they were not given NLO watch duties:

> Q: * * * * There was a night watch order issued in December 2008. And if you need to look at that, that is Union Exhibit 6.
> A: Yes.
> Q: Was this change in the watchstander out of service book that we see in this night done at your initiative?
> A: Yes.
> Q: By the way, after this night order, did it continue to get reissued?
> A: No. As I explained, we have another process that aren't [sic] in any of these. It's our operations procedure for implementing watchstanding out of service, and that is a procedure, and it specifically says if you initiate a change from the continuing training supervisor through the assistant ops manager, the services will be issued as follows. So that procedure is in effect.

[Wright, Tr. 221]. There is also no dispute that this continued to be the practice in 2009 when the ADMs in UX 9 and 10 were written. The ADMs were inartfully drafted, and were later corrected. *See* CX 5. But they do not, in themselves, establish that ILC students were actually qualified to stand the watch. In order to get there, the Union would have had to produce the drafter of the ADM and establish that he or she had more authority and expertise to make a call about qualifications than the Operations Manager, the Assistant Operations Manager, the PTN Training Manager and the Fleet Training Manager, all of whom testified in this case. A poorly drafted ADM neither changes the facts on the ground, nor does it invalidate the unchallenged testimony of four Company witnesses. In other words, this line of questioning did nothing to assist the Union in establishing that ILC students were actually qualified to stand NLO watches.

IV. THE UNION FAILED TO PROVE THAT ST. LUCIE PLANT MANAGEMENT BELIEVED ILC STUDENTS WERE QUALIFIED TO STAND NLO WATCHES

Fourth, the Union raised the fact that Management at St. Lucie Plant, in a few isolated instances, allowed ILC students to stand NLO watches. Apparently, the Union's view was that if St. Lucie allowed this to happen on a few occasions, the persons who allowed the practice must be correct and the four Company witnesses who testified at the hearing must all be wrong. Again, this is not something the Union gets to simply imply. As the party with the burden of proof, it was up to the Union to call a witness from St. Lucie Plant to affirmatively state that St. Lucie Management engaged in the same type of analysis that PTN Management had, and concluded that ILC students are qualified to stand all NLO watch stations. The Union made no such showing.

To the contrary, Mr. Sizemore established that St. Lucie was not consistent in its own practice:

Q: There has been some questions here about St. Lucie Plant practice and Mr. Warman has asked a variety of witnesses about that. I would like to talk to you a little about what you have learned about St. Lucie's practice.
A: Based on when we started to prep for this and when I was called because I'm actually filling in for my director who is at INPO, and found out that at St. Lucie that we actually had two different practices going on. When we removed somebody from license class based on academic reasons or personal reasons or whatever that was a [NLO] going to be a reactor operator, when we removed them, we put together a detailed list of delta training or gap training and under instruction watches and they have to go through that to be able to start standing on non-licensed operator watch. Unfortunately also identified was that they were allowing individuals to stand watches although it was only a few instances. We have allowed at St. Lucie for an individual to stand watches without maintaining essentially the continuing training program the way that it should be.
Q: What, if anything, actions did the Company take about that?
A: Once I was aware of that, I directed one of my direct reports to write a condition report out of the corporate office. That condition report which is put into the system is evaluated so there will either be a condition evaluation which Is our lowest evaluation or apparent cause or root cause evaluation based on the screening of it through the committee. And then actions will be taken to correct that.

Tr. 245-46. This hardly establishes the ILC students are, in fact, qualified to stand NLO watches. In requiring students dropping out of ILC class to undergo gap training, St. Lucie Management recognized that important NLO requalification information was missed during ILC training. Once again, the Union failed to meet its burden.

V. THE CONTRACT DOES NOT REQUIRE THE COMPANY TO PROVIDE TRAINING TO ILC STUDENTS SO THT THEY CAN CONTINUE TO STAND NLO WATCH

Finally, employees volunteer to attend ILC and become Licensed Operators. *See* JX 1, p. Nuclear 38. They do this knowing that they will lose some overtime work opportunities. Indeed, the Union pressed the /do to compensate ILC students for the lost overtime, and the Company agreed to increase base wages of ILC students to offset the same. *See* Tr. 122-23. Now, in addition to this increase in base wages, the Union asserts that the Company should absorb the cost of providing training to these students so they can stand NLO watch, solely for their own benefit. *See* Tr. 214.15. Or, preferably, that the Company pays ILC students a windfall of cash for hours not actually worked. *See* Tr. 19.

It would take a great deal of resources for the Company to be able to obtain the benefit of the services of ILC students in the plant. As can be deduced from Mr. Stamp's testimony, the cost of training ILC students to stand NLO watch would be significant. *See* Tr. 277-78. It costs the Company approximately $28,000 per month to train students in ILC, which works out to $6,900 per student per week. If the Company were to extend ILC training by the amount of time

it would take for those students to take a week off every five weeks to attend NLO training, it would extend ILC by 14.4 weeks (4 weeks a month, times 18 months, divided by 5). That would increase the Company's costs for ILC by nearly $100,000 per student (14.4 times $6,900 per week).

This is an exorbitant cost. More importantly, there is nothing in the contract that requires this expenditure. Nowhere in the contract does it state that the Company must keep ILC students qualified to stand NLO watches. The obligation to provide training in general is implicit in the arrangement between the Company and the Union. Certainly such an obligation could be inferred if the issue was the Company's obligation to provide the training necessary for employees to perform the work they were hired to do. In other words, the Company is obligated to provide NLO training to NLOs, or mechanic training to mechanics, etc.

But in this case, the Grievants are not seeking to be NLOs, they are seeking to be licensed operators. The Company more than fulfills its obligation to provide necessary training to these employees by investing $500,000 per student and 18 months of training and resources to ensure that they can perform the duties of a Licensed Operator. There is positively nothing in the contract that requires the Company to do more than this. The Union's assertion that the Company must expend even more resources to train ILC students to stand NLO watch, or in the alternative, give those students money for hours they never worked is absurd.

The Company is obligated to abide by INPO guidelines. Training ILC students to be able to stand NLO watches is impractical, costly and unsupported by the contract. Perhaps that is why the Union seeks only a financial award from the Arbitrator:

> Q: The Union in this case has argued that the correct thing to do is sort of go back to the way it was before December 2008 and just state that everybody who is in ILC class is qualified to stand on NLO watches.
> Mr. Warman: Objection, mischaracterization. I told you we wanted the monetary remedy under the contract. That's what we want.
> The Arbitrator: I'll sustain that. Rephrase it.
> Q: Let me take a moment here. Am I to understand that the Union's sole request is for a monetary and not to change the practice?
> Mr. Warman: Give me money. We have lost the overtime opportunities. There is a specific monetary remedy in the contract.

Tr. 181. But it was the Union that went to the point of recalling a witness to establish that ILC classes 26 and 27 have also grieved the Company's practice. *See* Tr. 286. So not only does the Union seek payment for hours not worked in this case, but it will be seeking the same going forward. The Union's argument is astonishing. It seeks an unjustified financial windfall for the Grievants in this case and for all classes going forward. Luckily, the Union is not entitled to this windfall without first showing that there was a breach of contract. Contrary to Mr.

Wiseman's assertion, it was not enough to show that the Grievants lost overtime opportunities. The Union had to prove that the Grievants were qualified to work the overtime assignments they missed. The Union fell far short of meeting that burden.

Conclusion:

The Union's burden in this case was to prove that students in ILC classes 24 and 25 were actually qualified to stand the NLO watches they were denied. The Union presented no evidence whatsoever to meet its burden. For this reason, and those discussed more fully herein, the Union's grievance must be denied.

DISCUSSION AND OPINION

PAST PRACTICE

The parties have differed in framing the issue(s) in this case. After studying the record and evidence provided, including testimony of all witnesses, the Arbitrator has chosen to frame the issue as follows:

> Did the Company violate the Memorandum of Agreement 2004 - 2008 Nuclear Supplement Article 44. Distribution of Overtime? If the answer is yes, what is the appropriate remedy?

The matter as filed by the Union in their grievance alleges ". . . . the Company has declared all of these students[1] not qualified to stand watch and therefore, ineligible for overtime. The Memorandum of Agreement allows these students to be included in the Non-licensed Operators' overtime list and should be eligible for all overtime . . . ."

The Company's position on the issue is that students in ILC classes 24 and 25 were denied overtime because it was determined that they were not qualified (emphasis added) to perform Non-Licensed Operator watch duties.

The parties both look to the 2004 - 2008 Memorandum of Agreement (MOA) in force at the time the Union's allegations which prompted the grievance in this case. The specific language upon which the Company relies is found in the Nuclear Supplement to the MOA, Article V, Hours of Work-Working Conditions-Rates of Pay, 44, Exhibit "A", Note 1. The language of Paragraph 2 of Note "A" 1 is clear and unambiguous in its meaning as follows:

> Licensed Operator candidates who have not yet obtained an NRC license will be included on the Non Licensed Operator (NLO) overtime list provided they have the appropriate qualifications for the overtime assignment (Arbitrator's emphasis). It is the Company's intent to ensure that direct hire Licensed Operators be provided the opportunity to train in all watch stations; licensed requirements and non-licensed requirements.

[1] Reference to ILC 24 and 25.

The Non-Licensed Operators' (NLO) career path to becoming Licensed Operators (LO) according to the uncontroverted testimony of Council U4 Union Business Manager, Gary Aleknavich, is: 1) associate nuclear plant operator (ANPO); 2) nuclear plant operator (NPO); and 3) senior nuclear plant operator (SNPO). Students in initial license classes (ILC) ergo ILC 24 and 25 are all SNPO qualified.

Mr. Mike Pedrianes, Chief Steward at the Turkey Point Nuclear (TPN) facility for eleven (11) years, is the steward of record. Upon his return from being on vacation in January 2009, he became aware that ILC class 24 was not being allowed overtime (emphasis added) while in class. A Night Order[2] dated December 27, 2008, from the Company caught his attention. The Operations Night Order in question stated as follows:

> "Recently a Nuclear System Operator enrolled in Initial License Class assumed an NSO Watchstation while out-of-service. There has been some confusion on this topic. O-ADM-312, NSO Initial and Continuing Training, requires that NSOs that miss continuing training and do not make up the training within two requalification cycles be placed in the Watchstander Out-of-Service book. Once ILC NSO students have missed two NSO requalification cycles, Training has notified Operations, and these Operators have been listed as out-of-service for NSO watchstations. The Shift Manager, Unit Supervisors, and Field Supervisor are responsible for ensuring Operators placed on the shift watchbill are in service for the watchstations they're assigned (ref: 0-ADM-202). Additionally, NSOs should also be aware of their status and notify the Field Supervisor if assigned a watch in which they do not meet the qualifications.
>
> The NSO Training Review Committee is evaluating alternatives to permit ILC students to remain in service while pursuing their license, but this has not been approved."

Mr. Richard Wright who was transferred from the Seabrook, New Hampshire nuclear power plant assumed the Turkey Point Assistant Ops Manager position in 2005. Mr. Wright became the Operations Director before leaving TPN in 2011. It was he who directed the above change in Company policy and/or practice in December 2008 as seen in the above Night Order. Specifically, he examined the NLO re-qualifications at TPN while NLOs were in ILC status and found that the NLOs in the ILC status were not meeting the requirements needed to be standing watch.

The Institute of Nuclear Power Operations[3] (INPO) had placed the TPN facility on probation during 2005 - 2006. Mr. Wright testified that he interacted with the INPO accrediting

---

[2] Night Orders (NO) expire after thirty (30) days. To remain in effect, the NO must be incorporated into the plant's Administrative Procedures (ADM). The December 27, 2008 NO was not re-issued to FPL employees. The NSO Training Review Committee did not approve this NO.

[3] A body that accredits training programs and publishes rules that must be met for a facility to maintain its accreditations to qualify operators to operate a nuclear plant.

board after addressing the specific objectives cited by INPO that TPN was not meeting: "THE OBJECTIVES AND CRITERIA FOR ACCREDITATION OF TRAINING IN THE NUCLEAR POWER INDUSTRY"; Objective 2 - Management of Training Procedures and Resources and Objective 3, Initial Training and Qualification.

Mr. Pedrianes in his undisputed testimony stated that in the prior five or six years before the above issue arose, there had been no disqualification of students in ILC from working regular non-licensed overtime. During the grievance process Pedrianes testified that Mr. Sam Shafer, Company Assistant Operations Manager for operations training support at TPN, told Pedrianes that denying overtime to ILC 24 and 25 students was based upon an interpretation of an "Institute of Nuclear Power Operations" (INPO) document. He testified that TPN had been operating out of compliance for forty (40) years and the NO would correct the prior company assumption that ILC students were eligible to work overtime.

The Arbitrator has carefully reviewed all of the evidence, the relevant MOA in effect during 2004 - 2008, the parties' exhibits, the hearing transcripts, and the parties' position(s) including their arguments and has arrived at the conclusion that the grievance is sustained for the reasons that follow.

There is no dispute by the Company that for over twenty (20) years or more the Company assumed that ILC students were qualified to work overtime (emphasis added) to stand watch.

Specifically the program focused on the non-licensed operator (NLO) re-qualification program. The re-qualification program must be completed by NLOs every five (5) weeks.

The Company in its long standing past practice did not require (emphasis added) that the NLOs in an Initial License Class (ILC) complete a NLO re-qualification program every five (5) weeks in order to be kept in the overtime watchstander book.

The Company's O-ADM-312, p. 21, approval date August 8, 2006 (emphasis added), was in force during the period of time ILC 24 and 25. Paragraph 5.6 clearly reflects the Company's practice in pertinent and relevant part as follows:

5.6 NSOs Attending A Licensed Operator Program

5.6.1 NSOs attending an Accredited Licensed Operator Program will maintain proficiency for watch standing duties as a NSO by:

1. Successfully completing all academic requirements such as exams, JPMs, Simulator Training scenarios, etc., as required by the applicable Licensed Operator Program they are attending.
2. Competing all assigned/required LMS/CBT/E-Learning items as well as maintaining current status with Plant Training Bulletins, Modification and Operations Bulletins in accordance with Step 3.6.5 of this procedure.
3. Maintaining all required qualifications current whenever they would be

required for the particular watch to be assumed by the operator including, but not limited to, Emergency Response Organization, Respirator and Fire Brigade.

A revised O-ADM-312 with an approval date of November 12, 2009, p. 22, stated in relevant and pertinent part as follows:

5.6 NSOs Attending A Licensed Operator Program

5.6.1 NSOs attending an Accredited Licensed Operator Program will maintain proficiency for watch-standing duties as a NSO by:

1. Successfully completing all academic requirements such as exams, JPMs, Simulator Training scenarios, etc., as required by the applicable Licensed Operator Program they are attending.
2. Competing all assigned/required LMS/CBT/E-Learning items, as well as maintaining current status with Plant Training Bulletins, Modification and Operations Bulletins in accordance with Step 3.6.5 of this procedure.
3. Maintaining all required qualifications current whenever they would be required for the particular watch station to be assumed by the operator including, but not limited to, Emergency Response Organization, Respirator and Fire Brigade.

On November 10, 2010, the O-ADM-312, §5.6.1 was revised and stated as follows:

5.6.1 Qualified NSOs attending an Accredited Licensed Operator Program will lose NSO watch-standing qualifications and be removed from service in accordance with the missed training requirements of Step 5.5.6.2 of this procedure.

5.6.2 If subsequent re-establishment of NSO watch-standing qualifications I desired, the following shall be completed:

5.6.2.1 Make-up training requirements will be determined by comparing the missed NSOCT curriculum to the curriculum completed in the attended licensing class.

5.6.2.2 Required LMS items and qualifications shall be verified completed and current.

5.6.2.3 A make-up training plan will then be developed and successfully completed by the Operator prior to being returned to service for NSO watch-stander duties.

The parties, as stated earlier, have had a long past practice (emphasis added) with regard to Nuclear Paragraph 44, Distribution of Overtime, Exhibit "A" Note 1. As practiced, the Company has allowed students in an ILC class to be carried on the overtime watchstanding list. In this opinion of the undersigned, the parties have mutually accepted the practice which constitutes a major working condition subject to change only by collective bargaining of the parties' contract as opposed to any unilateral changes in practice.

As found in Elkouri & Elkouri, How Arbitration Works, Sixth Edition, p. 606, Arbitrator Maurice H. Merrill, in Phillips Petroleum Co. 24 LA 191, 1955, states as follows:

> " . . . it seems to me that the current of opinion has set strongly in favor of the position that existing practices, in respect to major conditions of employment are to be regarded as included within a collective bargaining contract ((emphasis added by Arbitrator), negotiated after the practice has become established and not repudiated or limited by it. This also seems to me the reasonable view since negotiators work within the frame of existent practice and must be taken to be conscious of it . . . ."

The past practice at TPN is without a doubt one of the longest this Arbitrator has seen. Arbitrator Merrill has captured in his well reasoned finding that, as is true in this case, we have a major working condition that is to be included within the collective bargaining agreement. In this case, the 2004 - 2008 MOA at Turkey Point.

BARGAINING HISTORY

On or about May 2008 the parties began negotiations of a new Memorandum of Agreement (MOA) which includes the Nuclear Supplement. The 2004 - 2008 MOA was in effect during the time ILC 24 and 25 students were in training. In June 2008 the Company submitted a proposal to the Union on Non-Licensed Operator (NLO) overtime. The Company's proposal called for the elimination of operator overtime during initial and continuing training (emphasis added).

The Union did not offer a counter proposal to the Company's proposal and no further discussion on the issue occurred again until November 2008. At that time the Company fleshed out its original June proposal. The Union again did not offer a counter proposal to the Company's and the issue was not acted on during the remainder of the 2004 - 2008 negotiations process.

On June 24, 2011, the parties initiated a tentative agreement (TA) which modified the Company's proposal which stated: "Operations personnel in a training status for a day or more will be considered not eligible for overtime assignments if the overtime is on the shift prior to the start of training and exceeds four (4) hours".

The above bargaining history clearly indicates the Company's intent to altar a major condition of employment when they excluded students in training from working overtime contrary to the prevailing long term past practice under the then bargained 2004 - 2008 MOA.

As noted in Elkouri & Elkouri (*Id.*) on the subject of a proposed clause rejected or withdrawn " . . . . if a party attempts, but fails, in contract negotiations, to include a specific provision in the agreement, arbitrators will hesitate to read such provision into the agreement through the process of interpretation. In a nutshell, a party may not obtain 'through arbitration

what it could not acquire through negotiation.' One Arbitrator explained that 'there is a hazard' in making a specific contract demand in negotiations:

> 'If the provision gets caught up in a grievance, the Party who proffers the language will have to bear the burden of demonstrating in a later arbitration proceeding that its omission ought not to be given its normal significance. Normally, of course, the plain inference of the omission is that the intent to reject prevailed over the intent to include.'"

In this case, the Company discovered that for twenty (20) to forty (40) years, it had labored under a mistaken assumption that the ILC course of study was of such a design that ILC students retained their NLO qualifications. As such, they did and were under the language crafted and agreed to by the parties to allow NLO ILC students to work overtime. The language in Nuclear 44, Exhibit "A", Note 1 did not change; nor, did INPOs accreditation requirements. They were both applicable during the period of time at issue.

The Company's submission of its proposals to eliminate the long practiced distribution of overtime adds significance to the Arbitrator's opinion -- that it recognized a need to bargain with the Union (emphasis added) on the major working conditions of overtime.

AGGRAVATING CIRCUMSTANCE

The evidence and undisputed testimony of Mr. Shannon Johnson established that while he was a student in a Hot License[4] class at St. Lucie Nuclear Power Plant from March 2008 - December 2009, he worked non-license overtime an average of ten (10) hours per pay period. The employees at TPN and St. Lucie Nuclear are represented by Union Council U-4 and work under the same MOA, including the Nuclear Supplement. The Company does not dispute the fact that St. Lucie distributed NLO overtime to "Hot License" students.

The Company argues that the Union did not present any St. Lucie Management personnel to counter the Union's position. The Arbitrator would have found it useful to hear such testimony to explain why the Company applied differing interpretations of the MOA and INPO regulations. The silence on the matter by the TPN managers speaks volumes.

AWARD

The Union has met its burden in providing a preponderance of evidence in support of the grievance that the Company violated the MOA in effect when it barred trainees in Turkey Point ILCs 24 and 25 from working overtime opportunities while in training to become licensed operators. Therefore, the grievance, as stated earlier, is sustained.

[4] Hot License synonymous with ILC.

REMEDY

The Company is directed to either offer or pay overtime in accordance with Article 44. The Arbitrator will retain jurisdiction for a period of ninety (90) days from the date of issuance of the award and/or sooner if the parties arrive at an agreement on the application of the award.

It is so directed this the 29th day of January in the year of 2013.

LeRoy R. Bartman, Ed.D.
Arbitrator