

BEFORE THE ARBITRATOR

In the Matter of the Arbitration Between)
Central Lincoln People's Utility District)
the Employer)
and)
IBEW Local 659)
the Union)

**ARBITRATOR'S OPINION
AND AWARD**

(Grievance of Joe Hiner
SCADA System Switching)

Representatives:

For the Union

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November 21, 2001

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WITNESS LIST

For the Union:

Bill Mills, Relay Meter Foreman

Wayne Secrist, Journeyman Serviceman

Matt Hillebrand, Journeyman Meter-Relay Technician

Joe Hiner, Journeyman Wireman

For the Employer:

Rick Oliver, Senior Systems Engineer and SCADA project manager

Mike Wilson - Chief Engineer and Systems Operation Manager

EXHIBIT LIST

Joint Exhibits

1. Collective Bargaining Agreement, October 11, 1999
2. Collective Bargaining Agreement, April 11, 1994
3. Grievance, April 3, 2000
4. Grievance correspondence: April 4, 2000, April 21, 2000, April 28, 2000 with attachment dated September 18, 1998, May 10, 2000
5. PUD contract proposal, February 16, 1999
6. Union contract proposal, February 16, 1999
7. Operating Switching Manual, revised April 1999
8. Electrically Operated Control Switch Relay For Both Manual and Remote Supervisory Control of Power Circuit Breakers, Technical Publication CSR-1, Eff. February 15, 1993
9. Manual: Modicon TSX Quantum Automation Series
10. Photographs of SCADA computer work stations
11. Photographs of switching system

Union Exhibits

1. Arbitrator Levak award (Oct. 1989)
2. State of Oregon Apprenticeship and Training Council, Central Lincoln PUD TATC, Revised 1/01
3. Diagram prepared by Bill Mills of SCADA switching system
4. [withdrawn]
5. Grievance, October 15, 1992
6. Grievance, July 23, 1985

Employer Exhibits

1. Letter to Ray Marvin from Brian J. Winters re Wireman position, January 8, 1986
2. Clarification of Union's Position - February 28, 1986
3. Letter to Jack L. Snook from Ray Marvin, March 21, 1986

I. INTRODUCTION

This dispute, between Central Lincoln People's Utility District (the Employer) and IBEW Local 659 (the Union), concerns a grievance submitted by bargaining unit member Joe Hiner which the Union timely submitted to the Employer on April 3, 2000, pursuant to the parties' Collective Bargaining Agreement. The grievance alleges that the Employer violated the Labor Agreement when it assigned switching work to non-bargaining unit personnel. The parties were unable to resolve the grievance pursuant to the dispute resolution provisions of their Labor Agreement. Accordingly, they submitted the dispute to arbitration. At an arbitration hearing held on August 7, 2001, in Newport, Oregon, the parties had the opportunity to make opening statements, submit documentary evidence, examine and cross-examine sworn witnesses and argue the issues in dispute. The parties stipulated that the dispute was properly before the undersigned Arbitrator who has the authority to issue a final and binding decision as to the issues submitted herein. The parties also stipulated that the Arbitrator would retain jurisdiction, for 60 days, over the remedial aspect of the dispute should a remedy be awarded in favor of the Union. The proceedings were transcribed by a court reporter. Upon the receipt of both parties' closing briefs to the Arbitrator on November 2, 2001, (both of which were postmarked on October 31, 2001), the hearing closed and the case stood fully submitted for decision.

II. SUMMARY OF THE EVIDENCE

A. Background

The Central Lincoln People's Utility District is a distributor of electric power with a service area encompassing a 120-mile long strip along the Oregon Coast. The area begins just south of Salishan and extends southward to the bridge at North Bend. The PUD has a total of 34,000 business and residential customers. Its main office is in Newport. The service area is divided into three operating division: Newport/South Beach, Florence and Reedsport. It has two

managerial areas, one covering the Newport/South Beach division and the other covering the Florence and Reedsport divisions. The PUD has a total of 146 employees. About 90 or 91 employees including linemen, servicemen, wiremen, metermen, among other positions, comprise the bargaining unit. Servicemen are based out of each operational area. All wiremen and relay technicians are based out of Newport, the main office, but move throughout the district as needed.

B. Switching Procedure and Practice

In 1998 the PUD purchased and began installing an automated monitoring system, known as SCADA, that has remote switching capabilities. The SCADA system is described in greater detail below. The grievance complained that on March 29, 2000, "management personnel operated the new remote SCADA system switching and testing substation and line switches" in violation of the contract because it is bargaining unit work. The Union presented evidence that it had been concerned about SCADA's remote switching capabilities. On September 18, 1998, Business Manager Ron Jones wrote then General Manager Mike Wilson that:

It was brought to our attention by the bargaining unit members that Central Lincoln P.U.D. intends to have non-bargaining unit personnel perform all switching functions once they are automated. If so, you may consider this notice that Local Union 659 does not agree to allow non-bargaining unit personnel [to] perform switching operations previously done by the bargaining unit.

As you may recall, we have always claimed jurisdiction of the historic scope of the work, even if technology changed the way that work was performed. Some examples are the U.G. locating devices, i.e., thumpers, and the infra-red cameras used to patrol lines.

We see the switching in the same way. Just because the "tools" change, does not mean the scope of the work changes.

This letter was posted for 1 1/2 years at the Employer's South Beach office, The issue was not discussed during negotiations in 1999 for the current Collective Bargaining Agreement. The Union also presented evidence that bargaining unit employees later raised the issue with

management, but were told that the issue was not open for discussion away from the bargaining table.

According to the evidence of record, the term “switching” means the opening and closing of circuits in lines or equipment in order to isolate load (i.e. electric power), direct load into different circuits, or isolate individual pieces of equipment for maintenance or normal procedural work. The Operating Switching Manual formally defines switching as “steps taken to energize or de-energize P.U.D. lines or equipment, transfer load from delivery to delivery, etc.” Exh. Jt-7, at 2. A switch can be closed to turn power on to a circuit, opened to close power to a circuit, or can be used to break or tie circuits together. The term does not logically apply to de-energized devices, at least in the view of the Employer.

The switching decision-making responsibility rests with the Employer’s three Operations Superintendents, who are also known as dispatchers. These individuals, who are not bargaining unit employees, are normally required to authorize all switching operations. Procedures are set forth in the Operation Switching Manual, Exh. Jt-7, a document in whose creation members of the bargaining unit participated. Operations Superintendents/Dispatchers have technical backgrounds, a great deal of experience and are well acquainted with the operations of the entire system, as opposed to just individual components. Dispatchers must make system-wide switching decisions while maintaining safety and service to customers. When circuits are switched, load may be transferred to a different area, so the dispatcher needs to understand the interrelationship between the amount of load being transferred and the capacity of individual substations, individual feeders, and individual power lines. It is a job that requires both skill and experience, and requires constant, on-going training, according to Mike Wilson, Chief Engineer and Systems Operation Manager. Bargaining unit employees are not authorized to perform switching without authorization from their Operations Superintendent except in emergencies or in special instances on isolated stations.

Bargaining unit employees have traditionally performed switching operations. The State of Oregon Apprenticeship and Training Council standards for the Central Lincoln PUD (Exh. U-2) requires bargaining unit employees to have at least 20 hours of training for the work processes of “substation maintenance and switching.”

Mr. Wilson testified that actually operating a switch is traditionally bargaining unit work if the switch is energized and load bearing. In addition, bargaining unit work has traditionally included opening and closing switches for maintenance, adjustment, or installation. Mr. Wilson opined that operating a non-energized or isolated switch can be done by both bargaining unit and non-bargaining unit employees. And, when the installation and testing of the new product requires an engineering opinion, the work is not limited to bargaining unit employees.

Union witnesses disagreed with part of Mr. Wilson’s testimony. Relay/Meter Foreman Bill Mills testified that bargaining unit employees have always, and apparently exclusively, operated switches regardless of whether the system was energized or not. He noted that the safety procedure of performing the switch remained the responsibility of the bargaining unit employee on hand. Mr. Mills testified that the procedure of testing a system involves a bargaining unit employee to isolate the equipment to be tested and the relay/metermen switches the device in and out to test it. Therefore bargaining unit employees perform switching procedures on a de-energized system. Mr. Mills and other Union witnesses testified that switching in conjunction with testing has always been bargaining unit work.

Both parties presented evidence of past practice of work related to switching. In particular, Joe Hiner testified that, prior to March 29, 2000, he was unaware of any non-bargaining unit employee at the PUD operating switches or doing testing in a non-emergency situation. Serviceman Wayne Secrist testified that, prior to March 29, 2000, in other than an emergency situation, he was unaware of any PUD non-bargaining unit employee operating SCADA to perform testing or operate a switch. Mr. Mills testified that testing has always been

done by bargaining unit servicemen, maintenance wiremen, linemen or relay/meter journeymen. He also testified that servicemen perform routine testing in the substations by operating switches to isolate loads in the breakers and change taps in the main transformer to increase or reduce voltage.

The Employer presented evidence, however, that when the PUD introduced its electronic relay, Consumer Information System and Geographic Information System, bargaining and non-bargaining unit employees worked together to test the electrical system and perform acceptance testing. Once these systems were in place, day-to-day responsibilities were designated to bargaining unit employees. The Union did not grieve any instance of management employee performing bargaining unit work.

Mr. Wilson also testified to a few instances where he operated non-energized switches in the installation of new equipment. These actions occurred after bargaining unit employees installed the new equipment and he needed to make sure the equipment was working properly.

Union witnesses, however, testified that they were not aware of instances where management had done any switching on circuits, except for those previously grieved, or in an emergency.

The Union presented a 1989 arbitration award of Arbitrator Thomas Levak holding that the Employer violated the collective bargaining agreement then in effect by allowing management personnel to use new technology to perform traditional bargaining unit maintenance work, when bargaining unit members were also employing this technology at the same time.

In 1985 and 1992, according to the Union's evidence, it grieved instances of management performing work traditionally done by bargaining unit members. Both grievances were resolved short of arbitration with resolutions favorable to the Union.

The evidence also showed that non-bargaining unit personnel have performed switching functions in emergency situations. The Operating Switching Manual acknowledges management's rights to perform tasks in the event of outages or other special circumstances to provide better services to customers in a timely manner. In reality, however, it is normally bargaining unit employees who perform after-hour switching to restore power or perform other emergency operations.

C. The SCADA System, Its Purchase and Installation

The PUD purchased a Supervisory Control and Data Acquisition (SCADA) system and began its installation in November 1998. SCADA is a system of software and hardware designed to allow PUD employees to view and monitor the entire system in real time and thus, is an improvement over the prior manually operated pin-board method. At the time of arbitration hearing, the PUD had SCADA installed on 12 of the PUD's 28 substations. The PUD expects to have SCADA operating in all of its substations in the next couple of years.

When SCADA is installed at a substation, sensors monitor individual components and relay the information to the central SCADA computers where the data is displayed in real time. SCADA allows PUD employees to monitor and control the system as a whole. It cannot be used for maintenance or to test individual components, in the opinion of Mr. Wilson. Bargaining unit employees are still needed for these tasks.

Engineering staff and Operating Supervisors have been trained to operate the SCADA system. This training must be refreshed and updated from time to time. In addition, the Employer has started a program for training bargaining unit personnel. Mr. Wilson testified that there are seven servicemen being trained on SCADA under the same system as non-bargaining unit employees. Once fully trained, these bargaining unit employees will have full access to the SCADA terminals. Serviceman Wayne Secrist testified that he is in the process of being trained on the SCADA system, and is one of the seven employees identified by Mr.

Wilson. Other employees who are not trained have access to the SCADA terminal on a read-only basis.

As with any new equipment, the SCADA system must be tested or “acceptance tested” to show it is working as promised by the vendor. The Employer presented evidence that vendors, technical and engineering employees, along with bargaining unit members, had performed SCADA acceptance testing at 11 of its substations without any objection from the Union prior to March 29, 2000, the day of events that gave rise to this grievance. The Union presented evidence suggesting it was unaware that non-bargaining unit members, except perhaps vendors, had performed switching in conjunction with SCADA system site acceptance testing.

Rick Oliver, a licensed professional engineer and electrical engineer with a four-year degree in electrical and computer engineering, is the PUD’s Senior Systems Engineer and SCADA Project Manager. Mr. Oliver explained site acceptance testing involves the contractor first delivering the hardware and software components that it assembled, programmed, and pre-tested in the factory. The devices are installed at the substation and then tested again in “a controlled environment” (Tr. 145), that is, with the devices isolated from the larger electrical distribution system. Each device is then operated remotely using the SCADA applications software through the master computer so that the vendor and PUD personnel can monitor the computer results and determine whether the system works together as anticipated.

According to Mr. Oliver, during the site acceptance testing at the other substations in which he participated, two PUD Senior Systems Engineers (Mr. Oliver and Steve Alexanderson) were at the SCADA master computer at the Newport office accompanied by a vendor’s representative. Bargaining unit employees were located out at the substation or in the field so they could do any prior switching that was needed to isolate the devices to be tested and report on-site visual verifications as needed. Mr. Oliver testified that prior to testing, the switching

necessary to isolate the piece of equipment or device was assigned to a bargaining unit employee at the substation. After the device was isolated, Mr. Oliver would establish radio contact with the substation and, using the keyboard at the master computer terminal, go through the necessary testing activities. During testing, a PUD engineer and a representative from the contractor used the SCADA keyboard to open and close breakers and they reviewed the results on various levels of SCADA screens to verify that the SCADA system was operating properly.

Mr. Oliver explained that if, during the site acceptance period, certain items fail (“certain devices [don’t] communicate correctly ... or it’s ... the programming portion ... at the station level” Tr. 147), the item must be corrected and retested. A list of items for retesting is made, known as a “punch list,” and punch-list testing occurs after the troubleshooting has been completed. The actual process of retesting is identical to the acceptance testing process described above. Punch-list testing had taken place on at least three of 12 SCADA installations prior to March 2000, to Mr. Oliver’s knowledge. The activity giving rise to this grievance on March 29, 2000, concerned punch-list testing for new SCADA system devices installed at Substation 261 and at an unidentified substation.

Mr. Oliver testified that during this testing process, more is involved than looking to see whether a switch is physically opened or closed. He explained (Tr. 157):

But that’s the only way you can check for each individual ... bit that comes through that represents a discrete point of opening and closing, or an analog string data coming in. We’re looking at it at a level that’s right at the program level. So we open up these small screens while we’re actually asking for them to operate that switch again if it failed to operate properly or SCADA didn’t report back. So therefore, you look at it, you see that bit change or didn’t change.

During the site acceptance testing, the vendors’ employees worked with the PUD’s engineers to help them understand the process that the SCADA software used and the checks that are incorporated in the system. Once the SCADA system is 100% operational at a new

substation, it is turned over to the PUD's operations staff for routine activities, Mr. Oliver's testimony indicated.

D. Punch-list Testing of SCADA on March 29, 2000

On March 29, 2000, Florence Operations Superintendent Richard Palmer and Senior Systems Engineer Steve Alexanderson operated some de-energized switches at Substation 261 and another substation while conducting punch-list testing of certain newly installed SCADA components at those substations. This activity was conducted in follow-up to the site acceptance testing at those substations because the SCADA system was not accurately reporting two switch positions. Management personnel did not use SCADA to switch energized devices. The lines at the substations were not in their normal configuration when Mr. Palmer opened and closed the devices using the SCADA and reviewed the results on the SCADA terminal.

The bargaining unit employee who submitted the grievance, Joe Hiner, testified that before Mr. Palmer tested the SCADA system, he instructed Mr. Hiner and other bargaining unit members to perform the switching necessary to isolate the pieces of equipment that Mr. Palmer wished to test. Bargaining unit members in the field diverted electric current away from particular switches so that they were isolated and not energized. They then let Mr. Palmer know when their activity had been completed. There was no dispute that bargaining unit employees performed the work of switching energized lines in order to isolate the devices for SCADA testing. Only the isolated or de-energized devices were opened and closed as part of the SCADA testing. Mr. Palmer did not use SCADA to transfer load in any of the switching operations that he carried out. After Mr. Palmer confirmed that the bargaining unit members had isolated those two pieces of equipment, he used the SCADA computer in the Florence office to open and close the de-energized switches. Specifically, he opened and closed a motor-operated gang switch and a circuit breaker, according to Joe Hiner's testimony. The

bargaining unit members reported back to Mr. Palmer whether or not the switches had moved and what position they were in. At the end of the testing, bargaining unit members returned the substation to its regular configuration. Mr. Hiner testified that SCADA could have been used to re-energize the devices at the substation, but that the work was done on site by bargaining unit members. The actual exercise of opening and closing switches for testing purposes via the SCADA system on March 29th probably can be measured in minutes, the record suggests. Opening and closing a single isolated switch via SCADA takes “milliseconds,” Mr. Mills testified. Tr. 56.

The record does not contain any information as to whether Mr. Hiner was aware that Steve Alexanderson, a licensed engineer like Mr. Oliver, participated in the SCADA testing along with Mr. Palmer.¹

III. ISSUES

The parties were unable to agree about a statement of the issues, leaving it for the Arbitrator to decide. The Union proposed the following:

Whether the Employer has violated the Collective Bargaining Agreement by assigning the performance of bargaining unit work including switching, testing and programming to non-bargaining unit personnel, via the use of the SCADA system. If so, what shall the remedy be?

The Employer proposed to frame the issues in the following manner:

Did the Employer violate basic principles, management rights, Articles 1.7.5, 4.1.1, 4.3. 4.61, 4.71 of the parties' Collective Bargaining Agreement when non bargaining unit employees performed certain operations with the SCADA system during site acceptance testing March 29, 2000? [These are the sections cited in the grievance]. If so, what's the appropriate remedy?

¹ Neither Mr. Palmer nor Mr. Alexanderson testified at hearing. Both Mr. Hiner and Mr. Oliver were personally aware of Mr. Palmer's participation. Mr. Oliver was personally aware of Mr. Alexanderson's participation, according to his testimony.

I have carefully considered both proposals. Although the choice is a close one, I prefer to frame the issues as follows:

Did the Employer violate the parties' Collective Bargaining Agreement when non-bargaining unit employees performed certain operations with the SCADA system during site acceptance testing March 29, 2000? If so, what is the appropriate remedy?

IV. RELEVANT CONTRACT LANGUAGE

The following contract language was cited by the parties as relevant to this dispute:

BASIC PRINCIPLES [No Article Number]

The purpose of this Agreement is to facilitate the peaceful adjustment of the differences that may arise from time to time and to promote harmony and efficiency to the end that the PUD, the Union, and the PUD's customers may mutually benefit.

The Union agrees for its members that they will individually and collectively perform loyal and efficient work and service, that they will use their influence and best efforts to promote public and employee safety, and protect the property of the PUD and its service to the public.

The PUD agrees that it will cooperate with the Union in its efforts to promote harmony and efficiency among the PUD's employees and will further the PUD's customers' interest whenever possible.

To these ends, this Agreement is made.

MANAGEMENT RIGHTS [No Article Number]

The PUD recognizes the Union as the exclusive bargaining agent for the employees covered by this Agreement. Nothing in the Agreement shall be construed as abridging the rights of the PUD, the Union or individual employees under the provisions of any applicable law or as required in the performance by the PUD or the Union of any act in violation of any such law. All usual and customary rights of management in the operation of the business not specifically limited to or abridged by a provision of this Agreement are recognized as being retained by the PUD.

ARTICLE II - DISPUTES, GRIEVANCES AND ARBITRATION

2.10 The arbitrator shall have no authority to amend, modify or supplement any provision of this Agreement.

2.11 Each party shall bear the expense of preparing and presenting its own case. Expenses of the arbitrator and any incidental expenses mutually agreed to in advance shall be borne equally by the parties hereto.

V. ARTICLE III - POSITIONS COVERED BY THIS AGREEMENT

3.1 Production Department Positions: ... Serviceman, ... Journeyman Relay/Meter Technician, ... Journeyman Maintenance Wireman,

ARTICLE IV - JOB DEFINITIONS - PRODUCTION DEPARTMENT

4.1.1 A Journeyman Lineman is an employee who has had a minimum of three (3) years' experience in electric utility line work and is able to qualify by examination.

4.3 A Serviceman is an employee who has a minimum of three (3) years working experience as a journeyman lineman and has qualified in all aspects of line work. He will be required to work alone at times and will be required at times to work with other crews. A Serviceman's job will include, but is not limited to, operating disconnects/switches, refusing transformers, installing new equipment, general maintenance, as well as conducting inspection programs. He will be required to complete related work forms and reports in a neat and orderly fashion. He will be required to have good oral and written communication skills. This position requires a person who can deal harmoniously and effectively with the public.

4.6.1 A Journeyman Relay/Meter Technician shall have a minimum of three (3) years' experience in electric utility installation, testing, servicing, and repair of electronic and electromechanical meters and relays. The Relay/Meter Technician shall have demonstrated proficiency at trouble shooting and repair of electronic equipment; have a working knowledge of microprocessor based control equipment; shall demonstrate proficiency at reading and understanding drawings and technical material related to meters, relays and electronic microprocessor based control equipment; have the ability to perform regular or periodic physical labor or exertion such as lifting, climbing or walking in inclement weather conditions; have demonstrated ability to work effectively with supervisors, associates and the public. When not assigned to meter or relay duties, he may be assigned to carry on other duties for which he is qualified, provided the duties do not conflict with the work covered by the positions in this Agreement.

4.7.1 A Journeyman Maintenance Wireman shall have a minimum of three (3) years' experience in electric utility substation testing, inspection and maintenance work. The Wireman shall demonstrate proficiency at installing, troubleshooting, repairing, dismantling, adjusting, replacing, and testing of equipment used in the operation of an electric utility transmission and distribution system; shall demonstrate proficiency at reading and understanding drawings and technical material related to the foregoing equipment; shall demonstrate proficiency with various power, hand and welding equipment required in the maintenance of utility equipment; shall demonstrate ability to work effectively with supervisors, associates and the public; shall demonstrate ability to perform regular or periodic physical labor or exertion such as lifting, climbing or walking in inclement weather conditions. The Wireman may do his own switching for the purpose of removing from service or returning to service equipment for testing, inspection or maintenance. When not assigned to Wireman duties, the Wireman may be assigned to carry on other duties for which he is qualified, provided the duties do not conflict with work covered by the positions in this Agreement.

Article XIII, entitled "BENEFITS AND WAGES," contains section 13.9, which is a schedule of wages for the various bargaining unit positions.

VI. SUMMARY OF THE PARTIES' POSITIONS

Position of the Union:

The Union contends that the remote switching, testing and programming functions via the SCADA system are bargaining unit work and a transfer of work by the PUD to outside sources is a violation of the Labor Agreement. The nature of the work using the SCADA system is essentially the same as without the use of the system and thus falls within the realm of traditional bargaining unit work. Furthermore, the PUD assigned work to non-bargaining unit individuals without offering the Union a chance to bargain over the matter. In particular, the Union contends:

- A. The PUD's transfer of switching and testing functions under the SCADA program violates the Labor Agreement's recognition clause.
 1. There are numerous cases holding that the employer violated contractual recognition provisions when transferring work designated to bargaining units to outside sources (citations omitted).
 2. The Labor Agreement's management rights clause stipulates that the PUD recognizes the Union as the exclusive bargaining agent for the employees.
 3. The Agreement recognizes the Union as the representative for production department positions of serviceman, journeyman, relay/meter technician and journeyman maintenance wireman, which are all covered by the Labor Agreement.

4. Switching and testing are traditionally performed by the above-mentioned bargaining unit employees. These functions are set forth in their job descriptions with training and apprenticeship programs required. Nowhere in the Labor Agreement are tasks at hand limited to energized systems.
- B. The PUD's assignment of switching and testing functions via the SCADA program to non-bargaining unit individuals violates the Labor Agreement's job security, seniority, and job classification provisions.
1. The Labor Agreement stipulates that the job positions in question be capable of and have the training to complete the tasks necessary to maintain a functioning system. This training is sufficient to operate a successful system with or without the use of the SCADA program.
 2. The Labor Agreement protects the seniority rights of the positions in question.
 3. The Operating Switching Manual, which defines the position of switchmen and was written with the cooperation of bargaining unit employees, reserves the tasks for Union employees.
 4. A number of arbitration decisions support this position (citations omitted).
- C. The PUD's assignment of switching and testing functions via the SCADA system to non-bargaining unit individuals is improper where the nature and object of such work is essentially the same as before the installation of the SCADA system.
1. If new technology is implemented, the work will generally continue to be bargaining unit work if the nature and purpose of the work remains the same as before the technology was introduced. (Citations omitted).
 2. The introduction of the SCADA system does not significantly alter the nature of the work.
 3. The PUD recognizes that routine or scheduled switching is bargaining unit work. Mr. Wilson's assertion that operating the SCADA system is non-bargaining unit work was not backed up by supporting evidence.
 4. Mr. Wilson argues that testing under the SCADA system involves engineering opinion. Although supervisors may oversee the procedure, the operation of the actual switches is designated for bargaining unit employees.
- D. The PUD violates past practice by assigning work traditionally performed by bargaining unit employees to individuals outside the bargaining unit.
1. Bargaining unit employees have historically performed tasks involving the switching and testing of systems. There was no evidence showing that the Union was aware that Mr. Wilson performed these tasks previously; consequently, his testimony was irrelevant. Mr. Oliver testified that he had performed remote switching but failed to make this known to any bargaining unit employees.
 3. Even if work is performed by non-bargaining unit employees, this does not make the assigning of future work to non-bargaining unit work permissible. *See, Kay Mfg Corp.*, 13 LA 545 (Komaroff, 1949).
 4. Unless life and property are in jeopardy and no bargaining-unit employees are available, the task of maintaining SCADA must be left for bargaining unit employees. (Citation omitted).
- E. The management rights language does not allow the PUD to transfer work from bargaining unit job classifications to non-bargaining unit positions.
1. Numerous cases offer support for this proposition (citations omitted).

2. The language grants management the right to maintain all the “usual and customary rights ... in the operation of the business not specifically limited or abridged by” the Agreement. It does not give management the authority to transfer work traditionally done by bargaining unit employees to non-bargaining unit employees.
- F. The PUD may not rely on the *de minimis* doctrine to transfer switching and testing functions via SCADA out of the bargaining unit.
1. Operating the SCADA system does not constitute a large amount of the bargaining unit’s workday. However, it is an integral and important part of their overall duty.
 2. Furthermore, their responsibilities remain essentially the same before and after the SCADA system was implemented; therefore the *de minimis* doctrine is not applicable. (Citation omitted).
- G. The PUD’s unilateral assignment of switching and testing functions to non-bargaining unit individuals without prior negotiations was unlawful.
1. Economic decisions of management that affect job security and working conditions are mandatory subjects of bargaining. The Employer’s unilateral assignments violated its duty to bargain.
 2. The PUD discussed the implementation of the SCADA system with bargaining unit employees but it did not present the possibility that traditional bargaining unit work would be taken from them.
 3. Management was aware that the Union was concerned with the issue.
 4. The PUD continued to ignore the issue. The Operating Switching Manual did not mention that assignments would be transferred nor was the issue addressed during negotiations for the current Labor Agreement. When employees tried to address the issue away from the bargaining table, they were told that it was not open for discussion.

Position of the Employer:

The PUD did not violate contract provisions when an Operations Superintendent and a Senior Systems Engineer performed tasks associated with the implementation of the SCADA system. The Labor Agreement does not mention SCADA and does not limit any work as exclusively bargaining unit work. In support of this position, the Employer argues:

- A. The Union has the burden of proof, which it has not met.
- B. The Labor Contract does not assign or limit who may work with SCADA.
 1. There is no mention in the 1999 Agreement or any prior agreements of the SCADA system.
 2. There is no language in the Agreement that restricts management from performing particular tasks, nor does that document designate certain work as bargaining unit work. It does, however, include a management rights provision.
 3. When no such restrictions are made in the Contract, it is generally assumed that the employer has the right to assign work as bargaining unit or non-bargaining unit. (Citations omitted).

- C. The Union cannot establish an exclusive claim to acceptance testing.
 - 1. For many years management, engineering staff and bargaining unit employees have worked cooperatively on acceptance testing for new devices or systems, such as electronic relays and the Consumer Information and Geographic Information Systems. Because of this, the Union cannot establish an exclusive claim to these activities.
 - 2. There are numerous cases that support the proposition that this is shared work (Citations omitted).

- D. The recognition clause does not restrict the PUD's right to assign work.
 - 1. This clause simply recognizes the Union as the exclusive bargainer of the bargaining unit members.
 - 2. This does not mean the Employer relinquishes its right to assign job tasks in good faith to bargaining and non-bargaining employees even though this might have adverse effects on members of the bargaining unit. (Citations omitted)
 - 3. There were no allegations that the changes were made in bad faith.
 - 4. There was no showing that there was any loss in bargaining unit jobs or hours; in fact, the PUD has added two bargaining unit positions since the installation of the SCADA system.

- E. Past practice supports the Employer's, and not the Union's, position in this case.
 - 1. In a 1989 decision, Arbitrator Levak sided with the Union when work involving a "maintenance tool" and not "surveillance equipment" was given to non-bargaining unit workers. He went on to note that bargaining unit employees historically performed the work in question. In this case, where the system's initial testing is in question, bargaining unit employees have not historically done the work. Furthermore, Levak warned that his decision should be limited to work that is not temporary, experimental, or serving a special purpose.
 - 2. There is no evidence that any members of management used SCADA for switching purposes during the normal course of operations. When management used SCADA, it was for a special purpose and was temporary.
 - 3. The Union did not object to management's testing of SCADA until the March 29, punch-list testing, even though the system had been installed at 12 substations and punch-list testing had taken place at least three of those.
 - 4. As stated previously, management and bargaining unit workers both worked on the installation of the Customer and Geographic Information Systems, and the Union did not grieve. These projects show a past practice of having non-bargaining unit employees perform acceptance testing on new systems and devices.
 - 5. A 1992 grievance was filed and ended with an informal resolution where the PUD acknowledged that management should not work on power stat equipment. Because of the low-level of this resolution, it should not be used as precedent. In any event, the subject matter did not involve the testing of new equipment.
 - 6. In 1985 a grievance was filed over management's operation of a forklift. The grievance did not claim that forklift operations are exclusive to bargaining unit employees but instead argued that bargaining unit employees were available but not used for the labor. Thus, this particular grievance is irrelevant. Moreover, it did not involve system or equipment testing, and similarly, such low-level resolutions should not be precedent-setting.

- F. There is no threat to bargaining members or to their traditional work.

1. There is no evidence to suggest that non-bargaining employees testing the SCADA system threatens the jobs and livelihoods of Union employees.
2. As stated previously, two new bargaining unit positions have been added since the addition of the SCADA system despite substantial revenue losses.
3. It was completely reasonable for non-bargaining unit employees to perform testing on de-energized systems in the testing of the SCADA system because skills from outside the bargaining unit were needed for the procedure.
4. The work in question only took a few minutes. The law should not take note of such a trifling circumstance.
5. The PUD engineers, Operating Supervisors and vendors did more than use the SCADA keyboard to open and close switches. In addition, they were checking, evaluating and troubleshooting the operating and reporting performance of SCADA at the system and program levels. This takes more expertise than held by bargaining unit employees.

VII. DISCUSSION AND ANALYSIS

A. Contract Interpretation Principles

“Arbitrators may be expected to recognize fundamental principles of contract law” in determining whether the rights and obligations under a collective bargaining agreement have been fulfilled. *Elkouri, supra*, at 570. As Professor Sinicropi noted, however,

The majority view [is] that collective bargaining agreements are special types of contracts with respect to which the principles of ordinary contract law, though not strictly applicable, are nonetheless helpful to arbitrators because they tap the wisdom of the past.

A. Sinicropi, *Remedies: Another View of New and Old Problems*, 34th Annual Meeting, National Academy of Arbitrators, 134, 137 (BNA, 1981). The following principles of contract law are particularly important to the resolution of this dispute and the Arbitrator has considered them carefully in determining whether to sustain or deny the grievance and in formulating the appropriate remedy.

The burden of proving a contract violation is on the party asserting the same. Arbitrator Justin stated:

[t]he mere assertion of a claim by one Party against the other under a collective bargaining contract, does not prove or establish the validity of that claim. Nor does a claim by one party, alleging that the other party violated a contract provision, unsupported by any proof, compel the other party to disprove it.

Hirst Enterprises, Inc., 24 LA 44, 47 (Justin, 1954). *Accord, Columbus Bottlers, Inc.*, 44 LA 397, 400 (Stouffer, 1965) (“the Union is the complaining party and in the absence of provisions to the contrary, it follows that the burden of proof rests with it to show that the Employer’s [action] constituted a violation of the Agreement ...”). Thus, in this case, the burden of proof rests with the Union, and I have kept that burden in mind in reaching a decision herein.

In addition, one should bear in mind that the quantum of proof is a “preponderance of the evidence.” This means that when the Arbitrator finds one way or another on a disputed fact, she has determined that it is more likely than not that her finding is true. The Arbitrator does not represent that her findings are based on absolute certainty.

An arbitrator’s goal in a contract dispute is to determine and implement the probable mutual intent of the parties. The arbitrator seeks a contract interpretation that is most consistent with the parties’ evident intent when negotiating the language in dispute. *Southern Indiana Gas & Elec. Co.*, 86 LA 342, 343 (Schedler, 1985); *Ind. School Dist. No 47*, 86 LA 97, 103 (Gallagher, 1985); *Boise Cascade Paper Group*, 85-1 ARB ¶8013 (Bognanno, 1984); *Riley Stoker Corp.*, 7 LA 764, 767 (Platt, 1947). 1 *Labor and Employment Arbitration*, §14.01[2] T. Bornstein and A. Gosline, eds., (Matt. Bender, 1991). An arbitrator’s task, as stated by Professor David Feller, is to “explicate what is implicit in the collective bargaining agreement.” Feller, “*Discussion-Remedies in Arbitration*,” *Labor Arbitrator-Perspective and Problems*, 17th Annual Meeting, National Academy of Arbitrators, 197 (BNA, 1964).

When contract language (reading the contract as a whole in light of its circumstances) is clear as to the issue in dispute, it ordinarily will be given effect. Language is ambiguous (i.e., language is unclear) if it can be reasonably construed in more than one way. *Black’s Law Dictionary*, 73 (5th ed., 1979). See also, *Armstrong Rubber Co.*, 17 LA 741, 748 (Gorder, 1952); E. Farnsworth, “*Meaning*” in *the Law of Contracts*, 76 Yale L.J. 939, 961 (1967).

When contract language requires interpretation, arbitrators apply one or more of several aids or guidelines that assist in determining the parties' mutual intent. These include extrinsic aids, such as past practice and bargaining history, as well as intrinsic aids, which are principles that assist with the interpretation of language from within the four corners of the document. *See generally, Elkouri*, at 479; *Fairweather's Practice and Procedure in Arbitration*, 178-182 (R. Schoonhoven ed., 1991). However, in applying these aids one must also include a strong dose of common sense in order to keep in mind that the ultimate objective of this exercise is to determine what the parties would have agreed to had they negotiated the precise issue in the case.

B. General Considerations On the Assignment of Work

Arbitrators frequently have had occasion to consider whether management violated a collective bargaining agreement by assigning work out of the bargaining unit when the contract language is ambiguous. Arbitrators have used varying approaches to the issue. Some rely on the "reserved rights" doctrine and the management rights clause for a result that favors the employer. A number of arbitrators in this group, however, moderate this view by considering, *inter alia*, factors pertaining to the reasonableness of the assignment and evidence showing the presence or absence of good faith. At the other end of the continuum are arbitrators who find contract violations based on implied violations of the recognition, seniority, pay and other clauses. *See* discussion in *Elkouri and Elkouri, How Arbitration Works*, 757-62, M. Volz & E. Goggin eds. (5th ed., BNA 1997) (hereafter cited as "*Elkouri*"). Most arbitrators, however, even ones ostensibly espousing one end of the continuum or the other, take to a middle ground and examine the circumstances of the transfer or contracting out of bargaining unit work. I prefer the approach that bases any prohibition on the recognition, classification/pay and/or other clauses, but also balances the parties' interests by allowing some assignment of work outside

of the bargaining unit under appropriate circumstances. This is a well-accepted approach that most likely reflects the parties' intent. *Elkouri*, at 760 (footnote citations omitted), explains:

[S]ome arbitrators have agreed that the recognition, seniority and other such clauses do evidence an intention to restrict the performance of unit work to unit employees, but at the same time they have considered that it is not an absolute restriction. Thus, ... the assignment of such work outside of the bargaining unit may be proper where there is "good cause," where it is de minimis, where the work is supervisory in nature, or where there is an emergency or some other justification.

As noted in *Elkouri* at 760-61, the arbitrator in *Chrysler Corp.*, 36 LA 1018, 1022 (Smith, 1961) further elaborated upon this view:

[T]his is not a case of "absolutes" one way or the other. Rather, it is a case of an appropriate balancing of the legitimate interests of management, the bargaining unit employees and their union representative. The management interest in efficient allocation of work should not have to stop at the boundaries of a defined bargaining unit. On the other hand, the decision to allocate work to employees outside of the bargaining unit should be one made in the honest exercise of business judgment, and not arbitrarily, capriciously or in bad faith.

Similarly, in *Advertiser Co.*, 89 LA 71 (Baroni, 1987), that arbitrator stated that the right to assign work out of the bargaining unit:

must be balanced between the employer's legitimate interest in efficient operation and effectuating economies, on the one hand, and the Union's legitimate interest in protecting the job security of its members and the stability of the bargaining unit, on the other The thinking of many arbitrators is that the [work assignment] must be performed in "good faith"; represent a "reasonable business decision"; not have the effect of "seriously weakening the bargaining unit"; and not result in "subversion of the labor agreement"

Arbitrator Baroni suggested that circumstances that would justify the transfer of unit work could include the purchase of new equipment or facilities; temporary subcontracting (presumably until regular employees are trained), the unavailability of regular employees for the work, and the existence of an emergency or urgent need to have the work done. In that case, the arbitrator found that the removal of bargaining unit work was a bare "attempt to reduce labor costs at the expense of undermining the integrity and strength, and eventual existence, of the bargaining unit" and therefore violated the parties' collective bargaining agreement. The arbitrator in *Jackson Public Schools*, 71 LA 177, 180 (Keefe, 1978) stated that consideration

must be given to, *inter alia*, past practice, organizational efficiency, economy, the soundness of the business judgment, and the absence of anti-union bias. See also, *Bell Telephone Co.*, 75 LA 750 (Garrett, 1980) (necessary to examine all the facts; in general, there must have been a change in underlying conditions relevant to the re-assignment of duties, and technological change may justify the reassignment); *Williams Pipe Line Co.*, 80 LA 338, 342 (Ross, 1983) (analysis focuses on reasonableness of the business decision); *Hygrade Food Products Corp.*, 73 LA 751, 755 (Matthews, 1979); *Shenango Valley Water Co.*, 53 LA 741, 744-745 (McDermott, 1969) (look at reasonableness of business decision and whether bargaining unit would be seriously weakened); *Olin Mathieson Chemical Corp.*, 42 LA 1025 (Klamon, 1964) (considered that an insubstantial amount of work was transferred in good faith); *North American Aviation, Inc.*, 17 LA 692 (Komanoff, 1951), (considered whether assignment of work was *de minimis* and caused any harm to the bargaining unit such as a reduction in hours). See discussion in 2 *Labor and Employment Arbitration*, §41.06, T. Bornstein and A. Gosline, eds., (Matt. Bender, 1991) and M. Hill and A. Sinicropi, *Remedies in Arbitration*, 109-10 (1981).

Thus, arbitrators typically consider various circumstantial factors with the objective of weighing and evaluating the parties' competing interests to the work at issue. A synthesis of the various cases shows that the following areas of inquiry are considered by arbitrators:

1. The precise contract language and any peculiar rights or restrictions. (This consideration is obvious; the arbitrator is guided first and foremost by the terms of the collective bargaining agreement.)
2. Any special skills, experience or techniques required to perform the work.
3. The nature of the work as intrinsically supervisory, managerial or otherwise of a kind that is not necessarily bargaining unit work.
4. The permanent, as opposed to the temporary or experimental nature of the work.
5. The quantity of work involved and its effect on the bargaining unit.
6. The parties' past practice as to the work.
7. Evidence showing that the work was performed under emergency conditions .

8. The evolving character of the work, i.e., whether there has been a change in its character and whether technological or automation changes are involved.
9. The employer's business reasons and other economic considerations driving the assignment of the work.
10. Evidence tending to show bad faith on the part of the employer or union animus

See discussion and cases cited in *Elkouri*, 758-9; 2 *Labor and Employment Arbitration*, §41.06, T. Bornstein and A. Gosline, eds., (Matt. Bender 1991) and M. Hill and A. Sinicropi, *Remedies in Arbitration*, 109-10 (BNA, 1981).

Of the above-referenced list of ten considerations, the first six are relevant. I note specifically that with respect to the last consideration, there was no contention or evidence that the Employer acted in bad faith or was motivated by union animus. Nor was there evidence or argument that the work in question took place under emergency conditions, that it had so evolved from a technological standpoint as to leave the jurisdictional claim of the Union, or that there were business reasons or economic considerations (unrelated to the second or third factors) that drove the assignment of the work in question. I will turn next to the application of the remaining considerations referenced above to the evidence in this case, and will respond to the various arguments of the parties in the appropriate context.

C. Evidentiary Evaluation

1. First Consideration: Contract Language

The Management Rights article contains both traditional recognition and management rights language:

The PUD recognizes the Union as the exclusive bargaining agent for the employees covered by this Agreement. All usual and customary rights of management in the operation of the business not specifically limited to or abridged by a provision of this Agreement are recognized as being retained by the PUD.

The Employer contends that absent restrictive contract language, management retains the right to assign work outside of the bargaining unit, so long as done in good faith and without

union animus. The Union disagrees, and contends that the recognition language impliedly restricts the Employer from encroaching upon the work of the bargaining unit by assigning the work to supervisors or engineers. Both the Employer's view and the Union's view are a little extreme, as indicated by my discussion above. Other circumstances should be considered.

As a starting point, however, the language of the Collective Bargaining Agreement must be considered. It is true, as the Employer points out, that no language in the Agreement specifically mentions the assignment of work or addresses the issue in this case. It also is true that the assignment of work in a general sense is a right reserved of management. On the other hand, the recognition clause, together with the job classification and description provisions found in Article 3.1, Article IV, and Article 13.9 act as a check on management's ability to assign or transfer work designated to contractual job classifications outside of the bargaining unit. Were it not the case, the Employer could easily undermine the integrity of the negotiated wage provisions and the Labor Agreement itself, not to mention the rights of the exclusive bargaining representative, by assigning bargaining unit work willy-nilly to non-union personnel. The Employer implicitly acknowledges this in its citation of cases stating that such assignments cannot be in bad faith or with union animus. Arbitrators, however, do not simply prohibit the arbitrary or wholesale assignment of work outside the bargaining unit, but also consider the above-listed factors to prevent more subtle encroachments on the integrity of the negotiated agreement, the bargaining unit and the rights of the exclusive bargaining representative. Most arbitrators, however, have a practical side, and are therefore willing to allow unintrusive assignments of work outside of the bargaining unit under the circumstances indicated, such as in emergencies, when driven by technological considerations, when experimental, when special skills are needed or when justified by other considerations.

2. Second and Third Considerations: Special Skills or Expertise, Intrinsic Function

I turn next to the consideration that appears to be key to the Employer's case. While the Union seems to generalize the issue as pertaining to switching functions generally which typically is bargaining unit work, including under the SCADA system, the Employer presents the case as involving not management or non-bargaining unit personnel performing switching, testing or programming at their whim, but the narrow instance of engineering and operating personnel applying their expertise and skills to perform site acceptance testing on the SCADA system. A review of the grievance, and its consideration in the context of the record evidence, shows that the Arbitrator should only decide the SCADA acceptance testing issue (which is deemed to include punch-list testing).

The Union is correct that there appears to be no dispute that the PUD recognizes routine or scheduled switching via the SCADA system as bargaining unit work. Switching via SCADA still involves the opening, closing or switching to energize or de-energize lines or equipment, or to transfer load. Remote switching via SCADA is merely one of several switching devices available to accomplish this same objective. Moreover, the PUD contemplates SCADA switching operations to be bargaining unit work where and to the extent it has been training bargaining unit employees to be proficient in such operations under the SCADA system.

As stated above in the summary of the evidence, on March 29, 2000, Florence Operations Superintendent Richard Palmer and Senior Systems Engineer Steve Alexanderson operated two de-energized switches at Substation 261 and another substation while conducting punch-list testing of the newly installed SCADA components at those substations. This activity was conducted in follow-up to the site acceptance testing at those substations because the SCADA system was not accurately reporting a motor-operated gang switch and a circuit breaker position. Management personnel did not use SCADA to switch energized devices. The

lines at the substations were not in their normal configuration when Mr. Palmer opened and closed the devices using SCADA and reviewed the results on the SCADA terminal.

The bargaining unit employee who submitted the grievance, Joe Hiner, testified that before Mr. Palmer tested the SCADA system, he instructed Mr. Hiner and other bargaining unit members to perform the switching necessary to isolate the pieces of equipment that Mr. Palmer wished to test. Bargaining unit members in the field diverted electric current away from particular switches so that they were isolated and not energized. They then let Mr. Palmer know when their activity had been completed. There was no dispute that bargaining unit employees performed the work of switching energized lines in order to isolate the devices for SCADA testing. Only the isolated or de-energized devices were opened and closed as part of the SCADA testing. Mr. Palmer did not use SCADA to transfer load in any of the switching operations that he carried out. After Mr. Palmer confirmed that the bargaining unit members had isolated those two pieces of equipment, he used the SCADA computer in the Florence office to open and close the de-energized switches. Specifically, he opened and closed the problematic motor-operated gang switch and a circuit breaker, according to Joe Hiner's testimony. The bargaining unit members reported back to Mr. Palmer whether or not the switches had moved and what position they were in. At the end of the testing, bargaining unit members returned the substation to its regular configuration, even though SCADA could have been used to re-energize the devices at the substation. The actual exercise of opening and closing switches for testing purposes via the SCADA system on March 29th probably can be measured in minutes, the record suggests. Opening and closing an single isolated switch via SCADA takes "milliseconds," Mr. Mills testified. Tr. 56.

Mr. Hiner's description of the March 29, 2000, punch-list testing procedure at Substation 261 and the other substation was the same as described by Mr. Oliver at the "three and a half" (Tr. 148) other substations where he conducted acceptance and punch-list testing. In all cases,

the isolation of the devices to be tested was done at the substation by bargaining unit employees doing what both sides acknowledge to be bargaining unit work. The on-site task of returning the circuits to their normal configuration and reenergizing them, also bargaining unit work, was done by members of the bargaining unit. Bargaining unit members also reported back to the personnel performing the testing whether the breakers at the locations being tested were properly opening and closing. The only task performed by non-bargaining unit personnel was at a keyboard in a remote location. Using the keyboard, the non-bargaining unit personnel would open and close breakers and review the results on various levels of SCADA screens to verify that SCADA system was operating properly.

The precise question is whether the skills of Mr. Alexanderson, a licensed professional engineer with a four-year degree, and/or of Mr. Palmer, an Operations Superintendent/Dispatcher, were needed to operate the keyboard at the remote location to open and close the isolated circuits, review the results on the SCADA screens and verify that the system was operating properly (or presumably if it was not, attempt to trouble-shoot the system).

Mr. Oliver convincingly explained why the skills of a licensed professional engineer or those of the vendor's employees (who presumably are similarly skilled, since they designed and built the system) were required for this task. According to Mr. Oliver, the role of PUD engineers is to review and evaluate from a systemic perspective the ways in which the SCADA software captures and reports the mechanical changes and to troubleshoot areas where performance has been problematic. Mr. Oliver further testified (Tr. 157):

[T]hat's the only way you can check for each individual ... bit that comes through that represents a discrete point of opening and closing, or an analog string data coming in. We're looking at it at a level that's right at the program level. So we open up these small screens while we're actually asking for them to operate that switch again if it failed to operate properly or SCADA didn't report back. So therefore, you look at it, you see that bit change or didn't change.

There was no contention that bargaining unit members have the training or experience of licensed professional engineers or are qualified to make the kind of evaluation described by Mr. Oliver.

Richard Palmer was also present at the SCADA terminal on March 29th. His position is Operations Superintendent, and his responsibilities include the substation in question. The Operations Superintendent perform the function of the dispatcher in the PUD's operation. The position requires a substantial level of technical expertise and utility experience; some Operations Superintendents are licensed engineers, according to testimony, although Mr. Palmer is not. According to the testimony of Chief Engineer Mike Wilson, Operations Superintendent/Dispatchers must have a "global" (Tr. 173) awareness of the PUD grid. They need to know the utility's entire system and the impact of switching any given circuit on the rest of the system, and more specifically, must understand the capacity of the substations, individual feeders, individual lines vis-a-vis the amount of load being transferred.

In the view of the Arbitrator, the Employer has made a convincing case that the keyboard operation aspect of the SCADA acceptance punch-list testing performed by Mr. Alexanderson and Mr. Palmer, required the skills and expertise of those personnel, and that they were not the skills and expertise of the bargaining unit members.

An additional skill or expectation that in the Arbitrator's opinion is part and parcel of acceptance testing is managerial. In other words, it is a management function to determine that the product or technology purchased works as promised and to decide whether and when to release progress or final payment to the vendor. Both Mr. Oliver and Mr. Wilson alluded to this in their testimony. Mr. Oliver testified that "we call it a site acceptance because ... we accept it and make sure it's done correctly for the money that ... we're paying. So you have to accept it and make sure it's ... supposed to operate in this manner." Tr. 146-47. Mr. Wilson testified, in

the context of an earlier matter in Toledo unrelated to SCADA, that he was asked to test a switch by bargaining unit personnel. He testified that he was asked (Tr. 236):

because I purchased the switch and I wanted—I was asking them how well it feels to them, and they said, well, try it and see for yourself. I wanted to know whether I want to buy more switches. The ultimate responsibility of buying this stuff is—was mine or my position's.

In other words, management is ultimately responsible for its purchasing decisions. This does not mean that particular managers necessarily have the expertise to perform a technical evaluation of the newly purchased device, system or equipment, but in a small utility such as the Central Lincoln PUD, that tends to be the case.

The Union appears to contend that bargaining unit employees could have been directed by Mr. Palmer or Mr. Alexanderson to open and close the switches that the two non-bargaining unit individuals chose to do themselves. In other words, if that is the Union's argument, a member of the bargaining unit could have sat at the keyboard and made the inputs directed by Messrs. Palmer and Alexanderson, while those individuals performed their evaluations of the system. The Arbitrator is too practical a person to accept this argument and cannot condone such doubling up of personnel.

3. Fourth and Fifth Considerations: Frequency of Occurrence, Quantity of Work Involved, Effect on the Bargaining Unit

Without dispute, Mr. Palmer's and Mr. Alexanderson's punch-list testing on March 29th was of a temporary nature done for a special need. There was no evidence that any member of management has used SCADA to open or close energized switches in the normal course of operations or for purposes other than site acceptance testing.

With respect to frequency of occurrence, the work did not occur on a one-time basis, however. Site acceptance testing had taken place at all twelve substations at which SCADA had been installed, according to the evidence, and punch-list testing had been performed previously by management at least three substations where problems were encountered.

Because the SCADA installation is ongoing, the Employer plans to repeat the same mode of acceptance and punch-list testing when future sites become operational. Nevertheless, fifteen instances, or perhaps a few more, of management operating SCADA to test its switching performance over a two-year period do not stand out as occurring with undue frequency, in this Arbitrator's opinion.

From the evidence, it appears the quantity of switching work performed by non-bargaining unit personnel on March 29, 2000, or in any instance of acceptance testing, was miniscule. It does not appear that it took very long to test the switches that were problematic at Substation 219. It is not entirely clear from the record how long a site acceptance test at any given substation tended to take, but there was nothing to suggest that the actual switching portion of that testing would take particularly long. While the review, evaluation and troubleshooting aspects might consume time, the Union does not claim those tasks as bargaining unit work.

The effect on the bargaining unit of the work at issue on March 29th was virtually nil. No bargaining unit member lost work opportunities of any kind, and the Union did not attempt to quantify any negative effect on the bargaining unit. Even considering all of the SCADA site acceptance testing in the aggregate, the effect on the bargaining unit could be considered miniscule, at best.

Both sides argued the applicability (or non-applicability) of the *de minimis* rule, which has it that "*de minimis non curat lex*," or the "law does not concern itself with trifles," roughly translated. The *de minimis* principle can be invoked as an absolute defense to a claim, but it is not necessary to do so here, because the end result will be the same.

4. Past Practice

Both parties presented past practice evidence and vigorously debated the significance of such evidence. In the Arbitrator's opinion, none of the evidence should weigh particularly heavily in the resolution of this dispute.

As the parties know, a binding past practice must be clear, unequivocal, and ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. *Revco Industries*, 85 LA 1034, 1039 (Newmark, 1985); *EEOC*, 84 LA 1231, 1237 (Mikrut, 1985); *Arkansas Power & Light Co.*, 81-1 ARB ¶8039 (Sisk, 1980); *Celanese Corp. of America*, 24 LA 168, 172 (Justin, 1954). See, *Elkouri*, at 632; 1 *Labor and Employment Arbitration*, §14.03[5] (T. Bornstein and A. Gosline, 1990); R. Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements," 59 *Mich. L. J.* 1017, 1025 (1961). Past practice evidence is inconclusive when it fails to indicate the contracting parties' mutual assent to the practice. *Galmorgan Pipe & Foundry Co.*, 46 LA 1007 (Dugan, 1966) (union's past practice argument rejected because there was no evidence of mutual agreement).

The Employer presented evidence that on several occasions, management and engineering employees worked with bargaining unit staff on acceptance testing for new devices or systems, such as electronic relays and the CIS and GIS systems. In addition, Mr. Oliver testified that he performed SCADA site acceptance and punch-list testing for some of the other substations alongside contractor representatives. The fact that acceptance testing has been shared with non-bargaining unit employees means that the Union cannot establish an exclusive claim to those activities, the Employer contends.

Relay Meter Foreman Bill Mills, however, testified that bargaining unit members have performed the testing and installation of new equipment, and that they have regularly operated switches to isolate loads as part of routine testing. Wayne Secrist concurred with this testimony. According to the Union, bargaining unit members have consistently and exclusively

performed all of the switching and testing work at the PUD, at least to the Union's knowledge. With respect to the Employer's evidence, the Union contends that the Employer was unable to present evidence that it made the Union or its representatives aware of instances of non-bargaining unit personnel performing any switching or testing functions. Specifically, Mr. Wilson testified that he had performed non-energized switching at two substations more than ten years earlier but the Union contends that there was no evidence that its representatives were aware of the incidents. Similarly, Mr. Oliver testified that he had, prior to March 2000, performed remote switching on three occasions during punch list and site acceptance testing of SCADA. He did not, however, inform any bargaining unit employees that he or any non-bargaining unit individual had done so, and there is no evidence that they knew what had occurred.

The Union's characterization of Mr. Oliver's testimony on the SCADA acceptance is someone incomplete. It is true that Mr. Oliver testified that he did not, in so many words, tell bargaining unit personnel in field substations that he, Rick Oliver, was personally about to open or close switches via SCADA after they had isolated the circuits at his direction. But the transcript shows the following:

[By Mr. Hayes:]

Q. Did anybody tell them [bargaining unit employees at the substation] that any nonbargaining unit person other than a vendor was operating the SCADA to operate a switch?

A. No, but at the same token, I was on the communication and saying that we were closing the switch, we were going through the testing procedures. We didn't know we had to say which one of us was actually having the keyboard at the time.

Tr. 161.

[By Mr. Rubin:]

Q. Just so that I'm clear, did you then say that we're closing the switch?

A. Always. I either say we're closing the switch or the switch is coming closed via SCADA. You know, I say it on the phone, I said the switch is coming closed, we're going to close the switch.

Q. And for some or all parts of the site acceptance tests that you participated in, were you talking directly to the bargaining unit employees?

A. That I participated in, absolutely, by telephone.

Tr. 161-62.

The point of this testimony is that it should have been, and probably was, evident to a least some bargaining unit personnel that Mr. Oliver was conducting the acceptance testing and operating the switches via the SCADA system. The bargaining unit personnel knew that the testing was going on, and they knew that somebody - either a vendor representative or non-bargaining unit engineer was testing the switches at the SCADA terminal. It is arguable it doesn't make any difference whether or not it was a vendor or a PUD non-bargaining unit employee; either was enough to put bargaining unit members on notice. What probably happened, in this Arbitrator's opinion, is that bargaining unit members at the site simply didn't think much about it. Whether their knowledge or inaction can be imputed to the Union leadership is something that does not need to be decided, in light of the other evidence favorable to the Employer that is unrelated to past practice.

The same evidentiary evaluation can be made on the other past practice evidence the Employer presented. According to the Employer's evidence, management employees participated in testing the Customer Information System when it was brought on line in 1997-1998. System engineers and technicians, none of them bargaining unit members, tested the Geographical Information System during its acceptance and start-up phases. The Union did not grieve those instances of non-bargaining unit employees doing bargaining unit work. The Employer contends that those situations are directly comparable to the installation and punch-list testing of the SCADA system. The Union maintained that if these instances occurred, it was unaware of them. Again, the Union's actual or constructive knowledge is a matter that does not

need to be decided here, although the Arbitrator again questions how these things could take place without at least some bargaining unit members perceiving the same.

Some discussion was made in the record and argument of the parties concerning past practice during emergencies. That evidence is irrelevant, in the Arbitrator's opinion, because the case at hand does not involve any kind of emergency. In any event, both parties agree that qualified non-bargaining unit personnel may perform switching functions in a bona fide emergency.

The parties disputed the implications of a prior arbitrator award and two grievance settlements. The Union contends that a 1989 decision by Arbitrator Thomas Levak in a dispute between the parties (Exh. U-1) and two grievance settlements support its position in this case. The Employer maintains that the arbitration decision and the grievance settlements are distinguishable on their facts; moreover, the grievance settlements are non-binding precedent.

The Employer persuasively argues that the 1989 Arbitrator Levak decision is distinguishable from the instant matter. That decision concerned the Employer using non-bargaining unit personnel to locate problem areas or "hot spots" in the PUD's substation transmission and distribution system with an infrared camera. Arbitrator Levak wrote that historically both bargaining unit and management employees did visual patrols of the transmission system looking for problems, but only bargaining unit members did "hotspot maintenance testing patrols," using a series of evolving technologies. In 1989, the PUD purchased two infrared cameras for patrol. In the southern division, only bargaining unit members used the camera, but in the northern division, a combination of bargaining unit members, managers, and engineers used the other one. The arbitrator agreed with the Union's characterization of the infrared cameras as a "maintenance tool," and hence the province of bargaining unit members, rather than a "surveillance instrument." Arbitrator Levak went on to limit the factual boundaries of his decision:

It should be further noted that this case does not involve the type of situation where the work assignment is a temporary one for a special purpose or need, is experimental or is performed only in an emergency.

Exh. U-1, at 7. In the case at hand, the work in question involves acceptance testing of a system, which necessarily involves the skills and expertise of engineering and dispatching personnel, as well as vendor employees.

Finally, the parties debate the significance of two prior Union grievances that were resolved informally short of arbitration. In a 1992 grievance, the Union complained a supervisor was trying to do bargaining unit work, was having difficulty, and asked a bargaining unit technician for assistance. The Employer responded to the grievant the next day by stating it would talk to the supervisor about not working on the equipment in question. As the Employer contends, the facts underlying the grievance are not analogous to those here. They simply involved a supervisor who erred by trying to do bargaining unit work himself. In a 1985 incident, the Union complained that Chief Engineer Mike Wilson violated the contract when he used a forklift to move equipment in the warehouse when bargaining unit employees were available to do the work; Mr. Wilson agreed with the Union's position. That grievance however, did not involve the same issue as the one in the instant case, and therefore is not instructive. And, as an aside, Mr. Wilson testified that he has continued to operate forklifts in order to test new forklifts that the PUD has purchased, and the Union has never grieved this activity.

The Arbitrator also shares the Employer's concern about having a grievance resolution set a precedent, unless it otherwise is part of an evidentiary package that satisfies the criteria for a binding past practice (i.e., clearly accepted by the parties as an established practice), or evidence is presented showing that the parties intended the resolution to be precedent setting.

5. Other Considerations

Other considerations mentioned by the Union concern its efforts to discuss SCADA remote switching issues previously, its assertion that the Employer made a unilateral change,

and the application of the Operation Switching Manual. The Union contends that the Employer had discussed the SCADA project with bargaining unit members as early as 1997 and had not indicated that SCADA would have any impact on bargaining unit work. A letter dated September 18, 1998, from Union Business Ron Agent Jones to Chief Engineer Mike Wilson stated that the Union would not agree to the performance of SCADA switching operations by non-bargaining unit employees. The letter was posted on a bulletin board in South Beach for a year and a half. The Operation Switching Manual, See Exh. Jt-7, which includes a section entitled "Remote Switching (SCADA Operations)," was revised in April 1999 with the assistance of bargaining unit members, but it did not include any provision that supervisors or other non-bargaining unit personnel would perform switching, testing or programming of the SCADA system at any stage of the implementation of SCADA. The issue of bargaining unit employees not performing switching, testing or programming functions on SCADA was not discussed at the table during negotiations in 1999 for the current Collective Bargaining Agreement. When bargaining unit employees raised the issue away from the bargaining table, they were told that the issue was not open for discussion, the Union asserts. The Union also notes that making a unilateral change on a mandatory subject of bargaining is an unfair labor practice.

One problem with the Union's arguments or concerns is that is that it broadly addresses switching or all SCADA remote switching, while the Arbitrator views the dispute narrowly, confining it to the reasons management, as opposed to bargaining unit personnel, performed the punch-list acceptance testing on March 29, 2000. Thus, to the extent the evidence cited could be considered to reflect the parties' intent, it does not address the question of acceptance testing.

Assuming for the purpose of argument that the Operations Switching Manual can be considered an extension of the Collective Bargaining Agreement, that document is silent as to the issue before the Arbitrator. Its section on remote switching using the SCADA system (see

Exh. Jt-7, at 31-2) simply establishes circumstances and a procedure for remote switching. It does not address acceptance testing, nor does it establish any jurisdictional boundaries, so far as this Arbitrator is able to discern.

It is true that the precise issue in this case was not negotiated, but that simply begs the question. In most contract dispute cases, the precise issue has not been negotiated, usually because it was not contemplated by the parties, or if it was, the parties chose not to resolve the question. (In a few cases, the precise issue has been addressed by the parties, but the final contract language is ambiguous and negotiating witnesses' recollection of the actual agreement differs.)

6. Conclusion

As the Arbitrator stated previously, the Collective Bargaining Agreement is ambiguous as to the issue submitted to the Arbitrator. While the Arbitrator must be careful not to overstep her bounds and "amend, modify or supplement any provision of this Agreement" (Article 2.10), she is also mindful of her duty to determine the parties' probable mutual intent, that is, what the parties, conducting their business reasonably, would have agreed to had they addressed the precise issue in advance of the dispute having arisen. The considerations or guidelines set forth at the outset of this discussion provide a useful framework for making this determination, and those considerations lead to a conclusion favorable to the Employer. In particular, the consideration relating to the skills and expertise needed to perform the SCADA acceptance testing, as well as the minimal (if any) impact the disputed work had on the bargaining unit, compel a result in the Employer's favor.

As is frequently the case having to do with the assignment of work outside of the bargaining unit, the Arbitrator's determination must be tailored narrowly to fit the facts and issue in dispute. Here, the permissive result for the Employer is extended only to switching conducted on non-energized circuits in conjunction with the testing of new equipment, devices

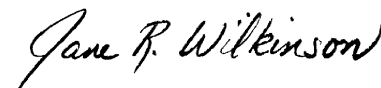
or technology where the skills, expertise or experience of particular non-bargaining unit personnel are needed to perform this task. The Arbitrator voices no opinion one way or the other on other areas mentioned in this proceeding where managerial employees have performed or might be performing bargaining unit work.

VIII. AWARD

For the reasons set forth in the foregoing discussion and analysis, it is the opinion and award of the undersigned Arbitrator that the Employer did not violate the parties' Collective Bargaining Agreement when it assigned SCADA acceptance testing work, which included the remote operation of switches on de-energized circuits, to non-bargaining unit personnel on March 29, 2000. Accordingly, the grievance herein is DENIED.

Pursuant to Article 2.11 of the parties' Agreement, the parties are ordered to share equally in the fees and expenses of the Arbitrator.

Date: November 21, 2001



Jane R. Wilkinson
Labor Arbitrator