paying for the things on which we spend money? The second question is: Will our shareholders want their money spent in that way? The third question is: Will our employees (who, remember, receive 15 percent of our pre-tax profit in profit-sharing bonuses) want us to continue spending their money in that way? A large measure of the efficiency in our workplace comes from having the interests of the customer, shareholder, and employee aligned, so that we find the answer upon which they all agree.

## SESSION III—PUBLIC UTILITIES
## EFFICIENCY EFFORTS IN THE PUBLIC UTILITY INDUSTRY: THE IMPACT UPON THE COLLECTIVE BARGAINING RELATIONSHIP

MARGARET R. BROGAN *

### Introduction

The analysis of employer efforts to increase efficiency in the workplace raises certain unique issues in the public utility industry. The current state of the industry is one of flux, due in large part to the dismantling of the previous regulatory structure. As individual states make deregulation decisions within the context of federal legislation affecting the industry, utility companies face increasing competition. Companies supplying residential customers in deregulated states, such as Pennsylvania and California, are fighting for the public's business by offering savings. At the same time, those companies must provide a reasonable rate of return to their investors and comply with the price caps of state public utility commissions. Finding ways to provide electric and gas service more efficiently helps achieve those goals.

Against this backdrop, unions are striving to retain their hard-won contractual rights. They are making their voices heard in regulatory hearings, in negotiations, and in arbitration. Their success in the arbitral forum is often based upon whether the collective bargaining agreement contains job protection rights that can withstand large-scale employer restructuring. Unions argue that efficiency should not be achieved at the expense of union jobs, which may result in less reliable service.

---

*Member, National Academy of Arbitrators, Narberth, Pennsylvania.

Arbitrators called upon to resolve public utility efficiency disputes are often faced with complicated contractual provisions that reflect years of adding clauses in negotiations in a piecemeal fashion. Parties in contract negotiations often have neither the time nor the inclination to remove obsolete paragraphs or rewrite contradictory articles. When bargaining history becomes cloudy, the intent of the parties is sometimes lost. Typically, contractual provisions were not originally intended for large-scale restructuring efforts. For example, when utility companies attempt to displace or downsize, they may invoke complicated lateral transfer clauses and bumping rights, or other job protection schemes that were not meant for large-scale layoffs. Contracts negotiated during regulated times often must be subsequently interpreted in the midst of the competitive concerns brought about by deregulation.

A review of recent reported arbitration decisions reveals few examples with respect to efficiency issues in the public utility industry. The following are two reported cases that deal with efficiency efforts. One involves the transfer of unit duties outside the unit, and the other deals with the reassignment of duties from one unit employee to another. Other arbitrators may rule differently when faced with similar issues.

## Arbitral Examples of Public Utility Company Attempts at Efficiency

### *The Transfer of Duties Outside the Unit*

Contractual language that may be relied upon in either challenging or authorizing the transfer of unit duties to non–bargaining unit employees may include the following: express clauses that speak to the employer's ability to contract out, or transfer, assignments; management rights clauses that may grant the right to remove duties from the unit, either expressly or by inference; clauses that reserve unit work to unit employees; recognition clause language; and wage schedule or job classification language, which could implicate jointly negotiated job specifications.

All of these contractual clauses were called into play in *Missouri Public Service,*[1] which involved the issue of whether a utility employer's transfer of a gas meter repairman's duties to an automated "effi-

[1]109 LA 821 (Kubie 1997).

cient" gas meter repair facility, run by a sister nonunion division of the employer, violated the contract. The employee, whose job was eliminated, was one of two individuals who would trade tasks: one would work in the field collecting defective gas meters; the other would work in the shop repairing them. The employer decided to send defective meters to the non-unit automated facility for repair, thereby resulting in the elimination of the grievant's job.

In concluding that the employer's assignment did not violate the contract, the arbitrator chose not to rely upon language forbidding the employer from contracting out "work which was done by any of its regular crews," in part because the employer argued that only one employee was affected, not a "crew." The arbitrator also was not swayed by the union's contention that contract language that prohibited unit work from being performed by management personnel compelled the inference that all bargaining unit work need be assigned to unit personnel. Such language, reasoned the arbitrator, only limited the employer's ability to assign work to management, not to non-unit employees.

Despite union reliance upon the recognition clause, the wage schedule, and job classification language, the arbitrator concluded that the employer's action was allowed given the contractual grant of management rights. The arbitrator indicated that the ruling was based upon the absence of any express prohibition against transferring work out of the unit, and upon evidence that the employer's decision was not undertaken in bad faith, but was premised upon rational efficiency concerns. In so concluding, the arbitrator noted that other arbitrators might find an inferred prohibition against transferring work out of the unit, based upon recognition, wage, and/or seniority provisions. The latter approach could utilize a balancing test, by comparing the employer's need for flexibility with the union's legitimate interest in job security.[2]

*Reassignment of Tasks to Other Unit Employees*

The culture of a public utility workplace often includes a craft mentality: the concept that employees are entitled to perform

---

[2] *Id.* at 823–24; *see generally* Sinicropi, *Revisiting an Old Battleground: The Subcontracting Dispute,* in Arbitration of Subcontracting and Wage Incentive Disputes, Proceedings of the 32nd Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1980), 125, 140–41.

certain tasks and should not be assigned other duties across classification and jurisdictional boundaries. Certain contract language or applicable past practice may support such rights in the arbitral forum, an outcome that may stifle employer attempts to provide more efficient services.

In *MidAmerican Energy Company,*[3] an employer wished to assign the duty of checking and adjusting soot blowers to the plant mechanics who had just completed mechanical repairs on the blower, rather than to the technicians who traditionally performed the work. The employer's rationale was that it was far more efficient to have the mechanic perform the duty, rather than incur the time and interruption associated with calling in a technician. The company specifically argued that it had to be more attentive to costs and efficiency, given the deregulation of the public utility industry and the resulting alternative power sources available to customers.

In concluding that the reassignment did not violate the contract, the arbitrator relied heavily on efficiency language found in its preamble. It stated, "The Union agrees for the employees of the Company covered by this Agreement that they will individually and collectively perform loyal and efficient work and service . . . and the Company agrees that it will cooperate with the Union in its efforts to promote harmony and efficiency among all the Company employees." The arbitrator found that this language obligated both parties to efficiency. Finding substantial equity for the employer's argument that it was more efficient for the mechanic to do the task, which in the arbitrator's view did not involve a unique skill or judgment, the grievance was denied.[4]

### Related Public Utility Issues in the Arbitration Forum

Other examples of efficiency concerns and employer actions, similar to those arising in other industries, illustrate the broad focus of the utility sector. In *Ohio Edison Company,*[5] the arbitrator concluded that the company improperly reduced hours to avoid the payment of a second meal, where the contract granted the right

---

[3]108 LA 1003 (Jacobowski 1997).
[4]*Id.* at 1005.
[5]102 LA 717 (Sergent 1994).

to a meal after an overtime shift, not after a specific number of hours. Another arbitrator concluded in *Cleveland Electric*[6] that the employer appropriately transferred mail delivery out of the unit, where the work was found to be primarily a non-unit function, and where the contract lacked an express clause relating to the transfer of work.

In *Southern California Edison Co.*,[7] the employer was found to have a legitimate right to place a work hour cap on emergency work, citing productivity and safety concerns. Another arbitrator denied a grievance in *Virginia Electric and Power Co.*,[8] based upon the company's failure to train additional reactor operators. In that case, the parties had not agreed to maximum staffing in the position, and the employer's failure to train was premised upon the lack of need due to the state of the industry.

## Future Trends

As utility companies respond to increased competition fueled by the evolution of deregulation, they are refocusing to become more competitive. Such efforts may include concentrating on specific types of power generation and on divesting themselves of less lucrative facilities. Such changes will have an obvious impact upon unionized work forces. In negotiations, companies may seek certain rights so as to achieve cost savings. For example, utilities may attempt to gain the right to contract out during peak periods, and to trim the work force in times of diminished energy usage.

An evolving case in point is the planned merger of nonunion Philadelphia-based PECO Energy with Chicago's union-represented Unicom Corp. There are no articulated plans at this time to transfer unit duties from Chicago to Philadelphia, but there will be transfer of engineering and administrative functions between the two cities. Whether this merger will have an impact upon the representation status of PECO, which has survived numerous attempts to unionize its workers, is unclear.

---

[6]105 LA 817 (Franckiewicz 1995).
[7]104 LA 1075 (Concepcion 1995).
[8]103 LA 80 (Strasshofer 1994).