

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

FLORIDA POWER & LIGHT COMPANY

and

Case 12-CA-211064

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO, LOCAL UNION 641

**BRIEF OF COUNSEL FOR THE GENERAL COUNSEL
TO THE ADMINISTRATIVE LAW JUDGE**

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I. INTRODUCTION AND STATEMENT OF THE CASE

Florida Power & Light Company (Respondent) is an electric public utility that transmits, distributes and sells electricity at various locations throughout the State of Florida to its customers. Respondent employs approximately 15,000 employees and has approximately four and a half million customers in the State of Florida. [TR 17-20, 40]¹ Respondent's main office is located in Juno Beach, Florida, with other offices located in Naples and Fort Myers, Florida, among others, where Respondent has over 400,000 customers. [GC Ex 1(g), par. 2(a); GC Ex 1(i), par. 2(a)]²

Since approximately 1945, International Brotherhood of Electrical Workers, AFL-CIO, Local 641 (the Union) has been the exclusive collective-bargaining representative of a bargaining unit of employees of Respondent. In the Fort Myers and Naples, Florida area, the Union represents approximately 60 employees. [TR 24-25, 41] Respondent and the Union have entered into successive collective bargaining agreements (CBAs), the most recent of which is effective by its terms from November 1, 2017 through October 31, 2020. The information request that is the subject of this proceeding was made while the previous CBA, which expired on October 31, 2017, was in effect. The CBA consists of a master agreement, along with three supplements. The only supplement relevant to this case is the Power Systems & Customer Service Supplemental. [TR 42-43; GC Ex 3 and 4]

The Union represents approximately 2900 of Respondent's employees, in the job classifications described in Article 1, paragraph 1 and Exhibit A of the CBA. [TR 24, 44; GC Ex 3 (Article 1, paragraph 1) and GC Ex 4 (pp. 35-37 and 41)]

¹ As used in this brief, "GC Ex" refers to General Counsel's exhibits, "R Ex" refers to Respondent's exhibits and "TR" refers to the transcript.

² Respondent admitted, and the facts establish, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. [GC Ex 1(g), Complaint, par. 2(a)-2(d); GC Ex 1(i), Answer, par. 2(a)-(d)]

Following an investigation of the charge filed by the Union in Case 12-CA-211064, a Complaint and Notice of Hearing issued alleging that Respondent violated Section 8(a)(1) and (5) of the Act. [GC Ex 1(g)]. Complaint paragraphs 4 and 6(a) were amended during the hearing held in Naples, Florida on October 29, 2018, before Administrative Law Judge Charles J. Muhl (Your Honor). [TR 6-7]

There are three main questions to be resolved. Those questions are:

1. Did Respondent fail or refuse to provide the Union with all relevant information that it requested in paragraphs 1 and 2 of its October 9, 2017 email, in violation of Section 8(a)(1) and (5) of the Act?
2. Did Respondent violate Section 8(a)(1) and (5) of the Act by waiting until the hearing to inform the Union that, in response to some of its requests, there was no information that existed or to which Respondent had access?
3. Did the Union, in any way, inform Respondent that it had not provided all of the requested information, and if it did not, was Respondent's response plainly inadequate, in violation of Section 8(a)(1) and (5) of the Act?

The General Counsel respectfully submits that the evidence establishes that Respondent violated the Act as alleged in the Complaint and the questions must be answered affirmatively.

In Section II of the brief, I set forth the background of this case and briefly summarize the evidence. Section III of the brief is the statement of facts. Section IV discusses credibility resolutions. Section V sets forth the argument and law establishing that the conduct in which Respondent engaged violated the Act as set forth in the Complaint. Finally, Section VI concludes the brief.

II. BACKGROUND AND BRIEF SUMMARY

Respondent's geographic jurisdiction includes most of Florida, including the North, West and Tri-County (Broward, Dade and Palm Beach) Regions. Respondent's Regions are divided into management areas. The West Region consists of the three management areas called Naples, Toledo Blade and Manasoto. Management areas are further divided into service centers. The service centers involved in this case include Golden Gate operations (GGO), Fort

Myers operations (FMO), Gladiolous operations (GDO), customer service and transmission/substation (T&S). [TR 19-20, 41; GC Ex 5(b)] Respondent's field employees have three work shifts (day, afternoon and night) with various shift schedules. [TR 20-21]

Bruce Jamison began working for Respondent on November 1, 1990 and has been the area manager for distribution in the Respondent's Fort Myers and Naples, Florida area since April 2007. Jamison works in the Naples (Golden Gate) and Fort Myers (Gladiolous) service centers. Jamison reports to the Regional Director; formerly Michael Warr and currently John Hawkins. [TR 16-18, 21-22] The individuals who report to Jamison are: Jordan Cook/Robin Khouri, former and current operations leader, respectively; Lynn Pattyson, engineering leader; David Clark, business leader; and Michael Cook, delivery insurance leader. [TR 18, 22]

Gregory King has been the Local Union's president since June 2013. King is also an executive board member for Systems Council U4, which is made up of 11 local union presidents. The local Union's other officials are Jack Wilson, vice president; Richard Hillman, financial secretary; and Dale Mugavero, recording secretary. Gary Aleknavich is a business manager for Systems Council U4. [TR 36-37; GC Ex 3 (pg. 1)]

The local Union has 14 to 16 stewards, including eight chief stewards. The relevant stewards involved in this case and their location are: Steve Carroll, Golden Gate (GGO); Rudy Byndloss, Gladiolous (GDO); Scott Hall, Bonita Springs workforce (BSW); Richard Hillman, transmission/substation; and Leroy Thomas, customer service. [TR 38]

King has been an employee of Respondent since March 31, 1981, and he is currently employed as a full-time senior line specialist performing electrical line work. King works Monday through Friday, from 7:30 a.m. to 3:30 p.m. King works approximately 800-900 overtime hours per year. Other employees work an average of 1200 overtime hours per year. [TR 39-40]

At the hearing, General Counsel witness Gregory King credibly testified that Respondent engaged in conduct that violated the Act as alleged in the Complaint. Respondent's witness, Bruce Jamison, incredibly denied that Respondent engaged in the alleged unlawful conduct,

despite admitting that, he unilaterally decided to produce certain records for a shorter time period than requested by the Union. Thus, Respondent's contention that it provided the Union with all of the requested information is contradicted by its own witness. Moreover, Respondent's assertion that the Union failed to notify Respondent of its failure to provide all relevant information does not withstand scrutiny, inasmuch as, after Respondent provided some information to the Union, the Union asked Respondent when it would produce the rest of the requested information. Respondent did not respond to the Union's query. Nevertheless, even if the Union did not notify Respondent that its response was insufficient, it is evident that Respondent's submission of documents was inadequate since, at the very least, it did not include records and documents for the entire timeframe covered by the Union's request. Accordingly, Respondent's failure or refusal to provide the Union with all of the relevant information that the Union requested violated Section 8(a)(1) and (5) of the Act.

III. STATEMENT OF FACTS

A. The CBA's overtime provisions and the parties' overtime grievance settlements

Paragraphs 38 and 44 of the CBA contain provisions that establish procedures for the assignment and distribution of overtime work. Paragraph 38 addresses call out overtime dealing with restoration, weather-related events and equipment failure. [TR 26, 44-45; GC Ex 4]

In 2009, Respondent and the Union entered into a letter of agreement entitled "Overtime Boundaries," which describes the procedures that Respondent must follow when assigning overtime work in non-hurricane or tropical storm event callout. [GC Ex 5(a)] In 2010, Respondent and the Union entered into a letter of agreement entitled "Tropical Systems Resource Call-Out/Assignment Boundaries," which specifically addresses the assignment of overtime work during tropical storms, which is referred to as restoration work. [TR 26, 45-46; GC Ex 5(b)]

Respondent and the Union have entered into numerous settlements resolving grievances filed by the Union from June 28, 2007 through January 12, 2017, concerning paragraphs 38 and 44 of the CBA supplement dealing with overtime work. [TR 47-48; GC Ex 6]

B. Hurricane Irma impacted Respondent's geographical area

In early September 2017, Hurricane Irma hit southwest Florida and traveled through the middle of the state. As a result, Respondent employed individuals other than bargaining unit employees, including subcontractors, to repair damage caused by Hurricane Irma. After a hurricane, employees attempt to restore power to hospitals, water plants, police and fire departments, as well as to all other customers. As a result, employees are expected to work overtime hours to perform restoration work. In addition to hiring subcontractors, Respondent may bring in bargaining unit employees from other areas around the state to perform restoration work. In keeping with their typical past practices, Respondent and the Union agreed that subcontractors hired to perform restoration work following Hurricane Irma would only be allowed to work from 6:00 a.m. to 10:00 p.m. [TR 27-29, 48-49, 53-54]

C. The Union requested information from Respondent

On October 9, 2017, Union president King submitted, via email, a request for information to Respondent, covering the time period of September 15, 2017 to October 8, 2017, for the service centers of Golden Gate (GGO), Fort Myers (FMO), Gladiolous (GDO) and Bonita Springs (BSW). In paragraphs 1 and 2 of the request (the only paragraphs in dispute), the Union sought numbers (count) and timesheets for various contractors, utility companies and Respondent crews that traveled from other areas to work for Respondent in the geographical area covered by the Union's request, as well as timesheets for customer service and transmission and substation (T&S) employees. The Union requested that Respondent provide the information by October 19, 2017. [TR 28-29, 50-52; GC Ex 7] Jamison admitted that the information that the Union requested was relevant. [TR 30]

The Union requested the information from Respondent in order to determine whether to file grievances against it for not abiding by the overtime provisions of the CBA or the parties' agreement to limit the work hours of contractors from 6:00 a.m. to 10:00 p.m. [TR 53]

D. Respondent and the Union met to discuss the Union's request for information (RFI)

On October 25, 2017, Respondent manager Jamison and Union president King met to discuss the Union's request for information (RFI). At that time, King told Jamison that, early one morning, he saw a truck from the contractor named Northline Utilities, and on another occasion an employee from the contractor named Wilco told a bargaining unit employee that Wilco employees had been working outside of the 6:00 a.m. to 10:00 p.m. time period. King also told Jamison that the Union did not see any bargaining unit employees working e-tickets and priority 1 tickets (work orders).³ Jamison told King that it would be unduly burdensome for Respondent to collect the contractor timesheets for the time period covered by the Union's request and asked if King could refine the scope of his request. Jamison also told King that he would look into the e-tickets and priority 1 screen issues. [TR 56-59]

E. Respondent and the Union engaged in a chain of email correspondence regarding the Union's request for information

Later on October 25, 2017, Jamison sent an email to King stating that it would be unduly burdensome for Respondent to gather the information requested by the Union concerning specific contractors, as well as the e-ticket and priority 1 screens. Jamison noted that the Union's request encompassed 25 days and covered four staging sites. [TR 59; GC Ex 7]

Later on October 25, 2017, King sent Jamison a reply email stating that, due to issues with past Union requests for information, he was not willing to refine the Union's request for information because the Union needed to be as specific as possible. [TR 60; GC Ex 7]

³ E-tickets are called in by police or fire rescue involving dangerous situations after a storm, such as a pole laying across a road or a wire landing on a car. Priority 1 tickets could involve the same dangerous situations, but they are called in by a customer, rather than police or fire personnel. [TR 57]

In the meantime, on or about October 28, 2017, King prepared a grievance form alleging that Respondent violated paragraphs 38 and 44, as well as the overtime boundary matrix, by not giving bargaining unit employees the opportunity to work the same hours as contractors and other utilities from September 15, 2017 through October 8, 2017. King gave the grievance to chief steward Steve Carroll to file it against Respondent, but does not know whether the grievance was ultimately filed. [TR 61-62; GC Ex 8]

On November 1, 2017, King sent an email to Jamison again requesting the same information as was sought on October 9, 2017. King provided Respondent with a deadline of November 3, 2017 in which to provide the requested information. [TR 62-63; GC Ex 7]

On November 3, 2017, Jamison sent a reply email to King stating that Respondent was in the process of gathering the requested information and that it was expecting to complete the request by November 27, 2017. Jamison further wrote that, with regard to paragraph 2 of the Union's request, it was unduly burdensome and would require the Union to refine the scope of the request. [TR 63; GC Ex 7]

On November 8, 2017, King sent a reply email to Jamison stating that he was not willing to refine the Union's request for information (RFI) because of Respondent's actions during the course of the Union's RFI in July and August 2017. Although King did not explicitly agree to extend the deadline for production, King noted that he would expect the requested information by the November 27, 2017 date that Jamison referred to in his prior email. [TR 64-65; GC Ex 7]

On November 27, 2017, Jamison sent an email to King separately responding to each paragraph of the Union's RFI of October 9, 2017. In response to paragraphs 1 and 2, Jamison provided the Union with a three-page document titled "Irma Naples," which contained a list of contractor names, number of workers the contractor employed, the staging site (area in which the contractor employees were working), start date and release date. In response to paragraph 5, Jamison also attached a 160-page spreadsheet titled "Ticket List for Irma," which showed, among other things, the ticket (work order) numbers in sequential order for the months of

September and October 2017 that Respondent assigned to contractors and unit employees in the work areas covered by the Union's RFI. [TR 65-70; GC Ex 7, 9 and 10]⁴

In the first week of December 2017, Respondent provided the Union with timesheets for customer service employees [GC Ex 11] and transmission employees [GC Ex 12]. The Respondent did not provide the Union with any timesheets for substation employees. [TR 73-74]

F. The documents that Respondent provided to the Union did not satisfy its request for information

King testified that the "Irma Naples" document [GC Ex 9] did not satisfy the Union's RFI of October 9, 2017 because the period covered by the Union's request extended through October 8, 2017, while the information provided by Respondent in the document ended on September 24, 2017. Jamison stated that Respondent did not provide any information after September 24, 2017 because its operations were restored on that date and the staging sites were shut down. [TR 90] However, the Union's request for information was not limited to restoration work performed by Respondent at staging sites. Rather, the Union's request encompassed all work performed by contractors, utilities and outside company crews at the Golden Gate (GGO), Fort Myers (FMO), Gladiolous (GDO) and Bonita Springs (BSW) service centers. Moreover, Jamison stated that Respondent had embedded (local) contractors perform follow-up storm work in the work areas covered by the Union's RFI and he admitted that the Union's information request, as written, was not limited to staging site work. Yet, as Jamison also admitted, Respondent did not even bother to conduct a search to determine whether contractor timesheets were available after September 24, 2017. [TR 104-106] Thus, it is apparent that Respondent likely has, or had, documents responsive to the Union's information request that it did not produce. Furthermore, Respondent's "Irma Naples" document did not include any information for Respondent crews from other areas and Respondent has never

⁴ Jamison stated that other company departments (central maintenance/purchasing group and a staff group) assisted him in gathering the documents requested by the Union, consisting of the number of contractors used and trouble tickets issued. [TR 33]

informed the Union that such information did not exist. In addition, at no point did Respondent provide the Union with information concerning e-ticket or priority 1 work. [TR 69, 71]

As explained by King, the “Ticket List for Irma” document [GC Ex 10] did not satisfy the Union’s RFI of October 9, 2017 because the information contained therein is very generic or overly broad. For example, the document does not specify whether a contractor or unit employee performed the work and it does not include the date and time of day that the work was performed. Because critical information was omitted from the document prepared by Respondent, the Union was unable to verify whether or not the contractors worked only during the hours of 6:00 a.m. to 10:00 p.m. [TR 71-72] While Jamison stated in his email of November 27, 2017 to King that the vendors (contractors) worked a shift from 6:00 a.m. to 10:00 p.m., despite the Union’s request, Respondent failed to provide any documents to support that assertion – apparently because Jamison felt his statement was all the Union needed. [TR 89]

The customer service employee timesheets produced by Respondent did not satisfy the request for information, as those timesheets failed to include any information for October 2017.⁵ [GC Ex 11], Furthermore, Respondent did not provide the Union with timesheets for any contractors, foreign utilities or substation employees. [TR 74-75] While Respondent has previously provided the Union with contractor timesheets, showing the time of day that they worked, Jamison asserted that there were no contractor timesheets available, in response to the Union’s RFI, because during a storm Respondent does not receive those timesheets that go through another vendor for payment processing. [TR 96] Assuming that Jamison’s assertion is true and responsive timesheets were not available, Respondent had an affirmative obligation to so notify the Union, which it failed to do.

⁵ The Union represents approximately 20 customer service and transmission and substation (T&S) employees. Customer service employees perform support duties for employees working in the field. Transmission employees have the same qualifications as line specialists and perform minor repairs. Substation employees have the same duties as customer service employees and can perform minor repairs. [TR 54]

Jamison stated that Respondent did not use any of its employees from outside the work area to perform work related to the Union's request for information. [TR 32] Similarly, Jamison stated that substation employees were not working in the areas covered in the Union's request for information. [TR 90] In addition, Jamison stated that Respondent does not have access to contractor timesheets. [TR 89] Thus, Respondent did not provide the Union with timesheets for any contractors, for Respondent employees from outside of the work area or for substation employees because such information did not exist or Respondent did not have access to it. However, Respondent never informed the Union that the timesheets either did not exist or they did not have access to those timesheets.

G. The Union followed-up on its request for information by asking Respondent when it would provide the rest of the information

Sometime in December 2017, after Respondent provided information to the Union in early December 2017, King had a conversation with Jamison at Respondent's Golden Gate facility, with no one else present. During their conversation, King asked Jamison when he could get the rest of the information that the Union requested; specifically, the contractor timesheets. Jamison replied that he did not have access to those documents and that someone else would have to supply them to the Union. However, Jamison did not tell King who would provide the Union with the rest of the requested information or by what date Respondent would provide the information to the Union. [TR 75-76]

While Jamison offered testimony about a December 2017 conversation related to a different information request, he did not directly deny engaging in the conversation described by King. [TR 89, 91-92, 96-98]

IV. CREDIBILITY RESOLUTIONS

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the

record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd.* 56 Fed. Appx. 516 (D.C. Cir. 2003); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions – indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622.

In assessing the credibility of the witnesses at trial it is necessary to evaluate the facts for the purpose of determining consistency and reliability or lack thereof. In this regard, Respondent's witness, Bruce Jamison, proved to be an inconsistent and/or evasive witness who showed a pattern of lack of candor, poor recollection, evasiveness in response to questions by the General Counsel and contradiction of his own testimony. Thus, Jamison proved to be an unreliable witness whose testimony must be discredited where controverted.

Throughout his testimony, Jamison exhibited a tendency to provide misleading or inaccurate testimony. In particular, Jamison claimed that Respondent provided the Union with all of the information that it requested, including timesheets for contractors, customer service and T&S employees. [TR 31] Jamison also claimed that the information Respondent provided to the Union covered the entire time period covered by the Union's request for information. [TR 32] However, the record evidence shows that Respondent did not provide any contractor information for the period after September 24, 2018 [GC Ex 9], even though the Union sought information through October 8, 2017. [GC Ex 7] In addition, the evidence reveals that Respondent did not provide the Union with customer service employee timesheets for October 2017 [GC Ex 11] or any timesheets for substation employees.

Jamison also claimed that, in his November 3, 2017 email to King, he respectfully an extension of time to November 27, 2017, for producing all of the information to the Union. [TR 85] Yet, Jamison's email reveals that he did not ask the Union for an extension of the deadline in which to submit the requested information, but rather he bluntly informed the Union that Respondent was not going to provide the information until November 27, 2017. Jamison then claimed that the parties had reached an agreement on an extension simply because King reluctantly responded that he would expect the information by Respondent's unilaterally imposed deadline of November 27, 2017. [TR 85]

Jamison also provided disingenuous testimony. In particular, Jamison stated that he did not understand that the purpose of the Union's request for information was to determine whether Respondent complied with the overtime procedures in the parties' CBA, even though King informed Jamison that the Union had a hunch that Respondent had contractors working beyond the 6:00 a.m. to 10:00 p.m. timeframe. [TR 28-29; GC Ex 7]

Jamison also exhibited poor recollection or was not being truthful in his testimony. In particular, Jamison stated that, other than the CBA language contained in paragraphs 38 and 44, he was not aware of any other provisions that describe the procedures that Respondent needs to follow when assigning overtime work. However, Jamison then admitted that the parties' entered into letters of agreement, entitled "Overtime Boundaries and Tropical Systems Resource Call-Out/Assignment Boundaries," which also describe procedures that Respondent must follow when assigning overtime work. [TR 26; GC Ex 5(a) and 5(b)]

In sum, based on the inconsistencies in his testimony, his inability to accurately recall material facts, as well as his lack of candor in relaying relevant information, Jamison's reliability and truthfulness as a witness is called into question and he should not be credited where his testimony is in dispute.

On the other hand, the General Counsel submits that Gregory King was credible throughout his testimony. Furthermore, he was candid, forthright, and his demeanor was quite

convincing on the stand. His testimony was consistent and non-evasive. Also, there is no evidence that he was untruthful or misrepresented any part of his testimony. Accordingly, King's testimony should be fully credited, especially where in dispute.

V. ARGUMENT

A. Respondent violated Section 8(a)(1) and (5) of the Act by failing or refusing to provide the Union with all relevant information it requested on October 9, 2017, covering the entire time period of September 15, 2017 to October 8, 2017.

In *Woodland Clinic*, 331 NLRB 735, 736 (2000), the Board held that an employer has an obligation to furnish to a union, on request, information that is relevant and necessary to its role as the exclusive bargaining representative of unit employees. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); and *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967). Further, an employer must respond to the information request in a timely manner. *Leland Stanford Junior University*, 307 NLRB 75, 80 (1992). An unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act, as a refusal to furnish the information at all. *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989). The Board has held that "An employer is obligated to provide a union with requested information if there is a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities." *Associated General Contractors of California*, 242 NLRB 891, 893 (1979). In addition the Board has stated that "where the information sought covers the terms and conditions of employment within the bargaining unit, thus involving the core of the employer-employee relationship, the standard of relevance is very broad, and no specific showing is normally required." *Ohio Power Co.*, 216 NLRB 987, 991 (1975), *enfd. per curiam* 531 F.3d 1381 (6th Cir. 1976).

The Board has held that information regarding subcontracting is not presumptively relevant and that the union must therefore demonstrate the relevance of the information. See, *Associated Ready Mixed Concrete*, 318 NLRB 318 (1995). However, Respondent never questioned the relevance of the subcontractor information that the Union requested. Indeed, at

the hearing, Jamison admitted that the subcontracting information that the Union requested was relevant. [TR 30] Nevertheless, it is clear that the Union established the relevance of the subcontracting information that it requested, inasmuch as the parties have negotiated overtime procedures in which subcontractors are limited to working within the specified hours of 6:00 a.m. to 10:00 p.m. In this regard, the Union has been able to obtain numerous favorable grievance settlements, wherein it claimed that Respondent violated the overtime provisions of the parties' CBA or other letters of agreement by improperly providing overtime work to subcontractors. [GC Ex 6]

The facts establish that, via email on October 9, 2017, the Union requested information from the Respondent covering the time period of September 15, 2017 to October 8, 2017, for the service centers of Golden Gate Operations (GGO), Fort Myers Operations (FMO), Gladiolous Operations (GDO) and Bonita Springs Workforce (BSW). The only portions of the Union's request in dispute are paragraphs 1 and 2, in which the Union sought numbers (count) and timesheets for various contractors, utility companies and Respondent crews that traveled from other areas to work for Respondent in the geographical area covered by the Union's request, as well as timesheets for customer service and transmission and substation (T&S) employees. The Union requested that Respondent provide the information by October 19, 2017.

At the hearing, Respondent stated that it did not provide the Union with various portions of its information request because either the documents did not exist or Respondent did not have access to the documents. In particular, Respondent claimed that it did not have access to contractor timesheets. [TR 89]

Afterwards, Respondent stated that there were no contractor timesheets available to provide to the Union, in response to its RFI, because during a storm Respondent does not receive those timesheets which go through another vendor for payment processing. Despite its assertion that timesheets were not available, Respondent admitted that, in the past, it had provided the Union with requested contractor timesheets. [TR 96] Even assuming Respondent's

claim regarding timesheets is true, Respondent never informed the Union of this claim, which will be further discussed later in this brief.⁶ Moreover, the record evidence establishes that Respondent's assertion that timesheets are not available is based on its erroneous and unilateral conclusion that that the Union's RFI was limited to restoration work performed by contractors until Respondent's staging sites were removed on September 24, 2017. However, the Union's RFI was not limited in any such way. Rather, the Union's RFI very clearly sought information for work performed by contractors, among others, from September 15 through October 8, 2017. Indeed, Respondent was well aware of this fact, inasmuch as, on October 25, 2017, Jamison sent an email to King stating that the Union's "request covers 25 days." [GC Ex 7] Jamison admitted that Respondent employed embedded (local) contractors to perform follow-up storm work in the work areas covered by the Union's RFI. However, Respondent did not even search for contractor timesheets for the period after September 24, 2017. [TR 104] In addition, Respondent did not provide the Union with requested numbers (count) of contractors and utilities that worked after September 24, 2017. The fact that Respondent did not even bother to search for documents after September 24, 2017 makes it clear that Respondent did not fulfill its obligation to provide the Union with relevant information that it requested. Thus, Respondent violated Section 8(a)(5) of the Act by its unlawful action and it should be required to search for and provide any responsive documents.

Respondent also failed to provide the Union with any information concerning e-ticket or priority one work, as requested by the Union. [TR 69, 71] In his email of October 25, 2017, Jamison told King that he "expressed a concern with the priority one/e-ticket screen and the hours that those contractors worked." Jamison then told King "We will investigate and provide

⁶ Jamison admitted that, other than the email chain encompassed in GC Ex 7, there were no other written communications between Respondent and the Union concerning the Union's RFI of October 9, 2017. In addition, Jamison noted that, other than the disputed conversation in December 2017, there were no other verbal communications between Respondent and the Union concerning the Union's RFI of October 9, 2017. [TR 101]

you with the vendors and hours worked for the priority one process.” [GC Ex 7] However, Respondent never provided the Union with such information. Accordingly, Respondent violated Section 8(a)(5) of the Act by its failure to do so.

Respondent further failed to provide the Union with customer service employee timesheets for October 2017, even though the Union’s request clearly extended through October 8, 2017. Respondent also failed to provide the Union with any timesheets for foreign utilities. Respondent did not provide an explanation, either to the Union or at the hearing, as to the reason why it failed to provide such information. [GC Ex 11] Accordingly, Respondent violated Section 8(a)(5) of the Act by its unlawful action.

B. Respondent violated Section 8(a)(1) and (5) of the Act by failing to inform the Union that certain documents responsive to the Union’s request did not exist.

The facts of this case are strikingly similar to that of *Graymont PA, Inc.*, 364 NLRB No. 37 (2016). Therein, the Board held that the employer violated Section 8(a)(5) of the Act by failing to timely inform the union that the employer did not possess certain information the union requested. In doing so, the Board overruled *Raley’s Supermarket & Drug Centers*, 349 NLRB 26 (2007), to the extent it held that for issues involving a failure to timely disclose that requested information does not exist, a finding of a violation is necessarily precluded by the absence of a specific complaint allegation. The Board held instead that the test in *Pergament United Sales, Inc.*, 296 NLRB 333 (1989), enfd. 920 F.2d 130 (2nd Cir. 1990), is applicable in determining whether the unalleged information-request violation may be considered.

Under *Pergament*, “the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated.” *Pergament*, 296 NLRB at 334.

In *Graymont PA, Inc.*, the Board noted that, under the duty to bargain, “[t]here can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties.” *NLRB v. Acme Industrial*

Co., 385 U.S. 432, 435-436 (1967) (citing *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956)). This obligation includes the duty “to timely disclose that requested information does not exist.” *Endo Painting Service, Inc.*, 360 NLRB 485, 486 (2014), *enfd.* 679 Fed. Appx. 614 (9th Cir. 2017). The Board noted, at footnote 18, that, when a respondent does not respond, or fully respond, to an information request, the requesting party would have no basis for knowing that the information does not exist.

Section 102.15(b) of the Board's Rules and Regulations provides that the complaint shall contain “a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed.” The complaint, however, is not the exclusive source of notice of the material issues to be addressed in a Board proceeding. Depending on the circumstances, notice may also be provided by the General Counsel's representations at the hearing, or it might be evident from the respondent's conduct in the proceeding. “It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated.” *Pergament*, 296 NLRB at 334. The determination whether a matter has been fully litigated “rests in part on ‘whether the respondent would have altered the conduct of its case at the hearing, had the specific allegation been made.’” *Piggly Wiggly Midwest, LLC*, 357 NLRB 2344, 2345 (2012) (quoting *Pergament*, *supra* at 335).

The Board has applied these *Pergament* principles in information-request cases. For example, in *Castle Hill Health Care Center*, 355 NLRB 1156, 1181-1182 (2010), the Board adopted the judge's finding of a violation where the judge found, under *Pergament*, that the respondent's “continued failure” to provide requested information was fully litigated and rejected the respondent's claim that the alleged violation was limited to the union's initial information requests. See also *Piggly Wiggly Midwest*, *supra* at 2344, 2356 (Board adopted the judge's

finding, under *Pergament*, of an unalleged violation pertaining to the failure to furnish certain sales and franchise information); *Gloversville Embossing Corp.*, 314 NLRB 1258, 1263 (1994) (Board found the respondent failed to timely provide information and also failed to provide it in a complete manner, even though the complaint did not specifically allege the latter).

Both prongs of the *Pergament* test are satisfied in this case, namely that the issue: 1) is closely connected to the subject matter of the complaint and 2) has been fully litigated.

First, Respondent's failure to timely disclose that the Union requested information that did not exist is a fact "closely connected" to the complaint's allegation that Respondent failed to timely furnish the Union with relevant requested information, as they both involve the same evidentiary facts (the Union's request for information and Respondent's response to that request) and present the same ultimate issue: whether Respondent, by its November 27, 2017 and early December 2017 response to the Union's October 9, 2017 request for information, satisfied its statutory obligation to bargain collectively and in good faith with the Union.

Second, the issue was fully litigated. From the outset, the General Counsel asserted that, by its response to the Union's information request, Respondent violated Section 8(a)(5) of the Act. At the hearing, Respondent asserted, as an affirmative defense to the complaint allegation, that it had no information responsive to the Union's request. Notably, Jamison testified that Respondent lacked responsive information and King testified that Respondent has delayed in providing information up to the date of the hearing. These circumstances show that (a) the absence of the specific allegation did not preclude Respondent from presenting exculpatory evidence, and (b) Respondent would not have altered the conduct of its case at the hearing had the more specific allegation been made. See *Pergament*, *supra* at 335

Accordingly, the issue of Respondent's almost 13-month delay in disclosing that the requested information does not exist is closely connected to the complaint allegations and was fully litigated. Accordingly, Respondent was afforded due process, it was not prejudiced by the

absence of a complaint allegation pertaining to the “nonexistence of information,” and it is appropriate for the Board to reach the merits of the issue.

Turning to the merits, the record evidence establishes the violation. In particular, the facts show that, in response to the Union’s RFI of October 9, 2017, Respondent did not provide the Union with any numbers (count) of contractors and utilities after September 24, 2017, timesheets for contractors or utilities, timesheets for Respondent employees who travelled from outside the work area or timesheets for substation employees. At the hearing, Respondent stated that it did not search for contractor information after September 24, 2017. [TR 90] Respondent also stated that it did not have access to contractor timesheets. [TR 89] In addition, Respondent stated that it did not use any of its employees from outside the work area to perform work related to the Union’s request for information. [TR 32] Similarly, Respondent stated that substation employees were not working in the areas covered in the Union’s request for information. [TR 90] Thus, Respondent concluded that it had no information to provide to the Union concerning those requests. Yet, Respondent did not inform the Union of the non-existence of those records. In fact, the first time that the Union became aware of Respondent’s position was at the hearing, inasmuch as King testified that the Union is still waiting to receive the requested documents from Respondent. [76-77]⁷

Plainly, the delay of this disclosure was unlawful, as it is well established that Respondent was “obligat[ed] to timely disclose that requested information does not exist” as part of the duty to timely provide information. *Endo Painting Service*, 360 NLRB 485, 486. See also *Dover Hospitality Services*, 359 NLRB 1103 (2013) (respondent unlawfully waited 13 months to provide the union with certain requested information and to tell the union that the remainder of the requested information did not exist), *affd.* and incorporated by reference 361 NLRB 906 (2014), *enfd.* 636 Fed. Appx. 826 (2nd Cir 2016); *Tennessee Steel Processors*, 287

⁷ It is important to note that the General Counsel did not learn of Respondent’s position, concerning the non-existence of certain documents requested by the Union, until the hearing.

NLRB 1132, 1132-1133 (1988) (respondent unlawfully waited 6 months to inform the union that certain requested information did not exist). Therefore, Respondent violated Section 8(a)(5) of the Act by failing to disclose in a timely manner that it had no information responsive to the Union's request for information regarding timesheets for contractors, for Respondent employees who travelled from outside the work area or for substation employees.

C. Respondent's defense that it had reason to believe that its response to the Union's RFI was completely satisfactory to the Union is without merit

Respondent noted that Jamison ended his email of November 27, 2017 to King by stating "Please review the information that is provided and provide feedback as to whether this satisfies your request." Respondent asserts that King did not reply further to Jamison's email and, therefore, Respondent had reason to believe that it had completely satisfied the Union's request for information. [TR 91] In this regard, Respondent may rely on *Day Automotive Group*, 348 NLRB 1257, 1262-1263 (2006) (finding no violation where the employer had reason to believe it had satisfied the union's requests and the union never said the information provided was insufficient or requested additional information) or similar cases.

Respondent's contention is factually flawed, inasmuch as, in December 2017, King asked Jamison when Respondent would provide the Union with the rest of the contractor timesheets. In response, Jamison told King, as he did at the hearing, that he did not have access to those documents, but that someone else, presumably another Respondent representative, would have to supply the Union with that information. [TR 76]⁸ Respondent had no further communications with the Union about the requested information.

⁸ It is noteworthy that, in their conversation in December 2017, Jamison did not tell King that the contractor timesheets did not exist, but instead stated that he personally did not have access to them. Jamison led King to believe that another Respondent official would be able to access the requested information and provide it to the Union. In contrast, at the hearing, Jamison testified that the contractor timesheets were essentially non-existent because Respondent could not obtain them from a third-party vendor in charge of handling the contractor billing during a storm. Assuming Jamison's testimony is true, Respondent had an obligation to provide the Union with that explanation, instead of waiting until the hearing to provide it as an affirmative defense.

Moreover, inasmuch as Respondent failed to provide the Union with various information as described above, Respondent's response to the Union's request for information was plainly inadequate. In this regard, in *Airport Aviation Services*, 292 NLRB 823, 824 (1989) the Board found a violation, notwithstanding the union's failure to apprise the employer that its responses were insufficient, as the responses were "plainly" inadequate. Thus, Respondent's defense does not withstand scrutiny. Accordingly, Respondent violated Section 8(a)(5) of the Act by its failure to provide the Union with all of the information that the Union requested in paragraphs 1 and 2 of its October 9, 2017 email.

VI. CONCLUSION

Counsel for the General Counsel respectfully submits that, for the reasons set forth above, Respondent violated Section 8(a)(1) and (5) of the Act in all respects alleged in the Complaint, as amended at the hearing. Counsel for the General Counsel respectfully urges Your Honor to recommend that the Board issue a remedial Order requiring Respondent to cease and desist from its unlawful conduct and cease and desist from in any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

Counsel for the General Counsel further requests that Your Honor recommend that the Board order Respondent to provide the information that the Union requested in paragraphs 1 and 2 of its October 9, 2017 email to Respondent.

WHEREFORE, Counsel for the General Counsel respectfully requests that the Administrative Law Judge find that Respondent committed the unfair labor practices alleged in the Complaint, and recommend that the Board order that Respondent provide the remedies described above and all other remedies deemed appropriate.

DATED at Tampa, Florida this 3rd day of December, 2018.

Rafael Aybar

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NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to provide or unreasonably delay in providing International Brotherhood of Electrical Workers, Local 641, AFL-CIO (the Union) with requested information that is relevant and necessary to its role as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All of our employees in the job classifications listed in Article 1, paragraph 1 of the Master Agreement and on pages 35 to 37 and 41 of the Power Systems & Customer Service Supplemental agreement.

WE WILL NOT fail or refuse to timely inform the Union that we have no responsive information in situations when the Union has requested information that is relevant and necessary to the Union's performance of its functions as the bargaining representative of our employees in the above unit and we have no information that is responsive to the Union's request.

WE WILL NOT in any like or related manner interfere with your rights listed above as guaranteed under Section 7 of the National Labor Relations Act.

WE WILL provide the Union with the information it requested on October 9, 2017, specifically, for September 15 to October 8, 2017, by service center (S/C) boundaries to include Bonita Springs Workforce (BSW), Fort Myers Operations (FMO), Gladiolous Operations (GDO) and Golden Gate Operations (GGO), (1) the utility and contractor count and (2) the timesheets for foreign utilities, contractors, embedded contractors and customer service employees.

FLORIDA POWER & LIGHT COMPANY

(Employer)

Dated: _____

By: _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlr.gov.

National Labor Relations Board, Region 12
201 E. Kennedy Blvd., Suite 530
Tampa, FL 33602-5824

Telephone: (813)228-2641
Hours of Operation: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **BRIEF OF COUNSEL FOR THE GENERAL COUNSEL TO THE ADMINISTRATIVE LAW JUDGE** in Case 12-CA-211064 was served on the 3rd day of December 2018, on the following persons and by the following means:

By electronic filing at www.nlr.gov to:

National Labor Relations Board
Hon. Charles J. Muhl
Administrative Law Judge
Division of Judges
1015 Half Street SE
Washington, DC 20570-0001
Facsimile: (202) 501-8686

By electronic mail to:

Richard J. Joy, Esq.
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Respectfully submitted,

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