

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Dixie Electric Membership Corporation, :
versus : CASE NUMBER 15-CA-19954 AND 15-
 : UC-61496
International Brotherhood of Electrical :
Workers, Local Union 767 :

BRIEF IN SUPPORT OF EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE'S DECISION

Dixie Electric Membership Corporation (hereafter "DEMCO") submits this brief in support of its Exceptions to the Administrative Law Judge's Decision, signed and issued by Administrative Law Judge Robert A. Ringler on July 21, 2011. DEMCO excepts to the determinations made by Administrative Law Judge Ringler (hereafter "Decision of ALJ") with respect to DEMCO's alleged obligation to bargain as erroneous and unfounded in law and fact. Accordingly, the Administrative Law Judge's decision should be rejected by the Board.

I. STATEMENT OF THE CASE

DEMCO provides electricity to customers in southern Louisiana. The Union involved in this proceeding, International Brotherhood of Electrical Workers, Local Union 767 (hereafter referred to as "Union" or "IBEW") was certified as the collective bargaining representative of DEMCO's non-managerial employees in 1974.

In November 2010, DEMCO announced a plan to change its management structure effective December 1, 2010. The non-management positions of Systems Operator and Chief Systems Operator were changed to management positions, and the job duties and responsibilities

of the prior positions were expanded. Existing employees were promoted into these new positions. This change occurred after both verbal and written notice was provided to the affected employees and to the Union in November, 2010. After notice, the Union made no request to bargain over this change. Over ten weeks later, on March 7, 2011, the Union filed an unfair labor practice charge against DEMCO. The basis of the Union's charge was, "Effective December 1, 2010, the above named employer has excluded the system operators from the bargaining unit."

DEMCO asserts that it was not required to bargain with the Union over the removal of the Chief Systems Operator and Systems Operators classifications from the bargaining unit and reclassification of those positions, with further expanded roles, as management positions. The employees who worked in those positions were, in fact, supervisory employees prior to their removal from the bargaining unit, and after their formal change to management on December 1, 2010, these positions were given some additional supervisory duties. Section 14(a) of the National Labor Relations Act (the "Act") states that no employer may be compelled to bargain over supervisors.

Alternatively, if the Board finds that DEMCO was required to bargain prior to the removal of these classifications from the bargaining unit, DEMCO asserts that the Union expressly waived its right to bargain pursuant to the stated terms of the Collective Bargaining Agreement (the "CBA") in existence at the time of the change. Further, IBEW is estopped from claiming that the change in those positions and work from classified positions to management positions was an unfair labor practice, because the Union failed to timely request bargaining after being provided reasonable advance notice of DEMCO's intentions prior to DEMCO's removal of these job classifications from the bargaining unit. The Union failed to timely request bargaining or submit a grievance to DEMCO as contemplated by the CBA in effect at the time of

the notice. In fact, the Union failed to act with due diligence or request or demand bargaining over the change in management structure or submit a grievance or an Unfair Labor Practices Complaint until approximately ten weeks later, after the CBA in place at the time of the change had expired and a new CBA had been negotiated. Finally, DEMCO asserts that after the expiration of the CBA in February, 2011, DEMCO had the right to not recognize the Union as the representative of statutory supervisors when bargaining for a new CBA, and DEMCO's Unit Clarification Petition was the proper vehicle to resolve this issue for the purposes of the new CBA adopted in February, 2011. In the new CBA, Systems Operators of Chief Systems Operator are not included the bargaining unit.

II. DEMCO LAWFULLY REMOVED CHIEF SYSTEMS OPERATOR AND SYSTEMS OPERATOR POSITIONS FROM BARGAINING UNIT.

The Administrative Law Judge erred in its determination that DEMCO unlawfully altered the Unit's scope by unilaterally removing the CSO and SO positions from the bargaining unit. (Decision of ALJ, p. 5-8). DEMCO acted within the law and the CBA in effect at the time when it removed the supervisory positions from the bargaining unit. Supervisors are not covered by the National Labor Relations Act and the Union failed to request or demand bargaining over the change.

The non-management positions of CSO and SO were changed to management positions, and the job duties and responsibilities of the prior positions were expanded after DEMCO provided reasonable and adequate notice to the Union. John Vranic, CEO and General Manager of DEMCO, testified that after supervising the CSOs and SOs, he determined that the CSO and SO classifications were, in fact, supervisory positions, and, as such, should be removed from the bargaining unit and placed into management positions. It was also determined that these Operators should and would be given even greater supervisory powers/duties to better manage

the operations of the Company.

The CSO and SO classifications are supervisory positions at DEMCO. Section 2(3) of the National Labor Relations Act, 29 U.S.C. §152(3) excludes any individual employed as a “supervisor” from the definition of “employee” and, consequently, from coverage under the Act. The defining criterion for supervisory status is set forth under Section 2(11) of the Act. Under Section 2(11), supervisory status exists if an individual possesses:

authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well settled that Section 2(11) is to be read in the disjunctive, and that the presence of any one of the twelve listed criteria/activities establishes supervisory status. *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273, 1277 (5th Cir. 1986); *NLRB v. Health Care & Retirement Corporation of America*, 511 U.S. 571, 114 S.Ct. 1778, 128 L.Ed.2d 586 (1994). Significantly, the Court held in *NLRB v. Health Care & Retirement Corporation of America*, “[t]he Act is to be enforced according to its own terms...[w]hether the Board proceeds through adjudication or rulemaking, the statute must control the Board’s decision, not the other way round.” (emphasis added) *Ibid* at p. 580. Under Section 2(11), the controlling statute, “any individual who has the authority to use independent judgment in the execution or recommendation of any of the functions listed...is a supervisor.” *Monotech of Miss. v. NLRB*, 876 F.2d 514 (5th Cir. 1989). Moreover, supervisory status requires only the existence of any of the enumerated powers/authorities and does not turn upon the frequency of its/their exercise. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949); *West Penn Power Company v. NLRB*, 337 F.2d 993 (3d Cir. 1964). *Morello v. Federal Barge Lines, Inc.*, 746 F.2d 1347 (8th Cir. 1984).

There is a long history of disagreement between the Board and the Courts of Appeal over the application of Section 2(11) to those individuals who monitor and maintain the transmission and distribution of power. These classifications known here as Systems Operator and Chief Systems Operator are similar to many other titles including Operations Coordinators, System Dispatchers and System Supervisors, that were routinely found by the Courts to be “supervisors” under the “responsible direction” criterion. Finally, in 1983, the Board agreed with the long judicial precedent and found that “system supervisors” were Section 2(11) supervisors because they responsibly directed field employees in the execution of complex switching orders. *Big Rivers*, 266 NLRB at 383 fn.2. From 1983 until its decision in *Mississippi Power & Light Company*, 328 NLRB No. 146 (1999), the Board followed its policy set forth in *Big Rivers* and excluded individuals in the system supervisor/dispatcher positions from utility company bargaining units as Section 2(11) supervisors. The Board’s decision in *Mississippi Power & Light* overturned well established precedent which had been followed by the Board and relied upon by utility companies for nearly two decades. Moreover, the *Mississippi Power & Light* decision was in direct conflict with over fifty years of decisions by the federal courts of appeal.

When the Board applied its new *Mississippi Power and Light* rationale ruling against Entergy Gulf States and found that its operations coordinators were not “supervisors,” the Fifth Circuit promptly reversed the Board. *Entergy Gulf States, Inc. v. NLRB*, 253 F.3d 203 (5th Cir. 2001). The Fifth Circuit noted that “the NLRB departed without a ‘reasonable explanation’ from the position it had espoused for nearly twenty years, and the position circuit courts enforced for many years before that, that electrical industry employees just like OCs are indeed supervisors. *Mississippi Power & Light* is unreasonably inconsistent with previous precedents under the NLRA.” The Fifth Circuit further cited *Monotech of Miss. v. NLRB*, 876 F.2d 516 (5th Cir.

1989), and noted that whether an employee is a supervisor is a question of fact. After analyzing the facts of the case under Section 2(11) of the NLRA, the Fifth Circuit found that the operations coordinators were supervisors, because they used independent judgment to direct other workers responsibly. In so finding, the appellate court noted that the courts have rejected the Board's arguments that the workers only "requested" cooperation from field workers who were employed under separate chains of command, and that the courts were not "dissuaded by evidence that the OC-like workers referred to written protocols, consulted with superiors in emergencies, and did not outwardly appear to be supervisors." The Court found that the Board's policy change was not supported by the argument that modern "work force and workplace changes" make quasi-professionals and quasi-overseers more common. The Board could not rely on general labor trends to justify a status change while admitting that the particular job at issue had not materially changed. The Court stated, "It is the specific facts, not the Board's perception of labor trends, that must determine how the relevant law applies." Finally, the Fifth Circuit noted:

Nor is there substantial evidence that OC supervisory responsibilities have significantly diminished in recent years. Technology and organizational developments have both added to and reduced OC responsibilities, but the material OC tasks have not changed. OCs still operate without supervision and direct field workers after-hours. They independently decide whether to open up an area office or how many workers initially to call to duty. They have discretion to prioritize repairs in a particular area and move field workers between jobs. Call shifts for field workers do not end until OCs release them. OCs have considerable responsibility for safe switching orders and timely power restorations. The OCs 'effectively direct field operations during emergencies and after hours.' *Arizona Pub. Serv. Co.*, 453 F.2d at 232. It is simply incorrect to describe the OCs directions to field personnel as an 'almost routine or clerical dispatching function.' 1999 WL 551405 at *14.

Despite the well-reasoned reversal of the Board in *Entergy Gulf States*, the Board has once again ruled that central distribution dispatchers are not supervisors under Section 2(11) of the Act. *Avista Corporation*, Case No. 19-RC-15234 (Sept. 4, 2009). In spite of the fact that

the 5th Circuit held that the Board had no reasoned basis to reverse its *Big Rivers* position on the workers in *Mississippi Power & Light*, and that the latter decision was inconsistent with still-governing circuit court law interpreting the NLRA, the *Avista* Court ruled that the Board has not overruled *Mississippi Power* or otherwise returned to the rule set forth in *Big Rivers Electric*.

Even considering that the clash between the federal courts and the Board has once again reared its ugly head causing an enormous back log of decisions that are contrary to federal court decisions, DEMCO's Systems Operators and Chief Systems Operators should be considered supervisors under the standards created by the Board. Unlike the distribution dispatchers in *Avista*, the DEMCO Systems Operators and Chief Systems Operator do have backgrounds with experience in DEMCO's field operations (Jeremy Blouin testified at hearing that he was a lineman for 7 ½ years before he became a Systems Operator and Ron May testified that the other operators had prior field experience); the operators do assign field employees to areas, shifts or crews on occasion; the chief systems operator does evaluate the performance of an employee; the operators are encouraged to report problems with field employees that results in corrective action; and the operators do create their own switching orders and are held responsible when these orders are not completed. According to Blouin, the Operators often operate equipment that allows them to fix a problem without using a field employee. In fact, the operators at DEMCO have a true managerial role that includes training as such.

The testimony at the hearing fully supports DEMCO's position. Ronald May, the Vice President of Engineering and Operations for DEMCO, testified at the hearing that he has been the direct supervisor of the Systems Operators since approximately January of 2008. Prior to that, John Vranic was the direct supervisor for the Systems Operators. When Vranic was promoted to CEO and General Manager for DEMCO, the supervisory duty transferred to May.

May testified that the Chief Systems Operator and Systems Operator positions have evolved into positions that are responsible for directing and operating the utilities systems 24 hours a day 7 days a week. Rather than simply answering telephones, taking information regarding power outages and requesting that other employees restore power, these operators utilize technology that constantly monitors the power system and addresses the problems or potential problems in real time so that power can be restored or outages avoided. The operators have to prioritize work daily, because DEMCO's services cover over 100,000 members and there are squirrels, fallen tree limbs, bad weather and a number of other problems can cause outages or interruptions of service all the time. Since December 1, 2010, operators use their independent judgment to direct DEMCO resources to restore power, to decide how many field personnel to call out to restore power, and the operators are held responsible for calling unnecessary field personnel. In other words, they could be subject to coaching or discipline for utilizing unnecessary field personnel. Furthermore, the operators do not have to seek May's approval to make these decisions. Unlike the dispatchers in *Avista*, May testified that the operators use their knowledge of the system to create switching procedures and then they execute the procedures by directing the field personnel to perform the tasks. A switching procedure is a set of unique written instructions that is created by operators and then followed by field personnel under the close supervision of the operators to ensure the safe and complete process of switching lines. The end result of switching lines might be transferring of a load, de-energizing a line or restoring power in an abnormal situation. Operators create switching orders almost daily for things like construction projects or to transfer loads from one source to another source. These switching procedures are normally created without higher management review or input. Operators have been charged with creating these switching orders both before and after December 1, 2010; however, prior to December 1, 2010,

the operators would generally seek May's approval of most of the orders they wrote. Operators are held responsible when the switching procedures are not completed. May and operator, Blouin, testified regarding a coaching session after a problem arose from an incomplete switching procedure. After December 1, 2010, the operators do not routinely seek May's approval for the switching orders they create. After December 1, 2010, a written job description was created for the operators that defines the roles and responsibilities of the operators.

Although many of the roles and responsibilities of the operators remained the same, after December 1, 2010, the operators were given authority to carry these functions and duties out without approval or concurrence from his or her management, because they now operate as management. After December 1, 2010, if the operators encounter difficulty with field personnel, they are required to report that information to May and to the District Supervisor who is the direct supervisor of the field personnel involved. This function is part of the disciplinary process for determining whether to discipline a field employee or to determine what steps can be made to make the work in the field run more smoothly. Systems Operator, Levy Sibley, reported a problem in the field that resulted in a coaching session with the field employee. Chief Systems Operator, Bonalee Conlee, provided May with concerns over field employee's work procedures, and the field employees were given a coaching session.

May testified about another example of the operators' use of independent judgment regarding a storm that caused many simultaneous outages. Systems Operator, Sibley, made the decision to reassign the Ascension parish crews to the Livingston Parish area to work on restoring power quickly. Normally, these two crews are in two different areas with different field supervisors and territories; however, Sibley determined that this assignment would restore power more efficiently. This required overtime work from the field employees, and Sibley did

not have to obtain authorization to direct this work.

May testified that since December 1, 2010, operators work more independently and don't obtain approval from management now that they are management. May also testified that operators call field personnel with skill sets that best fit the issue they are trying to resolve. For example, individuals with a greater skill set in restoring underground power outages are chosen by the operators for those types of problems. Likewise, operators know who to choose to operate an 18 wheeler and they do not require approval from May or anyone to make that choice. Jeremy Blouin testified that he is familiar with the field employees and he knows who is better at performing certain tasks than others. He factors that information into his decision about who to call for a particular duty. Blouin testified that the Operators also have authority to call contract crews for specialty work and non-DEMCO crews when dealing with weather conditions such as a tropical wave or ice storm. Although Ron May is Blouin's supervisor, Blouin does not call May for permission to work somebody on overtime. May testified that operators dispatch crews to outages and then reassign other personnel as needed without obtaining his concurrence.

Before and after December 1, 2010, operators have been the highest ranking employees at DEMCO at nights and on the weekends. Since that date, operators are also DEMCO management authority during normal work hours in addition to being management on weekends and after hours. May testified that since December 1, 2010, the outage clerk reports directly to the Chief Systems Operator, Conlee, who also performed an evaluation/interview of her. May testified that operators have always been able to prioritize repairs and call employees to restore power. They have also been able to move employees between jobs and assign work. The operators can hold field personnel over until the operators decide to release them. May testified that the biggest change in the operators' role since December 1, 2010 is that the operators have

been granted the authority to perform their duties without seeking management approval for non-routine decisions. May testified that the Systems Operators have authority to resolve customer complaints.

May testified that DEMCO started Management and Leadership Development Training classes and the operators were expected to and did in fact participate. These classes are for all DEMCO management personnel. A copy of the list of courses that Systems Operators were asked to attend was introduced as Exhibit R-2. Slides from presentations for management training that reflect the topics covered were introduced as Exhibit R-3. The sign-in sheets for management training reflected the signatures of Operators, Conlee, Sibley, and Landry. Minutes of a supervisors meeting that was held on December 8, 2010 reflect that the Systems Operators had moved into management positions and that discussions were had with other supervisors to explain what this meant and how to advise the field employees. These minutes were introduced as Exhibit R-4.

DEMCO's operators and chief operators are "supervisors" as defined by the Act, and, therefore, are not subject to the Act and were lawfully and correctly removed from the bargaining unit. The Administrative Law Judge's Decision did not determine whether the CSO and SO positions were supervisory. This determination is essential for a proper ruling on whether DEMCO altered the unit's scope by removing the positions from the bargaining unit. As such, the Board should set aside the Administrative Law Judge's determination.

III. IBEW UNION CONTRACTUALLY WAIVED ITS BARGAINING RIGHT IN THE CBA'S MANAGEMENT RIGHTS CLAUSE WHICH GAVE DEMCO THE RIGHT TO ESTABLISH AND DISCONTINUE JOB CLASSIFICATIONS.

Pursuant to the collective bargaining agreement in effect at the time of the alleged unfair labor practice, DEMCO had the right to reclassify its employees to better suit its business needs.

A waiver of bargaining rights may be contractually based. *Bancroft-Whitney Co., Inc.*, 214 NLRB 57 (1974); *Radioear Corporation*, 199 NLRB 1161 (1972) No rigid rules can be formulated regarding waivers, and the finding of a waiver will depend upon the circumstances of each case. See *Radioear Corporation, supra*. A question of waiver by contractual provision is a matter of contract interpretation. *Bath Marine Draftsmen's Ass'n v. NLRB*, 475 F.3d 14 (1st Cir. 2007); *Enloe Medical Center v. NLRB*, 433 F.3d 834 (D.C. Circuit 2005); *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992). The Administrative Law Judge failed to follow the well-established principles of contract interpretation. Furthermore, the Administrative Law Judge failed to consider all of the surrounding circumstances. *Electrical Workers IBEW Local 1466 v. NLRB*, 795 F.2d 150 (D.C. Cir. 1986).

Pursuant to Article II of the Contract by and between DEMCO and IBEW effective through February 28, 2011, DEMCO retained all management rights including the right to “**establish job classifications, and discontinue job classifications.**” The language is perfectly clear. Where the language of the contract is clear and unambiguous, courts may not inquire into the intent of the parties to contradict the plain meaning of the contract. *Paper, Allied-Indus. Chem. & Energy Workers Int'l Union, Local 4-12 v. Exxon Mobil Corp.*, 657 F.3d 272, 279 (5th Cir. 2011). DEMCO discontinued the job classifications of Systems Operator and Chief Systems Operator within the bargaining unit and established new management positions. Importantly, this was not the first time that DEMCO discontinued a job classification within the bargaining unit and established a classification within management.

During the hearing, testimony revealed that other employees of DEMCO had been removed from the bargaining unit without bargaining or opposition from the Union. John Vranic testified that one switchboard operator position and a number of administrative aid positions

were removed from the bargaining unit by DEMCO and without any opposition from or bargaining with the Union. The receptionist who was removed from the bargaining unit was removed because of the confidential information she handled as part of her employment. Ron May also testified that DEMCO created additional management positions besides the systems operator positions beginning around 2007 through the present. May reviewed DEMCO's Exhibit R-1 and discussed the people listed, all but two of whom were moved from the bargaining unit into management positions beginning in 2007. These positions were filled with existing employees. He noted that many of the changes were made to keep up with changing technology such as the Data Analyst position and the Computer Maintenance Technician.

The Administrative Law Judge erred by failing to find a contractual waiver in the Contract. (Decision of ALJ, p.8). The waiver was clearly articulated and agreed upon by DEMCO and IBEW. Furthermore, the Administrative Law Judge failed to consider the testimonial accounts of the conversations surrounding the negotiation of the management rights clause in the CBA. See *Columbus Electric Co.*, 270 NLRB 686 (1984), *enfd. sub nom. Electrical Workers IBEW Local 1466 v. NLRB*, 795 F.2d 150 (D.C. Cir. 1986) (clear and unmistakable evidence of the parties' intent to waive a duty to bargain "is gleaned from an examination of all the surrounding circumstances including but not limited to bargaining history, the actual contract language, and the completeness of the collective-bargaining agreement."). By refusing to apply the well-established principles of contract interpretation and failing to look at the surrounding circumstances, the Board should overrule the Administrative Law Judge's decision on the contractual waiver of bargaining.

IV. IBEW UNION WAIVED ITS BARGAINING RIGHTS BY ITS OWN INACTION.

Even assuming that the management-rights provision of the CBA did not constitute a

clear and unmistakable waiver of the Union's right to be consulted about changing the Systems Operator and Chief Systems Operator positions to management positions, DEMCO shows that IBEW, by its inaction, is estopped from asserting its right to bargain over the issue of the change of non-management System Operators and Chief Systems Operators to management positions. (Decision of ALJ, p. 7-8). Once an employer notifies a union of a proposed change in conditions of employment, it is incumbent upon the union to act with due diligence in requesting bargaining. *Meharry Medical College*, 236 NLRB 1396 (1978).¹ If there is adequate notice to the union of the employer's proposed changes, the burden shifts to the union to pursue the matter, if it wishes to do so. Failure to request bargaining may result in the waiver of the union's bargaining rights. *City Hospital of East Liverpool, Ohio*, 234 NLRB 58 (1978). The union in this case failed to request bargaining and cannot now be permitted to allege that DEMCO is in violation of Section 8(a)(5) of the Act.

During the week of November 8, 2010, face-to-face meetings were held between management and the Systems Operators in which the Systems Operators, Jeremy Blouin, Joe Cofield, Bonalee Conlee, Devin Landry and Levy Sibley, were advised that the classified positions of Systems Operator and Chief Systems Operator were going to be changed to management positions. Following these meetings, the Systems Operators were sent letters dated November 17, 2010, that advised them of the organizational restructure and provided them with an updated and expanded job description.

John Vranic testified that he met with Floyd Pourciau, the Business Manager for the

¹ The union's obligation to request bargaining arises upon actual notice even if such notice is received from a source other than directly from the employer. *Hartmann Luggage Co.*, 173 NLRB 1254 (1968).

Union, and Shane Pendarvis, Chief Steward for the Union, on November 18, 2010. After they had lunch, Vranic advised them that he wished to review the letter, dated November 17, 2010 that was addressed to Pourciau concerning the removal of the Systems Operators and Chief Systems Operators from the bargaining unit. Vranic testified that he explained the operational side of the company and the reasons for his decision. He provided a copy of the letter with attached job descriptions for the Operators to Pourciau. Importantly, neither Floyd Pourciau nor any other representative of the union ever requested bargaining. DEMCO never indicated that it would not bargain over the proposed change. Neither the Union nor any employees filed grievances concerning the decision to remove the Operators from the bargaining unit.

December 1, 2010, DEMCO changed its management structure, and the non-management positions of Systems Operator and Chief Systems Operator were changed to management positions. The job duties and responsibilities of the prior non-management positions were expanded. The existing employees, Blouin, Cofield, Conlee, Landry and Sibley were promoted into these new positions.

The Union failed to diligently exercise its right to demand discussion or bargaining, so it cannot now claim a failure to bargain on the part of DEMCO. Having been advised both verbally and in writing of the planned change of non-management positions to management positions, the IBEW had a duty to request bargaining before the effective date of December 1, 2010, and because IBEW did not request bargaining, and instead only threatened an unfair labor practice change, the IBEW waived its right to bargain over the change. It was the IBEW who had no desire to bargain over the change. Before the effective date of the change the IBEW and the affected employees could have, but chose not to, file a grievance, request bargaining, or file a ULP charge after it received notice of the change.

IBEW took no action to dispute the change after the existing CBA had expired and a new CBA had been negotiated in February, 2011. Although IBEW reserved the right to file a UL charge during bargaining for the February, 2011, CBA, that right and the right to bargain over the change had already been waived by the IBEW through inaction.

In *Kansas National Education Association*, 275 NLRB 638 (1985), the NLRB concluded that the union waived its right to bargain concerning the transfer of an employee to another position that required the employee to be placed in a probationary status. The union had received notice of the transfer from the affected employee and the union officer told the employee that he did not approve of the condition that he accept probationary status but did not otherwise protest the transfer. The transfer was effective on October 26 and almost a month later on November 21, the union protested. The NLRB found that the union failed to request bargaining until after the transfer was implemented and it effectively acquiesced in the action. The employer did not violate Section 8(a)(5) and (1) by implementing this transfer.

In *City Hospital of East Liverpool, Ohio*, 234 NLRB 58 (1978), the union's failure to request bargaining for over three weeks after having received notice of the employer's change in a term or condition of employment and after the changes had been implemented by the employer resulted in a waiver of its right to bargain.

The Board has ruled in a number of cases that requests for bargaining after reasonable notice and after the disputed action has been taken are not timely. In this case, the union never did request bargaining nor did it file a grievance in accordance with the CBA. DEMCO provided adequate notice to the Union, and the Board should overrule the Administrative Law Judge's determinations otherwise.

V. DEMCO PROVIDED ADEQUATE NOTICE AND WAS OPEN TO A MEANINGFUL BARGAINING SHOULD IBEW HAVE SO REQUESTED. DEMCO'S ACTIONS DID NOT WARRANT A FINDING OF FAIT ACCOMPLI.

As described above, DEMCO provided notice both verbally and in writing to the Union and affected employees of the management structure changes before those changes were implemented. (Decision of ALJ, p. 7-8). Once notified, neither the Union nor any employees requested bargaining or filed grievances concerning the change. No union representative ever requested or demanded bargaining. The Administrative Law Judge's determination that the union was excused from its failure to act with due diligence to request bargaining because DEMCO allegedly presented its decision to change the management structure as a fait accompli is unfounded in law and constitutes an abusively broad application of the fait accompli doctrine.

As a general principal, unions are required to act with due diligence to request bargaining or risk a finding that the union has waived its bargaining right. Fait accompli is an exception that excuses a union from this bargaining requirement only if the employer gives insufficient notice or otherwise makes it clear that it has no intention of bargaining about the issue. *Mcgraw-Hill Broad. Co., Inc.*, 355 NLRB No.213 (September 30, 2010). A fait accompli finding requires objective evidence and is a question of fact. *Id.* A union representative's subjective impressions of the employer's intention and the employer's use of positive language in its notice announcing the changes are, in and of itself, insufficient evidence to find a fait accompli. *Id.*; see also *Bell Atl. Corp.*, 336 NLRB 1076 (2001).

The Board has designated adequate advanced notice as the most important factor finding that employer's announcement of change was a fait accompli. *Knight Protective Serv., Inc. & Local 206, United Gov't Sec. Officers of Am. (Ugsoa)*, 354 NLRB No. 86 (Sept. 30, 2009). The Board has found an employer's actions to be a fait accompli where the employer failed to give

special notice of the change in advance to the union. *Cibi-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), *enf.* 722 F.2d 1120 (3rd Cir. 1983) (finding a fait accompli where the union's officers became aware of the change merely because they themselves were employees). An employer's actions may also be a fait accompli if the notice is provided at a point that is too proximate to implementation of the change. *Id.*; see also *Knight Protective Serv., Inc. & Local 206, United Gov't Sec. Officers of Am. (Ugsoa)*, 354 NLRB No. 86 (Sept. 30, 2009).

In this, DEMCO gave adequate notice to employees affected and the union. At least twenty days prior to the change, the employer held meetings notifying employees of the changes. At least 12 days prior to the change, the employer met with union representatives to further discuss the proposed change. The length of notice was adequate to provide the union with a meaningful opportunity to request bargaining. *Cf. Gulf States Mfg., Inc. v. NLRB*, 704 F.2d 1390 (5th Cir. 1983) (finding of fait accompli because union learned of layoffs only fifteen minutes before they were announced); *Intermountain Rural Elec. Ass'n v. NLRB*, 984 F.2d 1562 (10th Cir. 1993) (finding of fait accompli because employer had implemented unilateral change in policy before union received notice of the change). The employer communicated the changes in face to face meetings and by letter. The employer did not act secretly and fulfilled its obligation to inform the union. *Cf. NLRB v. Centra, Inc.*, 954 F.2d 366, 372 (6th Cir. 1992) (finding of fait accompli where employer implemented its plan secretly and failed to inform union until too late to bargain).

The employer's use of positive language in its communications is not a dispositive factor of a fait accompli. The language of an employer's proposed policy is not required to be phrased in an open-ended manner. *Gratiot Cmty. Hosp. v. NLRB*, 51 F.3d 1255, 1262 (6th Cir. 1995). Although the union threatened an unfair labor practice charge, the union failed to request

bargaining on the matter. The union is obligated to do more than merely protest a change; the union must meet its obligation to request bargaining. *Gratiot Cmty. Hosp. v. NLRB*, 51 F.3d 1255, 1262 (6th Cir. 1995) (quoting *YHA, Inc. v. NLRB*, 2 F.3d 168 (6th Cir. 1993)). Here, the union's threat of a ULP charge constitutes mere protest and does not satisfy the union's obligation to request bargaining.

Considering that DEMCO had conversations and written communications with the affected employees and the local union about the changes prior to their implementation and the union failed to act with due diligence to request bargaining, the union waived its right to bargain. A fair accompli does not exist in this case, as DEMCO took precaution to notify the union and provide a meaningful opportunity to request bargaining. There was an effective waiver of the right to bargain through the union's inaction.

VI. DEMCO'S UC PETITION WAS TIMELY AND A PROPER PROCEDURAL VEHICLE TO DETERMINE WHETHER THE CSO AND SOS WERE SUPERVISORS.

DEMCO filed a timely UC Petition. (Decision of ALJ, p. 9-10). The law does not prescribe a mandatory time frame to file a UC Petition. Although the Board generally declines to clarify bargaining units midway in the term of an existing CBA, the Board allows exceptions when the interests of stability and equity are better served by entertaining a UC Petition during the term of the CBA. *WNYS-TV (WIXT)*, 239 NLRB 170 (1978). In such circumstances, the Board allows UC Petitions to be filed shortly after the contract is executed. *Id. See also Massey-Ferguson, Inc.*, 202 NLRB 193 (1973). In this case, DEMCO filed the UC Petition in a timely fashion. The interests of equity, stability and judicial economy are best served by the Board ruling on the UC Petition to determine whether the CSO and SO positions are supervisory positions.

On February 7, 2011, DEMCO and the Union entered into an agreement where the Union

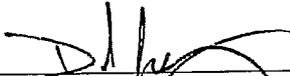
reserved its right to bring an Unfair Labor Practice claim while DEMCO reserved its rights. The Union filed its UL Practice claim on March 7, 2011 raising the issue of whether CSO and SO positions were supervisory positions. Once the Union filed a UL claim, DEMCO responded by filing a UC Petition on July 21, 2011- a petition that would have resolved the issue without further proceedings. The Administrative Law Judge refused to rule on the UC Petition and deemed it untimely. It is fundamentally unfair to require DEMCO to file a UC Petition before the Union filed its UL Practice claim. DEMCO filed its UC Petition shortly after the Union filed its UL Practice claim. It is in the interest of equity and stability for the Board to deem the UC Petition timely and rule on the issues it puts forth.

VII. Conclusion

In conclusion, DEMCO shows that it was not required by law to bargain with the Union over the removal of the Systems Operators and Chief Systems Operators classifications from the bargaining unit. The employees who worked in these positions were, in fact, supervisory employees prior to their removal from the bargaining unit. Alternatively, the Union expressly waived its right to bargain pursuant to the terms of the CBA in existence at the time, and the Union was estopped from claiming there was an unfair labor practice, because after having received prior notice of the proposed change, the Union failed to timely request bargaining and failed to timely submit a grievance as contemplated by the CBA. DEMCO submits this brief to demonstrate that the determinations made by Administrative Law Judge Ringler with respect to the unilateral removal of Chief Systems Operator (CSO) and Systems Operator (SO) positions from the unit and the obligation to bargain as erroneous and unfounded in law and fact. Accordingly, the Administrative Law Judge's decision should be rejected by the Board.

Respectfully submitted,

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- CERTIFICATE OF SERVICE -

THIS IS TO CERTIFY that on this 12 th day of March, 2012, I have served a copy of the above "Exception to Administrative Law Judge's Decision" and "Brief in Support of Exceptions to Administrative Law Judge's Decision" upon all parties as follows:

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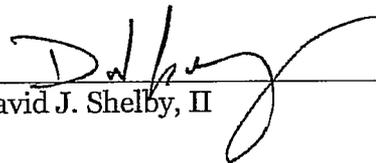
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