

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 15

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DIXIE ELECTRIC MEMBERSHIP CORPORATION  
and  
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,  
LOCAL UNION 767  
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\* Case Nos. 15-CA-019954  
\* 15-UC-061496  
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**COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING  
BRIEF TO RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S  
DECISION**

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Beauford D. Pines, Counsel for the Acting General Counsel in the above cases, submits this Answering Brief to Respondent's Exceptions to Administrative Law Judge's Decision. This is a case in which the employer removed its chief systems operator and systems operator classifications from the bargaining unit and made them a part of management without the consent of the union that has represented the systems operators for four decades. As the Administrative Law Judge correctly found, by engaging in such action, the employer unilaterally modified the scope of the unit and transferred work out of the unit in violation of Section 8(a)(1)(5) and (d) of National Labor Relations Act (Act).

**I. STATEMENT OF CASE**

The record evidence in this case was presented before Administrative Law Judge (ALJ) Robert A. Ringler on October 17 and 18, 2011. Thereafter on January 24, 2012, ALJ Ringler issued his Decision and Order, herein the ALJD, in this matter in which he concluded the Respondent violated Section 8(a)(1) (5) and (d) of the Act by a) modifying the scope of the bargaining unit without the Union's consent when it eliminated the Chief Systems Operator (CSO) and Systems Operators (SO) positions and converted the incumbents to non-unit workers and b) unilaterally transferring work outside of the unit without affording the Union an opportunity to negotiate over

the decision itself or its effects (ALJD 6-7). The ALJD set the deadline for exceptions as February 21, 2012.

On February 13, 2012, the Respondent filed a Motion for Extension of Time to File Exceptions. On February 14, 2012, the due date for receipt of exceptions was extended to March 12, 2012. On March 12, 2012, the Respondent filed Exceptions to Administrative Law Judge's Decision and Brief in Support of Exceptions to Administrative Law Judge's Decision. In response, on March 16, 2012, the Charging Party IBEW Local 767 (the Union) filed a Motion to Strike the Respondent's Exceptions and Supporting Brief. Simultaneously, the Union also requested an extension until April 13, 2012 to file an Answering Brief to Exceptions. On March 19, 2012, the due date for receipt of Answering Briefs to Exceptions was extended to April 13, 2012.

On March 21, 2012, the Respondent filed its Opposition to Motion to Strike Dixie Electric Membership Corporation's Exceptions and Supporting Brief, or in the Alternative Motion to request Leave to Amend Exceptions and Supporting Brief, Exceptions to Administrative Law Judge's Decision, and Brief in Support of Exceptions to Administrative Law Judge's Decision. On April 4, 2012, the Union filed a request for an additional thirty days to file an Answering Brief. On April 9, 2012, the due date for receipt of Answering Briefs to Exceptions was extended to May 14, 2012.

On May 7, 2012, the Board denied the Charging Party's Motion to Strike Respondent's Exceptions and Supporting Brief to the Decision of the Administrative Law Judge. The same date, the Union filed a request for an extension to May 21, 2012 to file an Answering Brief. On May 8, 2012, the due date to file Answering Briefs was extended to May 21, 2012.

Counsel for the Acting General Counsel respectfully submits ALJ Ringler's findings of fact and conclusions of law are properly supported by a preponderance of the evidence and are firmly grounded in National Labor Relations Board (Board) law.

## **II. RECORD EVIDENCE AND ANALYSIS<sup>1</sup>**

### **A. Background**

#### **1. Overview of the Respondent's Operations**

The Respondent provides electrical service to a little over 100,000 members (TR 229). As part of its business operations, the Respondent has several departments, including Administration, Finance, Systems Operations, Marketing and Member Services, Field Engineering, Right-of-Way, Engineering and Operations and District Office Operations (GCX 20 and 21). The chief systems operator (CSO) and the systems operators (SO) work in the control room at the Respondent's headquarters office located in Greenwell Springs, Louisiana (TR 39, 41). The systems operators monitor and regulate the Respondent's electrical system using tools such as the SCADA system, which is a large database that communicates with devices in the field and allows the systems operators to control devices remotely from the control room that (TR 74, 264, and 340).

In the District Office Operations department, the Respondent has six district offices: Central, Zachary, St. Francisville, Greensburg, Livingston and Galvez (TR 41; GCX 20). Each district office has a District Line Supervisor who makes the schedule for the field employees in the office and who is responsible for the work performed by the field employees (TR 46, 290). In each district office, field personnel, such as servicemen, are assigned specific geographic areas for their day-to-day work (TR 249). The field personnel receive their daily assignments from the district line supervisors and the crew leaders (TR 311).

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<sup>1</sup> References to transcript pages and the ALJD are designated as "TR" and "ALJD" respectively. An Arabic numeral(s) after "TR" or "ALJD" is a spot cite to a particular page of the transcript or the ALJD; and an Arabic numeral(s) following a page spot cite references specific lines of the page cited. References to exhibits are indicated as follows: GCX followed by the exhibit number for the Acting General Counsel, U followed by the exhibit number for the Union and R followed by the exhibit number for the Respondent.

**2. The Respondent has Historically Recognized the Chief Systems Operator (CSO) and Systems Operator (SO) Classifications as Bargaining Unit Employees**

The systems operators, also referred to as dispatchers, have been included in the bargaining unit since at least 1983 (TR 39, 107, 117). The duties of the systems operators evolved over the years with the advent of new technologies, but the Respondent continued to recognize the CSO and SO classifications as part of the bargaining unit (TR 196).

In about October 2006, the Respondent and the Union engaged in negotiations for a collective bargaining agreement (CBA) (TR 113, 171; GCX 3). There was no discussion during negotiations about changing the bargaining unit status of the systems operators (TR 116, 171). The negotiations resulted in a CBA effective February 28, 2007 through February 28, 2011. In Article III of the CBA, the Respondent recognized the Union as the exclusive collective bargaining representative of the CSO and SO classifications (TR 165).

**3. The Respondent Made a Mid-Contract Change to the Bargaining Unit Effective December 1, 2010**

In August 2010, relying upon the management rights clause in the CBA that provides in pertinent part that the company retains the right to “prepare job qualifications, establish job classifications, and discontinue job classifications ...,” the Respondent made the decision to change the CSO and SO classifications from bargaining unit to non-bargaining unit positions (TR 60). Thereafter, about a week prior to November 17, 2010, the Respondent held individual face-to-face meetings with the systems operators and informed the operators they would receive letters in the mail indicating their positions were being removed from the Union and they would become management employees responsible for directing the operations of the company twenty-four hours a day (TR 62-63, 357). The Respondent did not invite officials of the Union to attend the meeting (TR 283).

About November 17, 2010, the Respondent mailed letters to the employees in the CSO and SO classifications and informed them effective December 1, 2010, their positions would be changed to management positions (TR 357; GCX 7-7D). The following day, November 18, 2010, the Respondent met with the Union, gave the Union a copy of the letter given to employees and advised the company was going in a different direction and was making the changes reflected in the letter to be effective December 1 (TR 124, 126, 159; GCX 6). The letter provides, in pertinent part:

To facilitate the effective and efficient management of the company, effective December 1, 2010, DEMCO will be changing the management structure relative to the positions of Systems Operator and Chief Systems Operator. These positions will be eliminated and new management positions having the same titles will be utilized. The job descriptions for each new position are attached for your records. Existing employees will be promoted to the new management positions as follows: Bonalee Conlee-Chief Systems Operator, Levy Sibley-Systems Operator, Joe Cofield-Systems Operator, Jeremy Blouin-Systems Operator, and Devin Landry-Systems Operator.

The Union responded to receipt of the letter by informing the Respondent it would have to file labor board charges (TR 127). The Union did not perceive it could discuss the issues with the Respondent as the Respondent was telling the Union what the company had already decided about changing the scope of the bargaining unit (TR 128, 146, 150, and 162). The Respondent did not express a willingness to discuss any details regarding changing the bargaining unit status of the systems operators and did not ask the Union for a proposal on the matter (TR 128). Further, the Respondent did not inform the Union it had already mailed letters to the systems operators indicating their bargaining unit status would change effective December 1, 2010 (TR 132). The Respondent did not discuss with the Union how the pay or benefits for the CSO and SO classifications would change effective December 1, 2010 (TR 132).

On December 1, 2010, while the CBA was still effect, the Respondent changed the CSO and SO bargaining-unit classifications to non-unit positions (TR 28, 64, 184 and 190). The Respondent did not hire any additional bargaining unit employees or new employees to perform the work that

had been performed by the CSO and SO classifications prior to December 1, 2010 (TR 64). The Respondent did not assign any of the work that had been performed by the CSO and SO classifications prior to December 1, 2010 to other bargaining unit employees (TR 65). Rather, the Respondent had the employees who held the CSO and SO classifications prior to December 1, 2010 continue performing the bargaining unit work of the CSO and SO positions (TR 65).

**B. Response to the Respondent's Exceptions**

The Respondent asserts it was not required to bargain with the Union when it removed the CSO and SO classifications from the bargaining unit and reclassified those positions as management positions as employees filling the CSO and SO positions were supervisory employees prior to their removal from the unit effective December 1, 2010. Alternatively, the Respondent contends that according to the terms of the CBA in existence on December 1, 2010, the Union expressly waived its right to bargain regarding the removal of the CSO and SO classifications from the unit. Further, the Respondent contends the Union failed to timely request bargaining after receiving notice of the Respondent's intentions to remove the CSO and SO job classifications from the bargaining unit.

The record evidence, however, does not support the Respondent's assertions. Rather, the evidence undoubtedly supports ALJ Ringler's findings that the Respondent unilaterally modified the scope of the bargaining unit and transferred work from the unit in violation of Section 8(a)(1)(5) and (d) of the Act.

**1. The ALJ Correctly Found the Respondent Unlawfully Modified the Scope of the Bargaining Unit.**

The Respondent asserts the CSO and SO classifications are supervisory positions within Section 2(11) of the Act, and as such, it acted within the law and the CBA in effect at the time when it removed the CSO and SO job classifications from the bargaining unit after it provided notice to

the Union. Therefore, the Respondent contends the ALJ erred by not determining the statutory supervisory status of the CSO and SO classifications since such a determination is essential for a proper ruling on whether it altered the unit's scope by removing the positions from the bargaining unit.

Contrary to the Respondent's contentions, the record evidence supports ALJ Ringler's findings that the Respondent unlawfully modified the scope of the bargaining unit. The CSO and SO classifications have been included within the bargaining unit represented by the Union for decades dating back to at least 1983 (TR 39, 107, 117). Though the role of the systems operators changed over the years, nonetheless, the Respondent, until December 1, 2010, continued to recognize the operators as bargaining unit employees (TR 196). ALJ Ringler notes the Board has recognized that once a specific position has been included within the scope of the unit by either Board action or the consent of the parties, the employer cannot remove the position without first securing the consent of the union or the Board (ALJD 6, 5-10). *See Holy Cross Hospital*, 319 NLRB 1361 (1995)(elimination of unit house supervisor position while transferring such work outside of the unit).

In the instant case, the Union never agreed to the removal of the CSO and SO classifications from the bargaining unit. In fact, when the Respondent notified the Union on November 17, 2010 that effective December 1, 2010 the CSO and SO classifications would be changed to management positions, the Union informed the Respondent it would have to file Board charges (TR 157). Notwithstanding the Union's objection, on December 1, 2010, the Respondent reclassified the CSO and SO classifications from bargaining unit to management positions and for the first time created written job descriptions for the positions with the express intent of conferring supervisory authority on the operators (TR 28, 64, 67-68, 18, 1984). The Respondent made the changes effective

December 1, 2010 without the consent of the Union and it did not file a petition with the Board to clarify the unit prior to implementing the changes. (GCX 1(k)).

The instant case is almost factually parallel to the employer's action in *Mt. Sinai Hospital*, 331 NLRB 895 (2000). In *Mt. Sinai*, the employer had *sous chefs* that were included in the bargaining unit. The employer opened a new kitchen at its facility to provide high quality food service to its patients. The employer created some new *sous chef* positions to staff the new kitchen. The employer took the position that the newly created *sous chef* positions were statutory supervisors and the union disagreed. A grievance was filed on the issue and the grievance was taken to arbitration. The arbitrator ruled the *sous chefs* should be in the bargaining unit. Thereafter, the employer notified the union that the three individuals that held the *sous chef* positions at the time of the arbitrator's award were in new non-unit positions called assistant culinary manager. The employer changed the employees job titles, gave them a salary increase, and modified their job descriptions to make it appear they had additional responsibilities sufficient to justify the reclassifications. The Board reasoned that the employer reclassified the *sous chefs* positions to assistant culinary managers to keep them out of the bargaining unit. *Id.* at 906. The Board found that the employer violated Section 8(a)(5) of the Act by reclassifying the positions, and alternatively, by transferring work out of the bargaining unit. *Id.* at 906.

**2. The ALJ Correctly Found the Respondent Unilaterally Transferred Work out of the Bargaining Unit.**

The Respondent takes exception to ALJ Ringler's determination that it had a duty to bargain over the removal of the CSO and SO classifications and the work they performed from the bargaining unit. Contrary to the Respondent's assertions, the Board, as noted in the *Mt. Sinai* case referenced above, has concluded that the transfer of work from the bargaining unit is a mandatory subject of bargaining. *Id.* at 908. In the instant case, on December 1, 2010, the Respondent effectively removed work from the bargaining unit when it reclassified the CSO and SO

classifications to management positions but continued to have the individuals in those positions perform the same work they did as unit employees. *See Suzy Curtains, Inc.*, 309 NLRB 1287 (1992)(employee promotion to warehouse supervisor yet employee continued to perform various functions he did as a bargaining unit employee).

Moreover, when an employer undertakes a change in operation which involves a promotion of bargaining-unit employees outside the unit which results in the abolition of bargaining-unit jobs, such a change is a mandatory subject of bargaining. *Tesoro Petroleum Corporation*, 192 NLRB 354 (1971). The record evidence shows that the Respondent did not bargain with the Union regarding reclassifying the CSO and SO classifications from unit to management positions. *See Hampton House*, 317 NLRB 1005 (1995)(where the new supervisor continues to perform former bargaining unit work, an employer must bargain before removing the work from the unit). Accordingly, the record evidence supports ALJ Ringler's findings that the Respondent violated Section 8(a)(5) of the Act by unilaterally transferring the work performed by the CSO and SO classifications outside the unit without affording the Union an opportunity to negotiate over the decision itself or its effects (ALJD 6-7).

**3. The ALJ Correctly Found the Union Did Not Waive its Right to Bargain Over the Removal of the CSO and SO Classifications from the Bargaining Unit.**

The Respondent takes exception to ALJ Ringler's determination that the Union did not waive its right to bargain over the removal of the CSO and SO classifications from the bargaining unit. Obviously, the Respondent ignores the principle that a waiver is not to be readily inferred and it should be established by proof that the subject matter was consciously explored and that a party has "clearly and unmistakably waived its interest in the matter" and has "consciously yielded" its rights. *Century Electric Motor Company*, 180 NLRB 1051, 1055 (1970). Moreover, in order for a waiver to be found, a contract clause must specifically include the subject at issue, and the bargaining history must show that the matter at issue was fully discussed and consciously yielded.

*Johnson-Bateman Company*, 295 NLRB 180 (1999). The record evidence in the instant case demonstrates the Union did not consciously yield nor clearly and unmistakably waive its interest in the CSO and SO classifications remaining in the bargaining unit.

**a. The Management Rights Clause is Not a Waiver**

The Respondent acknowledges it discontinued the CSO and SO job classifications and created new management positions with the same titles. ALJ Ringler correctly concluded that the management rights clause contained in the CBA effective February 28, 2007 to February 28, 2011 is not a clear and unmistakable waiver of the Union's right to bargain over the CSO and SO classifications and the work they perform being transferred outside of the unit (ALJD 8, 25-26). The Respondent now asserts ALJ Ringler's conclusion is erroneous and that pursuant to the management rights clause it retained the right to establish and discontinue job classifications to better suit its business needs. The Respondent's assertions are not supported by the record evidence.

The record evidence does not reflect the Union ever gave the Respondent authority to remove work from the bargaining unit by changing the CSO and SO classifications from unit to management positions. The pertinent provisions of the management rights clause provides the Respondent retained the right "to prepare job qualifications, establish job classifications, and discontinue job classifications." Tellingly, the evidence reflects that during negotiations for the CBA, there was no discussion whatsoever regarding changing the bargaining unit status of the CSO and SO classifications (TR 116, 171). In this case, the Respondent did not just discontinue job classifications and establish new job classifications. Rather, the Respondent reclassified the CSO and SO classifications to supervisors effective December 1 although the employees in those positions continued to perform work that they did prior to December 1, 2010 as bargaining unit employees. Thus, the record evidence establishes the Respondent effectively transferred bargaining unit work out of the unit, which is not permitted nor addressed by the management rights clause.

The Respondent's reliance on the Board's decision in *Bancroft-Whitney Co., Inc.*<sup>2</sup> to support a conclusion the Union waived its right to bargain over the removal of the CSO and the SO classifications and the work they perform from the bargaining unit is misplaced. In *Bancroft-Whitney*, the union executed a CBA that contained a zipper clause that reads "[t]he parties hereto agree that they have fully bargained with respect to wages, hours and other terms and conditions of employment and have settled these for the term of this agreement in accordance with the term hereof." *Id.* at 57. The union also agreed to a clause that reads "[a]ll wages and other benefits to be received are contained in this agreement." *Id.* After the CBA was executed, the employer announced to unit employees they would not receive a wage dividend they had received in years prior to execution of the collective-bargaining agreement. The Board found the union waived its right to bargain over an annual wage dividend, which is a mandatory subject of bargaining. The Board specifically noted:

The contract negotiations in this case consumed a year, in which more than 30 bargaining sessions were held. The Union participated in these negotiations with full knowledge of the fact that the employees had been receiving an annual wage dividend; when the matter of the 1972 payment arose, *the matter of paying an annual dividend was brought directly and openly to the Union's attention.* Yet, during the long negotiations, the Union never asked for bargaining over the wage dividend or that any provision be made expressly therefor in the contract. Instead, it agreed to a contract which specifies the wages and other terms and working conditions of the employees and benefits to be received are contained in this agreement. All these circumstances, including the full and extensive negotiating, the detailed completeness of their resulting contract, and *the specificity of the particularly relevant contractual provisions*, demonstrate to us that the Union has clearly waived any right to bargain about the payment of an annual wage dividend during the contract's duration. (*emphasis added*)

*Id.* at 58.

In the instant case, unlike the facts in *Bancroft-Whitney*, the Respondent did not establish it brought directly and openly to the Union's attention during negotiations for the 2007 to 2011 CBA that the language in the management rights clause meant it could remove the CSO and SO classifications

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<sup>2</sup> 214 NLRB 57 (1974).

from the bargaining unit. Further, unlike in *Bancroft-Whitney*, the CBA in the instant case does not contain a zipper clause covering the CSO and SO classifications.

Moreover, to the extent the Respondent cites *Paper, Allied-Indus. Chem. & Energy Workers Int'l Union, Local 4-12*<sup>3</sup> for the principle that courts may not inquire into the intent of the parties to contradict the plain meaning of a contract where the language of the contract is clear and unambiguous, the management rights clause in the instant case does not support the Respondent's contention it had the right to unilaterally remove the CSO and SO classifications from the bargaining unit. Rather, as ALJ Ringler correctly reasoned in the instant matter, although the clause states the Respondent retains the right to discontinue job classifications and establish job classifications, the language is ambiguous concerning its right to transfer work outside the unit and, as such, does not constitute a clear and unmistakable waiver of the Union's right to bargain over the matter (ALJD 8, 25-35).

**b. The Union Did Not Waive by Inaction its Interest in Representing the CSO and SO Classifications as Part of the Unit**

The Respondent, alternatively, contends that even assuming 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 CSO and SO classifications to management, the Union, by its inaction, is estopped from asserting its right to bargain over the issue of the change from non-management to management positions. As ALJ Ringler correctly noted, the Respondent's decision to transfer the CSO and SO classifications and work outside of the unit was presented as a *fait accompli* that relieved the Union of its ordinary obligation to request bargaining (ALJD 7, 30-32).

The *fait accompli* determination is discussed in greater detail herein below.

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<sup>3</sup> 657 F.3d 272, 279 (5<sup>th</sup> Cir. 2011). The case is inapposite to the instant case as it involved the question of whether the union could force the employer to arbitrate a grievance where the CBA contained language that "[a]n arbitrable grievance is a good faith claim by one party that the other party has violated a written provision of this Agreement. ..."

To the degree the Respondent cites *City Hospital of East Liverpool, Ohio*<sup>4</sup> in support of its contention that once it notified the Union of the proposed change, the burden shifted to the Union to request bargaining with due diligence, the Respondent fails to recognize the facts in *City Hospital* are substantially different from the record evidence in the instant case. In *City Hospital*, the employer notified nurses who had substituted as acting head nurses that it intended to discontinue the position of head nurse. In concluding that the union acquiesced in the changes by failing to request bargaining until after the changes were implemented, the Board specifically noted “[i]n the instant case, Respondent announced its proposed changes over 3 week before they were to become effective and explicitly requested discussion on the proposed changes.” *Id.* at 59, fn 8. In the instant matter, in contrast the employer’s action in *City Hospital*, the Respondent did not explicitly request that the Union discuss the removal of the CSO and the SO classifications from the bargaining unit. In fact, the record evidence shows the Respondent did not express a willingness to discuss any details regarding the issue with the Union and did not ask the Union for a proposal on the matter (TR 128). Accordingly, ALJ Ringler correctly found the Union did not waive its rights by failing to request bargaining (ALJD 8, 10-11).

**c. The Union Did Not Waive by Past Practice its Interest in Representing the CSO and SO Classifications as Part of the Unit.**

The Respondent asserts the Union waived its right to bargain about the reclassification of the CSO and SO positions by allowing the Respondent to transfer a unit switchboard position out the unit in the past without bargaining or opposition from the Union. However, as the ALJ correctly noted, the Union’s acquiescence to an isolated transfer of work outside the unit does not constitute a waiver of its right to bargain over all succeeding work transfers (ALJD 8-9, 40-5). In *Colgate-Palmolive Co.*, 323 NLRB 515 (1997), the employer installed surveillance cameras in the restrooms

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<sup>4</sup> 234 NLRB 58 (1978).

without bargaining with the Union. The employer argued it had no obligation to bargain with the union because it had an established past practice of using surveillance cameras in the workplace. The Board pointed out that a union's acquiescence in an employer's past actions on a particular subject does not, without more, constitute a waiver of the right to bargain. *Id.* at 516. The same principle is applicable in the instant case. Accordingly, ALJ Ringler correctly found the Union did not waive its right to bargain by a past practice.

**4. The ALJ Correctly Concluded the Respondent Presented the Union with a *Fait Accompli*.**

ALJ Ringler concluded the Respondent presented the Union with a *fait accompli* on November 17, 2010 when it informed the Union of its decision to transfer the CSO and SO classifications and work outside of the unit (ALJD 7, 41-42). The Respondent takes exception to ALJ Ringler's determination that its actions warranted a *fait accompli* finding. This assertion ignores the fact that the record evidence establishes the Respondent had no intention of changing its mind when it informed the Union of its decision on November 18, 2010. *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013 (1982)(where notice is given shortly prior to implementation of the change because of lack of intent to alter position, then the notice is merely informational about a *fait accompli*). The evidence further reflects the Respondent made the decision in August 2010 to change the unit status of the CSO and SO classifications although it failed to notify the Union at that time. Only on November 18, 2010, did the Respondent give the Union a letter that stated in certain and unequivocal terms the systems operators "will be promoted to the new management positions" (TR 124, 126). The Union understood it could not discuss the issues with the Respondent because Respondent told the Union that it had already decided to change the scope of the bargaining unit (TR 128, 146, 150, and 162). The Respondent did not express any willingness to discuss any details regarding changing the bargaining unit status of the CSO and SO

classifications and did not ask the Union for a proposal on the matter (TR 128). The Respondent did not even inform the Union that it had already mailed letters to the systems operators indicating their bargaining unit status would change effective December 1 (TR 132). The Respondent did not discuss with the Union how the pay or benefits for the CSO and SO classifications would change effective December 1, 2010 (TR 132). In fact, the Union did not receive a copy of the job descriptions for the reclassified CSO and SO classifications until September 2011, months after the Respondent had implemented the change (TR 130).

Overall, the record evidence supports ALJ Ringler's determination the Respondent had no intention of changing its mind and it presented the Union on November 18, 2010 with a *fait accompli* in which the Union can not be said to have waived its right to bargain over the change. Where, as in the instant case, notice is given shortly prior to implementation of the change because of a lack of intent to alter its position, the notice is merely informational about a *fait accompli*. See *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001) citing *Gannett Co.*, 333 NLRB 355 (2001).

Respondent's reliance on *Gratiot Cmty. Hosp. v. NLRB*, 51 F.3d 1255, 1262 (6<sup>th</sup>. Cir. 1995) in support of its argument that its announcement of the removal of the CSO and SO classifications from unit to management positions is insufficient evidence to find a *fait accompli* is unwarranted. Rather, similar to the definite language used by the Respondent in the instant case when it announced in the letter sent initially to employees that it was removing the CSO and SO classifications from the bargaining unit effective December 1, 2010, the employer in *Gratiot Cmty. Hospital* announced its decision eliminating the practice of providing scrub uniforms to employees free of charge in a letter to employees that read it "will no longer furnish surgical scrub suits." The employer also issued a memorandum that read "the policy regarding hospital-supplied surgical scrubs has changed. Effective September 1 ... the Hospital will no longer supply employees with

surgical scrubs.” *Id.* at 1080. The Board noted that each pronouncement was a final and unqualified decision that sent a strong signal that the union had no effective role to play in the employer’s predetermined process. The Board reasoned as follows:

Even assuming that the Respondent’s communication to employees was sufficient to afford the Union indirect notice of the revised scrub policy, it was not notice which gave the RNA the opportunity to make a meaningful response. Here, by announcing its new scrub policy as if the decision was already cast in stone, and by conveying that decision to the employees rather than to their certified bargaining representative, the Respondent exposed its disinterest in genuine bargaining. Given these circumstances, the RNA was not required to go through the motions of requesting bargaining, for the Board does not require futile gestures. See *Michigan Ladder Co.*, 286 NLRB 21 (1987).

*Id.* at 1080.

The Board’s rationale in *Gratiot Cmty. Hospital* is equally applicable in the instant matter. Accordingly, ALJ Ringler correctly found the Respondent presented its decision to transfer the CSO and SO classifications and work outside the unit as a *fait accompli* to the Union on November 17, 2010, which relieved the Union of its ordinary obligation to request bargaining (ALJD 7-8).

**5. The ALJ Correctly Found the Respondent Could Not Remove the CSO and SO Classifications from the Bargaining Unit on the Basis the Employees Were Statutory Supervisors on December 1, 2010.**

The Respondent asserts ALJ Ringler should have determined the CSO and SO classifications removed from the bargaining unit were supervisory positions not subject to the Act. However, ALJ Ringler correctly reasoned that even assuming the CSO and SO classifications were statutory supervisors on December 1, 2010, when parties to a collective-bargaining relationship previously have voluntarily agreed to include supervisors in a bargaining unit, the Board will order the application of the terms of the CBA to such supervisors (ALJD 6, 21-29). As the Board noted in *Mt. Sinai*, once a position has been included within the scope of the unit, the employer cannot remove it without the consent of the union or the Board. *Mt. Sinai, supra*. The record evidence clearly establishes the Union did not consent to the CSO and SO classifications being removed from

the bargaining unit. Moreover, the Respondent did not file the unit clarification petition to exclude the CSO and SO classifications from the bargaining unit until July 21, 2011, well after it removed the classifications from the bargaining unit effective December 1, 2010 (GCX 1(k)). Thus, the record evidence supports ALJ Ringler's conclusion the Respondent did not have the consent of the Board or the Union to exclude the CSO and SO classifications from the unit.

Moreover, the record evidence reflects the Respondent failed to establish the CSO and the SO classifications were statutory supervisors prior to their removal from the unit effective December 1.

Section 2(11) of the National Labor Relations Act, hereinafter "Act," defines the term "supervisor" as:

[A]ny individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly 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 exercise of independent judgment.

This provision is to be read in the disjunctive and any of these enumerated powers is sufficient to confer supervisory status. *Kentucky River Community Care*, 532 U.S. 706, 713 (2001). As the Supreme Court stated in *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-574 (1994):

[T]he statute requires the resolution of three questions; and each must be answered in the affirmative if an employee is to be deemed a supervisor. First, does the employee have the authority to engage in 1 of the 12 listed activities? Second, does the exercise of that authority require 'the use of independent judgment'? Third, does the employee hold the authority 'in the interest of the employer'?

In enforcing the Act, the Board does not construe supervisory status too broadly because a worker who is found to be a supervisor is denied rights which the Act is intended to protect. *Chevron Shipping Co.*, 317 NLRB 379, 385 (1995). Additionally, it is well established that the party

alleging supervisory status has the burden of proving that it exists by a preponderance of the evidence. *Kentucky River*, 532 U.S. at 711-712; *Oakwood Healthcare*, 348 NLRB No. 37 (2006). This burden of establishing supervisory status must also be met by detailed evidence, not conclusionary statements. *Golden Crest Healthcare Center*, 348 NLRB No. 39, slip op. at 5 (2006).

The Respondent does not assert and the record does not contain any evidence that prior to December 1 the systems operators and chief systems operator hired, transferred, suspended, laid off, recalled, promoted, discharged, rewarded, disciplined, or adjusted the grievances of employees or effectively recommended such actions. The only scintilla of evidence in the record regarding the systems operators performing a supervisory power would have to be derived from whether they assigned or responsibly directed field employees prior to December 1, 2010.

As to assignments, the cumulative record evidence reflects that prior to December 1, 2010, the employees in the CSO and SO classifications did not assign daily tasks to field employees. The field employees receive their daily assignments from their respective district line supervisors. In outage situations, systems operators route field employees to specific outage areas, and to resolve a power outage, the operators may request that field employees perform specific steps according to a switching order. The switching orders are best viewed as a series of discrete tasks that must be performed in a sequential order. The Board has determined that such *ad hoc* assignments are not sufficient to confer supervisory status. *Croft Metals*, 348 NLRB No. 38 (2006). Although employees in the SO positions may route field employees to the location of a power outage, such action does not require the use of independent judgment. The SO positions route field employees in accordance with well established regulations and employer protocols during outages. In *Kentucky River*, the Supreme Court held that “the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer.” *Id.* The Court cited with approval the Board’s decision in

*Chevron Shipping Company, supra*, in which the Board concluded that licensed officers had great responsibilities but their use of independent judgment and discretion was limited by the employer's operating regulations and standing orders.

In the instant matter, the record evidence reveals the Respondent failed to establish by a preponderance of evidence that prior to December 1, 2010, the systems operators formed an opinion on or evaluated the skill level of field employees when routing employees to an outage location. The evidence indicates the district line supervisors make the duty and call-out lists, and the lists indicate which field employee can be called out and in what order. The systems operators then used the prepared lists to call-out the designated field employees both during and after normal business hours. The systems operators must follow the Respondent's call-out procedure. Moreover, after a first responder reported to an outage area and analyzed the trouble, the first responder, a field employee, informed the system operators if additional employees were needed, and if so, what job classifications were needed. Thus, the field employee, not the systems operators, determined skills needed and the number of employees. This stands in stark contrast to the evidence presented in *Oakwood Healthcare* where the charge nurses analyzed the personality of the staff and patients and specific skills or abilities of the nursing staff and the Board determined that the charge nurses made assignments based on the skill, experience and temperament of the other nursing personnel and on the acuity of the patients. *Oakwood Healthcare, supra*.

Similarly, as to responsibly directing employees, in *Oakwood Healthcare*, the Board interpreted the phrase "responsibly to direct" as follows: "If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both 'responsible' and carried out with independent judgment." *Oakwood Healthcare, supra* at 6. Further, the Board determined that for direction to be "responsible," "the person directing and performing the oversight of the employee

must be accountable for the performance of the task by the other such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly. *Id.* The Board reasoned that this concept of accountability “creates a clear distinction between those employees whose interests, in directing other employees’ tasks, align with management from those whose interests, in directing other employees, is simply the completion of a certain task.” *Id.*

The record reflects the Respondent failed to present detailed evidence that the employees in the CSO and SO classifications were held accountable for their direction of field employees prior to December 1, 2010. Indeed, the Respondent acknowledged that the systems operators cannot be held responsible for the actions of the field employees (TR 294). Moreover, the extensive use of computerized programs curtails the systems operators’ use of independent judgment in their positions. The cumulative record evidence reflects employees in the CSO and SO positions utilize SCADA, General Operating Procedures for Transmission and Distribution System, and the DMS Operator Guide in the performance of their jobs. All the detailed instructions provided by SCADA and the operating procedures and guides greatly reduce any discretionary choices available to the systems operators. The evidence reflects that switching operations must be performed within guidelines set by the Respondent. The SCADA system notifies the systems operators when an outage/emergency situation exists and shows the location of the power outages. The switching and clearance list guidelines show the systems operators how and when switching operations can be performed. The Echo protocol dictates how the systems operators must communicate switching sequences to the field employees. Tellingly, the systems operators cannot be disciplined if field employees perform their portion of switching orders poorly.

Accordingly, ALJ Ringler correctly found the Respondent modified the unit’s scope effective December 1, 2010 when it eliminated the unit CSO and SO classifications and converted

the incumbents to non-unit workers (ALJD 6, 14-15). The record evidence indicates the CSO and SO positions were not statutory supervisors prior to December 1, 2010. Additionally, the law is well settled that even if they were supervisors, the Respondent could not unilaterally remove them from the unit.

**6. The Respondent's Exception to the ALJ's Determination that its Unit Clarification Petition is Untimely is a Red Herring.**

To the extent the Respondent takes exception to ALJ Ringler's determination that its unit clarification petition is untimely, the issue is not relevant to the determination that the Respondent committed an unfair labor practice when it removed the CSO and SO classifications from the bargaining unit effective December 1, 2010. The Respondent acknowledges the Board generally declines to clarify bargaining units midway in the term of an existing CBA, however, Respondent cites *WNTS-TV (WIXT)*, 239 NLRB 170 (1978) and *Massey-Ferguson*, 202 NLRB 193 (1973) for the principle that the Board allows UC petitions to be filed shortly after the contract is executed. In *WNTS-TV*, the parties signed a CBA on March 17, 1978, and within 45 days thereafter, on May 1, 1978, the petitioner filed a unit clarification petition. Likewise, in *Massey-Ferguson*, the Board noted the unit clarification petition was filed shortly after execution of the CBA.<sup>5</sup> 202 NLRB at 194. In contrast to *Massey-Ferguson* and *WNTS-TV*, in the instant case, as noted by the ALJ, the Respondent did not file its unit clarification petition until between 121 and 143 days after execution of the CBA (ALJD 10, 1-5). Accordingly, ALJ Ringler correctly concluded the Respondent's UC petition should be dismissed as untimely to avoid a disruption of the collective-bargaining relationship (ALJD 10, 10-15).

**III. CONCLUSION**

Based upon the foregoing, Counsel for the Acting General Counsel respectfully submits the record evidence supports ALJ Ringler's findings of fact and law. Accordingly, Counsel for the

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<sup>5</sup> The decision reflects the CBA was signed on May 17, 1972, but does not reflect the date the petition was filed.

Acting General Counsel respectfully urges the Board to reject the Respondent's exceptions and to adopt the ALJ's findings and conclusions in their entirety.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2012, a copy of the foregoing Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions to Administrative Law Judge's Decision has been filed with the Office of the Executive Secretary for the National Labor Relations Board and forwarded by electronic mail to the following:

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