

Answering Briefs until May 21, 2012. Pursuant to Section 102.46(h) of the National Labor Board's Rules and Regulations, DEMCO files this reply brief to the Union's answering brief to address incorrect statements made by the Union relative to testimony at the hearing and the Union's misplaced reliance on *fait accompli*. DEMCO reasserts all issues and law raised in its Exceptions and, additionally, asserts the following in regards to DEMCO's argument that the Union waived its right to bargain through its own inaction.

II. DEMCO HAD EFFECTIVELY REMOVED POSITIONS FROM UNIT CLASSIFICATION TO MANAGEMENT CLASSIFICATION IN THE PAST.

DEMCO had successfully transitioned unit positions to management positions in the past without opposition from the Union. The Union incorrectly asserts that “[Ronald] May (Vice President of Engineering and Operations) testified that DEMCO had never previously removed a unit classification and made it a management classification.” (Charging Party/Union's Brief in Opposition to Despondent/Petitioner's Exceptions to the Decision of the Administrative Law Judge, p. 9). The incorrect statement attributed to a DEMCO representative was actually the testimony of Floyd Pourciau, the Union's Business Manager. (Hearing Record, p. 163). In fact, DEMCO proved that the company had effectively removed positions from unit classification to management classification in the past.

In 2007, DEMCO created new management positions, consistent with the company's technological evolution. (Hearing Record, p. 213). The Union misrepresents in its Brief in Opposition that, although some of these new positions were filled by promoting bargaining unit personnel to management positions, that no bargaining unit positions were eliminated in the process. (Charging Party/Union's Brief in Opposition to Despondent/Petitioner's Exceptions to the Decision of the Administrative Law Judge, p. 10). Although no bargaining unit positions were eliminated, some of the bargaining unit positions were left unfilled. (Hearing Record, p. 213). With bargaining unit personnel promoted into new management positions and those

bargaining unit positions left unfilled, DEMCO effectively removed positions and workers from unit classification to management classification in the past. The Union's position that DEMCO has never removed a unit classification is contrary to the Hearing Record.

III. FAIT ACCOMPLI IS NOT APPLICABLE IN THIS CASE BASED ON DEMCO'S ACTIONS PRIOR TO REMOVING THE SYSTEM OPERATORS FROM THE BARGAINING UNIT.

Unions are mandated by law to act with due diligence to request bargaining or risk a finding that the union has waived its bargaining right. Failure to request bargaining may result in the waiver of the union's rights to bargain. *City Hospital of East Liverpool, Ohio*, 234 NLRB 58 (1978). *Fait accompli* is an exception that excuses a union from this affirmative duty to request bargaining 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 is a question of fact that requires objective evidence- a burden not met by the Charging Party/Union in this case. *Id.*

The hearing record does not support a finding of a *fait accompli*. DEMCO gave adequate notice to employees affected and the union. At least twenty days prior to the change, DEMCO held meetings notifying employees of the changes. (Hearing Record, p. 62). At least 12 days prior to the change, the employer met with union representatives to further discuss the proposed change. (Hearing Record, p. 127). The length of notice was adequate to provide the union with a meaningful opportunity to request bargaining. Compare with *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). DEMCO 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).

During the week of November 8, 2010, face-to-face meetings were held between management and Systems Operators in which the Systems Operators, Jeremy Blouin, Joe Cofield, Bonalee Conlee, Devin Landry and Levy Sibley, were advised that the non-management positions of Systems Operator and Chief Systems Operator were going to be changed to management positions. (Hearing Record, p. 62, 357). 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. *Id.*

John Vranic testified that he met with Floyd Pourciau, the Business Manager for the Union, and Shane Pendarvis, Chief Steward for the Union, on November 18, 2010. (Hearing Record, p. 186-187). 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. *Id.* Vranic testified that he explained the operational side of the company and the reasons for his decision. *Id.* He provided a copy of the letter with attached job descriptions for the Operators to Pourciau. Neither the Union nor any employees filed grievances concerning the decision to remove the Operators from the bargaining unit. (Hearing Record, p. 188). Importantly, neither Floyd Pourciau nor any other representative of the union ever requested bargaining. *Id.*

IV. THE UNION SHOULD BE ESTOPPED FROM RELYING SOLELY UPON A *FAIT ACCOMPLI* DEFENSE WHEN THE UNION PREVIOUSLY REFUSED TO BARGAIN.

The Union's sole response against DEMCO's claim that the Union waived its right to bargaining by its own inaction is a *fait accompli* defense. The Union, incorrectly, asserts that

DEMCO's actions indicated that the employer was unwilling to bargain when, in fact, it was the Union who refused to bargain. By the Union's own admission, "as the Union said all along, it intended to fight the changes through the National Labor Relations Board." (Charging Party/Union's Brief in Opposition to Despondent/Petitioner's Exceptions to the Decision of the Administrative Law Judge, p. 6). The Union goes on to state that "the Union also believed it was not obligated to bargain over such changes in the scope of the bargaining unit." *Id.* Pourciau, the Business Manager for the Union, testified at the hearing that the Union "knew its fight was going to be through the NLRB." (Hearing Record, p. 134). It is illogical and inequitable to find a *fait accompli* where the Union made it abundantly clear that it was not willing to bargain over the position changes. The Union emphatically makes clear that it had no intention of bargaining, and planned to address its complaints and concerns only through Board charges. Where the Union refused to request and was unwilling to engage in bargaining, it should be estopped from asserting a *fait accompli* defense against DEMCO.

The National Labor Relations Act provides that any labor organization's (including unions) refusal to bargain constitutes an unfair labor practice. Just as an employer should not benefit from an unfair labor practice,¹ employees should not be able to reap the benefits from their unfair labor practices, specifically their refusal to collectively bargain with their employer.² *Kuno Steel Products Corp.*, 252 NLRB No. 127 (July 29, 1988). According to the NLRM website (emphasis added), "Congress enacted the National Labor Relations Act ("NLRA") in 1935 to protect the rights of employees **and employers, to encourage collective bargaining**, and to curtail certain private sector labor and management practices, which can harm the general

¹ See *Amcar Div., ACF Industries*, 231 NLRB No. 20, fn. 1 (August 2, 1977).

² See also *International Hod Carriers Bldg. & Common Laborers*, 135 NLRB No. 121, fn. 26 (January 1, 1962) ("To be sure, we would not permit a union to benefit by itself committing unfair labor practices to delay the holding of an election and thereby stay the sanctions of Section 8(b)(7).").

welfare of workers, businesses and the U.S. economy.”³ The NLRA protects DEMCO’s rights, as an employer, equally to the rights of employees.

In this case, the Union violated the NLRA and engaged in an unfair labor practice when it refused to bargain and opted, instead, to “fight” through the NLRB. For the Union to emphatically insist that it will file charges at the mere mention of moving any employees from the bargaining unit, clearly illustrates that the Union was, in bad faith, unwilling to bargain. Clearly the IBEW’s conduct has “the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce.” (*see* NLRA Section 1.[§151.]). Accordingly, the Union should not be able to benefit from its own unfair labor practice by now claiming *fait accompli*.

V. DEMCO’S SYSTEMS OPERATOR AND CHIEF SYSTEMS OPERATOR POSITIONS ARE SUPERVISORY POSITIONS, AND EMPLOYEES HOLDING THOSE POSITIONS ARE EXCLUDED FROM COVERAGE UNDER THE NATIONAL LABOR RELATIONS ACT.

Although not addressed in the Administrative Law Judge’s Decision, the removal of the Systems Operator and Chief Systems Operator positions resulted from a factual determination that these positions were supervisory positions, and, and as such, should be removed from the bargaining unit and placed into management positions. DEMCO offered evidence highlighting the supervisory nature of these positions. In its Opposition, the Union mischaracterizes the evidence and testimony in the Record in an attempt to allege that systems operators had or have no responsibility or accountability for the work of the field employees they purportedly supervise. (Charging Party/Union’s Brief in Opposition to Despondent/Petitioner’s Exceptions to the Decision of the Administrative Law Judge, p. 29). According to the Union, DEMCO asserted that “operators are responsible for the work that crews ‘do in the field,’ but [DEMCO] failed to offer any facts in support of this conclusory statement.” (Charging Party/Union’s Brief

³ <https://www.nlr.gov/national-labor-relations-act>

in Opposition to Despondent/Petitioner's Exceptions to the Decision of the Administrative Law Judge, p. 30).

These conclusory statements from the Union are contrary to the evidence presented at the Hearing. May, DEMCO's Vice President of Engineering and Operations, testified to the extent of responsibility and supervisory power the systems operator positions entail:

[T]he systems operators are responsible for all the outages that take place. They are responsible for ensuring that they're able to prioritize and make sure that the outages are handled appropriately...They are responsible for the work that the crews do in the field. They're responsible to make sure that the crews are doing what they're supposed to be doing as far as reporting that they're on scene, reporting what the problem is so that [DEMCO] can document it. They're responsible for using switch orders...ensuring that the crew in the field has the permission or the authority to re-energize the line. The operator has to be aware of everything that's going on...—for the protection of both the general public and the employees in the field. They need to know what's going on, have to know what's going on, so that they can make those switch orders without jeopardizing the safety of someone.

(Hearing Record, p.229). Where there is an error occurs in the switching process, DEMCO will hold a counseling or coaching session with the systems operator to ensure that the error will not occur again. (Hearing Record, p.273).

The Union would have this Board believe that control over switching orders is minimal responsibility because "switching is all done the same way." (Charging Party/Union's Brief in Opposition to Despondent/Petitioner's Exceptions to the Decision of the Administrative Law Judge, p. 26). However, the Record supports that systems operators are responsible for generating switch order procedures and executing by direction to the filed crews for completion of the task. (Hearing Record, p. 53). Although switching is all done the same way, system operators are responsible to discover the proper way to do so. (Hearing Record, p. 353). As Jeremy Blouin, a systems operator at DEMCO, testified, there is no exact, pre-dictated way to do his job. "[Systems Operators] have discretion...It just depends on the situation. Most of the time we use our own discretion." (Hearing Record, p. 352). Blouin further testifies that systems

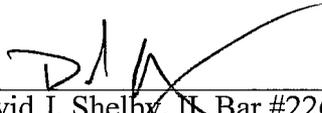
operators are responsible to make sure switching orders get completed, and systems operators “usually have the brunt of responsibility.” (Hearing Record, p. 355). Given the testimony of both DEMCO executives and current systems operators, the Union’s assertion that the systems operator positions are not supervisory in nature is contrary to the evidence presented.

VI. CONCLUSION

For these reasons and the reasons articulated in DEMCO’s Exceptions, the Board should reject the Administrative Law Judge’s Decision. The Union should be 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 Reply to further illustrate that the Union was unwilling to bargain and failed to request bargaining upon receipt of timely notice. Thus, the Board should find that the Union’s own actions and inactions constituted a waiver of its right to bargain.

Respectfully submitted,

TAYLOR, PORTER, BROOKS & PHILLIPS L.L.P.

By: 

David J. Shelby, II, Bar #22614
M. Lenore Feeney, Bar #18597
451 Florida Street, 8th Floor (70801)
P.O. Box 2471
Baton Rouge, LA 70821
Phone: (225) 387-3221
Fax: (225) 346-8049

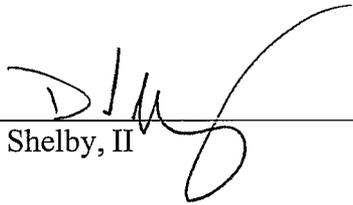
*Attorneys for Dixie Electric Membership
Corporation*

CERTIFICATE

On June 4, 2012, I served by electronic mail the foregoing Opposition to Charging Party's Motion to Strike Dixie Electric Membership Corporation's Exceptions and Supporting Brief and in the Alternative, Motion to Amend Exceptions and Supporting Brief upon:

Nora H. Leyland
Lucas R. Aubrey,
SHERMAN, DUNN, COHEN, LEIFER & YELLING, P.C.,
900 Seventh Street, N.W.
Suite 1000,
Washington, D.C. 20001.
Leyland@shermardunn.com
Aubrey@shermardunn.com

M. Kathleen McKinney, Regional Director,
Beauford D. Pines, Counsel for the Acting General Counsel,
NLRB region 15,
600 South Maestri Place, 7th Floor,
New Orleans, LA 70130-3414.
NLRBRegion15@NLRB.gov
Beauford.Pines@nlrb.gov



David J. Shelby, II