United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: February 27, 2008

TO : Rochelle Kentov, Regional Director
Region 12

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Sumter Electric Cooperative, Inc.
Case 12-CA-25384

177-9325
240-3367-8312-5600
393-6061-3300
524-1717-2400
530-6050-0800
530-6067-4055-4200
530-8045-3725
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This case was submitted for advice as to whether the Employer violated the Act when it unilaterally created new non-unit positions, reclassified bargaining unit employees as non-unit employees by transferring them into these newly-created non-unit positions, granted these employees increased wages, transferred bargaining unit work to these employees now outside the unit, eliminated the bargaining unit positions that formerly did this work, and laid off the unit employees who refused to accept transfers to the newly-created non-unit positions.

We agree with the Region that the Employer violated the Act by unilaterally changing the scope of the bargaining unit, failing to bargain with the Union regarding the employees in the newly-created non-unit positions, and retaliating against the former unit employees because of their union activities. [*FOIA Exemption* 5

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FACTS

Since 1979, Sumter Electric Cooperative Inc. (the Employer) and IBEW, Local Union 108 (the Union) have been parties to successive collective-bargaining agreements. The current agreement is effective until October 1, 2010. The agreement contains the following relevant provisions:

Article 2 – Recognition

2.2. The term "Employee" shall mean the bargaining unit described in the [certification proceeding], to wit:

All regular employees employed by the employer at its facilities located in or near Sumterville, Eustis, Groveland, Inverness and Ocala, Florida; but excluding all introductory and temporary employees, office clerical employees, professional employees, guards, supervisors as defined in the Act, and all employees who have authority to employ and discharge.

2.5. Nothing in this Agreement shall be construed as constituting acknowledgement by the Cooperative or a claim by the Union that any work or assignment of particular work may become the exclusive right of any employee or group of employees represented by the Union.

Article 3 – Management Prerogatives

3.1. . . . The rights of management which are not abridged by this Agreement, include but not (sic) limited to, the right . . . to determine the size and composition of its work force; . . . to . . . assign . . . work . . .; to discontinue, transfer, subcontract or assign some or all of its business operations, to modify or discontinue any job, classification, department, or operation; to make or change rules, policies, and practices; to introduce new, different or improved methods, means and processes of transportation, production, maintenance, service and operation, and to otherwise manage the business and direct the workforce.

Senior Engineering Technician and Service Planner Positions

The "senior engineering technician" position was created in 1996 as a bargaining unit position. Senior engineering technicians performed staking work, which involved placing stakes to show where equipment such as poles, anchors, and meters will be located.

In May 2006, the Employer created and posted a non-unit "service planner" position.[1] The Union was not notified of its creation, but it was posted internally and externally. When Union steward Carl Bowman learned of the creation of the position, he asked the Employer whether the service planners would be performing any senior engineering technicians' work. According to the Employer's Human Resources manager, Michael Forehand, he personally informed Bowman that the service planners would be performing the work that the non-unit "distribution designers" had performed, plus any additional work that needed to be done, meaning they would be doing all of the work throughout the system. Bowman does not recall Forehand making any such statements to him; he does, however, remember a conversation with Employer manager John Huber, where Huber explained to Bowman that the service planners would not be performing any bargaining unit work.

Around the same time as the creation of the service planner position, the Employer also assured the Union that senior engineering technicians would not be removed from the unit. During an unrelated third-step grievance meeting, Union representative John Murphy expressed concern that the Employer had previously reclassified the construction support representative position and the senior systems operator position out of the unit. Murphy asked the Employer's Director of Human Resources, Alex Markley, if the Employer was going to create a new non-unit classification to move senior engineering technicians out of the unit. Markley told Murphy that the Employer has no intention of doing that. He confirmed this response with a letter in which he addressed the Union's concern about the Employer "removing positions covered by the bargaining unit," stating "Let me reiterate that it is not our intent to 'cherry pick' positions, or to remove jobs covered by the labor agreement . . ."

In September 2006, the parties negotiated a new collective-bargaining agreement. There is no evidence that the parties ever discussed the creation of the service planner position, or its duties, at the bargaining table.

In November 2006, during several grievance meetings, the Employer threatened senior engineering technicians with job loss if they continued to file grievances. The filing of grievances had been increasing since 2004, with the majority of them filed by senior engineering technicians.

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[1] The first service planner was not actually hired until October 2006. No other service planners were hired until April 2007.

According to several witnesses, during one meeting Markley said that he was tired of all of the grievances, and then said that if he had to, he would fire or contract out all the senior engineering technicians.

In November 2006, Ben Brickhouse, the Employer's Director of Engineering and IT, conducted a meeting for all senior engineering technicians. According to all six employee witnesses, Brickhouse mentioned that the technicians and their related grievances are a cancer and that if they could not fix it, they would cut it out. The Employer's witnesses deny that Brickhouse made these statements. A senior engineering technician has also stated that Brickhouse told the employees that Markley clearly laid out that this problem would be cleared up in six months.

In April 2007, the Employer decided to make 11 service planner positions available, and to offer the positions to senior engineering technicians. The Employer created a revised service planner job posting which encompassed not only the duties of the former non-unit distribution designers, but also all of the duties of the senior engineering technicians.

On the same day, the Employer, represented by Brickhouse, Markley, and John McMurray, the T&D (transmission and distribution) line design manager, conducted a meeting for all senior engineering technicians. Brickhouse informed the employees that the service planner position was a "professional/administrative position requiring more discretion and independent judgment and is not part of the bargaining unit."[2] Senior engineering technicians were told that they would automatically be offered service planner positions if they applied. If they chose not to apply, the Employer would fill the service planner positions externally -- once the Employer was satisfied with the hiring process, it would reassess its continuing need for senior engineering technicians, as the Employer did not need extra employees.

The Union was not notified before the meeting of the Employer's decision to change the job duties of the service planners and offer those positions to the senior engineering technicians. While the meeting was in progress, Forehand called Union representative Murphy and explained the Employer was holding a meeting offering the

[2] The Employer also described the position as a professional/administrative position in various documents given to senior engineering technicians and the Union.

non-unit positions to unit senior engineering technicians. Forehand stated that, once the service planner positions were filled, any remaining senior engineering technicians would be laid off. Murphy expressed his displeasure that the Employer was not interested in working together with the Union.

In April 2007, Murphy faxed a letter to Forehand stating that the Employer's unilateral actions violated the Act and the collective-bargaining agreement and demanded that the Employer cease and desist from these actions and meet and bargain with the Union to remedy its actions. The Union filed a grievance over the Employer unilaterally changing the senior engineering technician unit positions into non-unit service planner positions, and it's stating that senior engineer technicians who did not bid on the service planner positions would be terminated. The grievance has been processed through the third step of the grievance-arbitration procedure. The parties have agreed to combine the grievance with three related grievances concerning the layoffs of senior engineering technicians. The parties have selected an arbitrator, but have not yet agreed upon a date for arbitration.

Six of the senior engineering technicians accepted jobs as service planners; three refused to take the positions, which then went to outside hires. The three remaining senior engineering technicians were laid off immediately following the hiring of the newly-hired service planners.

Differences between the Service Planner and Senior Engineering positions

The service planner job classification requires a bachelor's degree in Electrical Engineering and four years of experience in distribution design, an associate's degree in engineering and six years of experience in distribution design, or eight years of directly related experience in distribution design. Senior engineering technicians, on the other hand, were only required to have a high school diploma and four and a half years experience in distribution design. Service planners, like senior engineering technicians, were not required to have any professional license or membership in any professional association.

Service planners perform all of the job duties that were previously performed by the senior engineering technicians. With the exception of the one service planner who was hired before the reclassification of the position, service planners perform very little work that was not

previously performed by senior engineering technicians. Indeed, at least two service planners have said that their job duties did not change when they switched from their former unit positions to their new non-unit positions.

Employer's Asserted Past Practice of Unilaterally Changing the Scope of the Bargaining Unit

Distribution Designer

In 1996, the Employer created the non-unit "distribution designer" position. The Employer informed the Union of the creation of the position and the parties had a meeting regarding its creation. According to the Union, the Employer told the Union that the new non-unit position would perform design work for underground subdivisions and that no bargaining unit work or jobs would be lost as a result of its creation. As a result, the Union did not oppose the creation of the non-unit position.

Drafting Department/GIS Technologists/Substation Designer

Between 2004 and 2005, the Employer eliminated all bargaining unit "drafter" positions. The unit drafter positions were replaced with new two non-unit positions, "geospatial information system (GIS) technologists" and "substation designers." There is no evidence that the Employer informed the Union of the positions' creation. Once the Employer hired a second GIS technologist, the Union filed a grievance concerning whether the position should be included in the unit. No witness could recall the outcome of the grievance other than that it was not arbitrated and the position remained non-unit.

Vehicle Repair Specialist/Parts Specialist

In April 2004, the Employer created a non-unit "parts specialist" position that included job duties traditionally performed by bargaining unit "vehicle repair assistants." The Employer believes the position was posted, so any stewards or employees would have been aware of the posting, but there is no evidence the Employer contacted the Union to notify them of the position's creation. There is no other evidence that the Union knew of the position; in any case, the Union did not file a grievance or communicate with the Employer over its creation.

Construction Support Representative/Technical Services Specialist

In February 2006, the Employer created a non-unit "technical services specialist" position and invited the seven bargaining unit "construction support representatives" to apply for the new non-unit position. An Employer representative told the construction support representatives that they would be awarded the non-unit job if they bid on it, and that their current unit positions would be discontinued as a result of the creation of the new non-unit positions. The Union filed a grievance concerning the transfer of employees from a unit position to a non-unit position but its executive board voted not to arbitrate the grievance and the Union withdrew it "without prejudice or precedent."

Senior Systems Operator/System Control Coordinator

In April 2006, the Employer created a new non-unit "system control coordinator" position that was intended to replace the bargaining unit "senior systems operator" position. The Union filed a grievance, but withdrew it "without prejudice or precedent." The Union claims it withdrew the grievance because the affected employees did not respond to an inquiry of whether they wished to remain in the unit as senior system operators.

Shop Technician/Environmental Specialist

In October 2006, the Employer created a non-unit "environmental specialist" position. A bargaining unit "shop technician" was invited to apply for and was awarded the position. The Employer never notified the Union of the position's creation.

ACTION

We agree with the Region that the Employer violated the Act by unilaterally changing the scope of the bargaining unit, failing to bargain with the Union regarding the employees in the newly-created non-unit positions, and retaliating against the former unit employees because of their union activities. [*FOIA Exemption* 5

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The Employer Violated the Act by Unilaterally Changing the Scope of the Bargaining Unit

It is well established that, "once a specific job has been included within the scope of a bargaining unit by either Board action or consent of the parties, the employer cannot unilaterally remove or modify that position without first securing the consent of the union or the Board."[3] As we have previously stated:

> Where an employer moves an entire job classification out of the unit, or transfers employees out of the unit to do the same work they had been doing as unit employees, without the union's consent, it has unlawfully altered the scope of the unit.[4]

In the instant case, the Employer eliminated the senior engineering technician position and transferred the senior engineering technicians' job duties to the non-unit service planners without securing the consent of the Union or seeking the approval of the Board.

We note that the Board will find that there has been an unlawful change in unit scope regardless of whether new job duties justify removal from the unit. For example, in Mt. Sinai Hospital,[5] the Board found the employer violated the Section 8(a)(5) of the Act because its unilateral action constituted a change in unit scope even assuming the new position's removal from the unit was proper because of new supervisory job duties. In Mt. Sinai, the employer created a non-unit supervisory position with identical job duties of a unit position plus a few additional supervisory duties. The Board emphasized that even if the position was properly placed outside the unit, there was a change in unit scope because the unit employees who were transferred to the non-unit positions still continued to perform the same work.[6] Thus, the Board will find a change in unit scope when the same unit employees continue to perform

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[3] Wackenhut Corp., 345 NLRB 850, 852 (2005).

[4] Beverly Enterprises, Inc., Case 12-CA-19915, Advice Memorandum dated September 21, 1999.

[5] 331 NLRB 895 (2000), enfd. 8 Fed.Appx. 111 (2nd Cir. 2001).

[6] Id., at 895.

their unit work after being transferred to new non-unit positions.[7]

In the instant case, the non-unit service planners still continue to perform the same work that the senior engineering technicians did. While some service planners may have additional duties, at least two service planners have said that their job duties did not change when they were placed outside of the unit. Therefore, we agree with the Region that the Employer's unilateral actions amount to an alteration in the scope of the unit and are unlawful unless the Union consented to the change.

We further agree with the Region that the Union did not consent to the Employer's unilateral removal of the senior engineering technician classification from the unit. Initially, it is clear that the Union did not expressly consent. No evidence has been presented of such express consent, and the Union immediately and unequivocally objected to the Employer's unilateral actions by filing a grievance and an unfair labor practice charge over the change.

The Employer contends that the Union may nonetheless be found to have consented for two reasons. First, the Employer claims that the Union consented because it never requested that the Employer bargain over the effects of the Employer's unilateral actions to change the scope of the unit. Second, the Employer maintains that the collective-bargaining agreement establishes that Union consented.

As to the first claim, the Employer is correct that, when the Employer announced in April 2007 that it had designated the service planner position as non-unit, the Union did not explicitly request to bargain with the Employer with respect to the position. However, we agree with the Region that the Employer presented its unilateral decision as a fait accompli. An employer has a responsibility to give a union sufficient notice in advance of any proposed change to allow a reasonable opportunity to bargain.[8] If the notice is not sufficiently in advance of the proposed change, or the evidence establishes that the employer has already made its decision and has no intention

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[7] Beverly Enterprises, 341 NLRB 296, 296 (2005).

[8] Intersystems Design Corp., 278 NLRB 759 (1986) (quoting Ciba-Geigy Pharmaceuticals Division, 264 NLRB 1013, 1017 (1982) enfd. 722 F.2d 1120 (3rd Cir. 1983)).

of changing its mind, then the notice is nothing more than a presentation of a fait accompli.[9]

In the instant case, it is clear that the Employer had already made its mind up and had no intention of discussing the service planner position with the Union. Indeed, the Employer admits it was privileged by the collective-bargaining agreement to make such unilateral actions without the consent of the Union. As such, the Union was presented with a fait accompli and was not required to request to bargain over the service planner position.

As to the Employer's second claim, that it was privileged under the parties' collective-bargaining agreement to unilaterally alter the scope of the unit without the Union's consent, the Board recently reaffirmed its long held position that a purported contractual waiver of a union's right to bargain is effective if and only if the relinquishment was "clear and unmistakable."[10] In Metropolitan Edison Co. v. NLRB,[11] the Supreme Court, agreeing with the Board, stated that it would "not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable." In particular, the Board has held that generally worded management rights or zipper clauses will not, in themselves, be construed as waivers of statutory bargaining rights.[12]

The Board's application of its standard in Provena St. Joseph makes it clear that, when a contract does not specifically mention the action at issue, the Board will interpret the parties' agreement to determine whether there has been a clear and unmistakable waiver.[13] Thus, in

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[9] Ibid.

[10] Provena St. Joseph, 350 NLRB No. 64, slip op. at 8 (2007). See also, e.g., Johnson-Bateman Co., 295 NLRB 180, 184 (1989) ("[i]t is well settled that the waiver of a statutory right will not be inferred from general contractual provisions; rather, such waivers must be clear and unmistakable").

[11] 460 U.S. 693, 708 (1983).

[12] See, e.g., Hi-Tech Cable Corp., 309 NLRB 3, 4 (1992), enfd. 25 F.3d 1044 (5th Cir. 1994); Johnson-Bateman, 295 NLRB at 184-188.

[13] 350 NLRB No. 64, slip op. at 8-9 (Board based its waiver conclusions on such factors as express contractual

interpreting the parties' agreement, the relevant factors to consider include: (1) the wording of the proffered sections of the agreement at issue; (2) the parties' past practices; (3) the relevant bargaining history; and (4) any other provisions of the collective-bargaining agreement that may shed light on the parties' intent concerning bargaining over the change at issue.[14]

Applying those factors to interpret the parties' agreement here, we conclude that the Union did not clearly and unmistakably waive its right to consent to the unilateral changes in the unit scope by the Employer. As to the first factor, the management-rights clause in the collective-bargaining agreement does not allow the Employer to unilaterally alter the scope of the bargaining unit. In Bay Shipbuilding Corp.,[15] the employer, like the Employer in the instant case, unilaterally reclassified a unit position into a non-unit position. The employer claimed it was privileged under the parties' collective-bargaining agreement, specifically the management-rights clause. The Board examined the clause, which is similar to the one in the instant case, and found that the union did not waive its right to consent to any unilateral changes made in the scope of the unit by the Employer. The ALJ found that the employer "has the right to establish new departments" and "has the right to transfer employees to existing positions outside the bargaining unit," but concluded that the management-rights clause did not permit the employer "to designate the new department as 'Company--i.e. non-unit.'"[16] The employer was attempting "to justify removing a group of employees and their work from the collective-bargaining relationship" which it was not permitted to do under the collective-bargaining relationship.[17] Similarly, in the instant case, the Employer here may have had the right to

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language, the parties' bargaining history, and the reading of several contractual provisions "taken together").

[14] The first three of these factors have generally been considered by the Board in making "clear and unmistakable" waiver determinations. See generally Johnson-Bateman, 295 NLRB at 184-187; American Diamond Tool, 306 NLRB 570, 570 (1992). It is also appropriate to consider any other relevant contract provisions that shed light on the contractual intent of the parties in this regard.

[15] 263 NLRB 1133 (1972) enfd. 721 F.2d 187 (7th Cir. 1983).

[16] Id., at 1140.

[17] Ibid.

modify or eliminate any job classification and to transfer or assign employees to work but, as in Bay Shipbuilding, the management-rights clause did not authorize the Employer to unilaterally redesignate a unit position as non-unit.

As to the second factor, the evidence regarding past practice does not support the Employer's position. The Employer points to six instances in the past where it claims to have unilaterally changed the scope of the unit without the Union objecting. The Employer claims that the Union was aware of this practice, and that the Union in the most recent collective-bargaining negotiations did not propose any language to restrict the Employer's right to act unilaterally in this regard.

In one of the instances, the Union did not object to the creation of the distribution designer position because the Employer stated that no unit work would be lost as a result. As such, this example does not support the Employer's position. In two others, the Union apparently was never notified of the creation of the positions or even their existence. As such, the Union could not have acquiesced to the changes.

In the three remaining instances, the Union filed grievances regarding the Employer's unilateral actions.[18] While none of the grievances were arbitrated, and two of them were withdrawn by the Union, albeit "without prejudice or precedent," the fact that the Union filed grievances illustrates that the Union protested and did not consent to the Employer's unilateral actions resulting in a change in unit scope.

We recognize that it can be argued that, by withdrawing the grievances, the Union consented to the Employer's unilateral actions. Even if the Union did consent to, or did not unequivocally protest, every unilateral change by the Employer that the Union was aware of, however, this would not alter the result in the instant case. The Board has consistently held that a union's failure to demand bargaining in the past, without more, does not amount to waiver if it does not unmistakably show that the union intended to permanently give up its right to bargain about the matter in the future.[19] As the Board in

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[18] [*FOIA Exemption* 5

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[19] National Steel Corp. v. NLRB, 324 F.3d 928, 933-934 (7th Cir. 2003), enf'g. 335 NLRB 747 (2001).

Provena St. Joseph stated, "[i]t is well established that union acquiescence in past changes to a bargainable subject does not betoken a surrender of the right to bargain the next time the employer might wish to make yet further changes . . ."[20] Therefore, in the instant case, the Union's alleged acquiescence with regard to prior unilateral changes in the scope of the unit would not have privileged the Employer to unilaterally change the scope of the unit here.

As to the third factor, the Employer has produced no evidence of the parties' bargaining history to show that the Union clearly waived its interest in the allowing the Employer to unilaterally change the scope of the unit, let alone show that the parties discussed the matter at all. The Employer asserts that the Union had an opportunity to bargain about the creation of the service planner position during the September 2006 negotiations, but failed to do so. However, even assuming, arguendo, that this would demonstrate the Union's consent to the creation of the service planner position in 2006, it is undisputed that the Employer restructured the position in May 2007. There is no evidence that the parties ever discussed this restructuring or the Employer's ability to unilaterally reclassify unit employees and work as non-unit. Thus, the bargaining history also fails to indicate any Union waiver.

Finally, as to the fourth factor, there are a few additional provisions in the contract that shed light on whether the parties intended to allow the Employer to unilaterally change the scope of the unit without consent by the Union. Article 2.5 of the Agreement allows the Employer to move bargaining unit work from one bargaining unit classification to another. It does not, however, appear to allow the Employer to remove a group of employees from the bargaining unit and place them outside the bargaining unit. Moreover, the recognition clause states that all employees are part of the bargaining unit unless they fit into one of the excluded categories, such as professional employees. This certainly does not answer the question of whether the Employer may unilaterally create new position classifications, although it is relevant to that issue of whether or not the service planners are properly within the unit. Thus, the recognition clause establishes that the Employer does not have the authority

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[20] Provena St. Joseph, 350 NLRB No. 64, slip op. at 8 fn. 35, citing Amoco Chemical Co., 328 NLRB 1220, 1222 fn. 6 (1999), enf. denied, 217 F.3d 869 (D.C. Cir. 2000).

to unilaterally remove a bargaining unit position and replace it with a non-unit position.

Therefore, as there is nothing in the contractual language, past practice, or bargaining history showing a clear and unmistakable waiver by the Union, "the record fails to demonstrate there was a 'clear and unmistakable' waiver of the obligation to bargain about the removal of [an] entire [classification] from the unit."[21] As such, we agree with the Region that the Employer violated 8(a)(5) by unilaterally changing the scope of the bargaining unit.

The Service Planner Position is in the Unit

While we have concluded that the Employer violated the Act by changing the scope of the unit, the service planners' unit placement still must be determined in order to ascertain whether the Employer was required, and failed, to bargain with the Union regarding service planners. According to the recognition clause, all employees are in the unit except for "all introductory and temporary employees, office clerical employees, professional employees, guards, supervisors as defined in the Act, and all employees who have authority to employ and discharge." Therefore, the service planner position must be in the unit unless it falls into one of the above categories. As described above, the position was posted as a professional position. As such, we must decide whether the service planner position is a professional position as defined by Section 2(12) of the Act.

Section 2(12)(a) defines a professional employee as those:

> engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes. . . .

[21] Lincoln Child Center, 307 NLRB 288, 316 (1992).

Section 2(12) was meant to apply to small and narrow classes of employees and therefore, employees must satisfy each of the four requirements set forth in Section 2(12) before they qualify as professional employees within this definition.[22]

Section 2(12)(a) defines a professional employee in terms of the work the employee performs, and it is the work rather than the individual qualifications which is controlling under that section.[23] However, if only a few employees in the alleged professional group possess an appropriate advanced degree, it logically follows that the work does not require the use of advanced knowledge.[24] In the instant case, only one of the service planners has a bachelor's degree (in Business Management), only two have associate's degrees, and none of the service planners are required to maintain any professional licenses or membership in any professional association. Thus, it is clear that the position does not require "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning."

More significantly, the work performed by service planners does not appear to be professional in nature. For example, the work's output can be standardized in relation to a given period of time because the Employer measures the amount of work performed by service planners in construction man hours. As noted above, the service planners primarily do the same work formerly done by the senior engineering technicians in the bargaining unit. Indeed, at least two former senior engineering technicians have said that their job duties did not change when they became service planners. Therefore, because service planners do not perform work that is professional in nature, service planners are not professionals within Section 2(12) of the Act and they must be treated as unit employees.

The Employer's Actions were Motivated by Union Animus

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[22] See The Express-News Corp., 223 NLRB 627, 630 (1976); Arizona Public Service Co., 310 NLRB 477, 482 (1993).

[23] Aeronca, Inc., 221 NLRB 326 (1975).

[24] Western Electric Co., 126 NLRB 1346, 1349 (1960).

We further agree with the Region that the Employer unilaterally changed the scope of the unit, thereby eliminating a bargaining unit position, because of the senior engineering technicians' membership in and activities on behalf of the Union. As noted above, the senior engineering technicians filed a relatively large number of grievances. In response to those grievances, several Employer personnel made comments and threats to the technicians. The Region found, and we agree, that the threats by Brickhouse and Markley violated Section 8(a)(1) of the Act, and they demonstrate that the Employer harbored animus towards the senior engineering technicians because they engaged in union activities by filing grievances.[25] Indeed, five months after making such threats, the Employer carried them out by eliminating the senior engineering technician position and transferring the employees and their work to the non-unit service planner position, making it impossible for any former senior engineering technician to file a grievance. As such, the evidence establishes a prima facie Section 8(a)(1) and (3) case under Wright Line.[26]

We also agree with the Region that the Employer failed to meet its Wright Line burden. The Region has already concluded that the evidence demonstrates that the Employer's actions were not business related, but rather in retaliation for the senior engineering technicians' grievance filing activities. Therefore, we agree with the Region that the layoffs of the three senior engineering technicians, which resulted from the Employer's discriminatory actions, also violated Section 8(a)(1) and (3) of the Act.[27]

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[25] We agree with the Region that issuance of complaint regarding the threats is not time-barred under Section 10(b) because both the threats and the other actions by the Employer alleged to be unlawful in the charge were "part of an overall plan to undermine union activity." Carney Hospital, 350 NLRB No. 56, slip op. at 4 (2007).

[26] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[27] We note that we would further base our Section 8(a)(5) conclusion above upon our finding that the Employer violated Section 8(a)(3) of the Act by its discriminatorily-motivated decision to eliminate the senior engineering technician position. Where an employer's entrepreneurial decision is motivated by antiunion reasons, the employer is not exempt from its bargaining obligation under First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). See, e.g. Central Transport, Inc., 306 NLRB

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166, 166-167 (1992); Strawsine Mfg. Co., 280 NLRB 553 (1986), citing First National Maintenance, 452 U.S. at 687-688.

[28] [*FOIA Exemption* 5 .]

[29] [*FOIA Exemption* 5 .]

[30] [*FOIA Exemption* 5 .]

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In sum, we agree with the Region that: (1) the Employer violated the Act by unilaterally changing the scope of the bargaining unit; (2) the Union did not consent to the Employer's unilateral action; (3) the Employer

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[32] [*FOIA Exemption* 5
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[33] [*FOIA Exemption* 5 .]

[34] [*FOIA Exemption* 5 .]

[35] [*FOIA Exemption* 5
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violated the Act because it had a duty to bargain with the Union as the representative of the service planners and has failed and refused to do so; (4) the Employer's actions were motivated by Union animus; and (5) [*FOIA Exemption* 5

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Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated the Act by unilaterally changing the scope of the bargaining unit, failing to bargain with the Union regarding the employees in the newly-created non-unit positions, and retaliating against the former unit employees because of their union activities.

B.J.K.