Entergy Mississippi, Inc. *and* International Brotherhood of Electrical Workers, Local 605, AFL–CIO–CLC *and* International Brotherhood of Electrical Workers, Local 985, AFL–CIO–CLC. Cases 15–CA–017213, 15–CA–018131, and 15–CA–018136

August 14, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES AND GRIFFIN

This is a refusal-to-bargain case in which the Respondent is contesting the Board's unit determination in the underlying representation proceeding. The Board in that proceeding denied the Respondent's unit clarification petition, finding that the Respondent's transmission and distribution electric utility dispatchers (dispatchers) were not statutory supervisors. The Board clarified the unit specifically to provide that these positions be included.[1]

Pursuant to a charge and an amended charge on November 21, 2003 and February 27, 2004, respectively, a charge filed on October 20, 2006, and a charge filed on November 3, 2006, by International Brotherhood of Electrical Workers, Local 605, AFL–CIO–CLC and International Brotherhood of Electrical Workers, Local 985, AFL–CIO–CLC (the Unions), the Acting General Counsel issued the Order consolidating cases and consolidated complaint in this proceeding on March 30, 2012. The consolidated complaint alleges that the Respondent has violated Section 8(a)(5) and (1) of the Act by (a) insisting, as a condition of reaching any collective-bargaining agreement, that the Unions agree to remove all references to the dispatchers from such an agreement and to describe the dispatchers' terms and conditions of employment in an agreement other than a collective-bargaining agreement, thereby bargaining to impasse over a permissive subject of bargaining; and (b) failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the dispatchers. The alleged violations occurred following the Respondent's filing of a unit clarification petition on August 11, 2003, in Case 15–UC–149.[2] The Respondent filed an answer admitting in part and denying in part the allegations in the consolidated complaint, and asserting affirmative defenses.

On May 2, 2012, the Acting General Counsel filed a Motion for Summary Judgment and a Memorandum in Support of Motion for Summary Judgment. On May 3, 2012, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response and the Acting General Counsel filed a brief in reply to the Respondent's response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent argues that summary judgment is not appropriate because the Board lacked a quorum when it issued the decision in the underlying representation proceeding on December 30, 2011. Specifically, the Respondent claims that Member Becker's March 2010 recess appointment expired on December 17, 2011, when the Senate commenced pro forma sessions, leaving the Board with only two members. We reject this defense. The Constitution provides that a recess appointment expires at the end of the Senate's "next session." U.S. Const. Art II, Section 2, clause 3. Therefore, Member Becker's term, which began during the second session of the 111th Congress, expired at the end of the first session of the 112th Congress. By virtue of the 20th amendment, a session of Congress begins at noon on January 3 unless Congress passes a law specifying a different date. U.S. Constitution, 20th amendment, section 2. The prior session ends at the same time unless Congress passes a concurrent resolution of adjournment specifying a different adjournment date. Because Congress passed no such resolution Member Becker's term ended by operation of law at noon on January 3, 2012. The fact that the Senate was engaged in pro forma sessions in the last few weeks of the first session is irrelevant to the question of when the first session of the 112th Congress ended and the second session began. Accordingly, Member Becker lawfully participated in the resolution of the underlying proceeding which was decided by a valid Board quorum.[3]

The Respondent admits its refusal to bargain, but argues that this refusal is not unlawful on the ground that the Board erred in clarifying the unit to include the dispatchers, whom the Respondent contends are supervisors within the meaning of Section 2(11) of the Act. The Respondent further contends that its refusal to bargain pending the Board's decision on review was in response

[1] 357 NLRB No. 178 (2011).

[2] Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).

[3] *New Process Steel, LP v. NLRB*, 130 S.Ct. 2635 (2010). Member Hayes finds no jurisdictional basis for the Board to decide this issue and thus declines to address the merits of the Respondent's argument.

to the court's decision in *Entergy Gulf States v. NLRB*, 253 F.3d 203 (5th Cir. 2001), and cannot be deemed unlawful.[4] Thus, the Respondent claims it was "duty-bound to follow" the court's finding that the dispatchers were supervisors as the law of the circuit in which this case arises.

We disagree. Contrary to the Respondent, it was not entitled to make unilateral changes based on the Fifth Circuit's opinion in a different case. "[D]eciding who is a supervisor is a highly fact-intensive inquiry. So 'rules designating certain classes of jobs as always or never supervisory are generally inappropriate.'" *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 305 fn. 2 (6th Cir. 2012), quoting *Jochims v. NLRB*, 480 F.3d 1161, 1168 (D.C. Cir. 2007). In the underlying proceeding here the Board noted the court's holding in *Entergy Gulf States*, but explained that subsequent to that decision the Board issued *Oakwood Healthcare,* 348 NLRB 686 (2006), in which it clarified the meaning of the terms "assign," "responsibly to direct," and "independent judgment" under Section 2(11) of the Act. The Board then applied the *Oakwood* standard to the facts before it and concluded that the dispatchers in the instant case are not statutory supervisors. 357 NLRB No. 178, slip op. at 4–5. See, e.g., *Frenchtown Acquisition*, supra (rejecting argument that prior cases required finding nurses to be supervisors, and deferring to Board's definition adopted in *Oakwood Healthcare*).

Moreover, the Board has long held that while a unit clarification petition is pending, a respondent acts at its peril in removing positions from the unit and refusing to bargain with the employees' representative. See, e.g., *Bay State Gas Co.*, 253 NLRB 538, 539 (1980) (while unit clarification issue was pending, respondent acted at its peril in not consulting with union concerning job change and elimination of position); *Pilot Freight Carriers*, 221 NLRB 1026, 1028 (1975), revd. on other grounds 558 F.2d 205 (4th Cir 1977), cert. denied 434 U.S. 1011 (1978) (respondent acted at its peril in terminating pension contributions for the LPNs during the pendency of the unit clarification petition). Therefore, the Respondent's erroneous reliance on *Entergy Gulf States* does not insulate it from the allegations here.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.[5] On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a corporation with an office and place of business in Jackson, Mississippi (the Respondent's facility), and has been engaged in the purchase, production, transmission, and retail sale of electricity.

In conducting its operations, annually, the Respondent derives gross revenues in excess of $250,000, and purchases and receives at its Jackson, Mississippi facility goods valued in excess of $5000 directly from points outside the State of Mississippi.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

In addition, we find that International Brotherhood of Electrical Workers, Local 605, AFL–CIO–CLC and International Brotherhood of Electrical Workers, Local 985, AFL–CIO–CLC (the Unions), are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The unit

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

[4] The Respondent further argues that pursuant to the doctrine of laches and other equitable principles, the Respondent should not be penalized with additional damages because of the Board's delay in ruling on the Respondent's unit clarification petition. This defense has no merit. The Supreme Court and the Board have long held that the defense of laches does not lie against the Board as an agency of the United States government. *NLRB v. J. H. RutterRex Mfg. Co.*, 396 U.S. 258 (1969) (considerable delay by Board in issuing backpay specification does not warrant a reduction in the backpay award even if the delay contravenes the APA); *NLRB v. Quinn Restaurant Corp.*, 14 F. 3d 811, 817 (2d Cir. 1994) ("Requiring the employer to make employees whole for lost wages and to rescind unlawful work rules requires discrete acts that are not an inappropriate imposition on the employer, even given the passage of so much time."). Further, the delay in this case, while regrettable, was largely due to the evolving state of the law respecting the standard for evaluating supervisory status under Sec. 2(11) of the Act. See *Kendall College of Art and Design*, 288 NLRB 1205, 1212 (1988) (Board adopted judge's finding that "unexpected delay" in resolving managerial issue through unit clarification petition did not excuse employer's obligation to bargain).

[5] Member Hayes dissented from the Board's Decision on Review. He would have granted the Respondent's petition and clarified the unit to exclude the dispatchers. While Member Hayes remains of that view, he agrees that the Respondent has not presented any new matters that are properly litigable in this unfair labor practice case.

Included: Permanent electrical employees engaged in operation, meter reading, maintenance, construction, and storeroom activities employed on a monthly and hourly basis, in the following classifications: Lineman First class, Senior Lineman, Lineman Trainee, Crane Operator, Senior Cable Splicer, Cable Splicer, Cable Splicer Trainee, Head Tree Trimmer, Tree Trimmer, T & E Mechanic, T & E Trainee, Senior SC&M Mechanic, SC&M Mechanic, SM&M Trainee, Relayman, Relay Trainee, System Relayman, System Dispatcher, Substation Operator A, Assistant System Dispatcher, System Communication Man, Communication Man, Communication Trainee, System Meterman, Electric Meterman, Apprentice Electric Meterman, Polyphase Meter Installer – Jackson, Apprentice Polyphase Meter Installer – Jackson, Utilityman, Serviceman, Troubleman, Apprentice Serviceman – Outside Jackson, Customer Service Dispatcher, Service Dispatcher – Greenville, Distribution Dispatcher – Jackson, Assistant Distribution Dispatcher, Distribution Operator, Carpenter – Painter, Helper, Laborer, Bus Operator – Jackson, Special Meter Reader – Jackson, Meter Reader, Storekeeper; Excluded: superintendents, managers, clerical workers, all other classifications not listed above, guards and supervisors as defined by the Act.

In 1939, the Board certified the Unions as the exclusive collective-bargaining representative of the unit. This recognition has been embodied in successive collective-bargaining agreements.

B. The Unit Clarification Proceeding

On August 11, 2003, the Respondent filed the petition in Case 15–UC–149, seeking to exclude the dispatcher job classification from the existing unit on the basis that the dispatchers are supervisors under the Act. On January 29, 2004, the Acting Regional Director denied the Respondent's unit clarification petition. On April 20, 2004, the Board granted the Respondent's request for review of the Regional Director's decision. On September 30, 2006, the Board remanded the case to the Regional Director for consideration in light of its issuance of *Oakwood Healthcare, Inc*., 348 NLRB 686 (2006), and its related issues. Thereafter, on February 7, 2007, the Acting Regional Director issued a Supplemental Decision and Order finding that the dispatchers were not statutory supervisors. On December 30, 2011, the Board issued its Decision on Review, applying *Oakwood Healthcare* and clarifying the unit specifically to provide that the dispatcher positions be included.[6]

C. Refusal to Bargain

About November 6, 2003, the Respondent insisted that, as a condition of reaching any collective-bargaining agreement, the Unions agree to remove all references to the dispatchers from the collective-bargaining agreement and to describe the dispatchers' terms and conditions of employment in an agreement other than the collective-bargaining agreement. About November 6, 2003, in support of these conditions, the Respondent bargained to impasse. The complaint alleges, and the Respondent admits, that these conditions are not mandatory subjects for the purposes of collective bargaining.

About September 18, 2006, the Unions requested and the Respondent refused to bargain collectively about the dispatchers' terms and conditions of employment. On November 1, 2006, the Respondent removed the following dispatcher positions from the unit:

System Dispatcher	Substation Operator A
Assistant System Dispatcher	Customer Service Dispatcher
Service Dispatcher – Greenville	Distribution Dispatcher – Jackson
Assistant Distribution Dispatcher	Distribution Operator

The Respondent removed these positions from the unit without the consent of the Unions and without the dispatchers having indicated that they no longer wish to be represented by the Unions. At all material times the Unions have represented to the Respondent that they continue to represent the dispatchers as part of the unit. Since about November 1, 2006, the Respondent has failed and refused to recognize the Unions as the exclusive collective-bargaining representative of the dispatchers.

CONCLUSION OF LAW

By insisting about November 6, 2003, that, as a condition of reaching any collective-bargaining agreement, the Unions agree to remove all references to the dispatchers from the collective-bargaining agreement and to describe the dispatchers' terms and conditions of employment in an agreement other than the collective-bargaining agreement; and by failing and refusing since November 1, 2006, to recognize and bargain with the Unions as the exclusive collective-bargaining representatives of the dispatchers, the Respondent has engaged in unfair labor

[6] 357 NLRB No. 178, slip op. at 9.

practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to recognize and bargain on request with the Unions and, if an understanding is reached, to embody the understanding in a signed agreement. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) by unilaterally removing the dispatchers from the collective-bargaining unit, we shall order the Respondent to (1) return the dispatchers to the unit and, upon request, to recognize and bargain with the Unions as the exclusive representative of the unit with respect to rates of pay, wages, hours and other terms and conditions of employment; and (2) rescind any changes to the terms and conditions of employment of the dispatchers implemented since November 1, 2006, until such time as the parties have bargained in good faith to an agreement or impasse on the terms and conditions of employment of the dispatchers. We shall also order the Respondent to make whole the dispatchers for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful actions, in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

In addition, we shall order the Respondent to make all contractually-required contributions to the benefit funds that it failed to make, if any, including any additional amounts due the funds on behalf of the unit employees in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979). Further, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make any required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra, and *Kentucky River Medical Center*, supra.[7]

[7] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

ORDER

The National Labor Relations Board orders that the Respondent, Entergy Mississippi, Inc., Jackson, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Insisting to impasse upon a matter that does not constitute a mandatory subject of bargaining under Section 8(d) of the National Labor Relations Act.

(b) Excluding dispatchers from the bargaining unit represented by International Brotherhood of Electrical Workers, Local 605, AFL–CIO–CLC and International Brotherhood of Electrical Workers, Local 985, AFL–CIO–CLC without the consent of the Unions.

(c) Failing and refusing to recognize and bargain with the Unions as the exclusive collective-bargaining representative of the dispatchers.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Return the dispatchers to the unit and, on request, bargain with the Unions as their exclusive collective-bargaining representatives on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Upon request from the Unions, rescind the unilateral changes to the terms and conditions of employment of the dispatchers implemented since November 1, 2006, until such time as the parties have bargained in good faith to an agreement or impasse on the terms and conditions of employment of the dispatchers.

(c) Make the dispatchers whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful actions, with interest, as set forth in the remedy section of this decision.

(d) Make all contractually-required benefit fund contributions, if any, that have not been made to the fringe benefit funds on behalf of the dispatchers and reimburse the dispatchers for any expenses ensuing from its failure to make the required payments, with interest, as set forth in the remedy section of this decision.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order. (f) Within 14 days after service by the Region, post at its Jackson, Mississippi facility

copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.[9] Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 6, 2003.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 15 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 14, 2012

Mark Gaston Pearce, Chairman

Brian E. Hayes, Member

Richard F. Griffin, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[9] For the reasons stated in his dissenting opinion in *J. Picini Flooring,* 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT insist to impasse upon a matter that does not constitute a mandatory subject of bargaining as defined by the National Labor Relations Act.

WE WILL NOT exclude dispatchers from the bargaining unit represented by International Brotherhood of Electrical Workers, Local 605, AFL–CIO and International Brotherhood of Electrical Workers, Local 985, AFL–CIO–CLC.

WE WILL NOT fail and refuse to recognize and bargain with the Unions as the exclusive collective-bargaining representative of the dispatchers with respect to rates of pay, wages, hours and other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL return the dispatchers to the unit and WE WILL, on request, bargain with the Unions as their exclusive collective-bargaining representative.

WE WILL, on request from the Unions, rescind any changes to the terms and conditions of employment of the dispatchers implemented since November 1, 2006.

WE WILL make the dispatchers whole for any losses suffered as a result of our unlawful actions.

WE WILL make all contractually required benefit fund contributions, if any, that have not been made to the fringe benefit funds on behalf of the dispatchers and WE WILL reimburse the dispatchers for any expenses ensuing from our failure to make the required payments, with interest.

ENTERGY MISSISSIPPI, INC.