

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION**

In the Matter of

CENTRAL MAINE POWER COMPANY

Employer

and

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 1837,
AFL-CIO, CLC

Petitioner¹

Case 01-RC-099430

DECISION AND DIRECTION OF ELECTION

The Employer is a public utility engaged in the distribution of electricity to customers in the State of Maine. Petitioner (the Union) currently represents a bargaining unit of 400 to 500 employees employed by the Employer in various classifications. In this matter, the Union seeks to represent six fiber microwave technicians. The parties have stipulated, and I find, that such a unit is appropriate. The only issue litigated at the hearing was the inclusion of the fiber microwave technicians in the existing unit. The Petitioner seeks a self-determination election, sometimes referred to as an "*Armour-Globe*"² election, in which the fiber microwave technicians would be permitted to vote whether or not they wish to be included the existing unit. The Employer contends that the fiber microwave technicians do not share a sufficient community of interest with the

¹ The name of the Petitioner appears as amended at the hearing.

² See, *Globe Machine & Stamping*, 3 NLRB 294 (1937); *Armour & Co.*, 40 NLRB 1333 (1942); *Warner-Lambert Co.*, 298 NLRB 993 (1990).

unit employees to warrant their inclusion in the existing unit and that only a separate unit of fiber microwave technicians is appropriate.³

For the reasons set forth below, I find that the fiber microwave technicians share a sufficient community of interest with the unit employees to be included in the existing bargaining unit, and I shall direct a self-determination election.

FACTS

Duties of employees in the existing bargaining unit

The Employer distributes electricity to commercial, industrial, and residential customers in a certain geographic area in the State of Maine. The Employer operates 15 service centers with satellites. The Union has represented a bargaining unit composed of 400 to 500 employees for many years, and there

³ At the hearing, the Employer reserved its rights under *Noel Canning* to assert that the Board cannot lawfully process the instant petition. To the extent that the Employer contends that based on *Noel Canning v. NLRB*, ---F.3d---, 2013 WL 276024 (D.C. Cir. January 25, 2013), the President's January 4, 2012 recess appointments to the Board were invalid, I reject that argument and hold that the petition may be processed, for the reasons discussed below.

It is not appropriate for the Board, or the Board's appointed agents, to suspend its activities in response to a claim that Presidential appointments to the Board are not valid. The Board has publicly stated that it disagrees with the D.C. Circuit's *Noel Canning* decision, and, on March 12, 2013, the Board announced that, in consultation with the Department of Justice, it intends to file a petition for certiorari with the United States Supreme Court seeking review of the D. C. Circuit's decision. Furthermore, in *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. 1, fn.1 (Mar. 13, 2013), the Board took note that in *Noel Canning*, the D.C. Circuit Court itself recognized that its conclusions concerning the Presidential appointments had been rejected by other circuit courts. Compare *Noel Canning v. NLRB*, Nos. 12-1115, 12-1153, 2013 WL 276024, at *14-15, 19 (D.C. Cir. Jan. 25, 2013) with *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). Thus in *Belgrove*, the Board concluded that because the "question [of the validity of the recess appointments] remains in litigation," until such time as it is ultimately resolved, "the Board is charged to fulfill its responsibilities under the Act."

Finally, there is a strong public interest in addressing representation disputes as soon as possible that are of concern to employees and employers alike. Most representation disputes have long been resolved administratively without the necessity of court litigation. And even where, as here, there is a challenge to the authority of the Board to act, the Board's experience in continuing to process cases during the analogous dispute leading to *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), was that most of the cases decided during that time helped finally resolve labor disputes because the parties either accepted the Board's decision or settled the dispute.

is a current collective-bargaining agreement covering those employees. The bargaining unit employees work in various departments and classifications, as follows:

The Line Department employs about 150 lineworkers and trouble shooters in various classifications, who are responsible for the construction and maintenance of a system of overhead and underground lines that transmit electricity within a certain voltage range. This department also employs utility workers and a helicopter patroller who patrols the transmission lines from the air looking for problems.

The Cable and Underground Department employs four cable splicers who are responsible for maintaining an underground network of distribution and transmission cables.

The Substation Operations Department employs electrical workers, power technicians, and substation technicians who are responsible for installing and maintaining equipment in substations, which are buildings or enclosed yards containing transformers that reduce high-voltage incoming electricity to a lower voltage level that is appropriate for outgoing distribution lines.

The System Operations Department employs area operators and system operators who "switch out" transmission and distribution lines and place tags in areas where linemen and substation employees are working, to ensure, for the safety of the workers, that the lines they are working on remain de-energized.

The Revenue/Service Department employs service workers who disconnect and reconnect residential customers and read meters used for billing purposes.

The Technical Meter Department employs meter technicians, who install and maintain more complicated meters used by commercial customers with multiple services, as well as stock handlers and utility workers.

The Safety Department employs protective equipment testers who test the Employer's safety equipment.

The Garage Department employs a master technician and mechanics who maintain the Employer's fleet of bucket trucks, trailers, pickup trucks and other vehicles.

The Service Center Stores Stock Department employs stock handlers who oversee a warehouse for the Employer's equipment.

The Central Store Department employs freight deliverers, warehouse employees, and material handlers who distribute material to the service centers.

The North August Service Center (the NASC) is responsible for maintaining “reclosers,” i.e., equipment that de-energizes a portion of a circuit, and for rigging large transformers for the Line Department. The NASC also cleans up environmental hazards, such as oil spills. This department employs shop technicians, rigger mechanics, machinist welders, material and hazardous waste technicians, and clerks.

The Radio Service Department employs three radio service testers and installers, referred to at the hearing as “radio technicians,” who install, remove, and maintain two-way radio systems and equipment that is installed in the Employer’s trucks.

The Communications Center, also known as the “DDC,” employs dispatchers who send first responders, including linemen, trouble shooters, radio technicians and fiber microwave technicians, to answer trouble calls.

The Portland Customer Relations/Service Center Clerical Department employs customer relations center representatives and service center customer representatives who staff a call center, as well as various clerks.

Duties of the petitioned-for fiber microwave technicians

The six fiber microwave technicians at issue report directly to Paul Beaulieu, supervisor of telecommunications, who is also the immediate supervisor of the three radio technicians in the bargaining unit.⁴ The fiber microwave technicians work in the field at substations, poles and towers. They are responsible for installing, maintaining, troubleshooting and repairing the Employer’s fiber and microwave networks. The fiber network is composed of fiber-optic cables that are strung from pole to pole, while the microwave network is wireless. These networks are used both to transmit voice communication and to transport data such as meter readings and alarms over the Supervisor Control and Data Acquisition System (SCADA), which permits the substations to monitor the system and to open and close distribution lines remotely. The fiber microwave technicians also maintain the Load Management System used by the substations to reduce electrical load, the Energy Management System to which the SCADA data is sent, and a communications box called a “GMDS” that transmits SCADA data. They also install “frame relay circuits” as well as solar panels that are used to power certain pieces of equipment. They use equipment such as spectrum analyzers and “SONET” testers to detect problems.

⁴ The parties have stipulated, and I find, that Beaulieu is a statutory supervisor who should be excluded from any unit found appropriate.

Qualifications and training

As for the qualifications to become a fiber microwave technician, an associate's degree, which is usually in electronic communications, is preferred, but not required; the Employer accepts years of related experience in lieu of a degree. An FCC license is preferred but not required. Some of the current fiber microwave technicians have no associate's degree and some have no FCC license. Fiber microwave technician Robert Craig testified that, although he had experience in telecommunications when he was hired, he had no prior knowledge of the equipment he would have to work with as a fiber microwave technician and learned on the job. Sometimes the manufacturers of the equipment that the fiber microwave technicians use, such as microwave equipment or SONET equipment, provide training on the equipment. This training is attended only by fiber microwave technicians and non-bargaining unit engineers.

With respect to the qualifications required of radio technicians, an associate's degree in electronics is also preferred but not required, and relevant experience may be substituted. Some radio technicians have such a degree and some do not. The radio technicians are required to have working knowledge of FCC rules, to have a Maine driver's license, and to be able to lift and install radios.

The record does not reveal the particular qualifications and training required for the other bargaining-unit classifications, apart from the fact that they are very different for each classification. Thus, for example, only lineworkers must be trained to perform pole-top rescue, cable splicers must be able to use certain tools that are unique to their job, only mechanics need knowledge of diesel mechanics and hydraulics, and the helicopter pilot obviously has unique qualification and training requirements.

Contact with bargaining unit employees

The six fiber microwave technicians report to the Augusta Service Building (ASB), where there is a separate office for their group. Two of the radio technicians report to an office in the garage area at the ASB, and the third radio technician reports to a location in Portland. There are also lineworkers, substation workers, and warehouse employees who report to separate areas in the ASB. All employees are allowed to use the same lunchroom, bathrooms and parking areas at the ASB, but the fiber microwave technicians are not often at the ASB at lunchtime, as they spend 80 percent of their time in the field. The fiber microwave technicians and radio technicians occasionally attend common safety meetings or other types of meetings.

Every six weeks, each fiber microwave technician takes a turn being on call for a week to handle trouble calls.⁵ Sometimes the fiber microwave technicians can tell from monitoring computers in their own office that there is a problem, sometimes bargaining unit dispatchers call them about an alarm, and sometimes substation workers call them directly if they think there is a problem with the communication system.⁶ Craig testified that when he is on call for the week, he goes to a substation a couple times, on average, but sometimes it can be two or three times a day. When fiber microwave technicians answer a trouble call at a substation, they work together with a substation worker to determine if the problem is in the electrical system, which is the substation worker's responsibility to repair, or in the fiber optic or microwave system, which is the fiber microwave technician's responsibility to repair, or in certain lines leased by the Employer, which is the responsibility of the owner of those lines. Even if the problem is not in their own system, the fiber microwave technicians and substation workers wait while the other employee makes the repair to make sure that the problem is actually resolved before they leave. Once the repair is done, the fiber microwave technician notifies the dispatcher.

Fiber microwave technicians also work together with bargaining unit employees on various projects. Lately, the fiber microwave technicians have spent 50 to 60 percent of their time on project work. One such project entailed the installation of wireless "reclosers." The Employer installed 69 reclosers last year, doing two installations per day. A lineworker, substation worker, and fiber microwave technician are present at each installation. First, a lineworker mounts a recloser box and an antenna that will operate the recloser on a pole, using compass coordinates provided by the fiber microwave technician. Then a substation employee mounts some equipment. Finally, a fiber microwave technician checks to see if there is a good signal. If not, he may direct the line worker to point the antenna to a different compass heading or to fix a problem with a feed.

Another project is the Maine Power Reliability Project (MPRP), which involves commissioning major new power lines and substations. Seven substations have been completed or are in process. Each job involves, *inter alia*, numerous substation employees and a microwave fiber technician. First the substation employees run power to a "rack." Then the fiber microwave technician installs SONET, microwave, and/or SCADA equipment on the same rack. The fiber microwave technician must coordinate his work with that of the substation workers and discuss with them how the wiring should be installed. Each job may take about two weeks, and the fiber microwave technician may

⁵ The radio technicians do not rotate being on call; they must be able to work unscheduled overtime and respond to after-hours calls at all times.

⁶ Craig testified that he is pretty friendly with the substation employees and that they have shared their telephone numbers with one another.

leave and come back when the substation workers are ready for him to start the next step in the job.

A third project involves the installation of solar panels to provide power for frame relay circuits. A fiber microwave technician installs the solar panels, then sets a date with substation workers or lineworkers to “commission” or launch the circuit. This takes a day or two, during which the substation workers or lineworkers make sure their device is properly configured. If there is a problem, the fiber microwave technicians work together with the lineworkers or substation employees to determine what is causing it. Each classification troubleshoots his own part of the work.

The fiber microwave technicians occasionally work with the radio technicians. Fiber microwave technician Craig testified that in the last year he has worked with radio technicians to convert circuits from analog to the fiber optic network, one job that was for a day and another that involved three or four trips to a site. He has also worked with radio technicians at a tower in the last three months, one job for a day and another for four days. Two or three times a year, a radio technician accompanies a fiber microwave technician to the top of a mountain in a snowmobile, due to a company policy that requires at least two employees in a snowmobile. The last time this happened, each of the technicians performed his own work at the top of the mountain.

Interchange

There is no temporary interchange between the fiber microwave technicians and any of the bargaining unit employees. Beaulieu testified that the Radio Department is considered to be a stepping stone to the Fiber Microwave Department. There have been two permanent transfers from radio technician to fiber microwave technician positions in the last eleven years, including one transfer by a current fiber microwave technician. There is no evidence that any fiber microwave technicians have transferred to bargaining unit positions.

Hours, pay, and benefits

Fiber microwave technicians work Monday through Friday from 7:30 a.m. to 4 p.m. The bargaining unit employees work a wide variety of shifts, but there are some bargaining unit employees, i.e., Revenue/Service & Business Department employees and Portland Customer Relations Center customer representatives, who also work from 7:30 a.m. to 4 p.m. When there is a storm emergency, the majority of the bargaining unit employees work a schedule under which they work for 17 hours and rest for 7 hours until power is restored to the last customer, a schedule that may last for two to three weeks. Fiber microwave technicians are not put on a “17/7” schedule during storms, but they do go into “storm mode” and work until the job is done.

The pay of the fiber microwave technicians ranges from \$21.75 to \$27.46 per hour. All three radio technicians earn \$27.46 per hour. According to the collective-bargaining agreement, the hourly pay of the other unit employees ranges from \$13.27 to \$32.39 per hour. The pay of bargaining unit employees is set by the collective-bargaining agreement, and the unit employees receive annual contractual wage increases, regardless of their performance. The fiber microwave technicians receive wage increases at 18-month intervals that are based on merit, as determined by their score in a performance management system. Both fiber microwave technicians and bargaining unit employees are paid time and a half for all work over eight hours per day, double time for overtime work on Sunday, and double time and a half for certain hours worked on holidays.

The benefits received by the bargaining unit employees are set forth in the collective-bargaining agreement. There are some differences between the benefits received by the fiber microwave technicians and those received by bargaining unit employees regarding health insurance, accidental death insurance, travel accident insurance, long term disability insurance, vacation time, personal time, and sick days. All other benefits received by the fiber microwave technicians are substantially comparable to the contractual benefits.

ANALYSIS AND CONCLUSION

A self-determination election is a proper method by which a union may add unrepresented employees to an existing unit. *Globe Machine & Stamping*, 3 NLRB 294 (1937); *Armour & Co.*, 40 NLRB 1333 (1942). Such an election may be appropriate regardless of whether the employees in question may be found to be a separate appropriate unit. *Great Lakes Pipe Line Co.*, 92 NLRB 583, 584 (1950). The appropriateness of a self-determination election, sometimes referred to as an “*Armour-Globe*” election, depends on the extent to which the employees to be included share a community of interest with unit employees and on whether the employees to be added constitute an identifiable, distinct segment so as to constitute an appropriate voting group. *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990).

In determining whether employees share a community of interest, the Board examines such factors as functional integration, frequency of contact with other employees, interchange with other employees, degree of skill and common functions, commonality of wages, hours and other working conditions, and shared supervision. *Publix Super Markets*, 343 NLRB 1023, 1024 (2004).

I find that the fiber microwave technicians share a sufficient community of interest with the bargaining unit employees to warrant their inclusion in the existing unit. The fiber microwave technicians share common first-level supervision with the radio technicians, who are bargaining unit employees. Like many of the other bargaining unit employees, such as lineworkers, substation

workers, and radio technicians, they work in the field performing tasks that are technical in nature and require either a technical education or related experience and technical training. The fiber microwave technicians have frequent work-related contact with dispatchers, line workers and substation workers, working closely together with them to diagnose problems when troubleshooting and when working on various projects such as the recloser project, the MPRP project, and the installation of solar panels. The fact that the fiber microwave technicians perform a different function than the bargaining-unit employees on those occasions does not negate the fact that their work is closely integrated. *Peco Energy Co.*, 322 NLRB 1074, 1085-1085 (1997) (where senior designer provides drawings and technical assistance to maintenance technicians when efforts are made to diagnose equipment problems, it appears that their work is part of an integrated operation); *Mack Trucks, Inc.*, 214 NLRB 382, 386 (1974) (although some employees performed dissimilar tasks, their work is related to a common project). Finally, the fiber microwave technicians' pay is within the range of pay earned by employees in the existing unit, and their hours are the same as those of some of the bargaining unit employees.

In reaching this conclusion, I acknowledge that there is no temporary interchange between the fiber microwave technicians and the bargaining unit employees, that there have been only two permanent transfers, that there are some differences in the benefits of the two groups, and that the wage increases of the two groups are set by a different method. I find that all of these factors are outweighed by the other factors cited above. Further, the difference in benefits and the method of granting wage increases is insignificant, as it is attributable to the fact that the fiber microwave technicians' pay and benefits are currently established solely by the Employer, while the bargaining unit employees' pay and benefits are established by collective bargaining, which will also be the case for the fiber microwave technicians should they choose to become represented. *El Conquistador Hotel, Inc.*, 186 NLRB 123, 124 fn. 6 (1970).

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of Section 2(5) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time fiber microwave technicians employed by the Employer at its Augusta Service Building located at 57 Old Winthrop Road in Augusta, Maine, but excluding all other employees, temporary employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

If a majority of the valid ballots in the election are cast for the Union, the employees will be deemed to have indicated their desire to be included in the existing unit currently represented by the Union, and it may bargain for those employees as part of that unit. If a majority of the valid ballots are not cast for representation, the employees will be deemed to have indicated their desire to remain unrepresented, and I will issue a certification of results of election to that effect.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Brotherhood of Electrical Workers, Local 1837, AFL-CIO, CLC. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining whether there is an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **April 5, 2013**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, www.nlr.gov,⁷ by mail, or by facsimile transmission at 617-565-6725. To file the eligibility list electronically, go to the Agency's website at www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

⁷ To file the eligibility list electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **April 12, 2013**. The request may be filed electronically through the Agency's website, www.nlr.gov, but may not be filed by facsimile.

DATED: March 29, 2013

/s/ Jonathan B. Kreisberg

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