UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE OHIO EDISION COMPANY, A WHOLLY OWNED SUBSIDIARY OF FIRSTENGERGY CORP.	)	15-1783
and	)	**PETITION FOR REVIEW**
FIRSTENERGY GENERATION CORP.	)	
Petitioners,	)	
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent.	)	

The Ohio Edison Company, a Wholly Owned Subsidiary of FirstEnergy Corp. and FirstEnergy Generation Corp. hereby petition the court for review of the Order of the National Labor Relations Board ("Board") in Case Nos. 08-CA-099595 and 06-CA-092312 which was published at 362 NLRB No. 88. The Board's May 21, 2015 Decision and Order is attached hereto.

Respectfully submitted,

/s/ Nick A. Nykulak
Nick A. Nykulak (0075961)
Ross, Brittain & Schonberg Co., LPA
6480 Rockside Woods Boulevard S., Suite 350
Cleveland, Ohio 44131
Tel: 216-447-1551 / 216-447-1554
Email: nickn@rbslaw.com

Counsel for Petitioners

CERTIFICATE OF SERVICE

I do hereby certify that on this 1st day of July 2015, I served the foregoing Petition for Review via UPS Ground Delivery upon the following:

Linda J. Dreeben
National Labor Relations Board
Appellate Court Branch
1099 14th Street N.W., Suite 8100
Washington, D.C. 20570

Aaron B. Sukert
Counsel for the General Counsel
National Labor Relations Board – Region 8
Anthony J. Celebrezze Federal Building
1240 East 9th Street – Room 1695
Cleveland, Ohio 44199

Allen Binstock
Regional Director
National Labor Relations Board – Region 8
Anthony J. Celebrezze Federal Building
1240 East 9th Street – Room 1695
Cleveland, Ohio 44199

Nancy Wilson
Regional Director
National Labor Relations Board – Region 6
William S. Morehead Federal Building
1000 Liberty Avenue, Room 904
Pittsburgh, PA 15222

Mr. Herman Marshman
International Brotherhood of Electrical Workers
Local Union No. 272
838A Midland Ave.
Knights of Columbus, 2nd Floor
Midland, PA 15059

Marianne Oliver, Esq.
Gilardi, Oliver & Lomupo, PA
Benendun Trees Building
223 4th Avenue, Floor 10
Pittsburgh, PA 15222

Mr. David Childers
International Brotherhood of Electrical Workers
Local Union No. 1194
17 W. Church Street
P.O. Box 145
Milan, Ohio 44846

/s/ Nick A. Nykulak
Nick A. Nykulak (0075961)

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Ohio Edison Company, a wholly owned subsidiary of FirstEnergy Corp. *and* International Brotherhood of Electrical Workers, Local Union No. 1194, AFL–CIO, CLC

FirstEnergy Generation Corp. *and* International Brotherhood of Electrical Workers, Local Union No. 272, AFL–CIO, CLC. Cases 08–CA–099595 and 06–CA–092312

May 21, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On January 17, 2014, Administrative Law Judge Mark Carissimi issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2] We agree with the judge that the Respondent violated Section 8(a)(5) and (1) by failing to bargain with IBEW Local 272 (the Union) before implementing a change in the Employee Service Recognition Program (ESRP) on January 1, 2013.[3] Crucially, we affirm the judge's findings and conclusion that Union President Herman Marshman's statements to Director of Labor Relations Eileen McNamara constituted a request to bargain over the change. When McNamara notified Marshman of the change during the September 18, 2012 telephone call, Marshman responded, "[O]h no you don't! Again? Now you know I have to file a board charge," and stated that he would "ha[ve] to come to Akron [the Respondent's headquarters] for this one." The Respondent contends that Marshman's request was not sufficiently specific to constitute a bargaining request because it was made after McNamara described proposed changes to three other employment policies during their September 18 telephone call. We reject that contention. There is nothing in the record to indicate that Marshman's bargaining request did not encompass the proposed change to the ESRP. Moreover, any doubt the Respondent had about the Union's desire to bargain was clarified by the October 30, 2012 unfair labor practice charge and the November 20, 2012 amended charge, both of which specifically alleged that the Respondent failed to bargain over the change to the ESRP.

We disagree with our dissenting colleague's characterization of Marshman's comments to McNamara as a mere "protest." In addition to stating his opposition to the change, Marshman threatened to file a charge and stated that he would travel to the Respondent's headquarters in Akron, Ohio. McNamara testified that she understood from his response that Marshman was not happy about the change and that he was "serious" about both filing a charge and coming to Akron to discuss the matter with the Respondent's CEO, Tony Alexander.[4] She further testified that union representatives "frequently spoke" to Alexander about employment issues, and in this case, Alexander was the individual who had decided to change the ESRP. Accordingly, we disagree with our colleague that "[n]othing in Marshman's responses to McNamara can reasonably be construed as a request to bargain[.]"[5]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we adopt the judge's dismissal of the 8(a)(5) and (1) complaint in Case 08–CA–099595.

[2] We shall modify the judge's recommended Order to conform to the Board's standard remedial language. We shall substitute a new notice in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

[3] In doing so, we reject the Respondent's claim that the judge was required to apply a five-part test to determine whether the ESRP awards were gifts rather than terms or conditions of employment. See *Woonsocket Spinning Co.*, 252 NLRB 1170, 1172 (1980). The Respondent acknowledges that the Board has applied that test only in cases involving monetary Christmas bonuses, and has never applied it to cases, like this one, that involve tangible awards. See, e.g., *Longhorn Machine Works*, 205 NLRB 685, 690 (1973) (employer's unilateral discontinuance of awarding gold watches to employees on 10-year anniversary date violated Sec. 8(a)(5) and (1)). Further, in adopting the judge's finding that the change to the ESRP was substantial and material, we note that approximately 43 employees represented by the Union did not receive a recognition award because of the January 1, 2013 change.

In adopting the judge's finding that a union's acquiescence in past changes to mandatory subjects of bargaining does not constitute a waiver of the right to bargain over future changes, we do not rely on his citation to *FirstEnergy Generation Corp.*, 358 NLRB No. 96 (2012).

[4] Consistent with the Respondent's exception, we find that McNamara's email memorializing her September 18 telephone conversation with Marshman was sent later that same day, and not on September 19, as found by the judge. The judge's error does not affect our analysis or conclusions.

[5] The cases our colleague cites are distinguishable. In those cases, the union's mere protest of a proposed change was deemed insufficient to constitute a request to bargain. As stated above, we agree with the

Our dissenting colleague further argues that we are relying on the filing of an unfair labor practice charge to "convert" Marshman's comments into a request to bargain. That is simply not the case. Marshman's comments constituted a bargaining request, and the record supports the inference that the Respondent understood it as such. Like the judge, we rely on the filing of the charge only to clarify and provide context to Marshman's comments. As the judge noted, the Union filed the charge soon after being notified of the change, and over 2 months before the change was implemented, which would have allowed the parties an opportunity to bargain over the change. Compare *American Buslines*, 164 NLRB 1055, 1055–1056 (1967) (holding that the union's letter stating its disagreement with a change that was to take place in less than a week was not a request to bargain, where the union took no other action until filing a charge).

ORDER

The National Labor Relations Board orders that the Respondent, FirstEnergy Generation Corp., Shippingport, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with the International Brotherhood of Electrical Workers, Local Union No. 272, AFL–CIO, CLC as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I & T, and Yard Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards, other professional employees and supervisors as defined in the National Labor Relations Act, as amended.

(b) Unilaterally changing the length of time employees must serve to be eligible for awards under the Employee Service Recognition Policy (ESRP).

(c) 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) Before implementing any changes in wages, hours, or other terms and conditions of employment, notify and, on request, bargain collectively and in good faith with IBEW, Local 272 as the exclusive collective-bargaining representative of its employees in the appropriate unit.

(b) Rescind the change to the ESRP that was unilaterally implemented on January 1, 2013, and restore the 5-year length of service requirement that existed before the change was implemented.

(c) Make whole all employees in the bargaining unit who were not granted a service award because of the unlawful change made to the ESRP on January 1, 2013.

(d) Within 14 days after service by the Region, post at its facility in Shippingport, Pennsylvania, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 6, 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If 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 January 1, 2013.

(e) Within 21 days after service to the Region, file with the Regional Director of Region 6 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. May 21, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

judge's finding that the Union did more than merely protest the change: Marshman threatened to file a charge over the change and expressed a desire to discuss the matter with the decisionmaker.

[6] 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."

MEMBER MISCIMARRA, concurring in part and dissenting in part.

A core requirement of the Act is the duty to bargain in good faith regarding wages, hours, and terms and conditions of employment.[1] Yet the Act only requires employers to give the bargaining representative notice and the *opportunity* for bargaining, consistent with two longstanding principles that have been clearly established by numerous Board and court decisions. First, to preserve its bargaining rights, a union must *request bargaining* after it becomes aware of a potential change. In *NLRB v. Katz*, for example, the Supreme Court stated: "A refusal to negotiate in fact as to any subject which is within § 8(d), *and about which the union seeks to negotiate*, violates § 8(a)(5)" (emphasis added). 369 U.S. at 743. Second, a union waives its bargaining rights when, *without* requesting bargaining, it merely protests, raises objections, or files a refusal-to-bargain unfair labor practice charge in response to the employer's announced plans.

I believe the judge and my colleagues have misapplied both of these longstanding principles. Contrary to their findings, I would reverse the judge and dismiss the refusal-to-bargain allegation against Respondent FirstEnergy Generation because (i) the Union here never requested bargaining over the Respondent's announced intention to change its Employee Service Recognition Plan, and (ii) the Union's filing of a refusal-to-bargain charge did not constitute a request for bargaining, and decades of Board law establish that such a charge lacks merit when there has never been a request for bargaining.[2] For these reasons, I respectfully dissent from the finding of an 8(a)(5) violation as to FirstEnergy.

Factual Background

The Respondent[3] maintained a longstanding Employee Service Recognition Plan (ESRP) to acknowledge and reward employees for their loyalty to the Company. The ESRP was changed several times over the years, mostly through the Respondent's unchallenged unilateral actions. Prior to the events at issue here, the ESRP provided awards of increasing value for every 5 years of service. Thus, at 5 years, the value of the award was $35, at 10 years it was $69.50, at 15 years it was $75, and at 20 years it was $101. The award value increased in 5-year increments up to 50 years of service.

On September 18, 2012, Eileen McNamara, the Respondent's director of labor relations, called Herman Marshman, IBEW Local 272's president, and, reading from a prepared script, informed him of several planned changes, among them that the ESRP would grant awards to employees for every 10 years of service rather than every 5 years. McNamara informed Marshman that the change would take effect in January 2013.

In response, Marshman said, "Oh no you don't, you know I have to come to Akron [Respondent's corporate headquarters] on this," and he added that he would also have to "file a Board charge." The judge credited McNamara's testimony that Marshman did not state that the changes were subject to negotiation and did not request bargaining over any of the proposed changes, including those to the ESRP.[4] McNamara ended her call with Marshman by reading from her script: "Should you have any concerns or questions, please do not hesitate to call." On September 27, 2012, McNamara sent Marshman a followup letter that, among other things, restated the proposed changes to the ESRP. The letter also stated, "If you have any questions or concerns regarding the foregoing, please do not hesitate to contact me." It is undisputed that Marshman did not contact McNamara regarding the proposed changes. On October 30, 2012, Local 272 filed an unfair labor practice charge against the Respondent alleging that its unilateral changes to the ESRP violated Section 8(a)(5) and (1).

[1] See Sec. 8(a)(5) (making it an unfair labor practice for an employer to refuse to bargain collectively with a union that is the representative of employees); Sec. 8(b)(3) (making it an unfair labor practice for a union that is the representative of employees to refuse to bargain collectively with their employer); Sec. 8(d) (defining the obligation to "bargain collectively" as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession"). The matters about which bargaining is required under the statute—"wages, hours, and other terms and conditions of employment"—are commonly called "mandatory" subjects of bargaining. *NLRB v. Wooster Division*, 356 U.S. 342 (1958). It is unlawful for an employer to implement unilateral changes in mandatory subjects without giving the bargaining representative notice and the opportunity to request bargaining. *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

[2] There are no exceptions to the judge's dismissal of the refusal-to-bargain allegation against The Ohio Edison Company in Case 08–CA–099595, and I concur in the dismissal of that case.

[3] "Respondent" here refers to FirstEnergy Generation Corporation. As noted, the allegation against Respondent Ohio Edison was dismissed.

[4] Conversely, the judge discredited Marshman's claim that he told McNamara that the proposed changes were subject to negotiation.

Discussion

The judge found that Union President Marshman's responses to McNamara—"oh no you don't, you know I have to come to Akron on this," and "now you know I have to file a Board charge"—"leave little doubt" that he was requesting bargaining over the Respondent's proposed changes to the ESRP. These findings by the judge reflect an erroneous application of the two principles of black-letter Board law described above.

1. The Union never requested bargaining

The record reveals that the General Counsel has not satisfied his burden of establishing that the Union requested bargaining after being informed of the Respondent's proposed changes to the ESRP. At most, Marshman's responses constitute the type of protest or objection that the Board, in numerous cases, has found *not* to be an adequate substitute for requesting bargaining.

For example, in *Clarkwood Corp.*, 233 NLRB 1172, 1172 (1977), the employer's unilateral removal of phones and closing of a restroom were held lawful under Section 8(a)(5) where union officials "contacted Respondent and protested its contemplated actions," but "at no time did employee representatives request Respondent to bargain about removing the phones or closing the restroom." In *The Emporium*, 221 NLRB 1211, 1214 (1975), the employer did not unlawfully fail to bargain over subcontracting when the union representative, after learning of the employer's plans, "simply requested that Respondent not contract out," complained that the contractor refused to recognize the union, asked whether the respondent would "do something about this" and "took the position that . . . Respondent had violated its bargaining agreement," but where the union "never tested Respondent' s willingness to satisfy its bargaining obligation." In *Medicenter, Mid-South Hospital*, 221 NLRB 670, 679 (1975), the employer was found not to have unlawfully failed to bargain over polygraph testing where the union "showed no inclination to do anything but object" and failed to request bargaining. In *Kentron of Hawaii Ltd.*, 214 NLRB 834, 835 (1974), the Board held: "When an employer notifies a union of proposed changes in terms and conditions of employment, it is incumbent upon the union to act with due diligence in requesting bargaining" (footnote omitted). In *U.S. Lingerie Corp.*, 170 NLRB 750, 751–752 (1968), there was no unlawful failure to bargain over an employer's relocation because, according to the Board, "the Union had sufficient notice of Respondent's intended move to place upon it the burden of demanding bargaining if it wished to preserve its rights to bargain. . . ." In *American Buslines, Inc.*, 164 NLRB 1055, 1055–1056 (1967), there was no unlawful refusal to bargain over employee promotions that resulted in the bargaining unit's elimination because the Board found that, upon receiving notice of the employer's plans, "the Union failed to prosecute its right to engage in . . . discussion but contented itself by protesting the contemplated promotions . . . and by subsequently filing a refusal-to-bargain charge."

The foregoing cases all stand for the same proposition: there can be no 8(a)(5) violation unless the union, after learning of an employer's planned changes regarding a mandatory bargaining subject, makes a request that "*clearly indicates* a desire to negotiate and bargain." *Al Landers Dump Truck, Inc.*, 192 NLRB 207, 208 (1971) (emphasis added). Nothing in Marshman's responses to McNamara can reasonably be construed as a request to bargain or negotiate with the Respondent over the change to the ESRP. Marshman's statements registered disagreement or protest. As reflected in numerous Board cases, even strenuous objections or protests are not sufficient under Section 8(a)(5) to constitute requests for bargaining. See *Associated Milk Producers*, 300 NLRB 561, 564 (1990) ("It was incumbent on the Union to request bargaining—not merely to protest or file an unfair labor practice charge."); *Citizens National Bank of Wilmar*, 245 NLRB 389, 389–390 (1979) (same); *American Buslines*, supra.[5]

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[5] The judge cited several cases in support of his finding that Marshman's protests conveyed a request to bargain. In each of those cases, however, the union's response included some reference to dialogue, discussion, bargaining, or an exchange of ideas. Thus, in *Indian River Memorial Hospital*, 340 NLRB 467 (2003), upon which the judge specifically relied, the employer notified the union of a change in the work schedule, and the union's business agent responded that a schedule change was "a mandatory subject of bargaining." In response, the employer stated, "We are willing to bargain collectively over those items covering wages, hours, and working conditions," but "changing schedules . . . is a management right." Id. at 467. Thus, both the union's statement and the employer's response referenced bargaining, and the Board found a clear request to bargain. Id. at 468–469. In *Armour & Co.*, 280 NLRB 824 (1986), the Board found a request to bargain where, in response to a proposed change, the union stated that it "would like the opportunity to *discuss* with your company your position." Id. at 828 (emphasis in original). Similarly, in *Sunoco, Inc.*, 349 NLRB 240 (2007), the union business agent told the employer, on three occasions regarding its plan to subcontract certain work, that it was "bargaining unit work" and that the employer "ha[d] to bargain over that work." Id. at 242. On these facts, a request to bargain was found. Id. at 245.

Here, unlike the three cases relied upon by the judge, Marshman's comments were devoid of any reference to discussion or bargaining. On September 18, the day McNamara spoke with Marshman, McNamara emailed her superior that Marshman was "not happy" and that she was "sure he's serious about the charge and coming to Akron." The judge found that McNamara's email "reflects an understanding that Marshman was requesting bargaining as it indicates that she felt he was serious about coming to Akron *to discuss* the change to the policy"

2. The Union's refusal-to-bargain charge was not a request for bargaining

To bolster his finding that the Union requested bargaining, the judge cited *Trucking Water Air Corp.*, 276 NLRB 1401, 1407 (1985), for the proposition that "if an employer has doubt about whether a request for bargaining has been made, such doubt can be eliminated when a union files an unfair labor practice charge claiming a refusal to bargain." I believe this proposition is incorrect as a matter of law and objectionable as a matter of labor law policy.

Decades of Board precedent establish that the filing of an unfair labor practice charge, or the threat to file such a charge, does *not* excuse a union's failure to request bargaining, nor is the filing of a refusal-to-bargain charge equivalent to a bargaining request. The judge himself acknowledged that filing an unfair labor practice charge does not relieve a union of its obligation to request bargaining. The Board has so held for nearly 50 years. See, e.g., *Boeing Co.*, 337 NLRB 758, 763 (2002); *Associated Milk Producers*, 300 NLRB at 563; *American Buslines*, 164 NLRB at 1055–1056.[6]

This case closely resembles *American Buslines*, where a panel consisting of Members Fanning, Brown, and Jenkins unanimously dismissed the complaint alleging that the employer violated Section 8(a)(5) by failing to bargain with the union over the promotion and reclassification of all union-represented porters, which eliminated the bargaining unit and extinguished the union's representative status. 164 NLRB at 1055, 1057. A letter from the union "expressed [its] disagreement with this projected action, which it described as contrary to the [u]nion's certification and the existing labor agreement." Id. at 1055. As the Board found, "the [u]nion's immediate reaction was merely to protest the proposal in a letter by characterizing it as an invasion of its statutory rights." Id. The union's "next and final course of action *was to file an unfair labor practice charge*." Id. (emphasis added). On these facts, the Board unanimously concluded that dismissal was proper, reasoning as follows:

> When the Union was first apprised of Respondent's plan to promote all of the porters ... with the concommitant [sic] disappearance of the Union's bargaining unit, *it became incumbent upon the Union to enforce its bargaining rights diligently* by attempting to persuade the Respondent to alter its decision if it found the decision unacceptable.... In *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 297, the Supreme Court, in discussing the duty of labor organizations to initiate collective bargaining, held "that the statute does not compel ... [the Employer] to seek out his employees *or request their participation in negotiations for purposes of collective bargaining* .... To put the employer in default here *the employees must at least have signified to respondent their desire to negotiate*." Although this statement was made in a different context, we think it applicable to the facts in this case. Here, Respondent gave the Union 1 week's advance notice of its plan to promote the porters and invited discussion of "any phase of this situation." Nevertheless, *the Union failed to prosecute its right to engage in such discussion but contented itself by protesting the contemplated promotions in its letter dated February 10 and by subsequently filing a refusal-to-bargain charge.*

Id. at 1055–1056 (emphasis added). The Board's conclusion in *American Buslines* and other cases is clear: the filing of a refusal-to-bargain charge is not a request for bar-

(emphasis added), and my colleagues echo that finding. But what McNamara actually testified, as the judge noted, was that she understood Marshman's reference about coming to Akron to mean that "he wanted *to complain*" to the Respondent's CEO about this issue (emphasis added). Thus, the judge subtly but significantly misstates McNamara's testimony. Marshman did not refer to discussion or bargaining, and McNamara did not understand him to do so. McNamara's email reveals that she understood Marshman was unhappy about the ESRP change and wanted to complain about it—not that he wanted to discuss it or bargain about it.

[6] *Trucking Water Air Corp.*, upon which the judge relied, is not to the contrary. There, the union president (Schueler) called the employer's president (Pace) after hearing that the company, whose employees the union formerly represented, was back in business. The union president testified, "I asked Mr. Pace that I wanted to sit down with him and I wanted to talk about the situation. . . . I said I'd like to sit down with you right now and he said no." 276 NLRB at 1406. The judge found that "Schueler's request that Pace 'sit down' with him to discuss 'the situation' [met] the criteria" for a request to bargain. Id. at 1407. The judge then added the following dicta: "Were there any further doubt of the meaning of Schueler's statement to Pace, this doubt was eliminated shortly thereafter when the Union filed the unfair labor practice charge which led to the instant complaint." Id. The judge then cited *Sewanee Coal Operators Assn.*, 167 NLRB 172, 177 (1969), where—as characterized by the judge in *Trucking Water Air*—"the Board held that the filing of charges acted as a *renewal* of the request to bargain and Respondent's failure to indicate an intention to negotiate, thereafter, constituted a *second* refusal to bargain." Thus, in *Trucking Water Air*, the judge found that Schueler *had* requested bargaining, prior to and separate from the subsequent filing of an unfair labor practice charge. And the judge recognized that although filing a charge may *renew* a bargaining request previously made, it does not substitute for a request that had never been made. Here, by contrast, the judge erroneously cites *Trucking Water Air* for the proposition that an unfair labor practice charge effectively converts a prior union protest over a proposed change into a request for bargaining. This reading goes far beyond *Trucking Water Air* and directly contradicts the Board's long-held position that filing a charge does *not* make up for a union's failure to clearly indicate a desire to bargain. The Board has never cited *Trucking Water Air* for the proposition asserted by the judge in this case, nor have I found any other Board decision that supports such a proposition.

gaining, nor does it excuse a union's failure to make such a request.

There is a separate, equally important policy reason that should prevent the Board from treating a refusal-to-bargain charge as equivalent to a request for bargaining. The Act is intended to foster good-faith collective bargaining *without* parties unnecessarily resorting to Board litigation. The Board aids in that process by discharging its responsibility to keep the applicable "rules of the road" clear. See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 678–679 (1981) (emphasizing the need for "certainty beforehand" regarding bargaining obligations so that a party "may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice"). The decades-old requirement of a request for bargaining is one of several principles that permit parties to address bargaining obligations in an orderly manner. As noted above, employers planning changes in mandatory bargaining subjects must normally provide notice to the union and the opportunity for bargaining. *Katz*, supra. In response, the union has "the burden of demanding bargaining if it wishe[s] to preserve its rights to bargain." *U.S. Lingerie*, 170 NLRB at 751–752. Employers and unions then have a "*mutual* obligation," imposed by Sections 8(a)(5) and 8(b)(3), respectively, "to meet at reasonable times and confer in good faith" regarding the contemplated changes. See supra fn. 1.

Congress never intended a refusal-to-bargain charge to *commence* the process by which parties satisfy their bargaining obligations under the Act. An unfair labor practice charge enlists formidable Board investigative, prosecutorial, adjudicative, and remedial powers, the deployment of which Congress authorized only when a person allegedly "*has* engaged in or *is* engaging in any . . . unfair labor practice"[7]—namely, under Sections 8(a)(5) or 8(b)(3), a refusal to bargain. Without a sufficient request for bargaining, an employer cannot reasonably be deemed to have refused to bargain. Nonetheless, my colleagues, like the judge, give a refusal-to-bargain charge a different purpose by permitting a union that desires to challenge announced plans to file a refusal-to-bargain charge as an *alternative* to requesting bargaining. This is not the way Congress intended the Act to work. "It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strength of the parties." *H.K. Porter Co. v. NLRB*, 387 U.S. 99, 107–108 (1970). I believe my colleagues' decision is inconsistent with this principle.

For the above reasons, I would find that on the record before us here, the General Counsel has not satisfied his burden to prove that the Union requested bargaining after learning of the Respondent's planned change to the ESRP, and absent such a request, the Respondent cannot be found to have violated Section 8(a)(5). More generally, I disagree with my colleagues' adoption of the judge's finding that the refusal-to-bargain charge excused the Union's failure to request bargaining and triggered an obligation for the Respondent to engage in bargaining while the charge was pending. Accordingly, as to these issues, I respectfully dissent.

Dated, Washington, D.C. May 21, 2015

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

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 fail and refuse to bargain collectively and in good faith with the International Brotherhood of Electrical Workers, Local Union No. 272, AFL–CIO, CLC as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I & T, and Yard Departments at the Bruce Mansfield Plant, excluding

[7] Sec. 10(b) (emphasis added). In relevant part, Sec. 10(b) states: "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect."

technicians, office clerical employees and guards, other professional employees and supervisors as defined in the National Labor Relations Act, as amended.

WE WILL NOT unilaterally change the length of time you must serve to be eligible for awards under the Employee Service Recognition Policy (ESRP).

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, before implementing any changes in your wages, hours, or other terms and conditions of employment, notify and, on request, bargain collectively with IBEW, Local 272 as the exclusive collective-bargaining representative of our employees in the appropriate unit.

WE WILL rescind the change to the ESRP that was unilaterally implemented on January 1, 2013, and restore the 5-year length of service requirement that existed before the change was implemented.

WE WILL make whole all employees in the bargaining unit who were not granted a service award because of the unlawful change made to the ESRP on January 1, 2013.

WE WILL on request, bargain with IBEW, Local 272 as the exclusive representative of the employees in the appropriate unit concerning any change to the ESRP.

FIRSTENERGY GENERATION CORP.

The Board's decision can be found at www.nlrb.gov/case/08-CA-099595 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Aaron Sukert, Esq., for the General Counsel.
Nick Nykulak, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Cleveland, Ohio, on September 17, 2013. The International Brotherhood of Electrical Workers, Local Union No. 272, AFL–CIO, CLC (Local 272) filed the charge in Case 06–CA–092312 on October 30, 2012, and an amended charge on November 20, 2012, against FirstEnergy Corp.[1] The International Brotherhood of Electrical Workers, Local Union No. 1194, AFL–CIO, CLC (Local 1194) filed the charge in Case 08–CA–099595 on March 5, 2013, against FirstEnergy Corp. and an amended charge on June 21, 2013, against Ohio Edison Co, a wholly owned subsidiary of FirstEnergy Corp. On June 28, 2013, the Acting General Counsel[2] issued an order consolidating cases, consolidated complaint, and notice of hearing in these cases. On August 30, 2013, the Acting General Counsel issued an amended consolidated complaint and notice of hearing (the complaint). On September 3, 2013, the Acting General Counsel issued an amendment to the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Ohio Edison Co., a wholly owned subsidiary of FirstEnergy Corp. (Respondent Ohio Edison) is an Ohio corporation and wholly owned subsidiary of FirstEnergy Corp. with headquarters located in Akron, Ohio, and is engaged as a public utility in the purchase, production, transmission, and retail sale of electricity. Annually, in the course and conduct of its business described above, Respondent Ohio Edison derives annual gross revenue in excess of $250,000 and purchases and receives goods and materials valued in excess of $50,000 directly from points located outside the State of Ohio.

FirstEnergy Generation Corp. (Respondent FirstEnergy Generation) is an Ohio corporation and a subsidiary of FirstEnergy Corp. with an office and place of business in Shippingport, Pennsylvania, and is engaged as a public utility in the generation and distribution of electricity. Annually, in the course and conduct of its business described above, Respondent FirstEnergy Generation derives gross annual revenue in excess of $250,000 and purchases and receives at its Shippingport, Pennsylvania facility goods and materials valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania.

Respondent Ohio Edison and Respondent FirstEnergy Generation admit, and I find, that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 1194 and Local 272 are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that since on or about January 1, 2013, the Respondents unilaterally changed, from every 5 years to every 10 years, the length of service employees must serve to be eligible to receive employee service awards in violation of Section 8(a)(5) and (1) of the Act.

[1] All dates are in 2012 unless otherwise indicated.

[2] I have taken administrative notice of the fact that on October 29, 2013, the United States Senate confirmed President Obama's nomination of Richard F. Griffin Jr. to be the Board's General Counsel and that he was sworn in on November 4, 2013.

Background

FirstEnergy Corp., the parent company of both Respondent Ohio Edison and Respondent FirstEnergy Generation (collectively the Respondents), was formed in 1997 as a result of the merger between Cleveland Electric Illuminating, Toledo Edison, Ohio Edison, and Pennsylvania Power. FirstEnergy currently employs approximately 16,000 employees and has a collective-bargaining relationship with approximately 23 unions.

Respondent FirstEnergy Generation and Local 272 are parties to a collective-bargaining agreement effective by its terms from December 5, 2009, until February 15, 2013, covering certain employees at Respondent FirstEnergy Generation's D. Bruce Mansfield facility in Shippingport, Pennsylvania. On August 16, 2012, the parties entered into a "stipulation of settlement" that extended that agreement with certain modifications through February 15, 2014. The employees in the bargaining unit covered by this agreement have been represented by Local 272 since 1978. There are approximately 290 employees in the bargaining unit.

Respondent Ohio Edison and Local 1194 were parties to a collective-bargaining agreement effective from September 3, 2008, until September 3, 2013. On September 6, 2013, the parties entered into a tentative agreement effective from September 3, 2013, through September 2, 2016, that at the time of the hearing was undergoing a ratification vote. The bargaining unit is composed of transmission and distribution employees in several geographic locations in Ohio. The bargaining unit employees have been represented by Local 1194 since 1946. There are approximately 275 employees in the bargaining unit.

The Employee Recognition Award Policy

Respondent Ohio Edison and Pennsylvania Power, the predecessor to Respondent First Energy Generation, utilized an employee recognition award program applying to the FirstEnergy Generation unit and the Ohio Edison unit since at least 1973. The purpose of the policy is "To acknowledge employees for their service with the company." (Jt Exh. 6.) Pursuant to this policy, in the 1970s to the late 1980s, full-time employees received a tie tack or charm bracelet on their 1-year anniversary date of employment. During this same period, on an employee's 5-year anniversary, he or she would receive a tie tack or charm bracelet. The 5-year service recognition awards would increase in value based on length of service. Employees were also invited to a 5-year service recognition awards dinner after every 5 years of service.

In 1989, Ohio Edison and Pennsylvania Power changed their employee recognition policy to include an award catalog. Employees were permitted to choose an item from an award catalog on their 5-year anniversary. There were different levels of catalogs to celebrate different anniversaries and the awards in the catalog increased in value based on the number of years an eligible employee had been employed.

After it was formed pursuant to the merger in 1997, FirstEnergy continued the employee service recognition policy of its predecessors. The FirstEnergy employee service recognition award policy applies to all of the approximately 16,000 individuals employed by FirstEnergy, including supervisors. The employee service recognition policy is typically not incorporated into collective-bargaining agreements. The exception is that the contract between FirstEnergy Nuclear Operating Co., a subsidiary of FirstEnergy and IBEW, Local 29, effective from 2008 through 2011, and an extension of that agreement effective from October 1, 2011, through September 30, 2014, provides for the granting of service recognition awards to members of Local 29 at 5-year intervals. The most recent contracts and extensions between the Respondents and Local 272 and Local 1194 do not contain a reference to the employee service recognition policy, nor did any of the preceding contacts between those two Unions and the Respondents and the Respondents' predecessors contain such language. In fact, the parties to this case have never negotiated regarding the employee service recognition policy. In addition, the employee service recognition policy is not listed in the employee compensation and benefits handbook utilized by the Respondents.

The employee service recognition policy is set forth in documents entitled "Human Resources Letter 307" posted on FirstEnergy's human resources website. The human resources letters constitute the formal policies of all FirstEnergy subsidiaries. It is undisputed that human resources 307 letters applied to employees represented by both Local 1194 and Local 272. In a human resources letter 307 dated January 1, 1999 (Jt. Exh. 7), eligibility was changed to include part-time employees. This letter stated that employees would be recognized for their service at 5-year intervals, thus eliminating the recognition of an employee's 1-year anniversary. The letter also indicated that awards would be shipped directly to the human resources representative at each location who would be responsible for presentation of the award to the employee. Finally, this letter contained the following language which was maintained in all subsequent human resources 307 letters:

> This personnel policy is not a binding contract, but a set of guidelines for implementation. The Company expressly reserves the right to modify any of the provisions of this policy at any time and without notice.

On February 1, 2002, a new human resources 307 letter (Jt. Exh. 8) issued superseding the 1999 policy. The 2002 policy indicated, for the first time, that employees had the option of ordering their award from the website of the third-party vendor, Pat Geary and Associates, that provided the catalogs from which employees could select an award. The Pat Geary and Associates website was accessible via FirstEnergy's internal website. Awards could be selected from an individual's current service level or from the next lower level.

In 2004, FirstEnergy changed vendors for the gift catalogs from Pat Geary and Associates to C. A. Short. For the first time, employees were restricted to selecting awards from the catalog that corresponded to their award level. Previously, employees were permitted to select an award from the catalog at their anniversary level or a lower one. On January 1, 2004, the 2002 employee recognition reward policy was superseded by a new human resources letter 307 (Jt. Exh 9). Under the 2004 policy, the awards were delivered to the employee's home and not to the employee's supervisor for presentation. The 2004 policy also announced that employees would receive a

"service award package" that included a certificate of appreciation and a letter from FirstEnergy's CEO. The 2004 policy also indicated that employees who failed to order an award from the catalog would not receive one. Previously, if an employee did not select an award one would be selected for him or her.

On January 1, 2009, FirstEnergy issued a human resources letter 307 (Jt. Exh. 10) that superseded the 2004 policy. Under the 2009 policy, the anniversary of employees who had a break in service and were rehired after January 1, 2005, would be measured by their rehire date, and not in accordance with the pension plan's break in service rules. Employees hired prior to January 1, 2005, would continue to have their anniversaries determined by the pension plan's break in service rules. In a human resources policy letter dated February 28, 2011 (Jt. Exh. 11), FirstEnergy only changed the Internet website for employee access to the catalog.

The record establishes that since C. A. Short began serving as the third-party vendor the value of the employee service award increased in a uniform manner with an employee's length of service. After 5 years the value of the award is $35, after 10 years it is $69.50, after 15 years it is $75, and after 20 years it is $101. The value of the awards continues to increase in 5-year increments up to a 50-year anniversary award, which is worth $314.50. (Jt. Exh. 25.)

A sample 5 and 10-year anniversary award package, including the corresponding award catalog, was admitted into evidence at the hearing (Jt. Exhs.17 and 18, respectively). Each anniversary level of a gift catalog contains between 90 and 100 items, broken down into separate categories such as jewelry, electronics, cookware, and watches. There are 9 or 10 items contained in each category at every anniversary level. The catalogs are generated by C. A. Short around the time of an employee's anniversary date. The items contained in the catalogs are constantly changing as out-of-stock inventory is replaced with new items and new models of items replace older models. All the items contained in a catalog are limited to tangible items such as clocks, jewelry, and cookware. Employees do not receive cash or gift cards under the service recognition policy. The value of an award is not reported on an employee's W-2 form.

The Respondents' September 2012 Communications with Local 272 and Local 1194 and the Implementation of a Change in the Employee Service Recognition Policy on January 1, 2013.

On September 18, 2012, FirstEnergy representatives contacted various union representatives including Herman Marshman, Local 272's president, and David Childers, Local 1194's business manager, to inform them of upcoming changes to certain FirstEnergy employment policies, including the employee service recognition policy. The ultimate decision to change these policies, including the employee recognition award policy, was made by Tony Alexander, FirstEnergy's CEO. In order to maintain uniformity in the communications with the various unions, scripts were prepared for the labor representatives to use when speaking to the union representatives.

On September 18, Eileen McNamara, FirstEnergy's director of labor relations, called Marshman and informed him that various changes in employment policies would be announced to employees the next day. According to Marshman, McNamara told him that FirstEnergy would be making changes to various employment policies including the employee service recognition policy, educational reimbursement, death benefits, and long-term disability. Specifically with respect to the employee service recognition program, Marshman testified that McNamara told him that the change to the employee service recognition award program would be from the then current 5-year service award to a 10-year service award and that the change would take place in January 2013. Marshman further testified that he told McNamara that the changes in the policies that she had informed him of were subject to negotiations and that he expressed concern about FirstEnergy making these proposed changes without negotiations. According to Marshman, McNamara replied that she understood his position but that FirstEnergy did not agree with him on this point. Marshman testified that he stated that the changes were subject to negotiations and that FirstEnergy was forcing him to file an unfair labor practice charge, which he did not want to do.

McNamara testified that she utilized the script (R. Exh. 1) that had been prepared to discuss the upcoming changes to some employment practices at FirstEnergy when she spoke to Marshman on September 18. According to McNamara, she did not deviate from the script during her phone conversation. With respect to employee service awards the script indicates: "Will be given for each ten years of service rather than each 5 years." As a closing statement the script indicates: "As you can tell we are making changes that we believe will make a difference, but we are facing long-term challenges. These changes will take place at the beginning of the year, January 1, 2013. Should you have any concerns or questions please do not hesitate to call." McNamara testified that Marshman did not state that the changes she discussed with him were subject to negotiations nor did he request to bargain over any of the changes that she had relayed to him, including the changes to the employee service recognition policy. McNamara specifically denied that she said that FirstEnergy had no obligation to negotiate over any of the proposed changes. McNamara further testified that Marshman said in response to the changes in policies that she had announced, "Oh no you don't, you know I have to come to Akron on this." Marshman added that he would also have to go to the Board. (Tr. 131.) McNamara testified that she understood Marshman's reference to going to Akron to be that he wanted to complain to FirstEnergy CEO Alexander. McNamara further testified that union representatives frequently spoke to Alexander about employment issues that arose.

McNamara testified that her superior, Chuck Cookson, asked her to update him on the conversations that she had with the various union representatives that she had spoken to. Accordingly, on September 19, McNamara sent the following email to Cookson:

> Chuck-heard back from Herman and Local 50. Local 50 is fine. Herman is not happy (although very polite and made nice jokes). He said "on (sic) no you don't! Again? Now you know I have to file a board charge honey" and now he "has to come to Akron for this one." He was very nice about it though. He was actually quite funny-but I'm sure he's serious about the

charge and coming to Akron. I told him to stop by my office if he makes it Akron-he says, "oh yes, he is coming to Akron for sure." [R. Exh. 4.]

To the extent that the testimony of Marshman and McNamara conflicts, I credit McNamara. McNamara's demeanor while testifying exhibited certainty. In addition, her testimony was consistent with both the script that was prepared prior to her discussion with Marshman and with the email she sent to Cookson following her conversation with him. I find particularly persuasive the email she sent to Cookson as I doubt she would have included such detail regarding her conversation with Marshman unless it was true. On the other hand, I do not find Marshman's testimony regarding their phone conversation to be sufficiently reliable to base findings on it. His testimony was not particularly detailed and his demeanor while testifying was not impressive.

According to the uncontroverted testimony of Childers, Local 1194's business agent, on September 18, 2012, John Rossero, a FirstEnergy labor relations representative, called him to inform him of upcoming changes to employee benefits, including the employee service recognition policy. Childers was informed by Rossero, that FirstEnergy was going to change the employee service recognition policy and that employees would be rewarded at 10-year intervals as opposed to 5-year intervals. Childers admitted that he did not request to bargain over the change to the employee service recognition policy that Rossero had announced to him. When Childers was asked at the hearing why he did not do so, he replied, "The changes were not going to take place until January so I felt there was time, time to review what we were being told and how to respond to that." (Tr. 102–103.) The record establishes, however, that Local 1194 never requested to bargain over the change to the employee recognition policy prior to its implementation on January 1, 2013, or thereafter.

On September 19, the Respondents distributed to their employees and to Locals 272 and 1194, a copy of "FirstEnergy Employee Update Special Issue" which included changes in employee benefits that would be taking place effective January 1, 2013, including changes to the employee service recognition policy. (Jt. Exh. 12.) In this connection, this document stated "Employee Service Awards will be given for every 10 years of service rather than every 5 years of service."

The employee update included a message from FirstEnergy's CEO, Alexander, which indicated that because FirstEnergy stock had lost 6.45 percent in value, certain staff reductions as well as changes to employee benefits were being instituted. At the hearing, Stacy Silvis, a FirstEnergy benefits manager, testified that FirstEnergy and its subsidiaries would save approximately $200,000 per year corporatewide by changing the employee recognition service policy from 5 to 10 years.

On September 27, 2012, McNamara sent to Marshman a letter which stated in relevant part: "On September 19, 2012, the following additional benefit changes were announced, effective January 1, 2013:[. . .] Employee Service Awards-Will be given for each 10 years of service rather than each 5 years. If you have any questions or concerns regarding the foregoing, please do not hesitate to contact me." (Jt. Exh. 15) On the same date, an identical letter was sent by Rossero to Childers (Jt. Exh. 14).

On October 30, 2012, Local 272 filed an unfair labor practice charge in Case 06–CA–092312 alleging, in part, that Respondent FirstEnergy Generation violated Section 8(a)(5) and (1) by making a unilateral change in employee service awards on or about September 27, 2012. On November 20, 2012, Local 272 filed an amended charge that contained the same allegation regarding the employee service award program.

On January 1, 2013, the Respondents implemented a new human resources letter 307 (Jt. Exh. 16) which changed the employee service recognition program to reflect that awards would be received at 10-year anniversary intervals. The effect of this was obviously to change the policy of granting an award at a 5-year anniversary date to a 10-year anniversary date. This change applied to all employees and supervisors throughout FirstEnergy and its subsidiaries, except for employees represented by IBEW Local 29. Pursuant to their collective-bargaining agreement, those employees would continue to receive awards at the 5-year anniversary date. As a result of the January 1, 2013 changes to the employee service recognition policy, approximately 89 employees represented by Locals 272 and 1194 did not have their anniversaries recognized, who otherwise would have received a recognition award at a 5-year anniversary interval.

On March 4, 2013, Local 1194 filed the charge in Case 08–CA–099595 alleging, in part, that Respondent Ohio Edison violated Section 8(a)(5) and (1) by unilaterally announcing changes to the employee service award program on September 27, 2012, that became effective on January 1, 2013.

Analysis

Whether the Employee Service Recognition Policy is a Mandatory Subject of Bargaining

The General Counsel contends that the Respondents' employee service recognition policy is a condition of employment and therefore is a mandatory subject over which the Respondents had an obligation to bargain. The Respondents contend that the items provided to the employees through the employee service recognition policy are gifts and therefore not a mandatory subject of bargaining over which they are required to bargain.

Section 8(d) of the Act requires that an employer bargain with a union representing its employees with respect to "wages, hours, and other terms and conditions of employment." It is clear that an employer has a duty to bargain with the union over mandatory subjects of bargaining and that its failure to do so violates Section 8(a)(5) and (1) of the Act. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679–682 (1981); *NLRB v. Katz*, 369 U.S. 736, 743 (1962). In *Postal Service*, 302 NLRB 767, 776 (1991), the Board noted that it "has broadly construed the term 'wages' in Section 8(d) of the Act to include "emoluments of value . . . which may accrue to employees out of the employment relationship." *Central Illinois Public Service Co.*, 139 NLRB 1407 (1962). In other words the term "wages" does not refer to a sum of money given for actual hours worked; rather it also encompasses numerous other forms of compensation."

The Board has found that employee award programs which are based upon length of service are mandatory subjects of bargaining over which an employer has an obligation to bargain. In *Conval-Ohio, Inc.*, 202 NLRB 85 (1973), the employer had a service award program which provided for the granting of a gold watch to employees who attain 25 years of service and granting fixed amount cash awards for employees who attained 30, 35, 40, 45, and 50 years of service. The complaint alleged only that the unilateral discontinuance of the cash awards violated Section 8(a)(5) and (1) as the union did not raise a challenge to the discontinuance of the watch award. Id. at 88.

The Board found that the cash service award program for longevity of service was a mandatory subject of bargaining and therefore the employer violated Section 8(a)(5) and (1) by unilaterally discontinuing the program. In so finding, the Board adopted the following rationale of the administrative law judge:

> The cash service awards here involved are obviously not in the same genre as a Christmas bonus as they are not in any sense gratuities because they are essentially awards or payments for staying with [the] Company for stated long periods of time. It is significant that they are not even called bonuses. They are designated and known as employees' service awards. They are, in other words, awards for longevity of service. They are the thus definitely and positively tied into the working service of the employee and as such are part of an employee's compensation for continuous service for periods in excess of a quarter of a century. The cash awards are fixed in amount, depending only upon length of service and accordingly do not vary from time to time . . . . Id. at 92.

In *Longhorn Machine Works*, 205 NLRB 685, 690 (1973), the Board found that a service reward program that involved the tangible item of a watch and not a cash award also constitutes a mandatory subject of bargaining. In that case, the Board found that an employer's unilateral discontinuance of its established practice of awarding gold watches to employees on their 10-year anniversary date of employment violated Section 8(a)(5) and (1).

The Board's decisions in *Conval-Ohio* and *Longhorn Machine Works*, supra, are consistent with the rationale utilized by the Board in later cases in determining whether a matter, such as the employee recognition award policy involved here, is a mandatory subject of bargaining or a gift, over which the employer has no obligation to bargain.

In *Benchmark Industries*, 270 NLRB 22 (1984), affd. *Amalgamated Clothing v. NLRB*, 760 F.267 (5th Cir. 1985), the Board found that the employer did not violate Section 8(a)(5) and (1) by unilaterally discontinuing its practice of giving employees Christmas hams and dinners. The Board found that those items were gifts because they "had been given to all employees regardless of their work performance, earnings, seniority, production, or other employment related factors." 270 NLRB at 22.

In *North American Pipe Corp.*, 347 NLRB 836 (2006), the same employment related factors were utilized by the Board in considering whether the employer violated Section 8(a)(5) and (1) by granting stock in the employer's initial public stock offering to unit employees without notifying and giving the union an opportunity to bargain. The Board found that the stock award was a gift and not a mandatory subject of bargaining. In so finding, the Board noted the following:

> The award was not tied to employee renumeration. The size of the award was established without regard to any employment-related factors, including work performance, wages, hours worked, seniority, or productivity. In fact, the value of the award, when announced and when vested, was determined solely by market demand for equity shares in Westlake. Further, all eligible employees at each of Westlake's facilities including the Respondent's Van Buren plant, received the same amount of stock whether they were the highest paid managers or the lowest paid hourly employees. Finally, the award was related to a one-time event-the parent corporation's IPO-with no promise or prospect of repetition. [Id. at 838]

In *North American Pipe Corp.*, 347 at 839, the Board further found that the stock award at issue in that case was not tied to an employee's seniority. In this regard, the Board noted that in order to establish a link between an award and seniority, the seniority of employees must either be (1) proportionally related to the amount received, see, e.g., *Freedom WLNE-TV, Inc.*, 278 NLRB 1293, 1296–1297 (1986) (where the formula was based in part on years of service); and *Electric Steam Radiator Corp.*, 136 NLRB 923 (1962), enfd. 321 F.2d 733 (6th Cir. 1963) (where the bonus amount was based on length of service) or (2) an award must be given in recognition of an employee obtaining a specific level of seniority, see *United Shoe Machinery Corp.*, 96 NLRB 1309, 1326–1327 (1951) (where a stock award was authorized to "recognize long continued service by employees in a substantial way.")

Finally, In *North American Pipe Corp.*, 347 at 839, the Board noted that there was no relationship between the employees' relative seniority in the amounts they received as all eligible employees received the same amount of stock. The Board also noted that the stock was not given to employees in recognition of their attaining any particular level of seniority. Accordingly, the Board concluded that the employer's unilateral award of stock to unit employees did not violate Section 8(a)(5) and (1) of the Act.

In *Phelps Dodge Mining Co.*, 308 NLRB 985, 985 fn. 3, 999–1001 (1992), the Board found that "appreciation payments" given to employees were more than token gifts. In this regard the Board found that the payments constituted significant economic benefits to eligible employees based on the employment related factors of wages and hours worked.

In the instant case, the employee service recognition policy is tied to the employment-related factor of years of employee service. It is also a recurring program that awards employees regularly when they attain certain anniversary dates of employment with the Respondents. The awards have a fixed amount of value depending upon the length of service of an employee. Thus, the value of the award selected by an employee is tied to his or her length of service. Accordingly, I find that the Respondents' employee service recognition policy constitutes a mandatory subject of bargaining and that the Board's decisions in *Phelps Dodge Mining Co.*, *Conval-Ohio*, and *Longhorn Machine Works*, support this conclusion.

I find the Board's decision in *Benchmark Industries*, supra, to be distinguishable since the dinners and hams distributed in that case were given indiscriminately to employees without regard to employment-related factors. I also find *North American Pipe Corp.*, to be distinguishable. There, the stock granted to employees was on a one-time basis without any expectation of repetition. In addition, the award of stock was not sufficiently tied to any employment related factor so as to make it a bargainable matter.

I finally consider whether the change in the employee service recognition policy was substantial and material. As a result of the January 1, 2013 change in the policy, employees were given awards at a 10-year anniversary as opposed to a 5-year anniversary. Because of that change approximately 89 employees from the Ohio Edison and FirstEnergy Generation units did not receive awards in 2013. As noted previously, the value of the items awarded ranged from approximately $35 to $315. I find the change instituted by the Respondents is substantial and material under the standards utilized by the Board. *Bell Atlantic Corp.*, 332 NLRB 1592, 1595 (2000); *Millard Processing Services*, 310 NLRB 421, 424–425 (1993). Because the Respondents instituted a substantial and material change in a mandatory subject of bargaining, they were required to give notice to their respective Unions of the change to the employee service recognition policy and give them an opportunity to bargain over it.

Whether the Respondents Presented Locals 272 and 1194 with a Fait Accompli regarding the Changes to the Employee Service Recognition Policy

The General Counsel contends that the Respondents' communications to the Unions reflected the predetermined nature of the change to the employee service recognition policy and thus the Unions were presented with a fait accompli. The Respondents contend that the Unions were not presented with a fait accompli but rather were given sufficient notice of the change to the employee service recognition policy and an opportunity to bargain.

As noted above, both Marshman and Childers were called by McNamara and Rossero, respectively, on September 18 and informed that the Respondents would be instituting a change to the employee service recognition policy on January 1, 2013. Consistent with the scripts used by the Respondents' representatives for these calls, both union representatives were also told, "Should you have any concerns or questions please do not hesitate to call." On September 19 both Unions received the employee update, again informing them of the change to the employee service recognition policy the Respondents intended to institute on January 1, 2013. Finally, on September 27 both Unions also received letters again advising them of change to the employee service recognition policy that would be instituted on January 1, 2013. The letters also included the language "If you have any questions or concerns regarding the foregoing, please do not hesitate to contact me."

The standards utilized by the Board in determining whether a union is presented with a fait accompli are set forth in *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982):

> The Board has long recognized that, where a union received timely notice that the employer intends to change a condition of employment, it must properly request that the employer bargain over the matter. To be timely, the notice must be given sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time before the implementation or because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a *fait accompli*. [Footnotes omitted.]

In the instant case, both Unions were advised by the Respondents that the employee service recognition policy would be changed approximately 3½ months before the effective date of the change. On two occasions both Unions were specifically advised that if they had any questions or concerns they should not hesitate to call the Respondents' representatives. Under these circumstances, I find that the Respondents did not present the Unions with a fait accompli. Rather, both Unions were given notice long in advance of the Respondents' intended change to the employee service recognition policy. The Respondents' representatives invited the representatives of both Local 272 and Local 1194 to contact them if they had any questions or concerns regarding the new policy. Importantly, the Respondents took no action to implement the new policy prior to January 1, 2013. Under these circumstances, I find that the Unions were not presented with a fait accompli under the standards set forth above.

The Board's decision in *WPIX, Inc.*, 299 NLRB 525 (1990), relied on by the Respondents, is supportive of this conclusion. In that case, on December 8, 1988, the employer notified its employees that effective January 1, 1989, the mileage reimbursement rate would increase from 22-1/2 cents per mile to $.24 per mile. While the union was not specifically notified by the employer of the change in the reimbursement rate, a union representative, by chance, noticed a memorandum to employees notifying them of the January 1, 1989 change in the reimbursement rate shortly before Christmas in 1988. The union never requested bargaining over the change in the mileage reimbursement rate prior to its implementation. Under these circumstances, the Board concluded that the union had failed to request bargaining over a change in working conditions of which it had actual notice and there was insufficient evidence to establish that a request to bargain would be futile. Accordingly, the Board concluded the employer did not violate Section 8(a)(5) and (1) when it implemented the proposed change in the mileage rate

In reaching the conclusion that the Unions in the instant case were not presented with a fait accompli, I find the cases relied on by the General Counsel to be distinguishable. In *Ciba-Ceigy*, supra, on April 21, 1978, the employer notified the union of changes it was going to institute changes in the attendance policy effective on May 1, 1978. The union requested time to study the new policy and also requested the statistical information relied on by the employer as the basis for its proposed changes. At a meeting held on April 27, the union had not yet received the information requested but indicated that it would file a grievance over certain provisions of the policy. In neither meeting, however, did the union specifically request bargaining. However, on April 25, 26, and 27, the employer

mailed letters to employees whom it had targeted as chronic absentees which contained warnings and set up counseling sections. Under these circumstances, particularly since the new policy had already begun to be implemented before the April 27 meeting, the Board found that the union had been presented with a fait accompli regarding the implementation of the new attendance policy. Accordingly, the Board found that the employer violated Section 8(a)(5) and (1).

In *Pontiac Osteopathic Hospital*, 336 NLRB 1021 (2001), the employer sent a letter to the union advising it that it would be changing its paid time off benefits and procedures effective on January 2, 2000, that would affect both unrepresented employees and those represented by the union. In finding that the employer's notice to the union amounted to a fait accompli the Board found that the employer's decision to have a uniform policy applicable to all employees had been made prior to the December 8, 1999 notice to the union. The Board also found the language of the memo indicating it was the intention of the employer to "unilaterally" implement the revisions to be indicative of the fact that it was a final decision about which it had no intention to bargain. In the instant case, however, it is undisputed that IBEW Local 29 and FirstEnergy Nuclear Operating Company, another subsidiary of FirstEnergy, are parties to a collective-bargaining agreement that provides for employee recognition awards on an employee's 5-year anniversary date. While the record does not contain evidence as to the circumstances under which that provision was included in the collective-bargaining agreement, obviously, at some point, a subsidiary of FirstEnergy had engaged in bargaining over the employee service recognition program.

On the basis of the foregoing, I find there is insufficient evidence in the instant case to establish that the Respondents had no intention to bargain, under any circumstances, over the proposed change to the employee service recognition policy.

Whether Respondent FirstEnergy Generation Violated Section 8(a)(5) and (1) of the Act by Unilaterally Implementing a New Employee Service Recognition Policy Regarding the Unit Represented by Local 272

As noted above, I found that Local 272 was not presented with a fait accompli regarding the change in the employee service recognition policy that Respondent FirstEnergy Generation implemented at its Shippingport, Pennsylvania facility on January 1, 2013. I turn now to the issue of whether Local 272 made a valid request to bargain over those changes.

The credited testimony establishes that when McNamara called Marshman on September 18, and notified him that FirstEnergy was going to be implementing a change to the employee service recognition policy on January 1, 2013, Marshman replied, "[O]h no you don't" and that he would have to "file a Board charge." Marshman added that "he has to come to Akron for this one." When McNamara told him to stop by her office if he needed to come to Akron, Marshman replied that he was "coming to Akron for sure." McNamara testified that she understood Marshman's reference about coming to Akron to be that he wanted to complain to Tony Alexander, First Energy's CEO about this issue. McNamara's email that she sent to her superior, Cookson, the following day indicates that she was sure that Marshman was serious about filing a charge and coming to Akron.

I find Marshman's statements to McNamara objecting to the change in the employee service recognition policy, that he was going to file a charge over the issue and that he was "coming to Akron on this one" constituted a request to bargain over Respondent First Energy Generation's announced change to the policy. The Board has long held that a request for bargaining "need take no special form, so long as there is a clear communication of meaning." *Armour & Co.*, 280 NLRB 824, 828 (1986). See also *Sunoco Inc.*, 349 NLRB 240, 245 (2007); *MSK Corp.*, 341 NLRB 43, 45 (2004).

In *Indian River Memorial Hospital*, 340 NLRB 467, 468–469 (2003), when the union discovered that the employer was going to institute a change in the hours of work for unit employees, it faxed a letter to the employer indicating that the change was a mandatory subject of bargaining. The letter further indicated that unless the employer rescinded the notice to employees advising them of the change the union would file an unfair labor practice charge. The union's letter did not specifically request bargaining. The Board found, however, applying the principles set forth above, found that there was no doubt that the union's letter constituted a bargaining request.

In the instant case, although Marshman did not specifically say to McNamara, "I want to bargain with you about this change" the statements he made to her leave little doubt, in my view, that he conveyed to her that he was interested in bargaining about the change to the employee service recognition policy. I find that McNamara's September 19 email reflects an understanding that Marshman was requesting bargaining as it indicates that she felt he was serious about coming to Akron to discuss the change to the policy.

On October 30, 2012, Local 272 filed an unfair labor practice charge alleging that Respondent FirstEnergy Generation violated Section 8(a)(5) and (1) by making a unilateral change to employee service awards on or about September 27, 2012. Obviously, this charge was filed well before the implementation date of January 1, 2013. Generally, the filing of an unfair labor practice charge does not relieve a union of its obligation to request that an employer bargain over a proposed change. *Associated Milk Producers, Inc.*, 300 NLRB 561, 563 (1990).

The Board has held, however, that if an employer has doubt about whether a request for bargaining has been made, such doubt can be eliminated when a union files an unfair labor practice charge claiming a refusal to bargain over the issue in dispute. *Trucking Water Air Corp.*, 276 NLRB 1401, 1407 (1985). In the instant case, I find that any doubt that the employer had regarding Local 272's desire to bargain over the announced change to the employee service recognition policy should have been removed by the language contained in the charge filed by Local 272.

I find *Medicenter, Mid-South Hospital*, 221 NLRB 670 (1975), relied on by the Respondents, to be distinguishable. In that case, the employer and the union met several times during the 2 days between the employer's announcement of the polygraph testing program for its employees and the implementation of that program. Although during this period the employer invited a discussion of alternative proposals from the union, the

union never requested bargaining over the testing program but rather merely objected to it and said it would never agree to it. Under these circumstances, the Board found that the employer did not violate Section 8(a) (5) and (1) by implementing the polygraph testing program. As noted above, I find that in the instant case the statements of Marshman on September 18 indicated a desire to further discuss the implementation of the changes to the employee service recognition policy. Certainly, at no time, did Respondent FirstEnergy Generation expressly invite Local 272 to present an alternative to the impending change.

Before reaching a conclusion as to whether Respondent FirstEnergy Generation violated Section 8(a)(5) and (1) with respect to the employee service recognition policy as it applied to the unit represented by Local 272, I must consider a defense applicable to the complaint allegations involving both Respondent FirstEnergy Generation and Respondent Ohio Edison. In this connection, the Respondents argue that the acquiescence of both Unions to previous unilateral changes instituted in the employee service recognition policy constitutes a waiver of the Unions' right to bargain over the change in the length of service policy involved in this case.

The Respondents argue that FirstEnergy and its predecessors made many unilateral modifications to the employee service recognition program in the units represented by the Unions over the course of 20 years without objections being raised by the Unions. In this connection, the Respondents asserted that FirstEnergy and its predecessors have previously made the following changes to the policy: adding a gift catalog, eliminating the recognition dinners; eliminating the 1-year service anniversary award; expanding the policy to include all full-time and part-time employees; changing the method of measuring an employee's anniversary for rehired employees; changing the policy of shipping an award to the local human resources manager to shipping the award to the recipient; ceasing the policy of automatically selecting an award if the employee did not select one; adding the option of selecting a gift on the Internet; changing vendors; adding certificates of appreciation and letters from the FirstEnergy CEO along with the award catalogs; and restricting the level of the catalog from which an employee could select an award.

The burden of proof to demonstrate that a waiver exists on the basis of a union's past practice of acquiescing in unilateral changes rests on the Respondent. *Caterpillar Inc.*, 355 NLRB 521, 522 (2010).

The Respondents cannot meet that burden in this case.[3] Most importantly, it is well established that a union's acquiescence in past changes regarding a bargainable subject does not constitute a waiver of the right to bargain over further changes, even when such changes are similar to those made by the employer in the past without objection. *FirstEnergy Generation Corp.*, 358 NLRB No. 96, slip op. at 1 and 10 (2012); *Caterpillar*, supra at 523. See also *Georgia Power Co.*, 325 NLRB 420, 421 (1998); *Bath Iron Works Corp.*, 302 NLRB 898, 900–901 (1991); *Johnson-Bateman Co.*, 298 NLRB 180, 187–188 (1989). Moreover, in the instant case, the change of the length of time to obtain a service award from 5 to 10 years is different in nature from prior changes to the plan. Most of the prior changes involved administrative matters involving the operation of the policy. Because the change in eligibility for an employee service award is significantly different from the relatively minor administrative changes to the policy made in the past, those prior changes do not serve as a basis to establish the Unions waived their right to bargain over the change to the eligibility period for employee service awards. *FirstEnergy Generation Corp.*, supra. The most significant change, the inclusion of part-time employees, occurred in 1999 and is therefore remote in time. Finally, the record does not establish that the Respondents and their predecessors give specific notice to the Unions regarding prior changes to the employee service recognition policy.

Based on the foregoing, I find that Respondent FirstEnergy Generation violated Section 8 (a)(5) and (1) of the Act by failing and refusing to bargain with Local 272 prior to implementing the change in the employee service recognition policy.

Whether Respondent Ohio Edison Violated Section 8(a)(5) and (1) of the Act by Unilaterally Implementing a New Employee Service Recognition Policy Regarding the Unit Represented by Local 1194

As discussed in detail above, I find that Local 1194 was not presented with a fait accompli when Childers was notified in September 2012 that FirstEnergy would be instituting a change in the employee service recognition policy effective on January 1, 2013.

After being given notice of this change, it is undisputed Local 1194 did not request bargaining over the change to the employee service recognition policy prior to its implementation on January 1, 2013, or thereafter. It was not until March 4, 2013, that Local 1194 filed an unfair labor practice charge, alleging in part that Respondent Ohio Edison unilaterally implemented the change in the employee service recognition policy in violation of Section 8(a)(5) and (1).

Under the circumstances present in this case I find that Local 1194 waived its right to bargain over the changes implemented to the employee service recognition policy on January 1, 2013. Respondent Ohio Edison met its obligation to give notice to the Local 1194 about the plans change to the employee recognition

[3] I do not agree with the Respondents that the Board's decision in *Mount Clemens General Hospital*, 344 NLRB 450, 460 (2005), supports their position regarding waiver. In the first instance, in *Mount Clemens*, the Board indicated that the only exceptions before it for the General Counsel's exceptions to the administrative law judge's order and notice regarding an information request. Id. at 450 fn. 2. It is clear therefore that no exceptions were filed to the administrative law judge's finding that the employer did not violate Sec. 8(a)(5) and (1) by making changes in its pension plan. Id. at 459–460. It is settled Board policy that review of an administrative law judge's decision is limited to the issues raised by exceptions and that in the absence of exceptions, the Board does not pass on an administrative law judge's rationale, *FES*, 333 NLRB 66 (2001). Accordingly, I do not consider the portion of the Board's decision in *Mount Clemens* relied on by the Respondents to be binding precedent. I note, moreover, that in *Mount Clemens* that was specific contract language supporting the administrative law judge's conclusion that the union waived its right to bargain over changes to the pension plan. Thus, the case is also distinguishable on its facts.

policy and afforded a reasonable opportunity to request bargaining. Since Local 1194 never requested bargaining, it waived its right to bargain over the change in the employee service recognition policy. *Associated Milk Producers*, supra at 563, and cases cited therein.

As noted above, Local 1194 did not file an unfair labor practice charge over the implementation of the change to the employee service recognition policy until March, 2013. The filing of this charge did not relieve it of its obligation to request that the Respondent bargain over the proposed change. *Associated Milk Producers*, supra at 563.

Based on the foregoing, I find that Respondent Ohio Edison did not violate Section 8(a)(5) and (1) of the Act when it implemented the change to the employee recognition policy in the Ohio Edison unit on January 1, 2013, and I shall dismiss that allegation in the complaint.

CONCLUSIONS OF LAW

1. The International Brotherhood of Electrical Workers, Local Union No. 272, AFL–CIO, CLC (IBEW, Local 272) is, and, at all material times, was the exclusive bargaining representative in the following appropriate unit:

> All production and maintenance employees, including control room operators, employees in the stores, electrical, maintenance, operations, I & T, and yard departments at Respondent FirstEnergy Generation's Bruce Mansfield plant, Shippingport, Pennsylvania facility; excluding technicians, office clerical employees and guards, other professional employees and supervisors as defined in the National Labor Relations Act, as amended.

2. By failing to bargain in good faith with IBEW, Local 272 regarding a change from 5 to 10 years in the eligibility requirement of its employee service recognition policy, implemented on January 1, 2013, Respondent FirstEnergy Generation violated Section 8(a)(5) and (1) of the Act.

3. The above unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

4. Respondent Ohio Edison has not violated the Act.

REMEDY

Having found that Respondent FirstEnergy Generation has engaged in an unfair labor practice by failing to bargain in good faith with IBEW, Local 272 regarding a change to its employee service recognition policy which it implemented on January 1, 2013, I shall order it to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act. Specifically, I shall order Respondent FirstEnergy Generation to rescind the change to the employee service recognition policy effective January 1, 2013, which changed the length of time that an employee could receive a service recognition award from every 5 years to every 10 years. I shall also order Respondent FirstEnergy Generation to bargain with Local 272 before implementing any further changes in the employee service recognition policy. I shall also order Respondent FirstEnergy Generation to make whole each employee in the bargaining unit at its Shippingport, Pennsylvania facility, who would have been eligible to receive an employee service recognition award based upon 5 years of service, and who did not receive such an award because of the change in the eligibility policy effective January 1, 2013, by granting such employees an employee service recognition award.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, FirstEnergy Generation Corp., Shippingport, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to bargain in good faith with the International Brotherhood of Electrical Workers, Local Union No. 272, AFL–CIO, CLC (IBEW, Local 272) as the exclusive bargaining representative of the employees in the following appropriate unit regarding the employee service recognition policy. The unit is:

> All production and maintenance employees, including control room operators, employees in the stores, electrical, maintenance, operations, I & T, and yard departments at Respondent FirstEnergy Generation's Bruce Mansfield plant, Shippingport, Pennsylvania facility; excluding technicians, office clerical employees and guards, other professional employees and supervisors as defined in the National Labor Relations Act, as amended.

(b) Unilaterally changing the employee service recognition policy by changing the length of time required for an employee in the bargaining unit described above to receive an employee service recognition award from every 5 years to every 10 years.

(c) 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) On request of IBEW, Local 272, rescind the change to the employee service recognition policy regarding the 10-year length of service requirement that was instituted on January 1, 2013, and restore the 5-year length of service requirement that existed before the change was instituted.

(b) On request, bargain with IBEW, Local 272 as the exclusive representative of the employees in the appropriate unit concerning any change to the employee service recognition policy.

(c) Make whole all employees in the bargaining unit who were not granted an employee service recognition award because of the change in the length of service requirement instituted on January 1, 2013, and who would have received such an award based upon 5 years length of service, by granting such employees an employee service recognition award.

(d) Within 14 days after service by the Region, post at its facility in Shippingport, Pennsylvania, copies of the attached

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 6, 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. I n addition to physical posting of paper notices, the 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. 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 January 1, 2013.

(e) Within 21 days after service by the Region, file with the Regional Director 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. January 17, 2014.

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 fail or refuse to bargain in good faith with the International Brotherhood of Electrical Workers, Local Union No. 272, AFL–CIO, CLC (IBEW Local 272) as the exclusive bargaining representative of the employees in the following appropriate unit regarding the employee service recognition policy. The unit is:

> All production and maintenance employees, including control room operators, employees in the stores, electrical, maintenance, operations, I & T, and yard departments at Respondent First Energy Generation's Bruce Mansfield plant, Shippingport, Pennsylvania facility; excluding technicians, office clerical employees and guards, other professional employees and supervisors as defined in the National Labor Relations Act, as amended.

WE WILL NOT unilaterally change the employee service recognition policy by changing the length of time required for an employee in the bargaining unit described above to receive a service award from every 5 years to every 10 years

WE WILL NOT 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.

WE WILL, on request of IBEW, Local 272, rescind the change to the employee service recognition policy regarding the 10-year length of service requirement that was instituted on January 1, 2013, and restore the 5-year length of service requirement that existed before the change was instituted.

WE WILL, on request, bargain with IBEW, Local 272 as the exclusive representative of the employees in the bargaining unit concerning any change to the employee service recognition policy.

WE WILL make whole all employees in the bargaining unit who were not granted an employee service recognition award because of the change in the length of service requirement instituted on January 1, 2013, and who would have received such an award based upon 5 years length of service, by granting such employees an employee service recognition award.

FIRSTENERGY GENERATION CORP.

[5] 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."