

No. 15-60063

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

DIXIE ELECTRIC MEMBERSHIP CORPORATION

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW
AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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STATEMENT REGARDING ORAL ARGUMENT

This case involves the application of settled legal principles to straightforward facts. Specifically, the Board found that DEMCO unlawfully removed certain classifications of employees and their work from the existing bargaining unit. DEMCO asserts that those individuals are supervisors, but its contention has no bearing on the issues before the Court. Accordingly, in the Board's view, oral argument would not be of material assistance to the Court. If, however, the Court decides to hear argument, the Board requests that it be allowed to participate.

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JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Dixie Electric Membership Corporation (“DEMCO”) to review, and the cross-application of the National Labor Relations Board to enforce, the Board’s Order issued against DEMCO in *Dixie Electric Membership Corporation*, 361 NLRB No. 107 (Nov. 19, 2014).

(D&O II at RE 17-18.)¹ The Board had jurisdiction over the unfair-labor-practice proceeding below under Section 10(a) (29 U.S.C. § 160(a)) of the National Labor Relations Act, as amended (“the Act,” 29 U.S.C. §§ 151, et seq.). The Board’s Order is final with respect to all parties.

DEMCO petitioned for review on January 29, 2015; the Board cross-applied for enforcement on February 10. The filings were timely; the Act imposes no time limit on the initiation of review or enforcement proceedings. The Court has jurisdiction pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), because the underlying unfair labor practices occurred in Baton Rouge, Louisiana.

STATEMENT OF THE ISSUE

Whether substantial evidence supports the Board’s finding that DEMCO violated Sections 8(a)(5) and (1), and 8(d) of the Act by unilaterally removing the Chief Systems Operator and Systems Operator classifications from the bargaining unit.

¹ “D&O II” references are to the Board’s November 19, 2014 Decision and Order, located at pp. 17-18 of DEMCO’s Record Excerpts (“RE”). “D&O I” references are to the Board’s August 31, 2012 Decision and Order, reported at 358 NLRB No. 120 and located at RE 19-26. “Tr.” references are to the transcript of the hearing before the administrative law judge; “GCX” references are to exhibits introduced by the General Counsel at that hearing. “Br.” refers to DEMCO’s opening brief. References preceding a semicolon are to Board findings; those following, to supporting evidence.

STATEMENT OF THE CASE

After investigation of an unfair-labor-practice charge filed by the International Brotherhood of Electrical Workers, Local Union 767 (“the Union”), the Board’s General Counsel issued a complaint against DEMCO, alleging violations of Sections 8(a)(5) and (1), and 8(d) of the Act (29 U.S.C. § 158(a)(5) and (1), and § 158(d)). (D&O I at RE 19.) After conducting a hearing, an administrative law judge issued a decision finding that DEMCO acted unlawfully by unilaterally eliminating the Chief Systems Operator and Systems Operator positions from the unit, thus altering the unit scope without the Union’s consent. The judge alternatively found that DEMCO unlawfully failed to bargain in good faith with the Union over the decision to transfer such work from the unit, and the effects of that decision. (D&O I at RE 24.) Lastly, the judge found that DEMCO’s unit clarification petition, filed 4-plus months into the term of a new collective-bargaining agreement with the Union, was untimely.

After DEMCO filed exceptions to the judge’s decision, the Board (Members Hayes, Griffin, and Block) issued a Decision and Order on August 31, 2012, affirming the judge’s rulings, findings, and conclusions. *See Dixie Elec. Membership Corp.*, 358 NLRB No. 120 (“2012 Decision and Order”) (D&O I at RE 19.) DEMCO petitioned this Court for review of the 2012 Decision and Order, and the Board cross-applied for enforcement. On October 23, 2013, after the

Board had filed the record, the Court stayed further proceedings in that case pending the Supreme Court's review of *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), which raised questions concerning the validity of certain recess appointments to the Board.

On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which held that three recess appointments to the Board in January 2012, including those of Members Griffin and Block, were invalid under the Recess Appointments Clause. Subsequently, this Court, granting the Board's motion, vacated the Board's 2012 Decision and Order, and remanded the case to the Board for further proceedings. (D&O II at RE 17.)

On November 19, 2014, the Board (Members Hirozawa, Johnson, and Schiffer) issued the Decision and Order (361 NLRB No. 107) now before the Court. (D&O II at RE 17-18.) The Board explained that after considering de novo the administrative law judge's decision and the record in light of the parties' exceptions and briefs, as well as the vacated 2012 Decision and Order, it agreed with the rationale set forth there. (D&O II at RE 17.) Accordingly, the Board affirmed the judge's rulings, findings, and conclusions, to the extent and for the reasons stated in that decision, which the Board incorporated by reference. The Board also adopted the judge's recommended Order, as modified. (D&O II at RE 17.)

I. THE BOARD'S FINDINGS OF FACT

A. DEMCO Unilaterally Eliminates the Chief Systems Operator and Systems Operator Positions from the Bargaining Unit

DEMCO operates an electrical power cooperative that provides electricity to residential and commercial consumers. DEMCO and the Union have negotiated a series of collective-bargaining agreements over a period spanning more than 40 years. Relevant to this case, the parties executed a contract effective from February 28, 2007, to February 28, 2011, that included a unit expressly covering, among other classifications, the Chief Systems Operator (“CSO”) and Systems Operator (“SO”) positions. (D&O I at RE 19; GCX3(Exhibit A).) The CSO and SO employees are primarily dispatchers who assign field personnel to address outages and other problems. They monitor and control certain electrical systems through various computer applications and other methods. They also analyze outages, prioritize work assignments, and maintain logs and records. (D&O I at RE 20; Tr. 52-55, 60-61.)

On November 17, 2010, prior to the expiration of the parties’ collective-bargaining agreement, DEMCO’s Chief Executive Officer (“CEO”) met with the Union’s Business Manager and informed him that DEMCO was going to transfer the CSO and SO employees and their work outside of the bargaining unit. The CEO’s statements were echoed in a letter, contemporaneously given to the Union during the meeting, which stated that the CSO and SO positions “will be

eliminated and new management positions having the same titles will be utilized,” and that the current employees “will be promoted” into the positions. (D&O I at RE 20; Tr.124, GCX6.) During the meeting, the Union’s representative objected to DEMCO’s decision by informing the CEO that it was going to have to file unfair labor practice charges; the CEO replied that he understood. (D&O I at RE 20; Tr. 60-68, 127-29.) Prior to notifying the Union, DEMCO, via letters and verbally by its Vice President of Engineering and Operations, informed the CSO and SO employees that, “effective December 1, 2010, your position will be changed to a management position. Your old position will no longer exist.” (D&O I at RE 20; Tr.62-64, GCX7-9.)

Even though a contract covering the CSO and SO classifications was in force, DEMCO never bargained with the Union or sought its consent to remove the these positions. DEMCO never solicited the Union’s input or requested proposals regarding the removal of work from the unit. As the CEO and Vice President indicated, DEMCO removed the CSO and SO positions from the bargaining unit around December 1. (D&O I at RE 21; Tr. 64-66.)

B. Following DEMCO’s Elimination of the CSO and SO Positions from the Bargaining Unit, and Its Transfer of the Work from the Unit, Employees in Those Positions Continue Performing the Same Duties; DEMCO Belatedly Files a Unit Clarification Petition

After DEMCO moved the CSO and SO positions out of the bargaining unit, the same employees continued to perform the same duties that they had previously

performed. They continued to work out of the same control room. The technical aspects of the job remained the same, and they processed outages the same as they did in the past. (D&O I at RE 21; Tr. 60-66.)

Following the removal, DEMCO and the Union met in January and February of 2011 to negotiate a successor collective-bargaining agreement to the one set to expire on February 28. Their efforts resulted in a new contract, which ran from February 28, 2011 to February 28, 2015. (D&O I at RE 21; Tr. 167-68, GCX14-16, 18.) The parties, however, did not resolve their CSO and SO dispute. Instead, they signed an agreement noting that the Union did not agree to relinquish representation of the CSO and SO employees, and that the parties would abide by “a final legal determination . . . on any charge or suit” regarding their coverage under the collective-bargaining agreement. (D&O I at RE 21; GCX16.)

On July 21, 2011, more than four months after the successor collective-bargaining agreement took effect,² DEMCO filed a unit clarification petition. The petition sought to remove the CSOs and SOs from the unit specified in the agreement, in effect by asking the Board to conduct a representation proceeding on that question. (D&O I at RE 23; GCX1(a) and 1(k).)

² The administrative law judge found that, although a date certain was difficult to establish, the parties executed the agreement sometime between February 28 and March 22, 2011. (D&O I at RE 23 n.12.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On November 19, 2014, the Board (Members Hirozawa, Johnson, and Schiffer) issued its Decision and Order, finding, in agreement with the administrative law judge, that DEMCO violated Section 8(a)(5) and (1), and 8(d) of the Act (29 U.S.C. § 158(a)(5), and (1), and §158(d)) by unilaterally eliminating the CSO and SO positions from the unit, thus altering the unit scope without the Union's consent. (D&O II at RE 17, D&O I at RE 19.) The Board majority alternatively found that DEMCO violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with the Union about the decision to transfer such work from the unit, and its effects on unit employees.³ (D&O II at RE 17, D&O I at RE 19, 24.)

Adopting the judge's recommended Order as modified, the Board directed DEMCO to cease and desist from engaging in the above-described unfair labor practices and from, in any like or related manner, interfering with its employees' Section 7 rights. Affirmatively, the Board's Order directs DEMCO to: rescind the December 1, 2010 elimination of the unit CSO and SO positions, and consequent transfer of the work performed by such employees outside of the bargaining unit; recognize the Union as the exclusive collective-bargaining representative of the

³ Member Johnson found it unnecessary to pass on the alternative theory that DEMCO violated the Act by unilaterally transferring unit work from the bargaining unit. (D&O II at RE 17 n.1.)

employees occupying the CSO and SO positions and, upon request, bargain with the Union regarding those employees' wages, hours, and other terms and conditions of employment; apply the existing collective-bargaining agreement between the Union and DEMCO to employees occupying the nonunit CSO and SO positions, in the absence of any agreement to the contrary; notify and, upon request, bargain with the Union in good faith before transferring any work from unit employees to nonunit employees; make whole any unit employees for any loss of wages and benefits they may have suffered as a result of DEMCO's unlawful actions; and to post remedial notices. (D&O II at RE 17, D&O I at RE 19, 24-25.) Lastly, the Board ordered the dismissal of DEMCO's unit clarification petition dated July 21, 2011 as untimely. (D&O II at RE 17, D&O I at RE 25.) The Board dismissed the petition without prejudice to DEMCO's right to re-file it at an appropriate later date. (D&O II at RE 17, D&O I at RE 24 n.20.)

SUMMARY OF ARGUMENT

This case involves DEMCO's unilateral midterm change to its collective-bargaining agreement with the Union. Under settled principles, DEMCO's actions violated the Act. To begin, it is unlawful for an employer to unilaterally modify the scope of an existing bargaining unit. The facts plainly demonstrate that this occurred. DEMCO and the Union had a contract that specifically recognized a bargaining unit including the CSO and SO classifications. The unit was clearly

defined, and under Board law, any attempts to modify its scope would thus require the Union's or the Board's consent. Instead of obtaining consent, however, DEMCO simply announced that it was eliminating the classifications from the unit and transferring the work to nonunit positions. Shortly thereafter, it implemented the changes. On these facts, the Board reasonably found that DEMCO violated Section 8(a)(5) and (1) of the Act by unilaterally modifying the scope of the unit. Additionally, by modifying the collective-bargaining agreement during its term without the Union's consent, DEMCO independently violated Section 8(d) of the Act. DEMCO does not contest the Board's application of settled principles to find that an employer cannot unilaterally modify the scope of an established, agreed-upon unit. Instead, DEMCO simply argues that it made the CSO and SO positions supervisory, a contention that misses the point. Even if they were supervisors, that would not justify DEMCO's unilateral changes to the unit's scope and the collective-bargaining agreement.

Alternatively, the Board found that DEMCO failed to bargain with the Union over the decision to transfer work out of the unit and the effects of that decision. DEMCO errs in asserting that it was privileged to act unilaterally because the Union waived its right to bargain. As the Board reasonably found, because DEMCO presented its decision as a *fait accompli*, it would have been futile for the Union to request bargaining. And DEMCO failed to meet its burden

of showing that the Union, by assenting to a management rights clause in the parties' collective-bargaining agreement, clearly and unmistakably waived its right to bargain over the transfer of work. Thus, substantial evidence supports the Board's finding that DEMCO violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union over its decision to transfer work from the unit and the effects of that decision.

Finally, the Board did not abuse its discretion in dismissing DEMCO's untimely unit clarification petition without prejudice to re-filing at a later appropriate time. To prevent disruption of established bargaining relationships, the Board will process such petitions only if they are filed shortly before the parties' agreement is due to expire. Although a limited exception permits an employer to file a petition "shortly after" the execution of a collective-bargaining agreement, DEMCO did not do that. Instead, it waited longer than Board precedent allowed. The Board therefore properly dismissed the petition.

STANDARD OF REVIEW

When the Board engages in the "difficult and delicate responsibility of reconciling conflicting interests of labor and management . . . , the balance struck by the Board is 'subject to limited judicial review.'" *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975) (quoting *NLRB v. Teamsters Local 449*, 353 U.S. 87, 96 (1957)). In particular, "classification of bargaining subjects as 'terms or conditions

of employment’ is a matter concerning which the Board has special expertise,” and its judgment is entitled to considerable deference. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1979) (quoting *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 685-86 (1965)); *see also Local 2179, United Steelworkers of Am. v. NLRB*, 822 F.2d 559, 566 (5th Cir. 1987) (construing and applying the duty to bargain is a task at the heart of the Board’s function). As such, the Board’s construction of the Act should be upheld if it is “reasonably defensible.” *United Steelworkers*, 822 F. 3d at 566.

This Court recognizes “the Board’s expertise in labor law” and will “defer to plausible inferences [the Board] draws from the evidence, even if [the Court] might reach a contrary result were [it] deciding the case de novo.” *NLRB v. Thermon Heat Tracing Servs., Inc.*, 143 F.3d 181, 185 (5th Cir. 1998) (quotations omitted). The Board’s factual findings are conclusive “if supported by substantial evidence on the record considered as a whole.” *Mobil Exploration & Producing U.S. Inc. v. NLRB*, 200 F.3d 230, 237 (5th Cir. 1999) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951)). As this Court has observed, “[o]nly in the most rare and unusual cases will an appellate court conclude that a finding of fact made by the . . . Board is not supported by substantial evidence.” *Merchants Truck Line v. NLRB*, 577 F.2d 1011, 1014 n.3 (5th Cir. 1978).

Finally, this Court gives the Board broad discretion in resolving matters relating to unit clarification petitions. *NLRB v. Magna Corp.*, 734 F.2d 1057, 1061 (5th Cir. 1984) (citing *Boire v. Int'l Brotherhood of Teamsters*, 479 F.2d 778, 797 (5th Cir. 1973)). This Court will defer to the Board's resolution of the issue as long as the Board did not act in an "arbitrary and capricious" manner. *NLRB v. Baton Rouge Waterworks Co.*, 417 F.2d 1065, 1067 (5th Cir. 1969).

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT DEMCO VIOLATED SECTION 8(a)(5) AND (1), AND 8(d) OF THE ACT BY UNILATERALLY REMOVING THE CHIEF SYSTEMS OPERATOR AND SYSTEMS OPERATOR CLASSIFICATIONS FROM THE BARGAINING UNIT

A. DEMCO Violated Section 8(a)(5) and (1) of the Act by Altering the Scope of the Bargaining Unit Without the Union's Consent

1. Applicable principles

It is well settled that a party cannot unilaterally implement a change to the "scope of the employees' bargaining unit." *Local 666, Int'l Alliance of Theatrical Stage Emps. v. NLRB*, 904 F.2d 47, 50 (D.C. Cir. 1990); *see also Hill-Rom Co., Inc. v. NLRB*, 957 F.2d 454, 457 (7th Cir. 1992); *Newspaper Printing Corp. v. NLRB*, 625 F.2d 956, 963 (10th Cir. 1980); *NLRB v. Operating Eng'rs*, 532 F.2d 902, 907 (3d Cir. 1976). An employer therefore violates Section 8(a)(5) and (1) of the Act by modifying the scope of the unit without the approval of the union or the

Board.⁴ *See, e.g., Wackenhut Corp.*, 345 NLRB 850, 852 (2005); *Beverly Enters.*, 341 NLRB 296, 307 (2004).

The reasons why an employer may not force a change in bargaining unit composition are “as simple as they are fundamental.” *Boise Cascade Corp. v. NLRB*, 860 F.2d 471, 475 (D.C. Cir. 1998). “[I]f an employer could vary unit descriptions at its discretion, it would have the power to sever the link between a recognizable group of employees and its union[,] . . . in turn[,] . . . undermining a basic tenet of union recognition . . . and greatly complicating coherence in the negotiating process.” *Id.*; accord *Douds v. Longshoremen ILA*, 241 F.2d 278, 282 (2d Cir. 1957); *see also Hill-Rom Co.*, 957 F.2d at 457; *Newport News Shipbuilding and Dry Dock Co. v. NLRB*, 602 F.2d 73, 76 (4th Cir. 1979); *Hess Oil & Chem. Corp. v. NLRB*, 415 F.2d 440, 445 (5th Cir. 1969).

Once an appropriate bargaining unit has been established, “the statutory interest in maintaining stability and certainty in bargaining obligations requires adherence to that unit in bargaining.” *Shell Oil Co.*, 194 NLRB 988, 995 (1972), *enforced sub nom. OCAW v. NLRB*, 486 F.2d 1266, 1268 (D.C. Cir. 1973); *see*

⁴ Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees.” Section 8(a)(1) (29 U.S.C. § 158(a)(1)) prohibits an employer from “interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise” of their statutory rights. An employer who violates Section 8(a)(5) also commits a derivative violation of Section 8(a)(1). *Sara Lee Bakery, Inc. v. NLRB*, 514 F.3d 422, 426 n.3 (5th Cir. 2008) (citations omitted).

also Newspaper Printing Corp., 625 F.2d at 963-64. Allowing the alteration of existing units only through mutual consent or through the Board's administrative processes encourages rather than disrupts collective bargaining. *Douds*, 241 F.2d at 282. On the other hand, when an employer, over the objection of the union, demands a change in the bargaining unit, the "demand interferes with the required bargaining 'with respect to rates of pay, wages, hours and terms and conditions of employment' in a manner excluded by the Act." *Id.* at 283. Accordingly, once a specific job has been included within the scope of the bargaining unit, the employer cannot unilaterally remove or modify that position without first securing the consent of the union or the Board. *Hill-Rom Co.*, 957 F.2d at 457; *NLRB v. United Techs. Corp.*, 884 F.2d 1569, 1572 (2d Cir. 1989).

2. DEMCO violated the Act by unilaterally removing the CSOs and SOs from the bargaining unit

Substantial evidence supports the Board's finding (D&O I at RE 21) that "DEMCO unlawfully modified the unit's scope, when it eliminated the unit CSO and SO positions, and converted the incumbents into nonunit workers." Indeed, the basic facts of the case are not in dispute. As the Board pointed out, the CSO and SO positions were specifically and unambiguously included as part of the recognized unit in the parties' collective-bargaining agreement that was set to expire on February 28, 2011. (D&O I at RE 19; GCX3(see p.3 incorporating Exhibit A).) On December 1, 2010, before the agreement expired, DEMCO

removed the positions from the bargaining unit, without obtaining the Union's or the Board's consent. It follows that DEMCO, by unilaterally modifying the scope of the agreed-upon unit, violated Section 8(a)(5) and (1) of the Act. *See Mt. Sinai Hosp.*, 331 NLRB 895, 895 n.2, 907-08 (2000) (unlawful to unilaterally reclassify unit sous chef employees as nonunit assistant culinary manager positions), *enforced*, 8 F. App'x 111 (2d Cir. 2001); *Facet Enters.*, 290 NLRB 152, 159-60 (1988) (elimination of classification resulted in unlawful reduction in the composition and scope of established bargaining unit), *enforced in relevant part*, 907 F.2d 963, 975-76 (10th Cir. 1990); *see also Holy Cross Hosp.*, 319 NLRB 1361, 1361 n.2 (1995) (unilateral elimination of unit house supervisor position found unlawful where specific job had been included in scope of the unit).

Before the Court, DEMCO does not attack the principle that it is unlawful to modify the scope of the bargaining unit without the union's consent; instead it argues at length (Br.10-24) that the CSO and SO positions were supervisory. But the Board did not make any finding as to whether these employees were statutory supervisors because the Board did not need to do so. (D&O I at RE 23 n.17.) As the Board found (D&O I at RE 21), even if the disputed positions were supervisory, DEMCO would still not be privileged to alter the unit's scope unilaterally. The Board has consistently held that, where parties to a collective-bargaining relationship have agreed to include supervisors in a bargaining unit, it

will order the application of the terms of the collective-bargaining agreement to such supervisors. *Wackenhut Corp.*, 345 NLRB 850, 852-53 (2005); *Mt. Sinai Hosp.*, 331 NLRB 895, 895 n.2 (2000); *Gratiot Cmty. Hosp.*, 312 NLRB 1075, 1075 n.2 (1993); *Ariz. Elec. Power*, 250 NLRB 1132, 1132 (1961). In its brief, DEMCO ignores these cases and completely fails to address the Board's rationale for finding that the scope of the unit was unlawfully modified. DEMCO misses the point by arguing (Br.23-24) that the employees took on supervisory roles, and it offers nothing more than general assertions without legal support for its position that, if the employees are supervisors, it was privileged to modify the scope of the unit unilaterally.

DEMCO also errs in relying (Br.14-16) on *Entergy Gulf States, Inc., v. NLRB*, 253 F.3d 203, 205-08 (5th Cir. 2001). There, the question whether certain employees were statutory supervisors was properly before the Court because in the underlying agency case, the Board had conducted a representation proceeding addressing the issue. And the representation proceeding took place only because the employer had timely filed a unit clarification petition immediately prior to expiration of the parties' collective-bargaining agreement. By contrast, in the instant case, there was no underlying representation proceeding because, as shown below at pp. 29-31, DEMCO failed to file a timely unit clarification petition that could have initiated a representation proceeding before the Board.

Accordingly, contrary to DEMCO's apparent suggestion, *Entergy* is inapplicable here. The case most certainly does not stand for the proposition that an employer can unilaterally modify the scope of an established bargaining unit without the union's consent or the Board's imprimatur. Under settled Board precedent, even if the CSOs and SOs were supervisors, DEMCO was bound to honor its voluntary agreement to include them in the unit, and DEMCO violated Section 8(a)(5) and (1) of the Act by unilaterally reneging on its agreement.

B. DEMCO Violated Section 8(d) of the Act by Modifying the Existing Collective-Bargaining Agreement During Its Term

The Board also found (D&O I at RE 24 n.20) that DEMCO, by unilaterally eliminating the CSO and SO positions, violated the proviso to Section 8(d) of the Act (29 U.S.C. § 158(d)), which imposes specific, non-waivable obligations on "the party desiring . . . termination or modification" of a collective-bargaining agreement during its term. Among other requirements, a party seeking mid-term contract modifications must notify the Federal Mediation and Conciliation Service ("FMCS") within 30 days after timely notifying the union, and continue in full force and effect all the terms and conditions of the existing contract for a period of 60 days after such notice is given or until the expiration date of such contract, whichever occurs later. 29 U.S.C. § 158(d)(1-4). Moreover, during the effective period of a collective-bargaining agreement, "the employer commits an unfair labor practice if it changes . . . [a] condition *without the permission of the union.*"

Standard Fittings Co. v. NLRB, 845 F.2d 1311, 1315 (5th Cir. 1988) (emphasis added). As *Standard Fittings* further explains (*id.*), this is so because:

Section 8(d) of the [Act] prohibits either party from insisting upon a modification of the agreement during its term. While a contract is in force, Section 8(d) permits the union to refuse, even unreasonably, an employer's proposal to modify the terms established by the collective bargaining agreement.

Even if DEMCO had complied with the notification requirements noted above (and there is no evidence that it notified the FMCS), it still violated the proviso to Section 8(d) by failing to obtain the Union's consent before modifying the collective-bargaining agreement, and by failing to continue the agreement's terms in full force and effect until it expired on February 28, 2011. DEMCO's unilateral action, which rendered the agreement inoperative with respect to the CSOs and SOs, affected a range of their terms and conditions of employment. In its brief, DEMCO ignores Section 8(d), and provides no argument that would overcome the Board's finding. Moreover, its waiver arguments are unavailing. Absent an express reopener in the contract, not present here, "neither the union nor the employer ever waives the statutory right to refuse to consider, or to continue to consider, changes in the collective bargaining agreement while the agreement is still in force." *Standard Fittings*, 845 F.2d at 1315 (citations omitted).

C. Alternatively, DEMCO Violated Section 8(a)(5) and (1) of the Act by Unilaterally Transferring Work Out of the Unit

1. Applicable principles

It is well settled that an employer violates Section 8(a)(5) and (1) of the Act “if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment.” *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) (citing *NLRB v. Katz*, 369 U.S. 736, 743-48 (1962)); accord *Strand Theatre of Shreveport Corp. v. NLRB*, 493 F.3d 515, 520-21 (5th Cir. 2007). Courts have long held that “the allocation of work to a bargaining unit is a ‘term and condition of employment’” under the Act. *NLRB v. Seaport Printing & Ad Specialties, Inc.*, 589 F.3d 812, 816 (5th Cir. 2009) (quoting *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 676 F.2d 826, 831 (D.C. Cir. 1982)); *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 311 (D.C. Cir. 2003); *Citizens Publ. & Printing Co. v. NLRB*, 263 F.3d 224, 233 (3rd Cir. 2001). As a result, “an employer may not unilaterally attempt to divert work away from a bargaining unit without fulfilling his statutory duty to bargain.” *Road Sprinkler Fitters*, 676 F.2d at 831.

An employer that does unilaterally change terms and conditions of employment without notifying and bargaining with the union must show that it was exempted from the duty to bargain. See *Cypress Lawn Cemetery Ass’n*, 300 NLRB 609, 628 (1990) (employer must demonstrate why its refusal to bargain was

privileged); *see also Van Dorn Plastic Mach. Co. v. NLRB*, 881 F.2d 302, 308 (6th Cir. 1989) (“It is an accepted proposition of law that proof on matters which relate to justification for the employer’s actions rest with the employer.”).

As discussed below, the Board found that DEMCO unlawfully transferred the CSO and SO work out of the unit without bargaining with the Union. Because DEMCO presented its decision to remove the CSO and SO classifications as a fait accompli, it would have been futile for the Union to request bargaining. The Board, thus, reasonably rejected DEMCO’s argument that the Union waived its right to bargaining by its inaction. Furthermore, the Board reasonably rejected DEMCO’s claim that the Union, by assenting to a management rights clause, clearly and unmistakably waived its right to bargain over DEMCO’s transfer of work from the unit.

2. DEMCO unlawfully transferred work out of the unit without bargaining

As the Board found, even assuming *arguendo* that DEMCO did not improperly modify the scope of the unit by reclassifying the CSO and SO positions, its unilateral action was still unlawful because its transfer of the work away from the unit directly affected employees’ terms and conditions of employment. (D&O I at RE 22.) It is settled that the decision to transfer unit work to nonunit personnel, and the effects of such a decision, are mandatory subjects of bargaining. *Seaport Printing*, 589 F.3d at 816, *enforcing* 351 NLRB 1269, 1269-

71 (2007); *NLRB v. Solutia, Inc.*, 699 F.3d 50, 60 (1st Cir. 2012); *Road Sprinkler Fitters*, 676 F.2d at 831; *Hampton House*, 317 NLRB 1005, 1005 (1995).

Accordingly, prior to initiating any changes, DEMCO was required to bargain with the Union and afford it a reasonable opportunity for counter arguments or proposals. *Seaport Printing*, 589 F.3d at 816.

As the Board found (D&O I at RE 22), DEMCO instead presented its decision as a *fait accompli*. (D&O I at RE 20.) The Vice President of Engineering and Operations admitted that DEMCO made its decision in August, months before DEMCO notified the Union. He also testified that he told CSO and SO employees about their impending transfer a week before DEMCO informed the Union. (D&O I at RE 20; Tr.62-63.) Moreover, in its November 17 letter notifying the Union of its decision, DEMCO unequivocally described its planned course of action as a final decision that it had already made. DEMCO did not invite bargaining or input from the Union in any manner. (D&O I at RE 22; GCX6.)⁵

Even if, as DEMCO asserts (Br.10-24), it converted the CSO and SO positions to supervisory classifications, that unilateral action would not relieve it of its obligation to bargain over the change. As the Board explained (D&O I at RE 22), when an employer promotes an employee to a supervisory position, removing

⁵ DEMCO's November 17 letter to the Union stated that effective December 1, the CSO and SO positions "*will be* eliminated and new management positions having the same titles *will be* utilized." (D&O I at RE 20; GCX6 (emphasis added).)

the work from the bargaining unit, and the new supervisor continues to perform former bargaining unit work, the employer makes a change in terms and conditions of employment that triggers a bargaining obligation. *Hampton House*, 317 NLRB 1005, 1005 (1995). As shown above, the record amply supports the Board's finding that the CSOs and SOs continued to perform the same functions that they performed as unit employees. Such changes to the unit's terms and conditions of employment require bargaining under the Act. *Id.*

The facts of this case cannot be meaningfully distinguished from the many similar cases in which the Board has found an unlawful unilateral transfer of bargaining unit work when promoted employees continue to perform the same tasks they performed before their promotions out of the unit. For example, in *Hampton House*, the Board found an unlawful transfer of bargaining unit work when the employer, without bargaining, promoted some of its nurses to the position of nurse supervisor and the nurse supervisors performed the same patient care tasks as before. *Id.*; see also *Luther Manor Nursing Home*, 270 NLRB 949, 959-60 (1984) (unlawful transfer where LPNs promoted to supervisory nurse status continued same LPN duties), *enforced*, 772 F.2d 421, 424 (8th Cir. 1985); *Lutheran Home of Kendallville, Ind.*, 264 NLRB 525, 536-37 (1982) (same); *Fry Foods, Inc.*, 241 NLRB 76, 88 (1979) (violation where group leaders whom employer promoted to supervisor continued bargaining unit work), *enforced*, 609

F.2d 267, 270 (6th Cir. 1979); *Kendall College*, 228 NLRB 1083, 1088 (1977) (division chairs, who were reclassified as supervisory division director positions, unlawfully continued bargaining unit work), *enforced*, 570 F.2d 216 (7th Cir. 1978). Consistent with numerous other cases, the Board here reasonably found that DEMCO violated Section 8(a)(5) and (1) of the Act by unilaterally transferring the CSO and SO work out of the bargaining unit. (D&O I at RE 22.)

3. The Board correctly determined that the Union did not waive its right to bargain over DEMCO’s transfer of work

a. DEMCO presented its decision to transfer the CSO and SO positions out of the bargaining unit as a *fait accompli*, thus relieving the Union of an obligation to request bargaining

DEMCO errs in arguing (Br.28-35) that the Union waived its rights by failing to request bargaining over the decision to remove the CSO and SO positions from the unit. It is well-settled that an employer must inform a union of its proposals under circumstances which at least afford a reasonable opportunity for counter arguments or proposals. *NLRB v. Seaport Printing & Ad Specialties, Inc.*, 589 F.3d 812, 816 (5th Cir. 2009). And to prove that the Union waived its bargaining rights, the employer must show that it presented the union with a timely and *meaningful* notice of its proposal that afforded a reasonable opportunity for counter arguments or proposals. *Id.* (citing *Strand Theatre of Shreveport Corp. v. NLRB*, 493 F.3d 515, 520-21 (5th Cir. 2007) (unlawful to present union with a “*fait accompli* . . . unilaterally inform[ing] the [u]nion that [a] position had already been

eliminated”)); *see also Intersystems Design & Tech. Corp.*, 278 NLRB 759, 759-60 (1986) (quoting *Gulf States Mfg., Inc. v. NLRB*, 704 F.2d 1390, 1397 (5th Cir. 1983)); *Ciba Geigy Pharm. Div.*, 264 NLRB 1013, 1017-18 (1982), *enforced*, 722 F.2d 1120 (3d Cir. 1983). A union has no duty to request bargaining where management resolutely communicates that its decision is a *fait accompli*. *See, e.g., Asher Candy*, 348 NLRB 993, 996 (2006), *enforced*, 258 F. App’x. 334 (D.C. Cir. 2007); *Westinghouse Elec. Corp.*, 313 NLRB 452, 453 (1993).

As discussed above, pp. 22, DEMCO presented its decision to transfer the CSO and SO work outside of the unit to the Union on November 17 as a “done deal.” (D&O I at RE 20, 22.) In these circumstances, the Board reasonably found that the Union did not waive its rights by failing to request bargaining.⁶

DEMCO errs in relying (Br.9) on *NLRB v. Pinkston-Hollar Construction Services, Inc.*, 954 F.2d 306 (5th Cir. 1992), for the general principle that a union has a duty to request bargaining following an employer’s notice of a desired

⁶ DEMCO wrongly conflates (Br.28-29, 32-34) notice to the Union with its earlier notice to the employees. *See Bridon Cordage, Inc.*, 329 NLRB 258, 259 (1999) (“Notification to unit employees, however, is not equivalent to providing notice to their collective-bargaining representative. There is a legal distinction between employees and their selected representative.”) (quoting *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967) (“only the union may contract the employees’ terms and conditions of employment”)). *See also NLRB v. Walker Constr. Co.*, 928 F.2d 695, 696 (5th Cir. 1991) (the employer is required to notify the union itself, not just bargaining unit employees, of a new wage and health and benefits program).

change. It also errs in citing (Br.31) *Kansas National Education Association*, 275 NLRB 638 (1985), and *City Hospital of East Liverpool, Ohio*, 234 NLRB 58 (1978). None of these cases involved an employer presenting a change to a union as a fait accompli. Indeed, in *City Hospital of East Liverpool*, the Board noted that critical distinction in rejecting the administrative law judge's recommended finding. 234 NLRB at 60 n.8.

DEMCO also wrongly argues (Br.32) that the Union was required to do more than protest the change. In support of its position, DEMCO cites *Gratiot Cmty. Hosp. v. NLRB*, 51 F.3d 1255, 1262 (6th Cir. 1995), but fails to note that it is relying on the dissenting opinion. The majority's holding clearly supports the Board's position here: notice of a fait accompli is simply not the sort of notice on which the waiver defense may be predicated. *Id.* at 1260 (citations and quotations omitted).

b. The Union did not waive its rights in the collective-bargaining agreement

The Board properly rejected DEMCO's further assertion (Br.24-27) that it was not required to bargain with the Union over the transfer of the CSO and SO classifications out of the unit because the Union purportedly waived its bargaining rights in the management rights clause of the parties' collective-bargaining agreement. Although the Board's legal conclusions regarding the interpretation of a collective-bargaining agreement are subject to de novo review, *Coastal Int'l Sec.*

Inc. v. NLRB, 320 F. App'x 276, 280 (5th Cir. 2009), a waiver of statutory bargaining rights nevertheless must be “clear and unmistakable.” *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); accord *United Broth. of Carpenters & Joiners of Am., Local 2848 v. NLRB*, 891 F.2d 1160, 1164 (5th Cir. 1990). As the Board found, DEMCO failed to meet its burden of showing that the Union, by agreeing to the management rights clause, clearly and unmistakably waived its right to bargain over transferring work out of the unit. (D&O I at RE 22.)

In reviewing the management rights clause, the Board correctly found that it did not specifically address the subject at issue. Indeed, nothing in the parties’ collective-bargaining agreement clearly or unmistakably waived the Union’s right to bargain over work being transferred out of the unit. Although the management rights clause stated that DEMCO retained the right to “establish job[s] . . . and discontinue job classifications” and “assign and reassign . . . work,” it in no way granted DEMCO the right to unilaterally remove work from the bargaining unit. (D&O I at RE 22; GCX3.) And DEMCO did not discontinue the jobs that the CSO and SOs were doing. Rather, as DEMCO concedes (Br.16-17, 20), the employees continued to perform largely the same duties. Nothing in the management rights clause granted DEMCO the right to simply attach a new label to a group of workers in order to remove them from the bargaining unit and the protections of the collective-bargaining agreement. DEMCO’s overly broad reading of the

provision recognizing its right to “discontinue classifications” would improperly allow it to eviscerate the unit. In short, the Board correctly found that the management rights clause did not constitute a clear and unmistakable waiver of the Union’s right to bargain over removal of CSO and SO positions. *See Regal Cinemas*, 334 NLRB 304, 313-15 (2001), *enforced in relevant part*, 317 F.3d 300, 314 (D.C. Cir. 2003) (management rights clause that expressly authorized employer to “change or eliminate existing . . . procedures or work” did not encompass employer’s transfer of employees’ work to managers).⁷

DEMCO argues (Br.27) that the Board must consider the surrounding circumstances, but it offers no evidence that would shed light on the meaning of the contract language. The Board considers bargaining history only if the matter was fully discussed and consciously explored during negotiations, and the union consciously yielded or clearly and unmistakably waived its interest in the matter. *Johnson-Bateman Co.*, 295 NLRB 180, 185 (1989). DEMCO fails to demonstrate how this standard is met. Indeed, during the hearing, the union representative involved in contract negotiations resulting in the agreement expiring February 28, 2011, testified that there were no discussions about the general language in the

⁷ DEMCO attempts to imply (Br.26-27) that its past transfers of work indicate the Union has waived its rights here. But as the Board found, the Union’s prior acquiescence to a transfer of work—work not at issue here—does not constitute a waiver of its bargaining rights over all succeeding work transfers. *See Regal Cinemas*, 334 NLRB at 315; *Colgate-Palmolive Co.*, 323 NLRB 515, 516 (1997).

management rights clause. (Tr.113-14.) Accordingly, DEMCO failed to establish that the Union clearly and unmistakably waived its right to bargain over the transfer of work. (D&O I at RE 22.)

D. The Board Properly Exercised Its Discretion in Finding DEMCO's Unit Clarification Petition Was Untimely, Filed 4-plus Months After the Parties Executed Their Collective-Bargaining Agreement

DEMCO (Br.35-36) challenges the Board's determination to dismiss the unit clarification petition that it belatedly filed on July 21, 2011, more than four months after signing a successor collective-bargaining agreement that took effect on February 28. Preliminarily, it must be noted that a unit clarification petition would not in any way excuse DEMCO's unlawful alteration of the unit scope, or its failure to bargain over the transfer of work from the unit. In any event, DEMCO cannot seriously dispute that its petition was untimely even under a narrow exception allowing petitions that are filed "shortly after" the execution of an agreement. Accordingly, as shown below, the Board appropriately exercised its discretion in dismissing DEMCO's untimely petition without prejudice to re-filing at an appropriate time.

As a general rule, the Board will not entertain a petition for a unit clarification during the term of a collective-bargaining agreement that "clearly defines" the unit, because conducting a representation proceeding at that time would disrupt the parties' collective-bargaining relationship. *Wallace-Murray*

Corp., 192 NLRB 1090, 1090 (1971); *accord Consol. Papers, Inc. v. NLRB*, 670 F.2d 754, 757-58 (7th Cir. 1982) (citing cases). In such circumstances, the Board's consistent practice has been to dismiss the unit clarification petition without prejudice to re-filing "at an appropriate time," which is shortly before the agreement's expiration. *Wallace-Murray*, 192 NLRB at 1090; *see also Shop Rite Foods, Inc.*, 247 NLRB 883, 883 (1980). In considering whether a contract will bar such petitions, this Court gives the Board considerable discretion in deciding how to apply its rules to a particular case, and in formulating the contours of those rules. *NLRB v. Miss. Power & Light Co.*, 769 F.2d 276, 280-81 (5th Cir. 1985).

There is a narrow exception to the foregoing rule, under which the Board permits a petition to be filed "shortly after" a contract is executed. *See St. Francis Hosp.*, 282 NLRB 950, 952 (1987) (UC petition filed 48 days after contract execution meets "shortly after" standard); *see also Goddard Riverside Cmty. Ctr.*, 351 NLRB 1234, 1236 (2007) (7 days suffices); *Balt. Sun Co.*, 296 NLRB 1023, 1024 (1989) (79 days suffices); *WNYS-TV (WIXT)*, 239 NLRB 170, 170-71 (1978) (51 days suffices). Looking to whether DEMCO's petition fell within this narrow exception, the Board determined that four-plus months (or no fewer than 121 days) would stretch the limit too far. (D&O I at RE 23.) The Board, while recognizing that DEMCO reserved its right to file a UC petition "shortly after" the parties' new collective-bargaining agreement took effect, rationally found that DEMCO's delay

of four-plus months exceeded the outer limits of the exception to the rule prohibiting unit clarification proceedings during the term of an agreement that clearly defines the unit. (D&O I at RE 23.) Accordingly, consistent with its practice, the Board dismissed the petition without prejudice to DEMCO's right to file it at a later appropriate time. (D&O I at RE 24 n.20.) DEMCO (Br.35-36) offers no support, legally or factually, showing exceptional circumstances to justify its delay.⁸

As the Board explained (D&O I at RE 23), permitting DEMCO to proceed with its untimely petition would have "violate[d] the Board's well-established policy of not permitting the parties to use the unit clarification proceeding in a manner that would disrupt their bargaining relationship." *See Edison Sault Electric Co.*, 313 NLRB 753, 753 (1994). Particularly coming on the heels of DEMCO's unlawful unilateral change in the unit scope and transfer of work from the unit, processing the untimely petition would have improperly rewarded DEMCO for its bad acts. (D&O I at RE 23 n.16.) Especially in these circumstances, it cannot be said that the Board abused its discretion in dismissing the untimely petition.

⁸ DEMCO points out (Br.5-6,36) that it first noted its desire for unit clarification in its July 7 answer to the complaint. (GCX1(j).) But this action did not constitute a proper unit clarification petition. And even if DEMCO had filed a petition on July 7, it would have been untimely under the precedent noted above.

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the petition for review and enforcing the Board's Order in full.

Respectfully submitted,

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National Labor Relations Board
September 2015

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

DIXIE ELECTRIC MEMBERSHIP CORPORATION)	
)	
Petitioner/Cross-Respondent)	No. 15-60063
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case Nos.
Respondent/Cross-Petitioner)	15-CA-019954
)	15-UC-061496

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 7,620 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

s/Linda Dreeben
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Dated at Washington, DC
this 3rd day of September, 2015

**UNITED STATES COURT OF APPEALS
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Respondent/Cross-Petitioner)	15-CA-019954
)	15-UC-061496

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Linda Dreeben
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Dated at Washington, DC
this 3rd day of September, 2015