

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GLADES ELECTRIC COOPERATIVE, INC.

and

Cases 12-CA-168580
12-CA-175794
12-CA-180034

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 1933, AFL-CIO

Rafael Aybar, Esq., for the General Counsel.

Brian W. Koji, Esq. (Allen, Norton & Blue, P.A.)
of Tampa, Florida, for the Respondent.

Doug Sellars (IBEW) of Bradenton, Florida, for
the Charging Party.

DECISION

CHARLES J. MUHL, Administrative Law Judge. On November 30, 2015, Respondent Glades Electric Cooperative eliminated two bargaining unit job classifications and simultaneously created two nonunit positions. It moved all of the old unit work to the new job classifications and filled the positions with the former bargaining unit employees. The Respondent did so without notifying, bargaining with, or obtaining the consent of Local 1933 of the International Brotherhood of Electrical Workers, the affected employees' bargaining representative. The General Counsel's complaint alleges that these actions violate Section 8(a)(5) of the National Labor Relations Act, either because they constitute a change in the scope of the unit or a transfer of bargaining unit work outside the unit. The Respondent's initial move resulted in a domino effect of allegedly unlawful actions, culminating in the July 11, 2016 layoff of two affected employees after the Respondent returned them to the bargaining unit.

As discussed fully herein, I conclude that the Respondent changed the scope of the bargaining unit when it removed specific jobs that had been included in the unit without the Union's consent. I also find that the Respondent violated the Act in the other manners alleged in the General Counsel's complaint.

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STATEMENT OF THE CASE

On January 27, 2016, the International Brotherhood of Electrical Workers, Local 1933, AFL-CIO (the Union or Charging Party) initiated this case, when it filed the original unfair labor practice charge against Glades Electric Cooperative, Inc. (the Respondent or Company). Region 12 of the National Labor Relations Board (the Board) docketed the charge as Case 12-CA-168580. On April 28, 2016, the Union filed an amended charge in that case. On May 9, 2016, the Union filed the original charge in Case 12-CA-175794. On May 24, 2016, the Union filed an amended charge in that case.

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On May 31, 2016, the General Counsel issued a complaint against the Respondent in Case 12-CA-168580. The complaint alleges that the Respondent eliminated the bargaining unit positions of mechanic and meter specialist on November 30, 2015. It also claims the Respondent simultaneously created the nonunit positions of transportation foreman and energy services agent, transferring the bargaining unit work in the eliminated positions to the new job classifications. The complaint further alleges the Respondent announced these changes to employees and solicited unit employees to fill the nonunion positions. These actions are alleged to have constituted an unlawful change in the scope of the bargaining unit made without the Union's consent and an unlawful unilateral change in working conditions. The complaint also claims that the Respondent implemented new wage rates and other terms and conditions of employment for employees in the new positions. On June 9, 2016, the Respondent filed a timely answer to the complaint, denying these allegations and asserting multiple affirmative defenses.

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On July 13, 2016, the Union filed the original charge in Case 12-CA-180034. On July 25, 2016, the Union filed a second amended charge in Case 12-CA-175794.

On July 28, 2016, the General Counsel issued an order consolidating Case 12-CA-168580 and Case 12-CA-175794. The consolidated complaint added an allegation that the Respondent refused to accept and process grievances filed on behalf of bargaining unit employees in the energy services agent position on or about January 18, 2016. On August 9, 2016, the Respondent filed a timely answer to the consolidated complaint, again denying the substantive allegations and asserting affirmative defenses.

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On August 26, 2016, the Union filed an amended charge against the Respondent in Case 12-CA-180034.

Finally, on September 30, 2016, the General Counsel issued an order further consolidating cases and a second consolidated complaint, thereby adding Case 12-CA-180034. That complaint included new allegations that, on June 27, 2016, the Respondent threatened to

lay off employees because of their union membership and support, as well as due to their filing of charges with the Board in the prior two cases. The second consolidated complaint further alleged that the Respondent laid off employees Emily Hancock and Chad Sevigny on June 27, 2016, due to their union activities and the Union's filing of charges with the Board on their behalf. On October 11, 2016, the Respondent filed a timely answer to the second consolidated complaint, denying the substantive allegations and asserting multiple affirmative defenses.

This case was tried in Fort Myers, Florida, on December 14, 15, and 16, 2016. On the entire record, including my observation of the demeanor of witnesses and after considering the briefs filed by the General Counsel and the Respondent on March 3, 2017, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a private, non-for-profit electric cooperative engaged in the business of distributing electricity to its members. The Respondent's principal office and place of business is in Moore Haven, Florida. The Company also has facilities in Lake Placid and Okeechobee, Florida. In conducting its business operations in the past 12 months, the Respondent derived gross revenues in excess of \$250,000. It also purchased and received, at its Florida facilities, goods valued in excess of \$5000 directly from points located outside of the State of Florida. Thus, at all material times, I find that the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, as the Respondent admits in its answer to the complaint. I also find, and the Respondent admits, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Glades Electric Cooperative, Inc. is owned by approximately 12,000 members/customers. The Respondent distributes electricity to its members and tracks their usage through roughly 16,300 active meters. The geographic territory the Company serves is 5000 square miles in largely rural areas. It includes four counties and two Seminole reservations. The "power supply north" area encompasses Highland and Okeechobee counties. The Lake Placid facility is the main office in that area. The "power supply south" area is made up of Glades and Hendry counties. The Moore Haven facility is located in that area. Since 2011, Jeffrey Brewington has been the chief executive officer of the Company. He has worked for the Respondent since 2000.

At the time of the hearing, the Respondent's workforce totaled about 70 employees. Going back to the early 1970s, a portion of that workforce has been represented by the Union. The bargaining unit contained approximately 30 employees in November 2015. The parties' last collective-bargaining agreement ran from October 29, 2013, to October 28, 2016.¹ The contract

¹ GC Exh. 5.

listed the job classifications contained in the unit, which included mechanics and meter specialists. Gregory Krumm has been the president and business manager of the local since 2011. Krumm works for a different electric cooperative in Florida. The Union has two stewards each at its Moore Haven and Lake Placid offices, who also are employees of the Respondent. Matthew Perry is one of the stewards at Lake Placid.

A. The Work of Mechanics and Meter Specialists Prior to November 30, 2015

Prior to November 30, 2015, the Respondent employed three meter specialists: Emily Hancock, Donald Murphy, and Chad Sevigny. Their job duties were to read the Respondent's 16,000 meters each month to determine customer electricity usage for billing purposes. The meter specialists also disconnected, reconnected, and reread meters when necessary.² Chelsea Lowder was the immediate supervisor of the meter specialists. Lowder's supervisor was Margaret Ellerbee, then the Respondent's director of member services.

At some point in 2014, the meter specialists began installing "AMI," or auto read, meters. These new meters allow the Respondent to determine customer electricity usage electronically and remotely, without the need for a manual meter reading. For a subset of the auto read meters, meter specialists concurrently installed "remote disconnect" equipment. This equipment permitted the Respondent to remotely cut off electric service to a customer. The Respondent targeted the meters of certain customers who had repeated issues paying their bills on time for remote disconnect installation.

The Respondent's proposed 2015 budget and strategic work plan, dated November 25, 2014, referenced its ongoing AMI meter installation.³ The plan noted that the installation had begun and projected its completion by the end of 2015. The plan also stated that the Company would begin transitioning meter specialists into member service specialist positions by the end of the year, freeing them up to provide new services. Member service specialists are not in the bargaining unit.

At different points in 2015, the Respondent's supervisors discussed with meter specialists, and their union stewards, the fact that meter specialists' job duties would be changing as a result of the auto read meter installation. However, the Respondent provided no specifics about what changes would occur. The meter specialists completed their portion of the auto read meter installation in November 2015.

In this same timeframe, the Respondent also employed two mechanics: Jesse Brown and Jeffrey Prescott. The mechanics were responsible for preventative maintenance and repair of vehicles and other equipment in the Respondent's fleet. This included oil changes, repairing fenders, tire changing, painting, and small welding. The mechanics completed the repairs either at one of the Respondent's facilities or in the field if a vehicle broke down. At times, the

² The Respondent refers to disconnects of electricity supply as "clean up collections."

³ R. Exh. 4.

mechanics reported vehicle problems that were caused by driver error to a supervisor. James Morrissey, the power supply manager south, oversees the Respondent's fleet and supervised the mechanics.

5 During strategic planning sessions prior to November 30, 2015, the poor condition of the Respondent's fleet of vehicles was a frequent topic. The vehicles did not last as long as they should, due to improper use and unreported damages. The Respondent often had to report vehicle incidents to an outside organization that monitored its safety compliance. The organization recommended that the Respondent send its drivers to driving school.

10 To address this issue, Morrissey came up with the idea of creating a new job classification: transportation foreman. The purpose of the position was to have someone who could hold the drivers accountable for the equipment they were operating.

15 *B. The Respondent's Creation of the Transportation Foreman and Energy Services Agent Positions on November 30, 2015*

On November 30, 2015, Brewington sent a letter⁴ to all employees, which stated the following concerning meter specialists:

20 With the completion of the AMI system we no longer have need for meter readers, however this system has created new opportunities for us and we will transition our Meter Specialists to Energy Services Agents. In this new position our employees will become certified in energy auditing and begin servicing our members with home and business energy audits as one new responsibility. In addition we expect increased activities with power diversion, open service order investigations, LED light program, front counter and call center to name just a few. As we continue to understand the offerings available from the AMI system we expect the Energy Services Agents to become more and more utilized to improve service to our members.

35 Brewington also discussed mechanics:

40 First in Fleet we have reorganized, creating new Transportation Foreman positions with designated supervisory responsibilities. We will have a northern supervisor who will be responsible for all equipment at the Lake Placid yard and the Okeechobee office. Likewise, we will have a southern supervisor who will be responsible for all equipment at the Moore Haven yard. And finally we will have a third supervisor responsible for generators

⁴ GC Exh. 22.

and projects. Among other duties, these foremen will be charged with monitoring equipment usage with the intent of extending its useful life. And with a Foreman in charge of specific areas we expect to better serve you the user of fleet equipment.

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The Respondent designated both the energy services agent (ESA) and transportation foreman (TF) positions as outside the bargaining unit.

10 On that same date, Ellerbee met with Hancock and Murphy. Ellerbee told the two meter specialists about the new ESA position. Ellerbee said that it was a nonunion position, but would pay \$22 per hour, or more than a union raise would give them. She said that ESAs would have an opportunity for training on how to perform energy audits. Hancock and Murphy then signed a form indicating they were interested in the position. The remaining meter specialist, Sevigny, was at a hospital with his girlfriend on November 30, 2015. Ellerbee called him and said she had to come and see him about something important. Ellerbee then went to the hospital and met with Sevigny, where he too signed the ESA job interest form. The Respondent later transferred Hancock, Murphy, and Sevigny to the ESA position, effective November 30, 2015.

20 The Respondent also posted the transportation foreman job openings on the same date. Brown and Prescott signed the form expressing interest in the position. The Respondent ultimately transferred both to the TF position, starting November 30, 2015. The Company increased their hourly pay rate from \$28.16 to \$30.00 per hour. A little more than a week later on December 8, 2015, Henry Gunn accepted the Respondent's offer to become the third TF. 25 Gunn was hired from outside the company, but had worked for the Respondent in the past.

The Union first learned of the creation of the nonunit ESA and TF positions, after the Respondent provided employees with its notification letter. Prior to then, the Respondent had not notified the Union of its plan to transfer the unit employees to these new positions.

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On December 15, 2015, the Union filed a grievance over the Respondent's transfer of the unit employees to the new, nonunit positions. The Union also submitted a letter from Krumm to Brewington requesting that the employees be returned to their old positions. Krumm argued that the "new positions you required these employees to accept are the same jobs they were performing." The Respondent denied the grievance at Step 1 on December 21, 2015. In the written explanation for the denial, Brewington stated:

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Under the terms of the Collective Bargaining Agreement and applicable law, management has the exclusive right to reorganize, create, or discontinue job positions and the duties and responsibilities assigned to particular positions. . . .

Contrary to the Union's grievance, to the extent that the newly-established positions were rescinded, the affected employees

would not have reverted to the prior positions, but rather would have been subject to layoff due to the lack of need in the prior positions. In an effort to avoid layoffs, affected employees were offered the opportunity to fill the newly-created positions instead.⁵

During processing of the grievance, the Respondent and the Union met multiple times. At the Step 1 meeting, Krumm told Brewington the Union had an issue with the Respondent creating the new positions without telling the Union or giving it the chance to bargain. The Union appealed the grievance to Step 2 on December 29, 2015. The Respondent again denied the grievance at that step on January 11, 2016.⁶ At the Step 2 grievance meeting, Krumm asked Brewington why the Respondent could not have talked to the Union about the situation. Brewington reiterated as to the meter specialists that it was either they got transferred to the ESA positions or he could no longer keep them. Brewington stated the mechanics became supervisors in the TF position, due to a new GPS monitoring system for the fleet. Krumm asked that the Respondent delay the moves until the upcoming negotiations for a successor contract.

At one of the meetings in January 2016, an unidentified union representative said there was nothing stronger than a binding union contract. Brewington asked how they figured that, because Florida was a right-to-work state and he could fire them for not liking their shirt.⁷

C. The Work of Transportation Foremen⁸

After mechanics were transferred to the TF position, they continued to perform all of the job duties they previously performed as mechanics. In addition, Gunn and Prescott took on new job duties related to oversight of the Respondent's fleet of 72 vehicles. The Company purchased a software system for "automatic vehicle location" (AVL).⁹ This AVL system allowed the Respondent to remotely track the movements and operation of each vehicle. The resulting data is transmitted and stored on a website. The Respondent purchased the software in December 2015. From then until April or May 2016, Brown and Prescott installed the necessary equipment on each vehicle to enable monitoring of drivers.

On January 20, Gunn and Prescott sent identical emails to employees in Moore Haven and Lake Placid announcing the installation of the AVL system software.¹⁰ In the announcement, the new TFs stated that the purpose of the software was to improve driver safety and prolong the useful life of the Respondent's equipment. The communication further

⁵ GC Exhs. 23, 24, 25, and 41.

⁶ All dates hereinafter are in 2016.

⁷ Union Steward Perry testified in this regard. (Tr. 205.) Neither Brewington nor any other Respondent witness disputed this testimony.

⁸ Around September, the Respondent changed the name of this job title to "Operations Foreman."

⁹ The software is referred to as "Trimble" or "AVL" throughout the transcript.

¹⁰ R. Exhs. 13 and 14.

described the information that the system would track. It added that this information would be analyzed to determine “drivability” and possible changes that needed to take place in the operation of the vehicles.

5 The AVL system generates a weekly “driver safety scorecard,” tracking a driver’s acceleration, turning, braking, and speeding.¹¹ A driver’s scores in each of these areas are combined to generate an overall safety score. Gunn and Prescott are responsible for reviewing the weekly scorecards, then passing them out to each driver. The two also were given the responsibility of speaking to drivers about the report, if the overall score was below 75. Since
10 the software was installed, Gunn and Prescott only talked to three drivers about low safety scores.¹² In addition, the Respondent determined that it would not discipline any driver for low scores until at least January 1, 2017. This was done to insure that drivers could get comfortable with the new system. Thereafter, Gunn and Prescott will notify Morrissey, if a driver’s performance does not improve following a conversation with a driver about the scorecard.¹³

15 The third TF, Brown, plays no role in monitoring drivers’ performance. Instead, he is responsible for overseeing the Company’s 11 generators, all welding, and health department inspections every 2 years.

20 Other changes to the TFs’ job duties include evaluating vendors who service vehicles and equipment; purchasing any product needed to repair a vehicle, if the cost is \$1000 or less; and putting a vehicle back in service without further supervisory approval.

25 In addition to the TFs, the Respondent also employs a fleet service coordinator named Alison Beck. She has assisted in the field level oversight of the Company’s vehicles and equipment, both prior to and after the creation of the TF position. The TFs can assign certain work tasks to Beck. The tasks include ordering parts for vehicles and getting vehicles to and from vendors for service. The TFs also tell Beck when to clean up the Moore Haven office.¹⁴

30 Despite these new duties related to the AVL system, the TFs still spend almost all of their work time performing the job duties they previously did as mechanics. The TFs also

¹¹ R. Exhs. 16 and 17.

¹² Tr. 526–527, 579.

¹³ Brewington, Morrissey, and Gunn testified concerning the new TF job duties. (Tr. 520–527, 577–581, 658–660.) Neither Brown nor Prescott testified. Gunn provided a conclusory statement that he had authority to discipline employees. I do not credit that testimony, because both Brewington and Morrissey characterized the TFs’ authority solely as the ability to recommend discipline. (Tr. 527, 658, 665.) Moreover, that characterization fits with Gunn’s specific testimony. Gunn defined his authority as having a one-on-one conversation with the driver, then reporting it to his supervisor if performance did not improve. (Tr. 579–580.) Thus far, he has had no occasion to do anything but talk to a driver. Gunn also admitted on cross examination that he would not issue discipline to employees, without consulting with Morrissey first. (Tr. 587.)

¹⁴ Tr. 514–515. Tr. 534–536.

retained the same ability to remove unsafe vehicles from operation.¹⁵

D. The Work of Energy Service Agents

5 Murphy and Sevigny worked as ESAs from November 30, 2015, to June 27, 2016.
Hancock served in the position from November 30, 2015, to January 18, 2016.

10 Once meter specialists became ESAs, they continued to perform tasks related to meter
reading in the field. They went out and manually read new auto read meters, if they stopped
remotely communicating with the office. They continued to perform disconnects, reconnects,
and rereads of meters. Although the ESAs had less meters to manually read, they were spread
all over the Respondent's extensive geographic territory. As a result, the ESAs spent more time
driving than they had when their principal function was to manually read meters.

15 Nonetheless, with the elimination of having to read 16,000 meters manually, the residual
meter reading functions did not provide full-time work for the ESAs during the 7 months
Murphy and Sevigny served in the position.¹⁶ To fill in the gap, the Respondent found other,
unspecified job duties for them to perform. For Murphy, this included collecting bill payments
submitted to the Company's drop boxes, located throughout its geographic territory. The drop
20 box collections previously were performed by member services representatives.

25 As for new job duties as ESAs, the Respondent planned to provide training to the
employees, so that they could become certified at performing home energy audits. The purpose
of the audits was to help customers make their homes more energy efficient. The certification
process was supposed to take about 2 years. In January 2016, the Company sent Murphy and
Sevigny to an introductory 2-day course in Tampa. Later that same month, the Respondent sent
them for 4 days of training in Alabama, on how to check air ducts in homes for leaks. However,

¹⁵ Gunn gave conflicting accounts of what the time split was between old and new job duties. He first said it broke down to 50 percent each, but later indicated his new duties only took up 30 percent of his work time. (Tr. 584, 590.) I find the latter figure more likely, although understated, in light of the description Gunn provided of his AVL system job duties. To this point, Gunn has had to review approximately 35-40 driver score cards, one page each, per week. He had only two conversations with employees beyond that. Based upon my own review of these scorecards, it simply could not take a day and a half, or 30 percent of each 40-hour week, to review them. While Gunn also testified that he now has to look for new vendors and train employees as a TF, he gave no indication of what that specifically involved or how much time he spends on it. For all these reasons, I conclude the TFs almost exclusively spend their work time performing mechanics' job duties.

¹⁶ I credit Murphy's forthright and specific testimony concerning the lack of work he and Sevigny had after being transferred to the ESA position. (Tr. 474.) Murphy exhibited a sincere demeanor when testifying in this regard. Admitting his difficulty in filling work days, as a current employee with the Respondent's CEO in the hearing room, gives further credence to the testimony. Although Sevigny said his duties were "pretty much the same thing," he also testified about expressing concern to supervisors over the possibility of layoffs when he was an ESA. (Tr. 383, 393-395.) Such a concern is consistent with a reduced workload, not with continuing to have the same work.

the Respondent never sent the two for any additional energy audit training thereafter. From November 30, 2015, to June 27, 2016, no ESA actually performed any energy audit functions.

*E. The Respondent's Transfer of Hancock Out of the
Energy Services Agent Position in January 2016*

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On January 7, the Respondent issued a "verbal warning" (in writing) to Hancock.¹⁷ It was signed by Ellerbee and Lowder. Lowder told Hancock she was being disciplined for attitude towards a coworker. The warning stated that ESAs had been counseled the day before about their attitudes towards employees and that they needed to make an effort to have good working relationships with coworkers. An email, also dated January 7, was attached to the warning from Rene Rimes, one of Hancock's co-workers. Rimes described a conversation between her and Hancock that day, in which she alleged that Hancock was short with her. Almost immediately after receiving the discipline, Hancock filed a harassment complaint with the Respondent's human resources department.¹⁸

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A conflux of events followed on January 18. The Union filed a grievance to contest Hancock's January 7 discipline. The Union also appealed its grievance over the transfer of employees out of the meter specialist and mechanic positions to Step 3. In response to Hancock's harassment complaint, Brewington and a human resources representative advised Hancock that they found no harassment. The Respondent also transferred Hancock out of the ESA position and into a call center representative position.¹⁹

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¹⁷ GC Exh. 45.

¹⁸ This warning was the second that Hancock received in 3 months. On November 9, 2015, the Respondent suspended Hancock for 2 days without pay. Ellerbee told Hancock that the suspension was due to Hancock's insubordination, reckless driving, and lack of courtesy to a customer. Ellerbee advised Hancock that a customer called in and complained about her. Prior to then, the Respondent had not formally disciplined Hancock. However, she had been involved in two vehicle accidents in February and April 2015. On November 17, 2015, the Union filed a grievance contesting the suspension. (GC Exh. 20.)

¹⁹ The parties presented evidence and argument concerning the validity of Brewington's asserted reason for transferring Hancock out of the ESA position. Brewington testified that, when he learned Hancock was in a relationship with supervisor Megan Randolph, he had to transfer her to a different position where Randolph would have no oversight of her. The General Counsel contends that the Respondent revised its "Nepotism" policy subsequent to Hancock's transfer, to provide post-hoc cover for Brewington's asserted reason for the transfer. The revised policy included a new provision prohibiting "romantic and sexual relationships," including same-sex relationships, between supervisors and employees. The Respondent contends the policy revision had been contemplated well before Brewington learned of the relationship. I find this evidence irrelevant to the legal issues presented in this case and do not rely on it in rendering my decision. The General Counsel's complaint does not allege the Respondent's transfer of Hancock out of the ESA position was an unlawful act under the NLRA, nor could it since alleged discrimination based upon a same-sex relationship is not covered by the Act.

On January 20, Michael McDuffie, the supervisor of Union Steward Perry, handed the Union's grievance over Hancock's January 7 discipline back to Perry. McDuffie stated that Hancock was not in the bargaining unit and had no standing to bring the grievance.

5 On January 28, the Respondent denied the Union's grievance over the elimination of the meter specialist and mechanics positions at Step 3.

The Respondent and the Union had no further contact regarding the creation of the ESA and TF positions until May 2016.

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F. The "Coffee Meeting" Between Brewington and Sevigny in May 2016

In May 2016, Brewington conducted "coffee meetings" with employees to discuss any workplace concerns they had. This included a meeting with Sevigny. Brewington discussed a contract that the Respondent was losing to another power company as of June 30. The two also talked about the work Sevigny was performing as an ESA. Sevigny conveyed that he was driving around a lot. Sevigny also suggested other work that ESAs could be doing. At some point, Brewington asked Sevigny how he felt about the Union. Sevigny responded that Florida was a right-to-work state and he really did not know about unions in Florida. During this discussion, Brewington also told Sevigny he did not want the Union to run his company and that he wanted to run his company his way.²⁰

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G. The Respondent's Layoff of Hancock and Sevigny, Effective July 11, 2016

25 On May 6, an arbitration hearing was held over the Respondent's 2-day suspension of Hancock back in November 2015.

²⁰ I credit Sevigny's testimony regarding his coffee meeting with Brewington in May 2016. (Tr. 398-399, 402-403.) Sevigny testified with specificity and consistency concerning what Brewington said. He also appeared genuine while testifying about this, despite his obvious discomfort with the formal hearing environment. In contrast, when asked an opened-ended question about their conversation, Brewington gave a rambling response with generalities and little about what he actually said to Sevigny. (Tr. 639.) He did not provide, or appear to have any recollection, of his specific discussion with Sevigny, including about the Union. (Tr. 661.) That lack of recall also means I cannot afford any weight to Brewington's denial that he did not "interrogate" Sevigny during their discussion. (Tr. 640.) However, I do not credit Sevigny's testimony that he had two identical conversations with Brewington, one in February and one in May. Sevigny provided no differentiation in what was said at the two meetings. I find it illogical that the two would have the exact same conversation on two different occasions.

Beyond Brewington's statements to Sevigny, Hancock also testified concerning a comment she overheard Lowder make to Sevigny and Murphy on November 2, 2015, well before the Respondent eliminated the bargaining unit positions. (Tr. 272-274.) Hancock stated that Lowder told the two: "You all can take your Union handbooks and shove it up your asses." Lowder did not testify, so Hancock's testimony in this regard is uncontroverted. Thus, I credit the testimony.

Also at some point in May 2016, Brewington and Krumm met to further discuss the Respondent's creation of the two new positions. Brewington suggested a possible, quid-pro-quo resolution to the dispute. He told Krumm the Respondent was willing to move the meter specialists back to the bargaining unit, if the Company could keep the transportation foremen as supervisors outside the unit. As he had previously, Krumm responded that he thought the two should address the issue in contract negotiations.

On May 31, the General Counsel issued the first complaint against the Respondent in Case 12-CA-168580. That complaint contained the allegations related to the Company's transfer of bargaining unit employees to the nonunit ESA and TF positions.

In early June, Hancock's supervisor in the call center, Susan Watkins, told Hancock that she needed to change her job title back to ESA. Hancock continued to work as a call center representative thereafter.

On June 8, Krumm advised Brewington via email that the Union was declining the Respondent's quid-pro-quo offer to resolve the situation.

In a letter dated June 14, Brewington told Krumm that the Respondent now was "considering reorganizing its operations as it pertains to the job classifications of Energy Services Agent, Transportation Foreman, Meter Specialist, Mechanic, and Lead Lineman." Brewington further stated that the Respondent was willing to meet with the Union and negotiate over these issues. He provided dates at the end of June and beginning of July for bargaining. Krumm responded by letter dated June 22. He said the Union definitely was "interested in meeting and understanding" the reorganization of job classifications and potential layoffs. Krumm suggested wrapping these topics into negotiations over the successor contract. Krumm indicated he was not available to engage in discussions until July 13.²¹

However, prior to any bargaining or discussions taking place, Brewington held a meeting with Hancock and Murphy on June 27. Brewington told the two that he was tired of fighting the Union and he was not going to spend customers' money on it anymore. Brewington said that the Respondent was transferring the ESAs back to the meter specialist position on July 11. He told the two that he was keeping Murphy, but that Hancock and Sevigny were being put on 2 weeks of paid leave, then would be laid off. He said the Respondent was offering her and Sevigny 6 weeks of severance. He said the layoffs were occurring because there was not enough work for all three of them to do. Hancock asked Brewington why he was keeping Murphy, since she had more seniority than him. Brewington responded that was not how he read it.²²

²¹ GC Exhs. 28 and 29.

²² As to Brewington's statements in this meeting, I credit Hancock's uncontroverted, detailed, and consistent testimony. (Tr. 261, 300-302.) Moreover, I found Hancock's demeanor to be confident and reliable when testifying in this regard. Brewington did not testify about this meeting and Murphy's short testimony concerning it was not contradictory in any way to Hancock's account. (Tr. 479.)

Brewington also gave the employees a written notification of the layoff decision.²³ Brewington stated therein that Hancock and Sevigny were chosen “[a]fter considering the criteria set forth in the collective bargaining agreement.” Brewington also said:

5 In addition, if agreeable with your Union representative, the
 Cooperative also proposes to offer both [Sevigny] and [Hancock]
 severance in the amount of six weeks’ pay, contingent on agreeing
 to a mutually-acceptable general release agreement. Assuming
 10 the Union is agreeable, whether you elect to accept severance is
 solely your choice.

Brewington also confirmed that both Hancock and Sevigny were being placed on 2 weeks of paid administrative leave prior to the layoff.

15 On that same date, Brewington emailed a letter to Krumm advising him of the layoffs
 and severance offer. He also attached the employee notification letter, which he stated in his
 email he had “provided” to the employees.²⁴ Brewington stated that the Respondent had made
 the decision to return the ESAs to meter specialists. He further stated that, pursuant to Article 3
 20 of the parties’ contract, the Company had determined that two meter specialists needed to be
 laid off. Brewington said that Hancock and Sevigny had been selected for layoff pursuant to the
 parties’ contract, specifically Article 10.3. At the end of the letter, Brewington advised Krumm
 of the Respondent’s willingness to offer the two laid-off employees 6 weeks of severance pay,
 “subject to the Union’s approval.” He noted that the payment was contingent on the signing of
 a mutually-agreeable general release.

25 The last Respondent communication dated June 27 was from Brewington to all
 employees to announce the layoffs.²⁵ Therein, Brewington stated:

30 With the installation of [auto read meters] we knew the vast
 majority of Meter Specialist work would be eliminated and as
 such [the employees] were assured we could create new positions
 for them. That was the reason for Energy Service Agents.
 Unfortunately my creation of these new positions has been battled
 since day one and I have spent far too much of the membership’s
 35 money in legal fees. So today the Energy Service Agents were
 notified that effective July 11, 2016 they would revert to Meter
 Specialist with two of the three positions laid off.

²³ GC Exh. 30, p. 4.

²⁴ GC Exh. 30, p. 3. The record is not clear on whether Brewington notified the Union or the employees first on June 27. However, no dispute exists the notifications were provided the same day.

²⁵ GC Exh. 31.

Brewington also noted that the Respondent was providing two weeks of paid administrative leave to the laid-off employees and “had offered them a severance package.”

5 At the time the Respondent made the layoff decision, Sevigny was in the midst of an extended leave of absence. Thus, Brewington emailed the written layoff notification to him. Thereafter, Sevigny called Brewington, who told Sevigny he was sorry, but it was the Union’s fault that Sevigny got laid off. He added that the Union would not let them go to the ESA, so Brewington put them back to the meter specialist job and laid them off.²⁶

10 As noted above, the Respondent relied upon Articles 3 and 10.3 of the parties’ contract in making the layoffs. Article 3 is the management rights’ provision. In relevant part, Article 3.2 states:

15 The Cooperative specifically reserves the exclusive right in accordance with its judgment to . . .layoff and recall employees to work. . . .expand, reduce, alter, combine, transfer, assign, or cease any job, department, operation, or service, [and to] determine the number, location, and operations of plants and divisions and department (sic) thereof, the assignment of work, and the size and
20 composition of the work force.

Article 10.3, a portion of the contract provisions on seniority, states in relevant part:

25 The principle of classification seniority shall govern in the matter of layoff for lack of work, recall following layoff, and promotions, when, among the employees to be considered, experience, skill, cooperativeness and reliability are relative equal.

30 Article 10.6 of the contract addresses the accumulation of classification seniority:

35 Employees transferred to jobs outside the bargaining unit will accumulate additional classification seniority during such period of transfer, and in the event of return to the bargaining unit, their classification seniority shall apply in accordance with this Article.

H. The Events Following the Layoffs of Hancock and Sevigny

On June 30, the Union filed a grievance concerning the layoffs.

²⁶ Again, I credit the uncontroverted testimony of Sevigny in this regard (Tr. 400–401). Brewington did not testify concerning this conversation.

On July 1, while Hancock and Sevigny were on paid administrative leave, an arbitrator rendered a decision related to the grievance over Hancock's November 2015 suspension.²⁷ In the decision, the arbitrator concluded that Hancock had engaged in misconduct. He noted she had received repeated complaints about her attitude and erratic driving from both customers and fellow employees during a period from January to November 2015. However, the arbitrator also concluded that the Respondent had failed to provide Hancock with due process before disciplining her. The arbitrator sustained the grievance with backpay, removed the 2-day suspension from Hancock's file, and reduced her discipline to a verbal warning.

In a July 11 letter to Krumm, Brewington wrote: "While we have attempted to try to avoid layoffs by looking at creating other positions that solution has not proven to be as fruitful as I had hoped. As a consequence, layoffs of two of the three positions were unavoidable."²⁸

In a separate communication to Krumm that same date, Brewington noted that Sevigny asked about his severance pay and the Respondent told him the Union had not approved it as yet. Brewington asked Krumm if the Union would approve the severance. Krumm responded via email dated July 14. He expressed confusion over the Respondent's severance offer. He specifically asked whether the employees would be barred from returning to work with the Respondent, if they accepted the severance. On July 18, Brewington responded via email and provided Krumm with a copy of the proposed severance agreement.²⁹

In its written Step 3 denial of the layoff grievance dated August 3, the Respondent again stated that the layoffs were due to lack of work after the installation of the auto read meters.³⁰ In addition, Brewington also clarified that the choice of Hancock and Sevigny for layoffs was not based on classification seniority, but rather the employees' respective experience, skill, cooperativeness, and reliability. Finally, with respect to the ESA position, Brewington said:

[The Respondent] already attempted to launch an Energy Services Auditing program with the hope that these employees may be able to help establish that program. After seven months, it became apparent that the ESA initiative was unlikely to be productive with these employees at any time in the foreseeable future.

On August 22, the Respondent notified Hancock of an opening in a nonunit, systems operator job. On August 29, Hancock accepted the position. Hancock continued to be employed by the Respondent at the time of the hearing in this case.³¹

²⁷ GC Exh. 21.

²⁸ GC Exh. 34.

²⁹ GC Exhs. 35 and 44; R. Exh. 28.

³⁰ GC Exh. 38.

³¹ R. Exhs. 32, 33, and 35.

The Respondent also made three job offers to Sevigny following his layoff. Although Sevigny previously worked out of the Lake Placid facility, each of the positions the Respondent offered him after the layoff was located at its Moore Haven office. Sevigny declined the offers, because Moore Haven was too far from his home.

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After Hancock and Sevigny were laid off, the residual meter functions that Murphy was performing as the lone meter specialist took up only 50 to 60 percent of his overall work time. The Respondent assigned new duties to Murphy to fill the remainder.³²

10

I. Credibility: The Respondent's Reason for Returning ESAs to the Meter Specialist Position

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Although many of the facts in this case are undisputed, one major question exists which, in my view, has a significant bearing on the lawfulness of the Respondent's layoffs. It also requires the evaluation of witness credibility. That question is why the Respondent returned Hancock, Murphy, and Sevigny to the meter specialist position on June 27, 2016.

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Brewington testified concerning the reasons for the elimination of the ESA position after 7 months. With respect to his testimony as a whole, I found that Brewington provided numerous responses that were conclusory or vague. He often failed to provide specifics in areas particularly relevant to the issues in dispute, except in response to leading questions on direct. He also did not directly answer the questions posed by counsel or gave nonresponsive answers that included significant amounts of extraneous, irrelevant information. These factors detracted from his overall credibility.

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As to this specific issue, Brewington initially stated:

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[I]t's going through the whole process of trying to create the positions to move them into, and it not working, and then finally, ultimately as we were trying to use them in other areas, it wasn't working. Just things weren't working out for the energy service position. So it was obvious we had no choice but to put them back to the meter specialist as the Union was asking us to do, and there was not enough work to support three meter specialists.³³

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Brewington later elaborated as to why he decided none of the employees could continue in the ESA position.³⁴ As to Hancock, Brewington said:

³² As with his testimony about his pre-layoff workload and for the same reasons discussed above in fn. 16, I credit Murphy's testimony regarding his workload after the layoffs. (Tr. 468-470, 488-490.)

³³ Tr. 63-64.

³⁴ Tr. 643-646.

Some of the actions, her history, through the whole entire time that she's been with us, there was some current concerns with that. . . .she had altercations with members. She had altercations with employees in positions of authority throughout the Co-opyou need a professional person, under control, good attitude to go into a member's home.

Brewington also testified about his alleged concerns with Murphy, stating:

I see these guys that were part of Energy Service Group out in Oregon [who performed energy audits and from where Brewington's idea for ESAs originated], and they were of a different quality of person. I believe most of them are probably college educated and everything else. And I don't want to go into – with a half-baked program and send people into our members' home[s] and not have good people doing it and not have a fear of altercations between members and employees.

Finally, as to Sevigny, Brewington stated:

He was a very troubled young man with a lot of things going on in his life, and I was just concerned about sending him into members' homes. . . .[t]hat was compounded with the report on his class work and that and the education he was sent off to do so.

When subsequently questioned as to why he even started going down the path of creating the ESA position, Brewington responded:

I didn't know then. I didn't know how it would work out, but once we decided to go in that direction and develop the program, and it would take time to do that, once we identified the education, it took more than a month, and then it was, from then on it was a challenge, our new position was challenged with the demand [from the Union] to put them back into member meter specialists.

Ellerbe also testified in this regard.³⁵ In response to leading questions, Ellerbe stated generally that she became concerned about the three employees' suitability to become energy auditors. That concern allegedly was based on their level of professionalism and the work tasks needed to perform the job. The only specific example she gave of this involved Sevigny. Apparently, after the January training, Ellerbe asked Sevigny a question about unspecified "calculations." Sevigny could not remember the calculations, then could not find them in his

³⁵ Tr. 601–603.

handbook. In the end, he had to ask Murphy how to do it. Ellerbee also claimed to have relayed her concerns to Brewington, but not until May or June of 2016. When asked why Murphy and Sevigny were not sent to additional training, she stated: "They weren't that professional, and they, the Union wanted us to put them back as a meter specialist. They insisted."³⁶

I do not credit Brewington's and Ellerbee's testimony that the Respondent eliminated the ESA position, because Hancock, Murphy, and Sevigny lacked the professionalism needed to perform energy audits. Neither witness provided, or indeed had, any factual basis for that conclusion. The ESAs did not perform any actual job tasks related to energy audits, from which their performance could be evaluated. The lone ESA task that Murphy and Sevigny completed was to attend 6 days of training. But that training was completed in January 2016. Thus, if the two could not be adequately trained on the job, the Respondent would have known that 5 months before it eliminated the ESA position. Ellerbee gave no explanation as to why she did not discuss this with Brewington immediately after the training. She also did not explain why it came up again months later.³⁷ Moreover, if the employees were not professional enough based on their performance as meter specialists, Brewington would have been well aware of that prior to his creation of the ESA position. At that time, the Respondent had employed Murphy for at least 10 years, Sevigny for more than 7 years, and Hancock for more than 3 years. The employees did not suddenly become less professional after they became ESAs. But Brewington created the ESA position anyway and filled it with Hancock, Murphy, and Sevigny.³⁸

The chronology of events in this case and the Respondent's own contemporaneous statements provide the real reason for the Respondent's transfer of the ESAs back to meter specialists. After the Union filed the original charge in this case concerning the elimination of unit positions on January 27, no further ESA training took place. In fact, the Respondent took no additional action for months, until after the General Counsel issued the initial complaint on May 31. Two weeks later and only after Krumm rejected Brewington's quid-pro-quo settlement offer, Brewington advised the Union for the first time that the Respondent was considering reorganizing its operations, including as to meter specialists and ESAs. Although Brewington initially told Krumm he was willing to negotiate over this, the Respondent instead went forward with the reorganization before any negotiations took place. In fact, Brewington essentially implemented the quid-pro-quo solution he earlier proposed and the Union rejected. He returned the meter specialists to the unit and retained the transportation foremen outside

³⁶ Tr. 619.

³⁷ The Respondent's performance appraisal for Sevigny dated February 29 does not mention any problems that Sevigny had with the training. (R. Exh. 39.) To the contrary, Lowder wrote: "Over the next 6 months I expect to see a lot of new opportunities for Chad involving the Energy Surveys. I think he learned quite a bit at our training and will continue to grow his knowledge as he moves further into the position."

³⁸ The Respondent also did not explain why Hancock had to be returned to the ESA position at all. Hancock had been working as a call center representative for months, without incident. Her alleged lack of professionalism to conduct energy audits was having no bearing on her call center performance.

the unit. Then, when announcing the layoffs, Brewington told Sevigny it was the Union's fault. He also told all employees he was tired of spending customers' money on legal fees. This evidence establishes that the Respondent transferred the ESAs back to meter specialists, in response to the General Counsel's complaint and the Union sticking to its guns on the return of both meter specialists and mechanics to the unit. In their testimony, Brewington and Ellerbee even admitted, albeit reluctantly, that the Union's insistence upon the employees being returned to the meter specialist position played into the Respondent's decision. That is the only portion of Brewington's and Ellerbee's testimony in this regard that I credit.

ANALYSIS

I. DID THE RESPONDENT'S ELIMINATION OF THE METER SPECIALIST AND MECHANIC POSITIONS VIOLATE SECTION 8(A)(5)?

A. Legal Framework

The General Counsel's complaint alleges that the Respondent violated Section 8(a)(5) by eliminating the meter specialist and mechanic positions from the bargaining unit and replacing them with the nonunit energy services agent and transportation foreman positions. Two theories are advanced in this regard. First, the General Counsel contends that the Respondent changed the scope of the bargaining unit without the Union's consent. In the alternative, the General Counsel argues that the Respondent transferred bargaining unit work out of the unit, without first providing the Union with notice and an opportunity to bargain.

A party's proposal to alter the scope of an existing bargaining unit is a permissive subject of bargaining. *Hill-Rom Co., Inc. v. NLRB*, 957 F.2d 454, 457 (7th Cir. 1992). Because it is permissive, the other party to such a proposal may refuse to discuss it. Absent an agreement, the proposal cannot be unilaterally implemented, even if the parties bargain to impasse. In contrast, a transfer of bargaining unit work outside the unit is a mandatory subject of bargaining. *Wackenhut Corp.*, 345 NLRB 850, 853 fn. 8 (2005). As a result, a party may insist to impasse, and then unilaterally implement, a proposal seeking such a transfer of unit work.

The determination of whether a party's conduct constitutes a change in the scope of a unit or a transfer of unit work often has proven difficult for both the Board and reviewing courts. See *Hill-Rom Co., Inc. v. NLRB*, supra (Easterbrook, J., dissenting). Although the Board has decided a myriad of cases concerning the issue, common factual threads to be used in distinguishing between a change in unit scope and a transfer of unit work are not readily discernible. Moreover, cases with similar fact patterns have resulted in different outcomes.

Nonetheless, the Board repeatedly has stated that, once a specific job has been included in the bargaining unit, it cannot be removed from the unit absent the union's consent or a Board order. See, e.g., *Somerset Valley Rehabilitation & Nursing Center*, 364 NLRB No. 43, slip op. at 3 (2016) (eliminating unit licensed practical nurse (LPN) classification and assigning work to

existing nonunit registered nurses was change in scope of the unit); *Wackenhut Corp.*, 345 NLRB at 852 (elimination of unit sergeant position and transfer of job duties to existing, nonunit lieutenants was change in scope of the unit); *Hampton House*, 317 NLRB 1005, 1005 (1995) (setting forth the standard).

5

This framework also appears to apply where an employer promotes or reclassifies all unit employees in a job classification to new supervisory positions, but the new supervisors continue to perform their old bargaining unit work. See *Dixie Electric Membership Corp.*, 358 NLRB 1089, 1091 (2012), reaffd. 361 NLRB No. 107 (2014), enfd. 814 F.3d 752 (5th Cir. 2016) (reclassifying chief systems operator and system operator job titles from bargaining unit to supervisory positions, while having them perform essentially the same duties, was change in scope of the unit); *Mt. Sinai Hospital*, 331 NLRB 895, 895 fn. 2 (2000) (employer's reclassification of sous chefs to new, claimed-to-be-supervisory position of assistant culinary manager was change in unit scope, where employees continued to perform essentially the same work); *Holy Cross Hospital*, 319 NLRB 1361, 1364–1365 (1995) (creation of and transfer of unit work to new nonunit, supervisory position of shift manager, which resulted in "virtual elimination" of the unit position of house supervisor, was a change in scope of the unit). In contrast, the Board has found a transfer of unit work in certain cases where an employer has promoted some, but not all, unit employees to supervisory positions. See *Hampton House*, supra (promotion of certain, but not all, LPNs out of the bargaining unit into new supervisory positions was a transfer of unit work triggering a bargaining obligation, where employees continued to perform former unit bargaining work); *The Lutheran Home of Kendallville, Indiana*, 264 NLRB 525, 525 fn. 2 (1982) (promotion of a portion of unit LPNs to new supervisory positions was transfer of unit work).³⁹

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B. The Respondent's Actions as to Mechanics and Meter Specialists

Applying the above-described legal framework to this case, the Respondent's actions in removing all mechanics and meter specialists from the bargaining unit and placing them in the new transportation foreman and energy services agent positions would violate Section 8(a)(5) under either of the General Counsel's theories. Because the Respondent did not notify, bargain with, or obtain the consent of the Union, its conduct was unlawful either as a change in unit scope or a transfer of unit work.

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³⁹ There is a logical appeal to distinguishing cases based on whether the entire job classification is eliminated by promotions into supervisory positions (change in unit scope) or only some unit employees have been promoted (transfer of unit work), where the new supervisors retain their unit duties. But other Board decisions have found a transfer of unit work, even when all employees in a job classification have been promoted to supervisory positions. See *Bridgeport and Port Jefferson Steamboat Co.*, 313 NLRB 542, 545 (1993) (promotion of all captains into supervisory positions was transfer of unit work, although captains continued to perform unit duties); *Kendall College*, 228 NLRB 1083, 1088 (1977) (transfer of unit work when all unit division chairmen promoted into new supervisory positions, but continued to perform their old teaching duties).

Nonetheless, I conclude that the Respondent's actions should be classified as a change in unit scope. The parties' collective-bargaining agreement defines the bargaining unit to include both the mechanic and meter specialist positions. The Respondent moved all of the employees in each classification to non-unit positions on November 30, 2015. In doing so, the Respondent effectively eliminated the bargaining unit positions, irrespective of whether the job title remained in the unit description. The Respondent did not seek to fill either of the vacant unit positions. Rather, the new TFs continued to perform all of their previous unit mechanic duties. Similarly, from December 1, 2015 to June 27, 2016, the ESAs continued to perform what remained of their unit meter specialist work. The Respondent made these changes without even consulting the Union, let alone obtaining its consent. In fact, the Union steadfastly objected to what the Respondent did and repeatedly requested that the employees be reverted to their unit jobs.

The Respondent does not take a position on whether its actions as to the mechanics and meter specialists constitute a change in unit scope or a transfer of unit work. But it does make a variety of arguments as to why it acted lawfully.

With respect to mechanics/transportation foremen, the Respondent first contends that it exercised a management right to create new supervisory positions.⁴⁰ The general rule is that employers are entitled to make their own decisions as to how best to supervise their operations. *Bridgeport and Port Jefferson Steamboat Co.*, 313 NLRB at 545. Neither the decision to create new supervisory positions nor the selection of individuals to fill those positions is a mandatory subject of bargaining. *St. Louis Telephone Employees Credit Union*, 273 NLRB 625, 627–628 (1984). An employer's perceived need for more direct control of its operations can be a valid reason for reclassifying unit employees as supervisors. See, e.g., *Luther Manor Nursing Home*, 270 NLRB 949, 959–960 (1984); *The Lutheran Home*, 264 NLRB at 525. The Respondent did demonstrate a genuine need to add oversight duties to the mechanics' unit work, in order to improve its drivers' performance and to lengthen the useful life of its vehicles. The record establishes that the implementation of the AVL system improved drivers' performance.

The problem with the Respondent's argument is the transportation foreman continued to spend the vast majority of their time performing mechanics' work. Thus, the TF position was not really a new supervisory position. It was a reclassification of the mechanic position with a small amount of new duties added. Such a reclassification is a change in unit scope the Respondent could not make without the Union's consent.⁴¹ *Mt. Sinai Hospital*, 331 NLRB at 908; *Holy Cross Hospital*, 319 NLRB at 1361 fn. 2.

⁴⁰ In evaluating this argument, I assume, without deciding, that the transportation foremen are supervisors within the meaning of Section 2(11) of the Act. *Regal Cinemas, Inc.*, 334 NLRB 304, 304 (2001).

⁴¹ If, instead, the Respondent's actions were a transfer of unit work to a new supervisory position, its right to create that position and to select the individuals to fill the position does not relieve it from its bargaining obligation. Where a new supervisory employee takes some unit work to the position, the employer must bargain about that removal of work from the unit. See, e.g., *Bridgeport and Port Jefferson Steamboat Co.*, supra; *Mt. Sinai Hospital*, 331 NLRB at 895 (Member Hurtgen, concurring).

The Respondent also argues that its creation of the TF position was permitted under the Board's decision in *St. Louis Telephone Employees Credit Union*, supra. I find that case plainly distinguishable. There, the employer created new supervisory positions, within the meaning of Section 2(11), and promoted 21 employees from the bargaining unit into the positions.

5 However, following the promotions, the employer immediately began hiring replacements to fill the unit vacancies. Ultimately, none of the unit jobs were lost. In those circumstances, the Board found the employer's actions insufficient to create a bargaining obligation. In contrast here, the Respondent transferred all of the mechanics and their work out of the unit and did not hire anyone to fill those vacant positions.

10 The Respondent further contends that the Union waived its right to bargain over the creation of the transportation foreman position. It is well established that a waiver of statutory bargaining rights must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). The waiver of a statutorily protected right will not be inferred from a general contract provision; it requires that either the contract language relied on be specific or an employer showing the issue was fully discussed and the union consciously yielded its interest in the matter. *Georgia Power Co.*, 325 NLRB 420, 420-421 (1998). A generally worded management rights clause or zipper clause will not be construed as a waiver. *Hi-Tech Cable Corp.*, 309 NLRB 3, 4 (1992).

20 The Respondent relies only on contract language here. The specific provisions are Article 2.7 in the "Purpose" clause and Article 3.2 in the "Management" clause of the parties' collective-bargaining agreement. Article 2.7 states that "[t]he Union agrees that none of the provisions of this Agreement shall be deemed to constitute a valid claim that all or any work normally performed by the employees belongs exclusively to any one or group of employees of the Cooperative." The portion of Article 3.2 relied upon by the Respondent reserves for it the exclusive right to determine "the assignment of work" and "the size and composition of the work force." Both provisions are generally worded. Neither provision specifically addresses the Respondent's potential transfer of bargaining unit work to newly created positions outside the unit. Moreover, the language in Article 2.7 is vague, ambiguous, and open to multiple interpretations. As a result, I find that neither provision contains the specificity required to constitute a clear and unmistakable waiver of the Union's right to bargain over a transfer of bargaining unit work to nonunit positions. *Regal Cinemas*, 334 NLRB at 313, citing to *Geiger Ready-Mix Co. of Kansas City, Inc.*, 315 NLRB 1021 (1994).

35 The Respondent's final argument as to transportation foremen is that its removal of the mechanics from the bargaining unit had only a minimal impact on the unit's size. However, in the Board decisions involving the complete elimination of a unit job classification, the impact on the unit size is irrelevant. See *Somerset Valley Rehabilitation & Nursing Center*, supra; *Dixie Electric Membership Corp.*, supra; and *Wackenhut Corp.*, supra.

40 As to meter specialists, the Respondent contends that its action was lawful, pursuant to the Board's decision in *Kohler Co.*, 292 NLRB 716 (1989). I find that case inapposite. In *Kohler*, the employer unilaterally created 3 positions in the new job classification of "material control

clerk.” The company argued that the new positions were administrative and excluded from the bargaining unit by the terms of the parties’ contract. The General Counsel countered that the material control clerks’ job duties were identical to other employees in the unit. The Board determined that the clerks’ principal job functions and responsibilities were significantly different from those of unit employees. As a result, the employer had no duty to bargain over the creation of a new, nonunit position. But *Kohler* did not involve the elimination of a unit job classification or the filling of a new, nonunit job classification with unit employees. These factual distinctions render the decision inapplicable here.

For all these reasons, I conclude the Respondent violated Section 8(a)(5) by changing the scope of the bargaining unit without the Union’s consent. It also violated Section 8(a)(5) by its admitted setting of new wage rates and other terms and conditions of employment for the transportation foremen and energy services agents. Finally, because Hancock should have remained a part of the bargaining unit, the Respondent’s January 20, 2016, refusal to process the Union’s grievances on Hancock’s behalf likewise violated Section 8(a)(5). *Public Service Company of New Mexico*, 360 NLRB 573, 584–585 (2014).

C. *The Supervisory Status of Transportation Foremen*

As previously noted, determining the 2(11) supervisory status of transportation foremen is not necessary to resolving the complaint allegations regarding the elimination of the mechanics from the unit. However, if this issue had to be addressed, I would find the record evidence well short of sustaining the Respondent’s burden in this regard.

To establish that individuals are supervisors, a party must show that: (1) they have authority to engage in any 1 of the 12 enumerated supervisory functions; (2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;” and (3) their authority is exercised “in the interest of the employer.” *Brusco Tug & Barge, Inc.*, 359 NLRB 486, 489–490 (2012), reaffd. 362 NLRB No. 28, slip op. at 1–2 (2015), citing to *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 710–713 (2001); *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). A party can prove the requisite supervisory authority either by demonstrating that the individuals actually exercise a supervisory function or by showing that they effectively recommend it. *Oakwood*, 348 NLRB at 688. Because the burden of proof is on the proponent of supervisory status, here the Respondent, a lack of evidence is construed against that party. *The Wackenhut Corp.*, 345 NLRB at 854 (citations omitted).

In its brief, the Respondent asserts in conclusory fashion that the TFs are statutory supervisors, because they have the authority to effectively recommend discipline of drivers. The record evidence establishes only that the TFs could counsel a driver about their substandard driver safety scorecard, then notify Morrissey if performance did not improve thereafter. That notification could lead to discipline, but not until 2017. The authority to “effectively recommend” an action “generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is

ultimately followed.” *DirecTV U.S. DirecTV Holdings LLC*, 357 NLRB 1747, 1748–1749 (2011), citing to *Children’s Farm Home*, 324 NLRB 61, 61 (1997). The Respondent presented no evidence concerning what Morrissey would do, if and when a TF recommended a disciplinary action to him in the future. Thus, the record does not support a finding that any discipline would be issued without Morrissey conducting an independent investigation.⁴²

The Respondent also states, again in conclusory fashion, that the TFs are supervisors, because they assign work to Beck, the transportation coordinator. TFs instruct Beck to order parts; set up vehicle drop offs or deliveries from service vendors; and to clean the office. In the 2(11) context, the word “assign” is defined, in part, as giving significant overall duties to an employee. *Brusco Tug and Barge, Inc.*, 359 NLRB at 490. Moreover, as noted above, the authority must be exercised with independent judgment, meaning it must rise above the level of routine or clerical in nature. *Id.* The testimony described above gives no indication of the portion of Beck’s job duties that the TFs assign to her. In addition, it does not detail how they go about making these assignments. All three of the described job tasks appear to be routine or clerical in nature. Thus, the record evidence is insufficient to establish that the TFs assign Beck significant overall duties or exercise independent judgment when doing so.

Accordingly, I find the Respondent failed to carry its burden of demonstrating that transportation foremen are 2(11) supervisors.

II. DID BREWINGTON VIOLATE SECTION 8(A)(1) IN HIS MAY AND JUNE 2016 CONVERSATIONS WITH SEVIGNY?

The General Counsel contends that the Respondent committed two independent violations of Section 8(a)(1) in this case. First, the complaint alleges that the Respondent unlawfully threatened employees on June 27. On that date, Brewington told Sevigny that he was sorry, but it was the Union’s fault that Sevigny got laid off. He further explained that the Union would not let them go to the ESA position, so he had to put them back to the meter specialist job and lay them off. The Board repeatedly has held that an employer violates Section 8(a)(1), when it asserts that an employee’s or union’s protected activity is the cause of a layoff. See, e.g., *Joseph Stallone Electrical Contractors, Inc.*, 337 NLRB 1139, 1139 (2002) (employer linked an employee’s layoff to other employees and a union presenting grievances to the employer); *Aero Metal Forms, Inc.*, 310 NLRB 397, 400 (1993) (supervisor’s comment linked employee’s layoff to union activity of a relative). In this case, Brewington blamed the layoffs on the Union’s insistence that the Respondent return the employees to the meter specialist position and negotiate the transfer of them and their work to a new position. Brewington linked the layoffs to the Union’s protected activity, engaged in on behalf of Sevigny and the other employees. Thus, the statements violate Section 8(a)(1).⁴³

⁴² Even if the new duties constituted the ability to effectively recommend discipline, only 2 of the 3 transportation foremen had this authority. Brown, formerly a unit mechanic, is not involved in the review of driver safety scorecards.

⁴³ The Respondent did not address or offer any defense to this allegation in its brief.

The General Counsel's second allegation is that Brewington interrogated Sevigny during their February and May 2016 coffee meetings. At the hearing, counsel for the General Counsel moved to amend the second consolidated complaint to include this allegation. The Respondent opposed the motion. A judge has wide discretion to grant or deny motions to amend complaints under Section 102.17 of the Board's Rules and Regulations. *Rogan Bros. Sanitation, Inc.*, 362 NLRB No. 61, slip op. at 3 fn. 8 (2015). The factors to be evaluated in determining whether an amendment should be allowed are (1) whether there was surprise or lack of notice, (2) whether there was a valid excuse for the delay in moving to amend, and (3) whether the matter was fully litigated. *Stagehands Referral Service, LLC*, 347 NLRB 1167, 1171–1172 (2006).

Here, the General Counsel sought the amendment at the start of the hearing, before any witness testimony had been taken. The Respondent had an unlimited opportunity to present evidence concerning the alleged conversations between Brewington and Sevigny. Although the Respondent argues that the General Counsel had no valid excuse for the delay in seeking the amendment, I find that factor insufficient to warrant denying the motion. The Respondent was not prejudiced in any manner by the delay, because the matter was fully litigated at the hearing. Thus, I grant the General Counsel's motion to amend complaint paragraph 8(b).⁴⁴

Turning to the merits of the claim, an unlawful interrogation is one which reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act, under the totality of the circumstances. *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), *affd. sub nom Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The test is an objective one that does not rely on the subjective aspect of whether the employee was, in fact, intimidated. *Multi-Ad Services*, 331 NLRB 1226, 1227–1228 (2000), *enfd.* 255 F.3d 363 (7th Cir. 2001).

Based upon my credibility resolution discussed above, I found that the two had one coffee-meeting conversation in May 2016. At that time, Brewington asked Sevigny how he felt about the Union. Sevigny gave a non-specific answer in response, unwilling to share his position. Sevigny offered suggestions on additional work he could perform as an ESA during the conversation. Brewington instead told him that he did not want the Union to run his company and he wanted to run his company his way. Brewington is the CEO and highest-ranking official of the Respondent. His first question sought to determine Sevigny's position on the Union. At that time, the Union had for months objected to the Respondent's transfer of meter specialists to the ESA position. The record also contains no indication of Sevigny being an open union supporter prior to the conversation. The purpose of this meeting was to permit Sevigny to offer his workplace concerns. His discussion of additional work he could do suggests he was worried about the possibility of losing his job. Brewington's "my way" comment indicates he thought the suggestions were coming from the Union and that he was rejecting them. Under the totality of these circumstances, Brewington's statements violate Section 8(a)(1). *BJ's Wholesale Club*, 319 NLRB 483, 483 (1995); *Blue Cab Co.*, 156 NLRB 489, 506–507 (1965).

⁴⁴ At the hearing, I granted the General Counsel's unopposed motion to amend complaint paragraphs 4, 9, and 10. (Tr. 8–12, 683–684; GC Exh. 2.)

III. DID THE RESPONDENT VIOLATE SECTION 8(A)(5) BY ENGAGING IN
DIRECT DEALING WITH HANCOCK AND SEVIGNY?

5 The General Counsel's complaint alleges that the Respondent bypassed the Union and dealt directly with its employees regarding their terms and conditions of employment. This allegation addresses the Respondent's offer of severance pay to Hancock and Sevigny.

10 Severance pay as a form of wages constitutes a mandatory subject of bargaining. *Champion Int'l Corp.*, 339 NLRB 672, 688 (2003) (citations omitted). Implicit in a union's right to engage in effects bargaining is its right to bargain over severance pay. *Id.* Therefore, an employer violates Section 8(a)(5) and (1) of the Act when it engages in direct dealing with employees concerning severance pay.

15 Direct dealing is demonstrated where an employer communicates with represented employees to the exclusion of their union for the purpose of establishing working conditions or making changes regarding a mandatory subject of bargaining. *Permanente Medical Group*, 332 NLRB 1143, 1144–1145 (2000). The established criteria for finding that an employer has engaged in unlawful direct dealing are that (1) the [employer] was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing
20 wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and (3) such communication was made to the exclusion of the union. *El Paso Electric Co.*, 355 NLRB 544, 545 (2010) (citations omitted).

25 In this case, all the required elements have been met. As to the first and third elements, Brewington made the initial offer of severance pay to Hancock and Sevigny, both orally and in writing, in the meeting announcing the layoffs on June 27. No union representative was present at that meeting. Thus, the Respondent communicated directly with Hancock and Sevigny to the exclusion of the Union. Although Brewington notified the Union the same day, such
30 simultaneous communication of a proposal to a union and to employees still constitutes direct dealing. See *Armored Transport, Inc.*, 339 NLRB 374, 377 (2003).

35 Regarding the second element, the purpose of the meeting discussion and written layoff notification was to offer the employees 6 weeks of severance pay, an obvious term and condition of employment. The Respondent's failure to discuss the offer with the Union before presenting it to employees undercut the Union's representational role. Without engaging in any effects bargaining over the layoffs, the Respondent notified the meter specialists, and the rest of its workforce, about its severance offer on June 27. But it did not present a formal
40 proposal to the Union until July 18. In the interim, Sevigny understandably asked Brewington about the severance pay. Brewington then blamed the Union, saying he did not have approval to pay it. The Respondent put the cart before the horse. It should have notified the Union of its proposal and engaged in bargaining over severance, before speaking to the laid off employees.

Accordingly, I conclude that the Respondent violated Section 8(a)(5) by engaging in direct dealing with its meter specialists.

IV. DID THE RESPONDENT VIOLATE SECTION 8(A)(3) AND 8(A)(4)
BY LAYING OFF HANCOCK AND SEVIGNY?

5 Finally, the General Counsel's complaint alleges that the Respondent violated Section 8(a)(3), by laying off Hancock and Sevigny on July 11, 2016, because of their union activity. The complaint alleges that the layoffs also violated Section 8(a)(4), because they were motivated by the Union's filing and pursuing of Board charges on behalf of the two discriminatees.

10 To determine if an employee's layoff violates Section 8(a)(3), the well-known *Wright Line* standard applies. *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must demonstrate by a preponderance of the evidence that the protected conduct of Hancock and Sevigny was a motivating factor for their layoffs. The General Counsel satisfies this initial burden by showing
15 (1) the employees' protected activity; (2) the employer's knowledge of that activity; and (3) the employer's animus. If the General Counsel meets this initial burden, the burden shifts to the Respondent to prove it would have laid off Hancock and Sevigny, even absent their protected activity. *Mesker Door*, 357 NLRB 591, 592 (2011). The Board's *Wright Line* burden also applies to Section 8(a)(4) claims. *American Gardens Mgmt. Co.*, 338 NLRB 644, 645 (2002).

20 Turning to the elements of the initial *Wright Line* burden, the only matter in dispute is whether the Respondent harbored animus towards the protected conduct of Hancock and Sevigny.⁴⁵ I find the record evidence sufficient to establish this.

25 Prior to or simultaneously with the layoffs, the Respondent committed numerous unfair labor practices. They began with the Section 8(a)(5) unlawful change in unit scope as to meter specialists and mechanics on November 30, 2015. They continued with the Section 8(a)(1) statements made by Brewington to Sevigny in May and June 2016. Significantly, one of the unlawful statements blamed the Union for the employees' layoffs. They included the Section
30 8(a)(5) direct dealing the Respondent engaged in when offering the laid off employees a severance package on June 27. These other unfair labor practices support a finding of a

⁴⁵ The Respondent does not contest the other two elements of the initial *Wright Line* burden. In any event, the evidence demonstrates that Hancock and Sevigny engaged in protected conduct of which the Respondent was aware. Hancock and Sevigny were dues-paying union members, in contrast to Murphy. The Union grieved the Respondent's removal of Hancock, Murphy, and Sevigny from the bargaining unit on December 15, 2015. Either Hancock or the Union filed grievances on November 17, 2015, and January 18, challenging the Respondent's disciplinary actions against her. Grievance filing by an employee or by a union on the employee's behalf is protected conduct. *Schrock Cabinet Co.*, 339 NLRB 182, 186 (2003). The Union also filed charges with the NLRB on January 27, 2016, and May 9, 2016. The charges dealt with the Respondent's reclassification of meter specialists and the Respondent's refusal to accept the January 2016 grievance over Hancock's discipline while employed as an ESA. A union's filing of charges with the Board on an employee's behalf likewise is protected conduct. *Metro-West Ambulance Service, Inc.*, 360 NLRB 1029, 1030 (2014). The Respondent obviously was aware of the grievance and Board charge filings.

discriminatory motive for the layoffs. *Mid-Mountain Foods, Inc.*, 332 NLRB 251, 260 (2000), enf. mem. 169 LRRM 2448 (4th Cir. 2001).

Beyond these independent violations of the Act, Brewington also made statements showing specific animus as to the Union's defense of meter specialists. To reiterate, in his June 27 letter to employees announcing the layoffs, Brewington stated "Unfortunately my creation of these new positions has been battled since day one and I have spent far too much of the membership's money in legal fees." This statement likewise supports a finding of discriminatory motive. *Affiliated Foods, Inc.*, 328 NLRB 1107, 1107 (1999).

Finally, the Respondent's return of the ESAs to the meter specialist position and simultaneous announcement of layoffs occurred shortly after the General Counsel issued the original complaint in this case and the Union refused the Respondent's quid-pro-quo settlement offer. This timing also is indicative of a discriminatory motive. *Gunderson Rail Services*, 364 NLRB No. 30, slip op. at 30, 34 (2016).

Accordingly, I conclude the General Counsel has established that the Respondent's layoff of Hancock and Sevigny was motivated by animus, at least in part, towards the Union's objection to the elimination of the meter specialist and mechanics positions, as well as its filing of grievances and Board charges in support of that objection.⁴⁶

With the burden shift in place, the Respondent contends that it would have laid off Hancock and Sevigny irrespective of their protected conduct, due to a lack of work. In evaluating this argument, I must be mindful of the Board's direction that an employer cannot meet its burden merely by showing that it had a legitimate reason for its action. Rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086-1087 (2011); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984).

This case presents an unusual situation, in that it is not sufficient to evaluate only whether a lack of work justified the layoffs of two meter specialists. The Respondent transferred the ESAs back to the meter specialist position and simultaneously announced their

⁴⁶ In arguing that a discriminatory motive has been established, the General Counsel also points to certain statements made by the Respondent's supervisors. The first is Hancock's uncontroverted testimony that Lowder told Murphy and Sevigny in November 2015 that "you all can take your union handbooks and shove it up your asses." However, Hancock provided no additional information on what the conversation entailed. Thus, no context for the statement exists. Moreover, although the statement purportedly was made to both Murphy and Sevigny, neither corroborated Hancock's testimony when they testified or provided additional details. Thus, although I credited Hancock's testimony, I afford it little weight. The second is Brewington's statement at a grievance meeting in January 2016 that Florida was a right-to-work state and he could fire anyone for not liking their shirt. Although this is an incorrect statement of the law as it applies to his unionized employees, the comment, at most, provides weak support for a showing of general animus.

layoffs. It thereby conjoined the two actions. It also did not transfer the transportation foremen back to mechanics at the same time. Thus, I conclude the Respondent must demonstrate that both the transfer back and the layoffs of meter specialists would have occurred in the absence of protected conduct.

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The Respondent contends that it reverted Hancock, Murphy, and Sevigny to meter specialists, because they lacked the professionalism necessary to remain as ESAs. Based on my credibility determination above, I find that the Respondent's actual reason for doing so was the issuance of the General Counsel's complaint in Case 12-CA-168580 and the Union's continued insistence that meter specialists and mechanics be returned to the bargaining unit. As a result, the Respondent's asserted reason for the transfer back is a pretext. Because it is a pretext, the Respondent cannot meet its shifting burden. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007). Furthermore, because the unlawful transfer back was conjoined to the layoffs, I conclude that any layoffs which occurred thereafter were unlawful, irrespective of who was chosen.

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For all intents and purposes, that finding ends the necessary legal analysis. However, two remaining disputed issues bear addressing, in the event this case ultimately ends up before a higher authority.

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The first issue is whether the meter specialist layoffs could be justified by a lack of work. In evaluating the claim, the question must be framed in terms of the meter specialist work that remained as of June 27, 2016. It is undisputed that the principal job function of meter specialists was to manually read the 16,000+ meters operated by the Respondent throughout its large geographic territory. At the time of the layoffs, all of the manual meters had been replaced with the new meters that could be read remotely. The installation process for the new meters had been completed months before then. In addition, Hancock had been transferred to the call center representative position on January 18, 2016. Thus, for more than 5 months prior to the layoff, the Respondent had only two employees performing residual meter specialist functions. The Respondent had to find other job duties not previously performed in order to provide the two full-time work. Then, at the beginning of June 2016, Sevigny went on extended leave and Murphy was the only remaining employee performing those functions. Even after the layoffs occurred, Murphy was not spending all of his work time on meter specialist functions. As a result, I find that the record evidence demonstrates lack of work was a legitimate reason for the Respondent to lay off two of the three meter specialists.

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Nonetheless, it is not enough that the Respondent had a legitimate reason for laying off two meter specialists. The Respondent had to demonstrate that the layoffs would have occurred on July 11, 2016, even absent the employees' protected conduct. The record establishes that the meter specialists lacked worked throughout the entirety of the time they were classified as ESAs. The Company kept filling their schedules with, as Ellerbee put it, "whatever we could find to keep them busy."⁴⁷ Yet the Respondent did not return them to the unit and implement

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⁴⁷ Tr. 596.

layoffs, until after the General Counsel's complaint issued and the Union rejected a settlement offer. Thus, the Respondent did not meet its burden.

5 The second issue is whether the Respondent's ultimate selection of Hancock and
 Sevigny as the meter specialists who would be laid off was based on a discriminatory motive.
 Again, for the reasons described above, I conclude the General Counsel met his initial burden of
 demonstrating that animus was a motivating factor in their selection. Thus, the burden shifts to
 the Respondent to demonstrate it would have selected Hancock and Sevigny for layoffs, even
 10 absent their protected conduct. In making the selections, Brewington asserted that he reviewed
 the criteria for layoffs in the parties' collective-bargaining agreement. He testified that he
 looked at classification seniority and determined that Murphy had the most, then Sevigny, and
 then Hancock. In addition, Brewington considered the other factors enumerated in the contract:
 experience, skill, cooperativeness, and reliability. In that regard, the entirety of Brewington's
 15 testimony, on direct, is as follows:

Q: Well, walk us through that. How did you determine who was
 better on experience, and skill, cooperativeness, and
 reliability?

20 A: Well, just from the histories of meter reading activities and
 everything else, I know that [Murphy] had more experience.
 He was more skilled at it. And then [Sevigny] was very good
 at it. I was very concerned about his reliability anymore with
 all that was going on. They were both cooperative, and in the
 case of the other levels, that both of them –

25 Q: Both of whom?

A: [Sevigny] and [Murphy] were better than [Hancock].⁴⁸

I find this abbreviated, conclusory, unclear testimony insufficient to sustain the
 Respondent's burden of showing it would have selected Hancock and Sevigny for layoff, even
 30 absent their protected conduct. Brewington provided no specifics to support his conclusion that
 Murphy was the highest rated employee in the four enumerated factors. He provided no
 information about what process he used to arrive at his conclusion. He stated that he "got
 advice" from Ellerbee, but did not elaborate on what the advice was or any discussion the two
 had in this regard. Standing alone, this testimony is insufficient to render lawful the
 35 Respondent's selection of Hancock and Sevigny for layoff.

The Respondent also relies on performance appraisals and disciplinary actions issued to
 all three employees, which purportedly demonstrate that Murphy was better in the four

⁴⁸ Tr. 651–652.

enumerated categories.⁴⁹ For the most recent appraisals in early 2016, Murphy received higher ratings than the other two employees, although Sevigny's appraisal overall was quite positive. Murphy also had a prior, approximately 1-year stint as a working supervisor of Hancock and Sevigny, but the reason for it ending is not set forth in the record. As for discipline, the documentation does show that Hancock repeatedly had issues in interacting with supervisors and customers throughout her employment. However, the Respondent did not discipline her for the first time until November 2015. Murphy had been disciplined on three occasions during his career, including a 3-day suspension for an argument with Ellerbee in 2012. The record contains no evidence that the Respondent ever disciplined Sevigny. Certainly, it is not readily apparent from this uneven record evidence that Murphy should have been retained under the vague and subjective criteria in the contractual layoff provision.

In any event, and irrespective of what the documentation shows, I reject the Respondent's attempt to use it to meet its burden here. Brewington never testified he reviewed or relied upon the documentation in reaching his decision to lay off Hancock and Sevigny. Moreover, he does not appear to have had any role in the issuance of discipline or appraisals to employees. His signature does not appear on any of these documents and he offered no testimony as to his involvement in those areas. Because he admittedly was the "sole" decision maker on who got laid off, I find the failure to link the documentation to his unexplained decision making process renders it irrelevant.

For all these reasons, I conclude that the Respondent violated Section 8(a)(3) and 8(a)(4) by laying off Hancock and Sevigny on July 11, 2016, as alleged in the General Counsel's complaint.

⁴⁹ R. Exhs. 43–45, 49–50; GC Exhs. 48–50. At the hearing, I rejected two exhibits (R. Exhs. 48 and 53) in this regard. The first rejected exhibit contains supervisory notes of Hancock's performance from July 15, 2013 to November 16, 2015. The second rejected exhibit was the Respondent's November 9, 2015 suspension of Hancock, including statements from supervisors. I rejected these exhibits, based upon the contention of the General Counsel and the Charging Party that an arbitrator had removed the discipline from Hancock's personnel file, when ruling on the Union's grievance challenging Hancock's suspension. (Tr. 354–358, 603–605, 607–610.) At the end of the hearing, I allowed the parties to make further argument and told them I would take the issue under advisement, in particular to enable me to read the arbitrator's decision. (Tr. 679–682; GC Exh. 21.) Having now reviewed that decision and the exhibits in dispute, I reverse my earlier ruling and admit Respondent's Exhibits 48 and 53 into the record. The arbitrator reduced Hancock's 2-day suspension to a verbal warning. The bases for the reduction were the Respondent's failure to give Hancock sufficient forewarning of the possible disciplinary consequences of her conduct, as well as the failure to issue timely progressive discipline. However, the arbitrator also found that Hancock engaged in misconduct. He noted repeated complaints about her attitude, erratic driving with employees, and interactions with members. The only action the arbitrator ordered the Respondent to take was to remove the 2-day suspension and reduce it to a verbal warning. Thus, the General Counsel and the Charging Party are correct that I should not consider the 2-day suspension. But the arbitrator's ruling does not make Hancock's verbal warning and the underlying documents leading to it inadmissible. Likewise, the supervisory notes of Hancock's performance over more than a 2-year period, including those dealing with the conduct which led to the verbal warning, are not inadmissible, based upon the arbitrator's ruling.

CONCLUSIONS OF LAW

1. The Respondent, Glades Electric Cooperative, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Charging Party, International Brotherhood of Electrical Workers, Local 1933, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.
3. Since a date prior to 2013 and at all material times, the Union has been the certified exclusive collective-bargaining representative, within the meaning of Section 9(a) of the Act, of an appropriate unit of employees (the Unit) consisting of the following:

All employees in the classifications of Ground Man, Meter Specialist, Warehouse Specialist, Mechanic, 1st Year Apprentice, 2nd Year Apprentice, 3rd Year Apprentice, Certified Meter Technician, Certified Lineman, Certified Substation Technician, Journey Meter Technician, Journey Lineman, Journey Substation Technician, Lead Lineman, Lead Substation Technician, and Lead Meter Technician; excluding supervisor personnel, including staking supervisors, professional personnel, technical and office clerical employees, including those who act in a confidential capacity to the Cooperative, and all other employees not specifically included.

4. By unilaterally eliminating the mechanic and meter specialist classifications and transferring bargaining unit work formerly performed by those employees to the nonbargaining unit transportation foreman and energy services agents job classifications, the Respondent has changed the scope of the Unit without the Union's consent, in violation of Section 8(a)(1) and (5).
5. The Respondent further violated Section 8(a)(1) and (5) by the following conduct:
 - a. On or about November 30, 2015, unilaterally changing the wages and other terms and conditions of employment of mechanics and meter specialists.
 - b. On January 20, 2016, refusing to accept and process a grievance filed on behalf of a bargaining unit employee.
 - c. On June 27, 2016, bypassing the Union and dealing directly with employees in the Unit concerning their terms and conditions of employment.
6. The Respondent violated Section 8(a)(1), (3), and (4) by laying off employees Emily Hancock and Chad Sevigny on July 11, 2016.

7. The Respondent violated Section 8(a)(1) through the following conduct:
- a. On a date in May 2016, interrogating employees concerning their Union sympathies.
 - b. On or about June 27, 2016, threatening to lay off employees because of their support for, and membership in, the Union, and because the Union filed and pursued charges with the Board on behalf of employees.
8. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Because the Respondent violated the Act by unilaterally changing the scope of the bargaining unit without the Union's consent, the Respondent shall be ordered to restore the status quo ante. Thus, the Respondent shall be required to rescind its November 30, 2015, elimination of the mechanic and meter specialist positions from the Unit and consequent transfer of Unit work performed by such employees outside the Unit. The Respondent must offer the employees who previously held these positions reinstatement as mechanics and meter specialists, with the same wages, benefits, and other terms and conditions of employment they had before the Respondent's elimination of those classifications.⁵⁰

To further remedy the Section 8(a)(5) change in unit scope allegation, the Respondent shall be ordered to make the former mechanics and meter specialists whole for all wages and benefits lost as a result of the unlawful elimination of the unit positions.

⁵⁰ In a proposed notice, the General Counsel appears to seek, as an affirmative remedy, to have the Respondent recognize the Union as the exclusive collective-bargaining representative of transportation foremen and energy services agents. (GC Brf., pp. 54–55.) This mirrors an allegation contained in complaint paragraph 7. However, the General Counsel offers no legal argument in its brief regarding the complaint allegation or requested relief. That particular remedy has been approved in cases where the General Counsel's change-in-unit-scope theory is that an employer removed a substantial group of employees from the bargaining unit, without showing that the group was sufficiently dissimilar from the remainder of the unit to warrant removal. See, e.g., *United Technologies Corp.*, 292 NLRB 248, 248–249 (1989); *Bay Shipbuilding Corp.*, 263 NLRB 1133, 1139–1141 (1982). The General Counsel made no such argument in this case. In any event, such a remedy appears incongruent with restoring the unit classifications and transferring back the unit work. Thus, I decline to include this affirmative obligation in the remedy.

Having found that the Respondent engaged in direct dealing and refused to accept grievances, I shall order the Respondent to recognize and, upon request, bargain in good faith with the Union, as the exclusive collective-bargaining representative of the unit, regarding the terms and conditions of employment of the unit employees. I shall also order the Respondent to accept and process the Union's grievance over Hancock's January 7, 2016 verbal warning.

Because the Respondent's layoffs of Emily Hancock and Chad Sevigny violated the Act, the Respondent shall be ordered to offer them full reinstatement to their former meter specialist positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. The Respondent also shall make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. The Respondent must remove from its files any references to the unlawful layoffs of Hancock and Sevigny and to notify them in writing that this has been done and that the unlawful layoffs will not be used against them in any way.

The make-whole remedies described above shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall compensate Hancock and Sevigny for search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra., compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), the Respondent shall compensate Hancock, Sevigny, and any other affected mechanics and meter specialists for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 12 a report allocating backpay to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended order.⁵¹

ORDER

The Respondent, Glades Electric Cooperative, Inc., Lake Placid, Moore Haven, and Okeechobee, Florida, its officers, agents, successors, and assigns, shall

⁵¹ 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.

1. Cease and desist from

- 5 (a) Failing and refusing to bargain collectively and in good faith with the Union concerning the wages, hours, and other terms and conditions of employment of our employees in the following unit:

10 All employees in the classifications of Ground Man, Meter Specialist, Warehouse Specialist, Mechanic, 1st Year Apprentice, 2nd Year Apprentice, 3rd Year Apprentice, Certified Meter Technician, Certified Lineman, Certified Substation Technician, Journey Meter Technician, Journey Lineman, Journey Substation Technician, Lead Lineman, Lead Substation Technician, and Lead Meter Technician; excluding supervisor personnel, including staking supervisors, professional personnel, technical and office clerical employees, including those who act in a confidential capacity to the Cooperative, and all other employees not specifically included.

- 20 (b) Eliminating classifications in the bargaining unit without the consent of the Union or a Board order.

- (c) Unilaterally changing the wages and other terms and conditions of employment of unit employees without notifying and, upon request, bargaining with the Union.

- 25 (d) Refusing to accept and process grievances filed on behalf of bargaining unit employees.

- 30 (e) Bypassing the Union and dealing directly with employees in the Unit concerning their terms and conditions of employment.

- (f) Laying off employees due to their union activity or the filing and pursuit of unfair labor practice charges with the Board on their behalf.

- 35 (g) Interrogating employees concerning their union sympathies.

- (h) Threatening to lay off employees due to their union activity or the filing and pursuit of unfair labor practice charges with the Board.

- 40 (i) 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.

- 5 (a) Recognize and, upon request, bargain with the Union concerning the wages, hours, and other terms and conditions of employment of the employees in the Unit.
- 10 (b) Within 14 days from the date of this Order, rescind the elimination of the mechanic and meter specialist job classifications and the consequent transfer of work performed by these positions to positions outside the Unit.
- 15 (c) Within 14 days from the date of this Order, offer the employees who previously held the positions of mechanic and meter specialist reinstatement to the positions, with the same wages, benefits, and other terms and conditions of employment they had before the classifications were eliminated.
- 20 (d) Make the former mechanics and meter specialists whole for all wages and benefits lost as a result of the elimination of those positions, in the manner set forth in the remedy section of this decision.
- 25 (e) Within 14 days from the date of this Order, offer Emily Hancock and Chad Sevigny reinstatement to their former meter specialist positions, without prejudice to their seniority or any other rights or privileges they previously enjoyed.
- 30 (f) Make Emily Hancock and Chad Sevigny whole for any loss of earnings and other benefits as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.
- 35 (g) Within 14 days from the date of this Order, remove from its files any references to the unlawful layoffs of Emily Hancock and Chad Sevigny, and, within 3 days thereafter, notify them in writing that this has been done and that the unlawful layoffs will not be used against them in any other way.
- 40 (h) Accept and process the Union's grievance concerning the January 7, 2016 verbal warning issued to Emily Hancock.
- (i) Within 14 days after service by the Region, post at its facilities in Lake Placid, Moore Haven, and Okeechobee, Florida, copies of the attached notice marked "Appendix."⁵² Copies of the notice, on forms provided by the Regional

⁵² 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

5 Director for Region 12, after being signed by the Respondent's authorized
representative, shall be posted by the Respondent and maintained for 60 days
in conspicuous places including all places where notices to employees are
customarily posted. In addition to physical posting of paper notices, notices
10 shall be distributed electronically, such as by email, posting on an intranet or
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
15 these proceedings, the Respondent has gone out of business or closed the
facilities involved in these proceedings, the Respondent shall duplicate and
mail, at its own expense, a copy of the notice to all current employees and
former employees employed by the Respondent at any time since November
30, 2015.

- (j) 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 Regional Director attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C., June 1, 2017



Charles J. Muhl
Administrative Law Judge

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 recognize and bargain collectively with the International Brotherhood of Electrical Workers, Local 1933, AFL-CIO (the Union), as the exclusive collective-bargaining representative of our employees in the below appropriate unit, with respect to wages, hours, and other terms and conditions of employment:

All employees in the classifications of Ground Man, Meter Specialist, Warehouse Specialist, Mechanic, 1st Year Apprentice, 2nd Year Apprentice, 3rd Year Apprentice, Certified Meter Technician, Certified Lineman, Certified Substation Technician, Journey Meter Technician, Journey Lineman, Journey Substation Technician, Lead Lineman, Lead Substation Technician, and Lead Meter Technician; excluding supervisor personnel, including staking supervisors, professional personnel, technical and office clerical employees, including those who act in a confidential capacity to the Cooperative, and all other employees not specifically included.

WE WILL NOT eliminate positions, including mechanic and meter specialist, from the bargaining unit without the Union's consent or an order of the National Labor Relations Board (the Board).

WE WILL NOT unilaterally change your wages or other terms and conditions of employment without notifying and, upon request, bargaining with the Union.

WE WILL NOT refuse to accept and process grievances filed by the Union on your behalf.

WE WILL NOT bypass the Union and deal directly with our employees in the above-described bargaining unit concerning your wages, benefits, or other terms and conditions of employment.

WE WILL NOT lay you off due to your union activity or your Union's filing and pursuit of unfair labor practice charges on your behalf with the Board.

WE WILL NOT interrogate you concerning your union sympathies.

WE WILL NOT threaten you with layoff due to your union activity or your Union's filing and pursuit of unfair labor practice charges on your behalf with the Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize the Union as the exclusive collective-bargaining representative of employees in the above-described unit and, upon request, bargain collectively and in good faith with the Union concerning the unit employees' wages and other terms and conditions of employment.

WE WILL, within 14 days from the date of this Order, rescind our unlawful elimination of the mechanic and meter specialist job classifications and our consequent transfer of the work performed by these positions to positions outside of the unit.

WE WILL, within 14 days from the date of this Order, offer the employees who previously held the positions of mechanic and meter specialist reinstatement to the positions, with the same wages, benefits, and other terms and conditions of employment they had before we unlawfully eliminated the classifications.

WE WILL pay the former mechanics and meter specialists all wages and benefits they lost, as a result of our unlawful elimination of those positions.

WE WILL, within 14 days from the date of this Order, offer Emily Hancock and Chad Sevigny reinstatement to their former meter specialist positions, without prejudice to their seniority or any other rights or privileges they previously enjoyed.

WE WILL pay Emily Hancock and Chad Sevigny all wages and benefits they lost, as a result of our unlawful layoffs of them.

WE WILL compensate Emily Hancock and Chad Sevigny for search-for-work and interim employment expenses they incurred after we unlawfully laid them off.

WE WILL compensate Hancock, Sevigny, and any other affected mechanics and meter specialists for the adverse tax consequences, if any, of receiving a lump-sum backpay award.

WE WILL, within 14 days from the date of this Order, remove from our files any references to the unlawful layoffs of Emily Hancock and Chad Sevigny, and, within 3 days thereafter, notify

them in writing that this has been done and that the unlawful layoffs will not be used against them in any other way.

WE WILL accept and process the Union's January 18, 2016 grievance over our discipline of Emily Hancock on January 7, 2016.

GLADES ELECTRIC COOPERATIVE, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website:

www.nlr.gov.

South Trust Plaza, 201 East Kennedy Boulevard, Ste 530, Tampa, FL 33602-5824
(813) 228-2641, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/12-CA-168580 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (813) 228-2345.