

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

Case Nos. 12-CA-168580, 12-CA-175794, 12-CA-180034

GLADES ELECTRIC COOPERATIVE, INC.

and

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

**GLADES ELECTRIC COOPERATIVE INC.'S
EXCEPTIONS AND SUPPORTING BRIEF TO ADMINISTRATIVE
LAW JUDGE'S DECISION AND RECOMMENDED ORDER**

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TABLE OF CONTENTS

RESPONDENT’S EXCEPTIONS..... 1

- I. Complaint Allegations and Course of Proceedings. 1
- II. GEC’s Exceptions to the ALJ’s Decision and Recommended Order..... 3

RESPONDENT’S BRIEF IN SUPPORT OF EXCEPTIONS..... 6

STATEMENT OF FACTS..... 6

- I. Background. 6
- II. Relevant collective bargaining agreement provisions. 6
- III. Obsolescence of the Meter Specialist position and creation of Energy Services Agent position. 7
- IV. Sevigny and Hancock’s July 2016 Layoff and Alleged “Threat” of Layoffs. 12
- V. GEC’s Reorganization and Creation of the Transportation Foreman Positions..... 18

ARGUMENT..... 22

- I. The creation of the professional ESA position and GEC’s decision to offer the former Meter Specialists the opportunity to learn those positions does not violate the Act. 22
- II. GEC was not obligated to process a grievance submitted by Hancock while employed in a non-unit position..... 25
- III. GEC’s capitulation to the Union’s demand to revert Murphy, Sevigny, and Hancock to the Meter Specialist position was not unlawful, nor can its statement that layoffs would naturally follow constitute an unlawful threat..... 25
- IV. GEC’s layoff of Hancock and Sevigny did not violate the Act..... 29
- V. The ALJ’s remedy ordering reinstatement to obsolete positions is not an appropriate remedy. 30
- VI. GEC did not violate the Act by truthfully informing Sevigny and Hancock that it had offered to negotiate severance with the Union. 31
- VII. GEC did not violate the Act by creating the new supervisory Transportation Foremen positions. 32

CONCLUSION 37
CERTIFICATE OF SERVICE 37

TABLE OF AUTHORITIES

Cases

Adolph Coors Co., 235 NLRB 271 (1978) 31

Bridgeport and Port Jefferson Steamboat Co., 313 NLRB 542 (1993) 24

Cello-Foil Products, Inc., 178 NLRB 676 (1969) 36

Kohler Co., 292 NLRB 716 (1989) 24

KSLM-AM & KSD-FM, 275 NLRB 1342 (1985) 30

Lorac Const. Services, Inc., 318 NLRB 1034 (1995) 30, 31

Luther Manor Nursing Home, 270 NLRB 949 (1984) 34

*Mountaineer Park, Inc. & United Food & Commercial Workers Int'l Union, Local Union
23, AFL-CIO, CLC*, 343 NLRB 1473 (2004) 34

Proctor & Gamble Mfg. Co., 160 NLRB 334 (1966) 31

St. Louis Telephone Employees Credit Union, 273 NLRB 625 (1984) 24, 33, 34

*Starwood Hotels & Resorts Worldwide, Inc., d/b/a Sheraton Universal Hotel & Unite
Here Local 11*, 350 NLRB 1114 (2007) 34

The Lutheran Home of Kendallville, Indiana, 264 NLRB 525 (1982) 34

United Techs. Corp., 274 NLRB 609 (1985), *enfd.*, 789 F.2d 121 (2d Cir. 1986) 31

Wright Line, 251 NLRB 1083 (1980), *enfd.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*,
455 U.S. 989 (1982) 4, 28, 29, 30

Zenith Radio Corp., 177 NLRB 366 (1969) 36

Statutes

29 U.S.C. § 152(11) 33, 34

29 U.S.C. § 158(a)(1) 1

29 U.S.C. § 158(a)(3) 2

29 U.S.C. § 158(a)(4) 2

29 U.S.C. § 158(a)(5) passim

29 U.S.C. § 158(c) 31

Rules

Section 102.46 of NLRB's Rules and Regulations 1

**RESPONDENT’S EXCEPTIONS AND SUPPORTING BRIEF TO
ADMINISTRATIVE LAW JUDGE’S DECISION AND RECOMMENDED ORDER**

Glades Electric Cooperative, Inc. (hereinafter “Respondent” or “GEC”), pursuant to Section 102.46 of the National Labor Relations Board’s Rules and Regulations, hereby files its exceptions to the Administrative Law Judge’s Decision and Recommended Order in the above-captioned matter.

RESPONDENT’S EXCEPTIONS

I. Complaint Allegations and Course of Proceedings.

On September 30, 2016, the General Counsel issued the Second Consolidated Complaint in this case. The Complaint asserts that the Cooperative eliminated the Meter Specialist bargaining unit position on November 30, 2015, “and transferred and reassigned the work formerly performed by Meter Specialists to Energy Services Agents, without substantially changing the work duties performed by Energy Services Agents from the work duties performed by Meter Specialists.” (Consolidated Complaint, ¶¶ 6(c)-(d)). The Complaint further asserts that the Cooperative similarly eliminated the Mechanic bargaining unit position in favor of the non-unit position of Transportation Foreman without substantially changing job duties. (Consolidated Complaint, ¶¶ 6(a)-(b)). The complaint contends that the Cooperative was required to bargain over these decisions and the failure to do so constituted a violation of Sections 8(a)(1) and 8(a)(5) of the Act. The Complaint contends that the Cooperative also refused to process a grievance by Emily Hancock, a former Meter Specialist who sought to file a grievance over an alleged disciplinary counseling while later employed in the Energy Services Agent position, in violation of Sections 8(a)(1) and 8(a)(5) of the Act. (Consolidated Complaint, ¶¶ 8, 12).

The Complaint also alleges that the Cooperative’s Chief Executive Officer, Jeff Brewington, threatened to and did lay off employees Chad Sevigny and Emily Hancock because

of their support for, and membership in the Union, and because the Union filed charges on their behalf. (Consolidated Complaint, ¶¶ 9, 10, 14, 15). The Complaint contends that this conduct violated Sections 8(a)(1), 8(a)(3), and 8(a)(4) of the Act. Lastly, the Complaint contends that the Cooperative bypassed the Union and bargained directly with these employees regarding the payment of severance, in violation of Sections 8(a)(1) and 8(a)(5) of the Act. (Consolidated Complaint, ¶¶ 11, 16).

Just prior to the hearing, the General Counsel also sought to amend the Complaint to add an allegation that Brewington unlawfully interrogated Sevigny on two occasions in 2016, in violation of Section 8(a)(1). (Proposed Amendment, ¶¶ 8(b), 13).

On December 14-16, 2016, a hearing was held on the Second Consolidated Complaint before the Honorable Charles J. Muhl, Administrative Law Judge (“ALJ”). The ALJ issued his decision and recommended order on June 1, 2017. The ALJ determined that the Respondent violated Sections 8(a)(1) and (5) of the Act by unilaterally eliminating the Meter Specialist and Mechanic classifications and transferring bargaining unit work to non-unit positions, by refusing to process Hancock’s grievance, and by dealing directly with Hancock and Sevigny regarding severance pay. The ALJ further found that the Respondent violated Sections 8(a)(1), (3), and (4) of the Act by laying off Hancock and Sevigny. Lastly, the ALJ determined that the Respondent unlawfully interrogated Sevigny in May 2016 and threatened to lay off employees in June 2016, in violation of Section 8(a)(1) of the Act.

In his recommended order, the ALJ recommends that the Respondent be ordered to restore the status quo ante as of November 30, 2015. In so doing, the ALJ recommends that the Respondent be required to offer the employees who previously held these positions reinstatement to those positions with the same terms and conditions of employment, with make whole relief. The ALJ

further recommended that the Respondent be required to accept and process Hancock's January 2016 grievance concerning her verbal counseling.

II. GEC's Exceptions to the ALJ's Decision and Recommended Order.

These Exceptions are filed to the Administrative Law Judge's findings with respect to GEC's actions and to the recommended Order. Exceptions are taken to the following findings and conclusions:

1. To the ALJ's failure to find, in accordance with the uncontroverted evidence, that the job duties of the former Meter Specialist positions no longer exist and that those positions were eliminated by obsolescence, not as a means of transferring work from a bargaining unit position to a substantially similar non-unit position.

2. To the ALJ's determination that the Respondent's creation of the Energy Services Agent position and placement of the prior Meter Specialists into those positions constituted a violation of the Act. (ALJD, p. 21, L. 1-13, p. 22, L. 42-45, p. 23, L. 1-16).

3. To the ALJ's determination that the Respondent's Reorganization of the Mechanic position and creation of the supervisory Transportation Foreman position constituted a violation of the Act. (ALJD, p. 21 L. 1-35, p. 22, L. 1-40).

4. To the ALJ's determination that the Transportation Foremen positions did not constitute newly-created supervisory positions with substantially increased and distinct duties as those performed by the Mechanic position. (ALJD, p. 23, L. 20-45, p. 24, L. 1-17).

5. To the ALJ's determination that the Union had not clearly waived its right to bargain over the creation of non-unit bargaining unit Energy Services Agent and Transportation Foreman positions. (ALJD, p. 22, L. 11-19).

6. To the ALJ's determination that the Respondent violated the Act by threatening employees with layoff and by laying off Emily Hancock and Chad Sevigny because of the union's protected activities. (ALJD, p. 24, L. 25-39).

7. To the ALJ's determination that the Respondent violated the Act by unlawfully interrogating Chad Sevigny in May 2016. (ALJD, p. 25, L. 1-2, 19-41).

8. To the ALJ's determination that the Respondent engaged in direct dealing with Emily Hancock and Chad Sevigny regarding severance pay in violation of the Act. (ALJD, p. 26, L. 4-45).

9. To the ALJ's failure to find that the Respondent's actions in reverting Donald Murphy, Emily Hancock, and Chad Sevigny, back to the Meter Specialist position in June 2016 was specifically and repeatedly demanded by the Union from December 2015 through June 2016. (ALJD, p. 27-29).

10. To the ALJ's determination that the Respondent, to establish its burden under *Wright Line*, 251 NLRB 1083 (1980), is required to establish not only that Emily Hancock and Chad Sevigny would have been laid off even in the absence of any unlawful motive, but also that it would have transferred those employees back to the Meter Specialist positions in the absence of any unlawful motive. (ALJD, p. 28, L. 30-32, p. 29, L. 1-4).

11. To the ALJ's Conclusions of Law that the Respondent violated Section 8(a)(1) and (5) of the act 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, ... chang[ing] the scope of the Unit without the Union's consent." (ALJD, p. 32, L. 19-23).

12. To the ALJ's Conclusions of Law that the Respondent violated Sections 8(a)(1) and (5) of the Act by unilaterally changing the wages and terms and conditions of the Mechanics and Meter Specialists, by refusing to accept Emily Hancock's January 20, 2016 disciplinary grievance, and by dealing directly with Emily Hancock and Chad Sevigny regarding severance. (ALJD, p. 32, L. 25-33).

13. To the ALJ's Conclusions of Law that the Respondent violated Sections 8(a)(1), (3), and (4) of the Act by laying off Emily Hancock and Chad Sevigny. (ALJD, p. 32, L. 36-37).

14. To the ALJ's Conclusions of Law that the Respondent violated Sections 8(a)(1) of the Act by unlawfully interrogating Chad Sevigny in May 2016 and threatening employees with layoff in June 2016. (ALJD, p. 33, L. 1-8).

15. To the recommended order and remedy that the Respondent be required to restore the status quo ante as of November 30, 2015, and to make employees whole for all wages and benefits lost. (ALJD, p. 33, L. 19-26).

16. To the recommended order and remedy that the Respondent is required to reinstate Emily Hancock, Chad Sevigny, and Donald Murphy to the position of Meter Specialist as it existed on November 30, 2015, and to make the employees whole for wages and benefits lost. (ALJD, p. 33, L. 23-26, p. 34, L. 7-14).

17. To the recommended order and remedy requiring that the Respondent recreate three obsolete Meter Specialist positions as they existed on November 30, 2015, and to reinstate Emily Hancock and Chad Sevigny into those positions without loss of pay, benefits, or seniority. (ALJD, p. 34, L. 7-14).

18. To the recommended order and remedy that, within 14 days after service by the Region, Respondent post and distribute the “Appendix” attached to the decision and recommended order. (ALJD, p. 36, L. 38-p. 37, L. 14).

RESPONDENT’S BRIEF IN SUPPORT OF EXCEPTIONS

STATEMENT OF FACTS

I. Background.

As the ALJ found, GEC is a private, not-for-profit electric cooperative engaged in the business of distributing electricity to its 12,000 member owners throughout four rural counties and two Indian reservations in southern central Florida. (ALJD, p. 3, L. 17-18, 30-34). GEC’s territory is divided into two operating areas: Power Supply North and Power Supply South. (ALJD, p. 3, L. 34-35).

II. Relevant collective bargaining agreement provisions.

The collective bargaining agreement between GEC and the Union defines the scope of the appropriate bargaining unit. (GC Exhibit 5, p. 3). The agreement also contains an express provision designating positions which are properly excluded from the unit. (GC Exhibit 5, p. 3). In that respect, Article 1.2 states, “the following classifications of employees are specifically excluded from the bargaining unit: Supervisory personnel, including staking supervisors, professional personnel, technical and office clerical employees, ... and all other employees not specifically included in Section 1.1 above.” (GC Exhibit 5, p. 3).

The collective bargaining agreement also expressly dispels of the notion of exclusive “bargaining unit work.” In particular, Article 2.7 instructs, “[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.” (GC Exhibit 5, p. 4).

The collective bargaining agreement's Management Rights provision also speaks to the creation of new positions, the assignment of work, the size and composition of the work force, and the right to effect layoffs where necessary. To that end, Article 3.2 provides, in relevant part:

All inherent and common law management functions and prerogatives which the Cooperative has not expressly modified or restricted by a specific provision of this Agreement are retained and vested exclusively in the Cooperative and are not subject to arbitration under this Agreement. The Cooperative specifically reserves the exclusive right in accordance with its judgment to ... layoff and recall employees to work, ... determine the number, location, and operation of plants and divisions and departments thereof, the assignment of work, and the size and composition of the work force ... (GC Exhibit 5, p. 4).

Likewise, Article 4.4 provides that "the employees covered by this Agreement are entitled only to those certain aspects of wages, hours, or working conditions which are specifically covered by this Agreement [and] all aspects of wages, hours, or working conditions which were in effect prior to entering into this Agreement, and which are not covered by this Agreement, may be continued or discontinued without consultation with the Union." (GC Exhibit 5, p. 5).

Article 2.5 provides that, "the Union acknowledges its responsibility and agrees to support all efforts made by the Cooperative in seeking to obtain lowest possible operating costs consistent with fair labor standards." (GC Exhibit 5, p. 4).

While providing GEC with the unilateral right determine when layoffs are necessary, the collective bargaining agreement does specify the criteria to be used to select employees for layoff:

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 relatively equal. For purposes of this Article, layoff shall be deemed to mean loss of work for periods in excess of five (5) workdays. (GC Exhibit 5, p. 10).

III. Obsolescence of the Meter Specialist position and creation of Energy Services Agent position.

To track and invoice electricity usage, GEC employed approximately 16,300 meters located at member locations. (ALJD, p. 3, L. 31-32). Prior to November 30, 2015, GEC employed

three Meter Specialists -- Donald Murphy, Chad Sevigny, and Emily Hancock -- a bargaining unit classification, to physically travel to each member location every month and manually read these 16,300 meters. (ALJD, p. 4, L. 9-12). In 2014, GEC began replacing these manually-read meters with meters which automatically transmitted energy usage electronically and remotely (“AMI meters”), which eliminated the need for a Meter Specialist to travel throughout GEC’s 5000 square mile territory to manually read every meter every month. (ALJD, p. 3, L. 33, p. 4, L. 16-18). Additionally, for certain members who frequently fell behind in paying their bills, GEC also installed “remote disconnect” AMI meters.¹ (ALJD, p. 4, L. 18-22).

The conversion to AMI meters, and the resulting obsolescence of the Meter Specialist job duties, was well known to the employees and the Union long before November 30, 2015. As the ALJ found in this regard, GEC’s 2015 Strategic Work Plan (prepared in 2014) discussed the ongoing conversion, the fact that the conversion was expected to be completed by November 2015, and the fact that the Meter Specialist position would thereafter become obsolete. (ALJD, p. 4, L. 24-29; Respondent Exhibit 4). It is undisputed that these issues were specifically discussed with the Meter Specialist employees and the Union’s stewards throughout 2015 and before the Meter Specialist positions were eliminated. (ALJD, p. 4, L. 31-33; Transcript, p. 40, 188-89, 283, 312-13, 387-88, 394-95, 410, 417, 626, 630).

In an attempt to avoid layoffs of the Meter Specialists in November 2015 when the AMI meter conversion was completed, GEC decided to launch a professional certified energy auditing

¹Standard AMI meters could be read remotely, but not disconnected or reconnected remotely. As such, if a meter needed to be disconnected for nonpayment, or reconnected after payment, a Meter Specialist visited the member’s location to do so. In contrast, remote disconnect AMI meters were not only remotely read, but could also be disconnected and reconnected remotely by GEC office staff.

program and to provide an opportunity for the three former Meter Specialists to become trained and certified energy auditors (i.e., Energy Services Agents). (ALJD, p. 5, L. 18-33, p. 6, L. 9-19). These ESA positions were created as professional-level, highly-technical certified positions. (Transcript, p. 625, 630). The positions were created as white-collar non-bargaining unit positions,² with a starting wage rate significantly higher than the Meter Specialist wage rate. (ALJD, p. 6, L. 10-12; Transcript, p. 271, 282). As none of the three former Meter Specialists were qualified or certified at the time to perform ESA functions, they were advised that there would be a transition period during which they would be afforded education and training to become certified. (Transcript, p. 408-09, 423-25, 471, 602). There is no dispute that, to become a certified energy auditor, substantial education and training would be required. (Transcript p. 242, 599-600). The employees would have to take a number of classes and would need to become educated on performing complex mathematical computations pertaining to energy usage. (Transcript, p. 599-600). Unsurprisingly given the obsolescence of their positions and their own pre-existing admitted concerns about being laid off as a result, each of the three former Meter Specialists expressed an interest in the newly-created ESA positions and were placed into those positions on November 30, 2015. (ALJD, p. 6, L. 9-18; Transcript, p. 40, 188-89, 283, 312-13, 387-88, 394-95, 410, 417, 626, 630).

Notwithstanding GEC's intentions to avoid layoffs by offering the former Meter Specialist employees the opportunity to become ESAs, over the ensuing six months it became clear that the former Meter Specialists would be unable to become certified professional auditors at any point in the foreseeable future. First, as to Hancock, six weeks after transitioning into the ESA

²None of GEC's clerical, professional, or white-collar employees are included in the bargaining unit.

classification, it became necessary to transfer her to a clerical Call Center position because she began a romantic relationship with GEC's Safety Manager. (ALJD, p. 9, L. 6, p. 10, note 19; Transcript, p. 86, 102, 242, 260, 641). As the Safety Manager oversees all GEC field personnel, Hancock's relationship with the Manager violated GEC's nepotism policy and required that she transfer to a position over which the Manager had no oversight.³ (ALJD, p. 9, L. 6, p. 10, note 19; Transcript, p. 86, 102, 242, 260, 641). Accordingly, Hancock transferred to the Call Center on January 18, 2016, and it is undisputed that she never thereafter performed any duties associated with either the former Meter Specialist position or the newly-created ESA position. (ALJD, p. 9., L. 6; Transcript, p. 59, 86, 142, 242-43, 259, 299, 474, 645).

Regarding Murphy and Sevigny, during the transition period in the first half of 2016 each of them displayed an inability to grasp the education, training, and demeanor necessary to fulfill the duties of the ESA position. To this end, it is undisputed that both Murphy and Sevigny, along with their immediate supervisor Chelsea Lowder, were sent to educational classes and training in Tampa, Florida and Alabama to become trained to be professional certified energy auditors and begin the certification process. (Transcript, p. 299, 408, 425-26, 471-72, 600, 602, 618). It is further undisputed that these courses were only the initial introductory courses and, to become certified, additional training beyond these courses were required. (Transcript, p. 600, 602, 619).

Despite the introductory nature of these courses, after Murphy and Sevigny returned from the training in Alabama, it became apparent that they would not be able to become certified, professional, and capable energy auditors any time in the foreseeable future. (Transcript, p. 601,

³ As the ALJ noted in his decision, the transfer of Hancock to a Call Center position due to the violation of the nepotism policy is not a relevant issue in this case as the Complaint does not allege that GEC's decision in that regard violated the Act.

620, 644). Significantly, at no time during the hearing did the General Counsel, the Union, or the employees involved dispute that conclusion.

Additionally, during this same period of time, it is equally undisputed that Sevigny was experiencing serious unrelated personal issues that precluded him from being sent into member homes and which eventually necessitated him taking a medical leave of absence for counseling for the entire month of June 2016. (Transcript, p. 60, 142, 243, 379, 643-44).

The Complaint in this matter specifically alleges that the newly-created ESA positions perform substantially the same duties as the Meter Specialist position performed, an allegation not supported by the undisputed record. To that end, there is no dispute in this matter that before installation of the AMI meters, “the vast majority of the Meter Specialists’ job duties were manually reading meters.” (Transcript, p. 148). Nor was there any dispute that, with the installation of AMI meters, there was no longer a need to manually read more than 16,000 meters every month. (Transcript, p. 148-149, 309-10, 410). Indeed, the Union conceded this central point at the hearing:

Q: Is it the Union’s position today that there is sufficient work for three full-time meter specialists at Glades Electric?

A: No. (Transcript, p. 148) (Emphasis added).

Conceding this fact, the Union’s position since November 30, 2015 has been to demand that the three employees be maintained in the position of Meter Specialists, essentially in name only, and that the Cooperative simply “make work” for them to do in that position. (Transcript, p. 648).

GEC does not dispute that, during the initial transition period from November 30, 2015, to June 2016, a handful of residual Meter Specialist duties remained, but it is undisputed that those residual duties were diminishing by the day and were insufficient to keep even one full-time

employee occupied as of June 2016.⁴ During the hearing, these few residual duties were summarized as including “a few [meter] connects or disconnects and really whatever we could find to keep them busy.” (Transcript, p. 596). The uncontroverted evidence is that these residual duties encompassed a volume of about 1 to 2 connects/disconnects per day as of the Spring of 2016 and only a grand total of 40 connects/disconnects for the entire period from July 2016 to December 2016 (as remote disconnect AMI meters had been installed for overdue members). (Transcript, p. 596-98).

Murphy, the only Meter Specialist employed as of July 2016, candidly characterized the lack of work as follows:

My opinion is there’s not enough work for three people. I mean, I’m doing everything that I possibly can now. I’m keeping up with everything so far. ... I just don’t see it. I mean, there’s just not enough for me to do. They’re having to find things, add things to my daily schedule to keep me busy. (Transcript, p. 489).

IV. Sevigny and Hancock’s July 2016 Layoff and Alleged “Threat” of Layoffs.

After the elimination of the Meter Specialist position on November 30, 2015, the Union insisted at that time and on numerous occasions since that time (and throughout the hearing in this matter), that Murphy, Sevigny, and Hancock should be maintained as Meter Specialists despite the obsolescence of that position. For its part, GEC has consistently informed the Union that those positions are obsolete – a fact not in serious dispute in this matter – and that keeping those employees in those positions would necessarily result in layoffs.

To this end, it is undisputed that the Union’s grievance concerning the issue in December 2015 specifically demanded that the Cooperative “revert the Meter Specialist position and the Mechanic position back” to their prior positions. (GC Exhibits 23 and 24; Transcript, p. 146, 647-

⁴ Indeed, it is undisputed that no employee other than Murphy has performed any residual Meter Specialist duties since the beginning of June 2016, and that Hancock had not performed any such duties since mid-January 2016.

48). Notwithstanding, as the Union President readily admitted, at the time he “was told that there would be no more Meter Specialists needed because it was obsolete and that these new positions would do the work left over and they would do energy audits ...[and] they would have to be trained[.]” (Transcript, p. 88; see also Transcript, p. 647-48).

After the Union and the Cooperative unsuccessfully attempted to resolve the issues in May 2016, the Union, on June 8, 2016, once again insisted GEC “go back to our previous working conditions and positions.” (Transcript, p. 109, 149-50; GC Exhibit 27). Indeed, throughout this matter, the Union’s position has been to maintain all three employees as Meter Specialists and to simply “make work” for them to do, since they readily admit the fact that insufficient meter reading work exists.

Given Hancock’s transfer out of the ESA position, Murphy’s and Sevigny’s inability to master the necessary introductory coursework, and Sevigny’s personal issue and leave of absence, GEC capitulated to the Union’s demand and notified it on June 14, 2016 that since Murphy, Sevigny, and Hancock would not be able to successfully transition to the ESA position, it was considering moving those employees back to the Meter Specialist position. (ALJD, p. 12, L. 19-26; Transcript, p. 63-64, 652-53; GC Exhibit 28). Just as it had consistently told the Union before and after November 30, 2015, GEC also emphasized that putting these three employees back into the obsolete Meter Specialist position would necessitate layoffs. (ALJD, p. 12, L. 25-26; Transcript, p. 652-53). GEC offered to discuss the matter with the Union before moving forward. (ALJD, p. 12, L. 22-23).

In response to GEC’s capitulation to the Union that it transfer the employees back to the Meter Specialist position, triggering consideration of a layoff, the Union tellingly responded that “any (if necessary) layoffs of bargaining unit employees be per our bargaining unit agreement.”

(GC Exhibit 29). As such, on June 27, 2016, GEC returned Hancock, Sevigny, and Murphy to the Meter Specialist classification and, effective two weeks later, triggered the layoff provision set forth in Article 10.3 of the collective bargaining agreement. (GC Exhibit 30). Applying the factors set forth in Article 10.3, the Union was advised that Hancock and Sevigny had been selected for layoff and that Murphy would be retained to perform the minimal residual Meter Specialist duties that remained. (Transcript, p. 650-51; GC Exhibit 21).

At the hearing, the Union President essentially conceded that GEC's decision to transfer Murphy, Hancock, and Sevigny back to the Meter Specialist position at the Union's own insistence was not only not improper, but was exactly what the Union had been asking GEC to do since November 30, 2015:

Q: [A]re you contending in your charge that the Company acted improperly by taking these employees out of the ESA position and putting them back in the Meter Specialist position effective July 11, 2016?

A: Am I saying they acted improperly? Well, no, you know, they –

Q: And isn't that what the Union was asking them to do for the last 6 months prior to that, albeit without the layoff?

A: The Union's position was very specific. Put all the members that they had taken out back, and sit down and negotiate.⁵ (Transcript, p. 153).

Likewise, Union Representative Matthew Perry candidly testified on direct examination that what the Union and the General Counsel are asserting as an unlawful threat of layoff is nothing more than the GEC's steadfast, obvious, and undisputed position that layoffs would naturally result

⁵ Notwithstanding the Union's misguided assertion that GEC should negotiate over the layoff of obsolete Meter Specialist positions, there is no contention in the Complaint that GEC was obligated to do so. Indeed, there could not be any such allegation, given that the parties' collective bargaining agreement already contained a comprehensive negotiated layoff provision governing such issues.

if Murphy, Sevigny, and Hancock remained in (or reverted back to) the obsolete Meter Specialist positions after the transition to automatic meters was completed in November 2015:

Q: Was there ever any discussion in either that grievance meeting or any other grievance meeting as to the Company's position that if they put the Meter Specialists back in their position, they would have to fire them or lay them off?

A: Yes. Through several times of talking, he made the threat or mentioned that if he had to revert them back to the Meter Specialist positions, there would be layoffs.

Q: Did Mr. Brewington explain why he would have to lay off the Meter Specialists if they were put back in the bargaining unit?

A: He said he didn't have the work for them. (Transcript, p. 205-06).

* * *

Q: And was there any discussion about the Meter Specialists, what would happen if they were put back in the bargaining unit?

A: Yes. We had asked for them to be put back in the bargaining unit, and Mr. Brewington had stated that he didn't have work for them. And if he had to put them back, he would have to lay them all off. (Transcript, p. 214).

Having moved the employees back to the Meter Specialist position, the Cooperative laid off two of them (Sevigny and Hancock) based on the fact that there was insufficient work to keep three full-time Meter Specialists busy as the vast majority of their prior duties – i.e., manually reading 16,000+ meters every month -- was now done remotely. (T. 63, 309, 410). Here again, the Union President conceded GEC's existing contractual right to lay off without first negotiating over the issue:

Q: You understood, did you not, that the Cooperative had the right to lay off employees off employees for lack of work so long as the process within the union contract was followed?

A: Yes. (T. 154).

The selection of Sevigny and Hancock for layoff was based on the factors set forth in the collective bargaining agreement, namely Article 10.3, which provides that the selection is made based on the employees' relative experience, skill, cooperativeness, reliability, and seniority. (Transcript, p. 64-65, 649-652). Applying those factors, the facts are undisputed that Murphy had the most relevant experience. (Transcript, p. 652). At the time of hearing, he had been employed by the Cooperative in either a Meter Specialist or Meter Specialist Supervisor position for 8.1 years. (Transcript, p. 66). He was also the most skilled. (Transcript, p. 652). Murphy also had previously served as a working supervisor in the Meter Specialist position (supervising both Hancock and Sevigny), unlike either Sevigny or Hancock. (Transcript, p. 66, 167, 263, 317, 465-66). In contrast, Sevigny had 6.6 years of classification seniority and Hancock only had 3.3 years. (Transcript, p. 59, 65, 625; Respondent Exhibit 30).

As to reliability, GEC concluded that Murphy's record was superior to Sevigny and Hancock. At the time, GEC had significant concerns about Sevigny's reliability in light of the serious personal issues he was experiencing which prevented him from entering into member residences and required an extensive leave of absence. (Transcript, p. 652). As to cooperativeness, the relative annual performance reviews show that Murphy was rated higher in "Cooperation" than either Sevigny or Hancock. (Respondent Exhibits 39, 40, 41, 42, 43, 44, and 45). More specifically, Murphy was rated as "Good" as to cooperativeness in 2016 while Sevigny and Hancock were rated as "Fair" and "Poor," respectively. (Respondent Exhibits 39, 42, 43). Moreover, Hancock had been rated as "Unsatisfactory" in 2014 and "Fair" in 2013 as well (prior to any grievances or charges ever being submitted by her or the Union on her behalf). (Respondent Exhibits 44, 45).

Moreover, it is undisputed, as Hancock readily admitted, that every single supervisor she has worked under as a Meter Specialist (comprising a total of five separate supervisors), as well

as her Department Director, had raised concerns about her cooperativeness and attitude stretching back years before any grievance or charge was filed on her behalf. (Transcript, p. 361-63, 366-70; Respondent Exhibits 43, 44, 45, 48). It is also undisputed that Hancock was the only employee of the three that had received recent member complaints about her conduct – four in total. (Transcript, p. 247, 358-61, 371; Respondent Exhibits 19, 21, pp. 10-11).

In communicating the layoffs to the Union, GEC notified the Union that both Sevigny and Hancock were subject to recall if a position opened. (GC Exhibit 30). GEC also advised the Union that it would consider paying severance of up to 6 weeks' pay if the Union was agreeable. (GC Exhibit 30; Transcript, p. 117). The Union, however, later rejected the severance proposal and neither Hancock or Sevigny received any severance. (Transcript, p. 157-58). GEC did not bargain with the employees concerning severance; rather, GEC only advised the employees of the severance offer it proposed to the Union, while simultaneously informing them that the severance was subject to negotiation and agreement by the Union. (GC Exhibit 30). The details of the severance, including a proposed contingent release agreement, were only provided to and discussed with the Union. (Transcript, p. 121, 161-62, 348-49, 653; GC Exhibit 35; Respondent Exhibit 28). Similarly, when Sevigny inquired about the severance to GEC, GEC declined to discuss it with him and instead contacted the Union to discuss it. (Respondent Exhibit 28).

Shortly after being laid off in July, a System Operator position became available, which was offered to both Hancock and Sevigny. (Transcript, p. 57, 173, 228 262, 332; Respondent Exhibit 32). Hancock accepted the position and returned to work at the beginning of September 2016, where she remains employed.⁶ (Transcript, p. 173, 228, 257, 262; Respondent Exhibit 32).

⁶ Although Hancock's relationship with the Safety Manager continued as of the hearing in this matter, Hancock's employment in the Systems Operator position does not violate GEC's nepotism policy nor preclude her from working as a Systems Operator since the Safety Manager does not

Similarly, on three separate occasions subsequent to his layoff Sevigny was offered three different positions that became available, but he declined to accept any of them. (Transcript, p. 173, 228-29, 417-19).

V. GEC's Reorganization and Creation of the Transportation Foreman Positions.

In accordance with its long-term Strategic Work Plan, on November 30, 2015, GEC also reorganized its fleet maintenance and supervision operations. (ALJD, p. 5, L. 36-45, p. 6, L. 20-25). In particular, GEC eliminated two existing Mechanic positions and created three new supervisory-level positions and designated them as Transportation Foremen. (Transcript, p. 42-43, 45; GC Exhibits 7, 8).

Prior to November 30, GEC employed two mechanics: Jesse Brown and Jeffrey Prescott. (ALJD, p. 4, L. 37-38). The mechanics' job duties entailed only repair and maintenance of GEC's fleet and equipment and did not entail any supervisory responsibilities. (ALJD, p. 4, L. 38-45, p. 5, L. 1-3). GEC's creation of a supervisory-level position with greatly expanded duties was driven by a need for greater oversight of GEC's personnel who operated its vehicles and equipment, as well as the need to establish a pipeline of entry-level supervisors from which rank-and-file employees could eventually transition into upper management positions as such positions became available in the future. Indeed, as the ALJ found:

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.

To address this issue, [GEC] came up with the idea of creating a new job classification: Transportation Foreman. The purpose of this position was to have

have any oversight over the Systems Operator position, unlike the Meter Specialist and ESA positions.

someone who could hold the drivers accountable for the equipment they were operating. (ALJD, p. 5, L. 5-14).

GEC created three Transportation Foremen: one to supervise personnel in the Power Supply North district, one to supervise the Power Supply South district, and one to supervise all other equipment and special projects. (ALJD, p. 5, L. 36-45, p. 6, L. 1-4). Both Prescott and Brown applied for an were promoted to the Transportation Foreman position. (Transcript, p. 39, 43-46, 80, 186). Each received significant wage increases with their promotion, as well as other benefits typically reserved for management, such as a take-home vehicle. (ALJD, p. 6, L. 23; Transcript, p. 535). In early December, Henry “Phillip” Gunn was hired from outside GEC to fill the third Transportation Foreman position. (ALJD, p. 6, L. 24-25).

Although the Transportation Foreman position continued to perform repair and maintenance duties, the positions were significantly upgraded during the reorganization to also include substantial supervisor duties. Most notably, the Transportation Foremen were given oversight over the implementation and supervision of GEC’s newly-implemented AVL system being implemented in late 2015. (ALJD, p. 7, L. 25-31). Fundamentally, the changes to these positions were designed to give these employees “ownership of their shop,” with Transportation Foremen now responsible not just for maintenance and repair duties, but also running their entire operation, including using the AVL system to monitor, direct, and, if necessary, discipline employees. (Transcript, p. 174-75. 508).

The AVL system, which was installed in all but a couple of GEC’s over 70 vehicles provides a litany of data concerning safety measures and employee operation of each vehicle. (Transcript 511-12, 516, 522-24; Respondent Exhibit 17). The purpose of this data and the implementation of the AVL system “was to improve driver safety and prolong the useful life of the Respondent’s equipment.” (ALJD, p. 7, L. 35-36). To oversee the AVL system and supervise

GEC's drivers, Gunn and Prescott reviewed data concerning an employee's operation of the vehicle, including driver acceleration, turning, braking, speeding, and the like, every week. (ALJD, p. 8, L. 5-7). After reviewing the data, they then meet with the employees in their assigned district and provide direction and oversight regarding any needed improvement and changes. (ALJD, p. 8, L. 5-14). If the weekly report ("Driver Safety Scorecard") resulted in an aggregate safety score below 75, Gunn and Prescott were required to counsel with the employee involved. (ALJD, p. 8, L. 8-9; See e.g., Respondent Exhibit 17). Although GEC made the decision not to subject employees to formal discipline while the AVL system was being initially implemented, the Transportation Foremen have been given the responsibility to recommend discipline once this transition period has been completed. (ALJD, p. 8, L. 11-12; Transcript, p. 527-28, 530, 579-80, 587, 658; Respondent Exhibit. 16). The Transportation Foremen also have the authority to immediately remove any employee from service for unsafe or improper operation of the vehicles or equipment, without first obtaining the permission of any other manager. (Transcript, p. 528, 551-52, 665).

The Transportation Foremen also directly supervise GEC's Transportation Coordinator. (Transcript, p. 514, 551). In this respect, the Transportation Foremen are responsible for assigning the Coordinator's work duties. (ALJD, p. 8, L. 24-28; Transcript, p. 514-15, 551).

Unlike the prior Mechanic responsibilities, the Transportation Foremen also serve as the GEC liaison to outside entities, such as vendors, suppliers, local county governments, and GEC's external safety auditing organization ("RESAP"). (Transcript, p. 515-16, 517). For example, Brown recently oversaw and coordinated with a local county health department with respect to the county's inspection of GEC. (Transcript, p. 516).

The Transportation Foremen, along with the Safety Manager, are also critical to achieving the safety standards set by RESAP. (Transcript, p. 517-18). RESAP uses a national team of external auditors and safety managers to conduct unannounced comprehensive inspections of all facets of GEC's operations as it pertains to safety and accountability. (Transcript, p. 517-18). In RESAP's most recent audit in December 2016, the implementation and administration of the AVL system by the Transportation Foremen directly resulted in an increased rating and a successful audit result whereas, in contrast to recent years past, GEC had routinely received poor reviews in this area. (Transcript, p. 518-19).

Similarly, it is undisputed that, with the creation of the Transportation Foremen position and vesting them with the authority to hold employees accountable for the safe operation of their equipment and vehicles, GEC's lost-time accidents decreased from one accident every few days to zero accidents in a 200-day stretch in 2016 after implementation of the AVL system. (Transcript, p. 657-58).

It is also uncontroverted that another purpose of establishing the Transportation Foreman position was GEC's desire to create additional responsible supervisory positions to afford employees an increased pipeline of opportunities to eventually progress from rank-and-file positions to higher-level management. (Transcript, p. 660). To do that, and provide the employees with the necessary supervisory experience, GEC determined that it was imperative that the duties previously performed by the Mechanic position be reorganized and upgraded to ensure that Transportation Foremen were put into position to supervise and actually hold other employees accountable for their actions. (Transcript, p. 661).

As with the ESA position, the Transportation Foreman position was a transitioning position in early 2016 and was still being developed and expanded as GEC brought its AVL system online and expanded its features throughout 2016. (Transcript, p. 49).

ARGUMENT

I. The creation of the professional ESA position and GEC's decision to offer the former Meter Specialists the opportunity to learn those positions does not violate the Act.

As noted above, GEC excepts to the ALJ's findings and conclusions that it violated the Act by unilaterally creating the ESA position and affording the former Meter Specialists the opportunity to fill those positions (Exceptions 1, 2, 11, 12, 15, 16, 17, 18).

The facts in this case are undisputed that the primary responsibilities of the Meter Specialist position – manually reading 16,000+ meters every month – were eliminated as of November 30, 2015, leaving only a handful of residual Meter Specialist duties that couldn't keep even one employee occupied on a full-time basis. Accordingly, faced with this admitted obsolescence of a bargaining unit position, the critical issue in this case is whether an employer is privileged to unilaterally create a new, non-unit professional position and permit the occupants of the obsolete position to fill those positions while they undergo the education and training necessary for the professional positions. GEC contends that the Act clearly permits it to create new non-bargaining unit positions, and the ALJ's determination to the contrary must be rejected.

At the outset, it is notable that while the Complaint in this matter specifically alleges that the newly-created ESA positions are substantially identical to the Meter Specialists positions, the ALJ did not make a factual finding in that regard, as he could not under the undisputed facts of this case. While GEC agrees with the proposition that a mere retitling of an existing bargaining unit position as a means of changing the scope of the unit is not permitted by the Act, that is not what happened in this instance. Notwithstanding that the ALJ does not make a finding that the

Meter Specialist and ESA positions were substantially identical, the ALJ nonetheless concludes that GEC was required to bargain over the creation of the ESA position, based on the unsupported fiction that GEC's decision to create the ESA position altered the scope of the bargaining unit. The ALJ's analysis and conclusions in this regard are misplaced.

The creation of the ESA position in this case did not alter the scope of the bargaining unit. Rather, the scope of the bargaining unit was altered by the simple fact that advances in technology (i.e., the AMI and remote disconnect meters) rendered the bulk of the Meter Specialist job obsolete. Had GEC simply unilaterally laid off the three Meter Specialists on November 30, 2015, which it was privileged to do pursuant to its collective bargaining agreement, there could be no contention that its actions violated the Act. Likewise, had GEC created new professional ESA positions and hired other applicants for the position, there could be no contention that GEC was obligated to bargain over the creation of a professional non-unit position. Yet somehow, by offering the obsolete Meter Specialists the opportunity to fill those positions and permitting two of them to handle a few residual Meter Specialist duties for a several months while undergoing the necessary educational training for the new positions, the Act is allegedly violated. Simply put, GEC's creation of the ESA position was not what led to the removal of Murphy, Hancock, and Sevigny from the bargaining unit. Rather, the admitted obsolescence of their prior classification was the cause. The subsequent creation of the ESA position does not alter that fact.

Furthermore, GEC's collective bargaining agreement specifically provides it with the right to create non-unit positions while simultaneously making it clear that professional and technical positions, such as the ESA position, are to be specifically excluded from the unit.

As the Board has previously held, the general rule is that employers are entitled to make their own decisions as to how best to supervise and organize their operations. *Bridgeport and Port*

Jefferson Steamboat Co., 313 NLRB 542, 545 (1993). Neither the decision to create new positions nor the selection of individuals to fill those positions is considered a mandatory subject of bargaining. *Kohler Co.*, 292 NLRB 716 (1989); *St. Louis Telephone Employees Credit Union*, 273 NLRB 625, 627-628 (1984).

The Board's decision in *Kohler Co.*, 292 NLRB 716 (1989), is controlling. In that case, the Board held that the employer did not violate Section 8(a)(5) when it unilaterally created three new material control clerks outside of the bargaining unit. As in the present case, the General Counsel in *Kohler* contended that the newly-created classifications performed substantially identical duties to positions included in the bargaining unit. The judge found, however, and the Board agreed, that the facts established that the new positions were created to perform substantially different job duties than the bargaining unit personnel had performed. As such, the Board adopted the judge's conclusion that the employer was not obligated to bargain over the creation of these positions. The same result is compelled in this case. The ESA position was created to perform substantially different job responsibilities, namely professional energy audits -- duties which have never been performed by the bargaining unit in this case.

The ALJ's distinguishing of *Kohler* by noting that *Kohler* did not involve the elimination of a unit position is a distinction without a difference. As comprehensively set forth above, the creation of the ESA position in this case did not cause the elimination of the Meter Specialist position, rather the obsolescence of the Meter Specialist duties caused the position's elimination, with GEC creating the ESA position in an effort to thereafter avoid layoffs. The ALJ's entire analysis concerning the creation of the ESA position puts the proverbial cart before the horse. For those reasons, Exceptions 1, 2, 11, 12, 15, 16, 17, and 18 should be granted, and the charge alleging a violation of Sections 8(a)(1) and 8(a)(5) should be dismissed.

II. GEC was not obligated to process a grievance submitted by Hancock while employed in a non-unit position.

The allegation that GEC violated Sections 8(a)(1) and 8(a)(5) by refusing to process Emily Hancock's grievance concerning an alleged disciplinary counseling she received in January 2016 is likewise misplaced. This allegation is derivative of the allegation that GEC unlawfully created the ESA positions. As Hancock was employed in the non-unit ESA position at the time she submitted the grievance, and the grievance concerned events occurring well after November 30, 2015, Hancock was not entitled to file a contractual grievance and GEC was not obligated to process it. To the extent that GEC was within its rights to unilaterally create the ESA position and permit Hancock to take that position in lieu of a layoff, this allegation likewise fails and Exception 12 should be granted.

III. GEC's capitulation to the Union's demand to revert Murphy, Sevigny, and Hancock to the Meter Specialist position was not unlawful, nor can its statement that layoffs would naturally follow constitute an unlawful threat.

Incredibly, not only has the Union and the General Counsel contended that GEC acted unlawfully by creating the ESA position and allowing the former Meter Specialists to take those positions, but they also contend that GEC violated the Act when it capitulated to the Union's repeated demands to revert those employees back to the Meter Specialist position. Under this absurd view of the law, GEC not only violates the law if it continues to permit Murphy, Hancock, and Sevigny to serve as ESAs, and also violates the law if it agrees with the Union and reverts those employees back in the Meter Specialist position.

This inconsistency is even more apparent when the Union's admitted purpose is considered. As noted above, the Union's admitted position throughout this matter has been that GEC was required to maintain three Meter Specialist positions, despite the work being obsolete,

and, instead of effecting layoffs, to simply “make work” for them. GEC rejected that proposition in November 2015, and continues to do so to this day.

Here, GEC cannot be penalized for acceding to the Union’s repeated demands. In its written communication on December 15, 2015, the Union expressly stated, “Local IBEW 1933 respectfully requests that GEC reverts the Meter Specialist position and the Mechanic position back to their negotiated positions.” (GC Exhibit 23). On December 21, 2016, GEC responded (consistent with its position prior to November 30, 2015), “contrary to the Union’s grievance, to the extent that the newly-established positions were rescinded, the affected employees would not have been 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.” (GC Exhibit 25).

Subsequently, in May 2016, the Union again demanded that the employees be reverted back to their prior positions and, responding to GEC’s position that there existed insufficient work, even suggested that “maybe GEC will have to rotate all three [i.e., Murphy, Hancock, and Sevigny] until these issues are worked thru.” (GC Exhibit 26, p. 1).

Thereafter, on June 8, the Union once again reiterated, “We feel the best course of action would be to go back to our previous working conditions and position.” (GC Exhibit 27, p. 2). Rather than simply create work to rotate amongst these three employees as suggested by the Union, within three business days after the Union’s latest demand to revert the employees back to the Meter Specialist position, GEC capitulated to the request. (GC Exhibit 28).

Critically, the ALJ completely ignored the undisputed evidence that the Union specifically and repeatedly demanded GEC revert these three employees back to the position of Meter Specialist, and instead found that GEC purportedly acted with animus when it decided to throw in

the towel and capitulate to the Union's demands after unsuccessfully attempting a mutual resolution and rather than continuing to incur legal expenses to fight the issue.

Well prior to any grievance or charge being filed, GEC openly and consistently took the position that retaining Murphy, Sevigny, and Hancock in the Meter Specialist position after completion of the AMI installation would necessarily result in layoffs. Each Meter Specialist as well as the Union's Representative testified that GEC discussed this with them prior to November 2015, while also discussing GEC's plan to look at other positions that could be created to try to avoid layoffs.

Notwithstanding, from December 2015 through its last written demand in June 2016, the Union repeatedly demanded that GEC revert Murphy, Sevigny, and Hancock back to the Meter Specialist position. When GEC advised that it agreed to take such actions, which would necessarily result in layoffs, the Union responded in writing by advising that any layoffs should be done in accordance with the collective bargaining agreement. As such, neither the General Counsel nor the Union can now argue that GEC's decision to revert these three employees back to the Meter Specialist position in June 2016 is somehow retaliatory and violative of Sections 8(a)(1), (3), or (4). Simply put, they cannot have their cake and eat it, too.

Indeed, the Union President even conceded that the Union was not contending that placing these employees back into their prior Meter Specialist positions was improper:

Q: [A]re you contending in your charge that the Company acted improperly by taking these employees out of the ESA position and putting them back in the Meter Specialist position effective July 11, 2016?

A: Am I saying they acted improperly? Well, no, you know, they –

Q: And isn't that what the Union was asking them to do for the last 6 months prior to that, albeit without the layoff?

A: The Union's position was very specific. Put all the members that they had taken out back, and sit down and negotiate. (Transcript, p. 153).

Similarly, the Union's testimony likewise made it clear that the alleged unlawful "threat" to lay off employees was in no way based on union affiliation, union activities, or the filing of an unfair labor practice charge, but rather was based on GEC's long-standing, pre-existing position that layoffs would result if these employees remained as Meter Specialists in light of the meter reading function of their job becoming obsolete:

Q: Was there ever any discussion in either that grievance meeting or any other grievance meeting as to the Company's position that if they put the Meter Specialists back in their position, they would have to fire them or lay them off?

A: Yes. Through several times of talking, he made the threat or mentioned that if he had to revert them back to the Meter Specialist positions, there would be layoffs.

Q: Did Mr. Brewington explain why he would have to lay off the Meter Specialists if they were put back in the bargaining unit?

A: He said he didn't have the work for them. (Transcript, p. 205-06).

In this undisputed evidentiary context, the ALJ's determination that GEC unlawfully reverted the employees back to the Meter Specialist position and subsequently laid them off is unsupported and should be rejected. Under *Wright Line*, 251 NLRB 1083 (1980), *enfd.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), the General Counsel must establish a *prima facie* showing by proving the employer was aware of the protected activity at issue, that adverse action was subsequently taken, and that the adverse action taken was motivated by the protected activity.

In this case, there can be no finding of union animus based on GEC's capitulation to the Union's repeated demands to take exactly the action that GEC took – putting Murphy, Sevigny, and Hancock back into the Meter Specialist position. The fact that this decision, as a natural

consequence, led to the layoff of two of the three employees, cannot serve as a basis for union animus, particularly given the undisputed facts that GEC has been advising the employees and the Union since well before November 30, 2015, that the Meter Specialist position was obsolete and would result in layoffs if other positions were not created or did not become vacant for these three employees to fill. Indeed, GEC stated as much in 2014 when it published its 2015 Strategic Work Plan, well before any union activity or charge in this case. Accordingly, Exceptions 1, 2, 5, 6, 9, 10, 11, 12, 13, 15, 16, 17, and 18 should be granted.

IV. GEC's layoff of Hancock and Sevigny did not violate the Act.

As detailed above, GEC's decision to layoff two of the three Meter Specialists in July 2016 was a natural consequence of the decision to place the employees back in the Meter Specialist position after those positions had become obsolete. The evidence in this case is undisputed that, after November 30, 2015, only a few residual Meter Specialist duties remained for a brief period and that, as of June 2016, even those residual duties were insufficient to keep one full-time Meter Specialist busy. Consequently, even assuming *arguendo* that the General Counsel otherwise met his burden under *Wright Line*, the evidence is clear that these employees would have been laid off even in the absence of any protected conduct.

Ignoring this uncontroverted evidence, the ALJ determined that "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 ... Respondent must demonstrate **that both the transfer back and the layoffs of meter specialists would have occurred in the absence of protected conduct.**" GEC excepts to this added requirement to the *Wright Line* analysis. Contrary to the ALJ's analysis, GEC did not "conjoin" two otherwise independent actions. Rather, it reverted the employees back to the Meter Specialist position as requested by the Union, under circumstances where the natural consequence of that decision would result in layoffs.

The ALJ's analysis cannot properly reject GEC's undisputed evidence that the layoff would have resulted even in the absence of any protected activity by bootstrapping that conclusion to the finding that GEC improperly reverted the employees to the Meter Specialist position in the first instance. *See KSLM-AM & KSD-FM*, 275 NLRB 1342, 1342 (1985) (Holding, in the context of the elimination of positions due to automation, the Respondent must demonstrate that, "even in the absence of the unfair labor practices, [the employer] would have terminated the claimants for legitimate, business reasons."); *Lorac Const. Services, Inc.*, 318 NLRB 1034, 1036 (1995) (holding that reinstatement was not appropriate where, despite unlawful conduct in transferring employee to another position, employer would have laid off employee in any event for legitimate reasons). Exceptions 1, 9, 10, 11, 12, 13, 15, 16, 17, and 18, should be granted.

V. The ALJ's remedy ordering reinstatement to obsolete positions is not an appropriate remedy.

The impropriety of the ALJ's reasoning in placing an additional evidentiary burden on GEC in a modified *Wright Line* analysis is particularly evident in light of the inappropriateness of the recommended remedy. Here, the ALJ recommends an order requiring GEC reinstate Murphy, Hancock, and Sevigny to Meter Specialists positions as those positions existed on November 30, 2015, notwithstanding that there is no dispute in this case that the technological implementations have eliminated the job duties of that position as they previously existed. Simply put, there is no Meter Specialist work remaining for three employees to perform.

The ALJ's recommendation essentially orders GEC to either revert to manually-read meters, or to place three employees into positions to perform duties which no longer exist and pay them to perform no work. Nothing in the Act requires that result and the ALJ's remedy in this regard must be rejected. The purpose of the Act's remedial provision is to place the employees in the position that they would have been in absent the unlawful conduct, not to place them into a

better position. *Lorac Constr. Services*, 318 NLRB at 1036. The remedy of reinstatement to the Meter Specialist position as it existed on November 30, 2015, places these employees into a position better than they would have been in had GEC not created the ESA positions in the first instance. Accordingly, Exceptions 1, 9, 10, 11, 12, 13, 15, 16, 17, and 18 should be granted.

VI. GEC did not violate the Act by truthfully informing Sevigny and Hancock that it had offered to negotiate severance with the Union.

GEC excepts to the ALJ's determination that it engaged in direct dealing and bypassed the Union to offer Sevigny and Hancock severance at the time they were laid off. Board precedent establishes that an employer is not guilty of direct dealing merely by communicating to employees, in a noncoercive fashion, the substance of proposals made to the Union. *United Techs. Corp.*, 274 NLRB 609, 610 (1985), *enfd.*, 789 F.2d 121 (2d Cir. 1986) ("The Respondent's efforts were undertaken in a noncoercive manner and the publicity fully acknowledged the Union's rightful role as the employees' statutory bargaining representative.") (citing Section 8(c) of the Act, as well as *Proctor & Gamble Mfg. Co.*, 160 NLRB 334, 340 (1966) and *Adolph Coors Co.*, 235 NLRB 271, 277 (1978)). Here, it is undisputed that GEC offered to negotiate the issue of severance **with the Union**. It is equally undisputed that GEC refused to discuss the matter with Sevigny when he questioned GEC whether severance would be made available, with GEC instead referring the matter to the Union.

As the ALJ noted, "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." (ALJD, p. 26, L. 14-16) (Emphasis added). In this case, the elements of direct dealing have not been established. To the contrary, the evidence is undisputed that GEC never excluded the Union on this issue. Rather,

it explicitly informed both the Union and the employees that the issue was negotiable solely with the Union and refused to discuss details of its proposal with the employees.

In rejecting GEC's position, the ALJ relies on the fact that GEC truthfully advised the employees in its June 27 memoranda that it had made a severance proposal **to the Union**. While the ALJ characterized this memorandum as excluding the Union (ALJD, p. 26, L. 28), the plain language of that memorandum shows the opposite. Specifically, GEC's layoff notice to the Union stated, in relevant part, that "subject to the Union's approval, the Cooperative is willing to offer each employee the option of receiving an additional six weeks of severance, contingent on signing a mutually-agreeable general release." (GC Exhibit 30, p. 3). The memoranda provided to the employees thereafter (and copied to the Union) merely stated, "**if agreeable with your Union representative**, the Cooperative also proposes to offer both Chad and Emily severance in the amount of six weeks' pay[.]" (GC Exhibit 30, p. 4).

Contrary to the ALJ's conclusion, these communications do not, in any way, seek to exclude the Union from severance negotiations, but rather expressly states otherwise. GEC's actions in truthfully informing the laid off employees that it had made a severance proposal to the Union does not constitute direct dealing. Exceptions 8, 12, and 18 should therefore be granted and this allegation dismissed.

VII. GEC did not violate the Act by creating the new supervisory Transportation Foremen positions.

The contention that GEC violated Sections 8(a)(1) and 8(a)(5) by unilaterally creating the Transportation Foremen positions is also without merit. Contrary to the allegations of the Complaint, the duties performed by the Transportation Foremen positions were not substantially identical to the duties performed by the Mechanic position. Rather, in creating these positions,

GEC exercised its management right to create supervisory positions, with only minimal impact on the overall size and scope of the bargaining unit.

The instant case is similar to the Board's decision in *St. Louis Telephone Employees Credit Union*, 273 NLRB 625, 626 (1984). In that case, the Board held that the employer was not required to bargain with the Union when the employer decided to reorganize its operations and create several new supervisory positions even where, as here, prior bargaining unit employees were promoted to fill the new positions. As was the case in *St. Louis Telephone Employees Credit Union*, the changes at issue here were not merely retitling of previous bargaining unit positions. Rather, it is undisputed that the AVL-related duties were new and were not previously performed by the Mechanic position. It is equally undisputed that the Transportation Foremen were afforded the authority to recommend discipline, remove employees from service, counsel employees, direct the Transportation Coordinator, assist with budgeting, and the like, none of which was performed by the Mechanic position.

The fact that the Transportation Foremen also performed mechanic duties does not change the result, as the Transportation Foremen constituted supervisors within the meaning of Section 2(11) of the Act. As such, they were properly excluded by GEC under the terms of Article 1.2 of the parties' collective bargaining agreement. As the Board in *St. Louis Telephone Employees Credit Union*, 273 NLRB at 626-28, noted:

In the instant case ... the duties of the unit employees who were promoted had changed. The Respondent did not merely retitle bargaining unit employees who, but for a classification change, would have continued to perform bargaining unit work. Instead, the Respondent required the promoted employees to perform supervisory tasks and imbued them with the authority of statutory supervisors and managers—powers and responsibilities that they had not previously enjoyed when performing strictly bargaining unit work.

Moreover, the Board has consistently held that “neither the decision to create new supervisory positions nor the selection of individuals to fill these positions is a mandatory subject

of bargaining.” *Id.* Moreover, as the ALJ noted, 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 of Kendallville, Indiana*, 264 NLRB 525 (1982).

While altering the scope of the bargaining unit by removing a substantial number of employees from the bargaining unit can give rise to a duty to bargain, that is not the case here. *St. Louis Telephone Employees Credit Union*, *supra*. First, only two of the Transportation Foremen were Mechanics in the bargaining unit. Second, the undisputed evidence in this case is that the overall size of the bargaining unit has not been substantially diminished. Indeed, during this same period of time, GEC created several new bargaining unit positions, including several Linemen, a Meterman, and a substation position.

Here, the evidence establishes that the Transportation Foremen were supervisors as defined by Section 2(11) of the Act, which defines a supervisor as “any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” To be considered a supervisor, the individual need only possess one of these characteristics, so long as the authority is carried out in the employer’s interest and requires independent judgment. *Starwood Hotels & Resorts Worldwide, Inc., d/b/a Sheraton Universal Hotel & Unite Here Local 11*, 350 NLRB 1114, 1115 (2007); *Mountaineer Park, Inc. & United Food & Commercial Workers Int’l Union, Local Union 23, AFL-CIO, CLC*, 343 NLRB 1473, 1474 (2004). In this case, the evidence establishes that the Transportation Foremen have the effective

authority to recommend discipline, that they can unilaterally remove employees from an assignment for improper driving or equipment use, and that they direct and assign work for the Transportation Coordinator. As the ALJ specifically found, “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.” (ALJD, p. 21, L. 27-29).

While the Transportation Foreman still handle maintenance and repair duties, the primary and significant difference between their prior Mechanic job and the current Transportation Foreman job is that they have now been given supervisory responsibilities over other personnel based on their administration of the AVL system. (Transcript, p. 534). In this regard, not only are they now involved in discipline, but they are also doing additional functions such as researching and evaluating vendors to retain. (Transcript, p. 534). They have the authority to purchase equipment and supplies directly, whereas the Mechanic position did not. (Transcript, p. 534). They have the authority to remove and put back in service any vehicle or piece of equipment, whereas previously the Mechanic position did not. (Transcript, p. 534). The Mechanic position has never had the ability to discipline or recommend discipline, whereas the Transportation Foremen do. (Transcript, p. 534-35). The Mechanic position did not have any supervisory authority to direct the Transportation Coordinator and schedule her work, whereas the Transportation Foremen do. (Transcript, p. 535). They are now involved in the department budgeting process, whereas the Mechanic position was not. (Transcript, p. 536).

The ALJ's reliance on the fact that the Transportation Foremen had not yet exercised their disciplinary authority to a great extent is misplaced. The facts in this case are undisputed that this position is being transitioned in along with the implementation of the AVL system. GEC made the

conscious decision not to impose formal discipline on employees for failing to meet the new standards being imposed by the AVL system and enforced by the Transportation Foreman until after this transition period. The proper perspective on which to judge the supervisory status of the Transportation Foreman is not whether they routinely exercised their disciplinary authority in the first few months in the position, but rather whether they have the responsibility and authority to routinely exercise such authority as part of their job. Here, the evidence establishes that they do.

Additionally, the Union, by agreeing to Articles 2.7, 3.2, and 4.4 of collective bargaining agreement, has clearly and unmistakably waived any right to bargain over the creation of the Transportation Foreman position, notwithstanding that the position performs some work previously performed by employees in the bargaining unit. As noted above, Article 3.2 affords GEC the unilateral right to decide on the size and composition of its workforce and to assign work. Article 2.7, in turn, specifically provides that Union agrees that work normally performed by employees shall not be construed as belonging exclusively to the bargaining unit. *See e.g., Cello-Foil Products, Inc.*, 178 NLRB 676 (1969) (Finding no 8(a)(5) violation where the parties' collective bargaining agreement contained a management rights provision permitting the creation of new job positions); *Zenith Radio Corp.*, 177 NLRB 366, 367 (1969) ("However, where the provisions of a collective-bargaining contract authorize the employer to take such action without notification and consultation, he does not violate Section 8(a)(5) by acting unilaterally."). Article 4.4 permits GEC to discontinue any non-contractual benefit without consultation with the Union. Accordingly, Exceptions 3, 4, 5, 11, 12, 15, 17, and 18 should be granted and this portion of the charge dismissed.

CONCLUSION

For the foregoing reasons, the Respondent, Glades Electric Cooperative, Inc., respectfully requests that the Board grant its exceptions and dismiss the Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of August, 2017, a true and correct copy of the foregoing has been furnished via e-filing and email to:

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