

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

GLADES ELECTRIC COOPERATIVE, INC.

and

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

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

**GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S  
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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## TABLE OF CONTENTS

	<u>Page</u>
Table of Contents	i
Table of Cases	iv
I. Statement of the Case and Introduction	1
II. Background	2
III. Facts	4
A. The Contractual bargaining unit	4
B. Job duties of Meter Specialists as compared with those of Energy Service Agents (ESAs)	5
C. Job duties of Mechanics as compared with those of Transportation Foremen (TFs)	6
D. TFs and Operations Foreman's duties	7
E. Respondent suspended Emily Hancock	8
F. Respondent converted Meter Specialists to ESAs and Mechanics to TFs without providing the Union with prior notice	9
G. The Union requested to bargain and contested Respondent's decision to convert Meter Specialists to ESAs and Mechanics to TFs	12
H. Respondent refused to process grievances filed by the Union Concerning a verbal warning it issued to Hancock	14
I. Respondent transferred Hancock from ESA to call center representative	14
J. Step 3 grievance meeting regarding Respondent's decision to convert Meter Specialists to ESAs and Mechanics to TFs	16
K. Brewington interrogated Sevigny concerning his Union sympathies	16
L. Emails between Brewington and Krumm concerning Respondent's decision to convert Meter Specialists to ESAs and Mechanics to TFs	17
M. Respondent laid off Hancock and Sevigny, while directly offering them severance pay and blaming the Union for their lay-offs	19
N. The Union filed grievances contesting Respondent's lay-offs of Hancock and Sevigny	21

O.	Respondent held further discussions with Sevigny and the Union concerning severance pay	22
P.	The CBA and policy provisions applicable to seniority and lay-offs	22
Q.	Respondent and the Union discussed the grievances regarding the lay-offs of Hancock and Sevigny	23
R.	Respondent and the Union held successor CBA negotiations	24
S.	Meter Specialist work is now being performed, in part, by employees in other job classifications	25
T.	Respondent rehired Hancock in a lower-rated position	25
U.	Respondent made multiple offers of re-employment to Sevigny, all in the same geographically distant and lower-rated positions	26
V.	Since the lay-offs of Hancock and Sevigny, Murphy and other employees have continued to perform Meter Specialist work, and Respondent has assigned additional duties to Murphy	26
W.	Respondent issued discipline to Murphy on multiple occasions	28
IV.	Argument	29
A.	The ALJ correctly held that Respondent violated Section 8(a)(1) and (5) of the Act by changing the scope of the bargaining unit, without the Union's consent (Exceptions 1-5, 11 and 15)	29
B.	The ALJ properly concluded that, in the alternative, Respondent violated Section 8(a)(1) and (5) of the Act by transferring bargaining unit work out of the unit, without giving the Union notice and an opportunity to bargain (Exceptions 1-5, 12 and 15)	33
C.	The ALJ justifiably decided that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to accept and process a grievance filed by the Union on behalf of Emily Hancock concerning discipline issued to her (Exception 12)	35
D.	The ALJ rightly found that Respondent violated Section 8(a)(1) of the Act by interrogating and threatening to lay off employees because of their Union sympathies and activities, and because the Union filed and pursued the unfair labor practice charges in these cases on behalf of employees (Exceptions 6, 7 and 14)	36
E.	The ALJ properly held that Respondent violated Section 8(a)(1), (3) and (4) of the Act by laying off Hancock and Sevigny because they and the Union, on their behalf, engaged in grievance-filing activities, and because the Union filed unfair labor practice charges against Respondent (Exceptions 6, 9, 10, 13, 16 and 17)	38

F. The ALJ appropriately decided that Respondent violated Section 8(a)(1) and (5) of the Act by dealing directly with employees and bypassing the Union (Exceptions 8 and 12)	47
V. Conclusion (Exception 18)	49
Certificate of Service	51

## TABLE OF CASES

	<u>Page</u>
<b><u>United States Supreme Court</u></b>	
<i>NLRB v. City Disposal Systems</i> , 465 U.S. 822 (1984).....	39
<i>NLRB v. Katz</i> , 369 U.S. 736 (1962).....	33
<i>NLRB v. Kentucky River Community Care</i> , 532 U.S. 706 (2001).....	29
<i>NLRB v. Transportation Management Corp.</i> , 462 U.S. 393 (1983).....	38
<i>Paudler v. Paudler</i> , cert. denied 341 U.S. 920 (1951).....	45
<i>Wright Line</i> , cert denied 455 U.S. 989 (1982).....	38,41
<b><u>United States Courts of Appeals</u></b>	
<i>Continental Insurance Co. v. NLRB</i> , 495 F.2d 44 (2 <sup>nd</sup> Cir. 1974).....	48
<i>HERE Local 11 v. NLRB</i> , 760 F.2d 1006 (9 <sup>th</sup> Cir. 1985).....	36
<i>Inland Tugs v. NLRB</i> , 918 F.2d 1299 (7 <sup>th</sup> Cir. 1990).....	47
<i>Leeds &amp; Northrup Co. v. NLRB</i> , 391 F.2d 874 (3 <sup>rd</sup> Cir. 1968).....	34
<i>Mt. Sinai Hospital</i> , 8 Fed. Appx. 111 (2 <sup>nd</sup> Cir. 2001).....	28,31,34
<i>NLRB v. Roll &amp; Hold Warehouse &amp; Distribution Corp.</i> , 162 F.3d 513 (7 <sup>th</sup> Cir. 1998).....	47
<i>Paudler v. Paudler</i> , 185 F.2d 901 (5 <sup>th</sup> Cir. 1950).....	45
<i>Raymond F. Kravis Center for the Performing Arts</i> , 550 F.3d 1183 (D.C. Cir. 2008).....	28
<i>Royal Development Co.</i> , 703 F.2d 363 (9 <sup>th</sup> Cir. 1983).....	39
<i>Shattuck Denn Mining Corp. v. NLRB</i> , 362 F.2d 466 (9 <sup>th</sup> Cir. 1966).....	47
<i>Wright Line</i> , 662 F.2d 899 (1 <sup>st</sup> Cir. 1981).....	38,41
<b><u>National Labor Relations Board</u></b>	
<i>Active Transportation</i> , 296 NLRB 431 (1989).....	46
<i>Aero Metal Forms</i> , 310 NLRB 397 (1993).....	38
<i>Associated Services for the Blind</i> , 299 NLRB 1150 (1990).....	47
<i>Avante at Wilson, Inc.</i> , 348 NLRB 1056 (2006).....	29

<i>Bakersfield Californian</i> , 316 NLRB 1211 (1995).....	29
<i>Bloomfield Health Care Center</i> , 352 NLRB 252 (2008).....	36
<i>Boston Mutual Life Insurance Co.</i> , 259 NLRB 1270 (1982).....	39
<i>Bridgestone/Firestone, Inc.</i> , 332 NLRB 575 (2000).....	48
<i>Connecticut Light &amp; Power Co.</i> , 121 NLRB 768 (1958).....	29
<i>Crown Wrecking Co., Inc.</i> , 222 NLRB 958 (1976).....	39
<i>Detroit Edison Co.</i> , 310 NLRB 564 (1993).....	47,48
<i>Exterior Systems, Inc.</i> , 338 NLRB 677 (2002).....	36,37
<i>Franklin Home Health Agency</i> , 337 NLRB 826 (2002).....	30
<i>Friederich Truck Service</i> , 259 NLRB 1294 (1982).....	47
<i>GM Electrics</i> , 323 NLRB 125 (1997).....	37
<i>Golden Crest Healthcare Center</i> , 348 NLRB 727 (2006).....	30
<i>Hampton House</i> , 317 NLRB 1005 (1995).....	28
<i>Harborside Health Care, Inc.</i> , 330 NLRB 1334 (2000).....	30
<i>Kendall College</i> , 228 NLRB 1083 (1977).....	33
<i>Larry Blake’s Restaurant</i> , 230 NLRB 27 (1977).....	39
<i>Leeds &amp; Northrup Co.</i> , 162 NLRB 987 (1967).....	34
<i>Lin Rogers Electrical Contractors</i> , 328 NLRB 1165 (1999).....	36
<i>Los Angeles Soap Co.</i> , 300 NLRB 289 (1990).....	48
<i>Majestic Towers, Inc.</i> , 353 NLRB 304 (2008).....	35
<i>Manno Electric</i> , 321 NLRB 1 (1996).....	38
<i>Mastercraft Casket, Co.</i> , 289 NLRB 1414 (1988).....	38
<i>Michigan Masonic Home</i> , 332 NLRB 1409 (2000).....	29
<i>Mt. Sinai Hosp.</i> , 331 NLRB 895 (2000).....	28,31,34
<i>National Association of Government Employees</i> <i>(International Brotherhood of Police Officers)</i> , 327 NLRB 676 (1999).....	39

<i>North Miami Convalescent Home</i> , 224 NLRB 1271 (1976).....	29
<i>Portsmouth Ambulance Service</i> , 323 NLRB 311 (1977).....	39
<i>Proctor Mfg. Corp.</i> , 131 NLRB 1166 (1961).....	34
<i>Public Service Company of New Mexico</i> , 360 NLRB 573 (2014).....	35
<i>Queen Mary</i> , 317 NLRB 1303 (1995).....	29
<i>Raymond F. Kravis Center for the Performing Arts</i> , 351 NLRB 143 (2007).....	28
<i>Regal Cinemas Inc.</i> , 334 NLRB 304 (2001).....	34
<i>Rossmore House</i> , 269 NLRB 1176 (1984).....	36
<i>Royal Development Co.</i> , 257 NLRB 1168 (1981).....	39
<i>Scheid Electric</i> , 355 NLRB 160 (2010).....	36
<i>Scripps Memorial Hospital Encinatas</i> , 347 NLRB 52 (2006).....	36,37
<i>S.E. Nichols Marcy Corp.</i> , 229 NLRB 75 (1977).....	39
<i>Stevens Creek Chrysler Jeep Dodge</i> , 353 NLRB 1294 (2009).....	36
<i>St. Louis Telephone Employees Credit Union</i> , 273 NLRB 625 (1984).....	33
<i>Sunnyside Home Care Project</i> , 308 NLRB 346 (1992).....	37
<i>Tenneco Chems.</i> , 249 NLRB 1176 (1980).....	34
<i>Wackenhut Corp.</i> , 345 NLRB 850 (2005).....	28,31
<i>Waddell Engineering Co.</i> , 305 NLRB 279 (1991).....	47
<i>Western Union Telegraph Company</i> , 242 NLRB 825 (1979).....	29
<i>Williams Motor Transfer</i> , 284 NLRB 1496 (1987).....	37
<i>Wright Line</i> , 251 NLRB 1083 (1980).....	38,41
<i>Your Host, Inc.</i> , 315 NLRB 295 (1994).....	47

## I. STATEMENT OF THE CASE AND INTRODUCTION

Administrative Law Judge Charles J. Muhl (the ALJ) issued his Decision (ALJD) in these cases on June 1, 2017, reported at JD-45-17. Following an investigation of the charges filed by International Brotherhood of Electrical Workers, Local 1933, AFL-CIO (the Union) against Glades Electric Cooperative, Inc. (Respondent), a second Consolidated Complaint and Notice of Hearing issued, on September 30, 2016, in Cases 12-CA-168580, 12-CA-175794 and 12-CA-180034, alleging that Respondent violated Section 8(a)(1), (3), (4) and (5) of the Act. [GC Ex 1(ff)]. The Consolidated Complaint was amended at the hearing. [ALJD, p. 2, ln. 8-44; p. 3, ln. 1-6; TR 8-12; GC Ex 2]<sup>1</sup>

The ALJ found that, on November 30, 2015, Respondent violated Section 8(a)(1) and (5) of the Act by eliminating the unit positions of mechanics and meter specialists, and by reassigning all the work of mechanics and meter specialists to the same employees in new non-unit positions of transportation foremen (TFs) and energy services agents (ESAs), respectively, without the Union's consent and without giving the Union notice and an opportunity to bargain. [ALJD, p. 1, par. 1; p. 2, ln. 1-3]

In addition, the ALJ held that, on January 18, 2016, Respondent violated Section 8(a)(1) and (5) of the Act by refusing to accept and process a grievance filed by the Union on behalf of employee Emily Hancock concerning discipline issued to her. The ALJ further decided that, in May 2016 and on June 27, 2016, Respondent violated Section 8(a)(1) of the Act by interrogating and threatening to lay off employees because of their Union sympathies and activities, and because the Union filed and pursued the unfair labor practice charges in these cases on behalf of employees.

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<sup>1</sup> The following references will be used throughout this document: [ALJD, p. \_\_, ln. \_\_, fn. \_\_ ] = Administrative Law Judge's Decision page, line numbers and footnote number; [TR \_\_ ] = transcript page number; [GC Ex \_\_ ] = General Counsel's exhibit number; [R Ex \_\_ ] = Respondent's exhibit number; [R Br, p. \_\_, fn. \_\_ ] = Respondent's brief, page number and/or footnote number.

Moreover, the ALJ concluded that, on June 27, 2016, Respondent violated Section 8(a)(1), (3) and (4) of the Act by laying off employees Emily Hancock and Chad Sevigny because they and the Union, on their behalf, engaged in grievance-filing activities, and because the Union filed unfair labor practice charges against Respondent. Finally, the ALJ held that, on June 27, 2016, Respondent violated Section 8(a)(1) and (5) of the Act by dealing directly with employees and bypassing the Union, while offering the laid-off employees severance benefits in exchange for their agreement not to contest their layoffs.

The ALJ decided that the proper remedy for Respondent's violations of Section 8(a)(1), (3), (4) and (5) of the Act includes a requirement that it restore the status quo ante by reinstating Emily Hancock and Chad Sevigny to the position of meter specialist as it existed on November 30, 2015, and to make the employees whole for any wages and benefits lost. The ALJ also ordered that Respondent be required to accept and process Hancock's January 2016 grievance concerning her verbal counseling. [ALJD, p. 33, ln. 19-26; p. 34, ln. 1-14]

Respondent filed exceptions to all of the ALJ's findings adverse to its position and to the ALJ's recommended Order and Notice to Employees. This brief constitutes the General Counsel's answer to Respondent's exceptions. Section II of this brief sets forth the background of this case. Section III of the brief describes the relevant facts. Sections IV sets forth the argument and law establishing that the ALJ properly held that Respondent violated Section 8(a)(1), (3), (4) and (5) of the Act. Finally, Section V concludes this brief.

## **II. BACKGROUND**

Respondent is a rural electric cooperative engaged in the business of distributing electricity to its members (customers). Respondent employs approximately 70 employees. [ALJD, p. 3, ln. 17-18, 39; TR 20-21, 28, 38] Respondent's main office is located in Moore Haven, Florida, with other offices in Lake Placid and Okeechobee, Florida. Respondent has approximately 12,000 members of the cooperative and services approximately 16,300 meters.

Respondent is not an investor-owned utility (IOU). [ALJD, p. 3, ln. 17-20, 30-32; TR 29-30, 36, 71, 73, 78, 184]<sup>2</sup>

Respondent's geographic jurisdiction includes the Florida counties of Highlands, Okeechobee, Glades and Hendry, as well as the Seminole reservations of Brighton and Big Cypress. Respondent's power supply North division covers Highlands and Okeechobee counties, with facilities in Lake Placid and Okeechobee. Its power supply South division covers Glades and Hendry counties, with a facility in Moore Haven. The work shift for all field employees is Monday through Thursday from 6:30 a.m. to 5:00 p.m. [ALJD, p. 3, ln. 32-36; TR 35, 78, 183, 262]

Jeffrey Brewington began working for Respondent in May 2000, and has been Respondent's CEO since October 20, 2011. He reports to a nine-member Board of Trustees. The seven executive staff members who report to Brewington are: Tracy Vaughn, director of operations; Travis Turner, director of engineering; Paul McGehee, director of business development; Yvonne Bradley, director of employee services; Jennifer Manning, chief financial officer (CFO); Jesse Wallace, chief technology officer; and Margaret Ellerbee, chief assistant. [ALJD, p. 3, ln. 36-37; TR 28-31; R Ex 3]

Since approximately 1973, the Union has been the exclusive collective-bargaining representative of a unit of Respondent's employees including, among other positions, mechanics, meter specialists and linemen. [ALJD, p. 3, ln. 40; TR 36] Respondent and the Union have entered into successive collective-bargaining agreements (CBAs), the most recent of which was effective by its terms from October 29, 2013 through October 28, 2016. At the time of the hearing in this matter, the parties were honoring the terms of the CBA, even though it had expired by its terms, pending the negotiation of a new agreement. The Union represents

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<sup>2</sup> Based on the facts and Respondent's admission, the ALJ found that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. [ALJD, p. 3, ln. 20-25; GC Ex 1(ff), Consolidated Complaint, par. 2(a)-2(d); GC Ex 1(jj), Answer, par. 2(a)-(d)]

approximately 22 to 28 of Respondent's employees, in the job classifications described in Article 1.1 and Addendum A of the CBA. [ALJD, p. 3, In. 41-42; p. 4, In. 1-2; TR 37-38, 78-80; GC Ex 5]

Gregory Krumm, the Union's president and business manager since 2011, has been an employee of Lee County Electric Cooperative since 1991, and he is currently employed as a full-time lead lineman performing electrical line work. [ALJD, p. 4, In. 2-3] The Union's stewards at Respondent's locations are: Matthew Perry and Brian Rhymes in Lake Placid, and Tony Cunningham and Roshard Leavy in Moore Haven. [ALJD, p. 4, In. 3-5; TR 74-76, 144, 185] Perry has worked for Respondent since January 2007. He has been a lead lineman since October 2014, and a Union steward since 2013. Perry works in Respondent's Lake Placid (North) location. His supervisor is Michael McDuffie, power supply manager, North district. James Morrissey is the power supply manager, South district. McDuffie and Morrissey both oversee the line employees, and Morrissey also oversees the mechanics (now called transportation foremen or TFs). McDuffie and Morrissey report to Vaughn. Previously, Chelsea Lowder, member service administrative assistant, oversaw meter specialists/ESAs and reported to Ellerbee. Pedro Navarro currently oversees the meter specialists and reports to Turner. [TR 181-186, 267, 466; R Ex 3]

### **III. FACTS**

#### ***A. The contractual bargaining unit***

In Article I, Section 1.1 of the CBA, Respondent has recognized the Union as the exclusive bargaining agent for all employees in "all employee classifications" listed in Addendum A to the CBA, including, among others, mechanics and meter specialists. [GC Ex 5] Nothing in the management rights clause (Article III) or elsewhere in the CBA gives Respondent the right to eliminate entire job classifications that are included in the unit.<sup>3</sup> [ALJD, p. 14, In. 10-20]

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<sup>3</sup> The management rights clause, at Article III, Section 3.2 gives Respondent the right to "... reduce, alter, combine, transfer, assign, or cease any job, department, operation, or service..."

***B. Job duties of Meter Specialists as compared with those of Energy Services Agents (ESAs)***

The meter specialists' job duties included reading meters, as well as performing trouble calls, meter change outs, re-reads, reconnects and disconnects. In late 2014, Respondent started installing the AMI automatic meter system. The AMI meters are supposed to automatically collect the readings from the member's meters at substations, from which the readings are transferred to Respondent's office. In late 2015 or early 2016, Respondent announced that it had completed installing the AMI meters. However, after November 30, 2015, meter specialists continued installing AMI meters and currently there are installed AMI meters that are not set or functional. After Respondent installed the AMI meters, ESAs performed the same duties as the duties meter specialists had traditionally performed, including meter reconnects and disconnects, the installation of new meters, and re-reads on AMI meters when the automatic reading was not transmitted properly or at all. ESAs also trained to learn how to perform energy audits in customers' homes. Respondent's job descriptions for the meter specialist and ESA positions are almost identical. [ALJD, p. 4, ln. 10-13; TR 47-49, 88, 192, 236, 264-267, 310, 315-317, 381, 383, 389; GC Ex 6, 10-11]

Until November 30, 2015, when Respondent created the energy services agent (ESA) position, Respondent's meter specialists were Emily Hancock, Chad Sevigny and Donnie Murphy, who all worked at Respondent's Lake Placid location and reported to Chelsea Lowder, member service administrative assistant. [ALJD, p. 4, ln. 9-13; p. 6, ln. 9-12; TR 39, 80, 186, 382]

From May through August 2012, Emily Hancock worked for Respondent as a member service representative at the Okeechobee location. In August 2012, Hancock began working as a meter specialist in Okeechobee. In June 2015, Respondent granted Hancock's request to transfer to Lake Placid. Hancock worked as a meter specialist until November 30, 2015, at which time she earned \$20.93 per hour and worked 40 hours per week. [TR 257-259, 263]

On February 28, 2008, Chad Sevigny began working for Respondent as a meter reader, which position later became meter specialist. On July 2, 2012, Sevigny's job title became groundman; he held that title until August 12, 2013, at which time he returned to working as a meter specialist. Sevigny worked as a meter specialist until November 30, 2015, working 40 hours per week. Sevigny held the title of ESA from November 30, 2015 until July 11, 2016, at which time Respondent laid him off. Sevigny was on FMLA leave from June 1, 2016 through June 27, 2016, at which time Respondent placed him on paid administrative leave through his layoff. [ALJD, p. 14, ln. 4-5; p. 29, ln. 31; TR 379-380; R Ex 30]

***C. Job duties of mechanics as compared with those of transportation foremen (TFs)***

Mechanics' job duties were to perform repairs and maintenance on fleet vehicles and order necessary parts. TFs' job duties are the same as those previously performed by mechanics, except for the added duty of reading data from the Trimble (GPS or AVL) system installed on the vehicles. Respondent's job descriptions for the mechanic and TF positions are very similar. [TR 88-90, 174, 193, 511; GC Ex 12-15; R Ex 12] Until November 30, 2015, when Respondent implemented the TF positions, Respondent's mechanics were Jeffrey Prescott and Jesse Brown. Prescott works at the Lake Placid location and Brown in Moore Haven. [ALJD, p. 4, ln. 37-40; p. 7, ln. 24-27, fn. 9; p. 8, ln. 30-31; TR 39, 186]

Respondent did not begin installing the Trimble system in its approximately 70 vehicles until about January 20, 2016, almost two months after it reclassified mechanics as TFs, and installation continued until April 2016. [ALJD, p. 7, ln. 30-31; TR 512, 516; R Ex. 13 to 15]

Within the three months prior to the hearing in December 2016, Respondent changed the job title of the projects division TF to "operations foreman" and revised the job description for that position, which asserts that the operations foreman directs the fleet coordinator, Alisha (Beck) Cockram, who orders parts, transports vehicles and cleans the office at the partial direction of the TF. [ALJD, p. 7, fn. 8; TR 511, 514-515; GC Ex 15; R Ex 12, item III, C, 1]

#### ***D. TF's and Operations Foreman's duties***

In January 2016, TFs started training vehicle operators on the use of Respondent's Trimble (AVL) system. [TR 521, 566] Manager Morrissey testified that TFs conduct coachings with employees by reviewing their weekly safety scorecards with them concerning their driving habits, such as speeding or braking too hard, and that after the first year of implementing the Trimble AVL system, Respondent anticipates that the TF could recommend that employees be disciplined for driving unsafely. However, the TFs have not issued or recommended any discipline to any employees.<sup>4</sup> Morrissey also noted that TFs can remove a vehicle that is not being operated in a safe manner. However, Morrissey admitted that TFs derive that ability from their knowledge of the vehicle's structural integrity as mechanics, such as when a tire is bald or a vehicle spring needs repairing. [ALJD, p. 8, In. 5-14; TR 526-529, 548-549, 552]

Morrissey noted that TFs can purchase items for a vehicle repair up to \$1000, can decide to put a vehicle back in service on their own, can direct some of the work of fleet coordinator Cockram, accrue paid time off (PTO) differently than other employees, and are involved with budgeting. [TR 534-535] Morrissey admitted that, before becoming TFs, mechanics Brown and Prescott spoke to vehicle operators about not driving too fast and how to operate their vehicles in a safe manner. [TR 539] As TFs, Brown, Prescott and Gunn continued to perform routine repairs on Respondent's vehicles, as seen by their work orders of November and December 2015, the months right before and after Respondent changed their job titles from mechanics to TFs on November 30, 2015.<sup>5</sup> [ALJD, p. 8, In. 20-22; TR 542-544; GC Ex 54-55]

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<sup>4</sup> Contrary to testimony of Morrissey and Brewington that TFs only have the authority to **recommend** discipline to employees for driving unsafely, the ALJ correctly discredited Gunn, who claimed that he had the authority to issue discipline to employees. However, even Gunn admitted that his authority is limited to addressing any potential employee discipline issue with Morrissey and that he has only spoken to employees in coaching sessions, which involve training employees about the AVL system. [ALJD, p. 8, fn. 13; TR 579-581, 586-587, 665]

<sup>5</sup> In December 2015, the TFs performed many more work orders (79) as compared to November 2015 (21). [GC Ex 54-55] Morrissey stated that the reason is that Respondent had more personnel and, thus more repair work for its employees. [TR 544] This period coincides with the time when Respondent converted meter specialists to ESAs and was willing to find additional job tasks for them to perform in

Morrissey stated that all three TFs have the ability to direct the work of fleet coordinator Alisha (Beck) Cockram, but it is not in the job descriptions for Prescott or Gunn, only in the revised job description for Brown. The TFs do not have the authority to grant time off to Cockram. Morrissey directs some of Cockram's work. [TR 547, 549, 551] Moreover, Morrissey admitted that TFs do not have the authority to transfer, suspend or discipline employees and that only Morrissey can authorize extended overtime work. [TR 548, 550] Morrissey also acknowledged that mechanics, just as TFs, inspected Respondent's yard to make sure vehicles were in safe operating condition. [TR 555] Furthermore, Morrissey admitted that mechanics performed all of the duties and tasks listed under the "Supervises and Performs Personally" section of the TFs' job description. [TR 557-563; GC Ex 13-15] The other portions of the duties listed in the TFs' job description, for the most part, deal with their mechanical abilities and experience and involve functions they did as mechanics.<sup>6</sup> [ALJD, p. 8, 24-28; TR 566-572]

***E. Respondent suspended Emily Hancock***

On November 2, 2015, in the afternoon, while at Respondent's Lake Placid office, meter specialist Emily Hancock overheard her supervisor, Chelsea Lowder, talking in her office with meter specialists Murphy and Sevigny, and heard Lowder state, in a non-joking manner, "you all can take your union handbooks and shove it up your asses." Later that day, Hancock told Union stewards Perry and Rhymes about Lowder's comment made in the presence of the meter specialists. Perry then called Murphy and asked him what happened that day. [ALJD, p. 11, fn. 20, par. 2; TR 272-274, 276]

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that title, as non-unit employees, but was not willing to find such work for them in the unit position of meter specialists. Also, Respondent expects to further increase its work force in the future through an infrastructure program called America's Gateway and Logistics Center (AGLC). [TR 571]

<sup>6</sup> After being questioned about it several times on cross-examination, Gunn admitted that he does not have the authority to raise the target score on the Trimble scorecard system. [TR 589] Gunn initially testified that, as a TF, he spent about 50% of his time performing mechanic work. However, in answer to a question from the ALJ, Gunn abruptly changed his testimony and stated that he performed mechanic work about 70% of the time as a TF. [ALJD, p. 9, fn. 15; TR 584, 590] It is apparent that Gunn exaggerated his testimony on several occasions, which made him an unreliable witness.

On November 3, 2015, Hancock reported to work at Lake Placid early and went to an outdoor smoking section to smoke and have coffee. Murphy sat near Hancock and told her that she needed to keep his “fucking name” out of her mouth because he was told that if he gets brought up on anything related to the Union, Respondent was going to fire him and she was not going to have him lose his job. Hancock replied that she did not know what Murphy was talking about. [TR 274-276]

On November 9, 2015, Respondent issued Hancock a two-day suspension for alleged insubordination, based on Murphy’s accusation against her of reckless driving and discourteous behavior to a member (customer). On November 17, 2015, the Union filed a grievance concerning Hancock’s suspension. On May 6, 2016, an arbitration hearing was held concerning Hancock’s suspension grievance. On July 1, 2016, the arbitrator issued a decision sustaining the grievance with backpay, ordering Respondent to remove the two-day suspension from Hancock’s personnel file, and reducing the discipline to a verbal warning. [ALJD, p. 10, fn. 18; p. 15, ln. 1-8; TR 80-84, 187, 276-280, 352-355; GC Ex 19-21]

***F. Respondent converted Meter Specialists to ESAs and Mechanics to TFs without providing the Union with prior notice***

On November 30, 2015, Respondent created three energy services agent (ESA) positions, which were filled by meter specialists Murphy, Hancock and Sevigny. On that date, Respondent presented Murphy, Hancock and Sevigny with job opening forms for the ESA positions. ESAs earned \$22.00 per hour. In a meeting with Hancock and Sevigny, manager Margaret Ellerbee told them that the ESA position was non-union because it was not in the bargaining unit. Ellerbee also stated that there would be more opportunities for different trainings, such as energy audits, and a higher wage rate than the Union raise. Ellerbee did not provide information concerning all of the duties of the ESA position, but she had informed Sevigny of different tasks that ESAs could be doing if there were no meters to manually read. Murphy asked Ellerbee if Respondent spoke to the Union about the ESA position and Ellerbee

replied yes. Hancock was not pleased that the ESA position was non-union. [ALJD, p. 6, ln. 9-11; TR 40, 80, 185-186, 259, 271, 281-282, 314, 372, 423; GC Ex 6]

Earlier in 2015, Union stewards Perry and Rhymes heard from meter specialists that Respondent told them there may be changes in their job structure because of the new meters. However, during two stewards' meetings held thereafter, but prior to November 30, 2015, Perry and Rhymes asked Brewington what, if any, changes Respondent was going to make to the meter specialist position. Brewington replied that he was not sure what was going to happen and that Respondent had not yet figured it out. [ALJD, p. 4, ln. 31-34; TR 189-190, 283-284]

On November 30, 2015, Ellerbee met with Sevigny and his girlfriend at the hospital, while they were having a baby, in order for Sevigny to sign the ESA job opening form. [ALJD, p. 6, ln. 13-16] Later that day, Hancock told steward Perry that she was concerned that, because Respondent removed her from the unit, she would not be protected by the Union, especially after having filed a grievance earlier that month. Hancock also told Perry that Murphy said he was happy to make the change in position from meter specialist to ESA. [TR 188, 283, 385-386]

Respondent installed approximately 15,000 or 16,000 automatic (AMI) meters from about 2014 through about March 2016. Until November 30, 2015, this work was done by meter specialists. Since that time until July 11, 2016, AMI installation work was done by ESAs. In the period since Respondent created the ESA position, ESAs have performed re-reads on meters when the automatic reading was not transmitted properly or at all. There are more than 100 AMI meters that, for various reasons, do not work properly and require manual readings. In addition, after November 30, 2015, the ESAs spent full days performing cleanup duties (disconnect for past due customers) and other tasks that had always been performed by meter specialists, such as obtaining manual readings for non-AMI three-phase meters. Sevigny noted that it would take about half a day to re-read five or six meters because of the long distance between them. Thus, ESAs had a substantial amount of meter reading work, similar to when they held the meter specialist job title. [ALJD, p. 9, ln. 8-13; TR 236, 310, 314, 341, 346, 383, 390-391, 413-414]

Sevigny testified that, from summer 2015 through about March 2016, he had conversations with Ellerbee on a monthly basis and asked her whether Respondent would lay him off after the installation of the AMI meters was completed. Ellerbee told Sevigny that he would work for Respondent until he retired and that he would never get laid off because he was a good employee. [ALJD, p. 9, fn. 16; TR 388, 394-395, 417]<sup>7</sup>

On November 30, 2015, Respondent created three TF positions, two of which were filled by mechanics Prescott and Brown. On December 7, 2015, Respondent hired Phillip Gunn as a TF to fill the third position. Prescott handles the mechanical work in the northern district, Gunn handles the southern district, and Brown maintains generators. [TR 515-516] TFs perform mechanic duties, and also monitor Respondent's Trimble (GPS or AVL) system. [ALJD, p. 6, ln. 20-24; TR 43-45, 193, 508; GC Ex 7-9]<sup>8</sup>

On November 30, 2015, Union president Krumm first learned that Respondent had created and implemented the positions of ESAs and TFs as non-unit positions, after shop steward Perry told Krumm that Respondent CEO Brewington announced the changes to unit employees on that date, through a paycheck letter. Respondent removed the meter specialists and mechanics from the bargaining unit and stopped deducting Union dues from their paychecks. Respondent did not provide the Union with prior notification of the creation of the ESA or TF positions. [ALJD, p. 6, ln. 27-29; TR 86-87, 188, 191, 194, 284; GC Ex 22]

Krumm testified that Respondent provides Union dues deduction reports to the Union's financial secretary on a monthly basis. The Union dues reports show that, in November 2015, Respondent deducted Union dues for employees Hancock, Sevigny, Brown and Prescott. However, beginning in December 2015, Respondent stopped deducting Union dues for those

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<sup>7</sup> Sevigny already had skills which tend to show that he is capable of performing any work ESAs would perform, such as energy audits, that are in addition to the duties of meter specialists. Thus, Sevigny is certified as an air conditioning technician and can perform ESA high energy usage services, to educate customers on how to lower their electric bill. [TR 424]

<sup>8</sup> The TFs speak to employees about safe driving habits while using the Trimble AVL system. [TR 520-521]

employees because it had removed them from the bargaining unit. Krumm noted that Hancock and Seigny were Union members throughout the time when they were meter specialists and ESAs and continue to be Union members. By contrast, Murphy has not been a Union member since about 2011 or 2012.<sup>9</sup> [TR 129-131, 270-271, 384-385; GC Ex 39]

***G. The Union requested to bargain and contested Respondent's decision to convert Meter Specialists to ESAs and Mechanics to TFs***

On December 3, 2015, the Union requested that Respondent provide it with the job descriptions for the meter specialist, ESA, mechanic and TF positions. Perry testified that the TF do not direct any shop personnel or vehicle operators, despite such duties being listed in the job descriptions for TF. [TR 47-49, 196; GC Ex 10-15, 40]

On or about December 8, 2015, Respondent and the Union held a grievance meeting concerning Hancock's aforementioned suspension. During the meeting, the Union asked Respondent why it had decided to remove mechanics and meter specialists from the bargaining unit without giving the Union an opportunity to bargain about the issue. Respondent did not provide the Union with an answer. [ALJD, p. 7, ln. 7-9; TR 92-93, 197]

On December 15, 2015, Respondent and the Union held a step 3 grievance meeting regarding Hancock's suspension. At that time, shop steward Perry provided Respondent with a letter from Krumm to Brewington requesting that Respondent revert to the negotiated meter specialist and mechanic positions, inasmuch as the employees [in the new ESA and TF positions] were still performing the same job duties. Brewington gave Perry a note acknowledging that he received Krumm's letter. Also on December 15, 2015, the Union filed a grievance concerning Respondent's decision to remove the meter specialists and mechanics from the bargaining unit when it created the ESA and TF positions. On December 21, 2015,

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<sup>9</sup> In addition to the examples cited by the ALJ for finding that Brewington was not a credible witness, Brewington's claim that he did not know whether Hancock or Seigny paid Union dues or whether they were Union members as of June 27, 2016 strains credulity in view of his unlawful anti-union statements, discussed *infra*. [ALJD, p. 16, ln. 18-24; p. 18, ln. 7-10; TR 67]

Brewington sent a letter to the Union denying the grievance. [ALJD, p. 6, ln. 31-32; p. 27, fn. 45; TR 93-96, 198-200; GC Ex 23-25, 41]

In about late December 2015 or early January 2016, CEO Brewington met with ESAs Murphy, Hancock and Sevigny. Also present were manager Margaret Ellerbee and supervisor Chelsea Lowder. Brewington told the employees that the Union filed a grievance concerning Respondent's decision to convert meter specialists to ESAs and that, if the Union won the grievance, he would have to let them all go and advised them to start looking for other job opportunities. [TR 201-202, 290-291, 344] Although Brewington and Ellerbee testified, they did not deny that Brewington made this statement. Respondent did not call Lowder to testify about this meeting.

On January 5, 2016, Respondent and the Union held a step 2 grievance meeting concerning Respondent's decision to convert meter specialists to ESAs and mechanics to TF. [GC Ex 24] During the meeting, the Union asked Respondent why it did not negotiate the decision to remove the meter specialists and mechanics from the bargaining unit, as well as the creation of the ESA and TF positions. In response, Brewington told Krumm that either Respondent removed the meter specialists from the bargaining unit as ESAs or it would lay them off. Krumm told Brewington that there were other options which the parties could negotiate during the upcoming successor CBA negotiations, but Respondent rejected that approach. Krumm also told Brewington that the ESAs were performing the same duties as they had as meter specialists and the TF were performing the same duties as when they were classified as mechanics. Brewington replied that the TF are supervisors because they read Trimble (GPS or AVL) data from the fleet vehicles. However, he did not explain how reading the data makes TF supervisors, nor did Respondent explain to the Union why the ESA's could not be in the bargaining unit. Krumm filed the instant unfair labor practice charge to resolve the issue. [ALJD, p. 7, ln. 7-16; TR 96-98; 200-201]

***H. Respondent refused to process grievances filed by the Union concerning a verbal warning it issued to Hancock***

On January 7, 2016, Respondent issued a verbal warning to Hancock, as an ESA, for having a “bad attitude” towards a fellow employee Rene Rimes, member services representative, who complained to manager Ellerbee and supervisor Lowder that Hancock was rude to her. On January 18, 2016, Perry filed one grievance on behalf of Hancock concerning the verbal warning, and filed another grievance on behalf of the Union because Respondent did not allow the Union to represent Hancock. On January 20, 2016, supervisor McDuffie handed the grievances back to Perry and stated that Hancock and the Union did not have standing to file the grievances because Hancock was not in the bargaining unit. Thus, Respondent refused to process the grievances. [ALJD, p. 10, ln. 7-11, 17-18; p. 11, ln. 1-3; TR 202-204, 286-288, 305; GC Ex 42, 45]

In addition, on January 11, 2016, Hancock filed a complaint of sexual harassment with Respondent’s director of employee services, Yvonne Bradley. Also present at the time was payroll employee Sierra Cox. Hancock stated that Murphy harassed her about her same-sex relationship and that if she killed herself, Brewington and Ellerbee had helped in it. Bradley replied that she would investigate the complaint. Hancock and Megan Randolph, safety manager, began dating on July 23, 2015, and became engaged around Easter 2016. [ALJD, p. 10, ln. 14-15; TR 288-291]

***I. Respondent transferred Hancock from ESA to call center representative***

Hancock worked as an ESA from November 30, 2015 through January 18, 2016, at the Lake Placid location. On January 18, 2016, Bradley, with Brewington present, told Hancock that there were no findings of harassment. Brewington then told Hancock that she would be transferred from ESA to call center representative, a position that had always been outside the bargaining unit, effective the following day. [TR 288-291] On the same date, Respondent transferred Hancock to the non-bargaining unit position of call center representative at the

Moore Haven location, where her duties included answering phones and performing clerical tasks. [ALJD, p. 10, ln. 19-22] By that time, Brewington had learned that Randolph and Hancock were in a same-sex relationship. Brewington told Hancock that he transferred her from ESA to call center representative because he feared that her dating relationship with Randolph would compromise the safety program, presumably because she may investigate employee vehicle accidents and Hancock drove a company vehicle as an ESA. Thus, Respondent assigned Hancock to work in the call center because of her romantic relationship with Randolph as it related to Respondent's nepotism policy. [ALJD, p. 10, fn. 19]

Respondent's most recent revision to its nepotism policy added section D, entitled "Romantic or Sexual Relationships," which, in part, provides that the policy shall apply without regard to the sexual orientation of the participants. Respondent's nepotism policy was revised three times within one year on January 29, 2015, November 24, 2015 and January 28, 2016.<sup>10</sup> The policy was reviewed on November 22, 2016. Respondent does not notify employees when there are changes made to its policies. [TR 54-55, 170-171, 223, 293, 295, 319; GC Ex 18]

Hancock's fiancée, Megan Randolph, oversees all safety for all employees of Respondent regardless of position. Hancock asked Brewington if she and Randolph needed to break up, but Brewington said no. With the transfer from ESA to call center representative, Hancock lost the privilege of a company vehicle, phone and equipment, and she was forced to move from her residence to be closer to Moore Haven because of fuel and vehicle costs related to the long distance between Lake Placid and Moore Haven. On or about June 2, 2016, supervisor Susan Watkins told Hancock that, pursuant to Ellerbee's direction, Respondent was

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<sup>10</sup> Brewington incredibly denied that Respondent's nepotism policy was revised to, at least in part, address the same-sex relationship between Randolph and Hancock. [TR 56-57, 229] Hancock noted that, under Respondent's prior nepotism policy, she would have been allowed to remain in her position as an ESA. Hancock also noted that Respondent does not equally enforce its nepotism policy against other current employees who are in relationships, such as married couples Josh and Chelsea Lowder (Chelsea supervises Josh's duties) and Terry and Sierra Cox (Sierra handles Terry's payroll), whose respective job duties create conflicts of interest, as well as employee Courtney Brown and former Board member Russell Henderson, her grandfather. [TR 295-298, 320]

changing her job title back to ESA, but Hancock continued performing call center work. [ALJD, p. 12, ln. 12-14; TR 101-102, 242, 259-261, 268, 271, 285, 291-292, 299-300, 318, 321-323] Respondent did not provide Hancock with any energy audit training as an ESA, although it provided such training to Chelsea Lowder, Murphy and Sevigny. [TR 299, 342-343, 408, 425-427]

***J. Step 3 grievance meeting regarding Respondent's decision to convert Meter Specialists to ESAs and Mechanics to TFs***

In late January 2016, Respondent and the Union held a step 3 grievance meeting concerning Respondent's decision to convert meter specialists to ESAs and mechanics to TF. During the meeting, the Union again asked Respondent why it would not negotiate concerning its decision to remove the ESA and TF positions from the bargaining unit, considering that the employees in these positions were doing the same job duties bargaining unit meter specialists and mechanics had done. Brewington repeated Respondent's position that if Respondent put meter specialists back in the bargaining unit, he would lay them off because there was no work for them. The Union replied that there was work for them to perform because the ESAs were doing meter specialist work every day. The Union then noted that there was nothing stronger and more binding than a Union contract. Brewington responded by stating that because Florida is a right to work state, he could fire employees merely because he did not like the shirts they wore. [ALJD, p. 7, ln. 18-20; TR 205-206, 213-214; GC Ex 24]

***K. Brewington interrogated Sevigny concerning his Union sympathies***

In May 2016, at approximately 7:00 a.m., Brewington met alone with Sevigny in his office for a "coffee meeting" that lasted about 15 minutes. During the meeting, Brewington started the conversation by asking Sevigny how he felt about the Union. Sevigny replied that he did not know much about unions in Florida, which is a right to work state. Sevigny spoke to Brewington about other work that ESAs could be doing. Brewington asked Sevigny about his job duties. Sevigny replied that he was driving around a lot checking defective AMI meters. Brewington did

not appear to agree. Brewington told Sevigny that he was not going to let the Union run the company, but instead was going to run the company himself. [ALJD, p. 11, ln. 13-21; fn. 20, par. 1; TR 396-398, 403, 422]<sup>11</sup>

***L. Emails between Brewington and Krumm concerning Respondent's decision to convert Meter Specialists to ESAs and Mechanics to TFs***

In May 2016, Krumm and Brewington met alone to discuss the Union's grievance. [GC Ex 24] During the meeting, Brewington claimed that, with the change in meter technology, there was no work left for meter specialists to perform. Krumm again replied that there were still meters to be maintained and that the issue should be discussed through upcoming CBA negotiations. Brewington told Krumm that, if the Union allowed Respondent to "have" the TF (i.e. keep them out of the bargaining unit), Respondent would put the ESAs back in the unit as meter specialists. Brewington also asked Krumm to speak to the TF about Respondent's proposal to keep them out of the unit. Krumm said he would think about Brewington's proposal. However, Krumm decided not to raise this issue with Prescott and Brown because he did not want to put pressure on those long-time union members to decide whether or not they were to be removed from the unit. [ALJD, p. 12, ln. 1-6; TR 100-101, 107]

The Union has represented Respondent's lead linemen since before 2011. During their May 2016 meeting, Brewington told Krumm that he would be making all lead linemen supervisors and then remove them from the unit. Krumm opposed Brewington's threat.<sup>12</sup> Krumm pointed out to Brewington that mechanics and linemen have shared responsibilities, such as providing for the proper performance and maintenance of vehicles. Thus, with a

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<sup>11</sup> The ALJ correctly decided not to credit Brewington's denial that he told Sevigny that the Union should not tell him how to run his business [TR 69]. Such finding is supported by the fact that Brewington did not deny that he spoke to Sevigny about the Union during a "coffee meeting" in May 2016, and merely claimed that he could not remember such a discussion. [ALJD, p. 11, fn. 20, par. 1; TR 661]

<sup>12</sup> Thus, Brewington repeated Respondent's ploy of classifying bargaining unit employees as supervisors in order to remove them from the unit, as it did when reclassifying mechanics as TFs.

working mechanic classified as a supervisor, when a vehicle part breaks or malfunctions, the mechanic could unfairly blame the lineman regardless of actual fault. [TR 102-106]

On May 25, 2016, Krumm sent an email to Brewington, stating that Respondent had not informed the Union that it had hired Phillip Gunn as a transportation foreman, even though Respondent had asked the Union to speak to the TF regarding its offer to resolve the Union's grievance. [GC Ex 24] Thus, Krumm rightfully reasoned that Respondent had attempted to deceive the Union. Krumm also requested that Hancock be returned to the meter specialist position, instead of being isolated in a call center representative position and not being allowed to progress in the evolving meter specialist position. Krumm noted that Respondent deprived Hancock of training opportunities as an ESA, which could help her future employment mobility. Krumm further requested that Respondent process the grievance that the Union filed on Hancock's behalf while she held the ESA position. [TR 108, 175-176; GC Ex 26]

On June 7, 2016, Brewington sent an email to Krumm, asking whether the Union had thought about Respondent's proposal to keep the meter specialists in the bargaining unit and exclude the TF from the unit. On June 8, 2016, Krumm sent a reply email to Brewington, stating that the Union decided to decline Respondent's offer and asked whether Respondent had returned Hancock to her original position. [ALJD, p. 12, ln. 16-17; TR 109; GC Ex 27]

On June 14, 2016, Brewington replied by letter to Krumm, stating that Respondent was considering reorganizing its operations concerning the positions of ESA, TF, mechanic, meter specialist and lead lineman. Brewington's letter further stated that Respondent was considering lay-offs in the position of ESA (rather than meter specialist). Brewington offered dates in late June and early July 2016 for bargaining. [ALJD, p. 12, ln. 19-24; TR 110; GC Ex 28]

On June 22, 2016, Krumm sent a reply letter to Brewington, stating that the Union was interested in bargaining with Respondent, during the upcoming successor CBA negotiations concerning the issues Respondent raised. Krumm stated that the Union reserved the right to refuse changes to the bargaining unit. Krumm stated that the lead lineman and TF positions

were unit positions. Krumm stated that he was not available to negotiate during the dates offered by Respondent (due to his work for Lee County Electric during the peak storm season), but that he was available after July 13, 2016. Krumm pointed out that the storm season begins on June 20, and that he did not receive much notice to ask for approval from his supervisor to get time off from work in order to negotiate on the dates proposed by Respondent. [TR 111, 151, 179-180; GC Ex 29] Krumm testified that the Union repeatedly requested that Respondent put the meter specialists and mechanics back in the bargaining unit and negotiate about Respondent's intent to exclude them from the bargaining unit. [ALJD, p. 12, ln. 24-27; TR 153]

***M. Respondent laid off Hancock and Sevigny, while directly offering them severance pay and blaming the Union for their lay-offs***

On June 27, 2016, one week into the storm season, Brewington sent a letter to Krumm stating that, effective July 11, 2016, Respondent was returning Murphy, Sevigny and Hancock to their former position of meter specialist; on the same date, it would lay off Sevigny and Hancock; and it was willing to offer Sevigny and Hancock six weeks of severance, contingent on them signing a general release agreeing not to contest their lay-offs. Also on June 27, 2016, Brewington forwarded a letter to Krumm that he had provided to Murphy, Sevigny and Hancock that day, notifying them of the same issues described in the letter to Krumm. Those issues included the notice of lay-offs of Hancock and Sevigny, a proposal of six weeks' severance pay to Hancock and Sevigny (if they signed a general release agreeing not to contest their lay-offs), and notice that Sevigny and Hancock would immediately be placed on paid administrative leave until their lay-off date of July 11, 2016. [ALJD, p. 13, ln. 15-24; TR 42, 57, 113; GC Ex 30]<sup>13</sup>

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<sup>13</sup> On June 27, 2016, Respondent, for the first time, informed the Union that it would be reverting the ESAs back to meter specialists, laying off Hancock and Sevigny, and offering them severance pay in exchange for their agreement not to contest their layoffs. Respondent told the Union that it was offering severance pay to Hancock and Sevigny, at the same time that it made such offer directly to them. Thus, Krumm noted that Respondent did not provide the Union with notice or an opportunity to bargain about Respondent's offer of severance pay to Hancock and Sevigny, contingent on them agreeing not to contest their lay-offs. Brewington confirmed Krumm's testimony. [TR 118, 177, 206-207, 215, 663-665]

Also, on June 27, 2016, without giving the Union any opportunity to respond to his letter to Krumm, Brewington held a meeting with ESAs Murphy and Hancock. Director of employee services Bradley was also present. Brewington told Murphy and Hancock that Murphy would be retained as a meter specialist and Hancock and Sevigny would be laid off. Brewington also told Hancock and Murphy that he was tired of fighting the Union for the positions of ESA and meter specialist and was only going to keep Murphy. Brewington also stated that he was offering Hancock and Sevigny six weeks of severance pay if they did not contest their layoff. Hancock stated that she had the most seniority, but Brewington replied that he disagreed. [ALJD, p. 12, In. 29-38; p. 13, In. 1-13; TR 206, 261, 300-302]

On June 27, 2016, Brewington sent an email to Sevigny notifying him of his lay-off. Later that day, after receiving the email, Sevigny called Respondent's facility to speak to Yvonne Bradley about his retirement benefits. Sevigny ultimately spoke to Brewington, who told Sevigny that he was sorry, but it was the Union's fault that he got laid off. [TR 400] Sevigny testified that when he went on FMLA medical leave on June 1, 2016, he had a steady amount of work to perform as an ESA. He had been scheduled to return to work from medical leave during the week of June 27, 2016. [ALJD, p. 14, In. 4-9; TR 399, 405]

Also on June 27, 2016, Brewington sent a letter to all of Respondent's employees stating that, effective July 11, 2016, Respondent laid off Hancock and Sevigny, and that Respondent had placed them on administrative leave until their lay-offs and offered them a severance package. Brewington told employees that Respondent transferred Hancock and Sevigny from the meter specialist into the ESA position, but that the creation of that position was "battled since day one" (by the Union) and resulted in "far too much ... legal fees." [ALJD, p. 13, In. 26-37; p. 14, In. 1-2; p. 19, In. 2; TR 118; GC Ex 31]<sup>14</sup>

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<sup>14</sup> Brewington testified that Ellerbee provided input into the decision to lay-off Hancock and Sevigny, but incredibly asserted that, because 5 months had elapsed since the layoffs at the time of his testimony, he was unable to remember whether anyone else provided input about the layoff decision, concerning an issue he claims had vexed him for months because of the Union's resistance. [TR 60-62]

On June 30, 2016, Brewington sent a paycheck letter to employees stating, among other things, that the ESA position (i.e. Murphy) would now report to Pedro Navarro, as well as when the position reverted back to meter specialist (on July 11, 2016). [TR 118; GC Ex 32]

***N. The Union filed grievances contesting Respondent's lay-offs of Hancock and Sevigny***

On June 30, 2016, the Union filed three grievances on behalf of Hancock, Sevigny and the Union, regarding Respondent's decision to lay them off. On July 5, 2016, Respondent received the Union's grievances and requested that the grievances be moved to step 3 of the grievance procedure. [ALJD, p. 14, ln. 38; TR 121-122, 207; GC Ex 36-37]

On July 6, 2016, in a letter to Brewington, Krumm responded to the June 27 letters he had received from Brewington concerning the reversion of Murphy, Hancock and Sevigny to meter specialist positions, the immediate placement of Hancock and Murphy on paid administrative leave with notice that they would be laid off on July 11, 2016, and the offer of severance pay to Hancock and Sevigny. [GC Ex 33; TR 116-118] In the July 6, 2016 letter, Krumm also commented on information he had received that Brewington had informed Hancock about these matters in the presence of Murphy, and that Brewington had impersonally sent this information to Sevigny by email, rather than telling Sevigny in person or over the phone. Krumm requested that Respondent put the mechanics back in the bargaining unit, process a pending grievance (regarding discipline to Hancock in January 2016), and bargain about new positions it created, including that of Murphy's. Krumm contended that Respondent used union activities as the reason for the lay-offs of Hancock and Sevigny, and that Respondent disrespected Hancock and Sevigny in the way that it went about notifying them of their lay-offs. Finally, Krumm requested that Respondent stop its anti-union scheming by soliciting bargaining unit employees about their sympathies concerning the upcoming successor CBA negotiations, during coffee meetings with the CEO. [TR 116-118; GC Ex 33]

On July 11, 2016, Brewington responded to Krumm's July 6 letter, disputing the Union's contentions. Brewington also inaccurately stated that the Union rejected Respondent's offer to bargain about the return of the mechanic positions to the bargaining unit. [GC Ex 34] As noted above, Krumm's work schedule did not allow him to bargain during the limited dates and time frame offered by Respondent, in late June and early July 2016, and Krumm had requested to bargain about this matter in the context of successor CBA negotiations. [TR 120-121]

***O. Respondent held further discussions with Sevigny and the Union concerning severance pay***

Also on July 11, 2016, Brewington sent Krumm a letter stating that Sevigny had asked about his severance pay, and Respondent had told Sevigny that it did not yet have the Union's approval to pay it. [TR 162; R Ex 28] On July 15, 2016, Krumm sent an email to Brewington stating, inter alia, that the Union had not received any inquiries from employees concerning severance. [TR 224; GC Ex 44] On July 18, 2016, Brewington sent Krumm an email and attached proposed severance agreements for Hancock and Sevigny, which would require them to accept their lay-offs. [ALJD, p. 15, ln. 14-20; TR 121; GC Ex 35]

***P. The CBA and policy provisions applicable to seniority and layoffs***

Respondent has written policies that are in effect for all employees on its intranet system. Respondent's seniority and lay-off policy was revised on September 29, 2016. Section III of that policy provides that "job classification seniority shall be the time of **continuous** service... in a particular job classification." Thus, a break in service in a particular job classification would cause a loss of that specific classification seniority. [TR 51; GC Ex 16]

Article 10.3 of the CBA provides that "[t]he principle of classification seniority shall govern in the matter of layoff for lack of work..." "when, among the employees to be considered, experience, skill, cooperativeness and reliability are relatively equal." Article 10.6 provides that "[e]mployees 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.” However, Article 10.6 does not make clear whether transferring to a supervisory position is the same as transferring to a non-supervisory position outside of the bargaining unit. [GC Ex. 5] Thus, the Union’s position that Murphy’s transfer to a supervisory position resulted in the loss of his previous meter specialist classification seniority is a reasonable interpretation of the CBA. [ALJD, p. 14, ln. 22-34; TR 167]

***Q. Respondent and the Union discussed the grievances regarding the lay-offs of Hancock and Sevigny***

On August 1, 2016, Respondent and the Union held a step 3 grievance meeting concerning the lay-offs of Hancock and Sevigny. Present for Respondent were Brewington and legal counsel Brian Koji. Present for the Union were Krumm and stewards Perry and Rhymes. During the meeting, Krumm contended that Respondent had allowed Hancock and Sevigny to perform meter specialist duties while they were in the position of ESAs, but that because the Union wanted the ESA position in the bargaining unit, Respondent laid-off Hancock and Sevigny. Krumm also stated that the Union disagreed with Respondent’s selection of Murphy to be retained after the lay-off, because the Union believed that Hancock had more classification seniority. Krumm took the position that Murphy, Sevigny and Hancock are all equally experienced, skilled, cooperative and reliable to perform the duties of meter specialist, and that Hancock had greater classification seniority than Murphy or Sevigny and should not have been laid off.<sup>15</sup> [TR 246-247] Krumm stated that the fact that Murphy was not a Union member appeared to be a factor in Respondent’s decision to retain him. [TR 123-126, 219] Shop steward Perry asked Respondent whether it had offered any vacant positions to Hancock and Sevigny

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<sup>15</sup> The Union calculated the classification seniority of the meter specialists as follows: Hancock – 3.9 years; Murphy – 3.0 years; and Sevigny – 2.9 years (including .6 years for ESA position). The Union reached its calculation by only counting the most recent continuous time spent in the meter specialist position. Krumm noted that Murphy left the meter specialist position for an extended period of time (from July 2, 2012 through July 15, 2013, to work as a supervisor) and, thus, lost his previous classification seniority. Pursuant to the Union’s analysis, Sevigny lost his meter specialist classification seniority when he was in the position of groundman for over a year. [TR 126-127, 166; R Ex 30]

prior to laying them off. Respondent replied that it posted vacant positions on the facility bulletin board. However, Perry noted that, after their lay-offs, Hancock and Sevigny did not have access to the facility or the posting for vacant positions. Respondent replied that it had not made direct offers of employment to the laid-off employees.<sup>16</sup> [TR 218]

On August 3, 2016, Brewington sent Respondent's step 3 grievance response about the lay-offs of Hancock and Sevigny to Krumm and Perry. Respondent denied the grievances and stated that Murphy was not retained based on classification seniority, but rather based on experience, skills, cooperativeness and reliability, pursuant to the CBA. The grievances are currently pending arbitration. [ALJD, p. 15, ln. 22-33; TR 127-128, 220, 303; GC Ex 38]

***R. Respondent and the Union held successor CBA negotiations***

On or about August 23, 2016, Respondent and the Union began negotiations for a successor CBA. Present for Respondent were Brewington and Vaughn. Present for the Union were International Union representative Ed Mobsby, Krumm and stewards Perry, Rhymes, Cunningham and Leavy. Respondent proposed to remove mechanics from the bargaining unit description. On December 13, 2016 (two days before the unfair labor practice hearing in the instant matter), Respondent finally agreed to include the mechanics in the bargaining unit. However, Respondent did not agree to fill the mechanic positions. Respondent and the Union apparently made progress during the negotiations, in part, due to the instant NLRB proceedings. [TR 131-135, 177, 222, 252]

In negotiations, Krumm pointed out that Respondent had been willing to find alternative work for Hancock, Murphy and Sevigny outside of the meter specialist positions as non-unit employees (ESAs) until the Union enforced the employees' rights through grievances and unfair

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<sup>16</sup> On July 18, 2016, the Union requested information from Respondent concerning all new employee hires since April 1, 2016. Respondent provided the Union with a list showing four new employees had been hired. The Union requested the information in order to show that there were vacant positions after Respondent decided, on June 27, 2016, to lay-off Hancock and Sevigny. Indeed, on July 5, 2015, Respondent hired Shirleen Campbell Riley to fill the position of system operator. [TR 216, 228; GC Ex 43] On June 13, 2016, Respondent hired Angelita Garcia as a call center representative. [TR 304]

labor practice charges and sought to keep them in the bargaining unit, at which time Respondent refused to accommodate those employees by finding available work for them, related to AMI metering system. [TR 136, 155]<sup>17</sup>

***S. Meter specialist work is now being performed, in part, by employees in other job classifications***

After Respondent laid off Hancock and Sevigny, other employees, including linemen, meter technicians and troublemen, have picked up the slack by performing more meter specialist duties. Office employees are now monitoring accounts remotely, instead of meter specialists disconnecting meters. However, if power is used while an account is closed, Respondent risks that it may have to absorb that loss of electricity from an unknown source. Prior to the lay-offs of Hancock and Sevigny, linemen helped meter specialists perform their duties on a very minimal basis during regular work hours, and only if assistance was required on something more than a single phase meter, such as a three-phase commercial building meter. Linemen are now performing regular meter specialist duties, such as reconnects and disconnects, more often than before. The regular automatic (AMI) meters have to be manually reconnected or disconnected, whereas remote disconnect meters can be turned on and off remotely from the office. Respondent's supervisor Navarro testified that approximately five percent of Respondent's meters are remote disconnect meters.<sup>18</sup> [TR 220-221, 241, 243, 254, 311, 389, 412, 435]

***T. Respondent re-hired Hancock in a lower-rated position***

In September 2016, Respondent re-hired Hancock as new probationary employee, in the non-unit position of system operator, on the night shift at the Moore Haven location, at the wage

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<sup>17</sup> Krumm's observation shows that Brewington's claim, in the penultimate paragraph of his July 11, 2016, letter to Krumm [GC Ex 34], that he has "a history of creating positions for people who, through the course of changes in business, find themselves without work or unable to perform under new requirements," does not hold true when employees and the Union assert their rights under the Act.

<sup>18</sup> Perry was a meter reader (specialist) for Respondent from January 2007 through about March 2008. Prior to Respondent installing AMI meters, meter specialists read meters remotely from a hand-held device called an Itron, while being in the general area of the meter. [TR 233-234, 308]

rate of \$16.00 per hour. Her supervisor is Paul McGehee. Her duties include dispatching technicians when there are power outages. [ALJD, p. 15, In. 35-37; TR 262, 268-269, 271]

***U. Respondent made multiple offers of re-employment to Sevigny, all in the same geographically distant and lower-rated positions***

After laying off Sevigny, Respondent offered him employment on three occasions, at Respondent's Moore Haven location, which is one and a half hours away from his home. Sevigny is a single parent with four children. He predictably declined Respondent's offers because of the long distance, the reduced wage rate for the job he was offered, and because of child care issues. [ALJD, p. 16, In. 1-4; TR 247-248, 418-419, 421]

***V. Since the layoffs of Hancock and Sevigny, Murphy and other employees have continued to perform Meter Specialist work, and Respondent has assigned additional duties to Murphy***

Pedro Navarro is the supervisor/manager of substations and metering overseeing six employees. In about July 2016, Navarro began overseeing meter specialist Donnie Murphy. Murphy currently performs meter disconnects (i.e. clean-ups), including calling customers who have not paid their bill on time, and also picks up payments at the Employer's drop boxes. [TR 429-432, 468, 493-494] As a meter specialist, Murphy is currently assigned from three to 25 disconnects to perform at a time. Each disconnect can take up to an hour of driving time to get to the customer's residence, in addition to the time it takes to perform the disconnects. Disconnects and reconnects take about 20 minutes to perform. Murphy also sometimes replaces an AMI meter that is not working properly.<sup>19</sup> [ALJD, p. 16, In. 6-8; TR 237, 436-438]

Brewington told the Union that Respondent's position is that it will not find work for meter specialists, by looking for additional tasks for them to perform, in order to avoid a lay-off. [GC Ex 38] However, Navarro stated that Respondent has found additional job tasks for Murphy to perform as a meter specialist, such as calling customers to determine whether they will pay their

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<sup>19</sup> Navarro stated that Murphy has only worked a half-hour of overtime during the six months that he has supervised him from July 2016 through December 15, 2016, the date he testified at the hearing. However, on October 6, 2016 alone, Murphy worked one and a half hours of overtime. [GC Ex 46]

electric bill and picking up customer payments at drop boxes, while noting that those tasks used to be performed by member services employees. [TR 446-447] A few years ago, meter readers (now called meter specialists) were on call to perform reconnects after 5:00 p.m. That function is now assigned to linemen. Respondent could, of course, return those duties to meter specialists. [TR 451] In this regard, on November 30, 2015, Brewington sent a letter to employees, stating that, while transitioning meter specialists to ESAs, Respondent expected to assign them to perform various additional duties, due to increased activity resulting from the AMI meter system. Brewington did not deny that Respondent could have assigned those additional tasks to the meter specialists. [TR 675-676; GC Ex 22] In addition, Respondent also assigns Murphy to perform meter technician duties (coded as 586.00), such as it did on October 3 and 4, 2016. Those duties involve cleaning and organizing the warehouse, as well as re-stacking meters. (Meter specialist duties are coded as 903.00.) [TR 455, 470; GC Ex 46]

Currently, about every three to four months, Navarro sends about 20 AMI meters for warranty repair. Navarro noted that, starting in 2015, Respondent had a lot of trouble with the AMI meters and sent about 140 meters at a time to get repaired under warranty. As a result, meter specialists were required to perform additional work. [TR 434, 451] Now, Respondent has assigned meter technicians (meter men) to meter specialist duties of manually reading AMI meters that do not give proper readings or are not working properly. [TR 491-492] Also, the use of AMI meters has not resulted in any decrease in the number of customers who need to be disconnected and reconnected for non-payment of their electric bills. [TR 445]

After Respondent installed AMI meters, meter specialists began performing more meter reconnect duties for customers. [TR 475] Also, after Respondent converted meter specialists to ESAs, Ellerbee asked supervisor Navarro to have the meter technicians assist meter specialists with residual meter reconnects and disconnects, while Hancock worked in the office as a call center representative after January 2016. [TR 472] Trouble men have assisted Murphy with his meter specialist duties, if they are in the area where such work arises. [TR 489]

Murphy recently submitted a request to Respondent for 1000 remote disconnect meters to install on Respondent's meter system, and currently has equipment for 395 remote disconnect meters in the shop ready to be installed for customers who historically do not pay their electric bills on time. [TR 488] Respondent intends to install the remote disconnect equipment in all of its AMI meters. [TR 504]

***W. Respondent issued discipline to Murphy on multiple occasions***

Murphy began working for Respondent on or about October 8, 2005. [TR 464] He has not been a Union member for at least the last five years. [TR 503] On October 1, 2008, Respondent issued Murphy a documented verbal warning for breaking the antenna, for the third time, of the handheld Itron device that meter specialists used to perform their duties to read meters. [TR 484; GC Ex 50] On May 12, 2012, Respondent issued Murphy a three-day paid suspension for his discourteous and disruptive behavior towards supervisor Ellerbee, after being passed over for a promotion to a meter technician (meterman) apprentice position. [TR 250, 482-483; GC Ex 49] On April 11, 2016, Respondent issued Murphy a written reprimand for backing into a pole on March 17, 2016, which was his fourth such incident since 2013. [ALJD, p. 31, ln. 7-8; TR 480; GC Ex 48]

**IV. ARGUMENT**

**A. The ALJ correctly held that Respondent violated Section 8(a)(1) and (5) of the Act by changing the scope of the bargaining unit, without the Union's consent (*Exceptions 1-5, 11 and 15*)**

The scope (composition) of a contractual bargaining unit is not a mandatory subject of bargaining (it is a permissive subject), and an employer may not modify it without the consent of the union or the approval of the Board. *Raymond F. Kravis Center for the Performing Arts*, 351 NLRB 143, 144 (2007), *enfd.* 550 F.3d 1183 (D.C. Cir. 2008); *Wackenhut Corp.*, 345 NLRB 850, 852 (2005); *Mt. Sinai Hospital*, 331 NLRB 895, 895 fn.2 (2000), *enfd.* 8 Fed. Appx. 111 (2<sup>nd</sup> Cir. 2001); *Hampton House*, 317 NLRB 1005 (1995).

Respondent contends that it created the ESA position and merely gave the meter specialists the opportunity to fill that new position. [R Br, p. 22] Similarly, Respondent argues that it created the TFs as supervisory positions and simply allowed the mechanics to fill those positions. [R Br, p. 32-33] Contrary to Respondent's contention, Respondent completely eliminated the mechanic and meter specialist classifications as of on November 30, 2015. The former mechanics and meter specialists continued to perform all of the bargaining unit work they had previously performed, but with new job titles, which Respondent declared to be non-unit positions. Respondent's reclassification of unit mechanics and meter specialists as non-unit TFs and ESAs was done without the Union's consent, and without seeking to modify the unit description through a Board representation proceeding, such as a unit clarification petition. Accordingly, as correctly concluded by the ALJ, Respondent's conduct violated Section 8(a)(1) and (5) of the Act.

Furthermore, Respondent failed to establish that TFs are supervisors within the meaning of Section 2(11) of the Act. The burden of proving supervisory status lies with the party asserting that such status exists. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711-712 (2001). Thus, lack of evidence is construed against the party asserting supervisory status. *Michigan Masonic Home*, 332 NLRB 1409 (2000). In addition, evidence of actual authority to discipline, as opposed to mere titular or theoretical power, is required to establish supervisory status. See *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006); *Queen Mary*, 317 NLRB 1303, 1309 (1995). An employer's directive or a job description setting forth supervisory authority also does not conclusively establish supervisory status. *Bakersfield Californian*, 316 NLRB 1211 (1995); *Connecticut Light & Power Co.*, 121 NLRB 768, 770 (1958). Thus, the question is whether the evidence demonstrates that the individual actually possesses any of the powers enumerated in Section 2(11). *Western Union Telegraph Company*, 242 NLRB 825, 826 (1979); *North Miami Convalescent Home*, 224 NLRB 1271 (1976).

Employees are statutory supervisors if, in the interest of the employer, they hold the authority to engage in any one of the 12 specific criteria listed, and their “exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment.” *Harborside Health Care, Inc.*, 330 NLRB 1334 (2000).

Respondent claims that TFs have the authority to issue discipline concerning the AVL or GPS system managed by Trimble. [R Br, p. 34-35] However, Respondent did not begin to install the Trimble system until about January 20, 2016, almost two months after reclassifying the mechanics as TFs. In addition, there is insufficient evidence to show that TFs or the operations foreman have authority to discipline employees or effectively recommend discipline. The conclusionary testimony of Respondent witness Gunn as to his authority to issue discipline, in the absence of detailed, specific evidence that he exercised independent judgment, is insufficient to establish supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). To confer supervisory status, it must be shown that the exercise of disciplinary authority leads to personnel actions without the independent investigation or review of other management personnel. *Franklin Home Health Agency*, 337 NLRB 826, 831 (2002). As the ALJ found, Gunn admitted that, as a TF, he must discuss matters with his superior, Morrissey, before issuing discipline and that they would discuss matters before Gunn takes any action. [ALJD, p. 8, fn. 13] There is also insufficient evidence to show that the TFs supervise vehicle operators simply because they spend some time reviewing Trimble data and may occasionally discuss safe vehicle operating procedures with employees who operate vehicles.

The evidence further shows that the TFs are not supervisors within the meaning of Section 2(11) of the Act because no employees report to them. In this regard, Respondent’s claim that all three TFs “supervise” the single fleet coordinator does not withstand scrutiny. Their “directions” to the fleet coordinator to order parts, schedule repairs and clean the office are routine in nature and do not require the TFs to use independent judgment, and do not constitute responsible direction. There is no evidence that TFs are responsible if the fleet coordinator fails

to comply with their “directives.” In addition, the fleet coordinator continues to report directly to power supply manager Morrissey, who also directly supervises the TFs. The job description for TF merely states that such person “works with” and “coordinates with” the fleet coordinator. It is obvious that Morrissey is the only true statutory supervisor of the fleet coordinator, and that Respondent does not have three additional “supervisors” for the lone fleet coordinator.

The TF job description further states that the TF “supervises and performs personally mechanic work” and a host of specified mechanical duties. The supervision of work does not make someone a Section 2(11) supervisor if he is performing the work to be supervised. The job description further states that the TFs direct shop personnel and equipment operators, but there are no “shop personnel” other than the three “TFs.” Moreover, the equipment operators (i.e. linemen) have other supervisors and are not truly supervised by the TFs, who merely deal with equipment operators by training them on the use of equipment and by repairing and maintaining the equipment they use.

The facts of this case are very similar to those in *Wackenhut Corporation*, 345 NLRB at 852-855, where the employer reclassified bargaining unit sergeants as lieutenants and asserted, without success, that they had become statutory supervisors. See also, *Mt. Sinai Hospital*, 331 NLRB 895, fn. 1 (2000). Here, as in *Wackenhut Corporation*, Respondent's efforts to transform employees into supervisors within the meaning of Section 2(11) of the Act by changing their job titles and adding a few words to their job descriptions in an effort to cloak them with supervisory authority fails.

Respondent argues that it eliminated the meter specialist position because technological changes (i.e., AMI meters) rendered the functions of that position obsolete. However, when it made them ESAs, Respondent suggested additional duties it intended to assign to them, as described in Brewington's paycheck letter of November 30, 2015 to employees. [GC Ex 22] These duties were reasonably closely related to the traditional meter specialist work and did not justify removing the meter specialists from the unit. The evidence shows that, until Hancock and

Sevigny were placed on administrative leave in late June 2016, six months after the ESA job title was conferred on them, Sevigny and Murphy continued to perform many of the same duties of the meter specialists, such as performing meter disconnects and reconnects. Murphy continued to perform those functions as a substantial part of his work, even after July 11, 2016, when Hancock and Sevigny were laid off and he was reclassified back to the meter specialist title. Thus, the ESAs were largely performing bargaining unit work, and the related work was sufficiently closely related to the traditional meter specialist work to keep them in the bargaining unit. In this regard, Respondent did not file a unit clarification petition.

Respondent claims that, prior to November 30, 2015, it informed employees and Union stewards that, with the conversion of the AMI meters, the meter specialist position would become obsolete. [R Br, p. 8] However, the ALJ found that, although “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,” Respondent provided no specifics about what changes would occur. [ALJD, p. 4, In. 31-34; TR 189-190, 283-284] Thus, Respondent did not notify the Union that the meter specialist position would be eliminated or what, if any, changes would be made to the job.

Respondent argues that it did not need to negotiate the lay-offs of meter specialists with the Union because the CBA contained a provision for lay-offs. [R Br, p. 14, fn. 5] However, Respondent clearly had an obligation to obtain the Union’s consent and/or bargain with the Union before changing the scope of the bargaining unit (i.e., eliminating the meter specialist position and reassigning the work to the non-unit ESA position) or transferring bargaining unit work out of the unit. In this regard, the ALJ properly found that Respondent changed the scope of the bargaining unit. [ALJD, p. 21, In. 1-5]

The ALJ correctly decided that, on November 30, 2015, by reclassifying the mechanics and meter specialists as non-unit TFs and ESAs, respectively, Respondent changed the scope of the unit without the Union’s consent and violated Section 8(a)(1) and (5) of the Act.

**B. The ALJ properly concluded that, in the alternative, Respondent violated Section 8(a)(1) and (5) of the Act by transferring bargaining unit work out of the unit, without giving the Union notice and an opportunity to bargain (Exceptions 1-5, 12 and 15)**

An employer violates Section 8(a)(1) and (5) of the Act by unilaterally implementing, without notice to the union and affording the union an opportunity to bargain, changes in the terms and conditions of employment of its employees represented by the union. *NLRB v. Katz*, 369 U.S. 736 (1962). As Union President Krumm undisputedly testified, Respondent did not provide the Union with prior notice of the creation of the TF or ESA positions before announcing and filling those positions on November 30, 2015.

Even assuming for the sake of argument that Respondent added supervisory authority to the mechanics' duties performed by TFs, Respondent violated Section 8(a)(1) and (5) of the Act by converting its mechanics to TFs without giving the Union notice or an opportunity to bargain. Thus, in *Kendall College*, 228 NLRB 1083 (1977), the Board agreed with the ALJ that an employer may have an obligation to bargain with a union if it reduces bargaining unit work. For instance, if an individual promoted to a supervisory position continues to perform bargaining unit work, that loss of work to the bargaining unit is a change in the terms and conditions of employment that gives rise to a bargaining obligation. Cf. *St. Louis Telephone Employees Credit Union*, 273 NLRB 625, 627-628 (1984) (employer promoted individuals and immediately began hiring replacements to fill the bargaining unit vacancies and no unit jobs were lost).

Respondent contends that, since at least 2014, the Union and employees were aware of the obsolescence of the meter specialists since it was implementing the new AMI system. Although the record evidence shows that there were some informal talks of a new system, Respondent did not notify the Union when the changes would occur or that it was contemplating converting meter specialists to ESAs on November 30, 2015, or that the changes would cause layoffs, and there is no evidence that Respondent even hinted to the Union that it intended to

create TF positions or convert mechanics to those positions at any time before it acted on November 30, 2015.

As previously noted, the record also shows that the meter specialists continued to perform a substantial portion of the same duties when Respondent changed their title to ESAs; and that the TFs and operations foreman are continuing to perform the mechanical work that they previously performed as bargaining unit mechanics; and the record fails to establish that TFs are statutory supervisors.

Respondent's argument that it had no duty to bargain with the Union because the management rights clause authorizes it to eliminate positions is without merit. Although that clause privileges Respondent to "... reduce, alter, combine, transfer, assign, or cease any job, department, operation, or service..." a particular "job" is not the same as a job classification, and Respondent has not eliminated any particular jobs, departments, operations or services. Respondent failed to bargain as requested by the Union and as required by law. Moreover, a mere catchall phrase in a management-rights clause to the effect that the "Company retains the responsibility and authority of managing the Company's business,"<sup>20</sup> or that "all management rights not given up in the contract are expressly reserved to it,"<sup>21</sup> or reciting that the exclusive functions and rights of management include the right to establish, continue, or modify policies, practices, or procedures will fall short of being a "clear and unmistakable" waiver or relinquishment.<sup>22</sup>

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<sup>20</sup> *Leeds & Northrup Co. v. NLRB*, 391 F.2d 874, 877, 67 LRRM 2793, 2795 (3<sup>rd</sup> Cir. 1968), enforcing 162 NLRB 987, 64LRRM 1110 (1967). See also *Tenneco Chems.*, 249 NLRB 1176, 104 LRRM 1347 (1980).

<sup>21</sup> *Proctor Mfg. Corp.*, 131 NLRB 1166, 1169, 48 LRRM 1222, 1223 (1961).

<sup>22</sup> *Regal Cinemas Inc.*, 334 NLRB 304, 167 LRRM 1347 (2001) (employer's contractual right to implement technological developments did not imply waiver of union's right to bargain over allocation of work among different classifications of employees); *Mt. Sinai Hosp.*, 331 NLRB 895 (2000) (management-rights clause, which permitted employer to "discontinue, reorganize, or combine any operation even if the effect is a reduction in the unit work or in the number of unit employees," did not privilege the employer's reclassification of sous chefs out of the unit.

The evidence shows that the Union did not waive its right to bargain over the elimination of bargaining unit job classifications. The management rights and lay-off provisions of the parties' CBA do not constitute a clear and unmistakable waiver of the Union's right to bargain over a decision to convert meter specialists to ESAs or mechanics to TFs. Nor is there any other evidence to suggest that during bargaining or at any other time, by any other statements or actions of the Union, did it manifest an intention to waive its right to bargain over those decisions. To the contrary, the facts show that, on multiple occasions, after Respondent had acted unilaterally on November 30, 2015, the Union sought to negotiate with Respondent concerning its decision to convert meter specialists to ESAs and mechanics to TFs.

Accordingly, even if Respondent's changes implemented on November 30, 2015, are found to concern a mandatory subject of bargaining (General Counsel submits that the changes Respondent made concern a permissive subject of bargaining, as argued supra), Respondent violated Section 8(a)(1) and (5) of the Act by its failure and refusal to give the Union notice or an opportunity to bargain before it implemented those changes.

***C. The ALJ justifiably decided that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to accept and process a grievance filed by the Union on behalf of Emily Hancock concerning discipline issued to her (Exception 12)***

It is well settled that an employer's refusal to process a grievance violates Section 8(a)(5) of the Act. *Public Service Company of New Mexico*, 360 NLRB 573 (2014); *Majestic Towers, Inc.*, 353 NLRB 304 (2008). On January 7, 2016, Respondent issued a verbal warning to employee Emily Hancock regarding a complaint from a fellow employee. On January 18, 2016, the Union filed a grievance on Hancock's behalf concerning the verbal warning. On January 20, 2016, Respondent refused to process the grievance, claiming that the Union did not have standing to file it because Hancock, as an ESA, was not in the bargaining unit.

As an ESA, Hancock continued performing the duties of a bargaining unit meter specialist, including reading defective AMI meters, and performing reconnects and disconnects. Moreover, as demonstrated above, on November 30, 2015, Respondent removed meter

specialists, including Hancock, from the unit without the Union's consent, in violation of Section 8(a)(1) and (5) of the Act. Thus, it follows that Hancock, whether titled a meter specialist or an ESA, was a bargaining unit employee as of January 7, 2016, when the Union sought to file the grievance on her behalf. Accordingly, the ALJ properly concluded that Respondent's refusal to accept and process the Union's grievance violated Section 8(a)(1) and (5) of the Act.

***D. The ALJ rightly found that Respondent violated Section 8(a)(1) of the Act by interrogating and threatening to lay off employees because of their union sympathies and activities, and because the Union filed and pursued the unfair labor practice charges in these cases on behalf of employees (Exceptions 6, 7 and 14)***

An employer violates Section 8(a)(1) by making statements that are coercive and which have a reasonable tendency to interfere with employees' rights under the Act. *Scripps Memorial Hospital Encinatas*, 347 NLRB 52 (2006); *Exterior Systems, Inc.*, 338 NLRB 677, 679 (2002); *Lin Rogers Electrical Contractors*, 328 NLRB 1165, 1167 (1999).

With respect to alleged unlawful interrogation, the Board determines "whether under all the circumstances the interrogation [of an employee] reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Scheid Electric*, 355 NLRB 160 (2010); *Bloomfield Health Care Center*, 352 NLRB 252 (2008), quoting *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), affd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9<sup>th</sup> Cir. 1985). Among the factors the Board considers in such an analysis are the identity of the questioner, the place and method of the interrogation, the background of the questioning, the nature of the information sought, and whether the employee is an open union supporter. *Scheid Electric*, supra; *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB 1294, 1295 (2009).

The evidence, based on Sevigny's credited testimony by the ALJ shows that, in May 2016, Respondent's highest management official, CEO Brewington, interrogated Sevigny in Brewington's office at a "coffee meeting" with no one else present. Brewington specifically asked Sevigny how he felt about the Union, and Sevigny replied that he did not know much about unions in Florida, which is a "right to work" state. During the meeting, Brewington told

Sevigny that he was not going to let the Union run the company, but instead was going to run the company himself, thereby expressing his disapproval of the Union. There is no evidence that Respondent gave Sevigny any assurances that it would not retaliate against him based on his response to Brewington's question about his union sympathies. In addition, the interrogation occurred following Respondent's unlawful removal of Sevigny from the bargaining unit represented by the Union and placement in the non-union ESA position.

A violation of Section 8(a)(1) of the Act is not contingent upon an employee's subjective reaction to what was said. *Sunnyside Home Care Project*, 308 NLRB 346, fn. 1 (1992). Also, the intent or motive of the employer in making allegedly unlawful statements to an employee is not relevant with regard to 8(a)(1) violations of the Act. The statements are unlawful if they reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. The Board does not consider whether the statements succeed in discouraging union or protected activity under the Act. *Exterior Systems*, 338 NLRB at 679; *Scripps Memorial Hospital Encinitas*, 347 NLRB 52; *GM Electrics*, 323 NLRB 125, 127 (1997); see also *Williams Motor Transfer*, 284 NLRB 1496, 1499 (1987).

Thus, Brewington's motivation for questioning Sevigny is not relevant to the determination as to whether he interfered with Sevigny's Section 7 rights. Here, an objective employee would logically view Brewington's question as coercive. The message, in the context of Respondent's recent unlawful conduct affecting Sevigny and his co-workers, and in view of Brewington's subsequent comment at the May meeting, was that Brewington sought to elicit a response indicating that Sevigny did not like the Union, in violation of Section 8(a)(1) of the Act.

In addition, on June 27, 2016, after CEO Brewington sent an email to Sevigny notifying him of his placement on administrative leave and impending lay-off, Sevigny spoke to Brewington by telephone, and Brewington told Sevigny that it was the Union's fault that he got

laid off.<sup>23</sup> As the ALJ noted, Brewington did not dispute Sevigny's testimony. As CEO of Respondent, Brewington is its highest ranking official, and his statement to Sevigny had the tendency to coerce and restrain the employees in the exercise of their rights to support and assist the Union and engage in protected activities. By telling Sevigny that it was the Union's fault that he got laid off, Brewington sent a message that Respondent laid off Sevigny because the Union had filed grievances and unfair labor practice charges against Respondent on behalf of Sevigny and the other former meter specialists and mechanics. This constituted a threat to lay off employees because of their union activities and because the Union, on their behalf, filed unfair labor practice charges with the Board, in violation of Section 8(a)(1) of the Act. See *Mastercraft Casket, Co.*, 289 NLRB 1414 (1988) (the Board held that an employer's statements blaming a layoff on the union's knowledge of the employer's favoritism toward his family is inherently threatening). See also *Aero Metal Forms*, 310 NLRB 397, 400 (1993). Thus, the ALJ's decision that Respondent interrogated and threatened employees, in violation of Section 8(a)(1) of the Act should be upheld.

***E. The ALJ properly held that Respondent violated Section 8(a)(1), (3) and (4) of the Act by laying off Hancock and Sevigny because they and the Union, on their behalf, engaged in grievance-filing activities, and because the Union filed unfair labor practice charges against Respondent (Exceptions 6, 9, 10, 13, 16 and 17)***

The General Counsel has the burden of proving that Respondent was motivated to layoff alleged discriminatees because of union animus. If the General Counsel meets that burden, Respondent may defend by showing it would have laid off the alleged discriminatees in the absence of union activity. See *Manno Electric*, 321 NLRB 1 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 103 S Ct 2469 (1983).

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<sup>23</sup> Later that same day, Brewington sent a letter to employees stating that, effective July 11, 2016, Respondent would lay off Hancock and Sevigny, had placed them on administrative leave until their lay-offs and offered them a severance package. Brewington told employees that Respondent transferred Hancock and Sevigny from the meter specialist into the ESA position, but that the creation of that position was "battled since day one" (by the Union). This letter also arguably, albeit more subtly, placed the blame for the layoffs on the Union.

It is a violation of Section 8(a)(3) of the Act to cause layoffs in retaliation for the filing of a grievance under a collective-bargaining agreement. *Royal Development Co.*, 257 NLRB 1168, enf. in pertinent part 703 F.2d 363 (9<sup>th</sup> Cir. 1983). Thus, in *Boston Mutual Life Insurance Co.*, 259 NLRB 1270, 1279 (1982), the Board stated that it is well established that grievance filing is within the umbrella of the Act's protection. The underlying rationale of this principle is designed to promote the viability of collective bargaining. It assures employees the maximum benefits of their collective bargaining agreement. *Crown Wrecking Co., Inc.*, 222 NLRB 958, 962-963 (1976). Indeed, the right to file grievances, and have them adjusted, is explicitly granted in Section 9(a) of the Act. See *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), reaffirming that such activity is concerted activity under Section 8(a)(1) of the Act, in addition to, here, being union activity under Section 8(a)(3).

An employer engages in unlawful activity in violation of Section 8(a)(4) when it threatens employees that layoffs may occur because of the filing of unfair labor practice charges. See *National Association of Government Employees (International Brotherhood of Police Officers)*, 327 NLRB 676 (1999); *Larry Blake's Restaurant*, 230 NLRB 27 (1977); *S.E. Nichols Marcy Corp.*, 229 NLRB 75 (1977); *Portsmouth Ambulance Service*, 323 NLRB 311 (1977).

It is clear that employee Emily Hancock engaged in grievance-filing activities, and that the Union filed grievances and/or unfair labor practice charges on behalf of both Hancock and Chad Sevigny. In this regard, on November 17, 2015, Hancock filed a grievance against Respondent regarding the two-day suspension that it issued to her. Also, on December 15, 2015, the Union filed a grievance against Respondent concerning its decision to remove the meter specialists and mechanics from the bargaining unit when it created the ESA and transportation foreman positions. In addition, on January 18, 2016, the Union filed a grievance against Respondent for Hancock concerning a verbal warning it issued to her. In addition, Hancock and Sevigny have been Union members throughout their employment with

Respondent and Respondent had knowledge of their Union membership, inasmuch as it remitted their dues to the Union through payroll check-off deductions.

The unfair labor practice charges filed by the Union on behalf of Hancock and Sevigny included the original charge in Case 12-CA-168580, filed on January 27, 2016, and the amended charge in Case 12-CA-168580, filed on April 28, 2016, involving the change in the scope of the unit and reclassification of the meter specialists and mechanics; and the charge in Case 12-CA-175795, filed on May 9, 2016, and amended charge in Case 12-CA-175795 filed on May 24, 2016, concerning the refusal to permit Hancock to grieve her transfer from ESA to customer service (call center) representative and refusal to accept her grievance concerning her January 2016 verbal warning. [GC Ex 1(a), 1(d), 1(g), 1(j)]

Moreover, Respondent exhibited ample evidence of animus against the Union and employee supporters of the Union, including Hancock and Sevigny. In this regard, as Emily Hancock credibly testified, on November 2, 2015, she overheard supervisor Chelsea Lowder tell employees Murphy and Sevigny, in her office, in a non-joking manner, “you all can take your union handbooks and shove it up your asses.”<sup>24</sup> Respondent failed to call Lowder as a witness and Hancock’s testimony regarding her statement is undisputed. Respondent exhibited additional animus against the Union in about late January 2016, during a step 3 grievance meeting concerning its decision to convert meter specialists to ESAs and mechanics to TFs. After the Union asserted that there was nothing stronger and more binding than a Union contract, Brewington replied that because Florida is a right to work state, he could fire employees merely because he did not like their shirt, demonstrating his misunderstanding of the law and his disregard for the Union’s role as the representative of the unit employees. In about May 2016, Brewington told Sevigny, in a one-on-one meeting, that he was not going to let the

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<sup>24</sup> There is also hearsay evidence that, on November 3, 2015, Murphy told Hancock that she needed to keep his “fucking name” out of her mouth because he was told [by Respondent] that if he gets brought up on anything related to the Union, Respondent was going to fire him. Murphy did not deny the statement that Hancock attributed to him.

Union run the company, but instead was going to run the company himself, again expressing hostility towards the Union.

Respondent expressed further animus towards the Union in Brewington's June 27, 2016 letter to employees, regarding the layoffs of Hancock and Sevigny, in which he clearly implied that the Union was to blame for the layoffs because it had battled Respondent since day one. Respondent revealed additional evidence of animus by its decision not to lay off the only non-Union member, Donnie Murphy, as a meter specialist, despite Murphy having less continuous job classification seniority than Hancock and a checkered disciplinary history. CEO Brewington's aforementioned interrogations and threat of layoff directed to Sevigny, in violation of Section 8(a)(1) of the Act, also reveal its animus against the Union. Thus, there is ample evidence of Respondent's anti-Union animus.

In addition, Brewington's June 27, 2016, implied threat to lay off employees because the Union, on their behalf, filed unfair labor practice charges with the Board, establishes animus against Hancock and Sevigny based on the fact that the Union had filed unfair labor practice charges on their behalf.

Under these circumstances, the General Counsel has met its initial burden by presenting a prima facie showing, sufficient to support an inference that union activities and participation in the Union's charges, filed on their behalf with the Board, were motivating factors in Respondent's decision to lay-off Hancock and Sevigny, in violation of Section 8(a)(3) and (4) of the Act. Accordingly, the testimony will be discussed and the record evaluated in keeping with the criteria set forth in *Wright Line*, to consider Respondent's defense and, in the light thereof, whether the General Counsel has carried its overall burden.

By the time it laid off employees Hancock and Sevigny, Respondent had engaged in a series of unlawful acts in derogation of its duty to bargain in good faith with the Union and in derogation of its employees' exercise of their rights to engage in union and charge filing activities. The central piece of this unlawful conduct was Respondent's removal of a total of six

mechanics and meter specialists from the unit of about 28 employees represented by the Union and the reclassification of the same employees doing the same work in non-unit positions, thereby changing the scope of the bargaining unit without the Union's consent.

Moreover, there was no evidence that supported Respondent's basis for the layoffs, inasmuch as there was sufficient work available at that time for Sevigny, in the job classification of ESA, and for Hancock, in the job title of call center representative. It appears that Respondent would have continued to be willing to find work to fully employ them if the Union had not challenged their removal from the unit.

In summary, the evidence shows that Respondent's claim that it laid off Hancock and Sevigny because of a lack of work is pretextual. Moreover, the facts show that Respondent's selection of employees for lay-off was based on the employees' union and charge filing activities. Without any real explanation to the Union, Hancock, Sevigny, or any other employees, Respondent abruptly stopped the training program, wherein the ESAs would learn how to perform energy audits in the homes of customers (members), and reversed course on its stated intent of assigning other miscellaneous tasks to them, as described in Brewington's paycheck letter to employees of November 30, 2015, which he sent before he knew that they or the Union would dispute their removal from the unit by Respondent. [GC Ex 22]

Respondent claims that it stopped the ESA training because Hancock, Sevigny and Murphy did not have the professional attributes that Respondent was seeking in that position. However, such explanation is a pretext for Respondent's true motivation of retaliating against the Union, Hancock and Sevigny for engaging in grievance and unfair labor practice charge filing activities. In this regard, Sevigny was especially qualified for the duties of an ESA, inasmuch as he was already certified as an air conditioning technician who could perform high energy usage training services to educate customers on how to lower their electric bill. Moreover, Respondent did not even give Hancock an opportunity to prove that she was qualified to perform the tasks to be assigned under the classification of ESA, because, on

January 18, 2016, Respondent transferred Hancock to be a call center representative and did not even begin providing her with the ESA training that it provided to Murphy and Sevigny.

Respondent's stance on full employment for Hancock and Sevigny hardened after the Union, on or about December 8, 2015, on January 5, 2016, and in late January 2016, contested Respondent's decision to remove mechanics and meter specialists from the bargaining unit without the Union's consent, and without giving the Union notice and an opportunity to bargain about the issue.

In May 2016, CEO Brewington told Union president Krumm that, if the Union allowed Respondent to exclude the TFs from the bargaining unit, Respondent would put the ESAs back in the unit as meter specialists. During that meeting, Brewington threatened to make all lead linemen supervisors and then remove them from the bargaining unit as well. Thus, Respondent continued its pattern of seeking to erode the bargaining unit by classifying bargaining unit employees as "supervisors," as it did when reclassifying mechanics as TFs. On June 8, 2016, Krumm informed Brewington that the Union rejected Respondent's offer and requested that Respondent return Hancock to her original position. The Union's response set in motion Respondent's decision to retaliate, by laying off Hancock and Sevigny because of their union activities and involvement in the unfair labor practice cases, and because the Union had filed grievances and charges on their behalf. Thus, on June 27, 2016, Brewington informed Krumm that, effective July 11, 2016, Respondent was returning Murphy, Sevigny and Hancock to their former position of meter specialist, and that, effective on July 11, 2016, Respondent decided to lay off Sevigny and Hancock. Brewington revealed Respondent's unlawful motivation that day by telling Hancock and Murphy that he was tired of fighting the Union for the positions of ESA and meter specialist and was only going to keep Murphy. Likewise, that same day Brewington sent the letter to all employees stating that he had been "battled since day one" - obviously referring to the Union, regarding Respondent's decision to convert meter specialists to ESAs.

Moreover, that same day, Brewington told Sevigny that it was the Union's fault that he got laid off, thereby placing full blame on the Union for Respondent's unlawful actions.

Hence, Brewington decided to accelerate his earlier threat, made in late December 2015 or early January 2016, when he told Murphy, Hancock and Sevigny that the Union had filed a grievance concerning Respondent's decision to convert meter specialists to ESAs and that, if the Union won the grievance, he would lay them off.

Thus, on June 27, 2016, Respondent "returned" Hancock and Sevigny to the meter specialist positions, but refused to permit them to return to work. Rather, Respondent vindictively placed them on administratively leave immediately, with notice that they would be laid off in two weeks, in order to retaliate against them for their Union activities and participation in the unfair labor practice cases.

In light of Respondent's position that there was no work available for meter specialists, the Union's offer to bargain about this issue in upcoming contract negotiations would have reasonably included the discussion of additional duties for the meter specialists to perform, such as some of those which Respondent intended to assign to ESAs as described in Brewington's paycheck letter of November 30, 2015 to employees. [GC Ex 22] As noted above, the evidence reveals that ESAs did not stop doing the meter specialist duties. Moreover, there are now employees in a number of other job classifications, both in and out of the unit, including office personnel, linemen and meter technicians, who are performing meter specialist duties, such as meter installations, replacements, reconnects, disconnects and similar tasks.

Respondent contends that it laid off Hancock and Sevigny because the Union demanded that Respondent put the ESAs back in the bargaining unit and negotiate with the Union about their employment status and duties as meter specialists. [R Br, p. 25-27] However, Respondent failed and refused to negotiate with the Union, despite its obligation and the Union's repeated requests to do so.

Respondent argued that it currently does not have sufficient work available for more than one meter specialist, Murphy. However, the proper analysis is not how much work the meter specialists currently perform, but rather the amount of work that was available for them to perform at the time that Respondent laid them off on June 27, 2016. In this regard, the record shows that there was sufficient available work for meter specialists to perform, while other job classifications also performed some of their work. It is noteworthy that Respondent did not introduce into evidence any business records (i.e., work orders) to show who performed the meter specialist duties around that time period, which would be probative of its economic defense.

Respondent's unexplained failure to substantiate its purported economic justification for the layoffs by the production of documentary evidence undermines its defense and warrants an inference that if such records had been produced, they would not have been favorable to Respondent's position. Respondent's failure to produce such evidence "not only strengthens the probative force" of its absence "but of itself is clothed with a certain probative force." *Paudler v. Paudler*, 185 F.2d 901, 903 (5<sup>th</sup> Cir. 1950), cert. denied 341 U.S. 920 (1951).

Furthermore, Respondent's decision to lay-off Hancock and Sevigny, rather than Murphy, was discriminatorily based on Union membership and sympathies. Respondent stated that it selected Hancock and Sevigny for lay-off using Article 10.3 of the parties' CBA providing that "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." However, the record shows that Murphy, Hancock and Sevigny have relatively equal experience and skills, and even though cooperativeness and reliability are very subjective and easily susceptible to manipulation, Hancock and Sevigny possess those traits as revealed by their employment tenure. Thus, Respondent should have relied on the classification seniority of the meter specialists to determine which, if any, to select for lay-off. In this regard, Section III of Respondent's seniority

and lay-off policy provides that “job classification seniority shall be the time of **continuous** service... in a particular job classification.” Thus, a break in service in a particular job classification causes a loss of that specific classification seniority. [GC Ex 16] Hancock maintained continuous meter specialist classification since August 2012, while Murphy resumed his meter specialist classification on July 15, 2013 (after a break in service as a supervisor) and Sevigny resumed his meter specialist classification on August 12, 2013 (after a break in service as a groundman). [R Ex 30] Thus, under Respondent’s argument, it should have selected Murphy, and not Hancock, for lay-off.

Respondent showed favoritism towards Murphy because of his opposition to the Union, as revealed by his lack of Union membership and the confrontation with Hancock, on November 3, 2015, concerning Respondent’s display of anti-union animus by supervisor Lowder to Murphy and Sevigny. Indeed, in making its layoff selection, Respondent ignored Murphy’s disciplinary record, including a three-day suspension on May 7, 2012, because of his “reaction and subsequent actions [that] caused widespread disruption throughout [Respondent].” [GC Ex 48-50] There is no evidence that Sevigny has any discipline in his file, and Hancock only had two verbal warnings, one of which involves the grievance that the Union filed against Respondent on January 18, 2016, but which Respondent refused to accept and process based on its claim that she was not in the bargaining unit. It is also noteworthy that Murphy has not been a Union member since at least 2012.<sup>25</sup> This evidence shows that Respondent engaged in disparate treatment of Hancock and Sevigny because of their union membership, sympathies and activities, and because the Union filed grievances and charges on their behalf.

As described above, the reasons proffered by Respondent for its discriminatory action are pretextual and, therefore, indicative of illegal motivation. *Active Transportation*, 296 NLRB

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<sup>25</sup> Murphy’s anti-union stance may also be gleaned from the fact that Respondent called him as its witness in the instant matter and also paid him on May 6, 2016, for time he waited to testify on behalf of Respondent at the grievance hearing concerning the two-day suspension received by Hancock (which the arbitrator reduced to a verbal warning). [GC Ex 47]

431 (1989). Furthermore, it is well-settled under Board case law, that when a false reason is advanced “one may infer that there is another reason (an unlawful reason)” for the employer’s action. *Associated Services for the Blind*, 299 NLRB 1150, 1152 (1990); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 62 LRRM 2401 (9<sup>th</sup> Cir. 1966).

In summary, the General Counsel established a strong prima facie case, and Respondent failed to meet the burden of establishing that it would have laid off Hancock and Sevigny even if they had not engaged in union activities, and the Union had not filed grievances and charges on their behalf. Thus, the ALJ correctly held that Respondent’s actions of placing them on administrative leave and laying them off violated Section 8(a)(1), (3) and (4) of the Act.

**F. The ALJ appropriately decided that Respondent violated Section 8(a)(1) and (5) of the Act by dealing directly with employees and bypassing the Union (Exceptions 8 and 12)**

In *NLRB v. Roll & Hold Warehouse & Distribution Corp.*, 162 F.3d 513 (7<sup>th</sup> Cir. 1998), a case involving an employer’s unilateral implementation of an attendance policy, the court held that no opportunity for meaningful negotiation existed because, by presenting the plan directly to employees before notifying the Union, the Union’s negotiating role was significantly undermined. *Detroit Edison Co.*, 310 NLRB 564, 565-566 (1993). One of the purposes of early notification is to allow a union the opportunity to discuss a new policy with unit employees so it can determine whether to support, oppose or modify the proposed change. When an employer first presents a policy to its employees without going through the Union, the Union’s role as the exclusive bargaining agent of the employees is undermined. See *Inland Tugs v. NLRB*, 918 F.2d 1299, 1311 (7<sup>th</sup> Cir. 1990). Under these circumstances it is more difficult for the Union to present a unified front during negotiations. See *Friederich Truck Service*, 259 NLRB 1294, 1299 (1982). Also, if the change proves popular among employees, direct dealing may convince them that union representation is unnecessary. See *Detroit Edison Co.*, supra at 565-566.

Severance pay as a form of wages constitutes a mandatory subject of bargaining. See *Your Host, Inc.*, 315 NLRB 295 (1994); *Waddell Engineering Co.*, 305 NLRB 279 (1991); and

*Continental Insurance Co. v. NLRB*, 495 F.2d 44, 49 (2<sup>nd</sup> Cir. 1974). Implicit in a union's right to engage in effects bargaining is its right to bargain over severance pay. See *Los Angeles Soap Co.*, 300 NLRB 289, 295 (1990). Therefore, an employer violates Section 8(a)(5) of the Act when it engages in direct dealing with employees concerning severance pay. Respondent here conditioned its employees' eligibility for severance pay on agreeing not to contest their lay-offs.

Respondent engaged in unlawful direct dealing with unit employees Hancock and Sevigny by tendering to them a letter, on June 27, 2016, conditioning severance pay on not contesting their lay-offs, without having first tendered this letter to the Union. See *Detroit Edison Co.*, supra, where the Board found the employer engaged in direct dealing by tendering a memo containing a sweetened proposal for phasing out a job classification directly to employees, since the employer had failed to first adequately present the proposal to their collective-bargaining representative. Respondent instituted a process requiring employees to take affirmative actions in order to qualify for a benefit that was a mandatory subject of bargaining. Thus, although Respondent simultaneously sent the letter to the Union, it improperly interjected itself between the employees and their collective-bargaining representative, thereby undermining the effects bargaining process with the Union. See *Bridgestone/Firestone, Inc.*, 332 NLRB 575 (2000), where an employer was found to have engaged in unlawful direct dealing by requiring employees to sign forms as a condition for the employer releasing the employees' home addresses to a union.

Respondent's undermining of the Union is made further evident by the fact that, on or about July 11, 2016, Brewington responded to Sevigny's request for severance pay by stating that the Union had not yet approved it. On July 15, 2016, the Union replied to Respondent that it had not received any inquiries from employees about severance pay. Thus, Respondent implied to Sevigny that the Union was to blame for the fact that he had not received severance pay, thereby exacerbating its unlawful action. The ALJ properly held that, by engaging in this direct dealing and bypassing the Union, Respondent violated Section 8(a)(1) and (5) of the Act.

## **V. CONCLUSION (Exception 18)**

Based on the facts described above and established Board precedent, the evidence fully supports the ALJ's factual findings and conclusions that Respondent violated Section 8(a)(1), (3), (4) and (5) of the Act by: 1) eliminating the unit positions of mechanics and meter specialists, and reassigning all their work to the new non-unit positions of transportation foremen (TFs) and energy services agents (ESAs), respectively, without bargaining with the Union; 2) refusing to accept and process a grievance filed by the Union on behalf of employee Emily Hancock concerning discipline issued to her; 3) interrogating and threatening to lay off employees because of their Union sympathies and activities, and because the Union filed and pursued the unfair labor practice charges in these cases on behalf of employees; 4) laying off employees Emily Hancock and Chad Sevigny because they and the Union, on their behalf, engaged in grievance-filing activities, and because the Union filed unfair labor practice charges against Respondent; and 5) directly dealing with employees and bypassing the Union, while offering the laid-off employees severance benefits in exchange for their agreement not to contest their layoffs. Counsel for the General Counsel respectfully submits that the ALJ's conclusions that Respondent violated Section 8(a)(1), (3), (4) and (5) of the Act should be affirmed, and that Respondent's exceptions should be denied in their entirety.

Contrary to Respondent's Exception 18, Counsel for the General Counsel respectfully submits that the ALJ's recommended remedy is proper and necessary to effectuate the purposes of the Act. In this regard, the ALJ appropriately recommended that Respondent: restore the work of employees in the job titles of ESAs, TFs and operations foreman to the bargaining unit; upon request by the Union, restore the wages, hours or work and other terms and conditions of employment of those employees to the terms that preceded Respondent's reclassification of them on or about November 30, 2015; offer reinstatement to Emily Hancock and Chad Sevigny to their former jobs or to substantially equivalent positions to the positions they held at the time they were laid off on or about July 11, 2016, without any loss of seniority or

other rights and privileges they previously enjoyed; expunge any references to the layoffs of Hancock and Sevigny from Respondent's records and notify those employees in writing that this has been done and that the layoffs will not be used against them in any way; make whole Hancock and Sevigny for all losses they incurred as a result of their layoffs, including, but not limited to, payment for consequential economic harm they incurred as a result of Respondent's unlawful conduct, plus payment of interest compounded daily and compensation for any excess tax liability; file a report with the Regional Director for Region 12 allocating backpay to the appropriate calendar years; accept and process the grievance the Union filed on behalf of Emily Hancock regarding the verbal discipline she received; and post an appropriate Notice to Employees.

**DATED** at Tampa, Florida, this 8<sup>th</sup> day of September, 2017.

Respectfully submitted,

*Rafael Aybar*

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## Certificate of Service

I hereby certify that copies of the **GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** in Cases 12-CA-168580 et. al. was served on the 8<sup>th</sup> day of September 2017 on the following persons and by the following means:

By electronic filing at [www.nlr.gov](http://www.nlr.gov) to:

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