

**BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25**

INDIANA BELL TELEPHONE
COMPANY, INC

Respondent

and

COMMUNICATIONS WORKERS OF
AMERICA LOCAL 4900, A/W
COMMUNICATION WORKERS
OF AMERICA, AFL-CIO

Charging Party

CASE NO. 25-CA-218405

**POST-HEARING BRIEF OF RESPONDENT
INDIANA BELL TELEPHONE COMPANY**

Stephen J. Sferra
Jeffrey A. Seidle
LITTLER MENDELSON, P.C.
1100 Superior Avenue, 20th Floor
Cleveland, Ohio 44114
Telephone: 216.696.7600
Facsimile: 216.696.2038
ssferra@littler.com
jseidle@littler.com

ATTORNEYS FOR RESPONDENT
Indiana Bell Telephone Company

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent, Indiana Bell Telephone Company (“Company”), did not violate Section 8(a)(1) or (5) of the Act by assigning Premises Technicians (“Prem Techs”) in the Indianapolis Market (hereinafter “Indianapolis”) to pull fiber optic strands in apartment buildings (aka Multi Dwelling Units or “MDUs”) in the Indianapolis area for the purpose of providing future tenants with television, high speed internet, and Voice over IP services. The work assignments are covered by the Premises Technician Job Duties Memorandum of Agreement (“Prem Tech MOA”) that was bargained over and agreed to by the Company and Communications Workers of America (“CWA” or “Union”), most recently executed on April 12, 2015. Although CWA Local 4900 (“Local” or “Local 4900”) filed the underlying charge, the Complaint’s sole allegation is that the Company violated the Act by “assigning work involving the installation of fiber optic cable in multi-dwelling units to Premises Technicians... without first bargaining with the International Union.” Complaint ¶ 6. This allegation is without merit and the Complaint should be dismissed in its entirety.

The work assignments were limited to Prem Techs pulling or running fiber from the Serving Terminal, usually inside the MDU structure, to the ONTs, attached to each living unit. This work plainly is within the scope of the Prem Tech MOA, which provides “[t]he Premises Technician will perform all work from and including the Serving Terminal up to and including the customer premises for IP enabled products and services.” The Prem Tech MOA also reserves certain work tasks for “Core Techs,” including fiber fusion splicing. It is undisputed the Prem Techs did not perform any of the tasks specifically reserved for Core Techs under the Prem Tech MOA. This is a very narrow dispute. Only two to three Prem Techs were assigned to pull fiber in MDUs each day from April 16, 2018 through November 12, 2018, and during that period, Prem Techs only performed 3% of the MDU work in Indianapolis.

The Company had the contractual right to assign Prem Techs to pull wire in MDUs because the job duties performed are covered by the Prem Tech MOA, which was already bargained with CWA. The Board's recent decision in *MV Transportation*, 368 NLRB No. 66 (September 10, 2019) fundamentally altered the Board's assessment of alleged unilateral changes and mandates the Complaint to be dismissed. The Board adopted the "contract coverage" standard, providing that where "contract language covers the act in question, the agreement will have authorized the employer to make the disputed change unilaterally." The Board overturned the previous standard, which required the employer to bargain over any material changes to a mandatory subject of bargaining, unless the union gave a "clear and unmistakable waiver" of its right to bargain. Under *MV Transportation*, the Board no longer requires that the "agreement specifically mention, refer or to address the employer decision at issue." The Board made clear that when an employer and union bargain over a subject and memorialize their agreement "they create a set of rules governing their future relations" and "there is no continuous duty to bargain."

When Prem Techs were assigned to the MDU work, they merely ran fiber from the Serving Terminal to each living unit. This task is clearly within the scope of the duties as stated in the Prem Tech MOA. That agreement covers this work, and therefore the Company did not violate the Act because the parties already have bargained over Prem Tech job duties, and the bargained MOA covers the work tasks at issue. The Company simply had no continuing duty to bargain over the work assignments.

Despite no obligation to do so, the Company nonetheless gave CWA ample notice before assigning the work to Prem Techs. CWA District 4 Vice President Curt Hess expressed concern about the timing of the assignments and how it might impact out-of-state Core Techs, but he never requested to bargain. Although Local 4900 Vice President Larry Robbins later requested to bargain

over the work assignments, the Local does not have the authority to bargain over the Prem Tech MOA and the Company had no duty to bargain with the Local over MDU work.

In addition, assigning Prem Techs to perform MDU work was not a material or substantial change to any terms or conditions of employment. Local 4900 President Tim Strong candidly admitted that “work that belongs to the Premises Technician is similar or the same work” as the disputed MDU work. (Strong 52). Indeed, Prem Techs required no additional training to perform the MDU work and there were no changes in work schedules. There is no evidence that the work was more difficult or required additional skills. Prem Techs performed the same tasks on the MDU assignments they have always performed on non-MDU work.

General Counsel’s attempt to distinguish the MDU work because Prem Techs traditionally perform work in response to a customer order is meaningless. The work was within the scope of the Prem Tech MOA, and the physical tasks they performed were unchanged. The scope of Prem Tech job duties under the MOA does not turn on whether they are wiring service for future customers versus installing wiring for existing customers. This work assignment was not unlawful because it was not a material or substantial change in Prem Techs job tasks.

Likewise, General Counsel’s contentions that “Core Techs” traditionally performed the MDU work and traditionally “construct the network” is not only patently false but squarely contradicted by undisputed testimony that *contractors* construct the network infrastructure and also exclusively performed MDU work until late 2016. The term “Core Tech” generically refers to technicians in two distinct Market Business Units; Technical Field Services (“TFS”) and Construction and Engineering (“C&E”). TFS Techs, who began performing MDU work in late 2016, have never “constructed the network.” Contractors hired by C&E “construct the network” by placing fiber from the Central Office to the Serving Terminal, placing telephone poles, and

placing cross boxes. C&E Techs then spliced the fiber placed by contractors. These undisputed facts provide further evidence the MDU work was within the scope of the Prem Tech MOA.

In an effort to evade these undisputed facts, General Counsel fabricated issues related to the Company's compliance with a subpoena and requested sanctions to preclude the Company from offering testimony regarding who "traditionally" performed MDU work. The Company fully complied with General Counsel's subpoena and ever evolving modifications thereof. For all of these reasons, the Complaint must be dismissed in its entirety.

II. STATEMENT OF THE FACTS

A. Background of the Parties

The Company provides telephone, internet, and television services to business and residential customers. (Tr. 6).¹ For many years, Communications Workers of America ("CWA" or "Union") has been the collective bargaining representative for bargaining unit employees who work in the Company's operations throughout the traditional five-state "Midwest" region of Indiana, Michigan, Ohio, Wisconsin and a small portion of Illinois. (Tr. 6). The Collective Bargaining Agreement between the parties ("CBA") covers a bargaining unit of approximately 8,000 employees who work in various job titles and business units throughout that geographic area. (Tr. 9-10; GC 2). CWA is the union signatory to the CBA and its predecessor agreements, with the most recent CBA being effective April 12, 2015, to April 14, 2018.² *Id.*

In late 2006, the Company created the Prem Tech position to perform the installation and maintenance work necessary to provide the Company's newly developed U-Verse products and

¹ As used herein, the references to "R_" and "GC_-X" refer to the Respondent Exhibits and General Counsel Exhibits, respectively. The references to "[Witness Name] ___" refer to the witness and the transcript pages of the witness's testimony, and references to "Tr. ___" refer to stipulations from the official Transcript of Proceedings of the hearing held before Administrative Law Judge Rosas, in Indianapolis, Indiana on July 10 -11, 2019, and August 6-7, 2019.

² In August 2019, the Company and CWA ratified a successor agreement.

services. (White 401). In early 2007, and as a result of negotiations conducted with the CWA, the Company and other affiliated entities executed a memorandum of agreement with CWA, known as the Premise Technician Agreement. (White 402). This agreement set forth the wages and terms and conditions of employment for Prem Techs and was separate from the CBA. (White 402). In 2009, the Parties agreed to move the Premise Technician Agreement into Appendix F of the CBA. Appendix F governed the terms and conditions of employment for Prem Techs, while the “Core CBA” governed the terms and conditions of employment for other bargaining unit employees, include technicians working in Technical Field Services (“TFS Techs”) and Construction & Engineering (“C&E Techs”).³

CWA’s Constitution is the governing document of the CWA’s organization and activities. (Hess 575). The Constitution provides that the “Communications Workers of America shall be the collective bargaining representative of the members of the Union.” *See* CWA Constitution, Art. XVII, Section 1(a), available at <http://www.cwa-union.org/pages/constitution>. The CWA’s constitution further provides that “all contracts or agreements entered into shall be in the name of the International Union and bear the signature of approval of an authorized agent or representative of the International Union.” *Id.* at Section 1(b).

The CWA International Union operates through various “Districts” established under the CWA Constitution as “administrative units” of the CWA. The Districts are defined by geographic area. Each CWA District is led by a District Vice-President and staffed by District representatives employed by CWA. CWA District 4 covers the same geographic area covered by the CBA (Indiana, Michigan, Ohio, Wisconsin and a small portion of Illinois). (Tr. 9-10).

Local 4900 is a unit of the CWA and includes members in the greater Indianapolis, Indiana

³ General Counsel attempted to confuse TFS Techs and C&E Techs by referring to both groups as “Core Techs.” As detailed below, TFS Techs and C&E Techs perform distinct tasks and have distinct functions.

area. According to the CWA Constitution, Local 4900's is responsible to "represent the workers in their respective jurisdiction relating to Local matters," and to "actively implement all Union Programs and carry out the policies established by the District, State or Area meeting at which it is required to be represented." CWA Constitution, Art. XIII, Sections 9(a)-(b). (Tr. 9-10).

B. Relevant Contract Provisions

Generally, Prem Techs install and repair U-verse, internet, and DTV services from the Serving Terminal to the customer's premises. The Company and CWA have bargained over the specific tasks that can be assigned to Prem Techs and reserved specific tasks for "Core Techs." The job duties of Prem Techs are set forth in a Memorandum of Agreement dated April 12, 2015 ("Prem Tech MOA"),⁴ which includes:

1. The Premises Technician will perform all work at the customer premises up to and including the Network Interface (NID) or equivalent, except as specifically reserved for the Core technician below. This work will include but is not limited to all inside wiring, CPE equipment – including VoIP, testing, sales, customer instruction on equipment, etc., for all services regardless of the materials (e.g., copper, fiber, etc.), technology or equipment involved.
2. The Premises Technician will perform all work from and including the Serving Terminal up to and including the customer premises for IP enabled products and services.
3. The Premises Technician may also perform pair changes when installing IP enabled products and services.
4. The Premises Technician will perform all necessary field connections when installing IP enabled products and services including fiber cross-connects and fiber drops.
5. The Premises Technician may place bridge tap cancellation devices, excluding splicing them into cable pairs.
6. The Premises Technician may also perform all work from the serving terminal up to and including the customer premises if he/she has already been dispatched to the premises to perform the work as stated above.

⁴ The Prem Tech MOA contains several acronyms. "CPE" means Customer Premises Equipment, which includes equipment that is attached to or within a customer's premises. "VoIP" means Voice over Internet Protocol which is telephone services over the IP network. "TDM enabled voice service" and "ATM enabled DSL service" are telephone and internet services provided over the Company's Legacy network, as opposed to services provided over the IP network. "POTS" means plain old telephone service.

The Prem Tech MOA also specifies work Core Techs will continue to perform, including:

1. Installation and maintenance work for TDM enabled voice service (POTS), including station and inside wire installation and maintenance of POTS service.
2. Initial installation work for ATM enabled DSL service, excluding any or all vertical or enhanced products or services at the customer premises.
3. ATM enabled DSL service repair or maintenance outside the customer premises.
4. The Premises Technician may, however, perform any of this work from the serving terminal up to and including the customer premises if he/she has already been dispatched to the premises for work not covered by items 1- 3 immediately above.
5. Core Technicians will perform fusion fiber splicing.

(R 1).

C. Prem Techs, TFS Techs, and C&E Techs

All relevant events in this case relate to three distinct Market Business Units: Technical Field Services (“TFS”), Internet & Entertainment Field Services (“IEFS”), Construction and Engineering (“C&E”).

General Counsel’s core factual averment that “Core Techs” historically built or “constructed” the Company’s network infrastructure from the Central Office to the customer’s homes is a fallacy, refuted by undisputed facts. “Core Tech” is not an official title, but one commonly used to refer to “legacy” technicians who worked for years prior to the creation of the Prem Tech title. Technicians in TFS and C&E are referred to as “Core Techs” because they work under the core CBA, as opposed to the Prem Techs in the IEFS department, who work under CBA Appendix F. Thus, the term “Core Tech” refers to technicians in C&E or TFS. (White 441).

The Construction and Engineering (“C&E”) organization oversees the construction of the network infrastructure. C&E oversees the placement of all cable in the F-1 and F-2, as well as the placement of telephone poles, Cross Boxes, and Serving Terminals. (White 441; Collum 297-98;

Hess 574). C&E hires vendors to physically build the network, and C&E Techs connect the cable after vendors place all of the equipment. (White 441).

The Technical Field Services (“TFS”) organization (and its predecessors) performs repair and maintenance to the network infrastructure. (White 388-390). TFS technicians work on cable that comes from a Central Office (“CO”) and runs to distribution points, known as Cross Boxes, which distribute cable to Serving Terminals, which distribute cable to customer’s premises. (Strong 116-17). The segment of cable from a CO to a Cross Box is known as the “F-1.” Cable that runs from a Cross Box to a Serving Terminal is known as the “F-2.” (White 388). TFS Techs work on both aerial and underground cable, as well as “open sheath,” which involves cable coated in rubber or plastic. (White 416).

The Internet & Entertainment Field Services (“IEFS”) organization (and its predecessors) generally installs and repairs the network infrastructure from the Serving Terminal to and inside the customer’s premises. Relevant here, IEFS employs Prem Techs to install the Company’s IP-enabled services, which includes installing a “drop,” i.e., the cable connecting the Serving Terminal to the Network Interface Device (“NID”) attached to the customer’s home. Prem Techs then also connect the NID to the Residential Gateway inside the home, which provides services directly to consumer devices, such as televisions, computers, and phones. (Strong 41, 116; Bickel 637; Robbins 211). It is undisputed that Prem Techs routinely perform the tasks of drilling holes, pulling wiring through walls into customer’s homes, installing jacks and hooking cable to equipment. (Bickel 627).

D. History of the Prem Tech MOA

1. Introduction of U-Verse and Development of the IP Network

In late 2006, the Company launched its new “U-Verse” product, a terrestrial, i.e., underground, service that provides IP-based video, television content, high speed internet and voice service to residential homes via the IP (i.e., “internet protocol”) network. (White 391-92). To do so, the Company first had to construct the “IP network,” which was distinct from the existing “Legacy Network” that delivered traditional telephone, dial-up internet, and early DSL internet services. (White 391; R 3).

The new IP network required new equipment and placement of fiber optic cable in the field, which would be used instead of traditional copper wire. This construction project was called “Project Lightspeed” and was overseen by C&E. (White 391-93, 401). C&E hired contractors to place new equipment, called VRADs, in the field and to place fiber from the Central Office to the VRAD, either on telephone poles or underground. (White 393). Although contractors placed all of the new equipment and fiber, C&E technicians performed the splicing to connect all of the new equipment. (White 401).

General Counsel falsely claims that “Core Techs” traditionally “construct” the network to support the meritless contention that TFS Techs traditionally performed the disputed MDU work. Undisputed testimony demonstrates that C&E vendors construct the network, not TFS Techs.

2. Creation of the Prem Tech Title

In late 2006, the Company created the Prem Tech position to perform the installation and maintenance work necessary to provide the Company’s newly developed U-Verse products and services. (White 401). Creating the Prem Tech title was necessary to compete with the Company’s new primary competition, cable companies, which had different cost structures than traditional telephone service providers. (White 401).

In early 2007, following negotiations with CWA, the Company and other affiliated entities executed a memorandum of agreement with CWA, known as the Premise Technician Agreement. (White 402). This Agreement set forth the wages and terms and conditions of employment for Prem Techs. (White 402). Compared to the Core CBA, the Prem Tech Agreement had a lower wage component, different benefit structure, and more flexibility with scheduling. (White 402).

From 2007 through 2009, Prem Techs could only perform work from the NID (attached to the home) to inside the home, and run “jumpers” at the Cross Box to get connectivity to the home. (White 403-04). Prem Techs could perform all necessary installation work inside the home, but could not install the “drop” wire and they could not replace defective drops. (White 404). Prior to 2009, this limitation on Prem Tech duties required dispatch of a second technician (a TFS Tech) on all orders that needed a drop replaced or repaired. (White 405). The inefficiency of such “double dispatches” was a frequent problem because the new U-Verse products and services often could not be supported by the existing drop wire. (White 405). The Company desired to correct this anomaly in 2009 bargaining by expanding Prem Tech job duties. (White 405).

a. 2009 Bargaining

In 2009, the Company and CWA bargained over a new contract in Hoffman Estates, Illinois. (White 405).⁵ One of the Company’s goals was to expand the scope of work that could be assigned to Prem Techs. (White 408). Negotiations focused on the physical sections of cable in which Prem Techs could work and which products and services they could work on in each section of cable. Prior to 2009, Prem Techs generally only worked inside homes. (White 410). The Parties agreed to expand this so Prem Techs could work from the Serving Terminal to the

⁵ From 2009 through 2015, the Parties agreed that all proposals would be made at the main bargaining table and only each side’s bargaining Chair could pass proposals. (Linares 594-95).

home and on the connections associated with it on certain jobs. (White 410). Thus, Prem Techs could place and replace drops, eliminating the need to send a TFS Tech to do needed drop work.

Under the 2009 agreement, from the NID to inside the home, Prem Techs could perform all types of work, whether it involved phone, internet, or television, and regardless whether the work was on the Legacy Network or on the IP network, unless the task was specifically reserved for “Core” technicians (TFS or C&E). (White 411). Outside the home, Prem Techs could place drops and make connections if associated with IP enabled products and services. (White 410).

The parties reached an agreement, and at the Union’s request memorialized the agreement in writing, creating the 2009 “Prem Tech Job Duties Document.” (White 407-08; R 2). The parties did not sign or date the agreement. The Prem Tech Job Duties Document included limitations for Prem Techs in a separate section that reserved certain tasks for Core Techs, permitting Prem Techs to perform all other work. (White 410). The parties never discussed limiting Prem Techs to performing work when the job was assigned in response to customer orders. (White 414).

In exchange for broadening the scope of Prem Tech job duties in 2009, the Company provided a substantial wage increase for the Prem Techs and other improvements to benefits and other working conditions. (White 420). Starting in 2009, Prem Techs regularly replaced and repaired drop wires from the Serving Terminal to the NID, on both single-family homes and MDUs. (Bickel 631-32; White 404).

b. IPDSLAM Arbitration

On April 14, 2012, Arbitrator Jeanne Vonhof issued a decision in an arbitration held in 2011, arising from a grievance filed by CWA District 4 over the scope of Prem Tech job duties. (White 420; R 3). Beginning in 2010, the Company began using newly implemented equipment, known as an “IPDSLAM,” to provide customers with IP-DSL internet service over the IP network. The language of the 2009 Prem Tech Job Duties document provided that Prem Techs would

perform all work from the Serving Terminal to the customer's premises "for IP enabled products and services." (R 2). As such, the Company assigned Prem Techs to perform work on jobs involving IP-DSL service, including the installation and maintenance of stand-alone internet service. Similar to the issue in the present case, the Union took the position that all work performed on the network was reserved for Core Techs, unless specifically carved out for Prem Techs. Despite the plain language of the agreement, the Union contended that Prem Techs could only perform work on orders that included U-Verse television services.

Arbitrator Vonhof disagreed and held the Company did not violate the Prem Tech Job Duties Agreement by assigning Prem Techs to work on IP enabled DSL service because: (1) the agreement was prospective in nature, allowing the Company to assign work to Prem Techs that did not exist at the time the agreement was reached; (2) the Company can assign Prem Techs all work from the Serving Terminal to inside the premises when the work involved IP enabled products and services; and (3) the work could be assigned to Prem Techs regardless whether IPDSLAM equipment was used because the work was on the IP network. She specifically found:

"The agreement is prospective in the sense that it is meant to apply to the assignment of work happening in the future, if that work is covered by the agreement. The portion of the parties' agreement that has been in dispute in this case is work over installing and maintaining DSL service. The agreement over dividing this work between Core Techs and Prem Techs focused on the two general systems or networks over which DSL is transported, the IP enabled and ATM enabled networks. Service through an IPDSLAM is IP enabled DSL provided through a different type of equipment. It is considered a U-verse service, although the IPDSLAM cannot provide video service. There is no evidence that the parties bargained over the work to be performed down to this level of equipment. They did not agree to limit Prem Tech work on IP enabled DSL service only to DSL service provided upon equipment that was in use at the time of negotiations. ... As long as the work is encompassed within the overall category of IP enabled DSL service, it falls under the Prem Tech job duties, as agreed to in 2009.

(R 3, p. 44)(emphasis added).

c. 2012 Bargaining and the IDSLAM Arbitration Award

On February 29, 2012, representatives from the Company and CWA District 4 commenced bargaining over the Core CBA, which expired April 11, 2012. (Linares 593-94).⁶ The 2012 negotiations began while the IPDSLAM arbitration was pending and prior to the decision. On March 21, the CWA proposed to keep the Prem Tech Job Duties document with the same language from the 2009 agreement, but *broadly interpreted as the CWA had argued to the arbitrator* (i.e., that Prem Techs could only perform work that was specifically identified in the Prem Tech Job Duties document, with all other work was reserved for the Core). (Linares 596; R 3, 4). On March 30, the Union proposed to move the Prem Techs into the Core agreement. (Linares 594).

Arbitrator Vonhof issued her award on April 14. She rejected CWA's narrow interpretation, holding the agreement allows assignment of new work to Prem Techs "[a]s long as the work is encompassed within the overall category of IP enabled..." services. (R 3, p. 44).

On April 17, CWA passed a proposal that would have drastically changed the scope of Prem Tech job duties and would have effectively reversed Arbitrator Vonhof's decision. (Linares 597; R 5). The Arbitrator correctly found that the Prem Tech Job Duties agreement provided that Prem Techs could perform work on all IP enabled products and services from the Serving Terminal to the customer's premises, even for work that did not exist at the time that the contract was bargained. The April 17 proposal, in contrast, would have given all work to Core Techs, unless

⁶ Tim Strong's testimony should be heavily discredited because of his evasiveness and inability to remember anything about the Prem Tech document in 2009, 2012 bargaining on the Prem Tech MOA, or regarding the Union's proposals in 2012 bargaining. Strong was on the Union's bargaining committee in 2012 and served as the CWA's Chair of the Appendix F subcommittee (dealing with Prem Tech issues). (Strong 92). Incredibly, Strong testified that he could not recall if the parties agreed to the Prem Tech Job Duties agreement in 2012, and that did not recognize proposals made by CWA regarding the Prem Tech Job Duties agreement. (Strong 88-90). As Chair of the subcommittee that bargained over the terms and conditions of employment for Prem Techs, Strong essentially refused to testify about bargaining over the Prem Tech Job Duties agreement and the IPDSLAM arbitration by claiming he could not recall seeing the proposals or recall what was discussed in negotiations. (Strong 88-92).

specifically authorized in the proposed agreement, and excluded any future work. (R 5). While the Prem Tech Job Duties Agreement gives the Company broad authority to assign Prem Techs all work from the Serving Terminal to inside the customer's premises on IP enabled products and services, CWA proposed to limit their job duties to work on specific equipment, and to reserve for Core Techs "[a]ll work not carved out for the Premises Technician" in the proposal. (R 5).

The Company rejected that proposal. Ultimately, the parties agreed to renew the language of the Prem Tech Job Duties Agreement in 2012, without any changes. (White 425). Thus, the Parties *agreed to the same agreement as it was interpreted and enforced in the Vonhof award.*

d. 2015 Bargaining

In 2015 bargaining, Ellery Hunter was the Chief bargainer for the Company, and Curt Hess was the Chief bargainer for CWA. (Hunter 681). The Union initially proposed eliminating Appendix F of the CBA (which would have placed the Prem Techs in the Core CBA, subject to core wages, benefits and working conditions) and putting all technicians into the Core CBA. (Hunter 670; Strong 106). The Company rejected that proposal. (Hunter 670).

Ultimately, the parties agreed to *expand* the scope of work assignable to Prem Techs. The intent was to clarify the agreement to ensure Prem Techs would do all of the installations relative to fiber and associated connections. (White 426; Hunter 672). The parties agreed to expand Prem Tech job duties to perform: (1) fiber optic work associated with IP enabled products and services, (2) pair changes, and (3) bridge tap cancelation devices. (White 430). The Prem Tech MOA specifically reserved "fusion fiber splicing" for Core techs, but Prem Techs could perform mechanical connections or fiber lock connections on fiber. (White 431-32; Hunter 672; R 1).

Specifically, the Parties agreed to modify Paragraph 1 in the agreement to clarify that Prem Techs would work on fiber by adding the underlined language:

“The Premises Technician will perform all work at the customer premises up to and including the Network Interface (NID) or equivalent, except as specifically reserved for the Core technician below. This work will include but is not limited to all inside wiring, CPE equipment — including VoIP, testing, sales, customer instruction on equipment, etc., for all services regardless of the materials (e.g., copper, fiber, etc.), technology or equipment involved.”

In addition, the Parties agreed to add the language from Paragraph 2, stating “The Premises Technician will perform all work from and including the Serving Terminal up to and including the customer premises for IP enabled products or services.” (R 1). The Parties also agreed to add the following to the scope of Prem Techs job duties (R1):

“3. The Premises Technician may also perform pair changes when installing IP enabled products and services.”

“4. The Premises Technician will perform all necessary field connections when installing IP enabled products and services including fiber cross-connects and fiber drops.”

“5. The Premises Technician may place bridge tap cancellation devices, excluding splicing them into cable pairs.”

The 2015 changes expanded the scope of work that could be assigned to Prem Techs, excepting fusion fiber splicing, which was expressly reserved for the Core. (R 1).

Nothing in the Prem Tech MOA limits Prem Techs to performing work involving a customer order. The MOA instead gives the Company broad authority to assign Prem Techs “all work from and including the Serving Terminal up to and including the customer premises for IP enabled products and services.” (White 441; R 1).

E. AT&T’s Acquisition of DirecTV

In July 2015, AT&T acquired DirecTV. (White 434). As part of the FCC approval process, AT&T, on behalf of its operating companies, made a commitment to install fiber to 12.5 million

living units by the end of 2019. (White 434; Strong 122). Thereafter, the Company began a significant effort to deploy fiber optic cable to residential areas throughout the country.

In October 2015, the Company began to train Prem Techs in Indianapolis on fiber, including installing fiber drops to connect Serving Terminals to an ONT (i.e., fiber equivalent of the NID). From the time Prem Techs were trained to do fiber work, placing and replacing fiber drops became part of their regular duties. (Bickel 628). In addition, Prem Techs performed fiber work in MDUs on a daily basis whenever a customer ordered service. (Bickel 633).

Part of the Company's plan to meet its FCC commitment was to install fiber lines to multiple living units within an apartment building or complex. As a result, Prem Techs commonly installed fiber drops in apartment buildings. (Bickel 630-31).

F. History of MDU Work in Indianapolis

Sherry Brewer, Senior Technical Project Manager with AT&T Connected Communities, provided undisputed testimony regarding the history of MDU work performed in Indiana. (Brewer 599-600). Brewer, who oversees and coordinates MDU projects throughout Indiana, unambiguously explained that *prior to Fall 2016*, all of the disputed MDU work was performed *by building owners or by C&E contractors*. (Brewer 617-19). The only "Core Techs" to perform this work were TFS Techs, who began performing the work in late 2016. (Brewer 618). Even though TFS Techs performed some of the MDU work, C&E *contractors* also continued to perform such work. (Brewer 618-19). The General Counsel's contention that the disputed MDU work was exclusively performed by Core Techs or by TFS Techs is patently false.

Generally, the Company refers to apartment buildings as Multi Dwelling Units ("MDUs"). For many years, many MDUs in Indianapolis had traditional copper cable prewired throughout the building to provide service to each apartment unit. In 2011, the Company began building out fiber in new construction MDUs, known as "Greenfield" projects. The purpose was to enable tenants

to order fiber service, which would already be hooked up to their apartments. The Company contracts with building owners to arrange for the installation of the fiber, as well as marketing rights and obligations, and financial terms. (Brewer 603).

Beginning in 2011, the Company used contractors to run fiber from the Central Office to the Serving Terminal(s) at an MDU, but the *building owner* was responsible for all wiring *inside* the MDU, from the Serving Terminal to the ONT. (Brewer 609-10). Prior to 2016, the Company's Connected Communities organization coordinated at least 35-40 Greenfield projects in the Indianapolis area. (Brewer 610). In late 2015, the Company started an MDU project called Seasons of Carmel, where for the first time, C&E hired *contractors* directly to place the fiber inside the apartment buildings, rather than having it done by the building owner. (Brewer 616-17; GC 27).

As a result of the DirectTV acquisition, MDU projects became more prevalent in Indianapolis beginning late 2016. (Strong 122). In fall 2016, the Company began performing fiber overbuilds in established MDUs (as opposed to new construction), known as "Brownfield" properties. (Brewer 608, 618). Overbuilding an existing property generally follows the same process as a Greenfield property. (Brewer 607-08). C&E contractors place fiber from the Central Office to the Serving Terminal at the MDU. (Brewer 608). C&E contractors may also place wire inside the building to each floor. (Brewer 608). When the Company began Brownfield overbuilds in Fall 2016, it also started assigning TFS Techs to finish wiring inside the building, placing drop wires from the Serving Terminal to the ONT for each living unit. (Brewer 608). In 2017, TFS Techs performed inside wiring in both Greenfield and Brownfield properties. Notably, however, the Company still hired contractors to perform inside wiring for some MDU projects, and for other projects the building owner was responsible for the inside wiring. (Brewer 618-19).

G. The Company Assigns Prem Techs to Do MDU Work

Throughout 2017 and early 2018, work volumes for Prem Techs significantly declined in Indianapolis due to increased competition and increasing popularity of streaming services like Netflix and Hulu. (Ouellette 449-50; Bickel 633). In response, the Company loaned Prem Techs to areas with higher demand, such as Columbus and New Albany. (Ouellette 450). Due to the decreasing workloads, throughout 2017 managers asked Prem Techs on a daily basis to take voluntary time off without pay. (Ouellette 451; Bickel 634). In 2017, as many as 60 Prem Techs each day took time off without pay. (Bickel 635). Ultimately, the Company announced a surplus on December 15, 2017, to adjust for low work volumes, and removed 20 Indianapolis Prem Techs from payroll on January 9, 2018. (Ouellette 451-52). Following the surplus, the Company still lacked work for Prem Techs and continued to offer voluntary unpaid time off. (Ouellette 452; Bickel 634-35). From January through June 2018, Prem Techs in Indianapolis took 3417 hours of voluntary unpaid time off due to a lack of work. (Ouellette 455-56; R 18).

The opposite was occurring in the TFS organization in Indianapolis. TFS was struggling to keep up with the demands of its heavy workloads. (Hunter 679). TFS work volumes were extremely high, caused not only by the MDU work, but also increases in traditional demand work, which was significantly higher in Indianapolis than in other Midwest markets. (Shea Culver 651-52). TFS Techs had more work than they could handle and the organization looked for help. (White 679). Throughout 2017 and 2018, TFS “loaned” TFS Techs into Indianapolis *every week* who worked in the area on two to three week details. (Shea Culver 652-53). TFS Techs were loaned in from other parts of Indiana, St. Louis, Illinois, Michigan, and Ohio. (Shea Culver 652). Typically, TFS Techs were loaned into Indianapolis from multiple locations at the same time to keep up with the heavy workload. (Shea Culver 653).

In February 2018, TFS Director Brad Coleman and IEFS Director Jerry Ouellette first discussed assigning Prem Techs to assist with the large volume of MDU work in Indianapolis. (Ouellette 458). They discussed limiting the work Prem Techs would perform to pulling fiber from the Serving Terminal to the units within an MDU. (Ouellette 460). Initially, they planned to assign 25-30 Prem Techs to do the MDU work because IEFS had capacity (employees being *sent home* daily), and TFS had a desperate need (techs being *loaned in* daily). (Ouellette 460; Shea Culver 652). Before assigning any work to Prem Techs, Coleman and Ouellette agreed to discuss it with their bosses and with the Director of Labor Relations, Ellery Hunter. (Ouellette 461).

On February 27, 2018, TFS Director Brad Coleman sent an email to Hunter to get his input on using Prem Techs to pull fiber in MDUs. Coleman specifically noted that Prem Techs would not be doing any splicing, which would be left to TFS techs. (R 6). That same day, Coleman called Hunter and explained that TFS was struggling to keep up with the MDU work. (Hunter 679-680). Hunter explained that he did not see any problems with the work assignments, but had some concerns how it might affect upcoming negotiations with CWA, set to start March 5. Hunter understood that Prem Tech job duties can be a contentious issue in negotiations. Hunter was particularly concerned because Local 4900 President Tim Strong was on the Union's bargaining committee and the work assignments would be occurring in his Local's jurisdiction. (Hunter 680).

1. Discussions with District 4

Company representative Ellery Hunter and his Union counterpart Curt Hess provided consistent, corroborative testimony regarding their discussions during March and April 2018 regarding Prem Techs performing MDU work in Indianapolis. The substance of their discussions are essentially undisputed. Equally undisputed is that Hess *never* asked to bargain over this issue.

On March 2, Hunter called Hess to discuss various issues regarding upcoming bargaining and informed him the Company was considering having Prem Techs pull wire in MDUs in

Indianapolis. (Hess 561; Hunter 683-84). Hess expressed concern about timing because the parties were about to start bargaining. (Hess 561).

On March 5, Hunter and Hess met for bargaining in Chicago and again discussed Prem Techs doing MDU work. (Hess 563; Hunter 685). Hess testified he made a “general comment” to express his concern because issues around Prem Tech job duties can become contentious. (Hess 581). Hess again expressed concerns about the timing, because bargaining was just beginning. (Hunter 685). After this discussion, Hunter emailed Coleman and Ouellette and explained that the main hang up was timing relative to bargaining, but ordinarily he would approve (R7):

I began the discussion with them late Friday and more today. They [are] considering it, with the main [hang] up being the timing with Bargaining. Ordinarily I would just say we are moving forward but I need to give them some time so that this doesn't interfere with Bargaining. I'll let you know when we are good to go.

On March 9, Hunter and Hess again discussed Prem Techs performing MDU work. (Hunter 688; Hess 564). Hess asked specific questions about what tasks the Prem Techs would be performing compared to tasks performed by TFS Techs, and how that might affect TFS techs from other areas being loaned to Indiana. (Hess 564). Hess conceded the potential impact on TFS technicians would not be in Indiana, but on TFS technicians who might otherwise be loaned in to help with TFS work. (Hess 564; Hunter 688). In addition, Hess asked Hunter three questions: (1) whether Core Techs were on loan in Indianapolis, and if so, would they be sent back when the Prem Tech start doing the MDU work; (2) whether the Prem Techs would be placing fiber in the MDUs; and (3) whether the Prem Techs would be onsite with the Core Techs, or if the Core Tech would be making connections after the Prem Techs left. (Hunter 692; R 8). Hunter emailed those questions to Coleman and Ouellette for answers. *Id.*

Hunter subsequently answered Hess's questions and informed him there were TFS techs from Dayton loaned into Indianapolis, but they were doing demand work and not MDU work.

(Hunter 692). Hunter also explained that Prem Techs would be helping place drops and would be working alongside TFS Techs. (Hunter 692).

On March 13, Hess sent an email to Hunter with his objections to assigning MDU work to Prem Techs. (Hess 565; R 9). Hess claimed "the work discussed is outside of the current bargained Job Duties for Premise Technicians" and it had "historically been performed by" Core Techs. (R 9). Neither of these statements are true. Prem Techs have always pulled cable from the Serving Terminal into customers' premises. (Hunter 695). In addition, MDU work had only recently been performed by Core Techs – and they were still going to perform the tasks reserved for Core Techs on MDU jobs. (Hunter 695). Notably, *Hess made no request to bargain in those discussions.*

Hunter refuted Hess' objections (R10):

As I have stated in some of our recent discussions, placing inside wiring in MDU's is clearly within the scope of the Premises Technicians responsibilities as described in the [Prem Tech MOU]. Premises Technicians routinely place inside wiring, as well as drops, in the normal course of their daily work. The Company is therefore free to assign such work to either Premises Technicians or Core Technicians as it determines appropriate based on the needs of the business. Core Techs have been hired in Indianapolis recently, while Premises Technicians were recently declared surplus in the same area. It therefore makes perfect sense for the Company to assign this work to Premises Technicians.

On April 11, when the parties were in Chicago for negotiations, Hunter told Hess the Company would be executing on its plan to dispatch Prem Techs to assist on MDU work. (Hunter 700; R 11). Hess expressed that he was "disappointed," but made no proposals to change the scope of Prem Techs job duties and did not request to bargain over the work assignments. (Hunter 700). Hunter noted this conversation in his bargaining notes. (R 11). Hunter's testimony on these events was undisputed and corroborated by Hunter's notes and by Hess's testimony.

2. Discussions with Local 4900

After learning of the MDU assignments from Ouellette, on April 11 Area Manager Angela Bickel called Local 4900 Vice President Larry Robbins to notify him the Company would be assigning a small number of Prem Techs to pull wire in MDUs beginning on April 16, 2018. (Bickel 638). Robbins called Ouellette later that day, stating he was “adamantly opposed” to Prem Techs working in MDUs and concerned it would impact CWA District 4’s bargaining process. (Ouellette 474). Ouellette explained that IEFS would not be “loaning” Prem Techs to TFS, and that the work was not outside the scope of Prem Tech job duties because the assignments would be limited to pulling fiber from the Serving Terminal to the ONT, which Prem Techs did every day. (Ouellette 474). Ouellette also explained this was a work assignment that would help them keep employees working and help meet customer expectations. (Ouellette 475).

On April 12, Robbins sent an email to three IEFS Area Managers working in Indianapolis, copying Ouellette. (R 12). Robbins stated the Local was "unequivocally opposed to [the Company] loan[ing] Premise Tech[s] to TFS to do MDU work," threatened to follow up "with an extensive RFI." Robbins also requested to bargain on behalf of Local 4900. This surprised Ouellette because he is not responsible for bargaining over the Prem Tech MOA. (Ouellette 477). Also, the Company was not “loaning” Prem Techs to TFS, a contractual process subject to certain CBA terms. This was merely a work assignment because the assignment was merely pulling fiber and placing drops, tasks performed every day and covered by the Prem Tech MOA.

Ouellette initially contacted Labor Case Manager Grace Biehl for advice. (Ouellette 478). They discussed Robbins’ email and use of the term “loan.” They agreed to clarify this would be a work assignment, not a loan. (Ouellette 480; R 14). With the CBA about to expire, Ouellette also was concerned about possible job actions by the Local, so he emailed Coleman and Hunter to inform them of Local 4900’s “great resistance” to the plan. (Ouellette 477-78; R 13).

Ouellette responded to Robbins' email and made clear IEFS was not "loaning" technicians to do TFS work, but this was "a job assignment for work that IEFS technicians are qualified to do (drilling holes and pulling fiber)." (R 15). Thus, the Company was not making a unilateral change.

Robbins sent another email to Ouellette, claiming the work assignments were a unilateral change, and erroneously stating the work was "traditionally done by TFS," and asking if he was denying the Local's right to bargain. This surprised Ouellette, so he explained the Company retains the right to assign this work to techs who are qualified to perform it. Ouellette further explained that he is "willing to meet to discuss" any of the Local's concerns. (Ouellette 482; R 16, 17).

Ouellette received an email from TFS Area Manager Michael Shea Culver, which contained an information request from Robbins. On April 16, 2018, Ouellette fully responded to the information request. (Ouellette 484-86; R 19, 20).

3. Prem Techs Pull Wire in MDUs

After Hunter informed Ouellette he could assign Prem Techs to work on MDUs, Ouellette instructed his Area Managers to identify a few Prem Techs who were trained to pull fiber and who were scheduled to work. (Ouellette 472). Prem Techs performed inside wiring on MDU projects in Indianapolis from April 16, 2018 through November 12, 2018. (Ouellette 486). During that period, two to three Prem Techs were assigned to do the work each day. Only nine (9) different Prem Techs received those assignments during that period, for a total of only 227 individual job assignments. (Ouellette 489). TFS Techs continued to perform MDU work in Indianapolis. Respondent Exhibit 22 confirms that Prem Techs only performed 3.19% of the total hours of MDU work performed during the April 16 to November 12 period.⁷ In 2018, TFS Techs performed

⁷ R 22 identifies Business Services as performing some of the MDU work. Business Services is part of the TFS market business unit, and Business Services technicians are simply TFS Techs who are assigned to Business Services. (Ouellette 501).

nearly 50,000 hours of MDU work, while Prem Techs worked only 1645 hours on MDUs. The following, as demonstrated in R 22, shows the total number of hours worked on MDU projects each month in 2018 by TFS Techs (“Business Services” and “Field” techs) and by Prem Techs:

Month	BUS SRVC	FIELD	PREM	Grand Total
<i>January</i>		5065		5065
<i>February</i>	751	4760		5511
<i>March</i>	90	3400		3490
<i>April</i>	61	3795	254	4110
<i>May</i>		3973	517	4490
<i>June</i>		3003	300	3303
<i>July</i>		3480	197	3677
<i>August</i>		3954	177	4131
<i>September</i>		4588	62	4650
<i>October</i>		6034	81	6115
<i>November</i>		4209	58	4267
<i>December</i>		2752		2752
Grand Total	902	49014	1645	51560

Prem Techs did not perform any fusion fiber splicing and did not place Serving Terminals. They simply pulled fiber from the Serving Terminal to the ONT. Prem Techs worked their normal schedules and their hours were not cross charged to TFS. (Ouellette 473). Kenneth Wright, a Prem Tech who was assigned MDU work explained the tasks he performed:

I was basically pulling wire through the – I – because I am smaller than them, I would get up in the attics, push the wire down, you know, move over to the next one, push wire down, pull wire up from the outside and make bundles, and take it to wherever they told me to drop it down and do things like that, and I would get down there and cut out boxes sometimes if we already got the wires pulled, I would cut the boxes, put them in little boxes. I didn’t splice anything, I didn’t put ends on anything. I just basically pulled the wire itself. (Wright 343-44)

Because Prem Techs were performing the same tasks on the MDU projects that they perform every day, they required no additional training to perform MDU work. (Wright 342). The Prem Techs simply pulled wire, like they have always done.

III. ARGUMENT

The Company did not violate Section 8(a)(1) or (5) because it bargained with the CWA over the Prem Tech MOA, which unequivocally gives the Company the right to assign Prem Techs to pull fiber in MDUs. The Company had no duty to bargain over these work assignments in March and April 2018 because the assignments were covered by the Prem Tech MOA. Specifically, that agreement provides that Prem Techs “will perform all work from and including the Serving Terminal up to and including the customer premises for IP enabled products and services.” (R 1). The work assignments at issue involve only placing fiber from Serving Terminals to individual living units inside apartment buildings, for IP enabled products and services. Because these work assignments are clearly covered by the Prem Tech MOA, the Company had no duty to continue bargaining over this issue because it already reached an agreement with CWA. General Counsel’s contention that Prem Tech scope of work is limited to work assignments in response to customer orders is legally indefensible. The Prem Tech MOA broadly defines Prem Tech job duties and reserves limited duties for the Core. The Prem Tech MOA contains no limitation with respect to customer orders or MDU work, and the Company had no additional duty to bargain with CWA.

Moreover, CWA never requested to bargain over the work assignments. Ellery Hunter and Curt Hess discussed the work assignments throughout March and April 2018, but Hess never requested to bargain over the issue. The Complaint rightfully does not allege the Company failed to bargain with Local 4900 because the Local is not the exclusive bargaining representative, had no right to demand bargaining, and had no authority to bargain on behalf of CWA.

The Complaint allegations also must be dismissed because the work assignments were not a material, substantial, or significant change to Prem Tech job duties. Prior to the MDU work assignments, Prem Techs ran fiber from serving terminals to living units (whether in a single family home or in an MDU) on a daily basis, tasks that have been part of their duties since the

Company and CWA bargained to expand Prem Tech scope of work in 2009. The work assignments were not an unlawful unilateral change because the subject work was the same or similar to work Prem Techs had been performing for years.

Rather than litigate this case based on the facts, General Counsel inexcusably requested the extraordinary remedy of sanctions and exclusion of evidence by asserting meritless claims that the Company failed to fully comply with a request in a subpoena. General Counsel based this request on the Company's work tickets, *which were not even responsive to the subpoena request*, but still were produced to General Counsel in a representative sample of 300 tickets in response to the ALJ's instruction. The Company also produced spreadsheets containing **all** of the information from all work tickets from the requested garages during the requested time frame. General Counsel's request for sanctions must be denied and the Complaint dismissed in its entirety.

A. Because the Prem Tech MOA Covers the Disputed MDU Work, Respondent Did Not Violate the Act by Assigning That Work to Prem Techs

The Company did not violate Section 8(a)(5) because the disputed work assignment is covered by the Prem Tech MOA. The assignment of Prem Techs to perform MDU work in Indianapolis was not an unlawful unilateral change.

The Board's recent decision in *MV Transportation*, 368 NLRB No. 66, slip op. at 11 (2019) makes clear that when the Company and the Union bargain over a subject and memorialize their agreement "they create a set of rules governing their future relations" and "there is no continuous duty to bargain." The Board overturned the previous standard, which required a union to make "clear and unmistakable waiver" of its right to bargain over a material change to a mandatory subject of bargaining. Under *MV Transportation*, the Board no longer requires that the "agreement specifically mention, refer or to address the employer decision at issue. Where contract language

covers the act in question, the agreement will have authorized the employer to make the disputed change unilaterally, and the employer will not have violated Section 8(a)(5).” *Id.* at 11.

Known as the “contract coverage” standard, “this test rightly gives effect to the limits – or absence of limits – upon which the parties themselves have agreed. Under contract coverage, the parties are firmly in control of negotiating the parameters of unilateral employer action, as they should be.” *Id.* at p. 10. A union may also “waive” its right to bargain over a mandatory subject, but the “covered by” and “waiver” inquiries are analytically distinct⁸:

A *waiver* occurs when a union knowingly and voluntarily relinquishes its right to bargain about a matter; but where the matter is *covered by* the collective bargaining agreement, the union has exercised its bargaining right and the question of waiver is irrelevant.

Marine Corps Logistics Base v. FLRA, 962 F.2d 48 at 57 (D.C. Cir. 1992).

The contract coverage standard is well developed in case law applied by Circuit Courts for years. The D.C. Circuit has held that a “union may exercise its right to bargain about a particular subject by negotiating for a provision in a collective bargaining contract that fixes the parties’ rights and forecloses further mandatory bargaining as to that subject.” *NLRB v. US Postal Service*, 8 F.3d 832 (D.C. Cir. 1993). “[T]o the extent that a bargain resolves any issue, it removes that issue *pro tanto* from the range of bargaining.” *Connors v. Link Coal Co.*, 970 F.2d 902, 905 (D.C.Cir.1992).

It is undisputed the subject work is within the scope of the Prem Tech MOA. There is no dispute that the Company and the CWA extensively bargained over the MOA. There is also no dispute that the work assignments at issue were limited to Prem Techs pulling fiber cable from the

⁸ Even if the Board were to apply the “clear and unmistakable waiver” standard, the Company still would prevail. The Prem Tech MOA clearly identifies work tasks that the Company can assign to Prem Techs, including “all work” from the Serving Terminal to inside the customer’s premises for IP enabled products and services. The MDU work at issue squarely falls within this category of work and therefore, the CWA clearly and unmistakably waived its right to bargain over these work assignments.

Serving Terminal to living units inside MDUs. Fiber is installed to transmit IP enabled products and services. The Prem Tech MOA unambiguously gives the Company the right to assign this work to Prem Techs: **“The Premises Technician will perform all work from and including the Serving Terminal up to and including the customer premises for IP enabled products and services.”** (R 1). Not only does the Prem Tech MOA cover Prem Techs pulling fiber from the Serving Terminal to living units in MDUs, the language clearly and unmistakably gives the Company the right to assign that work to Prem Techs.

The Prem Tech MOA authorizes the Company to broadly assign work to Prem Techs. The agreement provides that Prem Techs “will perform all work from and including the Serving Terminal up to and including the customer premises for IP enabled products and services.” (R 1). The agreement also expressly defines the limitations on work that can be assigned to Prem Techs by expressly reserving certain job duties for the Core, including “fusion fiber splicing.” Critically, the Prem Tech MOA does not reserve MDU work or pulling fiber for the Core. (R 1). There is no dispute that TFS Techs performed all fiber fusion splicing on the MDU projects. There is also no dispute Prem Techs worked with fiber since October 2015, and place and replace fiber drops on a daily basis. (Bickel 628-33). A plain reading of the Prem Tech MOA demonstratively gives the Company the right to assign the disputed work to Prem Techs, who performed the same job tasks (connecting wire from the Serving Terminal to the NID or ONT) since 2015.

In *MV Transportation*, the Board made clear that “arbitrators and courts remain the primary sources of contract interpretation.” Slip op. at 11. The assignment of work at issue is entirely consistent with the plain language of the Prem Tech MOA and Arbitrator Vonhof’s award. As demonstrated by Arbitrator Vonhof’s decision, the Prem Tech MOA is prospective in nature and gives the Company the right to assign work that Prem Techs had not previously performed, so long

as the work is covered by the agreement. (R 3). The Prem Tech MOA was signed on April 12, 2015, more than 18 months before TFS Techs began working on MDU projects in late 2016. (R 1; Bickel 628; Brewer 618). There is nothing in the Prem Tech MOA that reserves MDU work for TFS Techs, and Arbitrator Vonhof's award expressly rejected the Union's proposed interpretation of the agreement that sought to reserve work for the Core unless the reservation is stated in the agreement. (R 3). The Prem Tech MOA expressly provides that Prem Techs "will perform all work from and including the Serving Terminal up to and including the customer premises for IP enabled products and services." (R 1). The MDU work at issue here is simply pulling fiber from the Serving Terminal to individual units in the MDUs, for IP enabled products and services. These work assignments were clearly within the agreed upon Prem Tech job duties under plain language of the Prem Tech MOA and the arbitrator's award.

General Counsel's argument that Prem Techs can only be assigned work in connection with a customer order is legally indefensible. Nothing in the Prem Tech MOA limits work assignments to customer orders. The Prem Tech MOA provides that Prem Techs "will perform all work from and including the Serving Terminal up to and including the customer premises." On MDU projects, technicians pull wire from the Serving Terminal to living units. "Customer premises" simply identifies the location where certain work is performed, and plainly means living unit. Although General Counsel attempted to limit Prem Tech job duties to work in response to a customer order, Local 4900 President Tim Strong conceded the MOA itself "doesn't specifically speak to an order." (Strong 52-53). Whether or not the living unit is occupied, the work tasks involved in placing a drop wire are the same, the Prem Tech simply runs fiber from the Serving

Terminal to the NID (or ONT), which is attached to the living unit. The Prem Tech MOA clearly gives the Company the right to assign the disputed work to Prem Techs.⁹

Although the disputed work clearly falls within the duties set forth in the Prem Tech MOA, the Company only needs to show a “sound arguable basis” for its interpretation of the agreement to avoid violating the Act. The Board made clear that “arbitrators and courts remain the primary sources of contract interpretation.” *MV Transportation, supra*, at 11. “The unfair labor practice determination depends solely on the interpretation of the contract in place, and the appropriate standard for the Board to apply is the sound arguable basis standard. The Board has only limited authority to interpret labor contracts and should not act as an arbitrator in contract interpretation disputes.” *Bath Marine Draftsmen's Ass'n v. NLRB*, 475 F. 3d 14, 25 (1st Cir. 2007). Here, the Company clearly had a sound arguable basis to support its interpretation of the Prem Tech MOA, which provides that Prem Techs can pull fiber in MDUs.

The allegation that the Company failed to bargain over the disputed work assignments must be dismissed because the Prem Tech MOA covers the work assignments at issue and establishes that Prem Techs can be assigned to MDU work.

B. CWA Did Not Request to Bargain Over the Work Assignment, and Local 4900 is Not the Bargaining Representative

The Complaint alleges that the Company assigned Prem Techs to pull wire and pre-wire MDUs “without first bargaining with the International Union.” (Complaint ¶ 6(c)). However, it is undisputed that CWA never requested to bargain over the work assignments.

⁹ General Counsel may argue that even if the Prem Tech MOU covers the disputed work, the Company had a duty to bargain over the effects of the work assignments. However, Courts have firmly rejected this type of argument. Where the contract covers a unilateral action taken by an employer, there is no duty to bargain over the effects of the unilateral action. See *Enloe Medical Center v. NLRB*, 433 F. 3d 834, 836 (DC Cir. 2005)(rejecting contention that the employer failed to bargain over the effects of implementing a new policy where it had the right to implement the policy under the contract.)

The Complaint does not allege that the Company failed to bargain with Local 4900, or had any duty to do so. Local 4900 was not the authorized bargaining representative and did not have authority to bargain over the Prem Tech MOA. Indeed, the Board has held an employer does not violate the Act when dealing with the International union instead of the locals when bargaining multi-unit matters. *M&M Transportation Co.*, 239 NLRB 73, 76 (1978). On the other hand, bargaining with a local can constitute an 8(a)(5) violation where the employer had a duty to bargain with another representative, such as a district or International. *Branch Motor Express Co.*, 260 NLRB 108, 117 (1982) (8(a)(5) violation to bargain with locals instead of designated Committee); *Spector Freight System, Inc.*, 260 NLRB 86, 94-95 (1982) (8(a)(5) violation to bargain with locals on matters within province of national negotiations); *Spriggs Distributing Co.*, 219 NLRB 1046 (1975) (where an employer bargains with a representative who has no real or apparent authority, the employer breaches its obligation to deal exclusively with the bargaining agent).

Ellery Hunter notified CWA representative, Curt Hess, on March 2 that the Company was considering assigning Prem Techs to do MDU work in Indianapolis. The Company did not implement the plan until more than six weeks later, on April 16. During that period, Hess never requested to bargain over the work assignments. Hess' only position was a concern about TFS Techs that were being loaned into Indianapolis from Dayton. Hess understood this was never an issue of local concern, but rather the Prem Tech MOA impacted the entire bargaining unit. Although Larry Robbins, the Vice President of Local 4900, requested to bargain over the work assignments, the Company had no duty to bargain with him because he did not have authority to bargain on behalf of the CWA.

C. Assigning Prem Tech to Pull Wire in MDUs was Not a Material or Substantial Change in Prem Tech Job Duties

Local 4900 President Tim Strong plainly admitted the “work that belongs to the Premises Technician is similar or the same work,” as the disputed MDU work. (Strong 52). Standing alone, this admission should be enough to dismiss the allegations that the Company had a duty to bargain over the work assignment. (Complaint ¶ 6). General Counsel simply failed to prove the Company made a material change when it assigned Prem Techs to pull wire on the MDU projects, and therefore the Company did not violate Section 8(a)(5).

Even if General Counsel shows the Company made a change to working conditions, the change is not an unlawful unilateral change unless it has a material and substantial effect on terms and conditions of employment. *Ironton Publication, Inc.*, 321 NLRB 1048, fn. 2 (1996). An employer is not obligated to bargain over changes so minimal that they lack an impact. *Rust Craft Broadcasting of New York*, 225 NLRB 327 (1976); *Peerless Food Products, Inc.*, 236 NLRB 161 (1978) (“[N]ot every unilateral change in work ... rules constitutes a breach of the bargaining obligation.”). No unlawful unilateral change to terms and conditions of employment will be found if the underlying work rule remains the same and a small change is made to the manner in which employees comply with that unaltered rule. *Goren Printing*, 280 NLRB 1120 (1986).

Minor rearrangements to job duties or working conditions are not subject to the bargaining requirement. *See, e.g., Ead Motors E. Air Devices*, 346 NLRB 1060 (2006)(transfer to full-time work in different part of facility, from the tool room to the stock room, did not constitute material change because duties and schedule were the same); *Scott Lumber Company, Inc.*, 117 NLRB 1790 (1957) (new requirement that employees do clean-up work while machines were not operating – as opposed to doing nothing or “horseplay” during that time – did not constitute substantial and material change subject to bargaining); *Alamo Cement Co.*, 277 NLRB 1031 (1985)

(employer did not violate Section 8(a)(5) when it unilateral modified a job classification, because the employee continued to spend most of his time performing the same duties he performed before the change and the changes only resulted in a "slight" increase in his hourly wage, assistance to another employee with a monthly report, and sporadic substitution for another employee.); *Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 327 (1976) (employer's decision to update its time-keeping practices by installing time clocks was not the type of significant change that required bargaining — the decision was part of the "day-to-day managerial control" and also not a "radical" change from past practice).

The only apparent "change" that General Counsel has taken issue with is the fact that Prem Techs are working on MDU jobs rather than demand jobs. However, Prem Techs are performing the same tasks in the same locations that they always have. There is no dispute that prior to 2018, Prem Techs have placed and replaced fiber drops from the Serving Terminal to the ONT on single family homes and in MDUs. (Robbins 242; Collum 314; Strong 117; Hess 584; Wright 365).

Prior to 2018, Prem Techs performed their typical job duties inside of MDUs, including work from the connection point inside the apartment and placing the jack. (Wright 339). Prior to 2018, Prem Techs routinely pulled wire in single family homes, including drilling holes and running wire behind walls. (Wright 357-58). The actual duties that Prem Techs performed on MDU projects was the same type of work they routinely performed, pulling fiber from the Serving Terminal to the ONT. Prem Techs did not require training to perform the MDU work and worked their normal schedules. This is not a material change because the work tasks performed by Prem Techs in MDUs were the same as they performed every day. General Counsel put on no evidence to show the MDU work was more difficult, required additional training or skills, or even involved any work tasks that Prem Techs did not perform prior to the MDU assignments.

General Counsel's claim this is a unilateral change because prior to 2018, Prem Techs only worked on jobs involving customer orders is a red herring and completely irrelevant. Prem Techs were performing the same tasks on MDU projects as they normally performed in the normal course, pulling wire and placing drops. On the MDU projects, Prem Techs simply ran fiber from the Serving Terminals to ONTs. That is the same work Prem Techs performed on single family homes and in MDUs prior to April 16, 2018. Whether the work assignment originated with a customer order or through a contract with a building owner (such as the MDU projects), the Prem Tech performs the same tasks. The work assignments cannot be an unlawful unilateral change because there was no material, substantial, or significant change to Prem Tech job duties.

General Counsel also misleadingly claims that Core Techs are responsible for "constructing the network," and falsely contends the MDU work is somehow part of "constructing the network." This contention ignores the reality that TFS technicians have *never* been responsible for constructing the network. C&E has always been responsible to build the network infrastructure and has hired *contractors* to place fiber in the F-1, build Cross Boxes, place fiber in the F-2, place telephone poles, and place Serving Terminals. (Strong 125; Collum 297-98; Wright 349-351; Hess 574). General Counsel failed to put forth any evidence to show TFS technicians performed any work that could be considered "constructing the network," and each of her witnesses admitted that the network was constructed by C&E contractors. *Id.*

D. Respondent Fully Complied with General Counsel's Subpoena and her Extraordinary Request for Sanctions Must Be Denied

Throughout the hearing, General Counsel repeatedly sought to preclude undisputed facts from coming into evidence. Rather than litigate this case on the facts, General Counsel requested sanctions against the Company to preclude evidence and take an adverse inference, falsely claiming that the Company failed to fully comply with one of eight requests in a Subpoena. The

Company fully complied with the Subpoena, and General Counsel's requests for information outside of the Subpoena, and therefore General Counsel's request for sanctions must be denied.

The subpoena request at issue, Request 8, stated the following:

Any documents which show what classifications of employees performed multi dwelling unit work to pre-wire and/or pull fiber wire inside units from April 12th, 2015 until April 14th of 2018. (Tr 151).

There is no dispute that the Company fully complied with the first seven requests in the Subpoena prior to the start of the hearing, and made exhaustive efforts to comply with Request 8, as General Counsel attempted to modify it throughout the hearing. Prior to the hearing, the Company filed a Petition to Revoke the Subpoena, asserting that Request 8 failed to specify what documents were sought with particularity, it was vague and ambiguous, and it was overbroad to the extent that it sought evidence regarding undisputed issues. The ALJ limited the request to work performed in the Indianapolis market, but otherwise denied the Petition.

As an initial matter, there is no dispute that Prem Techs did not perform the MDU work at issue prior to April 16, 2018. (Tr. 191). Nor is it disputed that C&E contractors and building owners performed the disputed work prior to Fall 2016, when TFS Techs also began performing the disputed work; or that from April 16, 2018 to November 12, 2018, Prem Techs also performed the disputed work. Although these facts are undisputed, General Counsel refused to stipulate to them, instead repeatedly requesting sanctions, claiming the Company failed to provide information in response to this request. General Counsel is merely attempting to establish the false narrative that TFS Techs have exclusive jurisdiction over the disputed work, while TFS Techs have never been the only group performing the work.

In the second day of hearing, July 12, 2019, after General Counsel questioned Jerry Ouellette, the Company's designated "custodian of records," General Counsel modified the

Subpoena request and decided that she wanted the Company to produce work tickets, claiming they were responsive to Request 8. The work tickets were not responsive to Request 8 because (1) they do not show the classification of employee was assigned the work ticket, (2) they may not indicate whether work was performed in an MDU, and (3) they may not indicate if the work performed was “to pre-wire and/or pull fiber inside units.”

General Counsel claimed she wanted the work tickets for the sole purpose of showing whether, prior to April 16, 2018, Prem Techs performed work that was similar to the disputed MDU work. (Tr. 191). Importantly, General Counsel made this assertion after her witness, President of Local 4900 Tim Strong, admitted that Prem Techs normally perform the same or similar work as the disputed MDU work. (Strong 52).

Despite the fact that the work tickets were not responsive to the Subpoena, the Company agreed to produce work tickets, but indicated that producing work tickets for all technicians in all six garages in Indianapolis would be burdensome. The ALJ suggested that the Company produce all work tickets from a single day to provide a representative sample. (Tr. 199-200). General Counsel acknowledged that “2015 is not necessary because they talked about contracts, so we can take out 2015.” (Tr. 199). The parties ultimately agreed the Company would produce 100 work tickets for “Prem Techs in Indianapolis... for the Hannah Garage, the Carmel Garage, the Muller Garage, for the week of April 2nd, 2018.” (Tr. 200-01). General Counsel agreed “That is fine.” *Id.* The agreement was for a “representative sample” of work tickets, there were no discussions of limiting the production to work tickets in an MDU environment.

Although the parties agreed to this production, General Counsel significantly modified her request prior to the next day of hearing, scheduled for August 6, 2019. General Counsel requested samples of tickets for Core Techs as well as Prem Techs, despite her representation that she wanted

the work tickets to see if Prem Techs performed work that was similar to the disputed MDU work, demonstrating that Core Tech tickets could not possibly be relevant.

On July 17, Respondent sent General Counsel two Excel spreadsheets that *summarized all of the data fields contained in every work ticket* from the five garages on the Prem Tech side and the six garages on the Core Tech side. (Tr. 263). Respondent also sent a sample work ticket, which confirmed that every field on the work ticket was also on the spreadsheet. (Tr. 263). Notably, the work tickets do **not** state whether the work was done in an MDU, unless a technician notes such in the “Tech Narrative” field. (Tr. 263). General Counsel easily could have filtered the electronic documents provided to find the actual data contained in any work ticket that she wanted.¹⁰

Although the Company produced all of the data from every work ticket, General Counsel expanded her request once again. Respondent fully complied with the expanded request, producing a representative sample of 300 work tickets: 100 from the Prem Tech Garage, 100 from the Core Tech Garages that were of the “customer demand” variety, and 100 from the Core Tech Garages that were non-customer demand. (Tr. 258). The Company produced this information to General Counsel on July 26, 2018.

General Counsel did not raise any concerns about the work tickets to the Company or to the ALJ until the hearing reopened on August 6. At the outset, General Counsel falsely claimed that Respondent did not fully comply with Subpoena Request 8, claiming: (1) certain work tickets produced were duplicates, (2) work tickets produced for Core Techs included techs from the

¹⁰ Moreover, Respondent Exhibit 23 contains a summary of work tickets that Jerry Ouellette believed to be Prem Techs performing fiber work in MDUs, from April 1, 2018, through April 7, 2018. (Ouellette 510). General Counsel repeatedly objected to entering R 23 into evidence, even though she was provided the work tickets that she requested, and R 23 identified which work tickets may have been relevant to the present case. Ouellette clearly explained how he searched for the potentially relevant tickets, by searching for “MDU” in the narrative field, and by looking for other indications on tickets that showed the assignment involved fiber. (Ouellette 510-14). The whole point of this was to show that Prem Techs performed fiber work in MDUs prior to April 16, 2018, which was confirmed by Angela Bickel and Tim Strong. (Bickel 630-32, Strong 117-120).

Hannah Garage, but there were no Core Techs working out of the Hannah Garage at that time (this is untrue) and (3) the tickets were not representative of the work performed in MDU settings. (Tr. 253). General Counsel conceded that Respondent offered additional work tickets, but claimed the offer was somehow insufficient, because the tickets were not produced by the “deadline.” (Tr. 253). General Counsel did not notify Respondent of the perceived deficiencies or objections until the Parties were on the record in hearing the morning of August 6, 2019. (Tr. 254).

Rather than requesting the documents be produced, General Counsel, again, requested an adverse inference be drawn, that “outside of the contract provided in General Counsel’s Exhibit 27, Core Technicians have traditionally performed the work related to construction of the network of the IP, including but not limited to pre-wiring the fiber optic wire cable.” (Tr. 254). The ALJ proposed to “revisit the issue of production” and indicated that the production should be “enlarged.” (Tr. 529). General Counsel rejected this idea, and asked for sanctions, rather than the production of the information she claimed to have needed. (Tr. 547). Later, General Counsel even went so far as to contend Request 8 included contractor information and contracts. (Tr. 611-614). Such requests are plainly not encompassed within Request 8.

The Board may impose a range of sanctions for subpoena noncompliance, "including permitting the party seeking production to use secondary evidence, precluding the noncomplying party from rebutting that evidence or cross-examining witnesses about it, and drawing adverse inferences against the noncomplying party." *McAllister Towing & Transportation Co.*, 341 NLRB 394, 396 (2004), *enfd.* 156 Fed.Appx. 386 (2d Cir. 2005). The Board is careful not to impose drastic sanctions disproportionate to the alleged noncompliance. See, e.g., *Teamsters Local 917 (Peerless Importers)*, 345 NLRB 1010, 1011 (2005) (reversing judge's dismissal of the complaint as sanction for party's noncompliance with subpoena, due to its harshness and "perhaps

unprecedented" nature and the availability of lesser sanctions). The burden of establishing noncompliance lies with the party that directed issuance of the subpoena. See *R.L. Polk & Co.*, 313 NLRB 1069, 1070 (1994), *affd. mem.* 74 F.3d 1240 (6th Cir. 1996).

The Board has refused to impose sanction where a subpoena request is unclear or where the requesting party fails to establish prejudice. See *Sister's Camelot*, 363 NLRB No. 13 (2015)(sanctions were not proper where requests were vague and no prejudice can be established); *CPS Chemical Co.*, 324 NLRB 1018, 1019 (1997), *enfd.* 160 F.3d 150 (3d Cir. 1998) (no prejudice from opposing party's arguable noncompliance with subpoena duces tecum because "[t]he Respondent identifie[d] no valid point that it was unable to prove for lack of other requested documentation"); *Addressograph-Multigraph Corp.*, 207 NLRB 892, 892 *fn.* 2 (1973) (failure of judge to require opposing party to comply with subpoena duces tecum not prejudicial, as "[t]he record fails to reveal the significance of the additional information sought and how it would affect our conclusions herein").

In stark contrast, in *McAllister Towing*, 341 NLRB 394, 396 (2004), the Board found the ALJ did not abuse his discretion by ordering limited sanctions following the employer's failure to respond to a subpoena, in any respect, prior to the start of the hearing and prior to the ALJ's ruling on a petition to revoke the subpoena. Although there were aspects of the subpoena that were plainly relevant to the matter, the employer failed to even attempt to comply. General Counsel requested (1) an adverse inference on the issues covered by the subpoena, (2) an opportunity to put on secondary evidence on the disputed issues, (3) prohibiting Respondent from cross examining the GC's witnesses on those issues, and (4) prohibiting rebuttal evidence. Finding the GC was prejudiced by the employer's failure to produce information, the ALJ granted the requests for sanctions only to the extent that he permitted the GC to introduce secondary evidence on the

issues in the subpoena and prohibited Respondent from rebutting that evidence (the ALJ permitted cross examination and did not impose an adverse inference).

Unlike *McAllister Towing*, the Company substantially complied with the Subpoena without objection and filed a Petition to Partially Revoke three of the Subpoena requests. The only issue remaining is whether the Company complied with Request 8. At the hearing, General Counsel requested a representative sample of work tickets – which are not responsive to the Subpoena – and the Company agreed to provide the requested tickets. Not only did the Company provide the 300 requested work tickets, it provided spreadsheets with all of the information from all work tickets from the six garages in question.

General Counsel is not prejudiced (and has not even attempted to demonstrate prejudice) by any alleged deficiencies in the Company’s production. General Counsel was provided with the information from every work ticket for the week of April 1-7, 2018. She received far more than the Subpoena requested, and far more than she requested after the Subpoena was issued. Moreover, General Counsel’s stated reasons that the work tickets were relevant was to show that Prem Tech did not perform MDU work prior to April 16, 2018 – yet, there is no dispute that Prem Techs did not perform non-demand MDU work (i.e., without a customer order) prior to April 16, 2018! General Counsel’s other reason for requesting the tickets was to show Prem Techs did not perform similar work, but General Counsel witness Tim Strong already testified they did perform “the same or similar work.” (Strong 52).

IV. CONCLUSION

Accordingly, and for all of the above reasons, the Complaint allegations in Case No. 25-CA-218405 are without merit and must be dismissed.

Respectfully submitted,

/s/ Stephen J. Sferra

Stephen J. Sferra
Jeffrey A. Seidle
LITTLER MENDELSON, P.C.
1100 Superior Avenue, 20th Floor
Cleveland, OH 44114
Telephone: 216.696.7600
Facsimile: 216.696.2038
ssferra@littler.com
jseidle@littler.com

Attorneys for Respondent
Indiana Bell Telephone Company

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of November, 2019, a copy of the foregoing was electronically filed and served via e-mail upon the following:

Patricia McGruder
Field Attorney
National Labor Relations Board, Region 25
575 N Pennsylvania Street, Room 238
Indianapolis, IN 46204
Patricia.mcgruder@nlrb.gov

Larry Robbins
CWA LOCAL 4900
1130 East Epler Avenue
Indianapolis, IN 46227-4202
lrobbins@cwa4900.org

/s/ Stephen J. Sferra

Stephen J. Sferra

One of the Attorneys for Respondent
Indiana Bell Telephone Company

4842-5545-8984.3 056169.1528