

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

INDIANA BELL TELEPHONE COMPANY, INC.,

and

Case 25-CA-218405

COMMUNICATION WORKERS OF AMERICA, LOCAL 4900

Patricia McGruder, Esq., for the General Counsel.
Stephen Sferra and Jeffrey Seidle, Esqs. (Littler Mendelson, PC),
Cleveland, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Indianapolis, Indiana on July 11–12 and August 6–7, 2019. Based on charges brought by the Communications Workers of America, Local 4900 (the Union or Local 4900), the complaint alleges that the Indiana Bell Telephone Company, Inc. (the Company or Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act)¹ on April 9, 2018² by unilaterally assigning to premises technicians fiber optic cable installation work in multiple dwellings which had been traditionally assigned to core technicians. The Company denies the allegations and alleges: (1) the Communications Workers of America (the CWA), as the international union, expressly waived its right to bargain over the assignment of such work to premises technicians; (2) the assignment of such work to premises technicians did not constitute a material, substantial, and significant change in their job duties; and (3) the CWA, as opposed to Local 400, never requested bargaining over the change.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, provides telecommunications services at several facilities in the State of Indiana, including Indianapolis, where it annually derives gross revenue in excess of

¹ 29 U.S.C. §§ 158(a)(5).

² Unless otherwise stated, all dates refer to 2018.

\$100,000. It also purchased and received at its Indiana facilities goods valued in excess of \$50,000 from outside of Indiana. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Company's Operations*

AT&T Teleholdings, Inc. (AT&T) does business in the Midwest United States as AT&T Midwest through the following five subsidiaries: The Company, the Illinois Bell Telephone Company, the Ohio Bell Company, Wisconsin Bell, Inc., and the Michigan Bell Telephone Company. The Company's operations cover Indiana.

In 2006, the Company started providing the U-verse brand of services to residential neighborhoods in the Indianapolis market. U-verse consisted of television, telephone and high-speed internet services provided through an internet protocol (IP) based communication network. The service is supplied to serving terminals at existing and newly constructed single family homes, multiple dwelling buildings and businesses. The Company often refers to the existing structures as brownfield projects, while new construction is referred to as a greenfield work. In new construction, multiple dwelling units (MDUs) are prewired during the rough in stage. In existing construction, there is an existing copper network and fiber is installed from a cross-connect cabinet to a serving terminal in a building or possibly each floor.

The delivery of U-verse services to MDU buildings in Indianapolis has been traditionally performed by core technicians and contractors.³ Core technicians and contractors designed and built the infrastructure, and connected IP networks by installing wire inside buildings.⁴

Premises technicians install and maintain U-verse products and services within MDUs. They set up and connect set-top boxes or modems to jacks already installed by core technicians. From 2007 to 2014, premises technicians dropped or repaired copper wire only. Since 2016, premises technicians also repaired fiber cable in MDUs pursuant to customer orders.⁵ Premises technicians' wage rates and benefits are less than those paid to core technicians, and the two classifications have different work and overtime scheduling rules.

In 2016, the Company restructured operations. Premises technicians were assigned to Internet, Entertainment, and Field Services (IEFS). Core technicians were assigned to either Technical Field Services (TFS) or Construction and Engineering (C&E). TFS technicians are classified as customer service specialists.

³ Although MDU literally refers to a multiple dwelling unit such as an apartment, counsel used the term for both units and the buildings housing them. Given the dispute as to what work was done in and outside of each unit, references to MDUs refer to building units, while the latter refer to MDU buildings.

⁴ GC Exh. 19.

⁵ This finding is based on the undisputed testimony of Angela Bickel. (Tr. 630-633, 639-642.)

B. The Transition to Fiber Cable

Prior to 2011, Indianapolis area MDU buildings were prewired with copper. That year, the Company began installing fiber, which produced much faster service, in newly constructed MDU buildings. The Company used contractors to run fiber cable from its central facility to serving terminals at MDU buildings, but contracted with building owners to prewire with fiber from the serving terminal to an optical network terminal (ONT) serving each MDU.

In July 2015, AT&T acquired DirecTV. As part of the federal regulatory approval process, AT&T, on behalf of its operating companies, agreed to install fiber wire connections for 12.5 million living units throughout the country by the end of 2019. In late 2015, the Company began that effort in residential areas in Indianapolis. By 2018, TFS had contracted out about 35 new construction projects.⁶

MDU projects became more prevalent in Indianapolis beginning in late 2016. Prior to that time, all of the disputed MDU work was performed by building owners or C&E contractors. Core technicians began performing some of this work. The process was the same as in new construction. Fiber cables were connected by a C&E contractor from a central office to a serving terminal in MDU buildings, possibly on each floor. Core technicians then placed drop wires from serving terminals to the ONT for each living unit. In 2017, core technicians began installing inside wiring in both new and existing MDU buildings.

Premises technicians performed the same type of work as core technicians in non-MDU environments, i.e., single-family homes and businesses.⁷ In contrast to the bundles of wires pulled from serving terminals to ONTs, however, premises technicians pulled single fiber wire from the serving terminals to boxes on customer premises called network interface devices (NID), and replaced defective wire.⁸ In addition, premises technicians installed copper wire within MDUs on a daily basis.

C. The Collective-Bargaining Relationship

1. The CWA International, Districts and Locals

The CWA's Constitution provides that the "Communications Workers of America shall be the collective bargaining representative of the members of the Union." CWA Constitution, Art. XVII, Section 1(a). It 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).⁹

⁶ I denied the General Counsel's motion to preclude the testimony of Sherry Brewer, Senior Technical Project Manager, on the grounds that the Company produced contractor invoices for only one project during this time. The subpoena requested documents relating to Company "employees" who performed this work and not contractors. (GC Exh. 27; Tr. 609-616.)

⁷ Core technicians were allowed to work down in classification; however, premises technicians were prohibited from working up in classification. (Tr. 667.)

⁸ This finding is based on Kenneth Wright's credible testimony. (GC Exh. 31; Tr. 338-342.)

⁹ See <http://www.cwa-union.org/pages/constitution>.

The CWA operates through various Districts established under its Constitution as “administrative units.” The Districts are defined by geographic area. Each District is led by a District vice-president and staffed by District representatives employed by CWA. District 4 covers the geographic area encompassed by the CBA (Indiana, Michigan, Ohio, Wisconsin and a portion of Illinois). Local 4900 is a unit of the CWA and includes members in the greater Indianapolis, Indiana area. According to the CWA Constitution, Local 4900 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). In enforcing the CBA and related agreements, Local 4900 has filed grievances and bargained local issues with the Company’s labor relations department, including vacation schedules, allotments, back to work agreements and grievance settlements.

2. The CBAs

For many years, the CWA, through District 4 and local districts, including Local 4900, has been the designated exclusive bargaining representative of approximately 8,000 AT&T Midwest region employees (the Unit) pursuant to Sections 9(a)-(b) of the Act. The CWA/AT&T Midwest bargaining relationship spans over 50 years. Most recently, the Company and CWA were parties to two collective bargaining agreements. The first was effective April 8, 2012 through April 11, 2015. The one at issue here was effective from April 12, 2015 through April 14, 2018 (the CBA).

The appropriate bargaining unit (the Unit) includes the employees described in article 1 and appendix B of the CBA. Those classifications include customer service specialists (core technicians), premises technicians, construction and engineering technicians, marketing support specialists, technical associates, dispatchers, and maintenance administrators.

In early 2007, and as a result of negotiations conducted with the CWA, the Company executed a memorandum of agreement setting forth a separate agreement covering only premises technicians. In 2009, the parties agreed to move the premises technician CBA into appendix F of the CBA (the 2009 agreement).¹⁰ Appendix F covered the terms and conditions of employment solely for premises technicians, while the CBA covered the terms and conditions of employment for other bargaining unit employees, include TFS and C&E technicians. That document included limitations for premises technicians in a separate section that reserved certain tasks for core technicians, permitting premises technicians to perform all other work.

Pursuant to the 2009 agreement, premises technicians installed and repaired telephone, internet and television services, unless the task was specifically reserved for core technicians. They were also tasked with replacing and repairing drop wires from serving terminals to NIDs at single-family homes and MDUs in connection with IP enabled products and devices. In exchange for broadening the scope of premises technician job duties, the Company agreed to increase their wages and benefits. Appendix F remained in effect on April 9, 2018.

¹⁰ The fact that the documents was unsigned is not an issue. (R. Exh. 2.)

D. The 2012 Arbitrator's Decision

In 2011, the parties arbitrated a dispute regarding the scope of premises technician job duties. It was a work jurisdiction dispute regarding the assignment of work to premises technicians that the Union charged was reserved for core technicians. The arbitration was still pending when the Company and District 4 commenced bargaining in February 2012 over the contract, which was expiring April 11, 2012.

On March 21, 2012, the CWA proposed to keep the premises technicians' duties the same as those in the 2009 agreement, but broadly interpreted as the CWA had argued to the arbitrator (i.e., that premises technicians could only perform work that was specifically identified in the premises technicians job duties document, with all other work reserved for core technicians).¹¹ On March 30, 2012, the Union proposed to move the premises technicians into the CBA.

In a decision, dated April 14, 2012, the arbitrator concluded, in pertinent part, that the 2009 agreement permitted assignments requiring premises technicians to perform IP-enabled U-verse services provided over the Company's internet protocol network, including the installation of wire from serving terminals to customers' premises. Additionally, the arbitrator ruled that premises technician job duties applied to the assignment of future work if covered by the CBA.¹²

During continued bargaining on April 17, 2012, CWA proposed to undo the arbitration award by limiting premises technician duties to work on specific equipment and reserving all other work to core technicians unless stated otherwise.¹³ The Company rejected that proposal and the parties agreed to renew the language of the 2009 agreement without any changes.

E. The 2015 Memorandum of Agreement

In a memorandum of understanding, dated April 12, 2015 (the MOU), the parties agreed to modify the premises technician job duties document as follows:

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.

¹¹ R. Exh. 3-4.

¹² Id. at 44.

¹³ R. Exh. 5.

While expanding premises technician's duties, the MOU specifically addressed the duties that continued to be reserved to core technicians:

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.¹⁴

F. The Modification of Premises Technicians' Duties

In October 2015, as part of the Company's fiber optic cable initiative, the Company trained Indianapolis area premises technicians to install and replace single fiber drops from serving terminals to ONTs, the fiber equivalent of the NIDs used for copper. Up to that point, premises technicians were installing copper from serving terminals to NIDs for single family homes and business, and associated equipment such as internet, television or voice over IP.

Prior to April 16, however, premises technicians did not build any phases of the IP network by placing fiber optic cable at the central office or on poles, cross-boxes or distribution boxes, pulling fiber cable to nodes or pull fiber cable throughout residential neighborhoods or MDU buildings, or pulling fiber wires through conduits, such as elevator shafts or ductwork in MDUs buildings. Their MDU related work typically involved the installation and repair of IP enabled services in response to customer orders. The fiber wire was already in place from the serving terminal to the MDU. In most instances, premises technicians worked from the jack to install U-verse or internet services by running copper wire, installed ONTs, jacks where necessary, set-top boxes and modems, checked signals, ran tests of copper wiring or performed repairs of copper wiring and jacks within MDUs. In instances where MDUs had been prewired or switched to fiber, premises technicians merely pushed a button to activate internet service.

Premises technicians also repaired and replaced, but did not pull, fiber wire from serving terminals to ONTs serving MDUs. Where a connection to an MDU was accidentally disconnected, a premises technician would trace the wire and reconnect it to the junction box. Where a fiber connection was incorrectly assigned to the wrong MDU, a premises technician would trace it and enter the correct information at the junction box. If the repair required splicing or fusion of wires or involved fiber from the serving terminal back to the cross-box, premises technicians had to put in a helper ticket for a core technician to repair the connection.¹⁵

¹⁴ GC Exh. 4; R. Exh. 1.

¹⁵ The General Counsel's request that I draw an adverse inference with respect to the Company's subpoenaed production of work tickets for the period of April 1-8 is denied. (Tr. 253-270, 505-530.) Although the production of work tickets was ultimately selective in nature, I give conclusive weight to the 23 work tickets, as interpreted by Kenneth Wright and corroborated by the credible testimony of Danny Collum and Preston Dorfmeier, showing that premises technicians repaired fiber connections but did not pull fiber from serving terminals to ONTs in MDUs prior to April 16. The testimony of Angela Bickel to

G. The 2017–2018 Workloads

5 In 2017 and 2018 in the Indianapolis market, the TFS group experienced high work
volumes. The addition of MDU work brought in-house increased the workload and the demand
was high. The TFS group in Indianapolis did not have enough core technicians to complete the
high volume of work and responded by borrowing other technicians from other TFS areas,
including District 4 unit employees from Dayton, Ohio. In addition, TFS offered and core
10 technicians worked significant overtime in Indianapolis throughout those years.

15 On the other side, the premises technician workload decreased between 2007 and 2018.
The Company regularly allowed premises technicians to voluntarily go home early. On January
9, the Company surplused 20 premises technicians in Indianapolis. Thereafter, the Company
continued to send premises technicians home early or offered voluntary unpaid time off several
days every week due to a lack of work. From January through June, premises technicians in
Indianapolis took 3,417 hours of voluntary unpaid time off due to a lack of work.¹⁶

H. Negotiations about Loaning Premises Technicians to IEFS

20 In response, in late February, TFS Director Bradley Coleman and IEFS Indianapolis
Market Director Jerry Ouellette agreed to dispatch premises technicians to pull wire from serving
terminals located at MDU buildings to individual apartment units. Core technicians would
continue to perform the necessary splicing or connections.¹⁷

25 Coleman then approached the Company's labor relations department for approval to have
premises technicians perform MDU work. On March 2 and 5, Hunter spoke with District 4
Assistant Vice President Curt Hess about the Company's desire to have premises technicians
utilized by TFS for MDU activities. During their discussion on March 5, Hess expressed that,
with the onset of bargaining, it was not the right time to move forward.
30

35 Later that day, Coleman informed Hunter that "John called late last week to tell me, he &
Randy had talk. Randy was wanting us to move forward with loans from IEFS (Prem Techs)
being loaned to TFS for MDU activities (NO fiber splicing). John said Randy was getting with
you about making that communication on with CWA. Have you had the opportunity to have that
discussion?" Hunter replied that the proposal was still under discussion:

Brad, I began the discussion with [the Union] late Friday and more today. They have
(sic) 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
40 that this doesn't interfere with Bargaining. I'll let you know when we are good to go.¹⁸

the contrary was inconsistent with that credible evidence, while Jerry Ouellette interpretation of the
information was vague and uncertain. (Tr. 189, 337-347, 353-363, 498-517, 566-567, 586-588, 627-
633, 711-712, 717-749, 769-771; GC Exh. 30-31; R. Exh. 23-24.)

¹⁶ R. Exh. 18.

¹⁷ R. Exh. 6.

¹⁸ GC Exh. 5; R. Exh. 7.

Hunter and Hess spoke again on March 9. In that meeting, Hess asked Hunter a series of questions about who was going to do the work, when the work was going to be done, and what work the premises technicians were going to do. Hunter answered those questions, and specifically explained that the premises technicians would only pull fiber wire and would not splice or make mechanical connections. He reported to Coleman and Ouellette later that day that the Union was “uncomfortable doing this” and needed answers to the following questions:

Do you have Core techs loaned into Indianapolis from Dayton, OH to help on the MDU work?

If so, how many, how long have they been there, and are you going to send them back when you start using the Prem Techs?

Will the Prem Techs be placing fiber cable in the buildings?

Will they be on site with the Core Techs, or will they do their placing work, leave the site, and then have the Core Techs go do the connections?¹⁹

Later that afternoon, Coleman replied to Hunter that business services technicians had been reassigned to perform MDU work and that loaned technicians from Dayton, Ohio had been temporarily filling in for them performing since March 5. However, the Company wanted the premises technician loaned to TFS in Indianapolis so it could return the business services technicians back to their regular (non-MDU) work and send the Dayton technicians to help in Columbus, Ohio. He also explained that premises technicians would only be pulling fiber drops in MDU buildings, while core technicians would continue to make the necessary fiber splicing connections.

On March 13, Hess emailed Hunter objecting to the assignment of the MDU work to premises technicians in Indianapolis. Hess claimed that this work had long been performed by core technicians, was outside the job duties of premises technicians and insisted “that any and all proposed additions to the job duties of the Premise Technician should be properly addressed during the negotiations in which the parties are currently engaged in.” Hunter disagreed:

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.²⁰

On April 11, during a sidebar discussion during bargaining, Hunter told Hess the Company would be executing its plan to dispatch premises technicians to assist on MDU work.

¹⁹ While explaining why he requested the information, Hess noted his concern as to whether the work usually done by core technician position was migrating from “higher paid titles to lower” and whether it would result in a “reduction of opportunity for overtime.” (GC Exh. 6-7; R. Exh. 8; Tr. 582-583.)

²⁰ GC Exh. 9; R. Exh. 9-10.

Hess said he was “disappointed” and the issue was not discussed further. After that session, Hunter told Coleman and Ouellette that “the freeze was off” and they could “move forward.”²¹

5 After being informed by Ouellette about the change, Area Manager Angela Bickel called
Local 4900 Vice President Larry Robbins on April 12 to notify him the Company would be
assigning a small number of premises technicians to pull wire in MDUs beginning on April 16.
Robbins objected and called Local 4900 President Timothy Strong to confirm that CWA had not
10 agreed to such a change at the bargaining table.²² He then called Ouellette stating his opposition
to premises technicians performing such work and concern that it would impact bargaining.
Ouellette denied that IEFS would be “loaning” premises technicians to TFS or that the work was
outside the scope of their duties. Ouellette also noted that the additional work duties would help
keep premises technicians employed.

15 Shortly after their discussion, Robbins emailed IEFS area managers in Indianapolis,
copying Ouellette and Coleman, stating that the Union was “unequivocally opposed” to the
Company unilaterally loaning premises technicians to TFS premises technicians to perform
MDU work. He added that the issue was discussed during current bargaining where the Union’s
bargaining committees reiterated the same position. Robbins also warned that an extensive
20 request for information would follow and requested to bargain over the change.²³

25 Before responding, Ouellette consulted with Labor Case Manager Grace Biehl. They
decided to characterize the additional premises technician duties as a work assignment, not a
loan. He then updated Coleman and Hunter of the Union’s “great resistance” to the plan and
replied to Robbins:²⁴

30 I would like to be clear that IEFS is not loaning technicians to IEFS. This is a job
assignment for work that IEFS technicians are qualified to do (drilling holes and pulling
fiber). The company does not see this as a unilateral change to the process we use today
to assign work Premise Technicians are qualified to do. Please let me know if you have
additional questions or concerns.²⁵

35 Robbins replied that the work assignments were a unilateral change to work “traditionally
done by TFS” and asked if the Company was denying the Union’s right to bargain. In his reply,
Ouellette denied the unilateral change, reiterating that “IEFS has the right to assign work that
technicians are qualified to do and, as such, there is nothing to be bargained. As always, I am
willing to meet to discuss any questions or concerns you have.”²⁶

²¹ Hunter’s testimony regarding these events was undisputed and corroborated by his bargaining notes. (Tr. 700–704; R. Exh. 11.)

²² During her testimony about this event, Bickel clarified that premises technicians never “work up to do core tech work.” (Tr. 212–214, 637–638.)

²³ Ouellette testified that he spoke with Robbins on April 11, but then clarified that it was shortly before he received the email from Robbins on April 12. (Tr. 473–480; GC Exh. 11; R. Exh. 12.)

²⁴ R. Exh. 13–14.

²⁵ R. Exh. 15.

²⁶ GC Exh. 12; R. Exh. 16–17.

Later that day, Robbins sent TFS Area Manager Michael Shea Culver a request for information relating to work performed by core and premises technicians since January. Ouellette provided the information on April 16, stating in pertinent part, that six technicians had been utilized for MDU work and their titles were CSS or “Systems Technicians.”²⁷

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I. Premises Technicians Assigned to Perform MDU Work

The work assignments at issue were assigned to premises technicians from April 16 through November 12, a 7-month period. They continued to work their normal schedules and their hours were not cross charged to TFS. The Company dispatched about two to three qualified premises technicians per week to work alongside core technicians in MDU buildings. The premises technicians pulled multiple fiber optic wires – as many as 50 to 60 – from serving terminals to ONTs in MDUs, while core technicians continued to install serving terminals and pull, splice and fuse the wires.²⁸ During that period, a total of 227 dispatches were assigned to nine premises technicians. Premises technicians performed 3.19 percent of the total MDU work during that period. TFS technicians performed nearly 50,000 hours of MDU work,²⁹ while premises technicians worked 1,645 hours of MDU work.³⁰

On April 19, the Union filed the first of several grievances relating to the assignment of premises technicians to perform MDU work that had been traditionally performed by core technicians. During bargaining on the same day, the Company tendered a written proposal to have premises technicians perform fiber fusion splicing and installation of all products without the limitation of reserved work for core technicians. The proposal did not specify the geographic area of Indianapolis.³¹ On April 26, the Union rejected that proposal and countered with the current language.³² On May 1, the Company countered with premises technician duties that again included fiber fusion splicing. The proposal included work reserved for core technicians, but excluded reserving fusion fiber splicing for them.³³ On June 6, the Union countered again with the current language. On June 27, the Company proposed premises technician duties identical to the previous contract and, on June 28, the parties tentatively agreed to leave premises technician duties unchanged from the previous contract.³⁴ In August 2019, the Company and CWA ratified a successor agreement to the CBA.

35

LEGAL ANALYSIS

I. THE DUTY TO BARGAIN OVER MATERIAL CHANGES

The General Counsel alleges that the Company violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union before unilaterally changing the work assignments of core

²⁷ R. Exh. 19–20.

²⁸ Wright credibly testified that he was not trained to do the disputed work that he did with the core technicians and just “followed their lead and did what 11 they told me to do.” (Tr. 341-347.)

²⁹ TFS personnel included core and business services technicians sent to assist during this period.

³⁰ R. Exh. 21–22.

³¹ GC Exh. 20.

³² GC Exh. 21.

³³ GC Exh. 22.

³⁴ GC Exh. 23–24.

and premises technicians relating to pulling fiber and/or prewiring in the final phase of the IP network in MDUs in Indianapolis from April 16 to November 12. The Company contends that the assignments were covered by the MOA and were not a material, substantial or significant change to premises technicians' duties. It also asserts that the Union was not the exclusive bargaining representative and had no right to demand bargaining or bargain on behalf of CWA.

Employers have a duty to bargain with the Union under Section 8(a)(5) about employees' wages, hours, and other terms and conditions of employment. These terms and conditions are "mandatory" subjects of bargaining. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). The Board recognizes that changes to employees' work assignments are mandatory subjects of bargaining. See, e.g., *Pepsi-Cola Bottling of Fayetteville*, 315 NLRB 882, 895 (1994) (employee start time a mandatory subject of bargaining); *Treanor Moving and Storage Co.*, 311 NLRB 371, 386 (1993) (employee hourly schedule is mandatory subject of bargaining); *Laidlaw Waste Systems*, 307 NLRB 52 (1992) (wage increase is a mandatory subject of bargaining). Thus, an employer violates its duty to bargain when it makes "a material, substantial, or significant change on a mandatory subject of bargaining without first giving the union notice and a meaningful opportunity to bargain about the change to agreement or impasse, absent a valid defense." *NLRB v. Katz*, 369 U.S. 736, 747 (1962).

When analyzing unilateral change, the Board considers the degree of impact to employees and their working conditions. See, e.g., *Ironton Publications*, 321 NLRB 1048, fn. 2 (1996) (reassigning certain camera work to non-bargaining unit employees was not a material and substantial change, as it did not have a significant impact on the bargaining unit). A change is unlawfully unilateral if it causes a real impact to employees or their working conditions. See, e.g., *Bohemian Club and Unite Here*, 351 NLRB 1065 (2007) (reassigning duties that resulted in cooks working extra time constituted a material and substantial change); *Iliana Transit Warehouse Corp.*, 323 NLRB 111 (1997) (implementing rule and hour changes without bargaining or notice constituted a material and substantial change). However, employer action that merely modifies an existing procedure is not an impermissible unilateral change. See, e.g., *Rust Craft Broadcasting of New York, Inc.* 225 NLRB 327, 327 (1976) (change from handwritten time cards to time clock immaterial); *UNC Nuclear Industries*, 268 NLRB 841 (1984) (change from non-oral to oral operator startup readiness tests immaterial); *W-I Forest Products Co.*, 304 NLRB 957, 959 (1991) (changes in smoking restrictions immaterial).

Work assignments to premises technicians and core technicians are mandatory subjects of bargaining encompassed within the CBA and MOU. Since 2009, premises technicians have installed and repaired connections for telephone, internet and television services in connection with customer orders, unless the task was specifically reserved for core technicians. They installed, replaced and/or repaired single drop wires from serving terminals to NIDs at single-family homes and businesses, and repaired or replaced wiring in MDUs in connection with IP enabled products and devices. Since 2016, premises technicians have also been trained to perform similar functions with fiber wire. However, they never pulled and/or prewired multiple fiber in MDU structures during the final phase in the construction of the network infrastructure.

The MOU authorized assignments to premises technicians to "perform all work from and including the Serving Terminal to and including the customer premises for IP enable product and services." The disputed work, however, is unrelated to the customary demand work or orders

that premises technicians were ordinarily tasked to perform. It was different to the extent that it required premises technicians, who usually worked alone, to work alongside a crew of core technicians and in locations they had not encountered previously. It also required them to pull multiple fiber wires – as many as 50 to 60 in a bunch – instead of a single one. Premises technicians were not, however, required to prewire, splice or fuse wire. The premises technicians were trained to perform this work in 2015 and, while it was a new function, Wright’s testimony established that the 9 premises technicians only needed to “follow the lead” of the core technicians in their crew. Moreover, the assignments did not alter their shift schedules or pay structure. As such, the disputed work performed by premises technicians was not substantially different from their work in pulling fiber or copper cable in non-MDU structures. As explained below, however, it was work that was contractually reserved to core technicians. Thus, any changes to those terms and conditions of employment were a mandatory subject of bargaining.

II. THE PREMISES TECHNICIAN MOU

The pivotal issue in this case revolves around the interpretation of the premises technician MOU as it relates to the pulling and pre-wiring of fiber wire in the final phase of building the IP network in MDUs. The Company contends that the document afforded it broad authorization since 2015 in the assignment of work to premises technicians and, specifically, the duty to pull fiber cable from serving terminals to MDUs based on the following language: “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.” The Company asserts that this is consistent with the practice of premises technicians between 2015 and 2018. In addition, the Company notes that the MOU expressly defined the limits on work that can be assigned to premises technicians by expressly reserving certain job duties for core technicians, including “fusion fiber splicing,” but not MDU work or pulling fiber for core technicians. Finally, the Company refers to the 2012 arbitration award rejecting the Union’s claim that sought to reserve all work to core technicians unless otherwise stated in the CBA.

The General Counsel contends that the MOU’s specific description of premises technicians duties, coupled with the reservation of certain work for core technicians, and past practice, are at odds with the Company’s deployment of premises technicians to perform fiber installations in MDU buildings after April 16. The General Counsel argues that the contractual authority and past practice of premises technicians is limited to the installation and maintenance of IP enabled products at customer premises including at the serving terminal, but excluding splicing, when premises technician have been dispatched to complete customer orders. The General Counsel also construes the 2012 arbitration award decision as inapplicable to the issues here because it related to demand work performed by premises technicians.

In assessing the applicability of the MOU to the disputed work by premises technicians, we are guided by the Board’s recent decision in *MV Transportation*, 368 NLRB No. 66 (2019). In *MV Transportation*, the Board modified its “clear and unmistakable waiver” standard by incorporating an initial “contract coverage” analysis as to whether the alleged change falls within the plain language of the agreement. If not, a significant unilateral change to a term or condition of employment constituting a mandatory subject of bargaining will be deemed unlawful “unless it demonstrates that the union clearly and unmistakably waived its right to bargain over the change or that its unilateral action was privileged for some other reason.” *Id.* at 2.

The plain language of the MOU enlarged some of the duties of premises technicians but only in the context of demand work in response to customer orders. The key terminology throughout the document is “customer premises,” which precludes any notion that premises technicians were expected to build any part of the network except for the very end of the process and as it related to the delivery of services to a “customer.” The MOU recited specific additional premises technician duties in connection with the installation of IP enabled products and services, as well as the related field connections, including fiber cross-connects and fiber drops. It also explicitly reserved certain work to core technicians, including fusion fiber splicing, but added that 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.”

The 2012 arbitration award did not conclude otherwise. Based on the parties’ intent, past practice, and bargaining history, the award found it permissible under the MOU for premises technician to assigned to install and maintain “IP enabled products and services,” including U-verse, from serving terminals to customers premises. That decision, however, did not expand the role of premises technicians beyond their role in responding to customer orders only.

Accordingly, a plain reading of the MOU coverage and the related contextual evidence establishes that: (1) non-demand work installing the last phase of the IP network in MDU structures was exclusively reserved to core technicians; and (2) it did not increase premises technicians’ duties to perform work in connection with non-demand work, whether building and connecting the IP network to new construction or integrating it into an existing MDU structure. As such, the assignment of duties to premises technicians requiring them to pull fiber in MDU buildings from April 16 to November 12 was outside the scope of those enumerated in the MOU.

III. THE UNION DID NOT WAIVE ITS RIGHT TO BARGAIN OVER THE CHANGE

A. *The Parties’ Past Practices*

Assuming, arguendo, that the plain language of the MOU is not deemed to have reserved the disputed work to core technicians, the Board examines whether the Union, based on the parties’ bargaining history, past practices, and contractual language, waived its right to bargain over the unilateral change. See, e.g., *American Diamond Tool*, 306 NLRB 570, 571 (1992) (waiver found based on union’s conduct clearly indicating that it would not object to unilateral layoffs); *E. I. DuPont de Nemours & Co.*, 367 NLRB No. 145, slip op. at 4 (2019) (contractual language relevant to a waiver analysis together with bargaining history and past practice).

Nothing in the parties’ bargaining history or past practice indicates a waiver by the Union with respect to the performance of non-demand work by premises technicians. To the contrary, the established practice of pulling fiber cable in connecting the last phase of the IP network to MDU buildings since 2016 was a category of work contractually reserved to and performed by core technicians from TFS, as well as those loaned from other departments. Consistent with the terms of the MOA, core technicians or contractors handled all non-demand work and built the IP network to the NID or ONT of an MDU building. They were not dispatched to perform the subsequent process of installing IP products and services; that was done exclusively by premises

technicians. Moreover, core technicians had a right of first refusal for their work, and if the work was declined, then contractors could perform the work. Finally, although core technicians could perform premises technicians' tasks under the CBA, premises technicians were prohibited from performing from "working up" to perform core technicians' duties.

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B. The Demands to Bargain over the Change

The Company also contends that the request to bargain were invalid because it was made by the Local 4900, and not CWA, the party named in the CBA. CWA is indeed the designated exclusive-bargaining representative of the Unit pursuant to Sections 9(a)-(b) of the Act and recognized as such at all material times by the Company. However, the CWA operates through various Districts established under its Constitution as "administrative units." Pursuant to Art. XIII, Sections 9(a)-(b) of the CWA Constitution, the Local 4900, as one of those administrative units, is obliged to "represent workers in their respective jurisdiction relating to Local matters." In that regard, the Local 4900 has bargained local issues with the Company's labor relations department and filed grievances in enforcing the contract. Accordingly, the Local 4900 was certainly empowered on behalf of CWA, the authorized bargaining representative, to raise its objection to an alleged violation of the CBA impacting its jurisdiction, demand bargaining over the change, and file the appropriate grievances and unfair labor practice charges on behalf of CWA.

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The cases cited by the Company stand for the proposition that an employer violates Section 8(a)(5) when it bargains with a local labor organization instead of the district or International with whom it has the contractual duty to bargain. *Branch Motor Express Co.*, 260 NLRB 108, 117 (1982) (violation to bargain with locals instead of designated committee); *Spector Freight System, Inc.*, 260 NLRB 86, 94-95 (1982) (violation to bargain with locals on matters within province of national negotiations); *Spriggs Distributing Co.*, 219 NLRB 1046 (1975) (employer breaches duty to deal exclusively with bargaining agent when it bargains with a representative who has no real or apparent authority). Here, however, there is no indication that the Company was being asked to bargain with the Union instead of CWA. Robbins, in his April 12 email, merely told Hunter that the Company needed to bargain over the change. He did not state anything to suggest that he was sidestepping CWA, which was in the midst of bargaining with the Company over a new contract for core and premises technicians.

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In any event, the record established that CWA and the Local 4900 both objected to the unilateral change when notified and requested bargaining. After several exchanges with Hunter, Hess objected on March 13 and requested that the Company bargain over the proposed changes at the main bargaining table. Hunter rejected that request on March 17. Ouellette rejected a similar request by Robbins on April 12.

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C. There was Insufficient Justification for the Unilateral Change

At the time of the Company's unilateral changes, the parties were in the midst of bargaining and there is no evidence that the parties were even remotely approaching an impasse on this or any other issue. As such, there were only two possible grounds for the Company to have implemented a unilateral change to working conditions: economic exigency and delay tactics by the CWA. *Bottom Line Enters.*, 302 NLRB 373, 374 (1991). There is no claim that

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the CWA engaged in delay tactics on this or any other issue at that point so the remaining question is whether there were exigent circumstances justifying the unilateral action.

5 The economic exigency exception as defined by the Board is limited to “extraordinary events which are an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.” *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995). In *RBE Electronics*, 320 NLRB 80 (1995), the Board made it clear that “[a]bsent a dire financial emergency, economic events such as ... operation at a competitive disadvantage ... do not justify unilateral action,” citing *Triple A Fire Protection*, 315 NLRB 409, 414 (1994). Moreover, 10 “business necessity is not the equivalent of compelling considerations which excuse bargaining.” *Hankins Lumber Co.*, 316 NLRB at 838.

15 Here, the Company needed additional core technicians to perform the end stage IP infrastructure work in MDU buildings. Its initial step was to borrow core technicians from its business services division to perform the MDU building work and borrow core technicians from Dayton to fill in for the business services technicians while they were doing that. After premises technicians were assigned to perform the disputed work, the loaned core technicians were sent back to Dayton. These circumstances did not constitute exigent circumstances or provide a compelling business justification to privilege its action to utilize premises technicians to perform 20 the pulling of fiber cable in the final phase of building the IP network in MDUs without bargaining first with the Union.

D. Impact of the Unilateral Change on Core Technicians

25 The Company’s assignment of the disputed work to premises technicians took away work from core technicians, who were paid higher regular and overtime wages. Prior to April 16, the Company borrowed employees from the same bargaining unit represented by District 4 in Dayton, Ohio to assist with the increased MDU workload. Rather than continue to use core technicians from Dayton or other bargaining unit locations, the Company unilaterally decided to 30 utilize 9 premises technicians to perform the disputed work. Thus, the change in work assignments from core technicians to premises technicians resulted in a loss of work for the former that was material, substantial and significant. *Overnite Transportation Co.*, 330 NLRB 1275, 1276 (2000) (even the potential loss of work is sufficient to require bargaining).

35 Under the facts and circumstances, the Company’s unilateral, substantial and material change and refusal to bargain over the assignment of premises technicians to perform the disputed work, which resulted in an alteration of the compensation structure for such work, and the loss of work, from April 16 to November 12, violated Section 8(a)(5) and (1) of the Act.

40 CONCLUSIONS OF LAW

1. The Respondent, Indiana Bell Telephone Company, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

45 2. The Communications Workers of America, District 4 is a labor organization within the meaning of Section (5) of the Act.

3. The Communications Workers of America, Local 4900, a/w Communications Workers of America, District 4 is a labor organization within the meaning of Section (5) of the Act.

5 4. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally utilizing premises technicians to perform the pulling of fiber cable in the final phase of the building of the IP network in the Indianapolis market.

10 5. The above unfair labor practice affects commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

15 Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁵

20 ORDER

The Respondent, Indiana Bell Telephone Company, Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall

25 1. Cease and desist from

30 (a) Refusing to bargain collectively with Communications Workers of America, District 4 and Communications Workers of America, Local 4900, a/w Communications Workers of America, District 4 as the exclusive bargaining representative of the employees in the appropriate unit:

All employees described in Article 1 and Appendix B of the collective-bargaining agreement between AT&T Midwest and Communications Workers of America, District 4, effective from April 12, 2015 through April 14, 2018.

35 (b) Refusing to bargain collectively with Communications Workers of America, Local 4900, a/w Communications Workers of America, District 4 as the exclusive bargaining representative of the employees in the appropriate unit in the Indianapolis market:

40 All employees described in article 1 and appendix B of the collective-bargaining agreement between AT&T Midwest and Communications Workers of America, District 4, effective from April 12, 2015 through April 14, 2018.

(c) Unilaterally utilizing premises technicians to perform the pulling and pre-wiring of fiber cable in the final phase of building the IP network in the Indianapolis market.

³⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

5 2. Take the following affirmative action necessary to effectuate the policies of the Act.

10 (a) On request, bargain in good faith with the Communications Workers of America, District 4 and/or Communications Workers of America, Local 4900, a/w Communications Workers of America, District 4 the as the exclusive collective-bargaining representative of employees in the Indianapolis market.

15 (b) Make whole all core technicians who lost wages and other benefits because Respondent unilaterally utilized premises technicians to perform the pulling and pre-wiring of fiber cable in the final phase of building the IP network in the Indianapolis market; and

20 (c) Within 14 days after service by the Region, post at all of its facilities in Indianapolis, Indiana, copies of the attached Notice.

25 (d) Within 21 days after service by the Region, file with the Regional Director for Region 25 a sworn certification of a responsible official on a form provide by the Region attesting to the steps the Respondent has taken to comply.

Dated: Washington, D.C. December 11, 2019

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Michael A. Rosas
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT refuse to bargain in good faith with the Communications Workers of America, Local 4900, a/w Communications Workers of America, District 4, as the exclusive collective-bargaining representative of the following employees:

All employees described in article 1 and appendix B of the collective-bargaining agreement between AT&T Midwest and Communications Workers of America, District 4, effective from April 12, 2015 through April 14, 2018.

WE WILL NOT change your terms and conditions of employment including by transferring any bargaining-unit work involving multi-dwelling units from core technicians to premise technicians without first notifying the Union and giving it an opportunity to bargain regarding the decision and its effects.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL bargain in good faith with the Union as the exclusive collective-bargaining representative of the above-described unit, including bargaining with the Union before implementing any changes in wages, hours, or other terms and conditions of employment of bargaining unit employees.

WE WILL make whole all core technicians who lost wages and other benefits because we changed your terms and condition of employment by transferring bargaining-unit work involving multi-dwelling units from core technicians to premise technicians without first notifying the Union and giving it an opportunity to bargain regarding the decision and its effects.

INDIANA BELL TELEPHONE COMPANY, INC

(Employer)

Dated _____ By _____
(Representative) (Title)

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

Minton-Capehart Federal Building, 575 N. Pennsylvania Avenue, Room 238,
Indianapolis, IN 46204-1577

(317) 226-7381, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/25-CA-218405 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE
DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY
OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR
COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE
REGIONAL OFFICE'S COMPLIANCE OFFICER, (317) 991-7644.