

**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

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**RESPONDENT INDIANA BELL TELEPHONE COMPANY'S BRIEF IN SUPPORT OF  
EXCEPTIONS TO THE DECISION OF THE ALJ**

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the sole question of whether Respondent, Indiana Bell Telephone Company (“Company”), unlawfully unilaterally assigned 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 Indianapolis from April to November 2018. The Complaint’s sole allegation is that the Company violated the Act by failing and refusing to bargain with the Communications Workers of America (i.e., the “International Union”) (“CWA” or “Union”). (Complaint ¶6(c)). The Board must reject Administrative Law Judge Michael Rosas’ (“ALJ”) extraordinary conclusion that the Company violated Sections 8(a)(1) and (5) of the Act by failing to bargain with the CWA because it is legally and factually indefensible.

The ALJ erred by misapplying the Board’s decision in *MV Transportation*, 368 NLRB No. 66 (2019), in finding the Company had a duty to bargain over assigning “non-demand” fiber installation work in MDUs to Prem Techs, because the parties’ bargained agreement already covered the disputed work assignment. The ALJ erred further by concluding that the CWA did not waive its right to bargain over that subject. CWA never requested to bargain and never designated the Charging Party, CWA Local 4900, as its bargaining representative.

In April 2018, and following notice and extensive discussions with the CWA, the Company began to assign a limited number of Prem Techs in the Indianapolis area to install fiber optic cable in MDUs. The work consisted of pulling strands of fiber cable through walls and ducts between the buildings serving terminals and each living unit. 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 ALJ’s finding that the Company had a duty to bargain over assigning “non-demand” fiber installation work in MDUs to Prem Techs squarely contravenes *MV Transportation*. That

decision fundamentally altered the Board's assessment of alleged unilateral changes and mandates the Complaint's dismissal. In *MV Transportation*, the Board adopted the "contract coverage" standard, providing where "contract language covers the act in question, the agreement will have authorized the employer to make the disputed change unilaterally." Under *MV Transportation*, 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."

The Company's assignment of the disputed work was proper under *MV Transportation* because the assignments are covered by the Premises Technician Job Duties Memorandum of Agreement ("Prem Tech MOA") that was bargained and agreed to by the Company and the CWA. The MOA provides that "[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 disputed work falls squarely within that empowering language. When performing the MDU work, the Prem Techs merely ran fiber from the Serving Terminal to each living unit, a task clearly within the scope of their duties under the Prem Tech MOA. Because the Parties' bargained agreement covers the disputed work, the Company had no continuing duty to bargain over the work assignments and did not violate the Act. This conclusion is further manifested because the ALJ correctly held that this disputed work "was not substantially different" from the work performed by Prem Techs in the ordinary course of their job duties. (Decision at 12: 9-10).

The ALJ's conclusion that the assignments were improper under *MV Transportation's* "contract coverage" standard is patent error and cannot stand. His central conclusion that Prem Techs were limited under the MOA to perform only "demand" work associated with a customer order contravenes the agreement's plain language and the parties' bargaining history, as further confirmed by the 2012 arbitration award by Arbitrator Vonhoff. The MOA's express grant of

broad jurisdiction to Prem Techs to perform “all work *from* and including the Serving Terminal *up to and including* the customer premises for IP enabled products and services” plainly covers the disputed work of running fiber cables from an MDU’s Serving Terminal to each living unit. Moreover, Arbitrator Vonhoff’s express finding that the agreement was “prospective in the sense that it is meant to apply to the assignment of work happening in the future” further proves that the parties’ agreement was not static and not limited to work tied to a customer order.

The ALJ’s parallel conclusion that the disputed work is “exclusively reserved” to Core Techs under the Prem Tech MOA also cannot be rationally drawn from the agreement’s plain language. The MOA expressly reserves for Core technicians only specific and limited work that they historically have performed relative to services *not* provided over the IP network. Under the MOA, the only “IP enabled work” reserved to Core Techs is fiber fusion splicing, and Prem Techs did not perform that work, nor any of the limited tasks expressly reserved for Core Techs.

The ALJ’s corollary finding that Core Techs have “right of first refusal” to perform the disputed work also is baseless. It is undisputed that from 2011 through late 2016, building owners and contractors performed all inside wiring work in MDUs in Indianapolis; Core TFS technicians did not start to perform that work until late 2016. The disputed work was never performed exclusively by Core Techs and they have no jurisdictional claim to it.

The ALJ also erred fundamentally by finding that the CWA did not waive its right to bargain over the disputed work assignments. This extraordinary conclusion is based on two patently false premises: (1) that Local 4900 was “certainly empowered on behalf of CWA” to request bargaining, and (2) that CWA District 4 Vice President Curt Hess “requested bargaining.” (Decision 14: 16-19; 14:35-36). Each assertion is demonstrably false.

It is undisputed that before assigning any of the disputed work to Prem Techs, the Company gave the CWA notice, and Company and CWA representatives had multiple discussions over the issue. It is equally undisputed that CWA District 4 Vice President Curt Hess never requested to bargain over the subject and never delegated that responsibility to Local 4900. Although the Local requested to bargain after-the-fact *on its own behalf*, the Local never asked to bargain over this subject on behalf of the CWA and, in fact, lacked authority under the CBA and the CWA's Constitution to do so. The ALJ cites no evidentiary support for his unsupported conclusion that CWA "requested bargaining" over the work assignments, and there is none in the record.

For all of these reasons, the ALJ's decision must be overturned and the Complaint dismissed in its entirety.

## **II. QUESTIONS PRESENTED**

The Company's Exceptions and Brief in Support present the following issue:<sup>1</sup> Whether the ALJ erred in finding the Company violated Section 8(a)(1) and (5) 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." (D 16:4-6).

## **III. STATEMENT OF THE FACTS**

### **A. Background of the Parties**

The Company provides telephone, internet, and television services to business and residential customers. (Tr. 6).<sup>2</sup> For many years, Communications Workers of America ("CWA"

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<sup>1</sup> The specific issues argued in this Brief in Support are set forth in the Argument headings and sub-headings contained in Section IV, Argument.

<sup>2</sup> 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.

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 effective April 12, 2015, to April 14, 2018.<sup>3</sup> *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 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 then separate from the CBA. (White 402). In 2009, the Parties agreed to move the Premise Technician Agreement into Appendix F of the CBA, which governed terms and conditions of employment for Prem Techs. 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”).<sup>4</sup>

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,

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<sup>3</sup> In August 2019, the Company and CWA ratified a successor agreement.

<sup>4</sup> 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 work in different departments.

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 operates through various "Districts" established under the CWA Constitution as "administrative units" of the CWA, each 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 area. Pursuant to the CWA Constitution, CWA Locals are 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 job duties that can be assigned to Prem Techs and the job duties specifically reserved for "Core Techs." The job duties of Prem Techs are set forth in a Memorandum of Agreement dated April 12, 2015 ("Prem Tech MOA"),<sup>5</sup> which includes:

1. The Premises Technician will perform all work at the customer premises up to and

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<sup>5</sup> 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."

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.

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)(emphasis added).

### **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”). The ALJ erroneously adopted the General Counsel’s central, and false,

factual averment that “Core Techs” historically built or “constructed” the Company’s network infrastructure from the Central Office to customer homes. This is a fallacy, refuted by undisputed facts.

“Core Tech” is not a contractual job classification, but rather a term commonly used to refer to “legacy” technicians who worked for years in different departments prior to the creation of the Prem Tech title in 2006. Technicians in TFS and C&E are referred to as “Core Techs” because they work under the core CBA, as opposed to Prem Techs in the IEFS department, who work under Appendix F. Thus, the term “Core Tech” generically refers to technicians in TFS or C&E. (White 441).

The 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” segments of the network, and the placement of telephone poles, Cross Boxes, and Serving Terminals. (White 441; Collum 297-98; Hess 574).<sup>6</sup> 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 of the network infrastructure. (White 388-390). TFS technicians work on the F-1 cable from a Central Office (“CO”) to the as Cross Boxes, which distribute cable to Serving Terminals, which distribute cable to customer premises. (Strong 116-17). 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

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<sup>6</sup> The F-1 segment runs from a Central Office to the first distribution point, a Cross Box. The F-2 segment runs from the Cross Box to the next distribution point, a Serving Terminal. (White 388).

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 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). The Company first constructed the "IP network," which was distinct from the existing "legacy" network that delivered traditional telephone, dial-up internet, and ATM-based DSL internet services. (White 391; R 3).

The new IP network required new equipment and placement of fiber optic cable in the field, replacing 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 lower 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 scheduling flexibility. (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 IP-network 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 Techs required dispatch of a TFS technician 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 corrected 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).<sup>7</sup> 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. (White 410). The Parties agreed to expand Prem Tech duties so they could place and replace drops from the Serving Terminal to the NID for IP enabled services, eliminating the need to send a TFS Tech to do needed drop work. (White 410).

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).

At the Union's request the Parties memorialized their 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 on Prem Techs duties in a separate section that reserved certain duties for Core Techs, permitting Prem Techs to perform all other work. (White 410). Nothing in that document purports to limit Prem Techs to performing only work associated with a customer order, and the Parties never discussed such a limitation in 2009 bargaining. (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

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<sup>7</sup> 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).

other working conditions. (White 420). It is undisputed that 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, CWA 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, CWA 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). 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 specifically authorized in the proposed agreement, and excluded any future work. (R 5). While the Prem Tech Job Duties Agreement gave 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 and putting the Prem Techs in the Core CBA. That would have meant Prem techs would have received the same wages, benefits and working conditions as the Core Techs. (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 cancellation 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 to work 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 ever 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 ALJ’s assertion that TFS Techs had exclusive

jurisdiction, and “right of first refusal” over the disputed MDU work is patently false, and conflicts with undisputed testimony. Brewer testified without contradiction that when the projects are initially planned, TFS management decides whether to hire contractors to do the work, leave the work to the building owner to perform, or staff the projects with TFS technicians. (Brewer 618-19). The ALJ’s assertion that Core Techs had first right of refusal over the work is entirely unsupported in the record. (D 14:1-2).

Generally, the Company refers to apartment buildings as Multi Dwelling Units (“MDUs”). For 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 that would already be connected 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 of the pre-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 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 started assigning TFS Techs to finish pre-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, Indiana. (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 laid off 20 Indianapolis Prem Techs 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 3,417 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. (Hunter 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 TFS techs would do. (R 6). That same day, Coleman called Hunter and explained that TFS was struggling to keep up with MDU work. (Hunter 679-680). Hunter explained 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 is essentially undisputed. Equally undisputed is that Hess *never* asked to bargain over this issue. Hess did not request to bargain on behalf of the CWA, and never designated Local 4900 as bargaining representative on this subject.

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.<sup>8</sup> In 2018, TFS Techs performed nearly 50,000 hours of MDU work, while Prem Techs worked only 1,645 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
<b>Grand Total</b>	<b>902</b>	<b>49014</b>	<b>1645</b>	<b>51560</b>

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

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<sup>8</sup> 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).

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)

The Prem Techs did not require any additional training to perform MDU work because they were performing the same tasks on the MDU projects that they perform every day. (Wright 342). The Prem Techs simply pulled wire, as they have always done.

#### **IV. LAW AND ARGUMENT**

##### **A. The ALJ erred by failing to apply the “contract coverage” standard under *MV Transportation***

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 decision in *MV Transportation*, 368 NLRB No. 66, slip op. at 11 (2019) makes 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.” 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. (emphasis added). A union may also “waive” its right to bargain over a mandatory subject, but the “covered by” and “waiver” inquiries are analytically distinct.<sup>9</sup>

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). “Once the Board determines that a contract covers a mandatory subject of bargaining, its interpretive task is at an end. **If the parties wish to enforce their contract, they may do so**

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<sup>9</sup> 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.

**pursuant to an arbitration clause or by bringing suit under 29 U.S.C. § 185.”** *Honeywell Intern., Inc. v. NLRB*, 253 F. 3d 119, 124 (D.C. Cir. 2001)(emphasis added).

Thus, even if the ALJ’s erroneous interpretation of the Prem Tech MOA were correct and the contract gave core techs exclusive jurisdiction over the disputed work – the Prem Tech MOA covers the disputed work and therefore the Company could not have violated Section 8(a)(5) of the Act, and the proper remedy for contract enforcement is through arbitration or the courts.

**1. The disputed work is within the Prem Tech’s scope of work under the Prem Tech MOA**

It is undisputed that 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 Serving Terminal to living units inside MDUs. Fiber is installed to transmit IP enabled products and services to individual apartment units. 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 also expressly defines the limitations on work that can be assigned to Prem Techs by expressly reserving only certain limited job duties for Core technicians. Relative to fiber work, the MOA only reserves for Core Techs the narrow task of “fusion fiber splicing” (i.e., the task of splicing fiber optic strands.) 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 have performed the job tasks of connecting wire from the Serving Terminal to the customer's premises, at 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. 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 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. This is further manifested by the ALJ's conclusion that the disputed work "was not substantially different" from the work performed by Prem Techs in the ordinary course of their job duties. (Decision at 12: 9-10).

The ALJ's conclusion that the Company failed to bargain over the disputed work assignments must be reversed because the Prem Tech MOA covers the work assignments at issue and establishes that Prem Techs can be assigned to MDU work.

**2. The ALJ's finding that Prem Tech's job duties are limited to "customer orders" is unfounded and contravenes the Vonhoff award**

The ALJ's finding that Prem Techs can only be assigned work in connection with a customer order is legally indefensible and cannot be reconciled with Arbitrator Vonhoff's 2012

arbitration award. Nothing in the Prem Tech MOA limits work assignments to customer orders, and the ALJ decision rests entirely on this fabricated limitation. 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.” The ALJ’s inference that the parties’ use of the term “customer” in this context denotes an actual installation or service order is not a rational construction.

Construing the MOA in its entirety, “customer premises” simply identifies one location where certain work is performed. This may be work at or inside a residential home in the case of a single-dwelling unit, or at or inside an apartment building in an MDU. When the parties bargained over the Prem Tech MOA, they defined both the types of work that Prem Techs could perform and the locations where they could work. (White 410-12). The MOA identifies various locations where Prem Techs perform work, including “at the customer premises,” at “the serving terminal,” and at the “serving area interface” (i.e., Cross Box). (R 1). Relative to installation or maintenance of IP related products and services, Prem Techs generally perform all work from the Serving Terminal to outside of the customer premises, and then all work inside the customer’s premises. It is no different on MDU projects, where technicians pull wire from the Serving Terminal to living units. There is nothing in the MOA to suggest the parties’ intended “customer premises” to be a substantive limitation on the types of work that Prem Techs can perform.

Further demonstrating that Prem Techs are not limited to work associated with a customer order, the Prem Tech MOA identifies various tasks performed by Prem Techs that do not reference the term “customer,” including:

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

- “The Premises Technician may place bridge tap cancellation devices, excluding splicing them into cable pairs.”
- “In addition, they will be responsible for cross connection work at the SAI (serving area interface) including the VRAD or equivalent.”

(R 1).

Moreover, Local 4900 President Tim Strong conceded that 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.

Finally, Arbitrator Vonhof’s 2012 award affirmed that 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 parties signed the MOA 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). Contrary to the ALJ’s decision, 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.

As noted by Arbitrator Vonhof, “[t]he 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.... 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.” Here, the work is encompassed within the overall category of IP enabled DSL service, and therefore it falls under the Prem Tech job duties. The parties never agreed to limit Prem Tech job duties to demand work in response to a customer order.

**3. The ALJ erred by finding that Core Techs had “first right of refusal” over the disputed work, which conflicts with the Prem Tech MOA and past practice**

The ALJ made a critical error in the finding the disputed work “was contractually reserved to core technicians.” (D 12:11). Moreover, there is nothing in the record to support the ALJ’s finding that “core technicians had a right of first refusal for their work, and if the work was declined, then contractors could perform the work.” (D 14:1-2). The ALJ’s interpretation of the Prem Tech MOA is legally unsupportable, directly conflicts with the plain language of the contract. The plain language of the Prem Tech MOA gives the Company broad authority to assign work to Prem Techs and carves out specific and narrow tasks that are reserved for core technicians. It simply cannot be disputed that the Prem Tech MOA gives the Company the right to assign Prem Techs to place fiber from the Serving Terminal to the ONT. There is simply no support, in the Prem Tech MOA or otherwise, for the ALJ’s finding that “non-demand work installing the last phase of the IP network in MDU structures was exclusively reserved to core technicians.” (D 13:21-22). The ALJ’s reference to “installing the last phase of the IP network” can only mean

placing fiber from the Serving Terminal to the ONT. The ALJ's conclusion ignores the undisputed fact that Prem Techs have placed fiber (or copper cable) from the Serving Terminal to the ONT (or NID) in single family homes and in MDUs since 2009. The Prem Tech MOA contains no limitations regarding "demand work" and does not specify whether Prem Techs can work in single-family homes or MDUs. The ALJ fabricated these limitations and inserted them into the bargained Prem Tech MOA.

The Prem Tech MOA expressly reserves certain tasks for Core Techs, but it does not reserve "non-demand work installing the last phase of the IP network in MDU structures" for Core Techs. Specifically, the Prem Tech MOA reserves the following tasks for Core Techs:

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."

The first three categories relate to the "legacy" network – and not the IP network – and are unrelated to placing or pulling fiber. The fifth category – fusion fiber splicing – denotes the only task reserved for Core Techs that relates to services provided over the IP network. There is no allegation that Prem Techs performed this task.

The ALJ plainly erred by adding a provision to the Prem Tech MOA that simply is not there. See *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970)(overturning NLRB order and finding the Board cannot compel an employer to agree to contractual terms). Contrary to the ALJ's finding,

the Prem Tech MOA does not limit Prem Techs to perform “demand work” or work associated with a customer order. By adding this extra-contractual limitation, the ALJ erred as a matter of law and the Complaint must be dismissed in its entirety.

**B. The ALJ erred by failing to find CWA waived its right to bargain over the work assignments**

**1. The ALJ erred in finding the CWA requested to bargain over the work assignments**

Contrary to the ALJ’s decision, the CWA did not request to bargain over the disputed work, and merely “objecting” to the work assignment does not equate to a request for bargaining. On March 2, Ellery Hunter notified CWA representative, Curt Hess, 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 Robbins, on behalf 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.

The ALJ erroneously claimed that “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.” (D 14:35-39). Hess did not request to bargain “over the proposed changes at the main bargaining table.” Hess requested that any proposed “additions to the job duties” of Prem Techs should be addressed in negotiations. (R 9). Hunter was not proposing any additions to the job duties of Prem Techs. The work assignments merely involved Prem Techs running fiber from Serving Terminals to ONTs, which is work they

have always done, as acknowledged by the ALJ. In response to Hess's email, Hunter explained the disputed work assignments were not "additions to the job duties" of Prem Techs:

As I've 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 Memorandum of Agreement: Job Duties (Premise Technicians). 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.

(R 10).

Hess did not request to bargain over the disputed work. Hess merely requested that any additional job duties of Prem Techs should be bargained at the main table. Hunter explained that the MDU work did not involve any additional job duties for Prem Techs – Hess did not respond. The CWA did not request to bargain over the work assignments, and therefore the Company could not have violated Section 8(a)(5) and the Complaint should be dismissed in its entirety.

**2. The ALJ erred in finding that Local 4900 was "certainly empowered" to request bargaining "on behalf of the CWA"**

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, the CWA never requested to bargain over the work assignments. Contrary to the ALJ's decision, 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.

The ALJ's contention that Local 4900 was "certainly empowered" to request bargaining "on behalf of the CWA" conflicts with the CBA and the CWA Constitution. (D 14:17-20)

Section 8.01 of the CBA provides that all bargaining over related to the bargaining unit's terms and conditions of employment must be conducted by duly authorized representatives of the Company and CWA:

All collective bargaining with respect to rates of pay, wages, commissions, hours of work and other terms and conditions of employment shall be conducted by duly authorized representatives of the Union and the Company respectively.

(GC 2, p. 12). The CBA defines the term "Union" to mean CWA, and not Local 4900 or any other Locals covered by the agreement. (GC 2, p. 1). Under the plain language of the agreement, CWA – not Local 4900 – is the exclusive bargaining representative for the bargaining unit. Larry Robbins requested to bargain on behalf of Local 4900, and he could not bargain on behalf of the CWA because he was not a duly authorized bargaining representative for the CWA.

The CBA is consistent with the CWA Constitution, providing that the CWA is the exclusive bargaining representative for the bargaining unit. The ALJ's conclusion that locals have the authority to request bargaining on behalf of the CWA cannot be reconciled with the CBA or CWA Constitution. The CWA 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 Constitution clearly limits the Local's responsibilities 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). Nothing in the CWA Constitution remotely

suggests that the Local has authority to request bargaining or to bargain over the Prem Tech MOA or the scope of Prem Tech's job duties.

Further, 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). The ALJ acknowledged that bargaining with a local instead of the exclusive bargaining representative (here, CWA) violates the Act, but he failed to distinguish applicable case law from the present case. Rather, the ALJ dubiously contended that "there is no indication that the Company was being asked to bargain with [Local 4900] instead of CWA." (D 14:29-30). This is simply untrue. In Robbins' email from April 12, he contended "**CWA Local 4900** is unequivocally opposed, to loan Premise Tech to TFS to do MDU work....We demand that no such action take place and hereby request to bargain this unilateral change." (R 12)(emphasis added). That email concluded with Robbins' signature block with his name and position with Local 4900, which further demonstrated that he was speaking on behalf of Local 4900, not on behalf of the CWA. This was the only request for bargaining over the disputed work assignments, and the request came from the Local, who did not have authority to bargain over the issue. The Local's request to bargain over the work assignments did not oblige the

Company to bargain over the issue because Local 4900 was not the exclusive bargaining representative and did not have authority to bargain over the Prem Tech MOA.

**C. The ALJ Erred in Finding that Respondent Had a Duty to Bargain Over the Disputed MDU Work Because the Work Assignments Were Not A Material or Substantial Change**

The ALJ correctly found that the disputed work was not substantially different from the work Prem Techs have always performed. It is undisputed that Prem Techs place fiber from the Serving Terminal to the ONT every day. It is also undisputed that the Prem Tech MOA provides that Prem Techs are permitted to place fiber from Serving Terminals to ONTs. The sole issue in this case is whether Prem Techs can place wire from Serving Terminals to ONTs in MDUs. The ALJ's finding that the disputed work is not substantially different from the work Prem Techs previously performed unequivocally necessitates dismissal of the Complaint in its entirety. There was no substantial change to the wages, hours, or working conditions of any bargaining unit employee, and therefore the Company could not have violated Section 8(a)(5) of the Act. *See 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).

Although the ALJ found that there was no substantial change to the working conditions for Prem Techs, he turned this case on its head, and found the Company violated the Act asserting (without any evidence) that assigning a small fraction of the disputed work to Prem Techs was a

material and substantial change for “core techs.” General Counsel presented no evidence that TFS Techs (or any other core techs) lost any work due to the work assignments to Prem Techs. To the contrary, undisputed evidence proved that TFS Techs had more work than they could perform, and the Company hired contractors to make up the difference. (Shea Culver 651-52; Hunter 679). Moreover, the disputed work has always been performed by contractors, and the Company only started assigning some of the disputed work to TFS Techs in late 2016.

The ALJ erred in his overbroad claim that “[t]he Board recognizes that changes to employees’ work assignments are mandatory subjects of bargaining.” (D 11:10-14). Changes to “work assignments” are only mandatory subjects of bargaining if the changes are substantial, material, and significant. *See 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). Here, the ALJ found the alleged changes were not significantly different from the work Prem Techs always performed, and there is no evidence whatsoever that there were any changes to the terms and conditions of employment for core techs.

The ALJ further erred in citing *Overnite Transportation Co.*, 330 NLRB 1275, 1276 (2000) for the proposition that “even the potential loss of work is sufficient to require bargaining” to justify the lack of evidence for his erroneous finding that “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.” (D 15:30-33). In *Overnight Transportation*, the Board found that the

employer violated the Act when it hired subcontractors to perform bargaining unit work, which violated the Act because “the bargaining unit is adversely affected whenever bargaining unit work is given away to nonunit employees.” 330 NLRB at 1276. The underlying rationale for the Board’s decision in *Overnight Transportation* was that the employer hired contractors in an effort to dilute the bargaining unit. That is not the case here - Prem Techs are in same bargaining unit as TFS Techs! There is absolutely no evidence that TFS Techs lost any work because certain Prem Techs were assigned a small portion of the disputed work, and the work assignments kept the disputed work within the bargaining unit. As such, there was no significant, material, or substantial change to the terms and conditions of employment for Prem Techs or TFS Techs, and therefore, the Complaint must be dismissed in its entirety.

**V. 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*

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 6<sup>th</sup> day of February, 2020, a copy of the foregoing was electronically filed and served via e-mail upon the following:

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