

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INDIANA BELL TELEPHONE COMPANY, INC.

and

Case 25-CA-218405

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

GENERAL COUNSEL'S BRIEF IN ANSWER
TO RESPONDENTS' EXCEPTIONS TO THE ALJ'S DECISION

Michael T. Beck
Counsel for General Counsel
National Labor Relations Board
Region Twenty-Five
575 North Pennsylvania Street, Room 238
Indianapolis, Indiana 46204
Phone: (317)991-7638
Fax: (317)226-5103
E-mail: michael.beck@nlrb.gov

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Comes now Counsel for the General Counsel and respectfully submits to the Board this Brief in Answer to Respondents' Exceptions to the ALJ's Decision. General Counsel hereby requests that Respondent's exceptions be denied in their entirety and the Administrative Law Judge's December 11, 2019 decision in this case be affirmed.

I. STATEMENT OF THE CASE

Pursuant to charges filed by the Communication Workers of America Local 4900, a/w Communication Workers of America, AFL-CIO, (Union) a Complaint issued on February 28, 2019. The Complaint alleged Indiana Bell Telephone Company, Inc. (Respondent) violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargaining over the mandatory subject of assigning the installation of fiber optic cable in multi-dwelling units to premises technicians rather than core technicians. An evidentiary hearing was held on the issues raised by the Complaint on July 11-12 and August 6-7, 2019, before Administrative Law Judge Michael A. Rosas. Post-hearing briefs were submitted.

On December 11 Judge Rosas issued his decision in the matter finding that Respondents Respondent violated Section 8(a)(1) and (5) by unilaterally assigning to premises technicians the pulling of fiber cable in the final phase of the building of the IP network in the Indianapolis

market. Judge Rosas specifically found that the assignment of the disputed work to the premises technicians was a mandatory subject of bargaining, the disputed work was not covered by the parties' Memorandum of Agreement setting forth the job duties of premises technicians, the Union did not waive its right to bargain over the assignment of the disputed work to the premises technicians, and finally, Respondent unilateral assignment of the disputed work to premises technicians, therefore, violated Section 8(a)(1) and (5) of the Act.

II. FACTS

In early March 2018 Indiana Bell Telephone Company, Inc. (Respondent) called the International Communications Workers of America (International Union) to discuss utilizing premises technicians to work in conjunction with the core technicians to pull fiber wire and/or pre-wire in the final phase of building the IP network in multi-dwelling units (MDUs) in Indianapolis, IN. The International Union responded that it would be problematic and that negotiations were about to commence for a new collective bargaining agreement. The parties had several other discussions concerning that subject, but the parties continued to disagree on Respondent's request to change the duties of premises technicians. About mid-March 2018, the International Union put its position in writing and objected to premises technicians performing the work historically performed by core technicians. In addition, the International Union informed Respondent it had to bargain on the subject matter. Although the parties were negotiating over a successor contract; Respondent never proposed to make changes to the Memorandum of Agreement (MOA) which set forth the premises technician job duties in the Indianapolis market.

Irrespective of the International Union's demand to bargain on the local issue, in April 2018, Respondent informed Communications Workers of America Local 4900 (Local 4900) of

its intentions to utilize premises technicians to work in conjunction with core technicians to pull fiber wire and/or pre-wire in the final phase of building the IP network in multi-dwelling units (MDUs) in Indianapolis. Local 4900 objected and requested to bargain. Respondent's reply was merely there was nothing to bargain. From about April 16, 2018 until November 2018, Respondent utilized premises technicians to pull fiber wire and/or pre-wire in the final phase of building the IP network in multi-dwelling units (MDUs) in Indianapolis without bargaining with the Union in violation of Sections 8(a)(1) and (5) of the Act.

A. Core technicians and premises technicians roles in Respondent's development and expansion of fiber optics in the Indianapolis market

1. Respondent's launch and growth of fiber optics cable in the Indianapolis market

Sometime in 2006 – 2007, Respondent launched its U-Verse business in residential neighborhoods in the Indianapolis market. Respondent first had to build and install an IP network to support TV services, phone, and high-speed internet services. (TR 386, 401) The customer service specialists, top craft positions also known as core technicians, built and installed the IP network for residential neighborhoods. (TR 44, 47, 48) Respondent referred to the constructing of the IP network as project work (non-demand work) that occurs on a property. It did not require interaction with a customer. Project work consists of building the network and preparing a unit for future services; however, it does not immediately deliver a service and/or product to a customer. (TR 19) In about 2015, Respondent had at least one project involving the disputed work. From about March to August 2015, TFS contracted out one MDU project, the Seasons of Caramel project.¹ It consisted of 14 buildings with over 300 units. It was a

¹ Respondent offered evidence that it used contractors to build certain phases of the IP network. Notably, it only produced evidence that one contractor was used during the period of 2015 to 2018. Furthermore, the evidence reveals that core technicians had the right of first refusal on the work. So, when a contractor did not perform that

greenfield. (TR 616) (GC Ex 27) In late 2015, Respondent began an initiative to put more fiber into neighborhoods. (TR 120)

2. Core technicians expanded the construction of the IP network to the MDU environments in the Indianapolis market

In 2016, Respondent restructured the technicians into Technical Field Services (TFS) and Internet, Entertainment, and Field Services (IEFS). (TR 108) IEFS consist of the premises technicians. (TR 142, 448) TFS consist of the customer service specialists or CSS (known as the core technicians). (TR 60) There were also core technicians in the Construction and Engineering (C&E) Organization. There are two different technicians which are part of the construction organization. The construction technicians in general also work on building the IP network and the I&R technicians maintain the IP network. (TR 435, 441-442)

Sherry Brewer, Senior Technical Project Manager, coordinated with engineers and the TFS organization regarding fiber optic work for properties. Brewer is responsible for scheduling the preconstruction meetings where timelines are discussed related to deployment and a rough schedule for TFS to run wiring. (TR 605) Engineering is responsible for designing the infrastructure needed to deliver the service. TFS owns the completion of the inside wiring work. (TR 606) ATT-TELCO-JA-000-000-552 acknowledges that TFS is involved in building the network. (TR 58-59) (GC Ex 26) This policy discusses the ability of C&E core technicians and TFS core technicians to perform the same work. It also corroborates that TFS is responsible for the in-build cost and performing the inside wiring. (GC Ex 26) In addition, the C&E Engineering, TFS-IM; IEFS: Engineering and Installation Guidelines – Network Terminating Wire (NTW) Description, Explanations, and Ownership Considerations discussed the

phase of building the IP network, core technicians did the work. For purposes of this brief, it is significant to note that traditionally core technicians built all aspects of the IP network.

coordination responsibilities of the TFS Manager for MDUs. In the guideline, it notes that the proper name for the inside wire or pre-wire is the Network Terminating Wire which is defined on page 1. Notably, Respondent still uses the terminology inside wire and/or pre-wire as seen in this case. Notwithstanding the terminology, the guideline denotes that TFS and Construction (i.e., C&E) place the inside wire and pre-wire and it may contract out the work. (GC Ex 19) This is determined at the preconstruction meeting.

The process that core technicians use to install fiber wire is similar in greenfields (new constructions) and brown fields (existing constructions). In greenfields the prewiring is done prior to drywall, during the rough in stage. (TR 606) In brownfields the fiber over build or fiber overlay is very similar to greenfields. A pre-construction meeting is held on the property to ensure that Respondent can complete the build. Then there is the coordination of the material and work schedule. In brownfields, there is an existing copper network. (TR 607) Construction contractors bring fiber from the cross connect cabinet to the fiber serving terminal at each building or possible each floor. Then TFS runs the wire from the fiber serving terminal to each unit. (TR 608) TFS is responsible for the final phase of building of the IP network which is the inside wiring. (TR 608) If the ground needs to be excavated or poles set, contractors do this (TR 608-609). If splicing on poles need to be done, splicers or badged employees, who are core technicians, do the work. (TR 609)

In early 2018, Respondent's Technical Field Services (TFS) organization used business services technicians, who are also core technicians from a different department, to assist with wiring in the MDUs so it didn't have other expenses related to loaned employees such as housing. (TR 501, 655, 656, 657) (R Ex 22)

3. Traditionally, premises technicians did not perform any duties that were the same or similar as building the final phase of the IP network.

Once Respondent was approved to install more fiber in the Indianapolis area, it had to outfit its copper plants into fiber plants. The core technicians built each phase of the IP networks. After the IP network was installed, core technicians² and premises technicians were dispatched to customer residents to install and maintain U-verse services.

On April 14, 2012, an arbitrator determined whether Respondent could assign premises technicians the installation work of stand-alone high-speed Internet (U-verse, a service/product) based on the parties 2009 negotiations. Respondent proffered job duties for premises technician as part of the bargaining history. At that time, Respondent had not deployed fiber optics in MDUs because it was not yet performing any of the disputed work. The arbitrator considered the party's intent, past practice, and bargaining history and concluded that the parties agreed that the premises technician could install and maintain "IP enabled products and services" at customer premises. The installation of stand-alone high-speed Internet (U-verse) was determined to be an IP enabled product and service so premises technicians could install and maintain it when dispatched. (R Ex 3)³

From 2015 through April 2018, premises technicians placed a fiber drop at each residential living unit that were not in MDUs in Indianapolis on a daily basis under a customer order to install services and products (i.e., based on demand work). (TR 187, 629-630, 640, 641)

²² Core technicians were allowed to work down in classification; however, premises technicians were prohibited from working up in classification. (TR 667)

³ The arbitration decision is irrelevant to the instant case. This decision does not change demand work which consists of face-to-face interaction with the customer on the customer premises and ensures the customer has services/products the day of service. It merely found that the stand-alone U-verse as a "service and product" which is inapplicable here.

However, premises technicians were not performing MDU work in 2015, 2016, 2017, or 2018 until the instant case. (TR 189)

The job duties of the premises technicians have continued to be to install or maintain IP enabled services. A more recent example of a premises technicians' job duties come from Ellery Hunter's testimony. Hunter, Respondent's Midwest Director of Labor Relations, stated that an example of a premises technician's job was when he ordered U-verse and a premises technician came to his house and installed the service. Hunter stated that the premises technician performed customer-demand work and are not allowed to do core technicians work. (TR 712, 711)

Moreover in 2018, the MOA describes the premises technician job duties occurring upon dispatch on a work order placed by a customer. (TR 438) A customer is someone who lives (i.e., rents or owns) in a unit, home, condominium or apartment and purchases a service/product in a store, kiosk, online, and/or door to door sales, based on a variety of methodologies the company utilizes to sell their products. (TR 42, 62)

The MOA refers to dispatch to the customer premise in several sections. Dispatched work is historically based on an order installed or maintained. (TR 53) The Memorandum of Agreement (MOA) dated April 15, 2015, which states in part that:

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 P enabled products and services including fiber cross-connects and fiber drops. Initial

With respect to work that Core Technicians will continue to perform, the MOA states in part that:

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.

Tim Strong, Local 4900 president, testified that the intent and meaning of the MOA was for premises technicians job duties to originate from a dispatch related to an install or repair on services and historically this is what Respondent has done. (GC Ex 4)

According to Angela Bickel, the Area Manager Network Services Technical Field Services Midwest, when installing or repairing, a premises technician needs to install jacks and wire inside the house for the associated equipment such as internet, TV or voice over IP and install. (TR 627) Outside the home, the premises technician would connect the single drop wire from the terminal to the home. If the drop was damaged, the premises technician would replace it. (TR 628) According to Bickel, in early October 2015 premises technicians were trained to do fiber drops and shortly thereafter began to install them. Bickel stated that all of the premises technicians were qualified to do the single fiber wire drop. (TR 628)

Kenneth R. Wright, Jr., a current premises technician who has been employed by Respondent since November 23, 2007, installs and repairs services on customer demand jobs. He engages in face-to-face customer interactions. He installs telephone, TV, internet, residential gateway, set-top boxes, wireless access point (WAP), DVR and DirecTV. (TR 355) Some services need hard-wired. Wright has never gone beyond one floor to wire in houses. He drops

a wire from the attic to the second floor, but if there was not wire down to the first floor, he would not drop it any further because he would damage the wall. (TR 357) He worked in crawlspaces and drilled 2 by 4 holes. (TR 358) When he wired into the home, it is one single fiber line to get it to the OMT, coax or CAT-5, which is a copper line. The walls already existed. Wright specifically said he was running wire from the jack around the wall, not inside the walls. (TR 748) He clarified that premises technicians do not fish wires inside walls (TR 749) They run the wires outside the wall. (TR 749)

All premises technicians do the same job. (TR 336) When asked if premises technicians work alone, Wright replied yes. (TR 747) Prior to 2018, on occasion Wright had worked on the same location as core technicians but not on the same jobs. Wright said if he is on an installation job, he will test to make sure the signal is good. He can do the repair if he had to replace the drop, but if it required repair from the serving terminal back to the crossbox, premises technicians are not permitted to open the cable. He would have to put in a helper ticket for a core technician to assist. (TR 362-363) For example, he was on a job where the wire was not working or he could not get a signal, and he put in a helper ticket. A core technician was dispatched since Wright did not know how to fix the outside wire. The core technician worked on the outside while he worked on the inside. They were on the same location but not on the same ticket. (TR 346)

As a premises technician, Wright testified that part of his job duty were to connect a single fiber wire drop from the serving terminal to the NID in residential neighborhoods when dispatched. (TR 338, 353) Premises technicians placed a single fiber drop on a customer order with the intent of providing service to a customer upon completion. (TR 586) This is when the construction of the network has already been completed. (TR 241) Prior to mid-April 2018,

premises technicians had never done anything with fiber drops outside of customer premise installations. (TR 586-587)

For instance, prior to 2018, premises technicians would get an order and their work would be inside of an apartment unit and the fiber was already terminated at a demarcation point inside the apartment. The premises technicians worked from the jack or the demarcation point. (TR 339, 340) They would use set-top boxes or modems to provide the service the customer ordered such as high-speed internet (TR 209) or do repair work on U-Verse service or internet service within an MDU. (TR 227) Premises technicians did not replace the wire from the serving terminal to the apartment unit. Wright testified that premises technicians did not have the type of wire on their trucks to install or repair wire from the serving terminal to the apartment. Also, this type of repair required fusion connections which was a prohibited task. (TR 229, 359, 360, 567)

According to Wright, when installing a single fiber wire at a customer home, the task involves working with one wire compared to working with a bundle of wires in an MDU setting. (TR 26) The drop is represented on GC Ex 31 by the line that runs from the serving terminal to the NID. (TR 338) In that exhibit it is an aerial drop. It is one fiber drop wire cable. (TR 339) Wright testified that working in an MDU setting involved learning something new. Wright said it required an employee to know the building layout and that the wires ran to many locations. (TR 341-342) Wright explained that the difference with a single drop wire at a customer home is he knew where he would put the wire. However, in an MDU setting, Wright stated someone had to coordinate the placement of the wires including which side of the building the wire would come out of, how to dress the wire and put it in boxes, and put the guttering or the enclosure cases on the outside to keep the wires out of the weather. (TR 347; 63)

Notably, prior to April 2018, premises technicians never performed any phases of building the IP network. They did not place fiber optic cable at the central office, place fiber optic cable on poles, cross boxes, and/or distribution boxes, pull fiber cables to nodes or pull fiber cables throughout a residential neighborhood or multi-dwelling units, and/or pull fiber wires through conduits, such as elevator shafts or ductwork in MDUs. (TR 337-338)

- B. Respondent requested to move premises technicians to work in conjunction with core technicians to pull fiber wire and/or pre-wire in the final phase of building the IP network in MDUs in the Indianapolis market, and the International Union opposed and requested to bargain the local issue.

In mid- to late- 2016, Respondent commenced building the IP network when it received the FCC approval of its acquisition of DirecTV. (TR 50, 122, 140, 608) Core technicians performed the work of building the IP network under the core agreement⁴. (TR 51, 123-124, 142) Notably, premises technicians were not performing this work. (TR 51)

Core technicians were responsible for building and maintaining the IP network in greenfields (new construction) and brownfields (existing construction). There are approximately four phases of constructing the network:

- (1) fiber optic cable is run from the central office to a fiber cross-box, referred to as F-1; (TR 621)
- (2) the fiber optic cable is then pulled from the cross-box to the fiber serving terminal, FST or F-2; (During this phase, the fiber optic wire can be pulled across telephone poles, buried underground, pulled through manholes, etc. in order to get

⁴ The core agreement is the collective-bargaining agreement with the exception of the appendices. The core agreement sets forth terms and conditions of employment for core technicians. At the time of this dispute, the core technicians at issue were in the Technical Field Services (TFS) Organization. The premises technicians were in the Internet, Entertainment, and Field Services (IEFS) Organization. Appendix F dictates their terms and conditions of employment for the premises technicians. (GC Ex 2)

it to the serving terminal for a residential neighborhood or MDU. Notably, this was performed by C&E and TFS core technicians.) (TR 125, 205, 645, 646)

- (3) splicing occurs at the distribution points (TR 205) and
- (4) the fiber cable is terminated until services are connected—
 - (a) for residential neighborhoods, single fiber cables are terminated at a box or demarcation point;
 - (b) for MDUs, the core technicians continue to pull the wires to the building where a terminal(s) is mounted on the side of the building, a fusion splice occurs, and fiber is distributed through more conduits such as elevator shafts, attics, crawlspaces and then to each individual unit to individual demarcation points.

(TR 43, 122-124, 125, 205, 217-223, 368-369, 502, 503, 573-574, 622, 645-647)

In the instant case, the work in dispute only involves the segment of the final phase 4(b) of building the IP network which is the pulling of fiber optic wire and pre-wiring in MDUs in the Indianapolis area⁵. (TR 502, 503, 702) (GC Ex 1(c))

In February 2018, Jerry Ouellette, Director Network Process and Quality Technology Operations, told Bradley Coleman, Director of Technical Field Services (TFS), that premises technicians were being sent home on a daily basis due to lack of work and asked about utilizing about 25-30 of them to work in MDUs to pull fiber from the serving terminal to units in Indianapolis.

Coleman felt that TFS was struggling to meet some of the requirements with loan technicians from other areas. According to Ouellette, a loan technician is when Respondent

⁵ The parties refer to the disputed work as MDU work, non-demand work, and/or project work.

utilizes an employee out of his/her original organization to work in another organization of the company. The hours and time are cross charged to the other organization. (TR 473)

Respondent had to pay for hotel and meals for loan technicians for an extended amount of time to help out with workload. The loaned technicians were assisting with demand work.⁶ (TR 460)

Whereas, a work assignment is within the employee's current work area and organization. There is no cross-charging of hours for a work assignment. (TR 473)

On February 27, 2018, Coleman sent Ellery Hunter, Director Labor Relations, a two-part email stating

Ellery – if IEFS [____] has capacity I wanted to see if we could get them for pulling fiber in MDU. ‘NO’ splicing – we would have TFS tech with them doing all splicing. Any issue on your part?

Sorry forgot to tell you where : -) Indianapolis

(R Ex 6) (TR 677)

Hunter stated that he talked to Coleman later on February 27th. Hunter stated that TFS had more work than technicians and they were looking for additional help. Coleman understood that IEFS had capacity and wanted to use those employees to perform the work. (TR 679)

Hunter told Coleman that he didn't see a problem, but, since they were within a week or so of the beginning of contract negotiations, he had some concerns about how it might affect said negotiations. Hunter stated he wanted to give the Union a heads up and would get back to Coleman. (TR 680)

On March 2, 2018, Curt Hess, Assistant to the Vice President of District 4 of the Communications Workers of America, received a phone call from Ellery Hunter. (TR 683)

Hunter told Hess that he was giving him the heads up that TFS was thinking about using some premises technicians in Indiana to help them out in the MDU build by placing wire. (TR 684)

⁶ The demand work occurs when a technician is dispatched to install or repair services/products based on a customer order. A core technician or premises technician may perform demand work.

Hess voiced concern that the work had not been previously done by premises technicians, and they were close to entering into negotiations pertaining to that work group. Hess never told Hunter that the Union would consider allowing premises technicians to perform MDU work. (TR 562) Prior to 2018, premises technicians had not performed any part of constructing/building the network for the IP with core technicians. (TR 563). Hess said he thought it was really bad timing and did not like it. The conversation was not very long. They talked about other items related to bargaining. (TR 684)

On March 5, 2018, Respondent and the International Union were in Chicago for bargaining. Hunter and Hess had another conversation regarding Respondent using premises technicians to pull wire and/or pre-wire in MDU environments. Hess expressed his concerns to Hunter that it was a change in the scope of work, the timing of the issue, and that core technicians had always performed the work. (TR 563-564) Hunter recalled Hess stating it was not a good time to do something like this and that the Union was considering its options for bargaining, particularly regarding the premises technicians and core technicians. (TR 685).

After the March 5th conversation with Hess, Hunter sent Coleman an email replying to Coleman's email which had been copied to Ouellette stating

Coleman: Ellery – John called late last week to tell me, he & Randy had talk (sic). 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 with CWA. Have you had the opportunity to have that discussion?

Hunter: Brad, I began the discussion with them 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 that this doesn't interfere with Bargaining. I'll let you know when we are good to go.

(GC Ex 5) (TR 686)

On March 9, 2018, Coleman sent another email to Hunter and copied Ouellette asking:

Ellery I know it has been an excited few days for you with bargaining just starting. But wanted to make sure you had not forgotten us – any update on our request?

(GC Ex 6)

On March 9, 2018, Hunter talked to Hess again because he was getting messages from Coleman and Ouellette about using the premises technicians. (TR 688) In this conversation, Hess had questions about the effect on the core technicians if the premises technicians were performing their job and about what the premises technicians would be doing versus the core technicians. Hess also asked about what the business unit had been doing already regarding loan technicians. (TR 688) Hess expressed concern that moving the work to a title that had not historically performed the work was a reduction of head count in some of the higher paid titles; Respondent migrating work from higher paid titles to lower; and the potential effect on the higher paid titles such as the reduction of overtime opportunities. (TR 582) Hess commented that if the work was being loaned in to core technicians then it keeps the core technicians busy and it should continue. (TR 583)

On March 9, 2018, Hunter sent an email to Coleman and Ouellette regarding Hess' questions

Brad, I had some additional discussion with the Union today and they are uncomfortable with doing this. They are asking questions that I need to provide answers to before we make a final decision on go or no go.

-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 tech go do the connections?

Ellery

(TR 689) (GC Ex 7)

On March 9, 2018, Coleman responded via email and copied Ouellette

- 1) 10- Core loans from Dayton – YES. They have been there since Monday, March 5th, They are there only short term because they are really needed in Columbus to work heavy BAU load. Columbus has consistently had the largest Bonded Pr service order load for me.
- 2) Prem Techs will ONLY be pulling fiber drops in MDU. The Core tech will be on site while the Prem Techs are pulling cable. Core techs are on site to make the necessary fiber splicing connection.

Let me know if you need more info

(GC Ex 7)

Within a few hours, Coleman sent another email stating

Ellery another important piece. The loaned Dayton techs are not working MDU. They are in the BAU load. That is why we are asking for the Prem Tech loans. To allow us to move some of our BAU Core techs out of MDU into BAU load so I can send Dayton's home (to help in Columbus).

(GC Ex 7)

Hunter gathered the information and relayed it to Hess. He told Hess that there were TFS technicians from Dayton that had been loaned into Indianapolis, but they were not doing MDU work. They were doing BAU (business as usual work – non project work) work. He said that the premises technicians would be helping with placing the drops in the building and that they would be working alongside the core technicians while the core technicians were doing the connection. Thus, they would be working together. (TR 692)

Hess said he would get back to Hunter. On March 13, Hess sent Hunter an email stating:

Ellery,
With regards to multiple discussions over the IEFS business unit employees, specifically Premises Technicians, doing work in conjunction with MDU installation, the Union requests the Company refrain from assigning such work as described. At this time, the Union's position is the work discussed is outside the current bargained Job Duties for Premise (sic) Technicians and has historically been performed by titles in the Core agreement. Furthermore, the timing of such initiative could certainly become problematic. *The Union maintains the position that any and all proposed additions to the job duties of the Premise (sic) Technician should be properly addressed during the negotiations in which the parties are currently engaged in.* {emphasis added}

(TR 566, 694) (GC Ex 8)

On March 17, 2018, Hunter responded to Hess via email stating:

Curt,
Earlier this week you wrote to raise concerns about Premises Technicians working on MDU installations in Indianapolis. 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 (sic) 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. I will, of course, be available to discuss any specific concerns you have as the work progresses. However, the Company intends to assign this MDU work as it deems appropriate to either Premises Technicians or Core Technicians.

(GC EX 9)

Hess told Hunter that he was disappointed to hear that. Hess did not have any other communications with Hunter. (TR 567)

On March 29, 2018, Matthew Roesner, Director Chief of Staff for Respondent, sent an email to Hunter and others with a copy to Ouellette asking

The question was raised on Bill's staff call regarding MDU work opportunities for the MW IEFS organization. While this is being done in KY/TN, the upper MW has been delayed due to TFS considerations (surplus) and we were just told, due to contract language (Ellery Hunter) Would you please provide a current status and our position on moving forward?

(GC Ex 10)

On March 29, 2018, Hunter replied via email stating

Currently Labor is recommending that we not assign the MDU work in the MW (IL, IN, MI, OH, & MI) while we are bargaining with CWA in the MW. I've discussed this with CWA already and taken the position that the work we are contemplating (placing fiber drops within the MDU but not connecting) is within the Prem Tech scope. The Union has disagreed and to avoid this complicate (sic) negotiations we recommend not executing at this time.

(GC Ex 10)

On April 11, 2018, Hunter claimed that he had a sidebar conversation during negotiations with Hess and told him that Respondent would move forward with utilizing the premises technicians on the MDU placement work. Hess stated that he was disappointed and would let Linda Hinton, Vice President for District 4, know. (TR 700-701) (R Ex 11) After the meeting with Hess, Hunter told Coleman and Ouellette that they could move forward.

On about April 11, 2018, Coleman contacted Ouellette to inform him that Hunter had given them the go ahead to assign premises technicians to do MDU work. Respondent set April 16th as the start date and planned to utilize 3 to 5 premises technicians to do the MDU work. On that day, Ouellette informed three area local managers in the Indianapolis market that they were planning to utilize the premises technicians to do the MDU work and asked them to notify the local union. (TR 471) Respondent was aware that all premises technicians were not able to perform the MDU work. (TR 472) Respondent asked managers to identify specific premises technicians to perform the work because not all premises technicians were fiber-qualified. (TR 472) Ouellette's instructions were that they needed to make sure the premises technicians were trained to pull fiber optics and that they needed to be scheduled. (TR 472) Ouellette testified that Angie Bickel, Area Manager Network Services Technical Field Services -Midwest, took the lead to inform Local 4900. (TR 473)

According to Bickel, in April 2018, Ouellette informed Bickel that Respondent would utilize premises technicians to perform core technician work in MDUs pulling wire. (TR 636-637) Ouellette indicated that there would be one or two premises technicians per area manager working on a crew daily. In the time that Bickel had managed premises technicians, they had never worked up in classification to perform core technician work. (TR 637) Contractually,

premises technicians are not permitted to work up in classification to perform core technician work. (TR 637)

After being informed of this, Bickel called Larry Robbins, Local 4900 Vice President, and told him that Respondent would be assigning one to two premises technicians per area manager group daily to pull wire in MDUS. She informed him that it would start that following Monday. (TR 638)

On April 11, Robbins called Ouellette and told him that he adamantly opposed premises technicians doing the MDU work. Robbins asked Ouellette to reconsider. Ouellette recalled that Robbins said something about being concerned about the impact of the bargaining process. Ouellette claims he told Robbins that he did not understand why Robbins considered premises technicians as loaned employees or how this was outside their scope of work. Ouellette told Robbins that Respondent was off-loading technicians and it was a work assignment that would help keep employees working and help out meet customer expectations. Later Ouellette received an email from Robbins that objected to Respondent utilizing premises technicians to perform part of core technicians work and requested to bargain. (TR 475)

- C. CWA Local 4900 objected and requested to bargain pertaining to the unilateral implementation of utilizing premises technicians to work in conjunction with core technicians to pull wire and/or pre-wire in the final phase of building the IP network in MDUs in the Indianapolis market.

The Respondent has a variety of methods for implementing a change to its policies. It could be emailed or verbally given to the International Staff representatives. (TR 38) At the district level, Ellery Hunter, Randy White, Vice President Labor - Midwest, or Steve Hanson would negotiate for the Respondent on matters. (TR 560) A change may be communicated verbally to the local level through a steward, chief steward, area representative, vice president or the president. At the local level, Grace Biehl would be in communication for Respondent. (TR

559) Local 4900 has bargained with Respondent on local issues such as vacation schedule composition, vacation schedule, allotments, work schedules, four-ten schedules, home garaging, central office garaging, consumer group, grievance settlements, and back to work agreements. (TR 775-776) The collective-bargaining agreement even has some specific local issues to be bargained such as Section 8.01 on page 12 and Section 23.05 on page 65. (TR 776,777) At the local level, the Union has responded via grievances or requests to bargain on a unilateral change. (TR 38)

On April 12, 2018, at 9:52 a.m., Robbins sent an email to Angela Bickel, Area Manager Network Services Technical Services - Midwest , Grace Biehl, Labor Case Manager, Lisa Brantley, Area Manager Network Services Technical Services - Midwest, Rhett Adwell, Area Manager Network Services – Midwest, with a copy to Ouellette, Coleman, Culver, and Michael Shea Culvert, Area Manager TFS, with the subject line as IEFS loans to TFS stating

ALL,

CWA Local 4900 is unequivocally opposed, to loan Premise (sic) Tech to TFS to do MDU work. TFS have performed this work since its inception. Furthermore, this issue has been discussed in 2018 bargaining and the bargaining committee has shared the same position as the local. We demand that no such action take place and hereby request to bargain this unilateral change. The Union will send a follow up email with an extensive RFI. We do not take the company's actions lightly as we work towards a mutual goal of a fair contract by expiration.

(GC Ex 11)

Ouellette forwarded Robbins email to Coleman and Hunter with the following message⁷

Brad & Ellery

We talked to the union this morning about our intent to loan technicians to work on MDU efforts in Indianapolis and were met with great resistance. I want to make sure that with the timing of the contract expiring and potential of this issue to impact the bargaining table that we all agree that we should move forward with this effort.

Within a few hours, Hunter sent an email to Grace Biehl

⁷ Note, the email exchanges are on different time zones.

Grace,

Can you call Jerry &/or Brad and get a better sense for how bad the reaction is and if there are more specific actions that the Union is considering as a result of this? By the way, if we move forward, Jerry should assign the work to the Prem Techs, not loan them to TFS.

(GC Ex 12)

About 30 minutes later, Grace replied to Hunter stating

Ellery,

I talked with Jerry and Larry about the situation. I also talked with Steve not too long ago and gave this feedback to Jerry. Jerry is going to go back to his manager and ensure that they are saying this is a job assignment and not a loan and that the PTs are doing work that is already within their scope. The managers are not to canvas the techs, they are to pick those who are qualified to do the work.

Larry is very upset with this work being done by the PTs and was headed to his office to write up the RFI he plans to send to us. Larry has talked to Tim Strong on this as well and he says that Tim is taking the same position. I believe we will see job actions on Monday when the PTs begin this assignment. I'll keep you apprised of the situation as it develops.

(GC Ex 14)

Later that day at 3:22 p.m., Robbins sent another email to the same group stating

All,

Is the non-response a denial from the company to bargain over this unilateral change?

The union is requesting a response no later then (sic) 5pm today before it pursues alternative actions.

(GC Ex 12)

At 3:29 p.m., Ouellette replied to Robbins

Larry,

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 (sic) Technicians are qualified to do. Please let me know if you have additional questions or concerns.

(GC EX 13)

At 3:45 p.m., Robbins responded to the group

Jerry,

This is a unilateral change. This is work traditionally done by TFS. So are you denying the unions right to bargain over this?

(GC Ex 13)

At 4:17 p.m., Ouellette stated

Larry,

The company respectfully disagrees that this is a unilateral change. We maintain 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.

(GC Ex 13)

On April 12, 2018, Robbins submitted a request for information that requested, in part, “How many loans have TFS requested to work MDU jobs and what were their titles?”

(R Ex 19) On April 16, 2018, Ouellette responded to the request for information. In part, he stated that six technicians had been utilized for MDU and their titles were “Customer Service Specialists” or “Systems Technicians”. (R Ex 20) On April 19, 2018, Local 4900 filed a grievance alleging that Respondent loaned premises technicians to TFS to do work that had been traditionally performed by core technicians. (GC Ex 15)

Hess was made aware that Local 4900 was having discussions with their labor counterpart over the issue when the premises technicians had actually commenced the work.

(TR 569) Tim Strong, Local 4900 President, informed Hess that Local 4900 had asked Respondent some questions, was seeking information, and wanted to bargain changes in scope of work. Strong also informed Hess that Local 4900 had filed grievances over the issue. (TR 570)

Meanwhile, Respondent and the International Union continued to bargain pertaining to the Midwest collective-bargaining agreement. During bargaining, on April 19, 2018, Respondent made a written proposal with provisions covering many facets of the job duties for the premises technicians, including fiber fusion splicing and the installation of any and all products without the limitation of reserved work for core technicians. The proposal did not

specify the geographical area of Indianapolis, Indiana. (GC Ex 20) On April 26, 2018, the International Union rejected Respondent's proposal and countered to maintain the current language. (GC Ex 21) On May 1, 2018, Respondent made a counter proposal for premises technician job duties that continued to include fiber fusion splicing. Although Respondent included reserved work for core technicians, it excluded reserving fusion fiber splicing for them. (GC Ex 22) On June 6, 2018, the International Union proposed to maintain the current language of the expired contract. (GC Ex 23) On June 27, 2018, Respondent made a proposal for the premises technician job duties which was identical to the previous contract. (GC Ex 23) On June 28, 2018, the parties entered into a tentative agreement on the premises technician job duties leaving them unchanged from the prior contract. (GC Ex 24)

- D. Respondent unilaterally utilized premises technicians to work in conjunction with core technicians for about six months to pull and/or pre-wire fiber optic cable in the final phase of building the IP network in MDUs in Indianapolis.

From about April 16, 2018, to about November 12, 2018, Respondent utilized premises technicians to pull and/or pre-wire fiber optic cable in MDUs in conjunction with the core technicians. (TR 486, 495) There were about 2-3 premises technicians per day working on a crew. (TR 486) A total of about 9 different premises technicians over that time period were utilized to perform MDU work. (TR 487) (R Ex21) Kenneth Wright was one of the nine premises technicians who worked in conjunction with the core technicians.⁸ Respondent Exhibit 21 denotes by month the number of days employees performed the disputed work at issue in the instant case. The row labels consist of the employees' identification numbers. Wright's identification number is KW4074. In the months of April through August, Wright performed the disputed work for the following number of days: 9; 19; 12; 13; and 6 respectively. From April

⁸ Wright is the premises technician who testified at the hearing.

through August 2018, Wright worked 59 times in the MDU environment pre-wiring and pulling fiber optic cable, which was the second highest amount of time worked by any of the employees. (R Ex 21)

Respondent used job type MTPXX8 for the MDU work. (TR 496) (GC Ex 29) Prior to April 16, 2018, premises technicians did not perform this type of work; therefore, MTPXX8 would not be on any premises technician's work tickets. (TR 496) Pursuant to the subpoena, Respondent was requested to furnish certain demand and non-demand tickets for the week of April 1, 2018 from designated garages in the Indianapolis area. None of those tickets had the job code of MTPXX8 for premises technicians. Non-demand work tickets for core technicians with job code MTPXX8 narratives state - pulled in fibers and spliced in apartments; fiber wire work; preinstalled fiber for overbuild. GC Ex. 29. Donny Collum, a core technician, testified that the work tickets with job type MTPXX8 are accurate narratives and the traditional type of work performed by core technicians in MDUs on non-demand tickets. (TR 300) (GC Ex 29)

Collum testified that the work ticket completed by Trent Driver on April 6, 2018 involved a copper-fed ticket to a home. This meant the fiber was thousands of feet away from the home and it transformed into copper before it came into the home. Collum knew it was a copper job because of the third letter in the job type - IRJIXX. The third letter J stands for fiber to the node (FTTN). The premises technician had signal issues; so, he had to create a helper ticket because he was not qualified to work on the wire. (TR 300 - 306) (GC 28).

Moreover, job type MTPXX8 was illustrated by GC Ex 30, which depicts a pre-wire job for an MDU commencing at the cross box where the fiber is fed; then it goes through poles; hits the splice; comes down the pole; and goes into the apartment building where it then branches off into multiple units. (TR 293) Core technicians are responsible for performing this work. (TR

293-294) Whereas, premises technicians perform work at a customer's premise and use a single drop wire as shown in GC Ex 31. A premises technician would work from a customer demand ticket, meaning a customer has ordered a service/product. A premises technician would perform work were the IP network has already been established. The premises technician may run a since wire called a drop to connect the service. In comparison, premises technicians do not perform the same or similar work as core technicians. (TR 745, 771)

Preston Dorfmeier, a core technician, testified that in April 2018 he was assigned to construct the IP network in MDUs in Indianapolis and premises technicians were assigned to pull the fiber in his crew. Dorfmeier was told by Brian Walton, manager, that he would have premises technicians working with him for a week or two at a time. (TR 370-371) On a weekly basis, Walton informed Dorfmeier which premises technicians would be on the job with his crew. Dorfmeier was part of a six- person crew. Normally, it was five core technicians and one premises technician. They were working on apartment complexes that were both existing and new construction. They did the work for about six to eight months. (TR 372) During this time, when the premises technicians were pulling the fiber, they were working side by side with the core technicians on the same project. (TR 372) Prior to April 2018, premises technicians did not construct any part of the IP network with core technicians, nor did they perform any of the stages of constructing the network of the IP. (TR 373) Prior to 2018, Dorfmeier had worked on the same location with premises technicians on helper tickets. (TR 373) A helper ticket is issued when the premises technician attempts to install a service such as internet, video, and/or DirecTV; but the technician cannot because there is something wrong with the IP network. Dorfmeier would repair the issue with the IP network so the premises technicians could finish the install of the service job. Dorfmeier had to repair the IP network because the premises

technicians were not allowed to get into the network other than connecting the service out of the terminal. (TR 373) Prior to April 2018, core technicians performed all of the stages of constructing the network of the IP.

About April 2018, Respondent had Kenneth Wright, a premises technician, help core technicians in MDUs. (TR 340) One of the managers asked Wright if he would like to do the MDU work. Wright responded yes because he was able to learn something new, and it was different from his usual premises technician work. Wright said that he had pulled wire at a residential home, but it was different in an MDU. Wright explained that an MDU had multiple stories and it was important to know the layout to go through the floors to run wire outside to different locations compared to working in a single residence home where there was only an attic and a customer's wall. (TR 341-342, 345) Wright followed the core technicians and did what they told him to do. (TR 342) Wright was pulling wire through the attics, pulling it from the outside and making bundles and taking it where he was instructed to drop it down, he cut out boxes, and he put the wires inside. (TR 343-344) Wright worked side by side with the core technicians on the same project. He did the same work as the core technicians except splicing. Wright had never pulled wire and/or pre-wired in an MDU before this assignment. After they pulled the wire, the core technicians continued to work. They hung boxes and spliced the wire. Wright said the core technicians used machines he had never seen before. (TR 345) Wright worked with a crew of three or four core technicians. The core technicians and Wright pulled the wire first and then the core technicians did the splicing. (TR 361)

The evidence revealed that premises technicians worked at least 1,645 hours from April 2018 through November 2018 performing the work in dispute. (R Ex22) In Respondent Ex 22, the chart shows MDU hours tracked in the Indianapolis market worked by business service

technicians, field services technicians, and premises technicians. (TR 498) The business service technicians are TFS technicians also known as core technicians. (TR 501) The field services technicians are TFS technicians also. (TR 499) The hours for these two classifications consist of more than pulling wire and pre-wiring. It includes running fiber optics from the fiber terminal to the units, which is part of building the network. The business service technicians and TFS technicians perform the same type of work. (TR 502-503) The hours for the premises technicians consist only of pulling wire and pre-wiring fiber. (TR 502)

According to Ouellette, Respondent Ex 23 is a subset of the premises technician customer demand work orders from April 1-8, 2018, filtered on if “MDU” appeared in the technician narrative. (TR 510, 511, 517) Ouellette testified that there was not a field to filter the work orders to determine if it was definitely an MDU project because premises technicians were not doing that work during this time. (TR 511) Respondent had a sum of 114 work orders that reflected MDUs in the narrative from the pool it searched. Of those, Respondent stated that 23 work tickets possibly dealt with MDU fiber work. According to Ouellette’s review of the narratives, several color codes were applied which represent the following: yellow indicated premises technicians did work on the fiber but it wasn’t clear enough to determine whether the premises technician ran the line from the serving terminal to the unit; green meant it was definitive that the premises technician was doing some type of work between the fiber serving terminal and the unit; and red meant the technician stated no work was done with fiber, instead it was an upgrade. (TR 513) (R Ex 23)

Danny Collum, who was formerly a premises technician’s,⁹ disputed Ouellette’s testimony. Collum noted that the premises technicians did not engage in pulling of fiber wire or

⁹ As a former premises technician, Collum filled out the job narratives. (TR 761)

pre-wiring fiber cable. Collum testified uncontradicted that the third letter in the job type on the work order tells you the type of work for the ticket. The letter “J” in the third position means fiber to the node, which is a copper job. (TR 762, 769) This information is codified in the job key. (GC Ex 32). Collum said work orders such as U-verse installation did not involve pre-wiring or pulling of fiber. (TR 769) More specifically, the following evidence was presented regarding the work orders:

Tech Name	Job Type	Job Performed
Risk, Jacob	IRJ7QUX	Wright testified that this was job was done in an apartment. The work was done at the jack. (TR 720)
Malone, Jerry	IRJ7QUC	Wright testified that the work was done in an apartment that had existing copper wire in a wall. Previous a core technician had pulled fiber and when it was spliced, it ended up on the wrong port in the box. The premises technician on this order had to shine the light back through the wire to find out where it needed to get a signal in the apartment. (TR 723)
Rebennack, Justin	IRJ7QXG	Collum testified that this was a copper job. The premises technician did a U-Verse installation. (TR 769)
Sampson, Aaron C	IRJ7QXX	Collins testified that this was a copper job. (TR 770)
Grigsby, Benjamin	IRJ7QXX	Collins testified that this was a copper job.
Drummond, Daniel	IRJ7QXX	Collins testified that this was a copper job.
Thom, Sean W	IRJ7IXX	Collins testified that this was a copper job.
Carey, Wayne L	IRJEIXX	Wright stated that the premises technician ran a SELT test to see if there was a break which is referred to as a bridge tap. This is for copper. (TR 733)
Carey, Wayne L	IRJEIUX	Wright testified that the order was an internet install. (TR 734)
Thom, Sean W	IRJ1IXX	Wright testified that on this order was a copper job in an apartment. The IW stands for inside wiring. (734-735)
Rector, Garrett L	IRJ7QXX	Wright testified that the copper had been switched to fiber. The pre-wire had already been completed so the premises technician just had to hit a button to install the service on fiber. The

		technician also upgraded the internet which is called a conversation. (TR735-736)
Mims, Elliott	IRJ7IUX	Wright testified that the order was to install internet service. (TR 736)
Nichols, Charles A	IRJ7QXC	Wright testified that there was a blank plate that the premises technician had to replace with the ONT, which converts the fiber optic signal digitally over copper to the modem if there was not fiber receptor on the back of the modem or the residential gateway. (TR 736-737)
Nichols, Charles A	IRJ71XX	Wright testified it was a copper job in an apartment. (TR 737)
Sampson, Aaron	IRJ1IXX	Wright testified it was a copper job in an apartment. (TR737-738)
Thom, Sean W	IRJ1FXX	Wright testified that the premises technician installed the internet and the inside wiring was already complete. (TR738)
Shafer, Robert	IRJ3QXG	Wright testified that the order was a conversion known as GPON. (TR 738-740)
Thom, Sean W	MRJ1FX	Wright testified that the order was a repair. The premises technician discovered something wrong with the computer or back feeding power on the ethernet. The technician replaced the A/B jack. (TR 739)
Malone, Jerry	MRJ1QXC	Wright testified that the premises technician did a red light to trace line and then connected it back to the junction box; this did not involve pre-wiring or pulling wire (TR 740-741)
Thom, Sean W	MRJ1IX	Wright testified that this order was a complete copper job. (TR 741)
Risk, Jacob	MRJ21X	Wright testified that the premises technician ran CAT 5 which was taking a line and running it under carpet, baseboards, and from one side of the wall to the other but no pulling the wire through the wall. (TR 741-742)
Nichols, Charles A	MRJ1IX	Wright testified that this order did not consist of fiber at all. It was a pedestal. (TR 743)
Thom, Sean W	MRJVIX	Wright testified that this was a copper only job. (TR 744)

According to Wright, the work that the premises technicians performed in Respondent Exhibit 24 was not similar to the work he performed when he worked with core technicians pulling wire, hanging brackets, and performing other tasks. The work that premises technicians

performed in Respondent Exhibit 24 is actually installs for specific customers to get those services up and running. (TR 745) Likewise, Dorfmeier stated the premise technicians do not perform the same or similar work as core technicians. (TR 771)

III. ARGUMENT

A. Judge Rosas Properly Concluded that Respondent Is Obligated to Bargain Over A Material Change Such As Assigning Premises Technicians to Pull and/or Prewire in the Final Phase of the IP Network in MDUs [Exceptions 1, 5, and 12]

In the instant case, the work in dispute is the utilization of premises technicians to work in conjunction with core technicians to pull fiber wire and/or pre-wire fiber cable as part of the final phase to build the IP network in MDUs in the Indianapolis market. The record is replete with evidence establishing that premises technicians were prohibited from performing core technicians' jobs. As well, the record evidence demonstrates that premises technicians were not pulling and/or pre-wiring fiber cable in the final phase to build the IP network in MDUs prior to the instant dispute. (TR 189, 300, 496, 563) (GC 29). However, in early March 2018, Respondent informed the International CWA that it was contemplating utilizing the premises technicians in Indiana to assist the core technicians in MDUs to pull and pre-wire fiber. Hess voiced concerns, asked questions, and ultimately rejected the concept of having premises technicians assigned work historically performed by core technicians. (TR 562) The International CWA requested that if Respondent wanted to discuss the matter that it propose it formally at the negotiation table. (TR 566, 694) (GC Ex 8) To the contrary, Respondent unilaterally assigned premises technicians to work in conjunction with core technicians to pull fiber wire and/or pre-wire in the final phase of building the IP network in MDUs. (TR 471-472; 636-638; 700-701)

The Board has held that changes with regards to employees' work assignments are mandatory subjects of bargaining. *See Treanor Moving and Storage Co.*, 311 NLRB No. 39 (1992); *Laidlaw Waste Systems*, 307 NLRB 526 (1992); *Pepsi-Cola Bottling of Fayetteville*, 315 NLRB 882, 895 (1994). It is well established that an employer violates Section 8(a)(5) of the Act if it makes material unilateral changes during the course of a collective-bargaining relationship on matters that are mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962). Simply stated, a prima facie violation of Section 8(a)(5) of the Act is established if it is shown that an employer unilaterally makes a material and substantial change in a term of employment without negotiating with the union. The burden is then on the employer to show, or demonstrate, the unilateral change was somehow permissible. *Fresno Bee*, 339 NLRB 1214 (2003).

The record evidence demonstrates that Respondent changed the premises technicians work assignment by requiring them to work under a different structure. The Memorandum of Agreement (MOA) dictated that premises technicians assignments consisted of “perform[ing] all work from and including the Serving Terminal to and including the customer premises for IP enable product and services.” (GC Ex 4) Premises technicians assignments consist of being dispatched to install and/or repair work on customer-demand orders to provide a service/product. (GC 31) Their job was to ensure the services of a product was functional for the customer. This could entail a single fiber drop when the construction of the network has already been complete. (TR 241, 338, 353, 586, 628, 748) (GC Ex 31). Respondent’s work orders show that premises technicians assignments were based on customer orders located on a customer premise to provide a service/product. (Tr 769) (R 24) The record evidence reveals that the work orders did

not involve pulling or pre-wiring of fiber and thus was not similar to completing the final phase of the IP network in MDUs. (Tr 745, 496, 771)¹⁰

Respondent argues that a 2012 arbitrator's decision enlarges premises technicians duties to include MDU (non-demand) work; however, the Judge correctly found that this decision "did not expand the role of the [premises technicians] beyond their role in responding to customer orders only". The decision focused on premises technicians only performing demand work for services/products at a customer premises when dispatched. (R Ex 3) Notably premises technicians had been trained to install fiber wire and they had only installed a single fiber drop in single-family homes. They never pulled and/or pre-wired fiber optics in MDUs during the final phase of building the IP network, which consist of a different skill set. (Tr 63, 341-342, 347) Wright's uncontradicted testimony established that the disputed work was new and that he received on-the-job training by the core technicians to learn the task. Wright also testified that the installation of a single drop wire was different from pulling wire for MDU work that included using multiple wires. (Tr 343-344)

Thus, when Respondent caused premises technicians to perform the disputed work, their job was no longer (1) customer-demand; (2) customer interaction; (3) product and service based; and (4) individual work. The MDU assignment was non-demand work by a crew at a property not occupied by a customer. The evidence also revealed that technicians had to pull multiple fiber wires in the MDUs, as many as 50 to 60 in a bunch, instead of a single one.

Moreover, Respondent changed the TFS core technicians and premises technicians work assignment by requiring core technicians to train premises technicians to perform part of the

¹⁰ Compare GC Ex 29 A work ticket by core technicians that demonstrate MDUs on non-demand work.

process of building the IP network in the final phase. Respondent changed core technicians work assignment by changing the dynamics of the core technicians crew. For nearly 18 months, core technicians worked on crews with only core technicians. (Tr 486-487, 495) (R Ex 21)

Respondent now breached the barrier between the work classifications and caused premises technicians to work in conjunction with core technicians. In the alternative, Respondent could have utilized the loaned Dayton core technicians to conform with the collective-bargaining agreement pertaining to the top craft classification. Instead, as Wright testified that as a premises technician working with the core technicians he learned something new and the work in the MDUs were more extensive than just adding a single drop wire in a residential home.

Ultimately, this allowed Respondent to create an apprentice program that neither party bargained for resulting in the core technicians having to build the IP network while training the premises technicians.

Additional evidence reveals that Respondent told Dorfmeier that premises technicians would be part of his crew performing the disputed work. Dorfmeier corroborated that premises technicians worked in conjunction with the core technicians in brownfields and greenfields. Whereas previously, premises technicians worked alone. (TR 346, 362-363, 370-372, 747) According to Dorfmeier and Wright, prior to April 2018, the premises technicians had never constructed any part of the network for the IP and/or done so in conjunction with core technicians. ((Tr 373) Although the technicians had worked on the same location occasionally based on helper tickets, notably they were not working together on the same ticket. (Tr 300-306) (GC 28) When Respondent utilized premises technicians to work in conjunction with core technicians, this alone created a material and substantial change in terms of conditions of employment.

Moreover, the Board has found that even if there is no actual loss of work, the potential of loss work is sufficient to require bargaining. *Overnite Transportation Co.*, 330 NLRB 1275, 1276 (2000). The evidence demonstrates that Respondent changed some of the core technicians work locations and form of pay when it utilized the premises technicians to perform the pulling and pre-wiring of fiber wire in the MDUs. For unknown reasons, although Respondent claimed loaned Dayton core technicians were not performing MDU work; it sent the loaned core technicians home when it began to utilize premises technicians to perform the disputed work. Coleman stated in an email that Respondent asked for the premises technicians so it could send the loaned Dayton core technicians home¹¹. Notably, the loaned core technicians were paid at a higher rate than premises technicians and received compensation for room and board while they were in Indianapolis; however, this was alleviated once they were sent back to Columbus. The evidence supports the finding that the assignment of the disputed work to premises technicians resulted in a loss of work for core technicians “that was material, substantial, and significant”

A change in work location which alters compensation is sufficient to be a material and substantial change. Notably, those core technicians regular pay rates and overtime rates were higher than premises technicians. Thus, if core technicians (not to mention had they been loaned core technicians) worked and obtained additional hours, the pay structure and benefits would have been different. (Tr 582-583) Third, Respondent changed the core technicians work assignment by taking work away from them. Core technicians were responsible for building the

¹¹ Respondent alluded that it made the change to utilizing the premises technicians to pull and pre-wire fiber wire during the final phase of building the IP network because it was cost-efficient compared to loaned technicians. If Respondent proffers this argument, its rationale for the change is irrelevant. Furthermore, no evidentiary evidence was given to support such a claim.

final phase of the IP network which included pulling and pre-wiring fiber optic cable in the MDU environments.

In the final process of building the network, Respondent isolated the tasks of pulling and pre-wiring fiber optic cable by utilized premises technicians to perform those duties. (TR 43, 122-124, 125, 205, 217-223, 368-369, 502, 503, 573-574, 622, 645-647) Due to segregating phase 4(b) from the other phases of building the IP network, Respondent decreased the number of core technicians working in MDUs assigned to the final phase of building the IP network. Hess foreshadowed this decline in the top craft work and Respondent proved to do just that within a six-month period. (Tr 582-583, 688)

Overall, the change in the nature of the work that premises technicians perform, the lack of interaction with customers for premises technicians, the lack of individualized work for premises technicians, additional duties of MDUs work related to pulling wire and pre-wiring for premises technicians, the reduction in top craft work; the shared work for core technicians with premises technicians in MDUs, and the change in the dynamics of work crews equated to a substantial and material change in the terms and conditions of employment of employees requiring Respondent to bargain over said change.

B. Judge Rosas Properly Found That the Disputed Job Duties Assigned to Premises Technicians Were Not Covered By Parties' Memorandum of Agreement [Exceptions 2, 3, 4, 6]

The Judge correctly concluded that the pulling and pre-wiring of fiber in the final phase of building the IP network in MDUs was contractually reserved to core technicians.¹² There is no dispute that the MOA premises technician job duties effective from April 12, 2015 through

¹² While the General Counsel agrees with the Judge's conclusion regarding the MOA not covering the disputed work, the General Counsel takes no position on the applicability of *MV Transportation*, 368 NLRB No. 66 (2019) to the instant case.

April 14, 2018 is the document that outlines premises technician job duties and reserves certain work for core technicians during the contract. (GC Ex 4) It, along with past practice (as set forth below), set forth the terms and conditions of employees' employment. Since 2016 at the inception of Respondent performing the MDU work until this dispute, the premises technicians never performed the disputed work. Wright's uncontradicted testimony reveals that the premises technicians did not have the type of wire on the truck to perform the disputed work. Likewise, no evidence was presented that premises technicians even performed similar work until this dispute occurred.

The MOA states that the premises technician will install and maintain all of the IP enabled products at the customer premises including at the serving terminal, but excluding splicing, when the premises technician has been dispatched. This language reveals a premises technician must be assigned work based on an order from a customer to install and/or maintain a services and/or product at a customer premise which does not involve splicing (GC Ex 4).

Notably, the MOA allows premises technicians to work at job locations classified as demand-work (i.e. orders placed by a customer) at a customer premises. For instance, as Hunter so perfectly explained, an example of a premises technicians' job is the same as the technician that came to his home to install and ensure he had services. Whereas, the MOA restricts premises technicians from working on non-demand work (i.e. project-based assignments like MDUs during the constructing of the IP network). The disputed work involves the pulling and pre-wiring aspect in the final phase of building the IP network in MDUs. The work sites at MDUs are referred to as projects. Moreover, building the IP network is a process that includes multiple tasks from the crew which takes place in a series of phases; including but not limited to

pre-wiring with new wire or overlays (depending on the structure), pulling wiring through conduits, and fusion splicing connections.

Although the agreement dictates premises technicians are assigned demand work, beginning in April 2018 Respondent assigned non-demand work to premises technicians by utilizing them in conjunction with core technicians to pull fiber and/or pre-wire in the final phase of building the IP network in MDUs. In the instant case, Respondent segregated the final phase of constructing the IP networking and instructed premises technicians not to splice. This took away some work from core technicians that had been traditionally assigned to them according to the contract and past practice.

Although Respondent testified that premises technicians were trained to install and repair a single drop line at a customer's premise, no evidence was offered that they were trained to do pre-wiring and/or pulling of fiber during the final construction phase of building the IP network. Notably, the MOA job duties mentioned premises technicians performing work from the serving terminal which may include a drop. Its purpose was for premises technicians to connect IP enabled products and services. However, in MDU settings, premises technicians were doing pre-wiring and pulling fiber wire for building the IP network with core technicians and not enabling products and services for a customer.

The appropriate reading of the language of the MOA reveals that the disputed work belongs to the core technicians because (1) it is located on a property where it is non-demand work; (2) premises technicians were not installing IP products and services but were instead building the IP network so that the products and services could be installed at a later date; (3) the work includes fusion splices which is work reserved for core technicians; and (4) core

technicians are not required to be “dispatched”, but premises technicians are required to be dispatched to a customer premise.

C. Judge Rosas Correctly Found That Based On the Parties Past Practice Respondent Assigned Core Technicians the Final Phase of Building the IP Network [Exception 7 and 8]

Assuming, the MOU did not reserve the disputed to work the core technicians, the Judge correctly found that the parties’ bargaining history or past practice did not indicate a waiver on behalf of the Union. Rather, the record evidence demonstrated that core technicians had traditionally performed the disputed work. Since 2016, the TFS core technicians were performing the final phase of building the IP network, which included, but was not limited to, pulling fiber wire and/or pre-wiring fiber cable in MDUs. At various times, Respondent even utilized core technicians from different departments within its organizations including loaned core technicians. Core technicians also had a right of first refusal for the work. If the core technicians declined the work, then contractors could perform the work. Notably, the record evidence only shows that during Respondent’s history of performing the disputed work only one contractor performed the disputed work. Respondent presented no evidence of any other entity performing the disputed work. In sum, past practice alone establishes that core technicians traditionally performed pulling and pre-wiring the final phase of building the IP network in MDUs.

D. Judge Rosas Correctly Found That The Union Did not Waive Its Right To Bargain Over The Utilizing Premises Technicians to Work in Conjunction with Core Technicians to Pull and Pre-wire Fiber in the Final Phase of Building the IP Network in MDUs. [Exceptions 9, 10, and 11]

In February 2018, Jerry Ouellette, Director Network Process and Quality Technology Operations, told Bradley Coleman, Director of Technical Field Services (TFS), that premises

technicians were being sent home on a daily basis and asked about utilizing about 25-30 of them to work in MDUs to pull fiber from the serving terminal to units in Indianapolis.

Coleman felt that TFS was struggling to meet some of the requirements with loan technicians from other areas. According to Ouellette, a loan technician is when Respondent utilizes an employee out of his/her original organization to work in another organization of the company. The hours and time are cross-charged to the other organization. (TR 473) Respondent had to pay for hotel and meals for loan technicians for an extended amount of time to help out with workload. The loaned technicians were assisting with demand work.¹³ (TR 460) Whereas, a work assignment is within the employee's current work area and organization. There is no cross-charging of hours for a work assignment. (TR 473)

On February 27, 2018, Coleman sent Ellery Hunter, Director Labor Relations, a two-part email stating

Ellery – if IEFS [____] has capacity I wanted to see if we could get them for pulling fiber in MDU. “NO’ splicing – we would have TFS tech with them doing all splicing. Any issue on your part?
Sorry forgot to tell you where : -) Indianapolis

(R Ex 6) (TR 677)

Hunter stated that he talked to Coleman later on February 27th. Hunter stated that TFS had more work than technicians and they were looking for additional help. Coleman understood that IEFS had capacity; so, he wanted to use them. (TR 679) Hunter told Coleman that he didn't see a problem; but, since they were within a week or so of beginning bargaining, he had some concerns about how it might affect contract negotiations. Hunter stated he wanted to give the Union a heads up and would get back to Coleman. (TR 680)

On March 2, 2018, Hunter, via telephone, first mentioned to Hess at the International level Respondent's desire to utilize premises technicians to perform the pulling and pre-wiring of fiber cable in the final phase of building the IP network. Hess informed Hunter of the Union's

¹³ The demand work occurs when a technician is dispatched to install or repair services/products based on a customer order. A core technician or premises technician may perform demand work.

disapproval of this proposal. On March 5, 2018, when the parties were in Chicago for bargaining, Hunter in a side conversation again mentioned to Hess about Respondent's desire to utilize the premises technicians. Notably Hunter never proposed this at the main table. Hess again expressed his concern pertaining to the timing of the issue with bargaining and that core technicians had always performed the work. On March 9, 2018, after email communications Respondents' management, Hunter talked to Hess again. Hess still expressed concerns and had several questions. Hunter sought the answers and relayed it to Hess. On about March 13, 2018, Hess requested that Respondent refrain from assigning the work to the premises technicians and maintained that any proposed additions to the job duties of the premises technicians be addressed during negotiations. The Union's communication was clearly a demand to bargain over the issue. Instead of presenting proposals on the subject matter, on March 17, 2018, Hunter informed Hess that Respondent intended to assign the MDU work as it deemed appropriate to either the premises technicians or core technicians.

The parties met several times between March and June to bargain over various topics, including the MOA setting forth the job duties of premises technicians. Although Hunter asserts that the parties did not bargain about premise technicians job duties, the evidence reveals that the parties negotiated on and ultimately agreed to identical language on the MOA from the prior collective-bargaining agreement. However, during the negotiations, Respondent never made any proposals specifying its desire to utilize premises technicians to work in conjunction with core technicians in the final phase of building the IP network by pulling and pre-wiring fiber optic cable in the Indianapolis area. As the parties negotiated, Respondent had ample opportunity to present a proposal related to utilizing premises technicians pulling and/or pre-wiring fiber in the final stage of building the IP network in MDUs in the Indianapolis area. Instead, early on in the

negotiations when there was no indication that bargaining had reached a stalemate or had otherwise become futile, in April 2018 Respondent informed Local 4900 that it would implement the unilateral change.

Moreover, Respondent did not bargain with Local 4900 pertaining to the disputed work as a local issue. Respondent knew early on during negotiations that it planned to target the Indianapolis market only. On March 29, 2018, Respondent had internal communications stating that it would not engage in a regional roll out of premises technicians performing the MDU work so the issue clearly remained a geographical issue in the Indianapolis area. After Respondent informed Local 4900 that it would utilize premises technicians to perform the pulling and pre-wiring of fiber cable in the final phase of the building of the IP network, the uncontradicted evidence shows that on about April 11, 2018, Larry Robbins, Local 4900 Vice President, called Ouellette and adamantly opposed the change. On April 12, 2018, Robbins sent an email to Angela Bickel, Area Manager Network Services Technical Field Services Midwest, stating that Local 4900 opposed the premises technicians performing TFS core technicians' duties and requested to bargain. Later that day, Robbins sent another email asking if Respondent's non-response was a refusal to bargain. Ouellette, via email, told Robbins that Respondent did not see it as a unilateral change. Robbins disagreed and again asked if Respondent was denying its obligation to bargain over the issue. Ouellette replied that Respondent had the right to assign work that technicians were qualified to do and, as such, "there is nothing to be bargained".

In sum, the evidence reveals that Local 4900 demanded to bargain about the job duties of the premises technicians and Respondent denied the request. The Judge correctly found that CWA Local 4900 was "empowered" to demand bargaining. The uncontradicted evidence establishes that Local 4900 has the authority to bargain local issues with Grace Biehl, Labor

Case Manager, such as vacation schedule composition, allotments, consumer group, back to work agreements, and grievance settlements. Local 4900 even filed grievances pertaining to the premises technicians performing core technicians work which signifies the Local's right to enforce the contract. The evidence demonstrates that the Union did not deploy delay tactics; rather, Respondent failed and refused to bargain with Local 4900 pertaining to this local issue.

E. Judge Rosas' Conclusion of Law and Order and Notice Are Appropriate

The evidence clearly established that Respondents violated Section 8(a)(1) and (5) of the National Labor Relations Act ("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.

IV. CONCLUSION

For the foregoing reasons, and based upon the entirety of the record, the General Counsel respectfully requests that Respondent's Exceptions be denied in their entirety.

SIGNED at Indianapolis, Indiana, this 28th day of February 2020.

Respectfully submitted,

/s/Michael Beck

Michael T. Beck
Counsel for the General Counsel
National Labor Relations Board
Region Twenty-Five
Minton-Capehart Federal Building, Room 238
575 North Pennsylvania Street
Indianapolis, Indiana 46204
Phone: (317) 991-7638
Fax: (317) 226-5103
E-mail: michael.beck@nlrb.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing General Counsel's Brief in Answer to Respondent's Exceptions to the ALJ's Decision has been filed electronically with the Office of the Executive Secretary through the Board's E-Filing System this 28th day of February 2020. Copies of the filing are being served upon the following persons by electronic mail:

Stephen J. Sferra, Attorney
Littler Mendelson
1100 Super Avenue East, 20th Floor
Cleveland, OH 44110
Email: ssferra@littler.com

Jeff Seidle, Attorney
Littler Mendelson
1100 Super Avenue East, 20th Floor
Cleveland, OH 44110
Email: jseidle@littler.com

Larry Robbins
Communication Workers of America Local
4900
1130 East Epler Avenue
Indianapolis, IN 46227-4202
Email: lrobbins@cwa4900.org

/s/Michael Beck

Michael T. Beck