

**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'S REPLY BRIEF IN SUPPORT OF  
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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ATTORNEYS FOR RESPONDENT  
*Indiana Bell Telephone Company*

## I. INTRODUCTION AND SUMMARY OF ARGUMENT

For the reasons stated in Exceptions and Brief in Support filed by Respondent Indiana Bell Telephone Company (“Company”) on February 6, 2020, the Board should reverse Administrative Law Judge Michael Rosas’ (“ALJ”) decision issued on December 11, 2020. The General Counsel’s (“GC”) Answering Brief raises no arguments not comprehensively addressed in Respondent’s Brief in Support, and distorts the relevant facts and controlling legal principles.

In April 2018, following notice and extensive discussions with the Communications Workers of America (“CWA” or “Union”), the Company began to assign a limited number of Premises Technicians (“Prem Techs”) in Indianapolis to install fiber optic cable in apartment buildings (aka Multi Dwelling Units or “MDUs”). The work consisted of pulling strands of fiber cable through walls and ducts from the buildings’ Serving Terminals to an “ONT” device attached to each living unit, where the fiber terminates. This was a small amount of work. Only two or three Prem Techs were assigned to pull fiber in MDUs each day over approximately seven months. During that period, Prem Techs only performed 3% of the MDU work in Indianapolis.

ALJ Rosas concluded that the disputed work “was not substantially different” from the work Prem Techs ordinarily performed. (D 12:9-10). Indeed, the Company and the Union have negotiated Prem Tech job duties, and their agreement is memorialized in the Premises Technician Job Duties Memorandum of Agreement (“Prem Tech MOA” or “MOA”), which provides

The Premises Technician will perform all work from and including the Serving Terminal up to and including the customer premises for IP enabled products and services.

The disputed work was simply pulling wire from Serving Terminals to living units in apartment buildings, work that plainly was covered by the Prem Tech MOA.

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 Company had the unassailable right to assign the work to Prem Techs. 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. For these reasons, the ALJ's decision should be reversed.

## **II. LEGAL ANALYSIS**

### **A. The Disputed Work is Covered By the Prem Tech MOA**

The Company did not violate Section 8(a)(5) because the Prem Tech MOA covers the disputed work assignment. The Company's assignment of Prem Techs to perform MDU work in Indianapolis therefore was not an unlawful unilateral change. The Board's decision in *MV Transportation*, 368 NLRB No. 66, slip op. at 11 (2019) is controlling. *MV Transportation* 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." Under contract coverage, the Board examines the plain language of the "agreement to determine whether action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally." *Id.* In doing so, "the Board will give effect to the plain meaning of the relevant contractual language, applying ordinary principles of contract interpretation." *Id.* Cognizant of the fact that the "agreement establishes principles to govern a myriad of fact patterns" and that "bargaining parties [cannot] anticipate every hypothetical grievance and . . . address it in their contract," the Board stated that it "will not require that the agreement specifically mention, refer to or address the employer decision at issue." *Id.* (quoting *NLRB v. Postal Service*, 8 F.3d 832, 838 (D.C. Cir. 1993) (alterations in *MV Transportation*)). "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.* “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 pursuant to an arbitration clause or by bringing suit under 29 U.S.C. § 185.**” *Honeywell v. NLRB*, 253 F. 3d 119, 124 (D.C. Cir. 2001)(emphasis added).

The Board’s very recent decision in *ADT, LLC*, 369 NLRB No. 31 (February 27, 2020), also compels reversal. In *ADT*, the Board overturned ALJ Michael Rosas’ decision and found the employer did not violate the Act when it unilaterally implemented mandatory 6-day workweeks in two of its facilities, notwithstanding that the applicable bargaining agreements did not explicitly authorize the employer to do so. Rather, the agreements provided that employees may be scheduled to work between 7:00 a.m. and 5:30 p.m. from Monday through Friday, and “Customer needs may periodically make it necessary for work to be performed on a second shift and/or Saturdays.” The agreement further provided that when additional shifts were needed, the employer would seek volunteers, and if there were no qualified volunteers, the least senior person would be assigned to perform the work. In a separate provision, the agreement provided that employees would be paid one and one-half times their regular rate for work performed “on scheduled days off.” The employer later instated a new policy of responding to service calls within 72 hours, and as a result, temporarily mandated 6-day workweeks for all employees. Oddly, ALJ Rosas interpreted this language to prohibit the employer from mandating overtime, enabling employees to work 6-day workweeks only on a voluntary basis. Although the agreements did not expressly authorize the employer to implement mandatory 6-day workweeks, the Board overturned the ALJ and found that by reading the aforementioned provisions together, the contract authorized the employer to require its employees to work on scheduled off days, and therefore did not violate the Act.

ALJ Rosas made the same error here as in *ADT*. His misinterpretation of the MOA underlies his erroneous conclusion. The MOA unambiguously gives the Company the right to assign the disputed 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). This empowering language plainly covers the work in question, i.e., pulling fiber strands from Serving Terminals to living units in apartment buildings. Incredibly, the ALJ interpreted this language to reserve work performed from the Serving Terminal up to living units in apartment buildings for *Core Techs*. The Board must reverse this glaring error.

The GC and ALJ erroneously rely on two strawman arguments in an attempt to defat *MV Transportation’s* contract coverage standard. First, they err by falsely contending that the Prem Tech MOA does not cover the disputed work because it was not “non-demand” work not associated with a customer order. This fabricated limitation on Prem Tech job duties is unsupported by the record evidence and conflicts with the plain language of that agreement.

As in *ADT*, where the same Judge Rosas fabricated the limit on mandatory 6-day workweeks, here the ALJ contrived the limitation that Prem Techs could only perform IP enabled work associated with a customer order. The Prem Tech MOA broadly empowers Prem Techs to perform “*all* work from and including the Serving Terminal up to and including the customer premises” for all “IP enabled products and services” (i.e., meaning services provided over the IP network). That contractual language covers both substantive elements of the disputed work: running of fiber cable (“IP enabled products and services”) *and* connecting that fiber from the Serving Terminal at the MDU to each individual living unit. Conversely, nothing in the Prem Tech MOA limits the scope of Prem Tech job duties to work associated with a customer’s order.

The ALJ's irrational construction that "customer premises" implicitly means an actual customer order does not give meaning to the Prem Tech MOA as a whole. Construing the agreement 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.

Secondly, the GC's Brief asserts the baseless proposition that the disputed work consisted of "building the final phase of the IP network," work ostensibly performed by TFS Techs. To the contrary, the record clearly demonstrates that the network is constructed by C&E contractors – not TFS Techs. (Brewer 617-19; White 393). Critically, the disputed work simply involved connecting fiber from Serving Terminals to living units in MDUs, and did not involve building any "phase of the IP network." As the ALJ conceded, such work "was not substantially different" from the work Prem Techs ordinarily performed, and work expressly authorized under the Prem Tech MOA.

Not only does the Prem Tech MOA cover Prem Techs pulling fiber from the Serving Terminal to living units in MDUs, the language expressly gives the Company the right to assign

that work to Prem Techs. 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. 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 work in MDUs.

**B. The CWA Waived its Right to Bargain Over the Work Assignments**

**1. CWA did not request bargaining over the work assignments**

The ALJ's conclusion that the Company unlawfully unilaterally assigned Prem Techs to perform the disputed work "without first bargaining with the International Union" – the Complaint's sole allegation (Complaint ¶ 6(c)) – is factually and legally indefensible. The record is undisputed that the CWA never requested to bargain and never designated the Charging Party, CWA Local 4900, as its bargaining representative.

The CWA, not Local 4900, is the exclusive bargaining representative for the bargaining unit. The GC's brief erroneously and vaguely contends that CWA representative Curt Hess requested to bargain over the disputed work. Hess merely "objected" to the work assignments, which is not a request for bargaining. *See Omaha World- Herald*, 357 NLRB 1870, 1871 (2011) (use of "discuss" and "explain" instead of "bargain over" waived bargaining rights); *Ingham Regional Medical Center*, 342 NLRB 1259, 1262 (2004) (use of "discuss" rather than "bargain" waived bargaining rights); *Huber Specialty Hydrates*, 369 NLRB No. 32 (February 25, 2020) (agreement that union could have "input" on change waived right to bargain over the change).

Undisputed facts prove conclusively that the CWA never requested to bargain. On March 2, Director of Labor Relations Ellery Hunter notified Hess the Company was considering assigning Prem Techs to do MDU work in Indianapolis. (Hess 561; Hunter 683-84). The Company did not

implement the plan until more than six weeks later, on April 16. It is undisputed that Hess never requested to bargain over the work assignments. Hess merely stated a concern that TFS Techs were being loaned into Indianapolis from Dayton. Hess understood this was never local issue, but rather the Prem Tech MOA impacted the entire bargaining unit.

After their initial conversation on March 2, Hunter and Hess continued discussing assigning Prem Techs to perform MDU work. The ALJ's conclusion 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" is patently false and unsupported in the record. (D 14:35-39). Nor did the ALJ cite to any evidentiary support for that incredible conclusion. In fact, 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 the parties' nascent negotiations on a new contract. (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, the same work they have always done, as the ALJ acknowledged. In response to Hess's email, Hunter explained the disputed work assignments were not "additions to the job duties" of Prem Techs because "placing inside wiring in MDU's is clearly within the scope of the Premises Technicians responsibilities as described in the [Prem Tech MOA]. Premises Technicians routinely place inside wiring, as well as drops, in the normal course of their daily work." (R 10). Hess did not respond to Hunter's email, and did not request bargaining over the assignments.

**2. Local 4900 is not the exclusive bargaining representative and was not "empowered" to request bargaining on behalf of the CWA**

Contrary to the ALJ's decision, Local 4900 was not "empowered" to bargain over the work assignments or to request bargaining on behalf of the CWA. (D 14:17-20). The Complaint alleges

the Company assigned Prem Techs to pull wire and pre-wire MDUs “without first bargaining with the International Union.” (Complaint ¶ 6(c)). The Complaint does not allege that the Company failed to bargain with Local 4900, nor that it had any duty to do so. Local 4900 was not the authorized bargaining representative and did not have authority to bargain over the MOA.

The ALJ’s conclusion that Local 4900 had authority to request bargaining on behalf of the CWA cannot be reconciled with the CWA Constitution or the parties’ CBA. 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, §1(a), available at <http://www.cwa-union.org/pages/constitution>. The 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 §1(b). The CWA Constitution clearly limits the Local’s responsibilities to “represent the workers in their respective jurisdiction relating to Local matters.” *Id.* at Art. XIII, §§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.

In accord with the CWA Constitution, the parties’ CBA similarly confirms the Local’s lack of standing to request bargaining on behalf of the CWA. Section 8.01 of the CBA provides that

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 [CWA] and the Company respectively. Agreements reached as a result of bargaining shall become effective when executed by duly authorized representatives of the Parties except as otherwise provided therein.

(GC 2, p. 12). Under this plain language, CWA – and not Local 4900 – is the exclusive bargaining representative for the bargaining unit. Local 4900 representative, Larry Robbins, requested to

bargain *on behalf of Local 4900*. He could not bargain on behalf of the CWA because he was not a duly authorized bargaining representative for the CWA.

Finally, 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) (employer breaches its obligation to deal exclusively with the bargaining agent when it bargains with unauthorized representative).

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. (D 14:22-29). His dubious contention that “there is no indication that the Company was being asked to bargain with [Local 4900] instead of CWA” (D 14:29-30) is demonstrably false and turns the lone Complaint allegation on its head. Robbins’ April 12 email was purposefully unequivocal:

**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, further demonstrating 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, which lacked 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 Work Assignments were Not a Material or Substantial Change, and Therefore the Company Did Not Have a Duty to Bargain Over Them**

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. *See Alamo Cement Co*, 277 NLRB 1031 (1985) (employer did not violate §8(a)(5) by unilaterally modifying a job classification, where the employee spent most of his time performing the same duties, and the changes only resulted in a "slight" wage increase, assistance to a coworker, and sporadic substitution for a coworker); *Ead Motors E. Air Devices*, 346 NLRB 1060 (2006)(transfer to full-time work in different part of facility did not constitute material change because duties and schedule were the same); *Scott Lumber Company*, 117 NLRB 1790 (1957) (new requirement that employees clean-up on down time, as opposed to doing nothing, was not a change subject to bargaining). 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.

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 12<sup>th</sup> day of March, 2020, a copy of the foregoing was electronically filed and served via e-mail upon the following:

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