

**Scott-New Madrid-Mississippi Electric Cooperative
and Local 702, International Brotherhood of
Electrical Workers, AFL-CIO. Case 14-CA-
24111**

April 9, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX
AND HIGGINS

On December 16, 1996, Administrative Law Judge Albert A. Metz issued the attached decision. The Charging Party filed exceptions and a supporting brief. The Respondent filed cross-exceptions, a supporting brief, an answering brief, and a motion to strike the Charging Party's exceptions. The General Counsel filed an answering brief to the Respondent's cross-exceptions.

ORDER

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs¹ and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Scott-New Madrid-Mississippi Electric Cooperative, Sikeston, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ In its answering brief, the Respondent moved to strike the Charging Party's exceptions on the basis that the Charging Party failed to identify the part of the judge's decision to which exception is taken and failed to support the exceptions by precise citation of transcript pages in accordance with Sec. 102.46(b)(1)(i), (ii), and (iii) of the Board's Rules and Regulations. Sec. 102.46(b)(2) of the Board's Rules states that any exception which does not comply with the requirements of Sec. 102.46(b)(1) may be disregarded. Although the Charging Party's exceptions are not in precise conformity with Sec. 102.46(b), we find that the Charging Party's exceptions are in substantial compliance with the Board's Rules. Accordingly, we deny the Respondent's motion. *America's Best Quality Coatings Corp.*, 313 NLRB 470 fn. 1 (1993), enfd. 44 F.3d 516 (7th Cir. 1995), cert. denied 115 S.Ct. 2609 (1995).

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Brendon P. Riley, Esq. and *Dorothy D. Wilson, Esq.*, for the General Counsel.

Thomas M. Hanna, Esq. and *Timothy P. Gilmore, Esq.*, for the Respondent.

Kevin Fagan, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

ALBERT A. METZ, Administrative Law Judge. This case was heard at St. Louis, Missouri, on October 9 and 10, 1996.¹ Local 702, International Brotherhood of Electrical Workers, AFL-CIO (the Union) has charged that Scott-New Madrid-Mississippi Electric Cooperative (Respondent) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).

The primary issues are whether Respondent: (1) violated Section 8(a)(1) of the Act by making various coercive statements about employees' union activities; (2) violated Section 8(a)(1) and (3) by discontinuing training and refusing to promote employee Marsha Mitchell; and (3) violated Section 8(a)(1) and (5) by unilaterally creating new qualifications for the position of staking engineer.

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent operates an electrical cooperative with a main office in Sikeston, Missouri, and a satellite office in Bloomfield, Missouri. During the 12-month period ending July 31, 1996, the Respondent derived gross revenues in excess of \$250,000 from its operations. In the same period the Respondent purchased and received at its Sikeston facility goods valued in excess of \$50,000 directly from locations outside the State of Missouri. I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

The Union has been the certified representative of a unit of Respondent's so called "inside" employees since July 1993.² The Respondent and the Union are signatories to a collective-bargaining contract covering this unit which has the effective dates of June 1, 1994, to May 31, 1997. The Union has also been the collective-bargaining representative of the Respondent's "outside" employees (linemen, etc.) for many years. Marsha J. Mitchell is employed by the Respondent as a work order clerk in the Sikeston office. Mitchell has been the "inside" unit steward since June 1, 1994. Most of the events in this case directly involve Mitchell and her activities as the union steward.

The Respondent's supervisory hierarchy includes General Manager Reuben Jeane and Financial Manager Gene Murphy. The Respondent is controlled by an elected board of directors and, at all material times, Clyde Hawes was a member of that board.

¹ All subsequent dates refer to 1996 unless otherwise indicated.

² All full-time and regular part-time field engineers, customer service representatives, dispatchers, accountants, accounting clerks, cashiers, computer operators, bookkeepers, secretaries, mechanics and clerical employees, employed at the Respondent's Sikeston and Bloomfield, Missouri offices, excluding all executive secretaries, administrative assistants, confidential employees, guards, supervisors as defined in the Act and all other employees.

III. THE UNFAIR LABOR PRACTICE ALLEGATIONS

A. *Mitchell's Computer Training*

Marsha Mitchell knew that computer operator, Linda Cantrell, was contemplating retirement. In late 1995 Mitchell asked Cantrell if she could teach her about the computer position and Cantrell agreed. Thus, in January and February 1996, Mitchell would occasionally assist Cantrell in her computer work. Managers Reuben Jeane and Gene Murphy observed Cantrell training Mitchell during this period.

On February 14, Murphy showed Mitchell a computer training brochure and asked her if there was any schooling she would like to attend. Mitchell told him that she wanted to go to the intermediate "IQ" school. Murphy said he would get back with her about her request.

On February 23 Mitchell filed two grievances with Jeane. One grievance concerned a pay dispute relating to employee Mary Simmons. The second involved the question of whether a newly created mapping job was unit work. These were the first grievances ever filed concerning the "inside" unit.

B. *Cantrell is Told Not to Train Mitchell*

Employee Peggy Evans testified that she had moved to a new job in mid-February. One or two weeks later she was approached by Murphy who told her that it would be in her best interest to start learning Linda Cantrell's computer operator job. Murphy told her to check with Mitchell to clear the training through the Union. Evans did discuss the matter with Mitchell who said she was unaware of any union concerns about such training. The following day Murphy came to Evans and told her there was no reason to involve the Union. He said that if anyone asked her about the training, "it was best to say that it was my interest . . . that it was me coming to him . . . about this learning." Evans thought it odd that Murphy changed his mind as to asking the Union about the training.

Murphy testified that Evans had approached him about learning Cantrell's computer job. He denied that he had ever instructed her to check with the Union about the training. Murphy did admit that he could have told Evans that there was no need to involve the Union in the training as he felt that was the case. He stated that he had talked to Jeane about the training before giving his approval to Evans for her computer training. Murphy recalled that Jeane thought it was a good idea.

Cantrell testified that on March 1 Murphy told her that she was no longer to instruct Mitchell or use her assistance in any way. He said that Peggy Evans had expressed an interest in the computer job and that Cantrell was to train her in the work. Murphy said that in the future any time Cantrell needed assistance she was to first call on her backup, Emily Manley, and if she was not available then to call on Peggy Evans.

Murphy admitted he had told Cantrell to train Evans. He denied, however, that he had told Cantrell that she should not train Mitchell. He did note that he had not observed Mitchell training with Cantrell after he had talked to her about training Evans. Murphy testified that if Cantrell and Mitchell had stopped the training it would have been of their own volition as he had never ordered that done. As discussed more fully below, I do not credit Murphy's testimony.

C. *Murphy's Confrontation With Mitchell*

Employee Mary Garner testified that on March 14 she witnessed Financial Manager Murphy approach Marsha Mitchell in the office and angrily point his finger at Mitchell. Murphy wanted to know why another employee had taken leave without permission. Mitchell told Murphy that she did not know what the situation was but that the person was a senior employee and she was sure the employee had properly taken leave.

Later the same day Garner was in Murphy's office on business. Garner testified that Murphy started talking about Mitchell and said that he had always gotten along with Mitchell and that she was a good employee. Garner recalled Murphy saying, "But . . . since she had taken over [as] the Union shop steward he had been unable to get along with her . . . that she was always flexing her radical Union muscles. He said that he had always tried to help Ms. Mitchell get trained for advancement in positions in the Company, but that he could only do what the boss would allow him to do."

Murphy recalled discussing the employee leave matter with Mitchell but he denied he was angry at her. He was not sure why he had brought the situation to Mitchell's attention as she had nothing to do with the leave. Murphy denied that he said anything to Garner about Mitchell flexing her radical union muscles. He did admit that he could have said that he had always tried to train Mitchell for advancement but he could only do what his boss (Jeane) told him to do. Murphy denied that he would have mentioned Mitchell's training in a negative context related to her union activities.

I found Murphy's denial of discussing Mitchell's union activities in the context of training was not credible. His demeanor was not impressive when he testified the event did not happen. Garner was direct and certain in her testimony and presented a convincing demeanor. I fully credit her version of the conversation with Murphy. The Respondent's disparaging remarks about Mitchell's steward activities and the inference that she was denied training because of her union activity are found to be violations of Section 8(a)(1) of the Act.

D. *March 20 Grievance Settlement Meeting*

On March 20, Mitchell and Mary Simmons were in General Manager Jeane's office discussing Simmons' pay grievance. They were able to reach a settlement in the matter and were waiting for the understanding to be typed. According to the women, Jeane was conversing with Simmons about the grievance and mentioned his feelings when Mitchell had served him with the grievance. Mitchell recalled Jeane said that it had caught him so off guard and made him so mad he could have knocked Mitchell out of his office. Mitchell protested that he was not being fair that she was just enforcing the contract. Mitchell recalled that Jeane said he knew that. Jeane then asked Mitchell if she had any more "irons in the fire." She told him she did not. Simmons testified that she recalled Jeane saying the grievance had made him so angry that he could have thrown Mitchell out of his office.

Jeane admitted that he had gotten angry when he received the grievances from Mitchell. He recalled that his anger took the form of his hitting his desk. He blamed his reaction on his feelings that he was doing a good job of following the terms of the contract. He said that he did not remember mak-

ing any comments to Simmons and Mitchell in the settlement meeting that could be construed as a threat. Jeane was asked whether he may have made the statement but did not remember doing so. He responded, "Possibly."

Jeane's demeanor and his evasive denials of making the threatening remark about throwing Mitchell out of his office were unconvincing. Mitchell and Simmons were credible witnesses whose demeanors were persuasive that they accurately recalled Jeane's remarks. Their testimony is credited. I find that the Respondent violated Section 8(a)(1) of the Act by Jeane's threatening statements to Mitchell because of her union grievance filing activities.

E. Mitchell's Denial of Training

On March 22 Mitchell asked Murphy about her request for attending computer school as she had not heard back from him. Murphy replied that Reuben Jeane had instructed him that she was not to go to the class. Mitchell told him that she felt they were discriminating against her and this included not letting her train for Cantrell's computer position. Mitchell recalled that Murphy said he was embarrassed and ashamed of the actions that were going on towards her but that he was only doing what he was told.

Murphy testified that he talked to Jeane about Mitchell going to the computer class, but, "At the time I talked to him he . . . was not ready to send anybody. It was sometime yet before that class was to take place and he said, 'I'm going to put it on hold.'" Murphy related that he periodically would go back to Jeane to see if he had granted approval for the training, and eventually Jeane told him Mitchell could go. He denied that Mitchell ever confronted him about discriminating against her in training or that he told her he was ashamed but that he was only doing what he had been told.

Jeane's recollection varied from that of Murphy. He testified that it was Murphy who delayed the approval. Jeane recalled that, at first, Murphy did not have a recommendation as to whether Mitchell should go to the class. Later Murphy came to him, said he had reviewed the matter and recommended Mitchell attend the class. Jeane then gave his approval. He denied that he had ever told Murphy that Mitchell's training was not approved.

On March 25 Murphy came to Mitchell and told her that she would be attending the class she requested. He gave her no reason for the apparent change in the authorization. Mitchell attended the computer training in April.

The Government asserts that the Respondent's withdrawal of Cantrell's training of Mitchell and the denial of Mitchell's computer schooling were punishments for her grievance filings. The Respondent denies that Mitchell's computer training was ever withdrawn or otherwise effected.

Murphy was not persuasive in explaining his conversations with Cantrell, Garner, and Mitchell concerning Mitchell's training. His demeanor was not convincing. I do not credit Murphy's denial that he told Cantrell to stop training Murphy. Cantrell was a very believable witness who had nothing obvious to gain by testifying against her employer. Considering Murphy's and Cantrell's contrasting demeanors, and the fact that Cantrell did cease training Mitchell, convince me that the training stopped according to Murphy's orders. Murphy's statement to Evans that she should claim that it was her interest in being trained by Cantrell raises a further infer-

ence of an effort to subvert Mitchell's computer training because of her union activities. Regarding the initial lack of approval for Mitchell's computer schooling, it is apparent that Murphy was being highly defensive when he told Mitchell that he was only doing what the boss told him. Murphy and Jeane's varying testimony as to how Mitchell's training request was handled was likewise not supportive of Respondent's case. Also indicative of the conclusion that Mitchell's training was effected by her union activities are Murphy's March 14 comments to Mary Garner. In that conversation he told Garner that Mitchell had been flexing her radical union muscles and, while he always tried to train Mitchell, he could only do what the boss allowed him to do. Based on the credited testimony of the Government's witnesses and the weight of the evidence, I find that the Respondent did preclude Cantrell from training Mitchell and initially decided not to allow Mitchell to attend computer schooling because of her union activities. These actions are found to be violations of Section 8(a)(1) and (3) of the Act. *Wright Line*, 251 NLRB 1083 (1980).

F. Staking Engineer Vacancy

The Respondent has a job classification referred to interchangeably as field or staking engineer. The duties of these employees are to process job orders generated by customer calls for new or revised electrical service. This involves going to the customer's location, meeting with a customer, and determining their needs for service and the materials and details required to accomplish the task. The staking engineer is responsible for drawing a staking sheet which diagrams the project and lists the materials needed. The staking engineer takes this information to his office location and enters it into the computer so a materials listing can be generated for the project. The staking engineer considers the customer's power requirements, and may refer to electric load sheets or architectural drawings with electrical plans. Such documents describe motors, wattages, voltages, and electrical phasing. The staking engineer calculates the required transformer sizes, wire sizes, pole, and hardware requirements, etc. These employees must also be cognizant of easements, pole placement, terrain, and removing obstacles for line construction such as brush and trees. The staking engineers must also be knowledgeable about common electrical standards such as those dictated by the National Electric Safety Code.

A job opening occurred for a staking engineer in March. Employee Peggy Evans testified that Jeane mentioned the job to her at the time he told her she would not be getting another job she had bid on. Jeane and she discussed the pay for the staking engineer job. Evans felt that Jeane was encouraging her to apply for the job. Jeane denied that he was encouraging to her but stated that he did not want anyone to feel they could not bid on a job. On April 17 Steve Hughart, the Union's business representative, filed a grievance alleging that the staking engineer position had not been posted for bidding by employees. The grievance also challenged the Respondent's use of a supervisor to do the job while it was vacant. On May 8, the Respondent did post the job. The posting listed, for the first time, qualifications that applicants must have: (1) experience in distribution line design and staking; (2) distribution line construction as a journeyman lineman; or (3) a bachelor's degree in electrical engineering. On May 9 the Union filed another grievance dis-

puting the Respondent's right to unilaterally require qualifications for staking engineer applicants. The grievance argued that current employees were not being given a fair chance to learn and advance into the staking engineer's job.

On May 10, Marsha Mitchell filed a written application letter bidding on the staking engineer job. She stated that she had experience working with staking sheets, doing work orders, and was familiar with the materials involved. Mitchell further stated that she thought these qualifications were sufficient to successfully learn the staking engineer position. Peggy Evans also applied for the staking engineer job.

G. Board Member Hawes' "Troublemaker" Statement

Employees Mitchell, Garner, and Mary Elizabeth Thomason testified that on approximately May 21 they were working in their mutual office area when board member, Clyde Hawes, came into the office. This was an unusual occurrence as Hawes seldom spoke to the clericals or was in their office area. In sum, the women recalled Hawes saying hello to them and then walking over to Mitchell's desk and saying, "I've come to see how the troublemaker is doing." According to the women Hawes, who was not smiling, then turned and left.

Hawes denied the event took place. He could only recall being in that office a couple of months later in July. He denied that he ever called Mitchell a "troublemaker."

All three women were straightforward and impressive witnesses. Their demeanors were those of witnesses who were honestly stating their best recollection of an extraordinary event in their working lives. Hawes was not convincing in his demeanor and testimony that the event did not happen. Considering all the circumstances, including the weight of the evidence and the demeanor of the witnesses, I credit the employees' version of the encounter. Hawes' remark is found to be a reference to Mitchell's union activities as a steward. I find that the Respondent violated Section 8(a)(1) of the Act by Hawes' coercive "troublemaker" statement. *Pottsville Bleaching Co.*, 303 NLRB 186, 189 (1991).

H. Mitchell is Not Promoted to Staking Engineer

On May 25, both Mitchell and Evans were notified by the Respondent that they were not qualified for the staking engineer job. As no candidates were found internally, the Respondent advertised the job generally. In August the Respondent hired Joe Brewer who had 30 years' experience as a journeyman lineman. At the time he was hired, Brewer was a foreman supervising a line construction crew for another employer.

The Respondent introduced evidence concerning the backgrounds of persons who had worked as staking engineers. O. C. Hamon was first to be hired in that job. He had worked as a journeyman lineman and a construction crew foreman. Later the Respondent had a reorganization and the job that Ray McLane held was eliminated. McLane was then transferred to work as a staking engineer. He had previously worked for the Respondent as a groundman on a line crew and as a dispatcher in the member services department. Hamon quit and the job was posted in January 1994. Loyd Rice, a journeyman electrician working for the Respondent, was awarded the job. Rice and McLane were the staking engineers when Larry Kelly was hired by the Respondent as

the systems engineer in March 1994. Kelly, who supervises the staking engineers among other duties, immediately had difficulty with the way McLane was performing. As a result he had to spend 40 to 50 percent of his time assisting and supervising McLane's work. This included traveling to McLane's Bloomfield office area from Kelly's Sikeston office. Kelly discussed the matter with Jeane and it was decided that McLane would be required to transfer to the Sikeston office where he could work with the other staking engineer and be more available for Kelly to oversee. Ultimately McLane did not want to transfer to the Sikeston office and he transferred to a different job. McLane's transfer created the staking engineer vacancy that is the subject of this case.

Mitchell has been employed as a work order clerk in the Respondent's Sikeston office. The work orders come from the staking engineers. She functions as an accounting clerk whose job is to make sure that costs are correctly tracked and that work orders are accurate before they are closed. Mitchell has no background in technical electrical work and has never done electrical field or construction work.

I. Analysis of the 8(a)(3) Allegations Concerning Mitchell's Being Denied the Staking Engineer's Job

The General Counsel has the initial burden of establishing that union or other protected activity was a substantial or motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support such a showing of discriminatory motivation are union activity, employer knowledge, timing, and employer animus. Once such unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Manno Electric*, 321 NLRB 278 (1996). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). "A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enf. sub nom. 705 F.2d 799 (6th Cir. 1982).

Mitchell's union activities as steward, including being the messenger for the delivery of grievances, was well known to the Respondent. The timing of her denial of the staking engineer's job was in close proximity to her filing of the grievances that angered General Manager Jeane. There is no doubt that the Respondent bore some resentment toward Mitchell because of her union activities.

System Engineer Kelly related how he had problems with McLane's work and the time it took to assist him in his duties. Shortly after starting to work for the Respondent Kelly had discussed with Jeane the technical qualifications he wanted staking engineers to have. Kelly related his experience at his former employer, Florida Power and Light, where staking engineers were required to have backgrounds as degreed engineers or journeymen linemen. They again dis-

cussed the matter when McLane's job came open. The initial discussions preceded any grievance filings by Mitchell. Kelly was a forthright witness who had no involvement with Mitchell and her union activities. I credit Kelly's testimony that he wanted staking engineers to possess technical skills that would avoid his having to devote substantial time to their training and that these discussions had nothing to do with Mitchell.

While Mitchell was exposed to some of the staking engineer work this was not shown to be sufficient to make her a qualified candidate to fill the vacancy. The Respondent's concern for hiring an employee with technical skills is adequately demonstrated by the record. In this regard I particularly find Kelly's testimony credible and substantial. I find that Respondent's action in not giving the staking engineer job to Mitchell is not a pretext based on qualifications. The denial of the job to Mitchell has not been shown by a preponderance of the evidence to be attributable to her union activities. The Respondent has shown that it would have acted in the same manner regardless of Mitchell's union activities. I find that the Respondent did not violate Section 8(a)(1) and (3) of the Act by refusing to promote Mitchell to the staking engineer job.

J. The 8(a)(5) Allegations

The complaint alleges that the Respondent changed the requirements for the staking engineer position without notice to, or bargaining with the Union. It is further alleged that this is a mandatory subject of bargaining requiring notice and bargaining before making such a change. The Respondent defends on the basis that the parties' collective-bargaining contract gave it the right to establish qualifications for the staking engineer position.

1. Background to the bargaining issue

The Respondent asserts that the following sections of the collective-bargaining contract gave it the right to include qualifications in the staking engineer job posting:

MANAGEMENT RIGHTS

2.01 The Company shall retain the right to manage its business, including but not limited to the right . . . to hire, promote, demote and transfer employees . . . to determine the qualifications, efficiency, and ability of employees through tests or other means . . . to establish new departments . . . to determine the number of employees at each classification . . . to determine the number and location of operations and the services and products to be handled, and otherwise, generally to manage the operation and direct the working force. The above rights are not all inclusive but enumerate by way of illustration the type of rights which belong to the Company. The Company retains all other rights, power, and authority, except those which have been specifically abridged delegated or modified by this Agreement. [Emphasis added.]

SENIORITY

3.03 Promotions of employees shall be vested exclusively in the corporation.

CLASSIFICATIONS OF EMPLOYEES AND RATE OF PAY

5.04 The Company shall determine the number of job positions and skill levels required for such positions. [Emphasis added.]

5.05 Employees that bid positions of higher pay and deemed qualified by management, shall start in the new position at their current pay.

GENERAL RULES AND WORKING CONDITIONS

10.06 Nothing in this Agreement shall be so construed as requiring the Cooperative to employ any person not required in the proper and efficient operation of its properties.

10.12 The Company shall have the right to test employees to determine their skill in job placement. This testing can be written, verbal or by observation on the job. Qualifications as described in company position description shall be the basis for skill testing.

ARTICLE XI

11.01 The whole of the Agreement between the Union and the Cooperative is contained in this instrument and there are no understandings, agreements, or representations not expressed herein.

11.02 Wherever in this Agreement action is to be taken, decision made, or approval given by the Cooperative, this shall mean only the Manager or Board of Directors of the Cooperative and no other person or body, unless specifically so stated in this Agreement to be otherwise.

2. Analysis of the bargaining issue

Section 8(a)(5) and Section 8(d) establish an employer's obligation to bargain in good faith with respect to "wages, hours, and other terms and conditions of employment." The Respondent denies that the qualifications it set for the staking engineer position are a mandatory subject of bargaining. The staking engineer position is a unit position, and I find that the subject of what qualifications are necessary for that job is a mandatory subject of bargaining.

The Respondent further asserts the contract gives it the right to require specific qualifications for the staking engineer job. The Board will not lightly construe a waiver by a union of its right to bargain over mandatory terms and conditions of employment:

In order to establish waiver of the statutory right to bargain over mandatory subjects of bargaining . . . there must be clear and unmistakable relinquishment of that right. *Exxon Research & Engineering Co.*, 317 NLRB 675 (1995). To meet the "clear and unmistakable" standard the contract language must be specific, or it must be shown that the matter sought to be waived was fully discussed and consciously explored and that the waiving party thereupon consciously yielded its interest in the matter. *Trojan Yacht*, 319 NLRB 741, 742 (1995).

The management-rights clause (sec. 2.01) in the parties' contract gives a general recitation of the Respondent's powers

under the agreement.³ It also specifically states the right of the Respondent "to determine the qualifications . . . and ability of employees through tests or other means." Section 5.04 specifically allows the Respondent to "determine the number of job positions and skill levels required for such positions." I find these particular clauses to be the most pertinent to the point that the collective-bargaining contract gave the Respondent the authority to set forth qualification standards for the staking engineer job. In addition, it is noted that the other clauses set forth above also recite powers conceded to the Respondent and some of these mention the broad area of employee qualifications. While I do not find these additional clauses dispositive of the issue, they do add emphasis to the fact that the subject matter was broadly considered by the parties in their negotiations. The cases are clear that an employer must not give too sweeping an interpretation to contract language that arguably may waive a union's right to bargain. The cases do, however, recognize a common sense "clear meaning" analysis of the issue. The plain language of the instant agreement gave the Respondent the right to establish reasonable qualifications for applicants seeking the staking engineer's position. I find that the Respondent did not violate Section 8(a)(1) and (5) when it inserted such requirements in its posting for the staking engineer job. *United Technologies Corp.*, 300 NLRB 902-903 (1990).

CONCLUSIONS OF LAW

1. Scott-New Madrid-Mississippi Electric Cooperative is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 702, International Brotherhood of Electrical Workers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the collective-bargaining representative of the Respondent's employees in the following unit:

All full-time and regular part-time field engineers, customer service representatives, dispatchers, accountants, accounting clerks, cashiers, computer operators, bookkeepers, secretaries, mechanics and clerical employees, employed at the Respondent's Sikeston and Bloomfield, Missouri offices, excluding all executive secretaries, administrative assistants, confidential employees, guards, supervisors as defined in the Act and all other employees.

4. Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Disparaging an employee and implying that the employee would not receive training because of her union activities and sympathies.

³General language in management-rights clauses is not sufficient to establish a clear and unmistakable waiver of a union's right to bargain. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Johnson-Bateman Co.*, 295 NLRB 180, 184 (1989); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), *enfd.* 722 F.2d 1120 (3d Cir. 1983). Likewise, unclear language contained in a zipper clause will not be interpreted as constituting a waiver of bargaining rights. *Outboard Marine Corp.*, 307 NLRB 1333, 1337-1338 (1992); *Michigan Bell Telephone Co.*, 306 NLRB 281 (1992).

(b) Threatening an employee with physical harm because she engaged in union activities.

(c) Calling an employee a "troublemaker," because she had engaged in union activity.

5. Respondent violated Section 8(a)(1) and (3) of the Act by denying computer training to Marsha Mitchell because of her union activities.

6. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondent has not violated the Act except as here specified.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent shall offer Marsha Mitchell the opportunity to train on the computer operator's job.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Scott-New Madrid-Mississippi Electric Cooperative, Sikeston, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disparaging employees or implying that employees will not receive training because of their union activities and sympathies.

(b) Threatening employees with physical harm because they engage in union activities.

(c) Calling employees "troublemakers" because they engage in union activities.

(d) Discriminating against employees by denying them training because they engage in union activities.

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

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

(a) Within 14 days from the date of this Order, offer Marsha Mitchell the opportunity to train in the computer operator's job.

(b) Within 14 days after service by the Region, post at its facilities in Sikeston and Bloomfield, Missouri, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon re-

⁴If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁵If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ceipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 4, 1996.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT disparage employees or imply that employees will not receive training because of their union activities and sympathies.

WE WILL NOT threaten employees with physical harm because they engage in union activities.

WE WILL NOT call employees "troublemakers" because they engage in union activity.

WE WILL NOT deny training to any employee because they support Local 702, International Brotherhood of Electrical Workers, AFL-CIO, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Marsha Mitchell the opportunity to train in the computer operator's job.

SCOTT-NEW MADRID-MISSISSIPPI ELECTRIC
COOPERATIVE