Siemens Building Technologies, Inc. *and* International Union of Operating Engineers, Local 832. Cases 3–CA–24624

December 14, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On August 25, 2004, Administrative Law Judge C. Richard Miserendino issued the attached decision. The Respondent filed exceptions and a supporting brief,[1] the General Counsel filed an answering brief to the Respondent's exceptions, and the Respondent filed a reply brief.

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

The judge found that the lead building operator (sometimes designated the "chief stationary engineer") should be included in the bargaining unit. The judge found that there was insufficient evidence that the incumbent in the position, Tim Berna, possessed the indicia of supervisory status. The Respondent excepts, contending that the judge should not have addressed the issue.

We conclude that the judge appropriately addressed the lead building operator's supervisory status. We further conclude that the judge correctly found that the position was not supervisory, and therefore should be included in the bargaining unit.

Before the Respondent took over the Iola plant, the position at issue was included in the bargaining unit. The position was also included in the alleged appropriate bargaining unit in *Siemens I*, supra, and the inclusion was not challenged. Thus, historically, the lead building operator has been included in the bargaining unit.

The complaint in the instant case did not allege that the position of lead building operator was included in the unit. The Respondent, in its answer to the complaint, denied without explanation the appropriateness of the unit. At the hearing, the General Counsel attempted to elicit testimony to support a finding that Berna possesses statutory supervisory authority.

Although the Respondent objected to testimony regarding Berna's supervisory status as of the time of the June 2003 poll (see fn. 1, above), it did not state at the hearing a position as to Berna's current supervisory status. Additionally, the Respondent did not offer at the hearing to stipulate to either the appropriateness of the alleged unit or Berna's supervisory status.[3] Under these circumstances, it was appropriate for the judge to determine whether the lead building operator was in the bargaining unit.

In his decision, the judge correctly stated that the burden is on the General Counsel, as the party asserting supervisory status, to show that the lead building operator is a supervisor,[4] and he found that the General Counsel had not met his burden.[5] The Respondent, having denied

[1] In our September 30, 2005 decision in *Siemens Building Technologies,* 345 NLRB 1108 (*Siemens I)*, we found that the Respondent became a successor employer to Monroe County, New York, when it took over the operations of the County's Iola powerplant, that a subsequent poll of employees' union sentiments was unlawful, and that the Respondent violated Sec. 8(a)(1) and (5) by failing to recognize and bargain with the Union.

In the instant case, the Respondent has excepted to the judge's finding that it violated Sec. 8(a)(1) and (5) by failing and refusing to recognize and bargain with the Union as the exclusive bargaining representative of its employees at its Fleet facility, which the Respondent began operating when the Iola plant was decommissioned. The judge, relying on the standard articulated in *Rock Bottom Stores,* 312 NLRB 400, 401 (1993), found that the Respondent had a continuing obligation to recognize and bargain with the Union because the operations at the Fleet facility are substantially the same as those at the Iola plant, and because employees formerly employed at Iola constitute a substantial percentage of the Fleet facility's employee complement. Chairman Battista and Member Schaumber note that a majority of the Fleet employees were former unit employees from the Iola facility, and find it unnecessary to pass on whether the bargaining obligation would exist if some lesser percentage of employees had transferred.

The Respondent asserts that it has no obligation to bargain regarding its employees at the Fleet facility. The Respondent contends that it was not a successor of Monroe County at the time it took over the operation of the Iola plant, and that the poll it conducted in June 2003 was valid and demonstrated that the bargaining unit employees "oppose[d] representation by IUOE Local 832." In light of our decision in *Siemens I,* supra, we find no merit in the Respondent's exceptions, as to the issue of successorship, in the instant case. See *Detroit Newspapers*, 326 NLRB 782 fn. 3, 784–785 (1998) (applying collateral estoppel), enf. denied on other grounds 216 F.3d 109 (D.C. Cir. 2000). We also find no merit in the Respondent's contention that the judge erred in denying its motion to postpone the hearing in this case until the issuance of *Siemens I.* See *Detroit Newspapers,* 326 NLRB at 785.

[2] The Respondent excepts to the judge's description of employees James Muhs' and Henry Brown's job duties. The Respondent asserts that these employees have no reasonable expectation of obtaining a permanent assignment at the Fleet facility.

The judge did not specifically include either of these employees in the bargaining unit. The evidence shows that both employees were in the unit at the time the Union demanded bargaining in December 2003 following the opening of the Fleet facility. It is not necessary to the disposition of this case to determine whether Muhs or Brown remained unit employees thereafter and we therefore do not reach that issue.

[3] In its reply brief to the Board, the Respondent stated that the supervisory status of the lead building operator had not been fully or fairly litigated in this case but nevertheless offered to stipulate that the position is supervisory. This belated offer has no bearing on the propriety of the judge having addressed the issue.

[4] See *NLRB v. Kentucky River Community Care, Inc.,* 532 U.S. 706, 712 (2001).

[5] We affirm the judge's finding that the General Counsel failed to show that Berna was a supervisor for the reasons stated in his decision. We also rely on the Board's inclusion of the position in the bargaining

the appropriateness of the alleged bargaining unit excluding the lead building operator, and having failed to offer to stipulate to the supervisory status of the position, cannot now be heard to complain that the judge decided the issue.[6]

ORDER

The National Labor Relations Boards adopts the recommended Order of the administrative law judge and orders that the Respondent, Siemens Building Technologies, Inc., Rochester, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Greg Lehmann, Esq., for the General Counsel.
Daniel M. Novak, Esq., for the Respondent.
Peter C. Nelson, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in Buffalo, New York, on May 4–5, 2004. The International Union of Operating Engineers, Local 832 (the Union) filed a charge against Siemens Building Technologies, Inc. (Respondent), alleging that on December 18, 2003, the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Respondent's employees. A complaint was issued alleging, among other things, that since January 1, 2003, the Union has been the exclusive collective-bargaining representative of the Respondent's employees in the appropriate bargaining unit; that the Respondent has unlawfully failed and refused to recognize and bargain with the Union; and that the appropriate bargaining unit includes all full-time and regular part-time stationary engineers, building operators, and firemen employed by the Respondent.

The Respondent's timely answer denied the material allegations of the complaint. The parties have been afforded a full opportunity to appear, present evidence, examine and cross-examine witnesses, and file posthearing briefs.

On the entire record, including my observation of the demeanor of the witnesses, as well as my credibility determinations based on the weight of the respective evidence, established and admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, operates three power facilities in Rochester, New York, which generate steam heat and/or domestic hot water for certain buildings owned by Monroe County, New York. In the 12-month period prior to the filing of the complaint, the Respondent purchased and received at its Rochester, New York facilities goods valued in excess of $50,000 from points outside the State of New York. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent further admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Prior Cases 3–CA–24050 and 3–CA–24304

On October 6–8, 2003, the following background facts concerning the parties here were fully litigated before Administrative Law Judge Martin J. Linsky in Cases 3–CA–24050 and 3–CA–24304.

Pursuant to a collective-bargaining agreement between the Union and Monroe County, New York, the Union represented certain stationary engineers, HVAC service engineers, and a chief stationary engineer located at the Iola Powerhouse Station (Iola plant) in Rochester, New York. The Iola plant provided steam heat and hot water to certain buildings owned by Monroe County in Rochester, New York. Although the Iola plant initially was a coal burning power plant, at some point prior to October 2003, two of its four boilers were converted to burn oil and natural gas, and a third boiler was converted to burn oil and natural gas in addition to coal.

In late 2002, Monroe County announced its decision to phaseout the Iola plant and to build two natural gas fired cogeneration facilities in Rochester, New York, that would provide steam heat and hot water to the buildings serviced by the Iola plant. Shortly thereafter, Monroe County sold the Iola plant to Monroe Newpower Corporation, a nonprofit entity formed by Monroe County to (1) build the two cogeneration facilities, (2) phaseout and close the Iola plant, and (3) provide steam and energy to certain Monroe County buildings. At the same time, Monroe Newpower negotiated a contractual arrangement with the Respondent to install, operate, and maintain the two cogeneration facilities, and to operate, phaseout and close the Iola plant. The effective date of the sale to Monroe Newpower was December 23, 2002. The effective date of the contract between Monroe Newpower and the Respondent was December 31, 2002. (GC Exh. 8.) The Respondent took over the Iola plant on January 1, 2003.

In mid-December 2002, the Union contacted the Respondent about negotiating a collective-bargaining agreement for the employees who would continue operating and maintaining the Iola plant. The Respondent expressed a willingness to negotiate

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unit in *Siemens I* and the absence of any evidence of significant changes in the duties of the position at the time of the hearing in this case.

[6] Chairman Battista notes that in *Siemens Building Technologies,* supra, the General Counsel alleged that the position of chief stationary engineer was a nonsupervisory unit position. The Board agreed and explicitly included that position in the unit. In the instant case, the General Counsel argues that the position of lead building engineer is a supervisory one. The parties are in accord that the change in name is inconsequential, and the General Counsel has not shown any substantive change in duties. In these circumstances, Chairman Battista agrees that the matter was adjudicated in the prior case. Thus, the Respondent's contention (that it was inappropriate to resolve it in the instant case) is moot.

with the Union. Contract proposals were exchanged, but a dispute arose over the length of the contract and discussions broke down. In the meantime, the employees represented by the Union continued working at the Iola plant doing the same jobs in the same manner servicing the same customers through the end of December.

In late December, the Respondent interviewed and hired employees to operate the Iola plant. A majority of the work force hired by the Respondent were the former employees of Monroe County who were represented by the Union. On January 2, 2003, the Union formally requested the Respondent to recognize and bargain with it. On January 16, 2003, the Respondent denied the Union's request.

On January 23, 2003, the Union filed an unfair labor practice charge in Case 3–CA–24050 alleging that the Respondent unlawfully refused to recognize and bargain with the Union. A hearing eventually was rescheduled for June 18, 2003. Two days before the hearing date, the Respondent polled the employees as to whether they wanted to be represented by the Union. The vote was 7–0 against union representation.

On June 17, 2003, the Union filed a charge in Case 3–CA–24304 alleging that the Respondent unlawfully told employees that they would have to resign from the Union in order to accept employment with the Respondent and that the Respondent unlawfully polled or otherwise interrogated the Iola plant employees about whether they wanted to be represented by the Union.

In a decision dated February 25, 2004, in *Siemens Building Technologies, Inc.* (*Siemens I*), JD–13–04 (Feb. 25, 2004) (GC Exh. 3), Judge Linsky found (1) that the Respondent was a *Burns*[2] successor with an obligation to recognize and bargain with the Union; (2) that the reasons given by the Respondent for not recognizing and bargaining with the Union do not demonstrate an objective loss of majority support to justify its refusal; and (3) that the poll taken was tainted by the unremedied unfair labor practice of the Respondent dating back to January 2003 when the Respondent unlawfully refused to recognize and bargain with the Union. The Respondent filed exceptions to the decision with the Board, the General Counsel filed an answering brief, and no cross-exceptions were filed. The matter is currently pending before the Board.

In the interim, and more specifically, on November 13, 2003, the Respondent began phasing in the new cogeneration facilities and phasing out the Iola plant. A majority of the regular full-time employees, who operated and maintained the boilers at the Iola plant, were relocated to one of the new cogeneration facilities. On December 3, 2003, the Union made a formal request for recognition and bargaining for the stationary engineers working at the new facility. On December 18, the Respondent denied that request, which is at issue here.

B. The Operation of the Iola Plant

When it took over the Iola plant on January 1, 2003, the Respondent hired nine bargaining unit employees on a regular full-time basis: Timothy Berna, Henry Brown Jr., John F. Ciminelli, Michael H. Healy, Paul T. McBride, James H. Muhs Jr., Ray O'Dell,[3] Anthony J. Pursati, and Daniel A. Steinfeldt. (GC Exh. 9.) Over the next 11 months, these employees maintained and operated the same equipment on the same shifts at the Iola plant for the same pay under the same immediate supervision for the same customers as they had prior to the takeover. The only change was in their job titles. Instead of being called stationary engineers, the Respondent called them building operators. Tim Berna, the chief stationary engineer, who was included in the bargaining unit, was entitled lead building operator.

The Respondent hired three other bargaining unit employees on a part-time basis and a third on a per diem basis. Robert Cammilleri, James C. White, and Richard C. Healy Jr. were bargaining unit employees, who were hired as part-time building operators.[4] Bert L. Lute was a former chief stationary engineer for Monroe County, who retired from that position prior to October 2002. The Respondent hired Lute on October 15, 2002, as a full-time consultant to assist with the take over of the Iola plant, but he was never stationed at the Iola plant after the Respondent took over on January 1, 2003. Instead, Lute worked an office job at another location in Rochester, New York. Although he was available to work as building operator at the Iola plant, Lute was seldom used in that capacity. (Tr. 43.)

The Iola plant had four boilers. Although it originally was a coal burning power plant, three of the four boilers had been converted to burn oil and natural gas long before the Respondent took over. (Tr. 43, 150.) Two of the boilers burned gas as a primary fuel. One boiler was modified with a side burner for gas. All three could also burn oil. When the Respondent took over in January 2003, there was only one boiler that burned only coal. By October 2003, the sole coal burning boiler was no longer operating and the coal supply was gone.[5] (Tr. 181.)

Throughout year 2003, the Iola plant provided steam heat to three buildings owned by Monroe County: Monroe Community Hospital; Monroe County Health and Social Services Building; and Pure Water Building. (Tr. 34.) The building operators with classes I and II stationary engineer licenses were responsible for the operation and maintenance of the boilers. They monitored the pumps, motors, and fans by observing a computer terminal in the control room and by visually inspecting the equipment as they made rounds at the plant. (Tr. 66–69; 87–90.) These individuals took water samples and tested the water. They also adjusted the chemical mix and water temperatures by turning values and knobs and adjusting other apparatus.

[2] *NLRB v. Burns Security Services,* 406 U.S. 272 (1972).

[3] O'Dell became ill in February 2003, was absent from work for several weeks, and never returned to the Iola plant. Instead, he received another job with the Respondent at another location.

[4] Cammilleri and Richard Healy left the Respondent's employ prior to November 2003, while John White left in early 2004. (Tr. 29–30, 43.)

[5] The unloading and transferring of coal from hoppers to conveyors to roto-stokers was the primary duty of a fireman, who had a class III stationary engineer license. The fireman was also responsible for retrieving and dumping coal ash. The stationary engineers responsible for maintaining and operating the boilers usually had a class I stationary engineer license or at least a class II license. (Tr. 148–149.) By October 2003, the fireman position had been completely eliminated. (Tr. 149.)

C. The Fleet Maintenance Facility is Brought Online

The original plan was to phase out and close the Iola plant and replace it with two new cogeneration plants. (Tr. 54.) One of the new plants is the Fleet Maintenance Building (Fleet facility), which is located approximately 500 feet from the Iola plant.[6] The Fleet facility has three boilers fueled by natural gas that generate steam. (Tr. 136.)

On November 13, 2003, the Respondent began the gradual startup of the Fleet facility and simultaneously began to close down the Iola plant.[7] (Tr. 23, 54.) The Respondent did not hire any new employees for the new facility. (Tr. 31.) Instead, five of the original nine regular full-time Iola plant building operators were relocated to the Fleet facility to operate and maintain the Fleet equipment. They are Tim Berna, John Ciminelli, Anthony Pursati, Michael Healy, and Dan Steinfeldt.[8] Their wages were unchanged and they kept the same shifts and same hours after relocating to Fleet. (Tr. 32–33, 59.) Their supervision stayed the same, i.e., Chief Stationary Engineer Tim Berna became the Fleet lead building operator.

In addition, Berna, Pursati, and Steinfeldt also continued to work at the Iola plant after November 13. (Tr. 26–28; 66–70, 83.) They were responsible for maintaining the Iola plant boilers in the event that extra capacity was needed during the winter months, as was the case in January and February 2004. (Tr. 42–43.) The three class I licensed stationary engineers were assisted by class II licensed stationary engineer James Muhs, who remained assigned to the Iola plant, but also worked at the Fleet facility.[9] Muhs made rounds at Iola, maintained the equipment, and maintained the water levels in certain tanks. (Tr. 99.) Muhs also performed general maintenance duties at the Fleet facility, like painting and cleaning, and was gradually taught how to operate the Fleet equipment. (Tr. 118, 120.) He estimated spending 50 percent of his time performing general maintenance at the Fleet facility. (Tr. 120.)

Two other full-time Iola plant employees, Henry Brown and Paul McBride, and one part-time employee, James White, remained assigned to the Iola plant. Brown continued to make rounds at the Iola plant checking air temperatures, gauges, and boilers. He was not responsible for maintaining the water tanks. (Tr. 125–126.) He, along with McBride, assisted in painting and color-coding lines at the Fleet facility, sweeping floors, and helping get that facility ready for full operations.[10] (Tr. 57.) White stopped working for the Respondent in early 2004.

D. Analysis and Findings

The complaint alleges, and the General Counsel argues, that on December 18, 2003, the Respondent failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Iola plant employees that were relocated to the Fleet facility. The underlying obligation to recognition and bargain with the Union is based on the fact that the Respondent is a *Burns* successor and that the poll it took in June 2003 was invalid because of the Respondent's unfair labor practice as found by Judge Linsky in *Siemens I.* Relying on *Rock Bottom Stores,* 312 NLRB 400 (1993), and *Harte & Co.,* 278 NLRB 947 (1986), the General Counsel and the Charging Party assert the Respondent had a continuing obligation to recognize and bargain with the Union because the operations at the Fleet facility are substantially the same as those at the Iola plant and because the employees that relocated to the Fleet facility constitute a substantial percentage—approximately 40 percent or more—of the new facility's complement.

The Respondent argues that it had no underlying obligation to recognize and bargain with the Union because it is not a *Burns* successor and because the poll that was taken in June 2003 indicates that the employees do not desire to be represented by the Union. These are precisely the same arguments raised in *Siemens I* and decided by Judge Linsky. In addition, it asserts that it has no duty to recognize the Union because the operations at the Fleet facility and the Iola plant are not substantially the same.

The Board has held on numerous occasions that absent newly discovered or previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) of the Act is not entitled to relitigate issues that were litigated in a prior proceeding. See *Task Force Security & Investigations,* 323 NLRB 674, 675 fn. 2 (1997) (a respondent in a compliance proceeding may not relitigate issues previously decided in an underlying unfair labor practice proceeding); *Nursing Center at Vineland,* 318 NLRB 901, 903 (1995) (alleged supervisory status of all LPNs could have been, but was not, raised by the respondent during the representation hearing, therefore, the parties and administrative law judge were bound by Board's unit determination); *Carlow's Ltd.,* 315 NLRB 27, 28 (1994) (respondent's defense that it had no responsibilities under expired collective-bargaining agreement is res judicata because issue was determined in previous contempt proceeding before Federal circuit court); *Bryan Memorial Hospital,* 282 NLRB 235, 235–236 (1986) (summary judgment granted by Board because all jurisdictional and evidentiary issues raised by the respondent were litigated in previous unfair labor practice proceeding); *Western Temporary Services,* 278 NLRB 469 fn. 1 (1986) (respondent had adequate opportunity to litigate all relevant issues in underlying representation case proceeding and therefore all issues raised by respondent were res judicata). Prior to the hearing in this case, all parties were advised that there would be no relitigation of the issues addressed by Judge Linsky's findings in *Siemens I.* Those issues are now before the Board for resolution. I know of no reason or legal authority (Board or otherwise) which requires me to con-

[6] The other cogeneration plant is located on the campus of Monroe Community College, Rochester, New York. It is operated by the college's engineering staff and is not involved in this case. (Tr. 30–31; 47–48.)

[7] At the time of the hearing, May 4, 2004, the Fleet building still was not fully operational.

[8] All five of these "building operators" have class I stationary engineer's licenses.

[9] Muhs received his class II stationary engineer's license in September 2003.

[10] Brown and McBride have class III stationary engineer's licenses.

sider and decide the issues now pending before the Board as a part of this case.[11]

The primary issue in the present case is whether both prongs of the *Rock Bottom Stores* test have been met. With respect to the employee complement at the Fleet facility, it is undisputed that all the regular full-time positions at that facility were filled by Iola plant stationary engineers, who had class I stationary engineer licenses and that no one other than those employees were hired to work or have been hired to work at the Fleet facility since that time.[12] In addition, the undisputed evidence shows that one other stationary engineer, James Muhs, who has a class II stationary engineer license, was gradually transitioned from the Iola plant to the Fleet facility and, at the time of hearing, he was performing several of the tasks performed by the class I stationary engineers. Thus, the undisputed evidence shows that the relocated Iola plant employees constituted the *entire* employee complement of the new Fleet facility.

With respect to whether the operations of the Fleet facility remain substantially the same as those of the Iola plant, the credible evidence shows that from the time it began operating on November 13, 2003, through the date of the hearing, May 4–5, 2004, the Fleet facility generated steam and hot water for the same buildings that the Iola plant generated steam and hot water. (Tr. 72.) Although the Fleet facility was designed to generate electricity, as well as steam, the undisputed evidence shows that at the time of the hearing that aspect of the Fleet operations was not operational. (Tr. 74, 95.) The Iola plant had four hot water boilers and the Fleet facility has four hot water boilers. As class I stationary engineer Daniel Steinfeldt testified, "[T]he Fleet boilers are smaller, but they operate the way boilers operate and they produce steam." (Tr. 94.) Between October 2003, and the date of the hearing, the Iola plant boilers were powered by oil and natural gas and the Fleet facility boilers were powered mostly by natural gas, but are equipped to burn oil. (Tr. 84.)

The evidence also shows that there was no change in job skills for the regular full-time building operators and that they received very minimal formal and informal training in order to operate and maintain the Fleet boilers. Although the Fleet facility was brought online in mid-November 2003, there was no formal training whatsoever until the very end of March 2004. (Tr. 60–61, 74.) The first day of formal training took place on March 30, 2004. Class I building operators Anthony Pursati and Daniel Steinfeldt testified that the regular full-time building operators received one-half day of training by Encorp concerning a switchgear, which was not fully operational as of the date of the hearing. (Tr. 61, 74, 85.) The second formal training took place on March 31. Pursati and Steinfeldt stated that they received another one-half day of training on the Siemens' automated controls systems, which was operational only for testing purposes. (Tr. 78–79, 86.)

In contrast, District Operations Manager Scott McKee stated that the training provided to the regular full-time building operators "was very thorough," even though he did not know how many days of training were provided and who was present for the training. (Tr. 56.) Despite his obvious lack of personal knowledge of specifics of the training that was provided, he opined that it was "several days of intense training." Eventually McKee conceded on cross-examination that the building operators had operated the Fleet equipment without any training from November 2003 through April 2004. McKee's testimony concerning training was unconvincing, contradicted by Pursati and Steinfeldt, and otherwise unspecific and vague. (Tr. 60–61.) I therefore do not credit this aspect of his testimony. Instead, I credit the credible testimonies of Pursati and Steinfeldt, who actually participated in the training, and whose testimonies are independently consistent. Their respective testimonies reflect that the training was minimal at best and that effectively there was no job skills change for the class I stationary engineers who relocated to the Fleet facility as building operators.

The lack of evidence reflecting a change of job skills is not surprising in light the testimony of the regular full-time building operators comparing their respective duties at the Iola plant and the Fleet facility. Building Operator Anthony Pursati explained the duties that he performed at the Iola plant prior to November 13, 2003, which he continued to perform after he was relocated to the Fleet facility. (Tr. 66–72.) Asked if he was responsible for the same job duties at the Fleet facility, he responded, "They're similar, the testing and treatment that we're doing now." (Tr. 72–73.) He later elaborated that he operated boilers at the Iola plant and now operates boilers at the Fleet facility. He operated pumps at Iola and operates pumps at Fleet. He operated fans at Iola and does the same at Fleet, but not to the same degree. (Tr. 79.)

Building Operator Daniel Steinfeldt described his typical day at the Iola plant on November 1, 2003. He stated that he "was responsible for starting the boilers and stopping them and making sure that they got blown down, and *a lot of it was just sitting by a computer and monitoring the conditions throughout the building*." (Emphasis added.) (Tr. 88.) He testified that coal burning had ceased by then and that regulating the gas burning boiler at Iola was easy because it was run by computer. (Tr. 88–89.) When asked to elaborate about monitoring conditions by computer at the Iola plant, Steinfeldt stated, "[W]e watched the amount of steam that was being produced and sent over to different customers. And if it was like on a Monday morning when the chillers were starting fat the hospital or the Social Services Building, you would have to make sure you had a second boiler fired and ready to go for the extra load." (Tr. 89–90.) Many of the adjustments had to be done manually, but some adjustments could be done by using the computer control, like increasing the firing load of the boiler. (Tr. 90–91.)

Steinfeldt went on to explain that his duties at the Fleet facility were very similar to the duties he performed at the Iola plant. (Tr. 93–94.) When asked specifically "[w]hat, if anything, is different at the Fleet Cogeneration Plant that you didn't do at the IOLA? Steinfeldt responded, "[a]t this time there isn't a lot that's different." (Tr. 94.) Questioned further he testified as follows:

[11] At trial here, the General Counsel, without objection from the Charging Party and Respondent, introduced into evidence the transcript and exhibits of *Siemens I*, as well as a copy of Judge Linsky's decision for the background purposes. (Tr. 6–7; GC Exhs. 2 and 3.)

[12] In its posthearing brief at pp. 18–19, the Respondent concedes that a substantial percentage of the employees at the Fleet facility have been drawn from the Iola plant.

> Q. Is there anything that's different?
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> A. It's different equipment, the boilers are smaller, but they operate the way boilers operate and they produce steam.
>
> Q. What about the computers?
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> A. Computers are a lot more advanced and there's a lot more graphics on them. They have alarms for, many alarms for temperatures, pressures that go out of, if the boiler goes down and stop codes that would register and let you know exactly what the problem is with the boiler. And we have a sheet that, for recommending troubleshooting, if something like that does happen, to follow. [Tr. 94–95.]
>
> Q. Anything else that was different?
>
> A. I forgot the question now.
>
> Q. The question is what is different?
>
> A. What is different? The computer, like I said, it has a lot more graphics on it and there's stuff that we haven't gotten to yet with power monitors when the generators are running. We're going to have further training on that. [Tr. 95.]

Class II stationary engineer James Muhs testified that up until May 2004 he remained assigned to the Iola plant, but worked at both the Iola plant and the Fleet facility. (Tr. 98–99.) At the Iola plant he continued to check and monitor the boilers making sure that the plant was operational in the event that extra steam was needed, as was the case in January and February 2004. (Tr. 115–116.) At the Fleet facility, he performed general maintenance up until about 2 weeks prior to the hearing, when regular full-time building operators Ciminelli and Steinfeldt began informally training him on to operate the Fleet facility equipment and how to access information on the Fleet computer. (Tr. 117.) Muhs testified that during in this 2-week period, he occasionally worked alone at Fleet checking water levels and water temperatures, even though he received no formal training whatsoever. (Tr. 101, 118, 121.)

Although the Iola plant and the Fleet facility both have computer control rooms, Muhs testified that the Fleet control was different because everything at the Fleet facility is controlled by the computer. (Tr. 118.) Instead of having to manually make adjustments by turning valves somewhere in the plant, Muhs could make the adjustment at a computer terminal inside the computer control room. While the evidence shows that the computer equipment at the Fleet facility is more sophisticated than the computer equipment at the Iola plant, there is no evidence showing that any of the building operators received or required computer training, formal or informal, other than maybe a half day at the end of March 2004. Indeed, the credible evidence shows that Muhs, a class II stationary engineer, was trained on the computer by building operators, Ciminelli and Steinfeldt, and that in less than 2 weeks he was independently operating the computer system.

The Respondent nevertheless argues that the Fleet facility is a very modern, automated facility, that produces steam and electricity and that the jobs and tasks performed at Fleet are very different from the Iola plant. In support of its position, it asserts at page 19 of its posthearing brief that in *Siemens I*, Judge Linsky found that "'the new cogeneration facility . . . *would* [emphasis added] require employees who operated the new facility to have different expertise than the expertise required to run the Iola Power Plant" and that the "job duties' at the two facilities '*would* [emphasis added] differ.' *Siemens I* GC Exh. 3 at 2, 4." The evidence in *Siemens I* that the Respondent specifically cites to support this assertion is the testimony of Mckee that:

> The existing power plant, the boilers there are an old style coal-powered boiler system that are manually operated, where people have to rake coals and pull ashes out and monitor the coal bed, everything is very manual.
>
> The new facility is automated, very modern, does not have any coal burning, therefore it's not very manually operated. It's an automated process that is not only producing steam, but producing electricity as well, which is not produced in the existing plant.
>
> The jobs are very different. The operation of the Iola Power Plant facility, as I mentioned, is more of a manual operation in that they are monitoring and controlling the steam generation boilers.
>
> At the new facility the tasks are completely different, where they're monitoring reciprocating engines which are producing power by driving a generator. They are monitoring oil levels and water samples, and things that are not Presently monitored at the existing power plant. [*Siemens I,* GC Exh. 2; Tr. 152–153.]

The Respondent's argument is unconvincing for several reasons. First, at the time of the hearing in the present case, the Fleet facility still was not generating electricity and there is no evidence indicating when that might occur. An argument based on what has yet to occur and how it may impact the work force is speculative.

Second, McKee's assertions, past and present, that the job skills and tasks of the building operators are very different are contradicted by the testimony of the employees with firsthand knowledge of the operations and job duties at both facilities, i.e., Pursati, Steinfeldt, and Muhs. That, coupled with the fact that McKee is not a stationary engineer and lacks their expertise, further undercuts his credibility.

In addition, the McKee's characterization of the Iola plant as an "old style coal-powered plant" is somewhat disingenuous. The undisputed evidence shows that coal was being phased out even before the Respondent took over the Iola plant and it had ceased being used before the Fleet facility began operating. For the first 10 months of 2003, oil and natural gas were used to fire the Iola plant boilers, except during peak periods when coal was used to meet increased demand for steam. By October 2003, which was 1 month before the Fleet facility was brought online, coal burning had completely ceased, but the Iola boilers were kept operating into 2004 by burning oil and natural gas. Thus, contrary to the Respondent's attempt to foster the impression that the Iola plant primary relied on coal to produce steam, the credible evidence shows otherwise.

Further, and contrary to the Respondent's assertions, Judge Linsky did not make any factual findings regarding the job skills, duties, and training of the building operators at the Fleet

facility as compared to the Iola plant. That issue was not even before him. His decisional comments at best can be described as obiter dicta because at the time of his hearing (October 6, 7, and 8, 2003), the Fleet facility had not even opened.

For all the reasons above, I find that the operations at the Fleet facility are substantially the same as those at the Iola plant and therefore the Respondent was obligated to recognize and bargain in good faith with the Union. Accordingly, I find that on December 18, 2003, the Respondent violated Section 8(a)(5) of the Act by failing and refusing to recognize and bargain with the Union.

E. The Supervisory Issue

At the hearing, counsel for the General Counsel asserted that lead building operator Tim Berna should be excluded from the unit because he is a supervisor within the meaning of the Act.[12] The burden is on the General Counsel to show that the lead building operator is a supervisor. *Kentucky River Community Care, Inc.,* 523 U.S. 706, 712 (2001). Section 2(11) of the Act lists in the disjunctive the types of authority that give rise to supervisory status. The exercise of any one of the types of authority is sufficient to establish supervisory status.

The undisputed evidence shows that the Fleet building operators report to Berna. He in turn reports to Scott McKee, the Respondent's district operations manager. Berna was the chief stationary engineer at the Iola plant and all the stationary engineers and firemen reported to him. The undisputed evidence also shows that prior to the Respondent taking over the Iola plant, the chief stationary engineer was included in the bargaining unit and covered by the collective-bargaining agreement. The undisputed evidence also shows that in the prior cases before Judge Linsky, the General Counsel did not seek to exclude Berna from the bargaining unit. (Tr. 165–166.) Thus, historically the individual performing the functions and duties of the what is now called the lead building operator has been included in the bargaining unit.

There is no evidence that Berna has the authority to hire, fire, transfer, suspend, layoff, recall, promote, discharge, reward or discipline anyone, or effectively recommend the same. There is no evidence that he schedules the employees or approves overtime. The evidence shows that before disciplining anyone, Berna must contact McKee, explain the situation, and get direction from McKee in order to carry out discipline. (Tr. 169.) The evidence further shows that at both Iola and Fleet, Berna directs employees and has the authority to grant timeoff. (Tr. 164–165.) However, there is no evidence showing the extent, if any, to which Berna uses independent judgment in exercising this authority.

Based on the evidence viewed as a whole, the fact that the chief stationary engineer historically has been included in the bargaining unit, the fact that the General Counsel did not address the supervisory issue in his posthearing brief, and the dearth of evidence submitted to meet his evidentiary burden, I find that the lead building operator is not a supervisory position within the meaning of the Act.

F. The Appropriate Bargaining Unit

Paragraph VI(a) of the complaint alleges that the following employees of the Respondent constitute an appropriate unit for purpose of collective-bargaining within the meaning of the Act:

> All full-time and regular part-time stationary employees, building operators and firemen employed by Respondent at its co-generation and IOLA power plant facilities located in Rochester, New York; excluding office employees, guards, managerial employees, and supervisors as defined in the National Labor Relations Act, 1947, as amended.

In its answer, the Respondent denied the allegation in the complaint, but did not describe a unit appropriate for bargaining. At the hearing, it did not submit evidence concerning the appropriateness of the unit nor did it address the issue in its posthearing brief.[13]

At the outset, it should be specifically noted that the "cogeneration" facility referenced in the above-referenced unit description is the Respondent's Fleet cogeneration facility located at 350 East Henrietta Road, Rochester, New York, some 500 feet from the Iola plant, as distinguished from the Monroe Community College cogeneration facility located at 1000 East Henrietta Road, Rochester, New York, which is approximately one-half mile from the Iola plant. (Tr. 25.)

In addition, the undisputed evidence shows, that from November 13, 2003, to the date of the hearing (May 4–5, 2004), both the Iola plant and the Fleet facility were operational, that the Iola plant was used for backup steam in January and February 2004, and that Iola was not closed at the time of the hearing. The undisputed evidence also shows that three class I stationary engineers (Berna, Pursati, and Steinfeldt) and one class II stationary engineer (Muhs) operated and monitored the boilers and equipment at both facilities during this time. As of the hearing date, Muhs was being trained to operate the boilers and equipment at the Fleet facility, and had operated these boilers and equipment alone on certain occasions.

There is no evidence that a fireman was employed at the Iola plant after October 2003. The primary duty of a fireman was to unload and operate equipment ancillary to the movement of coal. The Respondent stopped using coal at Iola in October 2003. The fireman position was eliminated at the Fleet facility because the Fleet boilers are not powered by coal.

Five full-time building operators with class I stationary engineer licenses are located at the Fleet facility (Berna, Ciminelli, Michael Healy, Pursati, and Steinfeldt).[14] They are hourly employees, who work 4 days a week, 12-hour shifts, and their pay and benefits are approximately the same. They all perform the same job functions and duties in terms of operating and maintaining the Fleet facility equipment.

[12] Neither the General Counsel nor the Charging Party argued in their posthearing briefs that Berna is or is not a supervisor within the meaning of the Act. They did not address the issue.

[13] At p. 9, fn. 1 of its posthearing brief, the Respondent generally asserts that lead building operator Timothy Berna is not a supervisor within the meaning of the Act, but does not address the unit question.

[14] Their job titles at Fleet were changed from "stationary engineer" to "building operator."

There are no part-time building operators employed at Fleet or part-time stationary engineers at Iola. However, part-time stationary engineers historically have been a part of the bargaining unit. There is no evidence disclosing that part-time building operators would not share a community of interest with the full-time building operators at the Fleet facility.

Class III stationary engineer Henry Brown, who stated that he was a building operator, later testified that he no longer "steadily" works with the building operators. (Tr. 124, 128.) Brown was a class III stationary engineer at Iola, who was not relocated to Fleet. After November 13, 2003, he continued working at the Iola plant mainly doing maintenance. He also performed occasional general maintenance at the Fleet facility. At the time of the hearing, Brown testified that he actually was not assigned to any one facility, but had different job assignments at different locations at different times of the day. (Tr. 125.)

Based on the evidence before me, I find that the appropriate bargaining unit includes:

> All full-time and regular part-time stationary engineers and building operators, including the lead building operator, employed by the Respondent at the Fleet co-generation facility located at 350 East Henrietta Road, Rochester, New York, and the Iola power plant located in Rochester, New York; excluding office employees, guards, managerial employees, and supervisors as defined in the Act.

CONCLUSIONS OF LAW

1. The Respondent, Siemens Building Technologies, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Union of Operating Engineers, Local 832, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time stationary engineers and building operators, including the lead building operator, employed by the Respondent at the Fleet co-generation facility located at 350 East Henrietta Road, Rochester, New York, and the Iola power plant located in Rochester, New York; excluding office employees, guards, managerial employees, and supervisors as defined in the Act.

4. By failing and refusing to recognize and bargain collectively and in good faith with the Union from December 18, 2003, to the present, the Respondent has engaged in and continues to engage in conduct which violates Section 8(a)(1) and (5) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent violated Section 8(a)(1) and (5) of the Act, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that the Respondent be ordered to bargain collectively and in good faith with the Union as the exclusive representative of the Respondent's unit employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, Siemens Building Technologies, Inc., Rochester, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain collectively and in good faith with the Union as the exclusive bargaining representative agent of its employees in the appropriate bargaining unit consisting of all full-time and regular part-time stationary engineers and building operators, including the lead building operator, employed by the Respondent at the Fleet co-generation facility located at 350 East Henrietta Road, Rochester, New York, and the Iola power plant located in Rochester, New York; excluding office employees, guards, managerial employees, and supervisors as defined in the Act.

(b) 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) On request, recognize and bargain collectively and in good faith with the Union as the exclusive bargaining representative of employees in the above-described appropriate unit and, if an understanding is reached, embody that understanding in a signed agreement.

(b) Within 14 days after service by the Region, post at its Iola plant and Fleet facilities in Rochester, New York, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notice 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 December 18, 2003.

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

[16] If 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."

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unlawfully fail and refuse to recognize and bargain in good faith with the International Union of Operating Engineers, Local 832, as your exclusive collective-bargaining representative, in following appropriate bargaining unit:

> All full-time and regular part-time stationary engineers and building operators, including the lead building operator, employed by the Respondent at the Fleet cogeneration facility located at 350 East Henrietta Road, Rochester, New York, and the Iola power plant located in Rochester, New York; excluding office employees, guards, managerial employees, and supervisors as defined in the Act.

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

WE WILL recognize the International Union of Operating Engineers, Local 832, as your exclusive collective-bargaining representative and on request bargain with the Union in good faith concerning wages, hours, benefits, and other terms and conditions of employment.

SIEMENS BUILDING TECHNOLOGIES, INC.