

**Arizona Public Service Company and International
Brotherhood of Electrical Workers, Local Union
No. 387, AFL-CIO. Case 28-CA-5193**

January 16, 1980

DECISION AND ORDER

**BY CHAIRMAN FANNING AND MEMBERS JENKINS
AND PENELLO**

On September 20, 1979, Administrative Law Judge Timothy D. Nelson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the Union and the General Counsel filed briefs in opposition to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions² of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Arizona Public Service Company, Phoenix, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

¹ Member Penello agrees that Respondent violated Sec. 8(a)(5) by failing and refusing to bargain over a clause to replace the subcontracting restrictions contained in the parties' collective-bargaining agreement after those restrictions had been declared in conflict with Sec. 8(e) and therefore invalid. However, Member Penello does not adopt all of the rationale of the Administrative Law Judge relating to whether the alleged "zipper clause" of the contract relieved Respondent of its statutory duty to bargain. Member Penello sees no need to reach that issue since he finds that Respondent's duty to bargain arose from the contract itself. Thus, art. XII expressly provided that, "[i]n the event that any provision of this Agreement is found to be invalid as a matter of law, either party may request the other in writing to reopen said conflicting provision for further negotiation." Interpreting the contract as a whole, Member Penello finds that the explicit wording of this reopener clause takes precedence over the more general wording of the alleged zipper and management-rights clauses relied on by Respondent, and obligated Respondent to negotiate with the Union concerning a replacement subcontracting provision.

² In setting forth his proposed remedy, the Administrative Law Judge advised the Union of alternative means by which it could enforce its rights. We find that it was unnecessary to offer such advice, and therefore place no reliance on that portion of the Decision.

However, we do not agree with Respondent's contention that the Administrative Law Judge demonstrated bias and prejudice in this discussion. We are satisfied that he gave thorough and objective consideration to all of the

arguments presented by the parties, and a careful examination of the record as a whole reveals no basis for Respondent's allegation.

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge: This case was heard pursuant to due notice on May 16, 1979,¹ in Phoenix, Arizona. It arises under Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.* (Act). There is the following pertinent procedural history: A charge was filed by International Brotherhood of Electrical Workers, Local Union No. 387, AFL-CIO (herein called the Union), against Arizona Public Service Company (herein called the Company) on January 16. Following an investigation of the Union's charge, the Acting Regional Director for Region 28 of the National Labor Relations Board (herein called the Board) issued a complaint and notice of hearing on March 30. Due service of the timely charge and complaint are established in the formal papers and are admitted by the Company.

The Issues

The issues may not be expressed briefly except at the risk of over-simplification. The central question presented is whether the Company was under an obligation, during the term of a pending collective-bargaining agreement, to bargain with the Union about subcontracting where an existing clause in the parties' contract pertaining to subcontracting had been voided as being in violation of Section 8(e) of the Act. Resolution of that question requires consideration of the meaning and impact of certain other clauses in the parties' contract pertaining to the right of "further negotiations" in the event that any clause be found unlawful, as well as the meaning and impact of "management-rights" and alleged "zipper" clauses.

Timely briefs were filed by the Company and the General Counsel. Upon the entire record,² including my consideration of the parties' briefs, and upon my observation of the witnesses' demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that the Company is an Arizona corporation engaged in business as a public utility furnishing electrical power and natural gas services to customers within the State of Arizona. In the representative year preceding the issuance of the complaint, the Company derived gross revenues from said operations in excess of \$250,000 and, during the same period, caused to be transported goods valued in excess of \$50,000 to its various operations in Arizona directly from suppliers outside Arizona.

¹ All dates hereinafter are in 1979 unless otherwise indicated.

² The General Counsel's unopposed motion to correct record is hereby granted with brief supplemental corrections which I have noted *sua sponte*.

II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Summary and Preliminary Findings

The material facts are not significantly disputed by the parties as is reflected in the Company's answer to the complaint as well as in a written stipulation of the parties received at the hearing as Joint Exhibit 6. Other Joint Exhibits consisting chiefly of correspondence between the parties bearing on the instant matter were received into evidence. Testimony was heard only concerning what happened at a meeting between the parties on February 12 at the Company's offices involving Charles Nelson, the Company's industrial relations manager, Frederick Steiner, the Company's attorney, Clyde Bowden, the Union's business manager, and Doyle Sweat, the Union's attorney. All but Steiner testified concerning the events of that brief meeting and their testimony is only marginally in conflict and, as to material points, it is harmonious.

The record discloses the following undisputed facts: The Company and the Union have had a continuous collective-bargaining relationship since at least 1947 covering a historically recognized collective-bargaining unit consisting of employees performing any of scores of jobs set forth in the wage appendix schedule of the parties' successive bargaining agreements. A cursory review of that schedule in the current agreement between the parties effective between April 1, 1978, and April 1, 1980, reveals that the unit consists generally of inside and outside production, maintenance, service, and construction employees, as well as automotive mechanics, helpers, truckdrivers, tree trimmers, dispatchers, warehousemen and employees in a variety of other job tasks and descriptions.

From the inception of the parties' bargaining relationship, successive collective-bargaining agreements, including the current contract, have included the following clause (captioned art. VI in the current contract):

Union Activities—Contract Work

Section 4. In case the Company shall contract any work which would be covered by this Agreement, such as the construction of electric lines, installations of switchgear, substation equipment, powerhouse equipment, gas lines, etc., the Company shall, before awarding such a contract, advise the contractor that such work is to be done under the terms and conditions of this Agreement and/or such other agreement as may be entered into between the contractor and bona fide local unions or international organizations affiliated with the American Federation of Labor-Congress of Industrial Organization. The Company shall give the Union the name of the contractor or contractors receiving such contracts.

Since about 1949, the parties' successive collective-bargaining agreements have also included the same language contained in the current contract's article XII which reads as follows:

Conflicting Law

Section 1. It is the intention of the parties that no provisions of this Agreement shall be in conflict with any law of the United States of America or the States of Arizona or New Mexico or any lawful Presidential Executive Order; but, if any article, section, clause, or provision of this Agreement shall be in conflict with, or contrary to, any such law or Presidential Executive Order, or be for any other reason invalid, such conflict or invalidity shall not affect any other article, section, clause or provision of this Agreement, which can be given effect without such conflicting or invalid provision. In the event that any provision of this Agreement is found to be invalid as a matter of law, either party may request the other in writing to reopen said conflicting provision for further negotiation.

The current contract between the parties also contains in article VIII a management-rights clause which reads as follows:

Management

Section 1. The management of the Company and the direction of its working force, including the right to hire, suspend, or discharge for cause, together with the right to relieve an employee from duty because of lack of work or other legitimate reason, is vested exclusively in the Company, except as the same may be expressly affected by any of the provisions of this Agreement.

Finally, the current contract contains in article XI, dealing with "Duration," a sentence at the end of that clause which reads:

It is distinctly understood and agreed that all previous agreements and understandings, if any, and all negotiations, whether oral or written, by and between the Company and the Union, are superseded by this Agreement.

In November 1978 the Union filed an unfair labor practice charge against the Company in Case 28-CA-5104, alleging, in substance, that the Company had violated Section 8(a)(1) and (5) of the Act by failing to furnish information to permit the Union to police compliance with the above-quoted article VI subcontracting restrictions. Following an investigation thereof, the Acting Regional Director for Region 28 dismissed the Union's charge in December 1978 concluding in material part that the above-quoted article VI, section 4, "is a union-signatory clause of a nature prohibited by Section 8(e)." The Union did not exercise its right to appeal to the General Counsel from the Acting Regional Director's dismissal of its charge and the parties have acknowledged or acquiesced in the conclusion that the above-quoted article VI clause pertaining to subcontracting is in violation of Section 8(e) of the Act. Accordingly, the correctness of the

Acting Regional Director's conclusion is not in issue in this matter.

On January 2, Bowden, for the Union, wrote to Nelson, for the Company, stating in pertinent part:

As you are aware, the National Labor Relations Board, in Case 28-CA-5104, ruled that article VI, section 4, of our collective-bargaining agreement was in violation of Section 8(e) of the National Labor Relations Act. Pursuant to article XII of our collective-bargaining agreement, the Union requests to reopen said conflicting provisions for further negotiations.

Following his receipt of that letter, Nelson wrote back to Bowden on January 12, stating in pertinent part:

While the Company is willing to meet and discuss with the Union the consequences of this decision [i.e., the Acting Regional Director's dismissal of the charge] it would appear that there is little in the way of "negotiations" which would be appropriate at this time.

Article XII provides that no other "article, section, clause, or provision" of the Agreement shall be affected by such a finding of invalidity. Therefore, excluding that portion of the contract found by the NLRB to be in violation of Section 8(e) of the Act, article VI, section 4, now provides that the Company, when contracting work covered by the Agreement, shall give the Union the name of the contractor or contractors receiving such contracts. The Company will continue to provide the Union with the name of any such contractor(s).

While negotiations regarding the possible modification of the "disclosure" requirement may be appropriate at this time, in light of the holding of the NLRB, any modification of the remaining valid portions of the contract would be premature prior to the expiration date of the Agreement.

B. The February 12 Meeting

After the foregoing exchange of correspondence, the parties met on February 12. The meeting was brief by all accounts, lasting only about 15 minutes. Extrapolating from the testimony of the three participants who testified (Nelson for the Company and Bowden and Attorney Sweat for the Union), but relying principally on Sweat's recall,¹ the following events occurred: Bowden started by saying that he wanted to protect his bargaining unit work and wanted some kind of "area standards" or "union standards" clause to replace the clause found illegal by the Acting Regional Director. Attorney Steiner replied that he had no problem with bargaining about the "effects, procedural effects, or impact" of what was "left over" (i.e., "left over" from that part of article VI, sec. 4, which the Acting Regional Director's ruling had invalidated). Steiner specifically mentioned in this regard that he believed that the last sentence of that section⁴ had not been invalidated by the Acting Regional Director.

¹ None of the three attempted to give a comprehensive "start-to-finish" rendition of the meeting. Sweat impressed me as having the clearest recollection. Nelson's recollection was more impressionistic, perhaps because Attorney Steiner was doing the talking for the Company at the meeting.

Steiner went on to say, however, that he would not renegotiate a clause to replace the one which had been invalidated. He argued that the contract barred such renegotiations because to do so would "erode" management's rights set forth elsewhere in the contract. Sweat sought clarification from Steiner as to what he had in mind in his offer to bargain about "procedural impact and effects," but Steiner's reply was nonspecific.

Steiner also sought to persuade the Union to defer the issue until the contract expired, adding that the issue of subcontracting could then be fully explored, and also pointing out that pursuing the question now would be expensive and time-consuming for the Union. Sweat again pressed Steiner by stating his impression that Steiner was refusing to bargain "on a union standards clause." Steiner replied: "We'll bargain only with you with respect to procedural impact and effects." Before the meeting, at the Union's request, Sweat had drafted a proposed "area standards" clause to replace the existing subcontracting restrictions declared invalid by the Acting Regional Director. Confronted with Steiner's statement on February 12 affirming Nelson's earlier letter of position to the Union, the Union concluded that the Company would not consider *any* proposal from the Union which had the effect of restricting the Company's right to subcontract unit work. Accordingly, the specific clause which Sweat had drafted was never tendered to the Company.

C. Further Background

It was stipulated by the parties (Jt. Exh. 6) that article XII of the contract (the "savings" and "reopener" clause) had never before been invoked nor interpreted by the parties, nor had the parties ever discussed "[w]hat effect, if any, other provisions of the collective-bargaining agreement would have upon the language of article XII." It was further stipulated that the Company "on an annual basis regularly subcontracts out work covered by the agreement, which subcontracted work annually exceeds \$500,000 in value."

This latter stipulation is interpreted to mean that work performed or capable of being performed by members of the bargaining unit covered by the parties' contract has been, and continues to be, subcontracted by the Company.

IV. ANALYSIS AND CONCLUSIONS

Subcontracting of bargaining unit work is a mandatory subject about which an employer must bargain with the labor organization representing the bargaining unit as the Supreme Court held in *Fibreboard*.² Consistent with this mandate, the parties, through successive labor agreements, had bargained specific terms, placing the limits and conditions reflected in article VI, section 4, on the right of the Company to subcontract unit work. Their contractual agreement in this area was declared unlawful under Section 8(e) of the Act. Faced with this development, the Company took the position that it was not obliged to meet and

⁴ Referring to the last sentence of art. VI, sec. 4, which reads: "The Company shall give the Union the name of the contractor or contractors receiving such contracts."

² *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203 (1964).

negotiate with the Union for the purpose of attempting to reach agreement on a lawful "replacement" clause. More specifically, the Company's position, as reflected in Nelson's letter to the Union of January 12 and in Steiner's remarks at the February 12 meeting, was that the Company would not negotiate about *any* proposal which would erode the Company's claimed right under the management-rights clause (art. VIII) to subcontract as it saw fit.

While not disputing the abstract proposition that subcontracting is a mandatory bargaining subject, the Company argues, in essence, that the Union waived the right to bargain limitations on or conditions to the Company's right to subcontract. This supposed waiver by the Union is to be inferred, so the Company argues, from the "saving" language of article XII, providing for continuation in effect of any contractual provisions not affected by the voiding as unlawful of any other contractual provision. Continuing its reasoning, the Company asserts that the management-rights clause (art. VIII) therefore remains in effect, notwithstanding the voiding of the article VI subcontracting clause. That management-rights clause states in pertinent part that "[t]he management of the Company . . . is vested exclusively in the Company, except as the same may be expressly affected by any of the provisions of this Agreement." Placing emphasis on that latter phrase, the Company asserts that the only pertinent restrictions on its inherent right to "manage," including by subcontracting, were contained in the now void article VI language. Accordingly, the Company concludes that the still-effective management-rights clause is no longer "expressly affected" by any valid subcontracting restrictions. Based on the foregoing interpretation, the Company maintains that it need not, during the term of the current labor agreement, negotiate about proposals which would undermine the (now unrestricted) management right to engage in subcontracting. Since the Union's proposed "area standards" clause necessarily would "limit" or "affect" the Company's right to subcontract,⁶ the Company need not agree to discuss that proposal or "[a]ny proposed union standards provision [which] would . . . limit the Company's right to contract work and so 'affect' its management rights under Article VIII."⁷

As is evident from a restatement of the Company's position, a highly technical and attenuated process of reasoning must be embraced in order to infer that the Union waived its statutory right to bargain over subcontracting practices after the existing subcontracting clause was declared unlawful. I conclude that the Company's position is without merit as involving both a strained and distorted interpretation of the contract language itself and an overly

broad view of what constitutes a labor organization's waiver of statutory rights.

Taking the latter issue first, the Board, with court approval, has repeatedly held that waiver by a union of the right to bargain over a mandatory subject is not to be "readily inferred" and will not be inferred absent a "clear and unmistakable" showing.⁸ Considering next the contractual language relied on by the Company in making its "waiver" argument, it is plain that there is no language which clearly and unmistakably commits the Union to forfeiture of the right to bargain with the Company over subcontracting in the event that the preexisting clause pertaining thereto were declared unlawful. Certainly nothing in article XII, the only provision which even discusses the eventuality of a clause's being declared invalid, clearly and unmistakably reflects the Union's intention to forfeit bargaining on any subject covered by a provision which becomes invalidated. To the contrary, article XII expressly reserves to "either party" the right to request the other "to reopen said conflicting provision for further negotiation." Thus, if anything, an intention is manifested by that language to preserve, rather than to forfeit, the right to bargain about the subject covered by any clause which should become invalidated. It is only by implication, and a strained one at that, that the other "savings" language in article XII might be construed so as to result in forfeiture of the right to reopen a subject matter covered by a clause which has been invalidated. Such an implication, especially one which is directly contrary to "reopener" language appearing in the same clause, does not, under any standard of contract construction, amount to a waiver let alone a "clear and unmistakable" one.⁹

Nor do the management-rights provisions of article VIII and what the Company refers to as "zipper" language in article XI contain language which would satisfy the "clear and unmistakable" waiver test. Neither such clause refers to the subject of subcontracting. And the Board, with court approval, has regularly refused to find a clear and unmistakable waiver of the right to bargain over a mandatory subject from the inclusion in a labor agreement of management-rights and "zipper"¹⁰ language even more sweeping than that relied on by the Company herein.¹¹

Accordingly, I find the Company's defense based on a supposed contractual waiver by the Union of the right to bargain over subcontracting practices to be unsupported. The Acting Regional Director's action in declaring the article VI, section 4, subcontracting restrictions to be unlawful therefore did not have the effect of precluding negotiations for a lawful "replacement" provision. To the

⁶ Whether the Company's supposition is correct that the Union's proposal necessarily would limit or affect its subcontracting prerogatives is not material. The Union's proposal was not received in evidence and the Company never saw it. As is concluded hereafter, it was the Company's anticipatory refusal to entertain *any* proposal having such an effect, based on its meritless "waiver" defense, which violated its duty to bargain in good faith over an acknowledged mandatory bargaining subject.

⁷ Extracting from the Company's summary of its position contained at Co. br., p. 14.

⁸ *Gary-Hobart Water Corporation*, 210 NLRB 742, 744 (1974), and cases cited at fn. 9, *enfd.* 210 F.2d 284 (7th Cir. 1975).

⁹ This is not to imply that contractual "reopener" language is essential to preservation of the right to bargain in midcontract about the subject matter of a clause which has been declared invalid. The question, unnecessary to decide herein, of the significance of contractual silence on the subject of reopening in

the event of a severable clause's being declared invalid should be resolved by resort to the "clear and unmistakable" test. Arguably, absent bargaining history or some other evidence indicating a contrary intention, mere "silence" on the subject of reopening would not constitute a clear and unmistakable waiver of the right to reopen a subsequently invalidated provision dealing with a mandatory bargaining subject.

¹⁰ As the General Counsel correctly points out on brief, the purported "zipper" language of art. XI appears to be more in the nature of a contractual ban against "parol evidence" than a contractual ban against raising any subject during the contract's term which is already addressed in the contract, or which, by failure to so address it, is deemed waived.

¹¹ See, e.g., *The Bunker Hill Company*, 208 NLRB 27, 32-33 (1973), and cases cited at fns. 17 and 18; cf. *Southern Materials Co., Inc.*, 181 NLRB 958 (1970), enforcement denied 447 F.2d 15 (4th Cir. 1971).

contrary, by reference to the "reopener" language of article XII alone, the parties committed themselves to further bargaining about whether, and under what circumstances, subcontracting of bargaining unit work might take place. This same obligation exists as a matter of law where, as here, there has been no waiver by the Union of the statutory right to bargain over the mandatory subject of subcontracting in the event that its existing agreement in this area were invalidated.

It follows, therefore, that the Company's refusal, as expressed in Nelson's January 12 letter and in Steiner's February 12 statements, to discuss any "replacement" provision which would undermine the Company's supposed contractual right to engage in unrestricted subcontracting violated Section 8(a)(5) and (1) of the Act. It does not matter that the Company expressed a limited willingness to bargain over the "procedural impact and effects" of the Acting Regional Director's decision, since that narrow offer, whatever it may have contemplated,¹² clearly did not include bargaining over any proposal which might seek to place limits or conditions on the subcontracting of unit work.

The Board's decision in *Westinghouse Electric Corp. (Mansfield Plant)*, 150 NLRB 1574 (1965), is instructive in this latter regard. There, the Board, interpreting *Fibreboard, supra*, refused to find that the employer violated Section 8(a)(5) by failing to notify and bargain with the Union over the letting of individual subcontracts of work performable by the unit in question absent some showing of detriment to the bargaining unit, and under circumstances where the subcontracting decision was economically motivated, was no different in scope or character from the employer's historical practice, and the union had repeatedly sought, without success, to obtain provisions in the parties' successive labor agreements to limit established subcontracting policies. (Id. at 1576-77). The Board's focus in that case, as I read it, was on whether or not Respondent engaged in impermissible unilateral action when it persisted in its historical subcontracting practice having no definable detrimental impact on the bargaining unit. Thus, the Board stated in language which is pertinent to the distinction here drawn:

We do not mean to suggest that . . . *an employer is any less under an obligation to bargain with the union on request at an appropriate time with respect to such restrictions or other changes in current subcontracting practices as the union may wish to negotiate.* But it is to be noted that no claim is made in this case that the Respondent has ever refused to honor a request for such bargaining; *the sole issue before us is whether the Respondent transgressed its statutory obligation by not consulting with the Union about each of its thousands of*

¹² At all points up to and including the hearing herein, it seemed reasonably clear that the Company, by offering to bargain over the "procedural impact and effects," was referring in some less-than-clear-cut way to the manner in which the "surviving" language of art. VI, sec. 4, might be implemented under circumstances where the substantive restrictions on subcontracting had been invalidated by the Acting Regional Director's decision. On brief, however, the Company is now heard to say that the above phrase means that the Company "is obligated to discuss any dispute over the impact and effects of its contracting policies where unit detriment is likely to occur" (br., p. 12, emphasis supplied); and that the Company "is prepared to discuss the impact and effects of any subcontracting decision" (br., p. 14). This "clarified" position seems to be one adopted *ex post facto* at the leisure of counsel. It was never so expressed to the Union, as is found above. Neither does this

annual subcontracting decisions which involved unit work. [*Ibid.*, emphasis supplied.]

By contrast, here the Company's continuation of its historical subcontracting practice following the Acting Regional Director's voiding of the existing contractual restrictions is not under challenge as it was in *Westinghouse, supra*. Rather, it is the Company's refusal to entertain *any* union proposals calculated to restrict subcontracting of unit work, proposed at an "appropriate time" (i.e., when, as concluded above, the right to "reopen" the subject had been triggered by the action of the Acting Regional Director), which is attacked by the complaint. And, as the first underscored portion of the quoted opinion in *Westinghouse* makes clear, such an appropriately timed request must be entertained by an employer without regard to whether or not his subcontracting practices are economically motivated and are consistent in scope and degree with historical practice.¹³ It is because subcontracting of unit work is a matter affecting unit employees' terms and conditions of employment (*Fibreboard, supra*), and because the Union made a timely request to negotiate thereon, that the Company was obliged to meet and negotiate on the Union's proposals.

One final argument of the Company is considered next. At the hearing I sustained the General Counsel's objection to the following question put by company counsel to Union Representative Bowden:

Q. (By attorney Steiner) Is it now the union's position that it wants only to negotiate concerning an area standards provision?

Attorney Steiner then argued in response to the General Counsel's objection that, "if it is the Union's position that it will bargain only on one subject which is not open for bargaining, then it is not the Company which is refusing to bargain, but it is the Union which is refusing to bargain." I ruled that such a fact, if true, "would only have relevance to some potential future charge . . . against the Union" and that this was not "the forum to be perfecting positions for [the] future."

On brief, the Company argues that this ruling was "prejudicial" to the Company's right to establish "a defense to an 8(a)(5) charge."¹⁴ Ignoring that this involves a seeming shifting of positions, I nevertheless adhere to my ruling for the additional reasons stated below. The cases cited by company counsel involve situations where a union, by a pattern of demonstrated inflexibility and rigid adherence to contracts as originally proposed, "precluded the existence of

"clarified" position alter the conclusions set forth above. Whatever the Company intends by the phrase in question, it adheres to the view that it need not, during the life of the current contract, fulfill its statutory obligation to bargain over *whether, and under what circumstances*, subcontracting of unit work may occur. It is this latter position which constitutes a refusal to bargain in good faith over a mandatory subject, thereby violating Sec. 8(a)(5) and (1) of the Act.

¹³ Those circumstances are, however, relevant to a consideration of the scope of remedial action which the Company must take. See "The Remedy," *infra*.

¹⁴ Co. br., p. 5, citing *Roadhome Construction Corp.*, 170 NLRB 668 (1968); *Continental Nut Co.*, 195 NLRB 841 (1972).

a situation in which [the employer's] good faith could be tested."¹⁸ Here, exactly the opposite is the case. It was the Company, whose adamant rejection through Nelson's letter of January 12 and Steiner's comment on February 12 of any possibility of bargaining over a proposal to "replace" the invalidated subcontracting article, which "precluded the existence of a situation" in which the Union's good faith could be tested. The Company never sought to bargain over a replacement proposal. It preemptively declared the subject to be "out of bounds" before the Union ever had an opportunity to advance a specific proposal. Under those circumstances, it can scarcely be "prejudicial"¹⁹ to the Company's defense to preclude inquiry into the subjective intentions of the Union's negotiators about a proposal which they never tendered to the Company.

V. THE REMEDY

The General Counsel limits his remedial request to an order requiring the Company to bargain with the Union over the "substance" as opposed to merely the "impact and effects" of the Company's subcontracting practices. I take this to mean that the Company should be ordered to bargain in good faith about whether, and under what circumstances, the Company might engage in subcontracting of bargaining unit work. In essential agreement with the General Counsel, I conclude that the gravamen of the instant complaint is that the Company has wrongfully placed limits on the scope of bargaining over the subcontracting issue. Accordingly, my recommended Order is designed to require that the Company cease and desist from insisting that bargaining take place only on the subject of what it calls the "impact and effects" of the Acting Regional Director's voiding of the existing article VI, section 4, subcontracting clause.²⁰ Affirmatively, my recommended Order is designed to require the Company, immediately upon the Union's request, to engage in good faith bargaining over any proposed lawful restrictions on practices involving the subcontracting of bargaining unit work.

Where, as here, there is no allegation nor evidence that the Company has unilaterally altered its subcontracting prac-

¹⁸ *Continental Nut Co.*, *supra* at 858. See also *Times Publishing Co., et al.*, 72 NLRB 676, 683 (1947), from which the above-quoted language is paraphrased.

¹⁹ To raise the claim of "prejudice" in this context is to suggest that, had the pending question been permitted, the Company would have secured an answer permitting it to invoke the cited "union intransigence" defense to an 8(a)(5) charge. It continues to elude me how counsel can conscientiously argue that it could expect an answer to the objected to question which would perfect such a defense under circumstances where the Company had refused to entertain any "replacement" subcontracting proposal from the Union and therefore never had any basis for supposing that the Union would be intransigent. Put differently, the cited cases do not authorize inquiry such as that attempted by company counsel into what the Union's bargaining posture would have been had the Company not refused to bargain over a mandatory subject.

²⁰ Or, treating the "clarified" position of the Company discussed *supra* at fn. 12 as reflecting the Company's current degree of willingness to bargain, that it cease and desist from imposing even those conditions on its willingness to negotiate over subcontracting.

²¹ Apart from the manifest detriment occasioned by the Company's unlawful conduct affecting the unit employees' rights to bargain through their chosen representative about subcontracting of unit work, there is no suggestion that identifiable financial detriment has occurred to members of the bargaining unit. Thus, there is no evidence that the Company has enlarged the amount of unit work let out to subcontractors, nor that layoffs or

practices from those extant at the time the Acting Regional Director declared article VI, section 4, to be unlawful,²¹ and especially in the absence of any request therefore by the General Counsel, it is unwarranted to provide further relief in the form of, for example, an order requiring reinstatement of the *status quo ante* for the violation of Section 8(a)(5) found herein or an order requiring that unit employees be "made whole."

The Company has clearly "bought time" by its unlawful refusal to bargain, but it is not at all evident how that advantage could be negated by a remedial order from the Board. The Union, on the other hand, is not without practical recourse under the circumstances. It may exercise its statutory right to seek information relevant to its formulation of bargaining demands about subcontracting practices affecting the bargaining unit;²² and, should such information disclose that the Company has unilaterally enlarged or otherwise detrimentally changed subcontracting practices from those extant as of the Acting Regional Director's ruling on the existing subcontracting clause, appropriate charges may be filed and additional relief sought from the Board. Moreover, there is authority for the proposition that the no-strike clause in the parties' contract is inapplicable, at least to the extent that the Company persists in its refusal to bargain in good faith over its subcontracting practices.²³

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act and is, and has been at all times material herein, the exclusive collective-bargaining representative of the Company's employees in an appropriate collective-bargaining unit consisting of the employees performing the jobs set forth in the wage appendix schedule to the current collective-bargaining agreement in effect between the Company and the Union.

3. By failing and refusing, on and after January 12, 1979, to bargain collectively in good faith over terms to replace the

curtailments of unit work opportunities have occurred as a consequence of the Company's conduct found unlawful herein.

²² See, e.g., *Doubarn Sheet Metal, Inc.*, 243 NLRB 821 (1979), and authorities cited therein.

²³ *N.L.R.B. v. Lion Oil Co.*, 352 U.S. 282, 290-291 (1957), in which the Court ruled that, where, as arguably here, the parties' contract provided for negotiation and modification of a contractual provision during midcontract, the right to strike in support of union demands relating to such "reopened" matter is not affected by a general no-strike provision in the contract, but exercise of such right is still subject to the 60-day notice requirements of Sec. 8(d) of the Act. This is, of course, not to be construed as a determination of the parties' rights in this area, especially in the light of the peculiar "no-strike" language in the current contract which, at art. I, sec. 2, commits the Union not to strike during the agreement's term" and during any period of time while negotiations are in progress between the parties hereto for the extension or renewal of this Agreement." Rather, these observations are made in support of the conclusion that the specific unfair labor practices of the Company do not require a broader remedy than that recommended herein. See, e.g., *Cities Service Oil Company*, 158 NLRB 1204, 1207 (1966), in which the Board stated:

In devising all our affirmative orders, however, we bear in mind that the remedy should be appropriate to the particular situation requiring redress, and should be tempered by practical considerations.

subcontracting restrictions contained in article VI, section 4, of the current collective-bargaining agreement between the Company and the Union, the Company has violated Section 8(a)(5) and (1) of the Act.

4. The aforesaid violation of the Act, occurring in connection with the Company's operations, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead, and have led, to labor disputes burdening and obstructing commerce and the free flow of commerce.

Upon the foregoing findings of fact, conclusions of law, and the entire record herein, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER²¹

The Respondent, Arizona Public Service Company, Phoenix, Arizona, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to bargain collectively in good faith with the Union over the subject of subcontracting of work performed or capable of being performed by members of the bargaining unit covered by the current bargaining agreement between the Company and the Union.

(b) In any like or related manner refusing to bargain collectively in good faith with the Union over mandatory bargaining subjects, or interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

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

(a) Upon the Union's request, immediately meet and bargain collectively in good faith with the Union regarding subcontracting of work performed or capable of being performed by members of the bargaining unit covered by the current collective-bargaining agreement between the Company and the Union.

(b) Post at all facilities of the Company where employees in said bargaining unit work copies of the attached notice marked "Appendix."²² Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by the Company's authorized representative, shall be posted by the Company immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps the Company has taken to comply herewith.

²¹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its

findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

²² In the event that 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."

APPENDIX

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

After a hearing at which all sides had the opportunity to present evidence and arguments, it has been found that we violated the National Labor Relations Act, as amended, by refusing to bargain in good faith with International Brotherhood of Electrical Workers, Local Union No. 387, AFL-CIO, about lawful terms to replace restrictions on subcontracting which were contained in the current contract with that Union, but which were declared to be unlawful. To remedy that violation, we hereby notify our employees as follows:

The National Labor Relations Act gives employees the following rights:

- To organize themselves
- To form, join, or support unions
- To bargain with their employer as a group through a representative which they choose
- To act together for collective bargaining or other mutual aid or protection
- To refrain from the above activities except to the extent that such right is limited by a lawful agreement to require employees to become or remain union members after a certain grace period.

In recognition of these rights, we further notify our employees that:

WE WILL NOT refuse to bargain with the above-named Union over lawful terms to replace the restrictions on subcontracting of bargaining unit work which were contained in the current contract with that Union.

WE WILL NOT in any like or related manner refuse to bargain in good faith with that Union, or interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in the National Labor Relations Act.

WE WILL, upon the Union's request, immediately meet and bargain with the Union over lawful terms to replace restrictions on subcontracting of bargaining unit work which were contained in our current contract with the Union, and, if agreement is reached with the Union on such terms, WE WILL, upon the Union's request, reduce the same to writing and sign them.

ARIZONA PUBLIC SERVICE COMPANY