Central Soya Company, Inc. *and* District 50, United Mine Workers of America. *Cases Nos. 25–CA–1686 and 25–CA–1712. April 14, 1965*

DECISION AND ORDER

On August 14, 1963, Trial Examiner John H. Eadie issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, asset forth in the attached Intermediate Report. Thereafter, the Respondent and the General Counsel filed exceptions to the Intermediate Report and briefs in support thereof.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in this case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations, but only to the limited extent consistent with this Decision and Order.

The Respondent is engaged in the business of manufacturing, processing, and selling soybean and related food products. Its Decatur, Indiana, plant is the only one involved in these proceedings. At all times relevant hereto the Charging Party, District 50 UMW, has been the collective-bargaining representative of Respondent's production and maintenance employees at the Decatur plant. At issue in the instant case is the failure of the Respondent to give the Union notice and an opportunity to bargain with respect to six subcontracts for maintenance work let over a period from August 20, 1962, to February 19, 1963. The maintenance work and the circumstances of the specific subcontracts are fully described in the Trial Examiner's Intermediate Report. As to five of these subcontracts, roofing work, tank repair, de-airing tank, tank moving, and removal of concrete, the record reveals that the Respondent did not possess the necessary equipment used by the outside contractors or employ employees sufficiently trained to operate such equipment. In view of the unusual nature of these particular maintenance tasks, we are of the opinion that such work was not, in any event, unit work as to which the Respondent was under an obligation to give the Union advance notice in contracting situations under Section 8(a)(5). The record also indicates that one of the above subcontractors, Industrial Maintenance, which had been engaged to repair Respondent's tanks with special equipment, performed certain spray painting jobs such as painting several truck dumps and the

"head house." Respondent contends that the dumps were painted because the subcontractor was waiting for the tanks to be emptied and the "head house" was painted because Respondent's maintenance employees were not assigned to jobs involving work at high levels. The Respondent, however, did possess spray-painting equipment and employed employees qualified to use such equipment. It would therefore seem that at least some of the spray painting performed by Industrial could reasonably be considered customary unit work. Whether this work was so enmeshed with the tank repair job and work at high levels as to warrant the conclusion that the work in its entirety was not unit work is a matter we need not decide. For purposes of decision here, it is enough to note that this record does not establish that maintenance employees suffered any significant detriment as a consequence of the spray-painting work performed by Industrial Maintenance. It is true that five maintenance employees were on layoff status as of November 23, 1962. However, it is not established that any of these employees were qualified painters or, indeed, that the subcontract involved a type of painting which they might have performed on and after November 23.

The Trial Examiner, relying on the Board's decisions in *Town & Country Manufacturing Company., Inc.*, 136 NLRB 1022, and *Fibreboard Paper Products Corporation.*, 138 NLRB 550, enfd. *sub nom. Coast Bay Union of Machinists, Local 1304, etc.*, 322 F. 2d 411, affd. 379 U.S. 203, found Respondent in violation of Section 8(a)(5) of the Act although he concluded that Respondent's arguments were "particularly persuasive." Since the Trial Examiner's Intermediate Report, the Board has had further occasion to consider the obligation of an employer to notify and consult with its employees' bargaining representative in the general area of subcontracting. The Board has pointed out that the *Fibreboard* line of cases "was not intended as laying down a hard and fast rule to be mechanically applied regardless of the situation involved."[1] In the instant case it is clear that Respondent has not refused to bargain with the Union as to its practice of subcontracting unit work. Indeed, the parties have frequently arbitrated the validity of Respondent's conduct in letting particular subcontracts. Considering the minimal amount of unit work involved, the absence of clear evidence that the performance of such work by a subcontractor under the particular conditions here present involved a departure from previously established operating practices, the failure of the General Counsel to establish that as a consequence of these subcontracts, employees represented by District 50 suffered any significant impairment of job tenure, employment security, or reason-

[1] *Westinghouse Electric Corporation (Mansfield Plant)*, 150 NLRB 1574.

ably anticipated work opportunities, we conclude that Respondent's conduct herein did not violate Section 8(a)(5) of the Act as alleged in the complaint.[2]

Accordingly, without passing on other defenses raised by the Respondent, we shall dismiss the complaint in its entirety.

[The Board dismissed the complaint.]

[2] *Kennecott Copper Corporation (Chino Mines Division)*, 148 NLRB 1503; *American Oil Company*, 151 NLRB 421.

INTERMEDIATE REPORT

STATEMENT OF THE CASE

Upon charges filed on December 5, 1962, and on February 25, 1963, the General Counsel of the National Labor Relations Board issued a complaint dated April 19, 1963, against Central Soya Company, Inc., herein called the Respondent, alleging that the Respondent had engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended, herein called the Act. The Respondent filed an answer in which it admitted the jurisdictional allegations of the compaint but denied the commission of any unfair labor practices.

A hearing was held before Trial Examiner John H. Eadie at Decatur, Indiana, on June 18 and 19, 1963. The Respondent moved to dismiss the complaint. Ruling was reserved. The motion to dismiss is disposed of as hereinafter indicated. After the conclusion of the hearing, the General Counsel and the Respondent filed briefs with the Trial Examiner.

Both from the entire record in the case, and from his observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent is an Indiana corporation, with places of business at Fort Wayne and Decatur, Indiana. It is engaged in the business of manufacture, processing, and sale of soybean and related food products. The Decatur plant is the only one involved in these proceedings.

During the period of 12 months preceding the date of the complaint herein, the Respondent sold and shipped from its Decatur plant finished products valued in excess of $50,000 to points outside the State of Indiana.

The complaint alleges, the Respondent's answer admits, and I find that the Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

District 50, United Mine Workers of America, and Local No. 15173, District 50, United Mine Workers, herein collectively referred to as the Union, are labor organizations within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The issues*

There are no substantial issues of fact in this case. The Respondent's answer admits the appropriateness of the unit and that a majority of the employees in said unit designated and selected the Union as their representative for the purposes of collective bargaining. The complaint alleges that the Respondent awarded contracts to independent contractors for certain maintenance and repair work which "formerly and customarily" had been performed by the Respondent's employees. It is undisputed and the evidence shows, as will be discussed hereinafter, that in the past employees of the maintenance and yard departments had performed work on jobs to some extent comparable to those involved herein; and that the Respondent at times had contracted out such jobs. It also is undisputed that the Respondent did not notify the Union of its intention to contract out such work or give it the opportunity to bargain thereon.

At the hearing the General Counsel conceded that the Respondent contracted for the work "with no discriminatory intent." In his brief he states, "the justification for calling in an outsider to perform this work is not in issue." Accordingly, with these concessions in mind, and since the evidence conclusively shows that the Respondent's action was based solely upon economic or other compelling reasons, I find it unnecessary to set forth in detail the testimony of the Respondent's witnesses in this connection.

B. *Background*

The employees in this bargaining unit here involved were represented for the purposes of collective bargaining by the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL–CIO, Local 261, from 1950 until July 1, 1962, the expiration date of the last contract between the Brewery Workers and the Respondent. This contract contained a past-practice clause by which the Respondent agreed to continue "to live up to established precedence"; a detailed grievance procedure, for "any grievance which the employees or any of them claim to have suffered," which culminated in "final and binding" arbitration at the request of either party; and a management-rights clause reading as follows:

> It is understood and agreed that the Company shall have the sole right to hire, promote, or discharge for cause, any employee; enforce rules and regulations fairly; and maintain discipline and efficiency of employees at its sole discretion subject to the grievance procedures. The Company shall determine the type of product to be manufactured.

The parties stipulated that under the above and preceding contracts, the Brewery Workers filed many grievances, a number of which concerned contracting out of work by the Respondent; that in the contracting out grievances the Respondent took the position that the decision to so contract out was within the province of its management rights under the contract; that three of those contracting out grievances, one of which involved maintenance employees, went to arbitration; and that the arbitrator decided two of such cases, including the one involving maintenance work, in favor of the Respondent and one in favor of the Brewery Workers.

During the latter part of 1958, the Brewery Workers complained to Robert Chappuis, the Respondent's personnel manager, about not being notified before the contracting out of work. Chappuis told the representatives of the Brewery Workers that, where practical and possible, the Respondent would attempt to give them advance notice. He also told them, however, that such notification should not be construed as a seeking of the Brewery Workers' permission or consent to contract out work. Thereafter, the Respondent contracted out "a lot" of the jobs. On at least one occasion, during 1960, it gave the Brewery Workers advance notice.

On or about January 18, 1962, a majority of the employees in the bargaining unit in an election conducted by the Board selected the Union as their collective-bargaining representative. The Union was certified on or about February 14, 1962.

In *District 50, United Mine Workers of America and Local 15173, District 50, United Mine Workers of America (Central Soya Company, Inc.)*, 142 NLRB 930, the Board found the Charging Party herein and its Decatur plant local had violated the Act for insisting, during the negotiations leading to the current bargaining contract, on the inclusion of certain agricultural workers in the bargaining unit. The hearing in said case was held on August 1 and 2, 1962. The record in the instant case does not disclose when the Union abandoned its unlawful demand.

Commencing on or about September 25, 1962, the Union requested the Respondent to bargain collectively in an appropriate unit. The Respondent and the Union entered into a collective-bargaining agreement on or about October 9, 1962.

The changeover in the employees' bargaining representatives was marked by carryovers of some union officers and provisions of the collective-bargaining agreements, including the grievance and arbitration procedures and the no-strike provisions. However, at the Respondent's insistence the following was inserted into the management-rights clause of the current contract: "It is understood and agreed that the Company has the right to direct the working force and determine the methods of manufacturing." Also, during the negotiations leading to the current contract, at the Respondent's demand the Union by letter dated October 2, 1962, agreed, in effect, that past practices would not affect the management-rights clause.

Under the current contract the Union has filed about 30 grievances, with a number of them going to arbitration. No grievances were filed by the Union relating to the contracting out involved herein.

C. *Roofing*

Industrial Maintenance Company, Inc., performing roofing work for the Respondent for about 8 or 9 days on or about August 20 and October 10, 1962. The value of the equipment used by Industrial Maintenance in resurfacing the Respondent's roofs was about $40,000; and consisted of a "hydrowash," "Graco" pumps, high pressure spray guns, 10,000-pound burst pressure hose, filtering equipment, and compressors.[1]

Before 1955 the Respondent resurfaced its roofs with the "hot mop" method. This consists of hand mopping a layer of hot asphalt on a roof, imbedding a layer of felt in the asphalt, and then covering the felt with a second layer of asphalt The only equipment used was something in which the asphalt could be heated and a pump to get the asphalt up on the roof. When using the above method, the Respondent "primarily" contracted out the work. Such roofing jobs were not found to be satisfactory because "grain dust" deposited on the roof formed acids which "deteriorate the covering as well as the felts quite rapidly."

In 1955 the Respondent started using the "Trempco compound" for roofing because of its longer life. This compound is a cold asphalt emulsion and is applied in the same manner as hot asphalt. When using this method, the Respondent "primarily" used its own employees to resurface the roofs.[2] The jobs were found not to be satisfactory because of leaks.

The spray-gun method used by Industrial Maintenance gave a higher quality roof due to the fact that the mastic could be sprayed on in layers of uniform thickness. The importance of this is that a roof is only as durable as its thinnest point. This essential uniformity cannot be achieved by hand mopping. Also, the spray-gun method is much faster and consequently more economical than hand mopping. The spray gun spreads mastic at the rate of about 165 gallons per hour. To put on the same amount of mastic by hand mopping would take a man about 2½ days. Further, the evidence discloses that the Respondent did not have the equipment to perform the work by the spray-gun method; that its employees were not trained in the use of such equipment; and that none of its employees were on layoff during the time in question.[3]

D. *Tank repair*

The Respondent contracted with Industrial Maintenance for the cleaning by sandblasting of the interior of its No. 7 tank. The job took about 2 days and was completed by November 22, 1962. Industrial Maintenance used a 210-cubic foot compressor, a half-ton sandblaster generator with an air hopper, power scaffolding, a "Puls Air Machine," and hydrowash. The equipment was valued at about $16,000, and required men with special training to operate it.

No. 7 tank had a capacity of 250,000 gallons and had contained fish solubles for about 17 years. The cleaning was incident to its conversion to a container for soybean oil. It was essential to get the tank absolutely clean for the reason that the soybean oil goes into edible products. If it contains any trace of contamination or foreign odor, it cannot be sold. Fish solubles affect the sides of a tank, crusting and pitting them. The length of time that the tank holds fish solubles affects the crusting and pitting.

About 1949 the Respondent switched over No. 9 tank from fish solubles to soybean oil. The tank had a capacity of 20,000 gallons and had been used for fish solubles for about 8 years. In order to clean it, the tank was hand scraped and then filled

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[1] Marty Martinovitch, owner of Industrial Maintenance, testified that it takes about 6 months to train a man to use the above equipment, and that he does not rent out the equipment without a trained operator because of the danger involved.

[2] Jesse Schlickman, a working foreman in the maintenance department and recording secretary of the Union, testified that the Respondent's maintenance employees "done complete roofs on the feed mill in or around 1954, and on meal, milling and service building and the solvent department around . . 1957, and done the complete roof on the Second Street warehouse, both broiler buildings in feed research, office building at feed research and tops of 20 silos in 1959" James C Basham, Respondent's chief draftsman in the engineering department, testified that Trempco method was used on the feed mill in 1955, on the Second Street warehouse in 1959, and on "some research buildings"; and that "carpenters, insulators, masons and painters" were used for the work.

[3] The Respondent's witnesses testified to the effect that employees were not available to perform the roofing work because of the "bean rush season"; and that aside from quality considerations, the work could not be performed after cold weather set in.

with water, steam, and caustic.[4] It took about 4 weeks to perform the work, but analysis still showed traces of condensed fish solubles and fish odor in the soybean oil. Thereafter the Respondent converted five or six tanks from fish solubles to soybean oil. All were cleaned by sandblasting and by outside contractors.

The evidence discloses that the Respondent did not have either the equipment[5] or employees trained in its use to clean tanks by sandblasting; and that five maintenance employees were laid off on November 23, 1962.

E. *Spray painting*

Industrial Maintenance performed some spray painting for the Respondent during November 1962. It painted "one and two truck dumps" on November 13, 14, and 15, and tanks Nos. 18 and 19 on November 28, 29, and 30. Industrial Maintenance also spray painted the "head house" during November.[6] For this work Industrial Maintenance used power scaffolding, hydrowash, a sandblaster, and an airless paint spray gun. The equipment had a total valuation of between $16,000 and $17,000.

On or about November 13, 1962,[7] Schlickman had a conversation with his supervisor, Glen Straub, Jr. Referring to the painting of the truck dumps, he asked Straub why the Respondent was contracting out work that "normally" had been performed by maintenance employees.[8] Straub replied that he would get "the answer." The following day he told Schlickman:

> . . . I have what's supposed to be the answer, as far as I know. Industrial Maintenance was called in to clean out and sand blast number seven tank and when they got here the tank was not empty and cleaned out ready for them to go to work, and as they would have to pay him from the time he came in, they decided to have him paint number one and number two truck dump.

On November 27, Hershey and Schlickman met with Ralph Kenyon, the superintendent of the maintenance department. Schlickman asked him why the Respondent

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[4] Chalmer Bollenbacher, the Respondent's feed plant superintendent, testified without contradiction that the caustic residue was disposed of by washing it from the tank "into the sewer which went into the river"; and that there is no practicable method for disposing of the caustic at the present time since "the State has tightened up on their regulations of what you put into the water streams."

[5] Schlickman testified that the Respondent had a sandblaster with a hopper capable of holding 200 to 300 pounds of sand; that maintenance employees used it on two occasions "in the early 50's or late 40's"; that it was not used to clean the inside of a tank; and that the sandblaster used by Industrial Maintenance "was considerably better and bigger" than the Respondent's.

[6] In addition to the above dates, the complaint alleges work performed on November 20, 21, 22, 23, and 24. The evidence does not disclose the specific dates on which the head house was painted.

[7] Concerning a meeting on the above date of union representatives with Warren Druetzler, the Respondent's personnel manager, Schlickman testified without contradiction as follows:

> . . . It was in the Company conference room. This meeting was called to discuss the administration of the contract that we had signed on October the 9th, and get a better understanding of the administration of it, and Mr. Druetzler showed up for the Company and for the Union was Adam Mair, and Ralph Courtley, International Representatives for the Miners Organization, District 50, and Kenneth Hershey, President of Local 15173, James Shackley, Vice President of Local 15173, and myself, recording secretary of 15173, and in the process of this meeting, I asked Mr. Druetzler what—if they were going to continue contracting out maintenance work that we had normally done. His answer was, "I presume we will."
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> Then Mr. Courtley stated it didn't look very good to him to contract out maintenance work when we had maintenance employees laid off out of the department at the time.
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> * * * * * * *
>
> I don't remember of any answer.

The evidence shows that no maintenance employees were laid off as of November 13, 1963.

[8] Schlickman testified without contradiction that maintenance employees "painted the truck dumps last time they were painted, that was in 1953 . . . with brush"; and that tanks Nos 18 and 19 also were painted by maintenance employees "the year they was installed . . . in '54 or '55."

was "contracting out the painting work that we had normally done." Kenyon replied that "we did not have enough men to do the work." Schlickman then remarked that the Respondent should call back to work the employees who had been laid off.[9]

Concerning equipment[10] owned by the Respondent and used on jobs by maintenance employees, Schlickman testified without contradiction as follows:

> . . . we have a DeVilbiss high pressure spray outfit and then we have a Graco Airless Gun, practically the same as the one that Martinovitch used. There is only one difference. His has an extra motor with a paddle to stir the paint and ours don't . . . .
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> * * * * * * *
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> We painted 500 foot of tunnel under silos, basement of the north head house, and the elevator department, painted the lunchroom, in the elevator department, painted a path, and the side walls and the ceiling in the feed mill, first floor, and we painted the new micro room in the feed mill, and we painted both floors in the lecithin department.

Tom Allwein, the Respondent's plant manager since 1955, makes the final decision on the method of doing a job after receiving recommendations of his supervisors and the engineering department. In connection with the above painting, he testified to the effect that his decision to contract out the work was based on a number of factors, including skills, manpower and equipment available, safety,[11] and particularly time and weather considerations.[12] He further testified that: It had been the Respondent's past practice to contract out jobs involving work at high levels; "the Union" had not filed grievances on such jobs; to the best of his recollection the Respondent's employees had never painted the head house; [13] in November 1961, the plant suffered a severe dust explosion "throughout our elevators"; the truck dumps were involved in the explosion; the resulting repair work was given to outside contractors; and "the Union" had not filed grievances over the contracting out of such explosion-damage work.

F. *De-aerating tank*

On or about November 29 the R. J. Foster Pearcy Co. lined the Respondent's de-aerating tank with an anticorrosive crystalline substance called Pre-Krete. The job took about 7 hours. The Respondent had no employees with any experience in applying Pre-Krete; and none of its plasterers were laid off on the above date.

The work came about as follows: From October through the winter two boilers are required to supply sufficient steam for the plant. If the smaller Keeler boiler goes down during this period, it is necessary to take part of the solvent plant out of production. On November 20 to 22, 1962, during a scheduled maintenance shutdown of the solvent plant, it was discovered that the de-aerating tank to the Keeler boiler had become so severely pitted that it could not be put back into safe operation. The purpose of the de-aerating tank is to heat water for the boiler. This is done because cold water has a high dissolved oxygen content and would corrode the boiler. It is not safe or advisable to operate the boiler for any extended length of time with cold water. However, the solvent plant had to be started up again on November 23, and as a temporary emergency measure the de-aerating tank was bypassed and cold water was pumped directly into the boiler. It was therefore important to get the de-aerating tank back into operation as quickly as possible

On the recommendation of the boiler consultant in the Respondent's engineering department, Allwein decided to line the tank with Pre-Krete. The Respondent con-

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[9] As noted above, five maintenance employees were laid off on November 23, 1962.

[10] As related above, the Respondent did not have a comparable sandblaster, power scaffolding, or hydrowash.

[11] The evidence shows that the head house is approximately 185 feet high.

[12] Allwein testified that paint should be put on with temperatures above 40 degrees, and that he took into consideration the length of time it would take the maintenance employees "in cleaning the surface or preparation of the surface to be painted and getting a good, proper application." Martinovitch testified that without his equipment it would have taken 2½ weeks to paint the tanks and about a month to just clean the surfaces of the truck dumps "inside and outside."

[13] Schlickman testified credibly that the maintenance employees painted the head house in 1953.

tacted the manufacturer of Pre-Krete who advised of the hazards of applying the material and the need for skill and experience in applying it.[14] For these reasons the manufacturer recommended that the Respondent use Pearcy, its State representative.

G. *Tank moving*

On February 18, 1963, Baker & Schultz Construction Company moved the Respondent's No 13 tank to a concrete pad. For this job it used a crane and a lowboy. The tank holds 30,000 gallons.

With the exception of the No. 2 tank, tank moves at the Respondent's plant have all been performed by outside contractors, including the moving of the No. 13 tank to the position it occupied prior to February 18, 1963.

In the spring of 1960, Baker & Schultz, using a crane, moved the No. 2 tank to a temporary location where it was placed on a foundation of railroad ties. This tank has a 50,000 gallon capacity. In October 1962 the No. 2 tank was again moved to a concrete pad by the Respondent's own yard employees. The employees jacked up the tank, backed a lowboy under it, lowered the tank onto the lowboy, drove the lowboy to the concrete pad, and skidded the tank down off the lowboy onto the pad On this occasion Baker & Schultz had the lowboy available but no operator. Since the Respondent needed to have the tank moved immediately, Baker & Schultz as a favor loaned the lowboy without charge to the Respondent Baker & Schultz normally do not loan equipment without charge or rent it without an operator.

Allwein made the decision to use Baker & Schultz to move No. 13 tank and made it on the basis that the only practicable way of moving it was by equipment not possessed by the Respondent. The Respondent had neither a crane nor a lowboy and did not have in its employ an experienced crane operator.

The evidence shows that even if the Respondent could have rented a lowboy, No 13 tank could not have been moved in the same manner by which the No. 2 tank had been moved by the yard employees. Due to the location of the No. 13 tank, it would have been very difficult to position a lowboy near it. Unlike the No. 2 tank, the No. 13 tank was encircled by a concrete rim which prevented the lowboy from being backed under it; and the No. 13 tank was attached to a pumphouse which also would have prevented the lowboy from being backed under it.

H. *Removal of concrete*

On February 19, 1963, Baker & Schultz Construction Company removed large chunks of reinforced concrete from one of the Respondent's buildings being converted into a "dog food unit." Baker & Schultz used a large caterpillar tractor with a clam-shell scoop to remove the concrete chunks and dump them into trucks owned and driven by employees of the Respondent. The job took about 8½ hours.

The decision to use Baker & Schultz was made by Plant Manager Allwein and was based on the recommendation of Paul Hilyard, the Respondent's yard foreman, that to contract out the work was the only practical and safe way of doing the job. Time was a definite factor for the reason that the Respondent wanted to get its new product on the market as soon as possible.

In order to convert the building, three levels of reinforced concrete flooring had to be removed This work was done by the Respondent's yard employees. The floors, about 6 inches thick, were taken down in slabs of about 5 by 15 feet by using jackhammers to break the concrete away from the steel beams and then by cutting the reinforcing steel with torches As each slab was hammered and cut away, it dropped to the bottom floor. The result was a large uneven pile of debris with jagged pieces of concrete and reinforcing steel sticking out of it. About half of the pile remained in slabs weighing from 1 to 1½ tons

On the morning of February 18 the Respondent's yard employees removed a few slabs of the concrete, using a boom truck and a winch. They attached cables to the concrete chunks and winched them out of the door of the building. The method was abandoned because it was time consuming and dangerous. The Respondent then tried to remove the concrete with its "Ferguson tractor with a front end loader"; but

[14] Robert Pearcy, owner of R J. Pearcy Company, testified, in substance, that if Pre-Krete is not applied properly, it will not adhere to the tank; and that even an experienced plasterer requires special training of about 100 hours in order to become qualified to perform the work.

the machine could not lift the concrete. After several hours, Hilyard stopped the employees from working, telling them that Baker & Schultz would come in the next day and remove the concrete.[15] On February 20 the Respondent removed the balance of the debris left by Baker & Schultz from the building, using its own equipment and employees.

The evidence shows that it would have taken the Respondent's employees 3 to 6 weeks to winch out the concrete; that none of the yard employees were laid off at any time involved herein; and that the Respondent could not have rented equipment such as that used by Baker & Schultz without an operator.

I. *Conclusions*

I have considered carefully the whole record and the briefs submitted by the parties. The arguments submitted by the Respondent in its brief are particularly persuasive. However, from the facts and in view of recent Board cases[16] I find that the Respondent violated Section 8(a)(5) of the Act when it unilaterally subcontracted the above work for economic reasons without first notifying the Union of its intention to do so or giving it an opportunity to bargain thereon.

IV. THE REMEDY

It has been found that the Respondent violated Section 8(a)(5) of the Act by unilaterally subcontracting maintenance and/or repair work without bargaining with the Union over its decision to do so. Accordingly, it will be recommended that the Respondent cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

It will also be recommended that the Respondent make whole those employees adversely affected for any loss of earnings suffered as a result of the Respondent's unlawful action in bypassing their bargaining agent and unilaterally subcontracting unit work, by payment to each of them of a sum of money equal to that which he would have earned as wages during his layoff, less his net earnings during such period in accordance with the formula prescribed in *F. W. Woolworth Company*, 90 NLRB 289, together with interest on such sum, such interest to be computed in accordance with the formula prescribed by the Board in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. All production and maintenance employees, including the scheduling clerk in the feed mill employed in the Respondent's plants at Decatur, Indiana, and the lecithin, elevator, maintenance, solvent, feed mill, yard, steam power, and trucking departments and laboratories (including the analytical, feed research, and technical sections thereof), at Respondent's Decatur, Indiana, plant, exclusive of office clerical employees, plant clerical employees, sales personnel, guards, professional employees, agricultural laborers, temporary employees, supervisory foremen, assistant superintendents, and all other supervisors, as defined in the Act, constitute an appropriate unit within the meaning of Section 9(b) of the Act.
4. The Union has been at all times on and after February 14, 1962, the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.
5. By unilaterally subcontracting unit work on and after August 20, 1962, without first notifying or bargaining with the Union as the exclusive representative of the employees in the aforestated appropriate unit, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.
6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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[15] Later during the same day, Hilyard told yard employee James Shackley that the Respondent had contracted out the work because the yard employees had "enough work to do without doing this work" and removal of the concrete by the yard employees "was going too slow."

[16] *Town & Country Manufacturing Co., Inc., et al.*, 136 NLRB 1022; *Fibreboard Paper Products Corporation*, 138 NLRB 550.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is hereby ordered that Central Soya Company, Inc., Decatur, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from refusing to bargain collectively with District 50, United Mine Workers of America, as the exclusive bargaining representative of the Respondent's employees in the appropriate unit with respect to wages, hours, and other terms and conditions of employment, and from unilaterally subcontracting unit work or otherwise unilaterally changing the wages, hours, and other terms and conditions of employment of unit employees without prior bargaining with the above-named Union or any other union they may select as their exclusive bargaining representative.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Make whole those employees adversely affected for any loss of earnings suffered by them as a result of the Respondent's unlawful action in the manner set forth in the section above entitled "The Remedy."

(b) Bargain collectively with District 50, United Mine Workers of America, as the exclusive bargaining representative of the Respondent's employees in the above-described appropriate unit with respect to wages, hours, and other terms and conditions of employment.

(c) Preserve and, upon request, make available to the National Labor Relations Board or its agents, for examination and copying, all records necessary for the determination of the amount of backpay due under this Recommended Order.

(d) Post at its plant in Decatur, Indiana, copies of the attached notice marked "Appendix." [17] Copies of said notice, to be furnished by the Regional Director for Region 25, shall, after being duly signed by the Respondent or its authorized representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 25, in writing, within 20 days from the date of the receipt of this Intermediate Report, what steps it has taken to comply herewith.[18]

[17] In the event that this Recommended Order be adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "a Decision and Order."

[18] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with District 50, United Mine Workers of America, as the exclusive representative of all employees in the appropriate unit.

WE WILL NOT unilaterally subcontract unit work or otherwise unilaterally make changes in the wages, hours, and other terms and conditions of employment for the employees in the appropriate unit without prior bargaining with District 50, United Mine Workers of America, or any other union which they may select as their exclusive bargaining representative.

WE WILL make whole those employees adversely affected for any loss of earnings suffered as a result of our bypassing the above-named exclusive bargaining representative and unilaterally subcontracting unit work.

CENTRAL SOYA COMPANY, INC.,
Employer.

Dated_____ By_____
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 614 ISTA Center, 150 West Market Street, Indianapolis, Indiana, Telephone No. Melrose 3-8921, if they have any question concerning this notice or compliance with its provisions.

Miami Coca-Cola Bottling Company *and* Ralph Gonzalez, Brendan Coughlin, General Sales Drivers & Allied Employees Union, Local No. 198, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Richard W. Loban, and Robert W. Shephard. *Cases Nos. 12-CA-2058-1, 12-CA-2058-2, 12-CA-2097, 12-CA-2157-1, and 12-CA-2157-2. April 14, 1965*

SUPPLEMENTAL DECISION AND ORDER

On September 28, 1962, the National Labor Relations Board, herein called the Board, issued a Decision and Order in the above-entitled proceedings,[1] finding, *inter alia*, that the Respondent had discriminatorily discharged Brendan Coughlin, Donald Elgie, Ralph Gonzalez, and Robert W. Shephard in violation of Section 8(a)(3) and (1) of the Act and directing that the Respondent make whole the above-mentioned employees for any loss of earnings resulting from the discrimination. Thereafter, on November 19, 1963, the United States Court of Appeals for the Fifth Circuit entered its decree enforcing the aforesaid Board Order.[2]

On April 24, 1964, the Regional Director for Region 12 of the Board issued backpay specifications and, on May 8, 1964, the Respondent filed an answer thereto. Upon appropriate notice issued by the Regional Director for Region 12, a hearing was held before Trial Examiner Benjamin B. Lipton on June 15 and 16 and August 5, 1964, for the purpose of determining the amounts of backpay due the four claimants. The Regional Director's Backpay Specifications were amended by stipulations entered into at the hearing. On December 10, 1964, the Trial Examiner issued his attached Supplemental Decision, in which he found that the discriminatees were entitled to the following payments together with interest at 6 percent per annum on each of the quarterly sums found due from the end of each calendar quarter: Donald Elgie, $2,518.63; Ralph Gonzalez, $4,000.00; Brendan Coughlin, $8,747.28; and Robert W. Shephard, $9,271.28. Thereafter, the General Counsel and the Respondent filed exceptions to the Trial Examiner's Supplemental Decision and the Respondent filed a supporting brief.

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[1] 138 NLRB 1209.

[2] *N.L.R.B.* v. *Miami Coca-Cola Bottling Company*, 324 F. 2d 501.