Ohio Medical Products, Division of Air Reduction Company, Inc. *and* Lodge 1406, International Association of Machinists and Aerospace Workers, AFL–CIO. Case 30–CA–1430

November 3, 1971

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND KENNEDY

On April 30, 1971, Trial Examiner Thomas S. Wilson issued his Decision 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, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

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

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 Trial Examiner's Decision, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[1]

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 Trial Examiner and hereby orders that the Respondent, Ohio Medical Products, Division of Air Reduction Company, Inc., Madison, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order.

MEMBER KENNEDY, dissenting:

In my view, established precedent requires dismissal of the complaint. The facts in this case do not support the legal conclusion that Respondent subcontracted bargaining unit work in violation of Section 8(a)(1) and (5).

The dispute in this case is limited to the custodial work for Respondent's offices in Madison, Wisconsin, which were moved on or about November 15, 1970, from 1400 Washington Street to 3030 Airco Drive. It is admitted that bargaining unit employees performed the office custodial work at the Washington Street address prior to April 13, 1970, and it is undisputed that they have not performed such work at either address since that date. The charge herein was filed on November 10, 1970, more than 6 months after the bargaining unit employees ceased to perform the work in question.

Before subcontracting the office custodial work at the Washington Street address in April, Respondent advised the Union of its intentions. The Union voiced no objections. The record establishes that on or about October 16, 1970, 1 month before the move was made of the office employees, Respondent advised the Union that custodial work at the new office building would be performed by a different subcontractor than the one it had utilized at the Washington Street facility.

The majority adopts what I regard as an erroneous finding by the Trial Examiner that "a management representative told Hans Neibuhr, chairman of the union shop committee, . . . that Respondent would *temporarily* subcontract" the office custodial work. (Emphasis supplied.) I believe the Trial Examiner's finding that the Union was told by a management representative that the subcontracting would be temporary is not supported by the record. Hans Neibuhr testified forthrightly that he could not recall which of two management representatives he had talked to about the subcontracting in April. Similarly, when questioned as to what specific words were used

[1] The Trial Examiner did not fix the precise date of the subcontract arrangement between Northern Building Maintenance and the Respondent Exhibits in evidence reflect the fact that this was based upon a September 23, 1970, bid by the maintenance company, agreed to at a meeting of the parties on October 2. Respondent's purchase order covering this custodial service is dated October 9. Thus, the October 16 information given the Union concerning this subcontract was "notice" of an existing subcontract for custodial work to begin in the future Thereafter, on November 13, 1970, the Union filed an unfair labor practice charge, well within the 10(b) period

Our dissenting colleague views the practice of subcontracting custodial work in the executive offices as having been initiated with union consent—outside the 6-month limitation on the filing of charges provided by Section 10(b) of the Act In so finding he is of the opinion that the initial subcontract awarded to D N S in mid-April 1970 is determinative, interpreting the testimony to show that it was not temporary and that it established a practice In our view objective factors refute this it was awarded specifically for work at the old address, was subject to cancellation at any time, and the office move was then contemplated for July In addition, in bargaining for a new union contract the Respondent sought to exclude custodial employees and certain other classifications from the recognized unit, which is essentially a production and maintenance unit growing out of 1947-48 certifications. The Respondent was unsuccessful in gaining this concession from the Union and on September 11, 1970, executed a new agreement with the Union which left intact the existing recognition clause. Despite this, the Respondent proceeded to subcontract the office custodial work at its new location and in mid-October informed the Union that it had awarded the above subcontract to Northern Building Maintenance. We find on this record that the Trial Examiner correctly concluded that the subcontract in the spring of 1970 was a temporary arrangement and that the second subcontract was unilateral action in violation of Section 8(a)(5) and (1)

by the unspecified management representative, he could not recall that he was told that the subcontracting would be temporary.[2]

In addition to filing the unfair labor practice charge herein, the Union filed a grievance in respect to this matter on November 25, 1970. The Respondent answered that "the grievance was untimely in that more than 22 days had elapsed since the subcontracting of the janitorial work which began on April 13, 1970." The grievance has not been pursued.

The Board has repeatedly stated that the *Fibreboard*[3] doctrine would not be "mechanically applied regardless of the situation involved. Thus it is wrong to assume that, in the absence of an existing contractual waiver, it is a *per se* unfair labor practice in all situations for an employer to let out unit work without consulting the unit bargaining representative." *Westinghouse Electric Corporation,* 150 NLRB 1574, 1576. The Board has dismissed complaints where it appeared that the subcontracting was in accordance with past practice, there was no proof of discriminatory motive, and there was absence of significant impact upon unit employees. See *Superior Coach Corporation,* 151 NLRB 188; *American Oil Company,* 152 NLRB 56; *Central Soya Company, Inc.,* 151 NLRB 1691; *American Oil Company,* 151 NLRB 421; *The Fafnir Bearing Company,* 151 NLRB 332; *Shell Oil Company,* 149 NLRB 283; *Kennecott Copper Corporation,* 148 NLRB 1653; *Allied Chemical Corporation,* 151 NLRB 718; *Westinghouse Electric Corp., Bettis Atomic Power Laboratory,* 153 NLRB 443.

Respondent had subcontracted extensively in the past. In this connection, the union shop committee chairman testified: ". . . [W]e constantly had it on our agenda program to say why was our work being subcontracted out. In the past there had been at times plating, screw machine work, plating work being out. In the February agenda, to be specific, we put on the agenda in February that why some of the paint had been subcontracted out of the shop, . . ."[4] The record further indicates that the Union had pursued an earlier grievance to arbitration with respect to the subcontracting of trash removal. The arbitrator ruled in favor of the Respondent and against the Union. Apparently, it was this practice of the Respondent with respect to subcontracting which prompted the Union in the 1970 negotiation to propose limitations on the Respondent's right to subcontract. The July 1970 strike was settled, however, without any limits imposed upon the right to subcontract.

It is equally clear that Respondent's subcontracting of the disputed work has not resulted in the layoff of any bargaining unit employees. When the Respondent moved from its old plant on Washington Street to Airco Drive, the eight employees who had previously been doing custodial work were transferred to the new facility and continue to do custodial work. There is no showing that Respondent's subcontracting resulted in any detriment to any bargaining unit employees.

Finally, there is not the slightest suggestion in the record that Respondent's decision to subcontract the disputed work was prompted by discriminatory motives.

In summary, the subcontracting here did not, in my view, constitute a unilateral change unlawful under Section 8(a)(5) and (1). Moreover, such subcontracting was done more than 6 months preceding the filing of the charge, and under Section 10(b) a finding of its unlawfulness would be time barred. Accordingly, on the facts here, considered in the light of case law, a dismissal of the complaint is clearly warranted.

[2] Although the Union's business representative and witness, Vernon Zitlow, made frequent reference to the temporary character of the subcontracting, he had no discussions or understanding with Respondent as to whether the subcontracting was of a temporary or a permanent nature Zitlow testified that he had relied exclusively on information furnished him by Union Shop Committee Chairman Neibuhr

[3] 138 NLRB 550, enfd. 322 F 2d 411 (C A.D C.), affd. 379 U S 203.

[4] Respondent's evidence indicates that Respondent had subcontracted shop work such as automatics, machining, painting, and other services such as window cleaning, grass cutting, and snow removal.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

THOMAS S. WILSON, Trial Examiner: Upon a charge duly filed on November 13, 1970, by Lodge 1406, International Association of Machinists and Aerospace Workers, AFL–CIO, hereinafter called the Union or the Charging Party, the General Counsel of the National Labor Relations Board, herein referred to as the General Counsel,[1] and the Board, respectively, by the Regional Director for Region 30, Milwaukee, Wisconsin, issued its complaint dated January 7, 1971, against Ohio Medical Products, Division of Air Reduction Company, Inc., herein referred to as the Respondent.

The complaint alleged that the Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Labor Management Relations Act, 1947, as amended, herein referred to as the Act.

Respondent duly filed its answer admitting certain allegations of the complaint but denying the commission of any unfair labor practices.

Pursuant to notice a hearing thereon was held before me in Madison, Wisconsin, on February 23, 1971. All parties appeared at the hearing, were represented by counsel or representative, and were afforded full opportunity to be heard, to produce and cross-examine witnesses, and to introduce evidence material and pertinent to the issues. At the conclusion of the hearing, oral argument was waived.

[1] This term specifically includes the attorney appearing for the General Counsel at the hearing.

Briefs were received from General Counsel and Respondent on March 22, 1971.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The complaint alleged, the answer admitted, and I, therefore, find:

Ohio Medical Products, Division of Air Reduction Company, Inc., is a New York corporation with a plant and offices located in Madison, Wisconsin, where it is engaged in the manufacture, sale, and distribution of medical equipment. During the past year, a representative period, Respondent sold and shipped, in interstate commerce, products valued in excess of $50,000 from its Madison, Wisconsin, plant to customers located outside the State of Wisconsin.

Ohio Medical Products, Division of Air Reduction Company, Inc., is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE UNION INVOLVED

Lodge 1406, International Association of Machinists and Aerospace Workers, AFL–CIO, is a labor organization admitting to membership employees of Respondent.

III. THE UNFAIR LABOR PRACTICES

A. *The Facts*

As of the beginning of the year 1970 Respondent's facility was located at 1400 East Washington Street in Madison, Wisconsin. Respondent's facility as of this time consisted of a two-story building with the manufacturing department located on the first floor and the executive offices, both plant and division, occupying the second floor thereof. At this time the janitorial or custodial work for both floors was done by members of the Union.

As of this time Respondent and the Union were parties to a collective-bargaining agreement effective from June 1, 1968, to June 1, 1970.[2] Article II (recognition) of this agreement reads as follows:

> 1. For the purpose of collective bargaining, the employer recognizes the Union as the sole collective bargaining agency for all employees in the tool room and machine maintenance, building service, janitor-watchmen, janitors, the pattern shop, the machine shop, assembly, apparatus repair, plating and polishing, painting, assembly and machine shop inspection, receiving, the shipping room, the stock room, sheet metal and fabricating department, the truck drivers, group leaders and jobbing shop, but excluding office and clerical employees, foremen, guards, and all or any other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action and will discuss with the committee representing the employees or with any other accredited representatives of the Union, all matters pertaining to grievances, wages, hours and working conditions. At all times, under all circumstances and regardless of the termination or breach of this Agreement, janitor-watchman and essential building maintenance employees shall have free access to the plant of the Employer and the Union will not interfere with or obstruct their entry or exit.
>
> 2. The Union was certified on January 8, 1947, and May 28, 1948, as the sole representative of the employees in the bargaining unit for collective bargaining purposes by the National Labor Relations Board following elections held by that board on December 20, 1946, and May 6, 1948.
>
> 3. By a separate and supplemental Agreement, dated July 15, 1948, between the parties hereto, the two bargaining units have been combined and now constitute a single unit for collective bargaining purposes.
>
> 4. This Agreement shall cover all present and future plants in Madison, Wisconsin, and its immediate area which the Company may operate during the term of this Agreement or any extension thereof, including all plants operated as the result of expansion or change.
>
> 5. The provisions of this Agreement shall be binding upon the parties hereto and their successors and assigns.

Also as of this time Respondent had acquired some 165 acres now identified as 3030 Airco Drive in Madison where it was having three separate buildings constructed: (1) a manufacturing plant; (2) a boiler house; and (3) an office building.

The manufacturing department moved from 1400 Washington Street into the Equipment Plant Building[3] between the middle of March and April 13, 1970. The executive offices remained at 1400 Washington Street because the office building at 3030 Airco Drive was still incomplete. The executive offices were then scheduled to move in July. Due to the usual construction delays this move was not actually made until November 1970.

From the middle of March to the middle of April, while the manufacturing department was moving, or had moved, to Airco Drive and while the department and division offices still remained at 1400 Washington Street, the regular monthly and other meetings between Respondent and the Union were in a state of chaos due to the move and to the temporary layoffs and other confusion caused by the move. At or about this time a management representative told Hans Neibuhr, chairman of the union shop committee, that all Respondent's custodial employees, unit employees, would move with the manufacturing department and that Respondent would temporarily subcontract out the custodial work to be done in the executive offices at 1400 Washington Street because that would only require a small amount of part-time work by a man or two. Due to the

[2] In fact Respondent and the Union had been parties to collective-bargaining agreements covering Respondent's employees since 1946.

[3] This is the name given to the building housing the Madison manufacturing department in order to distinguish it from the 40 some other manufacturing department buildings located throughout the United States which are included in the Respondent division.

existing chaos caused by the move Neibuhr and Zitlow, union business representative, agreed to this temporary expedient. At this time it was still believed the executive offices would move sometime in July.

Accordingly, the manufacturing department plant manager, Jerome R. Sheridan, on or about April 13 subcontracted the custodial work at 1400 Washington Street to a company known as D.N.S. while all the regular eight custodial employees were transferred to Airco Drive along with the manufacturing department. The D.N.S. employees did the same custodial work in the offices at 1400 Washington Street as had been done in the past by the unit custodial employees.

On April 21 Respondent and the Union went into negotiations for a contract to succeed that expiring on June 1, 1970.[4] Among other proposals the Union sought to limit Respondent's right to subcontract while in its proposal Respondent sought to eliminate experimental machinists, store stock clerks, maintenance mechanics, and custodial employees from the recognition clause of the agreement. As usual the Union failed to overcome Respondent's objections to a subcontracting clause while Respondent met with complete and absolute opposition to its proposal to eliminate from the bargaining unit the aforementioned employees. The parties reached what one Respondent official referred to as a "Mexican standoff."

After the negotiations on June 1 failed to reach agreement the Union walked out on strike. At the negotiation session on July 3 the parties reached tentative agreement which the Union accepted with the result that the strike ended on July 5 with the employees returning to work.

On or about October 20 Zitlow received a report from Neibuhr to the effect that Respondent intended to subcontract out the custodial work at the new executive office building on Airco Drive when the executive offices were finally moved to that building in November.

However, sometime in October, the purchasing agent for the division contracted with Northern Building Maintenance Company to do the custodial work in the new office building. It is interesting that neither Sheridan nor any of the manufacturing department officers had anything to do with the negotiations of this contract with Northern Building Maintenance because the plant manufacturing department officials were the ones which had with the Union's tacit consent subcontracted out the custodial services at 1400 Washington Street.[5]

About October 16 at the regular agenda meeting with the Union Respondent informed the union committee that it was contracting out the custodial work in the new office building. The Union objected.

On or about November 4 Zitlow and Hodge, Respondent's director of industrial relations for the division, lunched together, at Hodge's request, at which time Hodge informed Zitlow that Respondent was going to abandon its efforts to eliminate the experimental machinists, store stock clerk, and maintenance mechanics from the unit as Respondent did not think it could win an arbitration on these employees but that Respondent was going to subcontract out the custodial work in the new office building. When Zitlow inquired if Respondent had let the contract for this work and what the wages, fringe benefits, etc., were and if the subcontract had a clause protecting the rights of the unit custodial employees, Hodge said that he did not know.

On November 10, after orally requesting a copy of the subcontract for custodial work in the office building, Zitlow, at Hodge's request, wrote Respondent in pertinent part as follows:

> Janitorial jobs and work performed by the bargaining unit and covered by the collective bargaining agreement in the company's offices over many years, however, is being removed by the Company from bargaining unit coverage.
>
> I understand your telephone conversation to me of this morning in respect to this work that it has been already decided by the Company that it did not need to be bargained, as it was different or something else again.
>
> I made request of you for the following information relevant to this janitorial work:
>
> (1) A copy of the contract between Ohio Medical Products Co. and the Northern Building Maintenance firm, whom the Union is given to understand will now perform our work.
>
> (2) A list of the wage rates Northern Building Maintenance is paying or intends to pay for janitors (custodians) to perform said type of work in the office of the Company.
>
> (3) A list of benefits, Northern Building Maintenance will provide for these janitors (custodians).
>
> (4) A copy of the provisions that Northern Building Maintenance has with Ohio Medical Products Co., providing a guarantee that bargaining unit members in the janitorial custodian classifications as of May 31, 1968 retain and accrue their plant and department seniority and that employees holding plant seniority dates as of May 31, 1968 have bumping rights into the janitorial custodian classifications.
>
> You advised that the Company would not provide the Union with the above requested information—that it was not Ohio Medical Products Co.'s concern what Northern Building Maintenance paid its employees or what benefits they had, that Ohio was only interested in what they charged Ohio Medical for their services.

On or about November 15 the division executive officers moved into the new office building on Airco Drive.[6] The contract with D.N.S. at 1400 was canceled, of course, when the executive officers of the division were moved. Since that time the custodial work in the office building has been done by employees of the subcontractor, Northern Building Maintenance Co., which was the low bidder and accepted by the purchasing agent of the division. The custodial work

[4] Other negotiation sessions were held on May 7, 13, 14, 19, 22, 25, 26, and June 1

[5] At the hearing Respondent produced nobody who knew anything about the negotiations with Northern Building Maintenance or, in fact, anything about the terms of that subcontract.

[6] Just when the plant executive officers moved into the equipment plant building is not shown in this record, but these officers moved in after the employees had been moved into the building.

at the Equipment Plant Building is still being done by the unit custodial employees.

On November 25 the Union filed a grievance under the new collective-bargaining agreement alleging that Respondent was in violation of that agreement by subcontracting the custodial work in the new office building. Respondent denied this grievance on the grounds that it was untimely filed because Respondent began subcontracting on April 13, 1970, and also on the ground that subcontracting was not in violation of the contract. The Union failed to request arbitration of this grievance.

On January 6, 1971, Respondent sent the Union all the information requested in the Zitlow letter dated November 10 except the contract of the Northern Building Maintenance Company with Respondent. On the following day, January 7, 1971, the instant complaint issued against Respondent.

B. *Conclusions*

Despite Respondent counsel's imagination and ingenuity this remains a simple case, albeit somewhat out of the usual routine.

The facts disclose without contradiction that Respondent here for many years had recognized and bargained with the Union as the exclusive bargaining representative of the janitor/custodians, among others of Respondent's employees, and that the resulting collective-bargaining agreement covered not only the existing Madison plant but also all other plants which Respondent might acquire in and around the Milwaukee area including expansion plants. The facts also prove that for a number of years unit janitors/custodians had under the existing agreement been cleaning both the plant and the offices, both the plant and division offices which for years had been located on the floor above the manufacturing area.

Then in 1970 Respondent moved into new quarters some 7 miles away: a new and expanded manufacturing plant and a separate office building. For reasons best known to itself Respondent desired all personnel in the office building to be free from union representation. So, after unsuccessfully attempting to eliminate the janitor/custodian classification from the collective-bargaining agreement with the Union, Respondent in October or November unilaterally and without notice to or bargaining with the Union subcontracted the janitor/custodian work in the new office building to a third party. This sudden unilateral action by Respondent in the face of the recognition clause and without notice to or bargaining with the Union representing the janitor/custodians not only constituted an apparent violation of the collective-bargaining agreement but also a violation of Section 8(a)(5) of the Act as a unilateral change in working conditions.

Respondent says—without furnishing any proof thereof at the hearing—that by subcontracting this janitorial work to an independent contractor it thereby saved money. At the hearing Respondent failed to show any economic necessity requiring this alleged saving. Of course the plant officials testified that by so doing it, the plant, saved some indirect labor costs formerly charged against it, thereby naturally reducing the per item manufacturing cost. Such saving no doubt to an operating manufacturing manager is important. His balance sheet looks better with every indirect cost item eliminated which he can eliminate. However it is only a bookkeeping saving as far as the manufacturing plant is concerned because the Company or the division, the employing entity, still has to pay for the necessary janitorial/custodial work required in its new office building because that has to be paid to make the offices useable whether or not it is charged on the books to the manufacturing plant or to the division.

No doubt, if the independent contractor used nonunion labor for the janitorial services, the cost of this work would be somewhat less than it would be having the work done by union labor under the collective-bargaining agreement. That seems to be one of the facts of life today. Hence the actual savings to the Company or division, as distinguished from the manufacturing department, would be only the difference between the cost of nonunion labor and the cost of union labor. However here Respondent failed to show any economic necessity, much less a dire economic necessity, which would justify Respondent in making this move unilaterally and without bargaining with the Union.

But Respondent has other strings to its bow.

The first of these is that, as the original subcontracting at 1400 Washington Street occurred on April 13, 1970, the 6-month 10(b) period had expired before the charge was filed on November 13, 1970, and hence the instant case must be dismissed. This contention lacks merit because the subcontracting objected to in the complaint is that involving Northern Building Maintenance Company where the subcontract was signed by Respondent as of some indefinite date in October or November 1970 and thus well within the 6-month limitation. It is, however, true that on or about April 13, 1970, the Union made no objection to Respondent's subcontracting out of the "part time" temporary janitorial/custodial work remaining to be done at 1400 Washington Street until that office moved, supposedly in July, to the Airco Drive location. The Union made no objection to this subcontracting as an accomodation—but not a waiver—to Respondent during the confusion created by the move from 1400 Washington Street to Airco Drive. To claim this accomodation to be a permanent waiver is pushing things awfully far particularly in the light of the Union's strenuous and successful objection to Respondent's attempt during negotiations to eliminate the janitors/custodians from the appropriate unit. Consequently this contention of Respondent also lacks merit.

Respondent's next string in the bow is that the use of the words "plants" and "Madison, Wisconsin, Plant" in the collective-bargaining agreement were "specifically chosen" "simply because the thrust of the scope of recognition went to the factory and in no way went to the divisional offices." In other words, according to Respondent, the word "plants" was used specifically to indicate that the agreement covered only the manufacturing department as distinguished from office buildings and the divisional office. It is quite true that there is not one word in the agreement relating to offices or office buildings. It is true that until 1970 Respondent's executive offices, both manufacturing and divisional, were located in the plant at

1400 Washington Street. But it is also true that at least since the June 1968 agreement[7] unit janitors/custodians have been doing the cleaning in both the plant and the executive offices, plant and division, under the existing collective-bargaining agreements. This history under these collective-bargaining agreements speaks louder than Respondent's claim of the restrictive use of the word "plants" as excluding, at least, divisional offices.

Consequently I cannot accept Respondent's ingenuous argument regarding the intentional restrictions imposed on the agreement by the use of the word "plant." The contention of the implied restrictions is historically contrary to fact. At best the restrictions are unclear and implied. At worst such alleged restrictions appear almost surrepticiously imposed. Indeed if the word was specifically used for its alleged restrictive quality at the time of its first use in the collective agreements—even if that event occurred only during the year 1968—then the draftsman of the agreement displayed a degree of clairvoyance which was almost inhuman in its foresight.

Finally Respondent here seems to see a legal distinction between what has been called here the manufacturing department, i.e., those employees and plant officials directly involved in the actual manufacture of Respondent's products, and the "division headquarters" executives, as referred to in Respondent's brief, by maintaining here that the collective-bargaining agreement between the Union and "OHIO MEDICAL PRODUCTS DIVISION AIR REDUCTION COMPANY, INC., Madison, Wisconsin, plant," is applicable to the manufacturing department but not to the division. I must agree that the capitalization and punctuation above confuses rather than clarifies. But the fact is that the Madison manufacturing department is one of some 40 similar manufacturing departments or plants under the direct control of those executives comprising what Respondent chooses to refer to as "the division headquarters." By some legal legerdemain Respondent seems to be attempting to create two individual separate legal entities out of the manufacturing department and its division executive office. I recognize the fact that recently the Board perceived such separate individual legal entities in two "divisions" of one employing entity, the widespread *Hearst Corp.*, in 8(b)(4) cases.[8] However neither of these recent cases goes so far as to see separate legal entities within a single division of an employing corporation. This attempt by Respondent thus carries this separate legal entity theory one step beyond the *Hearst* cases. In my considered judgment Respondent's attempt goes at least one step in the theory of corporate fiction too far. Accordingly I must, therefore, find that the "division headquarters" was included within the terms of the collective-bargaining agreement in evidence here just as was the manufacturing department.

Hence by unilaterally subcontracting the janitorial/custodial work in its new office building without notice to or bargaining with the Union as the recognized exclusive bargaining agency for the employees performing such work for Respondent in Madison, Wisconsin, Respondent unilaterally removed such employees from the agreed-upon appropriate unit in violation of Section 8(a)(5) and (1) of the Act.[9]

The fact that this unilateral action by Respondent did not cause any of the unit employees to lose their employment because they continued their occupation in the plant is immaterial here. It is material that the Union was deprived of the right to represent those janitors/custodians required for the work at the new office building. By so doing Respondent unilaterally modified the collective-bargaining agreement in violation of Section 8(a)(5) and (d) of the Act.

Furthermore by letter dated November 15 the Union made demand on Respondent for certain stated material pertinent to the issue involved in Respondent's unilateral act in subcontracting the work in the new office building to a third party. Originally Respondent refused the Union's demand but subsequently one day before the issuance of the instant complaint supplied some, but not all, of the material requested. By such refusal Respondent also violated Section 8(a)(5) and (1) of the Act.[10]

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent refused to bargain with the Union in two respects, it is necessary to restore the status quo by ordering Respondent to cancel its agreement with Northern Building Maintenance Company for the janitorial/custodial service in Respondent's new office building at 3030 Airco Drive and to employ the necessary janitors/custodians in accordance with the already existing collective-bargaining agreement with the Union. In addition Respondent's unfair labor practice in subcontracting out the janitor/custodian services in the office buildings, whereas the collective-bargaining contract clearly required using unit employees, deprived the Union of the dues which would have accrued to its benefit if Respondent had complied with the collective-bargaining agreement. Hence I will order Respondent to pay to the Union a sum of money equal to the dues which would have been paid to the Union if unit employees had been employed as required.

[7] The June 1968 agreement is the earliest collective-bargaining agreement introduced in this record The divisional offices, however, have been on the second floor of the facility at 1400 Washington Street since the early 1940's so that unit employees have probably been cleaning those offices ever since that time

[8] *Los Angeles Newspaper Guild (Hearst Corp.)*, 185 NLRB No. 25, and *American Federation of Television and Radio Artists (Hearst Corp.)*, 185 NLRB No. 26, both decided August 27, 1970.

[9] *Fibreboard Paper Products Corp* v. *N L.R B*, 379 U.S 203.

[10] *N.L.R B.* v. *Rockwell-Standard Corporation*, 410 F.2d 953 (C.A 6).

Because of the type of the unfair labor practices engaged in by Respondent, I fail to sense an opposition by Respondent to the policies of the Act in general and so I deem it necessary only to order Respondent to cease and desist from in any like or related manner interfering with the rights guaranteed its employees in Section 7 of the Act.

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

CONCLUSIONS OF LAW

1. Lodge 1406, International Association of Machinists and Aerospace Workers, AFL–CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.
2. By refusing or failing to bargain in good faith with the Union by subcontracting the janitorial/custodial work at the new office building at 3030 Airco Drive without notice to or bargaining with the Union and by refusing to provide pertinent information requested by the Union, Respondent has engaged in and is engaging in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.
3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: [11]

ORDER

Respondent, Ohio Medical Products, Division of Air Reduction Company, Inc., Madison, Wisconsin, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain in regard to the janitorial/custodial work at the new office building located at 3030 Airco Drive with the Union as the representative of such employees and in accordance with the existing collective-bargaining agreement between itself and the Union.

(b) Refusing to supply pertinent information requested by the Union in regard to the janitorial/custodial employees at its office building at 3030 Airco Drive, Madison, Wisconsin.

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

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

(a) Cancel the contract it now has with Northern Building Maintenance Company covering the janitors/custodians presently employed at said office building.

(b) Bargain with the Union or employ janitors/custodians at said building in accordance with the presently existing collective-bargaining agreement between itself and the Union.

(c) Pay to the Union a sum of money equal to that which would have been due to the Union under said collective-bargaining agreement for the dues of the janitors/custodians employed in the new office building since it opened in November 1970.

(d) Post at said office building and in the Equipment Plant Building in Madison, Wisconsin, copies of the attached notice marked "Appendix." [12] Copies of said notice, on forms provided by the Regional Director for Region 30, after being duly signed by Respondent's representative, shall be posted by Respondent 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 Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 30, in writing, within 20 days from the date of the receipt of this Decision, what steps the Respondent has taken to comply herewith.[13]

IT IS FURTHER RECOMMENDED that, unless the Respondent notify said Regional Director within 20 days from the receipt hereof that it will take the action here recommended, the Board issue an order directing Respondent to take the action here recommended.

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[11] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 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.

[12] In the event that the Board's 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 be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals enforcing an Order of the National Labor Relations Board."

[13] In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 30, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

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

WE WILL cancel our agreement with Northern Building Maintenance Company regarding the janitorial/custodial service in our new office building located at 3030 Airco Drive.

WE WILL employ the janitorial/custodial employees to work in said new office building under the terms of our collective-bargaining agreement with Lodge 1406, International Association of Machinists and Aerospace Workers, AFL–CIO, and employ them in accordance with the terms and conditions set forth in that collective-bargaining agreement.

WE WILL supply pertinent information requested by the Union in regard to the janitorial/custodial employees at its office building at 3030 Airco Drive.

WE WILL pay to the Union a sum of money equal to that which would have been due to the Union under said collective-bargaining agreement for the dues of the janitors/custodians employed in the new office building since it opened in November 1970.

WE WILL NOT refuse to bargain with the Union in regard to these janitorial/custodial employees at the new office building.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, including the Union herein, to bargain collectively through a bargaining agent chosen by our employees, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any such activities.

OHIO MEDICAL PRODUCTS,
DIVISION OF AIR
REDUCTION, INC.
(Employer)

Dated By

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

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.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Commerce Building, Second Floor, 744 North Fourth Street, Milwaukee, Wisconsin 53203, Telephone 414–272–3861.