Sunoco, Inc. (R&M), a wholly owned subsidiary of Sunoco, Inc. *and* Atlantic Independent Union. Cases 3–CA–25293 and 3–CA–25654

January 31, 2007

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND KIRSANOW

On August 11, 2006, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and Charging Party each filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Sunoco, Inc., Tonawanda, Syracuse, and Rochester, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(c).

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

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT change our established past practice of affording bargaining unit employees an opportunity to make jet fuel deliveries prior to subcontracting such work, without giving the Atlantic Independent Union timely notice and an opportunity to bargain.

WE WILL NOT refuse or fail to respond in a timely and complete manner to the Union's requests for information regarding the subcontracting of bargaining unit work, including the subcontracting of jet fuel deliveries.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL restore our established past practice of affording bargaining unit employees an opportunity to perform jet fuel deliveries before subcontracting out such deliveries.

WE WILL, before implementing any changes in the wages, hours, or other terms and conditions of employment of unit employees, notify and, upon request, bargain collectively and in good faith with the Union as the exclusive bargaining representative of employees at our Tonawanda, Rochester, and Syracuse, New York facilities who are members of the following bargaining unit:

All non-exempt operating and clerical employees of Sunoco (R&M), but excluding casual employees, sec-

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

In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally changing its past practice of providing unit employees with the opportunity to make jet fuel deliveries before subcontracting such deliveries, Member Schaumber notes that the Respondent did not contend that its decision to subcontract jet fuel deliveries was motivated by a reason not particularly amenable to collective bargaining. See *Furniture Rentors of America v. NLRB*, 36 F.3d 1240, 1248 (3d Cir. 1994) (rejecting the Board's *Torrington Industries*, 307 NLRB 809 (1992), analysis and finding that the determination of whether an employer's decision to subcontract was a mandatory subject of bargaining should also look into whether the subcontracting decision was driven by other issues amenable to collective bargaining). Member Schaumber further observes that, even if the Respondent had advanced such an argument, the Respondent has not proffered any first-hand evidence regarding the reasons why the Respondent decided to subcontract jet fuel deliveries.

[2] We will modify the judge's recommended Order to conform to the Board's standard remedial language. We will also substitute a new notice. To remedy the Respondent's unlawful unilateral change, the judge properly issued, inter alia, a "limited" bargaining order requiring the Respondent to notify and, upon request, bargain with the Union before implementing any changes in wages, hours, and other terms and conditions of employment. In the corresponding paragraph of the notice, however, the judge's wording reflected a general, affirmative bargaining obligation that the Order does not impose. The substituted notice corrects this inadvertent mistake.

retarial employees, sales employees, professional employees, employees at employer operated service stations, guards, watchmen and supervisors as defined in the Labor-Management Relations Act, as amended.

WE WILL make whole, with interest, any bargaining-unit employees for any loss of pay or other benefits they may have suffered as a result of our unlawful conduct.

WE WILL provide a timely and complete response to the Union's October 24, 2005 request for information regarding our subcontracting of jet fuel deliveries at the aforementioned terminals.

SUNOCO, INC. (R&M), A WHOLLY OWNED SUBSIDIARY OF SUNOCO, INC.

Aaron B. Sukert, Esq., for the General Counsel.
Daniel Johns and *William Kennedy, Esqs. (Ballard, Spahr, Andrews & Ingersoll, LLP),* of Philadelphia, Pennsylvania, for the Respondent.
Lance Geren, Esq. (Freedman & Lorry, P.C.), of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Buffalo, New York, on May 16–17, 2006. The Atlantic Independent Union (the Union) filed the charge in Case 3–CA–25293 on February 28, 2005. The General Counsel filed a complaint predicated on this charge on June 28, 2005. The Regional Director approved a settlement of the case on October 13, 2005, just prior to the scheduled beginning of an unfair labor practice hearing.

On November 17, 2005, the Union, which represents all nonexempt operating and clerical employees (drivers, terminal operators, and mechanics) of Respondent at three of Sunoco's terminals in New York State, filed the charge in Case 3–CA–25654. On February 28, 2006, the Regional Director revoked the settlement in Case 3–CA–25293 and consolidated it for hearing with Case 3–CA–25654.

The complaint alleges that Respondent Sunoco, Inc. (R&M), a subsidiary of Sunoco, Inc., unilaterally announced that it was subcontracting all jet fuel deliveries at its Tonawanda (near Buffalo), Rochester, and Syracuse, New York facilities in November 2004.[1] Respondent did not act on this announcement until October 2005. The General Counsel thus alleges that Respondent unilaterally subcontracted 50 percent of all jet fuel deliveries at the above three facilities to Griffith Energy, Inc. on or about October 17, 2005, and then subcontracted all jet fuel deliveries to Griffith on or about January 5, 2006. The General Counsel alleges that in taking the aforementioned actions without prior notice to the Union and without affording it an opportunity to bargain, Respondent violated Section 8(a)(5) and (1) of the Act.

Respondent makes numerous arguments in response to these allegations. Its principal contentions are as follows: (1) its subcontracting of jet fuel deliveries was not a change from the status quo; (2) its subcontracting was not a mandatory subject of bargaining because it was not predicated on cost factors; (3) assuming that Respondent was required to bargain, the Union waived its bargaining rights; and (4) any change Respondent made with regard to jet fuel deliveries was not material, substantial and significant in that unit employees did not suffer any adverse impact as a result of its subcontracting.

The General Counsel alleges further that Respondent violated Section 8(a)(5) and (1) in failing and refusing to provide the Union with all the information that it requested regarding the subcontracting of jet fuel deliveries at these three facilities on or about October 24, 2005.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Sunoco, Inc. distributes petroleum products from facilities in Tonawanda, Rochester, and Syracuse, New York. At these facilities it annually receives goods valued in excess of $50,000 from points outside of the State of New York. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Union has represented bargaining unit employees at the three facilities in question for as much as 70 years. Sunoco purchased these terminals in 1988. Sunoco and the Union have been parties to successive collective-bargaining agreements, the most recent of which is effective from March 1, 2004, through March 31, 2008. The bargaining unit consists of drivers, mechanics, and terminals operators. However, Respondent's unit clarification petition, seeking to exclude the terminal operators from the bargaining unit, is currently pending before the Board. See *Sunoco, Inc.,* supra.

The principal product transported by bargaining unit truck-drivers is gasoline. However, since the 1990s, these drivers have also transported jet fuel to the storage facilities for the Buffalo, Syracuse, and Rochester airports. The trailers used to transport jet fuel are different from those used to transport gasoline. These vehicles are "dedicated" solely to the transport of jet fuel.

The parties' collective-bargaining agreement does not address Respondent's right to subcontract unit work. However, until October 2005, Respondent's practice was to use its own trailers driven by bargaining unit drivers to deliver jet fuel if at all possible. Sunoco employees working at the central dispatch

[1] There are various Sunoco entities involved in this case. As far as I am concerned, the only relevant point regarding this fact is that the Marketing Division and the Refining and Supply Division, which are the only ones involved in the decision to subcontract jet fuel deliveries, are part of the same corporation, Sunoco, Inc. Sunoco Logistics, another entity within Sunoco, Inc., apparently owns the three terminals in question See 347 NLRB 421 (2006).

unit near Philadelphia called the Tonawanda, Rochester, and Syracuse terminals daily to determine whether unit employees were available to make Respondent's jet fuel deliveries on Respondent's trailers. Often unit employees, who were not scheduled to work, made these deliveries when working voluntary overtime.[2] Only when unit drivers were not available did Respondent subcontract its jet fuel deliveries in these geographic areas. On at least some occasions, if unit drivers were not available at one of the New York State terminals, the jet fuel deliveries would be assigned to an available unit driver at another terminal.

In November or December 2004, Respondent decided to subcontract jet fuel deliveries in New York State. This decision was communicated to bargaining unit employees at several safety meetings. Unit employees were told that, starting in January 2005, jet fuel deliveries would be made by subcontractors, rather than by unit truckdrivers. Sunoco made no effort to communicate this decision to John Kerr, the Union's president, who was its normal contact for labor relations matters. Kerr was informed of Respondent's decision by union stewards at the various terminals, who had attended the safety meetings in their capacity as rank-and-file employees.

Respondent did not begin contracting out jet fuel deliveries in January 2005.[3] That month Ruth Clauser, Sunoco's human resource manager, called Union President Kerr. I credit the following account of that conversation testified to by Kerr:

> A. I asked Ruth what she knew about the jet fuel work in New York State and she said what are you talking about. I said well look I'm hearing rumors that they want to contract out all of our jet fuel work up there and that's our work you can't just do that. You have to bargain over that work and she said I don't know anything about [it] and I'll get back to you on it. [Tr. 58.]

Clauser essentially confirmed that she had a discussion with Kerr in January 2005, in which he initiated a discussion regarding the subcontracting of jet fuel.

> Q. [W]ell, in your phone calls with Mr. Kerr or conversations or were there any other meetings with Mr. Kerr end of 2004, beginning of 2005, during which jet fuel was discussed?
>
> A. There was a reference to what's going on with jet fuel, that's the extent of the conversation, there was no request to bargain. [Tr. 449; also see Tr. 455, 466.]

Kerr again asked Clauser about jet fuel deliveries at a February 15, 2005 meeting near Philadelphia. He told Clauser that the jet fuel deliveries were bargaining unit work and that Respondent could not subcontract this work without bargaining with the Union (Tr. 59). Clauser told Kerr that she would have to get back to him.[4] A few days later, Respondent invited potential subcontractors to submit bids for the jet fuel delivery work. Sunoco did not inform the Union that it was doing so. The Union then, on February 28, filed the first unfair labor practice charge in this matter, alleging that Respondent had violated Section 8(a)(5) by unilaterally deciding to subcontract jet fuel deliveries at the three terminals in question.

On April 29, 2005, Kerr attended a meeting in Palmyra, New Jersey, at which Ruth Clauser and Bill Marchbank, Respondent's transportation manager for its marketing division, were present.[5] Kerr told Marchbank that jet fuel deliveries were bargaining unit work and that Respondent had to bargain over subcontracting it out (Tr. 69).[6] Marchbank told Kerr that Respondent had decided to subcontract jet fuel deliveries on the basis of a risk assessment (Tr. 510).

Kerr responded that there was no greater risk delivering jet fuel than there was delivering gasoline. At this meeting Kerr asked Respondent for: (1) data as to what it cost Sunoco and its subcontractors to deliver jet fuel from the three facilities from 2002 through 2004; (2) copies of potential subcontractors' bids to deliver jet fuel at these facilities; and (3) details about the risks and their costs to which Marchbank referred. Kerr followed this up with a written request for such information on May 16.

The Union, which filed its initial charge over Respondent's announcement that it was going to subcontract jet fuel deliveries in New York State, filed an amended charge alleging Respondent's failure to provide the information requested on April 29 and May 16. The General Counsel issued a complaint and the parties reached a settlement just prior to a hearing on the complaint, which was approved by the Regional Director on October 13, 2005. This settlement agreement was subsequently set aside and vacated by the Regional Director on February 28, 2006, on the grounds that Respondent failed to comply with it.

Pursuant to the October 2005 agreement, Respondent provided the Union with data for 2002–2004 which respect to what it cost Respondent to deliver jet fuel with its own trucks, compared to the cost for delivering jet fuel by common carrier (sub-

[2] The availability of unit drivers for overtime work was enhanced by the fact that they worked four 10-hour days and thus could have worked overtime on 3 days or nights per week.

[3] At Tonawanda, the subcontracting of jet fuel deliveries was apparently discussed regularly at safety meetings. During 2005, Respondent repeatedly informed unit employees that the date that jet fuel deliveries would be switched to subcontractors was being pushed back. Employees at Tonawanda were also told early in January 2005 that Respondent would sell the two jet fuel trailers at that terminal.

[4] Clauser testified that she did not recall the subject of jet fuel deliveries being discussed at the February 15, 2005 meeting; however, she did not contradict Kerr. In fact, she conceded that it is very possible that jet fuel was discussed at this meeting (Tr. 464). Two other Sunoco representatives who were present at this meeting did not testify (Tr. 58). Anthony Dellaratta, the Union's vice president, who was also present at the February 15 meeting, testified at trial, but not about the February 15 meeting. I credit Kerr's uncontradicted testimony regarding the February 15 meeting.

[5] I accord no weight to a letter that the Union contends it sent Sunoco in March requesting bargaining. There is no probative evidence that Respondent received such a letter.

[6] I credit Kerr's testimony. Neither Marchbank nor Clauser directly contradicted him. Marchbank responded to leading questions whereby he denied that Kerr said he wanted to bargain, or that Kerr indicated that subcontracting the jet fuel deliveries violated the parties' collective-bargaining agreement, and that Kerr did not indicate that he would file a grievance (Tr. 510).

contractors).[7] The parties agreed that Respondent would provide the range of bids submitted by potential subcontractors for the jet delivery work, without revealing the identity of the bidders. Sunoco also provided a qualitative, but not quantitative description of the risks associated with the delivery of jet fuel. Respondent agreed to post a notice by which it promised to provide the information as specified in the settlement negotiations and give the Union an opportunity to bargain with respect to the subcontracting of jet fuel deliveries.

The day that the settlement was approved Respondent's lead scheduler emailed all other schedulers to inform them that beginning October 17, jet fuel deliveries at the three facilities would no longer be made by unit employees, but would be made by Griffith Energy, Inc., a subcontractor (GC Exh. 39). Respondent did not inform the Union of this change.

Between October 14 and 19, 2005, Ruth Clauser and John Kerr had a telephone conversation in which she discussed a schedule for providing the information that Respondent would provide pursuant to the settlement agreement. Clauser did not tell Kerr that Respondent was going to immediately subcontract the jet fuel deliveries to Griffith.

Just before implementation of the change, Respondent decided to initially subcontract only 50 percent of the jet fuel deliveries to Griffith.[8] Sunoco didn't inform Kerr of this policy, He learned about it from James Englert, the Union's steward at Tonawanda, and Armin Mathison, the steward at Rochester.

Upon learning of this development, Kerr transmitted a new and much more extensive information request to Clauser on October 24, 2005. Kerr stated in that request that the information was necessary for the Union to be in a position to bargain over the subcontracting of jet fuel work. Respondent, by Ruth Clauser, provided some of the information requested by the Union on November 8, 2005 (GC Exh. 9). Clauser asked the Union to inform Respondent by November 14, whether it wanted to bargain over the jet fuel subcontracting. Sunoco objected to other portions of the Union's October 24 request (Jt. Exh. 1, Exh. D). The information requested in the October 24, 2005 letter that Respondent did not provide the Union is as follows:

> Paragraph (a) of the Union's request:
> Copies of the actual proposals issued by the Company inviting carriers to bid on the jet fuel work, including the carrier to which the bids were issued, the amount and identity of the product being subjected to bid, and identify the amount per terminal for each product being subjected to bid.

Respondent objected to this request on the grounds the request was covered by the settlement agreement in which the Union agreed to accept the low and average bids in lieu of actual documents relating to the bid process.

> Paragraph (f) of the Union's request:
> Copies of all the bids submitted for the jet fuel work, including the dates the bids were sent out, the carriers to which the bids were directed, the dates the bids closed and were due back to the Company, the entity to which any bid was awarded, and identify any carrier that bid on all the available work.

Respondent objected to this request on the same grounds as it objected to the request in paragraph (a).

> Paragraph (t) of the Union's request:
> Copies of any all communications between the Company and Griffith Energy from June 2004 through the present regarding the hauling of jet fuel in the state of New York.

The Company objected to this request on the grounds that it was covered by the settlement and was irrelevant to the Union's ability to bargain over the Respondent's decision to subcontract jet fuel deliveries.

> Paragraph (u) of the Union's request:
> A copy of the bid submitted by Griffith Energy to the Company for the jet fuel work in the state of New York.

Respondent objected to this request on the grounds that it was covered by the settlement agreement.

> Paragraph (v) of the Union's request:
> Copies of any and all emails or other communications sent by Bob Dallas to Colin Chadwick, Joanne Williams, Glen Sellier or any other dispatcher between October 10, 2005, through the present regarding jet fuel work in the state of New York.

Respondent objected to the relevance of this request to the Union's ability to bargain over Sunoco's decision to subcontract jet fuel delivery.

The Union's response to Clauser's November 8 letter was to file the charge in Case 3–CA–25654 on November 17.[9]

On or about January 5, 2006, Respondent informed its customers that Griffith would be performing all jet fuel deliveries at the three facilities. Since early January 2006, Respondent has not assigned any jet fuel deliveries from the three New York terminals to bargaining unit employees.

Sunoco did not inform Union President Kerr either of the 50 percent policy or the implementation of 100 percent subcontracting of jet fuel deliveries. This information was communicated either directly to unit employees and/or to the union stewards at the three terminals. Kerr found out about both these developments from Jim Englert, the Tonawanda union steward. As a result of this change some of the drivers are at times working less than 40 hours a week, even though they are paid for 40 hours pursuant to the terms of the collective-bargaining agreement. At least some of the drivers have experienced a significant decline in their compensation due to a

[7] Respondent provided this comparison in cents per gallon. Jt. Exh. 1, Exh. C. Prior to the settlement agreement, Respondent had provided the Union none of the information it requested in April and May 2005.

[8] The decision to subcontract 50 percent of jet fuel deliveries in October, rather than 100 percent, was made in reaction to the settlement of the original ULP charges. Respondent may have realized that immediately subcontracting 100 percent of the jet fuel deliveries was too obviously inconsistent with the settlement agreement it had just signed.

[9] This charge alleges a breach of the settlement agreement, unilateral changes, and a failure to provide information.

decline in opportunities for overtime, which is directly related to the subcontracting of jet fuel deliveries.[10]

Analysis

Respondent had an established past practice at the three terminals in question of affording unit drivers the opportunity to perform jet fuel deliveries before subcontracting such deliveries.

Although, there were no contractual restrictions on Respondent's ability to subcontract, its established past practice of affording its unit drivers the opportunity to perform jet fuel deliveries before contracting out was a term and condition of their employment.[11] An employer's practices, even if not required by a collective-bargaining agreement, which are regular and long-standing, rather than random or intermittent, become terms and conditions of unit employees' employment, which cannot be altered without offering their collective-bargaining representative notice and an opportunity to bargain over the proposed change. *Granite City Steel Co.,*167 NLRB 310, 315 (1967); *Queen Mary Restaurants Corp. v. NLRB,* 560 NLRB 403, 408 (9th Cir. 1977); *Exxon Shipping Co.,* 291 NLRB 489, 493 (1988); *B & D Plastics,* 302 NLRB 245 fn. 2 (1991); *DMI Distribution of Delaware,* 334 NLRB 409, 411 (2001). A practice need not be universal to constitute a term or condition of employment, as long as it is regular and longstanding. *Locomotive Fireman & Enginemen,* 168 NLRB 677, 679–680 (1967).

A past practice must occur with such regularity and frequency that employees could reasonably expect the "practice" to continue or reoccur on a regular and consistent basis. *Philadelphia Coca-Cola Bottling Co.,* 340 NLRB 349, 353–354 (2003); *Eugene Iovine, Inc.,* 328 NLRB 294, 297 (1999). In the instant case, there is no question that for a period of years, Respondent had offered unit employees at the three terminals the initial opportunity to perform jet fuel delivery and that these employees could reasonably expect this "practice" to continue. Thus, Respondent's policy of providing unit employees at the three terminals the first opportunity to perform jet fuel delivery was an established past practice at these facilities. This practice could not be changed without providing the Union notice and an opportunity to bargain.[12]

Respondent's Subcontracting of Jet Fuel Deliveries was a Mandatory Subject of Bargaining

A decision to subcontract bargaining unit work is a mandatory subject of bargaining where the employer is, as in the instant case, merely replacing employees in the bargaining unit with employees of an independent contractor to do the same work under similar working conditions. *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203 (1979). In *Torrington Industries,* 307 NLRB 809 (1992), the Board stated that such subcontracting decisions do not involve a change in the scope and direction of the business and thus are not "core entrepreneurial decisions" outside the scope of the bargaining obligation.

Respondent contends that pursuant to the Supreme Court decision in *First National Maintenance Corp. v. NLRB,* 452 NLRB 666 (1981), its decision to subcontract jet fuel deliveries is outside the scope of its bargaining obligations because that decision was not made on the basis of cost, but was made on the basis of risk, a consideration not amenable to the collective-bargaining process. I reject Respondent's contention in this regard because there is no first-hand evidence (nonhearsay) in this record as to the reasons for which Sunoco decided to subcontract jet fuel deliveries. Once the General Counsel has established that an employer has merely replaced unit employees with subcontractor employees to do the same work, it is Respondent's burden to prove that its reasons for doing so are outside its bargaining obligations. *Dubuque Packing Co.,* 303 NLRB 386, 390–392 (1991); *Collateral Control Corp.,* 288 NLRB 308 (1988).[13]

Respondent presented the testimony of one witness as to how and why the decision to subcontract jet fuel deliveries was

[10] The drivers were particularly dependent on jet fuel deliveries for overtime in the winter months when gasoline deliveries were less than in the summer months.

[11] Respondent argues that it had an established past practice at the three terminals of subcontracting jet fuel deliveries. This is correct, but it is not the issue in this matter. The issue is whether Respondent also had an established past practice at these three terminals of offering available unit drivers an opportunity to perform jet fuel deliveries before subcontracting, and whether it unilaterally changed this practice.

[12] Contrary to Respondent's assertion, the fact that this "right of first refusal" was not an established practice at other Sunoco terminals represented by the Union, is irrelevant to whether this was an established past practice at Tonawanda, Rochester, and Syracuse. See *Dorsey Trailers, Inc.,* 327 NLRB 835 (1999).

The cases cited by Respondent in its brief, *H. Perilstein Glass Co.,* 194 NLRB 434 (1971), and *General Electric Co.,* 264 NLRB 306, 309 (1982), do not support the proposition that an established past practice must exist throughout a bargaining unit. *Perilstein* is a case involving a dispute between two unions under Sec. 10(k) of the Act. The analysis for a 10(k) case is not necessarily identical to an 8(a)(5) and (1) matter. Moreover, in *Perilstein,* the losing party, the Teamsters, did not establish a past practice at the particular plant in question. The case did not turn on whether or not there was a unit-wide past practice.

Similarly, *General Electric* is totally irrelevant to the instant matter. The complaint was dismissed on the grounds that Respondent's subcontracting of unit work was not a material, substantial and significant change. Moreover, the judge focused on Respondent's practices within one plant, not whether the General Counsel could establish a unit-wide practice.

[13] As the General Counsel and Union point out in their briefs, under Board precedent, there is no need to apply the burden-shifting test from *Dubuque Packing,* once the General Counsel has established that Respondent's reasons for subcontracting had nothing to do with a change in the "scope and direction" of the business. *Torrington Industries,* 307 NLRB 809, 810 (1992). The General Counsel has easily met the *Torrington Industries* burden. Respondent continues to deliver petroleum products, primarily gasoline, from the three terminals with the same drivers, using similar types of trucks to the ones used to deliver jet fuel.

However, I am mindful that the United States Court of Appeals for the Third Circuit has rejected the Board's *Torrington Industries* analysis, *Furniture Rentors of America, Inc. v. NLRB,* 36 F. 3d 1240 (3d Cir. 1994); *Dorsey Trailers, Inc. v. NLRB,* 134 F.3d 125 (3d Cir. 1998). That Court, however, in *Furniture Rentors,* also indicated that the *Dubuque* decision contained a "thoughtful discussion of the bargaining obligation imposed by the Act that accurately reflected the framework established by *Fibreboard* and *First National,*" 36 F. 3d at 1246.

made. Bill Marchbank is the transportation manager for Sunoco's marketing division. According to Marchbank, "Marketing has nothing to do with jet fuel." (Tr. 488.) Sunoco's Refining and Supply Division purchases jet fuel which Sunoco sells to airports and airlines.

Marchbank's testimony, particularly the use of the passive voice in both his counsel's questions and Marchbank's answers, makes clear that he has no first-hand knowledge as to the reasons for which Respondent decided to subcontract jet fuel deliveries in upper New York State, or even when this decision was made:

> Q. Now, in the fall of 2004 did Sunoco make any decision concerning the hauling of jet fuel at New York locations?
>
> R. Yes.
>
> Q. What was decided at that time?
>
> R. We essentially in Marketing…work for Refining and Supply who sells and markets jet fuel. We have had an agreement with Refining and Supply to deliver their jet fuel in those three terminals. As a result of an accident[14] that occurred a year prior, the Refining and Supply management group decided they did not want us making deliveries of jet fuel any more in those three terminals (emphasis added)**.**
>
> Q. Who specifically made the decision
>
> . . .
>
> R. It would be Refining and Supply.

(Tr. 504–505.)

When asked about other factors that went into the decision, Marchbank testified:

> [Well], I think first off that was the incident that got everybody looking at it and then secondly, **then they looked forward to see . . . if there were any other things.**

(Tr. 506.)

In response to my questions regarding Respondent's assertion that the subcontracting had nothing to do with cost and only was made due to Respondent's concern for risk, Marchbank again made it clear that he only knows what individuals in Respondent's Refining and Supply Division have told him. (Tr. 521, 534.)[15] Indeed, he testified that he believes having jet fuel delivered by unit drivers is cheaper and entails less risk than having it delivered by subcontractors (Tr. 534–535.)[16]

Respondent did not proffer the testimony of any individuals from its Refining and Supply Division, such as Senior Vice President Joel Mannis, who presumably know why the decision to subcontract was made. (Tr. 523.) I draw an adverse inference from Respondent's failure to call such witnesses, as well as from its noncompliance with the Union's information requests, that Respondent has something to hide.

Additionally, Respondent's explanation is on its face nonsensical. Businesses generally deal with risk by buying insurance. Respondent has offered no explanation as to why that was not possible with respect to jet fuel deliveries. It is axiomatic that any subcontractor delivering jet fuel would have to have adequate insurance and that the cost of such insurance would be passed onto Sunoco. Moreover, if Sunoco contracted with a subcontractor that did not have adequate insurance, I suspect that it would not necessarily escape liability for any accident that occurred while the subcontractor was delivering its jet fuel. Finally, the fact that Sunoco requested a number of contractors to bid on its jet fuel deliveries, suggests that cost, indeed, was a consideration in determining who would deliver its jet fuel. In any event, Respondent has not established that its decision to contract out jet fuel deliveries was not amenable to the collective-bargaining process.

The Union did not Waive its Bargaining Rights

Respondent argues that the Union, by John Kerr, was aware that it was planning to subcontract jet fuel deliveries in December 2004 or January 2005, and waived its bargaining rights by not, at any time requesting bargaining over this issue. First of all, I find that the Union, by Kerr, timely requested bargaining, in his conversation with Ruth Clauser in January 2005, again in his conversation with Clauser in February 2005 and in his discussions with Bill Marchbank on April 29, 2005.

A request of bargaining need take no special form, so long as there is a clear communication of meaning. *Indian River Memorial Hospital,* 340 NLRB 467, 468–469 (2003); *Armour & Co.,* 824, 828 (1986). Although Kerr may not have specifically stated in the January 2005 conversation that, "I want you to bargain with me about this," his statements in the context that they were made would have left little doubt in the mind of a reasonably prudent person that the Union was interested in bargaining about jet fuel deliveries. Marchbank's response to Kerr at the April 29 meeting indicates that Marchbank understood that Kerr was requesting bargaining. Even if that were not true, the Union's information requests at that meeting clearly communicated the Union's desire to bargain.

The Union's Request to Bargain was Timely

After October 13, 2005, Respondent certainly presented the Union with a fait accompli. Any notice or offer to bargain regarding jet fuel deliveries made after that date concerned a decision that had already been made and implemented. Insofar as the period prior to October 13, one of two things is true; either the Union made a timely request to bargain, or conversely, Respondent presented the Union with a fait accompli with regard to the subcontracting of jet fuel deliveries. Given

[14] In 2003, a unit driver apparently ran over the foot of the employee of Executive Air at the Syracuse Airport. The Executive Air employee apparently had his foot amputated and sued Sunoco. However, it is unclear to this judge whether there is any nonhearsay evidence regarding this accident in this record.

[15] Tr. 521, line 7 should read: They've got to buy insurance and so my question is where are you saving money?

[16] As Union President Kerr pointed out in his February 15, 2006 letter to Respondent, GC Exh. 12, there are circumstances in which the financial risk to Sunoco may be greater when subcontractor employees are delivering jet fuel. If one of these employees is injured on the job, he or she might have grounds for filing a civil action against Sunoco. A unit employee would, on the other hand, most likely be limited to workers compensation as a remedy.

the fact that Respondent did not accept Griffith Energy's bid or implement its decision to contract out jet fuel deliveries until October 2005, the Union's request was timely because Respondent could have negotiated with it at any time prior to the award of the bid and maybe even afterwards.

On the other hand, if it was too late for Respondent to entertain the Union's request for bargaining prior to October 13, it was because it had made an irrevocable decision to subcontract jet fuel deliveries. This also would constitute a fait accompli which would preclude Respondent from justifying its subcontracting decision on the failure of the Union to request bargaining, *Pontiac Osteopathic Hospital,* 336 NLRB 1021, 1023 (2001).[17]

Respondent's subcontracting of the jet fuel deliveries was a material, substantial, and significant change in the terms and conditions of unit employees' employment.

A unilateral change is unlawful only if it is material, substantial, and significant. *Flambeau Arnold Corp.,* 334 NLRB 165 (2001); *Toledo Blade Co.,* 343 NLRB 51 (2004). If the General Counsel proves a substantial loss of unit employees' overtime opportunities, he has satisfied this element of his prima faci*e* case. *Cities Service Oil Services,* 158 NLRB 1204 (1966).[18] Respondent argues at pages 18 and 58 of its brief that the General Counsel has not established this element of a statutory violation. Sunoco contends further that no inference can be drawn from the record regarding a connection between jet fuel deliveries, subcontracting and the overtime available to unit employees.

Some of Respondent's arguments in this regard are predicated on the confusing and inconsistent nature of its records. For example, Respondent states at page 58 of its brief that Rochester unit drivers Richard Miller and Ed Hanson actually worked more overtime in the first 4 months of 2006, after Griffith began making all jet fuel deliveries, than they did in the first 4 months of 2005. This appears to be incorrect. This statement is based on the year-to-date totals in (GC Exh. 31), which do not correspond to the monthly overtime hours for each employee. Adding the monthly figures, Respondent's records show that Miller's overtime hours dropped from 145 hours in the first 4 months of 2005 (rather than the YTD total of 54.5) to 81 in the first 4 months of 2006. Hanson's overtime hours dropped from 123 (rather than the 65 YTD figure) in the first 4 months of 2005 to 82.5 in 2006. Moreover, Respondent's records indicate that other employees suffered a more significant decrease in overtime worked after the subcontracting to Griffith. Rochester driver Armin Matheson worked 258.8 hours of overtime during the first 4 months of 2005, but only 73.2 hours during the first 4 months of 2006.

General Counsel's Exhibit 26 also shows a significant decrease in overtime worked for almost every unit driver in Syracuse when the first 4 months of 2006 are compared with the first 4 months of 2003, 2004, and 2005. Driver George Archie worked 124.3 overtime hours during the first four months of 2006 compared with 173.8, 220.2, and 214.4 for 2003, 2004, and 2005. Unit Driver Mark Phelps worked 70 hours of overtime during the first 4 months of 2006 compared with 144.7, 178.3, and 150.2 for the comparable months of 2003, 2004, and 2005. The General Counsel's witnesses, particularly David Pigula and Joseph Baker, have also credibly linked the decline in unit drivers' overtime opportunities to Respondents' subcontracting of jet fuel deliveries.

Respondent suggests at page 18 of its brief that the General Counsel's evidence is contradicted by the fact that it subcontracted as much as 50 percent to two-thirds of its jet fuel deliveries from the Syracuse terminal in late 2003 and mid-2004, when employees worked more overtime than in early 2006. I see no contradiction.[19] Respondent's records, particularly General Counsel's Exhibit 25, however, show that a very marked increase in jet fuel deliveries for the months cited, as compared with the first 10 months of 2003. This would be consistent with the recovery of the American airline industry after the downturn caused by the September 11, 2001 attacks. For example, in August 2004, Respondent delivered approximately 741,000 gallons of jet fuel from Syracuse, as opposed to only 353,000 gallons in August 2003. Thus, the one-third of the jet fuel deliveries carried by unit employees in August 2004 almost equaled what they delivered in August 2003.[20]

Respondent violated Section 8(a)(5) and (1) by failing to provide the information requested by the Union on October 24, 2005.

While information relating to matters outside the bargaining unit are not presumptively relevant, the Union's request herein is clearly relevant to its duties as collective-bargaining representative in that Respondent was subcontracting out bargaining unit work. Respondent's defense to this violation is that the Union waived its rights to any more information than it agreed to accept in the October 13, 2005 settlement.

[17] My only hesitation in concluding that Respondent presented the Union with a fait accompli prior to October 13, is that it took so long for Respondent to implement its decision to subcontract the jet fuel deliveries. Certainly, the uncontradicted testimony of unit employees establishes that the decision was presented to them as a fait accompli in employee meetings at the end of 2004. Moreover, a note at the bottom of the shift schedules posted at the end of 2004 at Tonawanda and Rochester, stating that "this schedule is subject to change upon termination of jet hauling business," indicates that Sunoco was presenting the Union with a fait accompli. At this time no one from Sunoco had given notice of the decision to John Kerr, who Respondent knew was the individual who normally dealt with Sunoco on behalf of the Union in regard to matters of this nature.

I would also note that Bill Marchbank's response to Kerr on April 29, 2005, that the subcontracting decision was made on the basis of a risk assessment, as well as its unwillingness to provide Kerr with the information he requested at that meeting, would convey to a reasonable person that Respondent had made an irrevocable decision and that any request to bargain would be futile.

[18] Additionally, while no driver has been laid off since Respondent changed its past practice, it has not replaced some unit drivers who have quit or retired; thus decreasing the size of the bargaining unit.

[19] Actually, this judge is not sure what argument Respondent is making on the basis on this data. However, whatever the argument is, it does not take into the account the marked increase in jet fuel deliveries out of the Syracuse terminal.

[20] Gasoline deliveries peak in the summer months, so that unit drivers are more dependent on jet fuel deliveries in the winter months for overtime work.

Respondent cannot rely on a settlement agreement which it breached almost as soon as the ink was dry. If any party to this case should be estopped or precluded by the October 13, 2005 settlement, it is Sunoco. In that agreement it promised to bargain with the Union about the subcontracting of jet fuel deliveries. Almost simultaneously, Respondent subcontracted this work to Griffith Energy without notifying the Union and giving it the opportunity to bargain. Respondent's assertions with regard to its failure to provide all the information requested are without merit.

On April 29, 2005, Respondent told Union President Kerr that it was subcontracting the jet fuel delivery work for reasons unrelated to cost. Kerr immediately requested information to test or verify Respondent's assertions. The Union was clearly entitled to such information, *Chafin Coal Co.,* 304 NLRB 286, 290 (1991). Unreasonable delay in furnishing relevant information is as much a violation of the Act as a refusal to furnish any information at all, *Bundy Corp.,* 292 NLRB 671 (1989). Sunoco was certainly in violation of the Act by October when it agreed to provide some limited amount of information in exchange for a promise to bargain. Sunoco can hardly be allowed to claim that the Union waived its rights to information by entering into a settlement agreement with which Sunoco failed to comply.[21]

Additionally, the Union's October 24, 2005 information request was made in the context of circumstances very different than that in which it agreed to accept Respondent's watered down response. The Union had since learned that Respondent had selected Griffith Energy as its sole source subcontractor and that Sunoco had already abandoned its past practice of affording unit drivers the initial opportunity to perform jet fuel deliveries. The Union was entitled to obtain information shedding light on the reasons for these new developments.

CONCLUSIONS OF LAW

1. Since October 13, 2005, when Respondent informed its schedulers that jet fuel deliveries would be made by Griffith Energy, rather than by unit employees, Respondent has been in violation of Section 8(a)(5) and (1) of the Act. Its violation is that it made a unilateral change to terms and conditions of unit employees at the Tonawanda, Rochester, and Syracuse terminals by abandoning its established past practice of providing them with the opportunity to make jet fuel deliveries before subcontracting such deliveries. Respondent did so without providing the Union with notice and an opportunity to bargain with respect to this change.

2. Since November 8, 2005, when it refused and failed to provide the information requested by the Union in paragraphs A, F, T, U, and V of the Union's October 24, 2005 letter, Respondent has been in violation of Section 8(a)(5) and (1).

REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

ORDER

The Respondent, Sunoco, Inc., Tonawanda, Syracuse, and Rochester, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally subcontracting jet fuel deliveries at the above mentioned terminals without affording bargaining unit employees the opportunity to perform such work.

(b) Failing and refusing to provide all information requested by the Union in its October 24, 2005 letter.

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

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

(a) Restore its established past practice of affording bargaining unit employees the opportunity to perform jet fuel deliveries before subcontracting such deliveries.

(b) Before implementing any changes in the wages, hours, or other terms and conditions of employment of unit employees, notify, and on request, bargain collectively and in good faith with the Union as the exclusive bargaining representative of its employees at its Tonawanda, Rochester, and Syracuse, New York facilities who are members of the following bargaining unit:

> All non-exempt operating and clerical employees of Respondent, but excluding casual employees, secretarial employees, sales employees, professional employees, employees at employer operated service stations, guards, watchmen and supervisors as defined in the Labor-Management Relations Act, as amended.

(a) Provide the Union with any information it requested on October 24, 2005, that has not already been provided;

(b) Make whole its unit employees for any loss of pay or other benefits they may have suffered as a result of its unlawful conduct in the manner set forth in *Ogle Protection Service,* 183 NLRB 682, 683 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

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[21] *Courier-Journal,* 342 NLRB 1148 (2004), on which Respondent relies, is distinguishable from the instant case. The *Courier-Journal* had not breached the settlement agreement which the Board found entitled it to deny the union additional information.

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

(d) Within 14 days after service by the Region, post at its Tonawanda, Rochester, and Syracuse, New York terminals copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 13, 2005.

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

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