

Finch, Pruyn & Company, Inc. and Paper, Allied-Industrial, Chemical & Energy Workers International Union, AFL-CIO.¹ Cases 3-CA-23461-1 and 3-CA-23461-2

January 31, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER
AND WALSH

I. INTRODUCTION

The principal issue in this case is whether the Respondent, Finch, Pruyn & Company, Inc., violated Section 8(a)(5) and (1) of the National Labor Relations Act by unilaterally subcontracting during an economic strike for the pulp needed for its papermaking operation. We find, in agreement with the judge, that the Respondent's subcontracting was a lawful temporary measure to maintain its operations during the strike. Accordingly, we affirm the judge's findings that the subcontracting did not convert the economic strike to an unfair labor practice strike, and that the strikers remained economic strikers. Further, we find that the Respondent did not violate the Act by continuing its unilateral subcontracting after the strike had ended because of the absence of a union request to bargain about the poststrike subcontracting.

The case also presents two allegations that the Respondent failed to furnish requested information in violation of Section 8(a)(5) and (1) of the Act. First, the judge dismissed an allegation that the Respondent unlawfully refused to provide Paper, Allied-Industrial, Chemical & Energy Workers International Union, AFL-CIO, Local 18 (Local 18) with copies of the Respondent's subcontracts for pulp. Second, the judge found that the Respondent unlawfully refused to provide information, requested by both Local 18 and Paper, Allied-Industrial, Chemical & Energy Workers International Union, AFL-CIO, Local 155 (Local 155), regarding the preemployment drug testing of permanent replacement workers without offering to bargain over its asserted confidentiality concerns. For the reasons discussed below, we reverse the judge in both instances.

Finally, the complaint alleges that the Respondent unlawfully failed to recall employee Bernard Palmer after the strike had ended. Contrary to the judge, we find that the Respondent violated Section 8(a)(5) and (1) by unilaterally eliminating Palmer's prestrike "pcc oiler" position. However, we agree with the judge that the Respondent did not violate Section 8(a)(3) and (1) by eliminating Palmer's position or by failing to recall him to another available position.

¹ Hereafter PACE or the Charging Party.

We shall address these issues in turn.²

II. THE SUBCONTRACTING AND RELATED ISSUES

A. Factual Background

The Respondent operates a paper mill in Glens Falls, New York. The papermaking process requires pulp, which the Respondent produces in its own pulp mill located at the Glens Falls facility. Local 155 represents a unit of the paper mill employees. Local 18 represents a separate unit of the pulp mill employees. This case arose when the Locals (the Union) commenced an economic strike against the Respondent after unsuccessful contract negotiations.³

Bargaining for successor collective-bargaining agreements commenced about May 14, 2001.⁴ At the outset of the negotiations, the Respondent's president and chief executive officer, Richard Carota, advised the Union that the Respondent needed significant economic and labor cost concessions to remain competitive. Carota emphasized that employees of a nearby competitor were also represented by PACE but that they received significantly lower wages and benefits than the Respondent's union-represented employees. Carota stressed that this situation placed the Respondent at a substantial labor cost disadvantage. The record shows that the Respondent lost approximately \$6 million in 2001.⁵

Between May 14 and June 15, the parties engaged in more than 40 bargaining sessions. On June 15, the Respondent declared impasse and implemented its final offer.⁶ The Union commenced an economic strike the

² On March 26, 2004, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief. The Charging Party filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Charging Party filed a reply brief. The Respondent filed cross-exceptions and a supporting brief, the General Counsel filed an answering brief, the Charging Party filed a revised answering brief, and the Respondent filed a separate reply brief to each answering brief. On December 23, 2004, the General Counsel, pursuant to *Reliant Energy*, 339 NLRB 66 (2003), filed a citation of supplemental authority to *Fairfield Tower Condominium Assn.*, 343 NLRB 923 (2004). The Respondent filed a response on January 6, 2005.

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, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified below and to adopt the recommended Order as modified and set forth in full below.

³ Five other unions representing other employees of the Respondent also went on strike. This case involves only Local 18 and Local 155.

⁴ Unless otherwise noted, all subsequent dates are in 2001.

⁵ There is no dispute that the Respondent's economic concerns were bona fide.

⁶ The Union filed unfair labor practice charges alleging that the Respondent engaged in bad-faith bargaining. The Board's regional office

next day. It is undisputed at this point that the strike initially resulted from the parties' inability to agree on economic issues.

The Respondent previously had decided that it would not attempt to operate its pulp mill during a strike. Rather, the Respondent had developed a plan to keep its paper mill running by purchasing hardwood kraft pulp on the open market. The plan was based on the Respondent's knowledge that pulp was widely available, and at a price reaching an historic low due to an industrywide recession. Consistent with its prestrike planning, on June 18 the Respondent began placing a series of "spot" orders to purchase pulp. The Respondent placed 15 spot orders between June 18 and July 30, for delivery through December.⁷

The strike continued through the summer of 2001. During this period, the Respondent discovered that it was able to maintain the quality of its manufactured paper products with the use of the purchased pulp.⁸ The Respondent further realized that it could buy pulp more cheaply than it could produce it because the market price of pulp remained historically low. The Respondent continuously monitored the quality, price, and competitiveness of its operations using market pulp.

The parties' negotiations continued in September. In early October, the Union rejected the Respondent's revised last best offer. On October 15, the Respondent began to hire permanent replacements in all areas of its facility, except the pulp mill, which remained idle.

At the November 13 negotiating session, the Union inquired about the status of the pulp mill. The Respondent informed it that "no determination had been made to reactivate it as the price of purchased pulp was still below what it costs to make [our] own." The Respondent reaffirmed in writing the following day that the pulp mill is "down for the foreseeable future."⁹

dismissed the charges, and the General Counsel denied an appeal of the dismissal. In its brief in support of its cross-exceptions, the Respondent argues that the complaint allegations of unlawful subcontracting should be barred by dismissal of these charges. The Charging Party has filed a motion to strike this argument on the ground that it relies on facts that are not part of the record. Inasmuch as we are dismissing the subcontracting allegations on the merits, we find it unnecessary to pass on the Respondent's argument and on the Charging Party's motion to strike.

⁷ The Respondent projected that the strike reasonably could last at least 6 months because each striking employee was eligible for 26 weeks of unemployment compensation.

⁸ At the time of its prestrike planning, the Respondent was uncertain if purchased pulp, as compared to its own pulp, could produce the same level of quality in its finished paper products.

⁹ The Respondent made six additional market spot purchases of hardwood pulp between November 12 and 16, all for delivery through December.

On November 21, all seven unions ratified the Respondent's proposed agreements and the strike ended. Separate contracts were signed for each union, and recall agreements for strikers were signed on November 26.

When the strike ended, the Respondent decided to keep the pulp mill closed for the foreseeable future and to continue to purchase pulp on the open market. The Respondent kept its pulp mill closed throughout 2002. During that year it made approximately 85 separate spot purchases of market pulp to maintain production.

On February 26, 2003, the Respondent advised its employees that it would reopen the pulp mill in June 2003. The Respondent based its decision on two factors: the market price of pulp had begun to rise, and the Respondent faced a lengthy re-permitting process for the pulp mill if it remained closed any longer. As planned, the Respondent reopened its pulp mill in early June 2003, and recalled the majority of the former pulp mill strikers to their prestrike positions.

B. The Judge's Decision¹⁰

The judge found that the Respondent's spot purchases of pulp during the strike were a lawful measure undertaken to remain in business while countering the effects of the strike. The judge relied on well-established precedent holding that an employer may lawfully employ temporary subcontracting to continue operations in the face of an economic strike.¹¹ The judge explained that the Respondent acted consistently with its strike contingency plan and without antiunion animus. Accordingly, the judge concluded that the Respondent permissibly subcontracted unit work during the strike without bargaining with the Union.

The judge further found that the Respondent's decision to continue purchasing market pulp after the strike ended was undertaken solely to maintain its papermaking operations. The judge observed that the Union never made a request to negotiate with the Respondent over the continued purchases of market pulp, or over the decision not to reopen the pulp mill at the end of the strike. Therefore, the judge found that the Respondent did not violate

¹⁰ The General Counsel 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.

¹¹ See, e.g., *Land Air Delivery v. NLRB*, 862 F.2d 354 (D.C. Cir. 1988), *cert. denied* 493 U.S. 810 (1989); *Elliot River Tours*, 246 NLRB 935 (1979); *Empire Terminal Warehouse Co.*, 151 NLRB 1359 (1965), *affd.* 355 F.2d 842 (D.C. Cir. 1966); *Shell Oil*, 149 NLRB 283 (1964).

Section 8(a)(5) and (1) of the Act by its continued subcontracting for pulp.¹²

Having rejected the General Counsel's core subcontracting allegation, the judge rejected the concomitant strike conversion and striker reinstatement allegations as well. The judge explained that the economic strike could not have converted to an unfair labor practice strike as a result of the Respondent's lawful subcontracting. The judge observed, moreover, that there was neither subjective nor objective evidence that the subcontracting prolonged the strike.

The judge likewise found that the strikers remained economic strikers. The judge determined that, because the subcontracting was lawful, the strikers did not become unfair labor practice strikers, and the Respondent properly recalled economic strikers in accord with the parties' negotiated recall agreements.¹³

C. Discussion

1. The Respondent's subcontracting during the strike

The Respondent's unilateral purchases of pulp during the Union's economic strike were a lawful temporary measure to maintain its business operations. It is settled that, "when workers strike, an employer may temporarily subcontract unit work in order 'to enable the employer to continue operating in an emergency situation thrust upon it by a strike.'" *Naperville Ready Mix v. NLRB*, 242 F.3d 744, 756 (7th Cir. 2001), cert. denied 534 U.S. 1040 (2001), quoting *American Cyanamid Co. v. NLRB*, 592 F.2d 356, 360 (7th Cir. 1979). Accord: *Fairfield Tower Condominium Assn.*, supra at 924 (legitimate employer measures to maintain operations during a strike include temporarily contracting out unit work). The Respondent's actions were fully consistent with this principle.

The Respondent began purchasing pulp as a means to continue its operations during the Union's economic strike. Significantly, the Respondent tailored its purchases to the expected duration of the strike. The Respondent placed orders for delivery only through December 2001, which matched the Respondent's reasonable projection of the strike's duration based on the strikers' eligibility for 26 weeks of unemployment insurance.

¹² The judge additionally considered and rejected the Respondent's alternative argument that its decision to purchase market pulp was a management decision entirely exempt from bargaining under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). We address this issue below.

¹³ The judge also rejected, as lacking evidentiary support, the General Counsel's theory that Local 18 and Local 155 engaged in joint bargaining. We have reviewed the record on this point and adopt the judge's finding. We further find that the judge, for the reasons set forth in his decision, properly rejected the Charging Party's theory—not alleged by the General Counsel—that the Respondent unlawfully misled the Union regarding the hiring of permanent replacements.

In these circumstances, we find that the Respondent clearly did not violate the Act by unilaterally purchasing sufficient pulp to maintain its operations during the strike. See *Land Air Delivery*, 286 NLRB 1131, 1132 fn. 8 (1987) ("An employer is not under a duty to bargain over temporary subcontracting necessitated by a strike where such subcontracting does not transcend reasonable measures necessary to maintain operations in strike circumstances").

Indeed, the General Counsel and the Charging Party do not seriously contest the lawfulness of the Respondent's temporary subcontracting during the strike. Rather, the crux of their argument is that the Respondent decided in July 2001 to continue buying market pulp, *regardless of the duration of the strike*, as long as buying it was cheaper than producing it in its own pulp mill. They contend that the Respondent failed to notify and bargain with the Union over this asserted decision. The General Counsel and the Charging Party thus argue that, in July 2001, the Respondent unilaterally entered into what amounted to a permanent subcontract to buy pulp, thereby violating Section 8(a)(5) and (1) of the Act. We reject this argument because we find insufficient evidence that the Respondent in fact made such a decision in July.

The General Counsel and the Charging Party correctly argue that the Board and the courts have long drawn a distinction between temporary and permanent subcontracting during a strike. As the Seventh Circuit has explained:

[T]he mere fact that employees go on strike does not relieve the employer of the duty to bargain to impasse, and thus it does not permit an employer permanently to subcontract out unit work in the absence of an impasse.

Naperville Ready Mix v. NLRB, supra at 756; see also, e.g., *Land Air Delivery*, supra at 1132 fn. 8 ("Permanent subcontracting is distinguished from nonpermanent, stop-gap, or temporary measures entered into by an employer to continue service during a strike"). The facts in the present case, however, do not support the General Counsel's and the Union's proposed application of this distinction.

We have carefully reviewed the record and find, as did the judge, no evidence that the Respondent made a fixed decision in July 2001 to permanently continue subcontracting for pulp. The judge made a specific finding on this point:

[T]here was no single subcontract for the purchase of hardwood kraft pulp. Rather, the Respondent made periodic spot purchase orders based on its operational needs relative to the duration of the strike.

The record fully supports the judge's finding. There is no evidence that the Respondent entered into a long-term contract for pulp in the summer of 2001, even when the price had reached an historic low. Rather, the Respondent continuously monitored the fluctuating market price of pulp, as well as the quality of its manufactured products, as it evaluated whether to make additional spot purchases. These circumstances refute the contention that the Respondent made a decision in July 2001 to permanently subcontract for pulp without regard to the strike's duration.

Nor does the testimony of the Respondent's president, Richard Carota, establish that such a decision was made, as argued by the dissent. As the dissent acknowledges, the judge did not specifically discuss much of Carota's testimony. But, even so, Carota specifically testified that he did not recall making a permanent subcontracting decision in July 2001—the timeframe alleged by the General Counsel.

Our dissenting colleague concedes that the Respondent's original decision to temporarily subcontract was because of the strike. However, according to the dissent, the Respondent thereafter decided during the strike to permanently subcontract because the price of purchased pulp had reached a historic low. We disagree. Carota did not testify as to any change of decision. At most, Carota's testimony is subject to the interpretation that an increase in the cost of pulp could cause the Respondent to reconsider the original decision to subcontract because of the strike. But it does not follow that the price of pulp at the time of the original decision, or a lower price at a subsequent time during the strike, displaced the original reason for subcontracting. Indeed, if cost had become the reason for subcontracting, Respondent would have sought to "lock in" the lower cost for the future. The Respondent never did so.

In the end, the Respondent's unilateral subcontracting for pulp during the strike was, at all times, a lawful temporary measure undertaken to continue its business operations. For this reason, we agree with the judge's additional findings that the economic strike never converted to an unfair labor practice strike, and, consequently, that the strikers remained economic strikers whom the Respondent lawfully recalled in accordance with the parties' negotiated recall agreements.

2. The Respondent's subcontracting after the strike

The Respondent's unilateral subcontracting after the strike also did not violate the Act, though for a different reason: the Union waived its right to bargain. The record shows that when the strike ended the Respondent considered anew whether to reopen its pulp mill. The Respondent decided to keep the pulp mill closed and to continue

purchasing pulp. Obviously, the purchases were no longer necessary to counter the effects of the strike. The Respondent's decision was primarily an economic one: it was cheaper to buy pulp than to have the bargaining unit employees produce it.

Although we find that the Union waived its right to bargain, we find it appropriate to address the Respondent's initial contention that its decision to continue purchasing pulp instead of producing it was a management decision entirely exempt from bargaining under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). We disagree.¹⁴ We find, as did the judge, that the Respondent's subcontracting more closely resembles the type of subcontracting found to be a mandatory subject of bargaining in *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964).

In *First National Maintenance*, the Court held that an employer, which provided cleaning and maintenance services to commercial establishments, was not required to bargain with a union over its decision to discontinue operations at a nursing home and discharge its employees working there, after it was unable to secure an increase in its management fee. The Court reasoned that the employer's decision to shut down part of its business constituted a significant "change in the scope and direction of the enterprise [which] is akin to the decision whether to be in business at all[.]" 452 U.S. at 677. The Court concluded that bargaining over such management decisions, which directly impact employment but have as their focus economic profitability, should be required "only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." *Id.* at 679. In *First National Maintenance*, the Court concluded that the benefit of bargaining did not outweigh the burden placed on the employer's right to terminate part of its business for non-labor cost reasons. Accordingly, the Court held that the employer did not have a duty to bargain over the decision. *Id.* at 686.

In contrast, in *Fibreboard Paper Products v. NLRB*, supra, the Court held that an employer was required to bargain over its decision to subcontract bargaining unit work when it involved the mere replacement of bargaining unit employees with those of an independent contractor to do the same work under similar conditions of employment. 379 U.S. at 215. The *Fibreboard* Court underscored that a key consideration in this area is whether the employer's conduct "is suitable for resolution within

¹⁴ The majority on this issue consists of Members Schaumber and Walsh. As stated in fn. 19, *infra*, Chairman Battista finds it unnecessary to pass on whether the Respondent's subcontracting decision was a mandatory subject of bargaining.

the collective bargaining framework[.]” *Id.* at 214. When labor costs underlie the employer’s decision to subcontract bargaining unit work, the decision is particularly amenable to the collective-bargaining process. See, e.g., *Geiger Ready-Mix Co. of Kansas City*, 315 NLRB 1021, 1023 (1994), *enfd. in pert. part* 87 F.3d 1363 (D.C. Cir. 1996); *Naperville Ready Mix v. NLRB*, *supra* at 754.

In the circumstances here, we agree with the judge’s finding that the Respondent’s decision to purchase pulp rather than to produce it was more like the subcontracting at issue in *Fibreboard* than the partial closing at issue in *First National Maintenance*. At bottom, the Respondent replaced the unit employees assigned to the pulp mill with those of the contractors engaged to provide the Respondent with pulp. Labor costs clearly were a factor in the Respondent’s decision. From the very beginning of the parties’ negotiations, the Respondent emphasized that it needed significant labor cost concessions. More specifically, the Respondent identified labor costs as a significant factor in the competitiveness of its pulp mill operation versus those of its subcontractors.¹⁵ Thus, the Respondent’s decision was of the type that “is suitable for resolution within the collective bargaining framework[.]” *Fibreboard*, *supra*, 379 U.S. at 214.¹⁶

In aligning this case with *Fibreboard* rather than *First National Maintenance*, we also rely on the judge’s findings: (1) that the Respondent at all times maintained the pulp mill in a state ready for activation; and (2) that the Respondent, even while it was subcontracting for pulp, continued to produce essentially the same paper products using its same papermaking machines.¹⁷ And, of course, as soon as the market price of pulp had risen sufficiently,

¹⁵ During the strike the Respondent periodically issued memoranda to its salaried and replacement workers apprising them how the Respondent was doing during the strike. The Respondent explained in a July 30, 2001 memorandum:

Most kraft mills [that produce the subcontracted pulp] don’t pay double time or supply free health care *or* pay triple time for some holidays *or* double time and one-half for their other holidays *or* pay vacation pay of 150% to 300% of a normal 40-hour work week as we have done. These are some of the reasons their cost to make pulp is lower than ours. (Emphasis in original.)

¹⁶ It may be that the Union ultimately would have been unable to satisfactorily address the Respondent’s cost concerns, but, as the *Fibreboard* Court observed, “national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation.” 379 U.S. at 214.

¹⁷ The Respondent’s vice president of manufacturing, Raymond Barrows, testified that the Respondent did not produce any new or different products while subcontracting. (Tr. 680–681, 685, 688). Accordingly, we reject the Respondent’s contention that by subcontracting it produced different “text and cover” products and thus implemented a product type and design decision exempt from bargaining under *First National Maintenance*.

the Respondent reopened the pulp mill and recalled the majority of the unit employees to resume making the same products. In light of all of the above, the Respondent’s subcontracting for pulp hardly strikes us as a change akin to “opening a new line of business or going out of business entirely.” *First National Maintenance*, *supra*, 452 U.S. at 688.¹⁸ Accordingly, we find that the Respondent’s decision to continue subcontracting for pulp after the strike was a mandatory subject of bargaining.¹⁹

Nevertheless, in the circumstances here we are unable to find that the Respondent’s unilateral action violated the Act. As the strike was drawing to a close in November 2001, the Respondent expressly informed the Union of its decision to continue buying market pulp. Despite this explicit notification, the record shows that the Union never requested that the Respondent bargain over its decision to continue purchasing pulp and to keep the pulp mill idle. The Union’s failure to request bargaining over these topics constituted a waiver of its bargaining rights. *Citizens Natl. Bank of Willmar*, 245 NLRB 389, 389–390 (1979) (union which has notice of employer’s proposed change must timely request bargaining to preserve its right to bargain on that subject), *enfd.* 644 F.2d 39, 40 (D.C. Cir. 1981); see also generally *Lenz & Riecker*, 340 NLRB 143, 145 (2003) (reaffirming principle that, where a union fails to take advantage of an opportunity to bargain, the Board will not find a failure-to-bargain violation).

The General Counsel argues that a union is not held to have waived bargaining concerning a change that is presented to it as a *fait accompli*. See, e.g., *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001); *NLRB v. Crystal Springs Shirt Corp.*, 637 F.2d 399, 402 (5th Cir. 1981). But that is not the circumstance here. First, following the end of the strike, the Respondent did not enter into new contracts for pulp until December 18. This was

¹⁸ Compare *Eltec Corp.*, 286 NLRB 890, 892 (1987), *enfd.* 870 F.2d 1112 (6th Cir. 1989), *cert. denied* 493 U.S. 891 (1989) (bargaining required in light of employer’s retention of ownership rights in equipment and temporary nature of employer’s arrangements) with *Kingwood Mining Co.*, 210 NLRB 844, 845 (1974) *affd. sub nom. mem. UMWA v. NLRB*, 515 F.2d 1018 (D.C. Cir. 1975) (bargaining not required where employer totally eliminated mining portion of its operation and sold equipment).

¹⁹ The judge properly found that, because there was no relocation of unit work here, the test in *Dubuque Packing Co.*, 303 NLRB 386, 390 *fn.* 8 (1991), *enfd.* 1 F.3d 24 (D.C. Cir. 1993), *cert. denied* 511 U.S. 1138 (1994), is inapplicable. See *Geiger Ready-Mix Co. of Kansas City*, *supra* at 1022–1023 (*Dubuque* inapplicable when facility not permanently closed, its operation not relocated to another location, physical assets not permanently relocated and facility reopened).

Chairman Battista finds it unnecessary to pass on whether this subcontracting decision was a mandatory subject of bargaining. Rather, even assuming *arguendo* that it was, he agrees with Member Schaumber that the Union waived its right to bargain.

a full month after it had given notice to the Union of its intentions, affording ample opportunity to request bargaining. Second, the Respondent still did not enter into any long-term contracts. It continued to purchase pulp through individual spot contracts. This incremental approach afforded the Union an opportunity to request bargaining at any time over future purchases. And, as mentioned, the Respondent maintained the pulp mill in a condition ready for reactivation. Thus, at all times, there was a meaningful opportunity to bargain, which the Union simply did not take.

For these reasons, we affirm the judge's dismissal of the allegation that the Respondent's unilateral subcontracting after the strike violated the Act.

III. THE INFORMATION REQUESTS

The judge dismissed an allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to furnish Local 18, upon request, with a copy of the Respondent's contracts for the purchase of pulp. In addition, the judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain over an accommodation, under *Detroit Edison v. NLRB*, 440 U.S. 301 (1979), to furnish Locals 18 and 155 with information regarding its pre-hire physical exams and drug testing of replacement workers. We reverse both findings.

A. The Pulp Contracts

By letter dated January 23, 2002, Local 18 requested copies of the Respondent's contracts for pulp, asserting that the contracts were "relevant to helping us restore our members to their respective jobs." The Respondent did not comply. The Respondent replied, by letter dated January 29, 2002, that it was not required to furnish "confidential financial information" under *Nielsen Lithographing Co.*²⁰ The Respondent also asserted that Local 18 had not established the relevance of the requested information. However, the Respondent informed the Union that it did not anticipate starting the pulp mill "in the foreseeable future."

Local 18 sought to further establish relevance and to accommodate the Respondent's asserted confidentiality concerns. In a follow-up letter to the Respondent, Local 18 explained:

[W]e need the copies of the contracts so that we can determine for ourselves whether the company has adequate justification for failing to recall strikers to their

jobs in the pulp mill. We are agreeable for now to your eliminating the dollar amounts from the contracts.

The Respondent, by letter dated February 7, 2002, again declined to furnish copies of the contracts. The Respondent did disclose to Local 18 that it "ha[d] placed orders for purchased pulp for the year 2002."

The judge dismissed the relevant complaint allegation, finding that Local 18 did not show that the pulp contracts were relevant and necessary to its ability to represent the pulp mill workers. The judge reasoned that because the Respondent had advised Local 18 that it had purchased pulp for the year 2002, Local 18 was aware that the mill would remain closed for that period. The judge additionally noted that the contracts were "sensitive information of competitive significance" not subject to disclosure under *Nielsen Lithographing Co.*, supra.

It is axiomatic that an employer has a duty to furnish to a union, on request, information that is relevant and necessary to its role as the exclusive bargaining representative of unit employees. *Detroit Edison Co. v. NLRB*, supra at 303; *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967). Information pertaining to bargaining unit employees is presumptively relevant and necessary and must be produced. Where the requested information involves matters outside the bargaining unit—as here regarding the relationship between the Respondent and its subcontractors—the union has the burden of establishing the relevancy and necessity for such information. *Allison Corp.*, 330 NLRB 1363, 1367 (2000); *Postal Service*, 332 NLRB 635, 636 (2000) (broad discovery-type standard is applicable). We find, contrary to the judge, that Local 18 satisfied its burden.

As Local 18 argued to the Respondent, we find that copies of the pulp contracts were relevant and necessary to the Local's ability to assess and enforce the unit employees' recall rights. Most importantly, the contracts would have shown the duration of the Respondent's commitments to buy pulp. This was significant because the pulp mill employees would not return to their jobs so long as the Respondent continued purchasing market pulp. The Respondent clearly understood this purpose, even if not perfectly articulated by Local 18, as it advised Local 18 of the duration of the overall contracts. In these circumstances,²¹ Local 18's request was sufficient to put the Respondent on notice of a relevant purpose for the

²⁰ 279 NLRB 877 (1986), enf. denied and remanded 854 F.2d 1063 (7th Cir. 1988), on remand 305 NLRB 697 (1991), petition for review denied sub nom. *Graphic Communications Local 508 v. NLRB*, 977 F.2d 1168 (7th Cir. 1992).

²¹ There is no dispute that the Respondent understood the factual basis for the information request: the continuing closure of its pulp mill. See *Contract Flooring Systems*, 344 NLRB 1298 (2005).

information: determining when the pulp mill workers could return to their jobs.²²

Contrary to the judge, we find that the Respondent did not satisfy Local 18's need for information simply by advising it that the contracts would last through 2002. The Board has long held that a union is not required to accept at face value an employer's representations. A union is entitled to verify an employer's assertions. See *Wallace Metal Products, Inc.*, 244 NLRB 41 fn. 2 (1979) (union entitled to see actual contracts to facilitate verification).²³

To be sure, the Respondent had a legitimate confidentiality interest in the contracts. Under *Detroit Edison v. NLRB*,²⁴ however, this interest did not privilege the Respondent to reject Local 18's request outright. The Respondent had a duty to bargain with Local 18 over an accommodation between Local 18's information needs and its confidentiality interest. See, e.g., *International Protective Services*, 339 NLRB 701, 704-05 (2003); *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 20 (D.C. Cir. 1998), enfg. 324 NLRB 854 (1997). The Respondent failed to do so, essentially ignoring Local 18's proposal to redact financial terms from the contracts.²⁵ Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain with Local 18 over an accommodation for the provision of the requested information.²⁶

²² See *Beth Abraham Health Services*, 332 NLRB 1234 (2000); *Allison Corp.*, supra, 330 NLRB at 1367 fn. 23 (employer is obligated to furnish requested information where the circumstances should "put the employer on notice of a relevant purpose which the union has not specifically spelled out").

²³ See *Kellogg's Snack Co.*, 344 NLRB 756, 756 fn. 1 (2005) ("The Union needs the requested information to determine [the issue] for itself. . . [it] is not required to accept, at face value, the Respondent's assertion[.]")

²⁴ Supra, 440 U.S. 301.

²⁵ *Nielsen Lithographing Co.*, supra, relied on by the judge and the Respondent, is inapplicable. *Nielsen* concerns an employer's obligation to furnish a union with financial information to substantiate its claim of an inability to meet the union's bargaining demands. See, e.g., *AMF Trucking & Warehousing, Inc.*, 342 NLRB 1125 (2004). Local 18's request for copies of the pulp contracts did not relate to any inability-to-pay claim by the Respondent. The parties had already agreed on successor contracts at the time of the information request.

²⁶ No affirmative remedial order is necessary because the contracts were subsequently supplied pursuant to subpoena. This does not moot the violation, however, as an employer has a duty to timely respond to the information request. *Woodland Clinic*, 331 NLRB 735, 742 fn. 16 (2000).

B. *The Request for Information Regarding Prehire Physical Exams and Drug Testing*

By letters dated January 23 and 24, and February 24, 2002, the Union²⁷ requested that the Respondent provide the dates, times, and places where replacement workers were given pre-hire physical examinations and drug tests, as well as the names of the individuals tested. The Respondent replied that hiring decisions, including pre-hire screening of permanent replacements, were within its discretion and not relevant to the Union's representational responsibilities. The Respondent also expressed confidentiality concerns regarding the requested information. Nonetheless, the Respondent did inform the Union that all new hires were required to undergo pre-employment physical examinations and drug testing. The Respondent also identified the locations where the testing took place and who conducted the tests.

The judge found that the Union's requested information "generally" related to workplace safety and health and was relevant to the Union's representational duties. The judge also found that the Respondent had asserted legitimate confidentiality interests, which triggered its duty to bargain toward an accommodation under *Detroit Edison v. NLRB*, supra. The judge found that the Respondent failed to bargain toward such an accommodation and, for that reason, concluded that the Respondent violated Section 8(a)(5) and (1) of the Act. We reverse, because the judge's threshold finding of relevance was in error.

Prehire drug and alcohol testing of applicants is not a mandatory subject of bargaining, and therefore information concerning such testing is not deemed presumptively relevant. See *Star Tribune*, 295 NLRB 543, 548-549 (1989). Thus, as discussed above, a union seeking such information bears the burden of establishing its relevance to its representational duties. *Postal Service*, supra, 332 NLRB at 636. The union must offer more than "mere suspicion" in order to demonstrate the relevance of the information. *Sheraton Hartford Hotel*, 289 NLRB 463, 464 (1988); *Bohemia Inc.*, 272 NLRB 1128, 1129 (1984). We have carefully reviewed the record and find that the Union did not sustain its burden in this instance.

The Union claimed that its request was based on safety concerns, as the Union wanted to confirm that all replacement employees underwent drug screening. The Union, however, provided no support for its claim that the Respondent failed to uniformly require screening. The Union simply asserted that the Respondent's hiring was done amid "haste and confusion." Further, although

²⁷ Local 18 and Local 155 made separate requests for the same information.

the Union cited two “near miss” accidents that had occurred at the Respondent’s plant, the Union did not establish any possible link between these incidents and a lack of pre-hire drug testing.

The Union also asserted that the information was necessary to ensure that the Respondent was not discriminating against union-affiliated applicants. But the Union presented no evidence at all that would even remotely suggest that the Respondent was engaging in such discrimination. Cf. *Mid-Continent Concrete*, 336 NLRB 258 (2001) (union informed employer of factual basis underlying its contention of discrimination based on applicant’s union activities), *enfd.* 308 F.3d 859 (8th Cir. 2002).

In these circumstances, we conclude that the Union did not demonstrate the probable relevance of the requested information, and we shall dismiss this allegation.²⁸

IV EMPLOYEE BERNARD PALMER

The judge dismissed the complaint allegation that the Respondent violated Section 8(a)(5) and (1) of the Act when, after the strike ended, it unilaterally eliminated the pcc oiler position, which had been held by striker Bernard Palmer. For the reasons set forth below, we agree with the General Counsel and Local 155²⁹ that the Respondent’s conduct was unlawful.

Palmer was a long-time employee of the Respondent and a past president of Local 155. Beginning in 1983, he held the position of basement oiler. The basement oiler job took a total of 8 hours per day to perform, with responsibility for lubricating equipment in several areas of the Respondent’s operation. The basement oiler position included pcc oiler duties, which accounted for about 1 hour of work per day.

On May 28, 1997, the Respondent suspended Palmer for 4 months for allegedly sabotaging a machine. Local 155 filed a grievance over the suspension. While the grievance was pending, Palmer completed his suspension. However, the Respondent did not return him to his job as a basement oiler. Rather, the Respondent placed him in a newly created job: the pcc oiler position. There is no dispute that this new job took Palmer only 1 hour per day to perform. He nevertheless was paid a full sal-

ary. Ultimately, an arbitrator found no just cause for Palmer’s suspension and awarded Palmer full backpay. The arbitrator did not, however, order the Respondent to return Palmer to his basement oiler position.

Palmer remained in the stand-alone pcc oiler position, which still required only 1 hour of actual work per day, for approximately 4 years until the commencement of the strike. Following the conclusion of the strike, the Respondent never recalled Palmer to the pcc oiler position and never bargained with Local 155 with respect to the status of that position. Rather, the Respondent unilaterally reassigned the pcc oiler duties to another oiler position, effectively eliminating the pcc oiler position.

It is well-established that an employer violates Section 8(a)(5) and (1) of the Act if it makes a unilateral change in a term or condition of employment involving a mandatory subject of bargaining without first bargaining to impasse.³⁰ “The Board has long held the elimination of unit jobs, albeit for economic reasons, is a matter within the statutory phrase ‘other terms and conditions of employment’ and is a mandatory subject of bargaining within the meaning of Section 8(a)(5) of the Act.” *Plymouth Locomotive Works, Inc.*, 261 NLRB 595, 602 (1982). It is undisputed that the Respondent never bargained with Local 155 over the elimination of the pcc oiler position. The Respondent’s unilateral action and failure to fulfill its bargaining obligation is thus plainly established on the record before us. Cf. *Paul Mueller Co.*, 337 NLRB 764, 765 (2002) (employer’s admissions established the essential elements of its unlawful refusal to bargain).

The judge nevertheless dismissed this allegation, reasoning that the pcc oiler position “still exists,” though it is not assigned to any employee. However, the record shows that the Respondent has no intention to fill the pcc oiler position. Indeed, the Respondent emphasizes that it would be inefficient to ever fill it. We can find no meaningful distinction between a position that the Respondent will never fill and a position that has been formally eliminated. The bottom line is that the Respondent has unilaterally taken away a unit position without giving Local 155 prior notice and an opportunity to bargain.³¹

³⁰ See, e.g., *NLRB v. Katz*, 369 U.S. 736 (1962).

³¹ The Respondent argues that it was not contractually obligated to have a specific pcc oiler position. It is settled, however, that an employer’s “established past practice can become . . . an implied term and condition of employment.” *Bonnell/Tredegar Industries v. NLRB*, 46 F.3d 339, 345 (4th Cir. 1995). Any unilateral change in an implied term or condition of employment violates Sec. 8(a)(5) and (1) of the Act. *Lafayette Grinding Corp.*, 337 NLRB 832 (2002). Having maintained the pcc oiler job for approximately 4 years, the Respondent changed an implied term and condition of employment when it unilaterally eliminated the position. Thus, it is immaterial that the Respondent may not have been contractually obligated to provide for a pcc

²⁸ We recognize that the Union’s request covered the names of replacement employees, information which is deemed presumptively relevant. See *Grinnell Fire Protection Systems, Inc.*, 332 NLRB 1257 (2000), *enfd.* in pertinent part 272 F.3d 1028 (8th Cir. 2001). The Union’s request, however, intertwined the names with the requested testing information. In these circumstances, the Respondent was not required to parse out the Union’s request as constituting separate information requests, and to provide the names alone.

²⁹ The pcc oiler position was located in the paper mill unit represented by Local 155.

For these reasons, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally eliminating the pcc oiler position.³²

ORDER³³

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Finch, Pruyne & Company, Glens Falls, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with Paper, Allied-Industrial, Chemical & Energy Workers International Union, AFL-CIO, Local 18 in an attempt to reach an accommodation of interests in response to the Union's request for relevant information that the Respondent considers confidential.

(b) Eliminating bargaining unit positions without giving prior notice of such decision to Paper, Allied-Industrial, Chemical & Energy Workers International Union, AFL-CIO, Local 155 and affording it an opportunity to bargain regarding the decision and effects of the elimination of those positions.

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

(a) Rescind the unlawful unilateral elimination of the pcc oiler position.

(b) Within 14 days from the date of this Order, offer Bernard Palmer full reinstatement to his former job of pcc oiler, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Make Bernard Palmer whole for any loss of earnings and other benefits suffered as a result of the unlawful elimination of his position. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(d) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify, and, on request, bargain collectively and in

oiler position. The Respondent's obligation to maintain the status quo is not based on a collective-bargaining agreement but on its own past practice.

³² We agree with the judge, however, for the reasons set forth in his decision, that the Respondent did not violate Sec. 8(a)(3) and (1) of the Act by: (1) eliminating the pcc oiler position; and (2) by failing to recall Palmer to another available oiler position.

³³ We have modified the judge's recommended Order to conform to the violations found, and to correct certain inadvertent errors. We have substituted a new notice to comport with these modifications.

good faith with Paper, Allied-Industrial, Chemical & Energy Workers International Union, AFL-CIO, Local 155.

(e) 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.

(f) Within 14 days after service by the Region, post at its facilities in Glen Falls, New York, copies of the attached notice marked "Appendix."³⁴ 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 insure 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 facilities involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 31, 2001.

(g) 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.

IT IS FURTHER ORDERED that the amended consolidated complaint is dismissed insofar as it alleges violations not found.

MEMBER WALSH, dissenting in part.

A key factual issue lies at the core of this labor dispute: whether the Respondent¹ decided while its pulp mill employees were on strike to purchase low-cost pulp on the open market regardless of the duration of the strike. If the Respondent made such a decision, then it plainly violated Section 8(a)(5) and (1) of the Act because it is undisputed that the Respondent never provided

³⁴ 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."

¹ Finch, Pruyne & Company, Inc. The Respondent operates a paper mill in Glens Falls, New York.

the Union² with notice or an opportunity to bargain. The violation, in turn, would support the complaint allegation that the strike, at least with respect to Local 18, converted to an unfair labor practice strike, the result being that the Respondent also violated Section 8(a)(3) and (1) when it failed to immediately reinstate the Local 18 strikers at the conclusion of the strike. Contrary to the majority, the record evidence summarized below shows that the Respondent made that critical decision.³

I.

It is necessary to review only a few matters to get to the crux of this case. The Respondent and the Union have been parties to a long series of collective-bargaining agreements. This case arose from the parties' unsuccessful efforts in May and June 2001⁴ to negotiate a successor collective-bargaining agreement. There is no doubt that the negotiations were difficult. The Respondent was insisting on significantly reducing its operating costs, largely at the expense of its employees' wages and benefits. As the judge found, the parties' inability to resolve those cost issues led the Union to commence a strike on June 16, which, concededly, was economic in nature at the outset.

To withstand the strike, the Respondent began subcontracting for pulp to keep its paper mill operating. The Union ended its strike on November 21, but the Respondent refused to reinstate the pulp mill employees. Instead, the Respondent continued subcontracting for pulp for nearly two additional years, until June 2003. The Respondent finally restarted its pulp mill at that time both because the market price of pulp had risen substan-

tially and because the Respondent was facing a costly environmental recertification of the pulp mill if it remained idle any longer.

II.

As the majority finds, the Respondent was not obliged to bargain with the Union over its initial decision to purchase enough pulp to maintain its papermaking operation during the strike. This was a lawful temporary measure.⁵ As the majority acknowledges, however, an economic strike does not privilege an employer to unilaterally engage in permanent subcontracting.⁶ And subcontracting for an indefinite period not to terminate at the expiration of an economic strike is tantamount to permanent subcontracting.⁷ The record shows that the Respondent, at some point during the strike, made a unilateral decision to engage in such indefinite subcontracting here, thereby violating Section 8(a)(5) and (1).

The Respondent's president and chief executive officer, Richard Carota, testified at the unfair labor practice hearing that the Respondent decided during the strike to indefinitely subcontract for pulp, the price of which was reaching an historic low. Specifically, Carota testified that, "sometime . . . after the pulp mill was shut down initially because of the strike, sometime in that period of time, the company decided it was going to operate with purchased pulp, so long as it could continue to get that low cost pulp on the market."⁸

Although not discussed by the judge, Carota's testimony is particularly compelling both because of his intimate involvement in the management of the Respondent's affairs and because his testimony represents an

² "Union refers, collectively, to Paper, Allied-Industrial, Chemical & Energy Workers International Union, AFL-CIO, Locals 18 and 155. Local 18 represents, among others, the employees working in the Respondent's pulp mill and woodyard. Local 155 represents, among others, employees working in the Respondent's paper mill and machine room.

³ I join my colleagues in finding, for the reasons set forth in the majority decision, that the Respondent: (1) violated Sec. 8(a)(5) and (1) by failing to bargain with Local 18 over an accommodation of Local 18's request for copies of the Respondent's contracts for pulp purchases; (2) did not violate Sec. 8(a)(5) and (1) by refusing to furnish the Union with information regarding prehire physical exams and drug testing; and (3) violated Sec. 8(a)(5) and (1) by unilaterally eliminating employee Bernard Palmer's prestrike pcc oiler position. In light of the remedy provided for the latter violation, I find it unnecessary to pass on whether the Respondent additionally violated Sec. 8(a)(3) and (1) by eliminating Palmer's position or by failing to recall him to another available oiler position. Finally, inasmuch as I would find that the Respondent violated Sec. 8(a)(5) and (1) by failing to notify and bargain with the Union over its mid-strike decision to permanently subcontract for pulp, I find it unnecessary to pass on whether the Union waived its bargaining rights when the Respondent reaffirmed that decision at the conclusion of the strike.

⁴ All dates are 2001, unless stated otherwise.

⁵ See, e.g., *Naperville Ready Mix v. NLRB*, 242 F.3d 744, 756 (7th Cir. 2001), cert. denied 534 U.S. 1040 (2001); *American Cyanamid Co. v. NLRB*, 592 F.2d 356, 360 (7th Cir. 1979), enfg. 235 NLRB 1316 (1978).

⁶ See *Naperville Ready Mix v. NLRB*, supra at 756.

⁷ See *Land Air Delivery v. NLRB*, 862 F.2d 354, 357 fn. 2 (D.C. Cir. 1988), cert. denied 493 U.S. 810 (1989).

⁸ On direct examination by the Charging Party, conducted under Federal Rule of Evidence 611(c), Carota's testified as follows:

Q. Sometime before you sent this [Sept. 14, 2001] letter [to R's stockholders] and after the pulp mill was shut down initially because of the strike, sometime in that period of time, the company decided it was going to operate with purchased pulp, so long as it could continue to get that low cost pulp on the market, correct?

A. This is true, yes.

Carota's answer came after he initially testified that he did not "remember making such a decision" and that, in response to local news reporters' questions about how long the pulp mill would be closed, the Respondent may have said, "[I]ndefinitely, we didn't know. We didn't know how long the price of craft [pulp] would be down. We didn't know how long the strike would last." The judge failed to discuss any of this testimony.

admission against the Respondent's interests.⁹ Carota was the Respondent's highest-ranking management official, and it is undisputed that he was actively engaged in the Respondent's handling of the strike, the Union, its employees, and its investors. Indeed, it was Carota who, at the outset of the parties' negotiations, explained to the Union the Respondent's need for dramatic concessions, and it was Carota who issued regular updates on the situation to stockholders and employees alike. In these circumstances, Carota's admission that the Respondent decided during the strike to indefinitely subcontract for pulp is highly probative of the pivotal factual question in this case.¹⁰

Moreover, Carota's testimony is consistent with documentary evidence in the record. As described, the Respondent initially began subcontracting for pulp as a temporary means to continue its papermaking operations during the strike. Accordingly, in June 2001, the Respondent attributed its shutdown of the pulp mill to the strike.¹¹ In subsequent communications concerning the pulp mill, however, the Respondent focused on the price and quality of pulp available on the open market, and did not expressly link the shutdown of the pulp mill to the strike or its conclusion.¹²

Similarly, when the Union inquired in late Autumn 2001 about the status of the pulp mill, the Respondent, on November 13, advised the Union that, "no determination had been made to reactivate it." The Respondent further explained on that date why it had no immediate plans to restart the pulp mill: "the price of purchased pulp was still below what it costs to make [our] own." This response was fully consistent with Carota's testimony that the Respondent had decided during the strike to indefinitely purchase low-cost pulp on the open market.

Finally, in a December 14 letter to the Respondent's stockholders, Carota summed up the situation as follows: "[o]ur Pulp Mill and Woodyard have not operated since June because less expensive pulp remains available from

outside suppliers and its quality is equal to or better than our own pulp." This acknowledgement is hardly surprising, because the record shows that, by late Summer 2001, the Respondent had fully realized that it could maintain the quality of its manufactured paper products using pulp that was cheaper to buy than to produce. Carota's December 14 letter confirmed that, again, as Carota himself testified, the Respondent months earlier had adopted a strategy of indefinitely operating with market pulp so long as it could be bought cheaply.¹³

In finding that the Respondent did not make a mid-strike decision to indefinitely subcontract for pulp, the majority mistakenly relies on the Respondent's decision to place "spot" orders for pulp instead of entering into a long-term contract for pulp that "lock[ed] in" the lower cost for the future. This confuses the question of whether the Respondent made a decision to indefinitely buy pulp with the separate question of how the Respondent implemented that decision. That the Respondent eschewed long-term contracts in favor of making spot purchases is not inconsistent with the conclusion that the Respondent had adopted a strategy of indefinitely operating with purchased pulp.

Indeed, it appears that the Respondent's decision to place spot orders was dictated by market forces. The record indicates that the use of spot contracts was the norm in the industry. Moreover, there is no dispute that throughout 2001 and 2002 pulp was abundantly available on the open market at historically low prices. Pulp suppliers accordingly did not require long-term contracts.¹⁴ Placing spot orders made particular sense for the Respondent, as well, because it had to continuously weigh the price of pulp against its own costs, including the fixed expense of maintaining its pulp mill in a ready state. In these circumstances, the Respondent's use of spot purchases simply does not have the significance attributed to it by the majority.

At bottom, it appears that the Respondent, having gotten a taste of the cost-savings achievable by buying pulp, converted what was a temporary means to withstand the strike to an indefinite means to supplant its pulp mill operation. Whatever the merits of this conversion, the Respondent simply was not entitled to adopt it unilaterally. As the Seventh Circuit aptly observed when finding

⁹ The Respondent's position, as summarized in its answering brief, is that "[t]here simply was no . . . 'subcontract' of the sort imagined by the General Counsel in his brief and alleged in the Complaint."

¹⁰ Certainly, if the Respondent had not made such a decision during the course of the strike, one would expect that Carota would have testified to that effect. Instead, he testified to the contrary. Cf. *Polaroid Corp.*, 329 NLRB 424, 430 (1999) (testimony of respondent's chief executive officer confirms Board finding)

¹¹ On June 19, for example, the Respondent issued an internal memorandum, stating, "The Pulp Mill is down due to the strike." (R. Exh. 21).

¹² On July 23, for example, the Respondent issued an internal memorandum, explaining that it intended to "mothball" the pulp mill and reassign salaried employees working in that area "until the cost to produce our own pulp is less than the price of hardwood kraft pulp." (GC Exh. 102).

¹³ The evidence thus shows, contrary to the majority's view, that the low cost of pulp had "displaced" the Respondent's initial reason for subcontracting, which was solely to maintain operations during the strike.

¹⁴ Cf. *Elliott River Tours*, 246 NLRB 935 (1979) (subcontractor of struck employer demanded long term contract as a condition for taking on the work).

unlawful another employer's unilateral permanent subcontracting during an economic strike:

Here the Union is not challenging the Company's right to continue operating by contracting out unit work on a temporary basis. It objects only to the Company's unilateral decision to make the arrangement permanent in the absence of an emergency. . . . There has been no showing that this Company would have been harmed by negotiating with the Union prior to contracting out the . . . work permanently. Therefore no justification has been shown for the Company's failure to observe the bargaining obligations set forth in the Act.¹⁵

The Respondent accordingly violated Section 8(a)(5) and (1) of the Act by failing to notify and bargain with the Union over its mid-strike decision to subcontract for pulp "for an indefinite future period not to terminate at the expiration of the strike."¹⁶

III.

Further, the record warrants finding, contrary to the judge's decision, that the Respondent's failure to meet its bargaining obligation over that mid-strike decision converted Local 18's economic strike into an unfair labor practice strike.¹⁷ The result is that the Respondent also violated Section 8(a)(3) and (1) when it failed to immediately reinstate the Local 18 strikers at the conclusion of the strike.

The standard for determining whether a strike has been converted from an economic strike into an unfair labor practice strike is well-established: the unlawful conduct need not be the "sole or predominant" factor that caused a prolongation of the work stoppage; it is sufficient that the unlawful conduct was "a factor."¹⁸ The Board considers both subjective and objective factors in analyzing a claim of conversion.¹⁹

¹⁵ *American Cyanamid Co. v. NLRB*, supra at 360. The Respondent's decision was not required by any operational exigency. Cf. *Land Air Delivery v. NLRB*, 862 F.2d 354, 358 (D.C. Cir. 1988), cert. denied 493 U.S. 810 (1989) (permanent subcontracting during economic strike may be justified where "necessary to the business purpose of keeping the plant continuously in operation and time of decision is of the essence") (citations omitted). Further, I fully agree with Member Schaumber that the Respondent's decision was a mandatory subject of bargaining, and not a management decision exempt from bargaining under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

¹⁶ See *Land Air Delivery v. NLRB*, supra at 357 fn. 2.

¹⁷ The General Counsel asserts that the striking employees represented by Local 155, who were not employed in the pulp mill, were nonetheless affected by the Respondent's unilateral action because the two local unions engaged in joint bargaining. The judge's finding that they did not engage in joint bargaining, however, is supported by the record evidence.

¹⁸ *C-Line Express*, 292 NLRB 638 (1989).

¹⁹ *Id.*

Here, the judge rejected the General Counsel's claim of conversion, largely based on the absence of subjective evidence of the strikers' reaction to the Respondent's decision to permanently subcontract for pulp. What the judge failed to fully appreciate, however, is that a subjective analysis, which would consider the striking employees' characterization of their own motive for continuing the strike after the unfair labor practice, is precluded by the nature of the Respondent's misconduct. Central to the Respondent's unfair labor practice is its failure to notify Local 18 of its mid-strike decision. Not surprisingly, then, the record is devoid of evidence of the strikers' subjective reaction to that decision.²⁰ The judge therefore erred in pointing out, for example, the absence of evidence that the Respondent's indefinite subcontracting was discussed when the Union conducted its strike vote.

At the same time, the judge failed to pay heed to the principle that objective evidence may afford a sufficient and independent basis for finding conversion when subjective evidence is unavailable.²¹ It is thus well established that, "[a]pplying objective criteria, the Board and reviewing court may properly consider the probable impact of the type of unfair labor practice in question on reasonable strikers in the relevant context."²² "The common thread running through [objective criteria] cases is the judgment of the Board that the employer's conduct is likely to have significantly interrupted or burdened the course of the bargaining process."²³

The Respondent's mid-strike decision to indefinitely subcontract for pulp, viewed objectively, was a significant crossroad in the parties' bargaining process and the strike. Critically, because the Respondent did not notify Local 18 of that decision, Local 18 was deprived of an opportunity to reevaluate its position in light of this key development. Local 18, not to mention the strikers, was deprived of the opportunity to end the strike, to accept the Respondent's terms, or to take other appropriate action.²⁴

This was significant because at least two facts strongly suggest that Local 18 would have seized such an oppor-

²⁰ The judge's observation that the Respondent's purchases of pulp were open and notorious by September 2001 misses the point. The key fact, still unknown to the Union at that time, was that the Respondent had decided to purchase pulp *indefinitely*.

²¹ *C-Line Express*, supra at 638 (presence or absence of evidence of employees' subjective motivation is not a sine qua non for determining conversion).

²² *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1080 (1st Cir. 1981), abrogated on other grounds *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990).

²³ *C-Line Express*, supra, 292 NLRB at 638.

²⁴ Cf. *Eads Transfer, Inc.*, 304 NLRB 711, 712 (1991), enf. 989 F.3d 373 (9th Cir. 1993) (explaining policy favoring requirement that employers timely notify employees of a lockout).

tunity had the Respondent given timely notice of its decision. First, Local 18 had largely premised the strike on a belief that the Respondent would be unable over an extended period of time to supply its papermaking operation with the high quality pulp typically produced by the unit employees. This was a reasonable assumption. Although the market price of pulp is in constant fluctuation, the Respondent had *never* indefinitely shut down the pulp mill in favor of purchasing pulp, even when the market price was below the Respondent's manufacturing cost.²⁵ The Respondent's decision to indefinitely idle the pulp mill was thus historically unprecedented and, once made, it essentially eviscerated Local 18's perceived economic leverage. Second, when the Respondent finally informed Local 18 of its decision on November 13, Local 18 quickly capitulated. Within one week of receiving that notice, Local 18 ended the strike and its membership ratified the Respondent's last offer.²⁶

In these circumstances, there is good reason to believe that the strike in fact was prolonged by the Respondent's unlawful failure to give timely notice of its decision to indefinitely subcontract for pulp. For these reasons, I would find, contrary to the judge, that the Union's economic strike was converted into an unfair labor practice strike, at least with respect to Local 18, and that the Respondent thereby violated Section 8(a)(3) and (1) by failing to immediately reinstate the Local 18 strikers at the conclusion of the strike.

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

²⁵ President Carota testified that, since 1991, the price per ton of purchased pulp fell below the Respondent's manufacturing cost on four separate occasions, each lasting an average of 8 months. Yet the Respondent had never shut down the pulp mill or made paper from purchased pulp for an extended period of time. Prior to the strike, the Respondent had only purchased small amounts of pulp to use during planned temporary shutdowns or emergencies.

²⁶ It appears that the judge simply failed to grasp the significance of Local 18's quick action to end the strike. Instead, he focused on its failure to present evidence of anything occurring between November 14 and November 21 that would indicate that the Respondent's subcontracting decision prolonged the strike.

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 refuse to bargain in good faith with Paper, Allied-Industrial, Chemical & Energy Workers International Union, AFL-CIO, Local 18 in an attempt to reach an accommodation of interests in response to the Union's request for relevant information that we consider confidential.

WE WILL NOT eliminate bargaining unit positions without giving prior notice of such decision to Paper, Allied-Industrial, Chemical & Energy Workers International Union, AFL-CIO, Local 155, and affording it an opportunity to bargain regarding the decision and the effects of the elimination of those positions.

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

WE WILL rescind the unlawful unilateral elimination of the pcc oiler position.

WE WILL, within 14 days from the date of the Board's Order, offer Bernard Palmer full reinstatement to his former job of pcc oiler, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Bernard Palmer whole for any loss of earnings and other benefits suffered as a result of our unlawful elimination of his position.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify, and, on request, bargain collectively and in good faith with Paper, Allied-Industrial, Chemical & Energy Workers International Union, AFL-CIO, Local 155.

FINCH, PRUYN & COMPANY, INC.

Robert A. Ringler, Esq., for the General Counsel.
John S. Irving, Esq., of Washington, D.C., *William Bevan, III, Esq.*, of Pittsburgh, Pennsylvania, and *Michael T. Wallender, Esq.*, of Albany, New York, for the Respondent-Employer.

James R. LaVaute, Esq., and *Stephanie A. Miner, Esq.*, of Syracuse, New York, for the Charging Party.

DECISION
STATEMENT OF THE CASE¹

BRUCE D. ROSENSTEIN, Administrative Law Judge.² This case was tried before me on December 8–12 and 16–8, 2003, in Albany, New York, pursuant to an amended consolidated complaint and notice of hearing in the subject cases (complaint) issued on June 19, 2003, by the Acting Regional Director for Region 3 of the National Labor Relations Board (the Board). The underlying charges and amended charges were filed on various dates in 2002 by Paper, Allied-Industrial, Chemical & Energy Workers International Union, AFL–CIO (the Charging Party, the Union, Local 18, or Local 155) alleging that Finch, Pruyun & Company, Inc. (the Respondent or Employer), has engaged in certain violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely amended answer to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that Respondent engaged in violations of Section 8(a)(1) and (5) of the Act by its failure to provide necessary and relevant information to Local 18 and Local 155, its unilateral elimination of the pcc oiler position and the unilateral subcontracting of its pulp mill and wood yard without notice or negotiations with the Union. Additionally, the complaint alleges that effective June 16, 2001,³ certain employees of Local 18 and Local 155 commenced an economic strike that was prolonged by Respondent's subcontracting of its pulp mill without notice or negotiations with the Union in violation of Section 8(a)(1) and (5) of the Act, thereby converting the economic strike to an unfair labor practice strike for which the Respondent failed or refused to reinstate some of the striking employees in violation of Section 8(a)(1) and (3) of the Act. Lastly, the complaint alleges that the Respondent eliminated the pcc oiler position and failed to recall a striker to an available oiler position in violation of Section 8(a)(1) and (3) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the helpful briefs filed by the General Counsel, Charging Party,⁴ and the

¹ The allegations pertaining to the discharge of employees Hugh Capen and James Benway and the suspension of employee William Ryan alleged in pars. 13(a) and (b) of the complaint were resolved by the parties through a non-Board settlement reached after the opening of the hearing. The General Counsel has no objections to the terms of the settlement. Accordingly, as the settlement between the parties effectuates the purposes and policies of the Act, I approved and made it a part of the record (ALJ Exh. 2). Allegations concerning the status of these employees as economic or unfair labor practice strikers are still pending and will be addressed in the subject decision.

² Prior to the opening of the hearing the Union made a motion to disqualify me as the designated trial judge due to my former service as Special Counsel to the General Counsel between 1976 and 1979, when John S. Irving, Esq., one of Respondent's attorneys, served as General Counsel of the Board (ALJ Exh. 1). I denied the motion on the record for the reasons stated in the transcript (Tr. 5–8).

³ All dates are in 2001 unless otherwise indicated.

⁴ The Charging Party's unopposed motion to correct the transcript attached to its brief, is granted.

Respondent,⁵ I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the manufacture of paper at its facility in Glens Falls, New York, where it annually sold and shipped goods and materials valued in excess of \$50,000 directly to customers located outside the State of New York. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. Respondent's operation

Respondent is a privately held corporation that has been in existence for 138 years. It has a board of directors and individual stockholders. Since 1985, Richard J. Carota has been chairman, president, and CEO. Respondent manufactures approximately 240,000 tons per year of premium uncoated printing papers for advertising, book publishing, and business office uses nationwide. For many years Respondent's employees have been represented for collective-bargaining purposes by seven labor organizations including Local 18 and 155. Local 18, has a practice of entering into separate collective-bargaining agreements with the Respondent, as does Local 155. Historically, the last two 5-year collective-bargaining agreements have expired on the same day (GC Exhs. 2, 4, 67, and 68). Thus, bargaining for successor agreements normally occurs at the same time for all unions including Locals 18 and 155. Local 18 represents employees that work in the shipping, finishing, converting, buildings & grounds, waste treatment, warehousing, material handling, wood yard and pulp mill portions of the operation. At the time of the economic strike, there were approximately 300 Local 18 bargaining unit members, 75 of whom worked in the Employer's pulp mill and wood yard. The most recent collective-bargaining agreement between Respondent and Local 18 is effective from November 24 through December 31, 2006 (GC Exh. 3). Local 155 represents employees that work in the machine room, paper mill, pulp prep and quality (paper lab) departments. At the time of the economic strike there were approximately 149 Local 155 bargaining unit members, none of who worked in the Employer's pulp mill or wood yard. The most recent collective-bargaining agreement between the Respondent and Local 155 is effective from November 24 through December 31, 2006 (GC Exh. 5).

2. Prestrike bargaining

The parties engaged in approximately 45 prestrike meetings some of which included all the unions while others involved independent negotiation sessions between each union and the

⁵ By motion dated March 12, 2004, the Respondent moved to strike portions of the General Counsels and Charging Party's posthearing briefs. The General Counsel and the Charging Party filed oppositions to the motion. In view of my findings herein regarding the issues raised in the motion, it is not necessary to make a ruling.

Employer. At the first general meeting held on May 14, attended by all seven unions, Carota made a presentation entitled "The Ticonderogians are coming" (R. Exh. 38). He focused on their main competitor International Paper who has a plant geographically proximate in Ticonderoga, New York, that had been making inroads on the Employer in the critical specifications of brightness, quality, and smoothness. Carota informed the seven unions that International Paper, whose papermaker employees are represented by the same International Union, does not pay its employees double time and pays less than one-half the cost of their employee health care plan. Likewise, Respondent's retirement plans, life insurance and meal allowances are more costly than their chief competitor with International Paper having a substantial labor cost advantage of \$90/ton compared to the Employer's labor cost of \$150/ton. This information set the tone for Respondent's message to its employees that in order to stay competitive, it would be necessary to seek concessions during the upcoming negotiations. Indeed, just prior to the commencement of negotiations, employees were notified that one of the paper machines would be shut down for approximately 2 weeks due to lack of orders and excessive high paper inventories. It was known to all parties that the pulp and paper industry was in the midst of a major recession (R. Exh. 19).

On May 15, at the first substantive negotiation meeting among the parties, Locals 18 and 155 submitted their individual 2001 Labor Negotiation Agendas to the Employer (R. Exhs. 2 and 3). Additionally, the Unions presented a Main Agenda for the 2001 negotiations (R. Exh. 34). Historically, common provisions in each of the seven unions' agreements were negotiated together and at the same time with the Employer. For example, some of these items include profit sharing, wage increases, vacation benefits, group life insurance, healthcare, retirement, sick pay, holidays, double-time and holiday pay, disability pay, and workers compensation. The Employer calculated that the cost for the Main Agenda items would be an increase of approximately \$11,429,129 (R. Exh. 35).

As the negotiations approached June 15, the date the then collective-bargaining agreements for all seven unions were set to expire, the Employer provided on June 14 as requested by the Union, a last-best contract offer that was subsequently rejected. The Employer declared the parties were at impasse and implemented its last best contract offer. The Union filed unfair labor practice charges on June 17, asserting that the Respondent engaged in surface bargaining, bargained to impasse on a non-mandatory subject of bargaining (unit scope), made regressive proposals, would not meet with the Union, or refused to accede to the Union's demands in order to frustrate agreement. The Regional Director for Region 3, on September 14, refused to issue a complaint and on January 30, 2002, the General Counsel on appeal determined that further proceedings were deemed unwarranted. In pertinent part, the General Counsel determined that the evidence demonstrated that a genuine bargaining impasse limited to mandatory subjects was reached on June 15. In this regard, the evidence showed that prior to impasse the Employer met with the Union over 40 times and presented approximately 16 proposals. In addition, the Employer made numerous concessions to the Union on both economic and non-

economic issues, and ultimately withdrew 10 of its proposals in a good-faith attempt to reach agreement. Further, the Employer continuously supplied the Union with explanations based on documentation and objective evidence in order to support its bargaining position that it deemed concessions from the Union necessary in order to afford it greater flexibility so that it could remain competitive. Although the Employer took a hard position in bargaining, it revised its initial proposal that employees pay their own health insurance premiums, and it offered a \$1000 annual lump-sum payment to employees that it later increased to \$1500.

3. Prestrike planning

The Employer recognized that a strike in 2001 was a strong possibility, as it had endured a 19-day strike in 1996 when supervisors filled in and paper was produced at a reduced capacity. A contingency plan was developed that provided for an orderly shutdown of the pulp mill (R. Exh. 20). The Respondent decided that if a strike did occur, it would not operate the pulp mill but would attempt to purchase a superior grade of hardwood kraft pulp on the open market and slowly produce paper starting with the operation of one paper machine. As part of the contingency plan, the Respondent was aware that it could operate one paper machine for approximately the first month of the strike with the 1000 tons of previously produced stored pulp. Once exhausted, it would then have to depend on the hardwood kraft pulp to maintain its business operation. While the Respondent on occasions previously purchased small amounts of hardwood kraft pulp to use during planned and unplanned shutdowns or emergencies, it was uncertain if the hardwood kraft pulp would enable it to maintain the high quality of its paper products for distribution to its customers.

4. The strike and continued plant operation

On June 16, certain employees of Locals 18 and 155 engaged in an economic strike due to the parties' inability to come to an agreement on the wide disparity over wages and benefits that the Respondent sought in order to remain competitive with its rivals. The Union, in commencing the strike, was of the opinion that they possessed leverage due to the unique expertise of their employees in producing a sophisticated product and working on complex machines that would be difficult to operate with supervisors or retired employees over an extended period of time.

Respondent, in order to operate its paper mill and continue to remain in business, began to purchase hardwood kraft pulp on the open market since prices were at a 20-year historical low. Thus, the Respondent was able to purchase the pulp for less than it would cost to produce its own unique ammonium bisulfite pulp. Respondent knew its employees would be eligible for at least 26 weeks of unemployment insurance so enough pulp was initially purchased to last into early 2002. As the strike continued to progress into the summer and early fall of 2001, and the strikers began to draw vacation pay that had been accrued, the Respondent forecasted that the strike could be extended and decided to buy additional hardwood kraft pulp on the open market as prices remained low in comparison to producing its own pulp.

5. Negotiations and developments during the strike

The parties engaged in eight collective-bargaining sessions after the commencement of the strike on June 16. The first substantive meeting occurred on September 26, with the Union for the first time offering to contribute 5 percent to their health care costs and the Employer standing firm that the employees pay 50 percent of the costs similar to their primary competitors.

Newspaper articles in August and September 2001, confirmed that the parties were at a standstill on economic issues and the Union made assertions that the Respondent is not capable of making its customary top-quality paper because its skilled workers are on strike and the pulp mill is purchasing pulp rather than using its own sodium bicarbonate process to produce pulp (R. Exhs. 9 and 10).

By letter dated October 15 to all employees, the Respondent noted that due to the Union's recent rejection of a revised last best offer that made substantial movement on family health insurance and additional compensation for each striking employee, it was necessary to take steps to support the long-term operation of the mill and, accordingly, they had begun to hire permanent replacement workers in all areas of the facility with the exception of the pulp mill (R. Exh. 46).

During the negotiation session of November 13, the Union inquired about the current status of the pulp mill and was informed by Respondent that no determination had been made to reactivate it as the price of purchased pulp was still below what it costs to make their own. At the conclusion of this meeting, the Union was provided with a revised last best offer that would remain open through November 20.

The next bargaining session took place on November 19. The Union apprised the Respondent that the membership had voted on the revised offer and it was overwhelmingly rejected. The Union stated that if the Employer were truly interested in coming to terms, it would eliminate the maintenance of membership portion of the offer and reinstate the union-security clause, modify the pension benefit by permitting employees to lump out after 25 years and provide amnesty for all strikers. The Respondent rejected these proposals, but at the Union's request agreed to extend the last best offer to November 23, so that a revote could be taken. The union negotiators informed the Respondent that they would take the last best offer back to the membership with a recommendation to approve the agreement (R. Exh. 43).

On November 21, a second ratification meeting occurred for members of Local 18 and Local 155. The result of the tabulated votes showed that the Union had ratified the agreement. The Union communicated these results to the Respondent and the parties agreed that the strike was officially ended on November 21.

On November 24, Locals 18 and 155 entered into separate collective-bargaining agreements with the Respondent, which are effective until December 31, 2006.

On November 26, Local 18 and Local 155 entered into separate recall agreements that detailed the procedures for the recall of strikers to prestrike positions when a vacancy occurs (GC Exhs. 6 and 7).

The pulp mill remained closed during the remainder of 2001, the entire year of 2002, and into the first half of 2003. By

memorandum dated February 26, 2003, Respondent apprised all employees that it planned to reopen the pulp mill in early June 2003. The Respondent explained that the decision to reopen the pulp mill was based in part on the fact that purchase orders existed to buy hardwood kraft pulp through June 2003 but the market price of pulp is then expected to exceed the current estimate to produce our own pulp. Second, the New York State Department of Environmental Conservation apprised us that if the pulp mill remains shutdown beyond June 2003, it could possibly require the repermitting of the entire pulping operation, a lengthy process that could cost millions of dollars and require the pulp mill to be closed for an indefinite period. Accordingly, the striking employees in the pulp mill were informed that commencing in April 2003 they would be recalled as needed to their prestrike positions (R. Exh. 31). As of June 2003, the majority of the striking employees in the pulp mill have been recalled to their prestrike positions.

B. The 8(a)(1) and (5) Allegations

1. The refusal to provide information

The General Counsel alleges in paragraph 9 of the complaint that Local 18 and Local 155 independently requested certain items of information in January and February 2002, which was necessary and relevant to its performance as the exclusive collective-bargaining representative of each unit.

By letter dated January 23, 2002, Local 18 sought a copy of contracts relating to the purchase of contract pulp and on February 24, 2002, it sought weekly schedules and the date, time and place where replacement workers were given preemployment physical examinations and drug screening tests.

By letter dated February 9, 2002, Local 155 sought the location of where certain replacement workers took their pre-employment physicals/drug screening tests and on February 25, 2002, it requested additional clarification on issues related to drug screening.

The Respondent, in a letter dated January 29, 2002, informed Local 18 that the information regarding the purchase of contract pulp was financial data that it intended to keep confidential. The Respondent referenced a prior arbitration in which the arbitrator overruled the Union's request for confidential information and concluded the letter by confirming earlier advice that it does not anticipate starting the pulp mill in the foreseeable future, based on cost and quality considerations. In a subsequent letter dated February 7, 2002, the Respondent reiterated the same information as contained in its January 29, 2002 letter and noted in the interests of good labor relations that it has placed orders for purchased pulp for the entire year of 2002.

In letters dated February 22 and March 6, 2002, the Respondent replied to Local 18's requests on drug screening and preemployment physicals. Local 18 was informed that prehire drug screening was not a matter within their representational responsibilities and could result in divulging confidential information. The Respondent concluded the letters by informing Local 18 that all new employees undergo prehire physicals and drug screening, whether or not they later become union members.

By letters dated February 6 and March 6, 2002, Respondent replied to Local 155's requests for information regarding drug screening. As it had done with Local 18, Respondent informed

Local 155 that prehire drug screening was not a matter within their representational responsibilities and could result in divulging confidential information. The Respondent, while declining to provide the information requested, apprised Local 155 that all new employees undergo prehire drug screening.

The Supreme Court in the case of *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), provided a balancing test for accommodating a union's need for information and an employer's need to protect confidential information.

In resolving issues such as presented in the subject case, the Board held in *GTE California, Inc.*, 324 NLRB 424, 426 (1997) that:

An employer has a statutory obligation to provide requested information that is potentially relevant and will be of use to a union in fulfilling its responsibilities as the employees' exclusive bargaining representative.

....

A union's interest in relevant and necessary information, however, does not always predominate over other legitimate interests . . . Thus, in dealing with union's requests for relevant but assertedly confidential information possessed by an employer, the Board is required to balance a union's need for the information against any legitimate and substantial confidentiality interest established by the employer.

The legitimacy of the Union's need for information contained in preemployment physicals and drug-screening reports is clear, especially in view of the fact that it would be the exclusive bargaining representative of any replacement employees. Information related to workplace safety and health is generally, relevant and necessary for the Union to carry out its bargaining obligations. *Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 29 (1982), enfd. sub nom. *Oil Workers Local 6-418 v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983).

On the other hand, an employer certainly has a strong confidentiality interest with respect to the names and what facility replacement workers were tested in prior to their hiring.

The Board in *Pennsylvania Power*, 301 NLRB 1104 (1991), found that the respondent employer proved a legitimate and substantial confidentiality defense justifying its refusal to provide the names of informants who provided information about suspected drug use. Indeed, the serious public and employee safety considerations as in the subject case were present in the Board's analysis of the facts in *Pennsylvania Power*.

While the Respondent asserts a legitimate and substantial confidentiality interest in not releasing the names and what facility replacement workers were tested in for drug use prior to their hiring, I am of the opinion that the confidentiality interest was not so substantial as to justify the Respondent's blanket refusal to provide any information in response to the Union's requests. Thus, the Respondent had an obligation to come forward with some offer to accommodate both its concerns and the Union's legitimate needs for the information. Here, the Respondent made no offer to release the information conditionally or by placing any restrictions on the use of the information. Since the Respondent made no effort to bargain to accommo-

date the Union's interest in seeking relevant information and flatly refused the information sought by both Local 18 and Local 155 regarding preemployment physicals and drug screening for replacement employees, it violated Section 8(a)(1) and (5) of the Act. Therefore, the violation found is the failure to bargain over an accommodation (i.e., an alternative means of satisfying the Union's need), not the failure to provide the location of testing or the names of the replacement employees who undertook prehire physicals and drug screening tests.

In regard to Local 18's request for copies of contracts for purchased pulp to determine whether the Respondent has adequate justification for failing to recall strikers to their jobs in the pulp mill, I do not find that such information is relevant and necessary to Local 18's representational responsibilities. In this regard, the information sought would disclose sensitive information of competitive significance for which an employer is not required to disclose. *Nielsen Lithographing Co.*, 305 NLRB 697 (1991). Second, copies of contracts for purchased pulp that were requested in January 2002, is not necessary to determine adequate justification for failing to recall strikers to jobs in the pulp mill especially in light of the fact that Local 18 was informed in August, October, and November 2001, and on subsequent occasions, that the pulp mill would not be started for the foreseeable future and that hardwood kraft pulp had been purchased not only through February 2002 but for the entire year of 2002 (GC Exh. 17). Third, the Union withdrew allegations in Case 3-CA-23461-1 that since January 17, 2002, the Employer failed to recall reinstated strikers to open positions in the wood yard (CP Exh. 2(c)). Fourth, prior to the subject information request the parties on November 26 had negotiated a recall agreement that detailed the procedures in which striking employees would be recalled when vacancies occurred. Lastly, contrary to the General Counsel's assertion that the pulp contracts were relevant to the Union's consideration of the subject unfair labor practices, it is noted that when the instant information request was filed in January 2002 the third amended charge in Case 3-CA-23461-1 had not been filed that alleges the economic strike converted to a unfair labor strike in July 2001, when the Respondent unilaterally subcontracted its pulp mill by purchasing a superior grade of hardwood kraft pulp on the open market. I also note that in response to the Charging Party's subpoena the information was provided by the Respondent.

For all of the above reasons, I recommend that paragraph 9(a) of the complaint be dismissed.

2. Elimination of the pcc oiler classification

The General Counsel alleges in paragraph 10 of the complaint that Respondent eliminated the pcc oiler position in or around December 2001 without notification or bargaining with Local 155 over the conduct and effects of this conduct.

In May 1997, the Respondent suspended Local 155 employee Bernard Palmer for a period of 4 months because he allegedly engaged in acts of sabotage by shutting down a valve to the head box causing the flow of papermaking fiber to be interrupted and the machine to stop operations. Local 155 filed a grievance over the suspension, which ultimately was referred to arbitration. The arbitrator held that the suspension was not for just cause and awarded backpay and loss of seniority during

the period Palmer was out of work (GC Exh. 64). The Respondent abided by the arbitration award and placed Palmer in the position of a pcc oiler who was responsible for lubricating certain valves in a particular portion of the mill. Palmer credibly testified that while he was paid a salary commensurate with other full-time Local 155 employees who were classified as basement or machine room oilers his job responsibilities only took him approximately 1-hour per day. Palmer also acknowledged that after returning to work from the 1996 strike he was classified as a basement oiler and performed the duties and responsibilities of that position in addition to handling the duties of the pcc oiler job that took approximately 10 percent of his time.

The Respondent asserts that the position of the pcc oiler never existed until it assigned Palmer to the job full time after the arbitrator determined that his suspension was not for just cause. Palmer was placed in that position because of the Respondent's continued concern that he had engaged in acts of sabotage and they did not want to return Palmer to that section of the mill where the alleged acts occurred. The Respondent argues that while the pcc oiler classification still exists, they determined not to fill the position during the strike and after the strike ended the duties of that position could be performed more efficiently by other tour oilers who possessed the same skills.⁶ Indeed, as of the date of the hearing, the pcc oiler position has not been filled.

If the pcc oiler position were eliminated in December 2001, as alleged by the General Counsel, there would have been an obligation to notify and engage in appropriate negotiations with the Union. The facts, however, dictate otherwise. In this regard, at the commencement of the strike when Palmer and other Local 155 employees' ceased work, there was no need to fill the pcc oiler position, as the duties were not independently required. Once the strike ended, the duties could be performed as part of the responsibilities of the tour oiler position. Accordingly, as certain oiler room employees were recalled after the strike, the employee with the greatest seniority under the parties' recall agreement could adequately perform the duties of the pcc oiler position.

Therefore, I find that the pcc oiler position was never eliminated. Rather, the position was never filled during or after the strike ended. Since the position was never eliminated, and indeed still exists, there was no duty to notify and negotiate with Local 155. Therefore, I recommend that the allegations in paragraph 10 of the complaint be dismissed.

3. Subcontracting of the pulp mill

The General Counsel alleges in paragraph 11 of the complaint that in or about July 2001, but without Local 18's knowledge until on or about November 14, Respondent unilaterally subcontracted its pulp mill without prior notice or affording Local 18 an opportunity to bargain with respect to the conduct

and the effects of this conduct.

The General Counsel principally relies on two cases in arguing that Respondent has violated the Act as alleged in the complaint. In *American Cyanamid Co.*, 235 NLRB 1316 (1978), enfd. 592 F.2d 356 (7th Cir. 1979), the Board, in a short-form adoption, held that the employer violated Section 8(a)(1) and (5) of the Act when, during an economic strike, it contracted out unit maintenance and service work on a permanent basis without notifying or bargaining with the union. The administrative law judge found that during an economic strike, and in the midst of bargaining for a labor agreement, the employer decided to permanently contract all of its maintenance and service work, a decision affecting approximately 200 employees or nearly half of the bargaining unit. In furtherance of this decision, the employer, on January 9, 1976, made permanent an existing temporary contract arrangement under which such work was being performed and advised the Union of the elimination of those 200 jobs only after this was an accomplished fact. In concluding that the Employer did not establish a business justification for its subcontracting decision, the judge found that the economic strike that was in progress was converted into an unfair labor practice strike on January 9, 1976, when the employer changed the temporary contract covering the work to a permanent agreement.

In *Fiberboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), which predated *American Cyanamid*, the Supreme Court held that the "replacement of employees in the existing unit with those of an independent contractor to do the same work under similar conditions of employment" was a mandatory subject of bargaining under Section 8(a)(1) and (5) of the Act. That case, which did not involve a strike situation, involved the contracting out of maintenance work after expiration of a collective-bargaining agreement and for economic reasons, without first bargaining with the Union. The maintenance work in question continued to be performed in the plant by employees of the independent contractor instead of by employees of the employer.

The Respondent contends that the General Counsel's reliance on the above two cases is misplaced, and argues that the Supreme Courts decision in *First National Maintenance Corp.*, 452 U.S. 666 (1981), should be relied upon in finding that no bargaining obligation exists. That case stands for the proposition that an employer which was engaged in the business of providing housekeeping, cleaning, maintenance, and related services for commercial customers was not required to bargain over the decision to terminate a contract that permanently shut down a part of its business for purely economic reasons. The Court made a special effort to distinguish its holding in the case from that of *Fiberboard* in concluding that the employer in terminating the contract had no intention to replace the discharged employees or to move the operation, the instant dispute that led to the cancellation of the contract was solely over the size of the management fee that the union had no control or authority over and the union involved was certified long after the economic difficulties arose and no issue was present regarding the employer's abrogation of ongoing negotiations or an existing bargaining agreement. Likewise, the Court determined that the actions of the employer did alter the company's basic

⁶ The term "tour oiler" is another name for "machine room oiler". The duties of "basement oiler" and machine room oiler are similar, but they have separate work schedules and are separately considered in the call-in procedures under the collective-bargaining agreement between the Respondent and Local 155.

operation and the reduction of labor costs was not at the base of the employer's decision to terminate the contract.

In the subject case, certain employees of Respondent commenced an economic strike on June 16, and effective October 15, permanent replacements were hired. Here, the Union was the bargaining representative for many years before the pulp mill was shut down. Additionally, negotiations were ongoing and when the parties reached lawful impasse on June 15, the collective-bargaining agreement was still in effect. Additionally, the production of paper was not halted and improvements were initiated while the pulp mill was shut down. Indeed, with the purchase of the hardwood kraft pulp on the open market the Respondent did not change the nature or direction of its business operation, and the same paper products with identical color and weight were produced using the same paper machines. See *Bob's Big Boy Family Restaurants*, 264 NLRB 1369 (1982). Finally, Respondent did not terminate a portion of its business; rather it replaced the union represented employees in the pulp mill by subcontracting for the purchase of hardwood kraft pulp for a period of time. Likewise, during the entire time that hardwood kraft was purchased the Respondent retained the equipment necessary to manufacture pulp and reopened the pulp mill in June 2003. It then commenced using the retained equipment to manufacture its own pulp.

Based on the forgoing, and particularly noting that the purchase of the hardwood kraft pulp did not alter the Respondent's basic operation and in part the closing of the pulp mill resulted in a reduction of labor costs, I find that the issues in this case are matters that are not particularly suitable for resolution under a *First National Maintenance Corp.* analysis.

Long settled is the rule that an employer—at least absent an economic strike—is obligated to bargain with the union before it decides to subcontract. The basis for this requirement is that subcontracting erodes the bargaining unit and is an “appropriate” subject of bargaining.

In *Hawaii Meat Co. v. NLRB*, 321 F.2d 397 (9th Cir. 1963), a case that preceded *Fiberboard* and *American Cyanamid Co.*, the Court of Appeals determined that permanently contracting out is authorized to enable the employer to continue operating in an emergency situation thrust upon it by a strike.

In *Land Air Delivery v. NLRB*, 862 F.2d 354 (D.C. Cir. 1988), cert. denied 493 U.S. 810 (1989), enfg. 286 NLRB 1131 (1987), the Court of Appeals found that the employer violated Section 8(a)(1) and (5) of the Act by permanently contracting out bargaining unit work during the course of an economic strike in the absence of notifying and bargaining with the union because the decision was not motivated by economic necessity. In this decision, the Court held that in its opinion the decision of the U.S. Court of Appeals for the Ninth Circuit in *Hawaii Meat Co.* stands for no more than the proposition that an employer may not be obliged to bargain with a union about permanent subcontracting⁷ during a strike when that subcontracting is necessary to the business purpose of keeping the plant continuously in operation and time of decision is of the essence.

In its line of cases concerning subcontracting during an eco-

nomical strike, the Board uses the phrase “business necessity” to refer to decisions motivated by the desire to maintain business operations during the course of a strike. See *Elliott River Tours*, 246 NLRB 935 (1979) (board countenanced contracting out for 2 years which exceeded the duration of the strike because the subcontractor demanded a long-term contract as a condition for taking on the work), and *Empire Terminal*, 151 NLRB 1359 (1965), enfd. sub nom. *Dallas General Drivers Local 745 v. NLRB*, 355 F.2d 842 (D.C. Cir. 1966) (an employer is not under a duty to bargain over temporary subcontracting necessitated by a strike where the subcontracting did not transcend the reasonable measures necessary in order to maintain operations in such circumstances). In *Shell Oil Co.*, 149 NLRB 283, 285 (1964), the Board held that the respondent was not under a duty to bargain over contracts let and completed in the course of the strike since this temporary subcontracting necessitated by the strike did not transcend the reasonable measures an employer may take in order to maintain operations in such circumstances.

The General Counsel's complaint in paragraph 11 does not address whether the unilateral subcontracting of the pulp mill was of a temporary or permanent nature.⁸ In evaluating whether the actions of the Respondent were motivated by the desire to maintain business operations during and after the course of the strike, the facts leading up to the strike are instructive.

Respondent, based on their prior experience of enduring a strike in 1996, developed a strike contingency plan coinciding with the commencement of negotiations in May 2001. The parties engaged in extensive bargaining between May 15 and June 15, when they reached lawful impasse and the Respondent implemented the last best contract offer that had been rejected by the Union. There is no dispute that when the strike commenced on June 16 it was based on an inability to agree on economic issues. The Respondent began an orderly shut down of the pulp mill on June 15, but knew it could continue to manufacture paper on one of its four paper machines for approximately a 1-month period using the 1000 tons of stored pulp previously produced before the strike. As part of its contingency plan, the Respondent was aware that the cost of hardwood kraft pulp on the open market was at historical low prices and decided to purchase it in large quantities in order to remain in business and supply its customers with paper products after it exhausted its supply of stored pulp. In this regard, there was no single subcontract for the purchase of hardwood kraft pulp. Rather, the Respondent made periodic spot purchase orders based on its operational needs relative to the duration of the strike following the same practices as before the strike when it purchased hardwood kraft pulp from preferred suppliers. At the time this decision was made, the Respondent was uncertain whether it would eventually be able to produce quantities of paper at prestrike levels or whether the quality of its product would be diminished in any manner.

Based on the forgoing, I find that when the Respondent initiated the purchase of large quantities of hardwood kraft pulp in

⁷ The court took the term to mean subcontracting for an indefinite future period not to terminate at the expiration of the strike.

⁸ The pulp mill was shut down for approximately 2 years commencing on June 15.

or around the date of the strike and continued that practice until early 2003, it did so in order to maintain its paper making operations and was not undertaken because of union animus.⁹ Therefore, I find that the holdings of the Board discussed above (temporary subcontracting) and the decisions of the United States Court of Appeals in *Hawaii Meat Co.* and *Land Air Delivery* (permanent subcontracting), privilege the Respondent's subcontracting in this case and relieve it of any obligation to negotiate the subcontracting of the pulp mill and the purchase of hardwood kraft pulp on the open market in order to remain in business while countering the effects of an economic strike.

Accordingly, I recommend that the allegations in paragraph 11 of the complaint be dismissed.

The General Counsel opines that if a *Fiberboard* violation cannot be established then the Board's holding in *Dubuque Packing Co.*, 303 NLRB 386, 391 (1991), enfd. sub nom. *Food & Commercial Workers Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), should be followed in concluding that the subcontracting herein is a mandatory subject of bargaining. In that case, the Board recognized that an employer's decision to relocate bargaining unit work might be a mandatory subject of collective bargaining:

Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel successfully carries the burden in this regard, he will have established prima facie that the employer's relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the prima facie case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location or establishing that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate.

Applying these guidelines to the subject case, I am not convinced that the subcontracting of the pulp mill is covered under the standards set forth above. In *Dubuque*, the analysis involved a relocation of unit work from one location to another. Here, the work was not relocated. Rather, a superior grade of hardwood kraft pulp was purchased on the open market and was used in place of the pulp previously manufactured by the striking employees for the production of paper on the same machines that previously were used pre-strike. If others disagree with this conclusion, I would still find that the Union was not capable of offering labor cost concessions that could have

⁹ The complaint does not allege that the subcontracting was in any way based on union animus or was violative of Sec. 8(a)(1) and (3) of the Act.

changed the employer's decision to subcontract the pulp mill and purchase hardwood kraft pulp on the open market. In this regard, the costs of the Union Main Agenda items presented at the commencement of bargaining were in excess of \$11 million (R Exhs. 34 and 35). During the course of negotiations both before and after the strike, there were minimal monetary concessions offered by the Union. In fact, during the last substantive negotiation session held on November 19, the Union still insisted on an expensive pension enhancement proposal that would have significantly increased the life annuity and health care costs for retirees. Thus, at no time up to the date the strike ended did the Union make any substantive economic proposals to offset any of their proposed Main Agenda Items, never offered direct or indirect labor cost concessions nor did they offer the Respondent concessions on the difference that it was saving in purchasing hardwood kraft pulp on the open market in comparison to producing its own pulp.

Accordingly, since the Union did not and could not have offered labor cost concessions, I find that it would have been unable to change the Respondent's decision to purchase hardwood kraft pulp on the open market and therefore, the Respondent had no obligation to negotiate over the subcontracting of the pulp mill.¹⁰

4. Whether the economic strike converted to an unfair labor practice strike

The General Counsel alleges in paragraph 12(c) of the complaint that the economic strike was prolonged by the unfair labor practices of Respondent in unilaterally subcontracting its pulp mill without prior notice to or affording Local 18 an opportunity to bargain with respect to the conduct and the effects of this conduct. The complaint alleges strike conversion without knowledge by the strikers of the conduct later alleged to be an unfair labor practice.

The Board has consistently held that an employer's unfair labor practices during an economic strike do not automatically convert it into an unfair labor practice strike. Such conversion would be found only when there is proof of a causal relationship between the unfair labor practice and the prolongation of the strike. *Anchor Rome Mills, Inc.*, 86 NLRB 1120, 1122 (1949).

A strike that begins as a dispute over economic issues may be converted to an unfair labor practice strike if the General Counsel establishes that the "unlawful conduct was a factor (not necessarily the sole or predominate one) that caused a prolongation of the work stoppage." *C-Line Express*, 292 NLRB 638 (1989), enfd. denied on other grounds 873 F.2d 1150 (8th Cir. 1989). The Board will consider both objective and subjective evidence in assessing whether the General Counsel has met his burden:

Applying objective criteria, the Board and reviewing court may properly consider the probable impact of the type of unfair labor practice in question on reasonable strikers in the

¹⁰ Contrary to the General Counsel and Charging Party's argument in brief that the Union has the capability of offering the Respondent significant cost savings by agreeing to work for minimum wages and reduced benefits, LaBrum publicly stated on August 30 that, "Our people aren't going to go back for less than what they were making before the strike." (R. Exh. 9.)

relevant context. Applying subjective criteria, the Board and court may give substantial weight to the strikers' own characterization of their motive for continuing to strike after the unfair labor practice. [Id., quoting *Soule Glass Co. v. NLRB*, 652 F.2d 1055, 1080 (1st Cir. 1980).]

The General Counsel concedes that Local 18 did not learn about the subcontracting of the pulp mill until November 14.¹¹ Moreover, there is no dispute that the Union did not make a request to negotiate over the purchase of hardwood kraft pulp or the refusal of the Respondent to reopen the pulp mill. Likewise, the record does not support the position that when Locals 18 and Local 155 finalized their strike vote, the subcontracting of the pulp mill was discussed or was the underlying reason for the strike. Rather, the sole reason the employees voted for a strike was the Union's staunch opposition to the economic concessions sought by the Respondent. From the inception of the strike on June 16, until the first substantive negotiation session on September 26, the Union did not proffer any major economic concessions. The record does not contain nor was any evidence presented that the purchase of hardwood kraft pulp, which was open and notorious by September 26 was one of the reasons that the strike was prolonged. Indeed, according to the General Counsel's complaint it was not possible for the Union to have asserted that the strike was prolonged by the subcontracting of the pulp mill before November 14, since the Respondent did not officially inform the Union of this fact until that date. Even in the bargaining sessions held on November 13 and 19, the Union never asserted that the strike was prolonged based on the subcontracting of the pulp mill. Finally, the Union presented no evidence between November 14 and the end of the strike on November 21, that the subcontracting of the pulp mill prolonged the strike. It is also noted that the Union did not file the third amended charge until May 6, 2002, that alleged the conduct of subcontracting the pulp mill violated the Act and the strike converted to an unfair labor practice strike retroactively to July 2001, when the initial purchases of hardwood kraft pulp were made. This was a period nearly 6 months after the 5-year contracts and striker recall agreements had been negotiated and approximately 10 months after the alleged strike conversion in the absence of knowledge. *Mercedes Benz of*

¹¹ The Respondent did not officially inform the Union of the subcontracting of the pulp mill until that date. Unofficially, Union Chief Negotiator Robert LaBrum admitted that newspaper articles in June, July, and August 2001, specifically discussed Respondent's purchase of hardwood kraft pulp on the open market (GC Exhs. 15 and 16, R. Exh. 10) and its use in the manufacture of paper on the same paper machines as prestrike. Likewise, the Local 18 Union President testified that at no time during negotiations did Local 18 ever tell the Employer that if Local 18 had known about the status of the pulp mill, it would have ended the strike sooner. Thus, I reject the General Counsel's argument that had the Respondent notified the Union about the subcontracting, it might have abruptly ended what evolved into a long-term strike before the Employer permanently replaced its work force. In that regard, the Union was notified in advance of the Respondent's decision to hire permanent replacements yet it made no movement to end the strike during the approximately 1-month period between October 15 and November 14 when the hiring of permanent replacements was completed.

Orlando Park, 333 NLRB 1017, 1053 (2001) (the test is whether employees knew about the employer's conduct and sought to strike in protest of it).

Based on the forgoing, and particularly noting my above finding that there was no obligation for the Respondent to negotiate over the subcontracting of the pulp mill, I find that the evidence overwhelmingly supports both subjectively and objectively that the strike began as an economic strike and did not convert at any time subsequent to the strike's inception.

The General Counsel asserts in paragraph 12(a) of the complaint that at all material times from on or about May 14 through November 21, Local 18 and Local 155 bargained jointly with Respondent for the purpose of negotiating their individual collective-bargaining agreements that were executed on November 24.

The Respondent, while denying the above assertions, explains that, at times, it bargained simultaneously with seven local unions including Local 18 and Local 155 but never bargained jointly with any of the union's.

The General Counsel argues, under its theory of joint bargaining between Local 18 and Local 155, that when the economic strike converted to an unfair labor practice strike both Locals were impacted and therefore became unfair labor practice strikers with rights to reinstatement once they made unconditional offers to return to work.¹²

The Respondent vigorously denies this assertion and argues that any strike conversion which might have occurred, could only have been operative to Local 18 as they were the affected employees in the pulp mill and not to the separate unit of unaffected Local 155 represented employees.

I reject the General Counsel's theory of the case for the following reasons. First, as found above, I have determined that the strike which commenced on June 16 started and remained at all times an economic strike and never converted to an unfair labor practice strike. Second, in order to buttress the proposition of joint bargaining between Local 18 and Local 155, the General Counsel points to the historical practice of pooled voting engaged in by both Locals when undertaking strike and ratification votes.¹³ The fallacy in this argument is revealed in Chief Union Negotiator LaBrum's testimony wherein he admits that he was not aware of any written document regarding joint bargaining and none was provided to the Respondent prior to the commencement of bargaining on May 14, he never informed the other five unions that Local 18 and 155 would be engaging in joint bargaining, he never orally informed Respondent negotiators that Local 18 and 155 would be engaging in joint bargaining, he never orally informed Respondent negotiators about the practice of pooled voting nor did he put in writing or send the Em-

¹² The Union, at no time before or after the strike ended, made an oral or written offer to unconditionally return to work.

¹³ The procedure of pooled voting consisted of separate votes being taken by both Locals and then the votes were pooled giving a united tabulation. In the subject case, because Local 18 had a larger membership than Local 155, they could control the results of the vote regarding strike or ratification issues and Local 155 would be bound.

ployer a letter to this effect.¹⁴ Union Negotiator Michael Scarselletta also testified in the proceeding and agreed with the admissions of LaBrum. Further, LaBrum admitted that separate bargaining agendas for Local 18 and Local 155 were submitted to the Respondent at the inception of negotiations, that each Local union received a last best contract offer that was independently considered, and thereafter separate collective-bargaining agreements were executed with the Respondent.

For all of the above reasons, I reject the General Counsel's position that Local 18 and Local 155 were engaged in joint bargaining to sustain their argument that Local 155 employees became unfair labor practice strikers similar to Local 18 members who were employed in the pulp mill and were not notified about nor permitted to negotiate over the Respondent's purchase of hardwood kraft pulp at the inception of the strike.

C. *The 8(a)(1) and (3) Allegations*

1. Elimination of the pcc oiler classification

The General Counsel alleges that the elimination of the pcc oiler classification was not only undertaken without notice and bargaining with Local 155, but was also eliminated because of union animus.

In *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983). In *Manno Electric*, 321 NLRB 278 fn. 12 (1996), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in the protected activity.

I am not persuaded under *Wright Line*, that the General Counsel has made a strong showing that the Respondent was motivated by antiunion considerations when it allegedly eliminated the pcc oiler classification.

In May 1997, the Respondent suspended Local 155 employee Bernard Palmer for a period of four months because he allegedly engaged in acts of sabotage by shutting down a valve to the head box causing the flow of papermaking fiber to be interrupted and the machine to stop operations. Local 155 filed a grievance over the suspension, which ultimately was referred to arbitration. The arbitrator held that the suspension was not for just cause and awarded backpay and loss of seniority during

the period Palmer was out of work (GC Exh. 64). The Respondent abided by the arbitration award and placed Palmer in the position of a pcc oiler that was responsible for lubricating certain valves in a particular portion of the mill. Palmer credibly testified that while he was paid a salary commensurate with other full-time Local 155 employees who were classified as basement or machine room oilers, his job responsibilities only took him approximately 1 hour per day. Palmer also acknowledged that after he returned to work from the 1996 strike, he was classified as a basement oiler and performed the duties and responsibilities of that position in addition to handling the duties of the pcc oiler job that took approximately 10 percent of his time.

The evidence confirms that the position of the pcc oiler never existed in the mill until the Respondent assigned Palmer to the job after the arbitrator determined that his suspension was not for just cause. Palmer was placed in that position not because of union animus but due to the Respondent's continued concern that he had engaged in acts of sabotage and they did not want to return Palmer to that section of the mill where the alleged acts occurred. Significantly, Local 155 never protested or filed a grievance over Palmer's placement in the pcc oiler position after the issuance of the arbitrator's decision. The Respondent argues that while the pcc oiler classification still exists it determined not to fill the position during the strike. After the strike ended the duties could be performed more efficiently by four oilers who possessed the same skills. Indeed, as of the date of the hearing, the pcc oiler position has not been independently filled.

The General Counsel alleges that the Respondent still harbored animus against Palmer due to the arbitration and his service as Local 155 president between 1993 and 1997. First, as I previously found earlier in the decision, the pcc oiler position has not been eliminated. In this regard, at the commencement of the strike when Palmer and other Local 155 employees' ceased work, there was no need to fill the pcc oiler position, as the duties were not required. Once the strike ended, the pcc oiler duties could be performed as part of the responsibilities of the four oiler position. Accordingly, as certain oiler room employees were recalled after the strike, the employee with the greatest seniority under the parties' recall agreement could adequately perform the duties of the pcc oiler position. Thus, the General Counsel has not established that the pcc oiler position has been eliminated nor have they proved that Palmer was placed in the pcc oiler position because of his union activities.

Therefore, contrary to the General Counsel, I find that the pcc oiler position still exists but has not been filled since the strike ended due to legitimate business reasons unrelated to any union activities of Local 155.

Therefore, I recommend that the portion of the General Counsel's complaint that alleges that the pcc oiler position was eliminated because of union animus be dismissed.

2. Refusal to recall Bernard Palmer

The General Counsel alleges in paragraph 13(c) of the complaint that the Respondent failed to recall striker Bernard Palmer to an available oiler position because of his union activities.

¹⁴ I also note that no reference to pooled voting was contained in LaBrum's pretrial affidavit provided to the General Counsel prior to the issuance of the complaint.

As discussed above I am not persuaded under *Wright Line* that the General Counsel has made a strong showing that the Respondent was motivated by antiunion considerations in originally assigning Palmer to the pcc oiler position. Likewise, I am not convinced that the reason Palmer was not recalled to the available oiler position in January 2002 was due to his union activities.

In this regard, although Palmer testified that he had more seniority than coworker Peter Peceu who was recalled to the vacant machine oiler position in January 2002, Palmer admitted that Peceu was listed ahead of him on the updated June 13 Department Seniority list and the machine oiler schedule. Local 155 Secretary/Treasurer Ronald Gates testified that Peceu was the most senior laid-off worker on the prestrike department seniority list and the machine oiler schedule and in accordance with those schedules he was recalled ahead of Palmer (GC Exh. 90).

On November 26, Local 155 and the Respondent negotiated a recall procedure that governed the recall rights of "unreinstituted strikers" regarding the strike (GC Exh. 7).¹⁵ The Respondent, in accordance with that schedule, determined that Peceu was the senior machine room oiler on the Department Seniority list and he was recalled ahead of Palmer. While the General Counsel alleges that Palmer is senior to Peceu (GC Exh. 12), and should have been recalled first to the vacant machine room oiler position, this argument is nothing more than a differing and arguable interpretation over the meaning of the recall agreement. Indeed, both Palmer and Gates agree that if the department seniority list and the machine oiler schedule are relied on for the recall of the most senior oiler, then Peceu should have been recalled in January 2002. In any event, the parties differing and arguable interpretation of the recall agreement does not rise to the level of an unfair labor practice. Moreover, as discussed above, I am not convinced that Palmer was originally placed in the pcc oiler position because of his union activities nor am I persuaded that Palmer was not recalled to the vacant oiler position in January 2002, because of union animus. Rather, I find that the Respondent followed the parties' recall agreement when selecting Peceu (a coworker, union member and striker) as the most senior oiler to the available vacant machine room oiler position. Notably, Local 155 did not file a grievance contesting their interpretation of the recall agreement.

For all of the above reasons, I recommend that paragraph 13(c) of the complaint be dismissed.

3. Refusal to reinstate some of the strikers

The General Counsel alleges in paragraph 12(f) of the complaint that the Respondent has failed and refused to reinstate some of the striking employees, and has delayed the reinstatement of other striking employees to their former positions of employment due to their union activities.

Based on my finding above that the June 16 strike commenced and remained at all material times an economic strike, I am un-

¹⁵ The recall agreement at II(C) states in pertinent part: "The updated Department Seniority list dated June 13, 2001 and, where appropriate, the last permanent department schedule will be used to identify the senior qualified employee to fill the permanent vacancy."

able to find that the striking employees were delayed or not reinstated to their former positions of employment due to their union activities. Rather, I find that the Respondent properly recalled unreinstated economic strikers in accordance with the negotiated November 26 recall agreements (GC Exhs. 6 and 7).

Therefore, I recommend that paragraph 12(f) of the complaint be dismissed.

D. Respondent's Affirmative Defenses

1. The allegations in paragraph 11 of the complaint are time barred

The Respondent contends that the General Counsel's allegation in paragraph 11(a) of the complaint is barred by the statute of limitations in section 10(b) of the Act. The complaint alleges that the Union did not become aware of the subcontracting of the pulp mill until November 14, thus making the third amended charge in Case 3-CA-23461-1 filed on May 6, 2002, timely filed within 6 months of the Union learning of the unlawful conduct. Contrary to this position, the Respondent argues that the Union was aware as early as June and July 2001 through newspaper articles that it had contracted to purchase pulp on the open market and accordingly, the third amended charge is untimely filed.

I am not persuaded that notification through the newspaper satisfies the Respondent's obligation to give notice to a collective-bargaining representative when changes in conditions of employment are contemplated. The record confirms that it was not until the November 13 collective-bargaining meeting and reaffirmed in writing on November 14 (GC Exh. 37) that the Respondent informed the Union that the pulp mill would be shut down for the foreseeable future and hardwood kraft pulp was being purchased on the open market.¹⁶

Therefore, while the alleged violation of subcontracting the pulp mill took place more than 6 months before the filing of the third amended charge, the union did not have official notice of the subcontracting until a date within the 6-month period. The limitation period does not begin to run until the party filing the charge knows that an unfair labor practice has occurred. See *NLRB v. Electrical Workers*, 827 F.2d 530, 533 (9th Cir. 1987).

Under these circumstances, the Respondent's argument that the third amended charge filed on May 6, 2002, was untimely filed is rejected.

2. The hiring of permanent replacements

The Respondent contends that they lawfully hired permanent replacements before November 14, the date the General Counsel claims that Local 18 had knowledge of the subcontracting of the pulp mill as alleged in paragraph 11 of the complaint.

The Union argues that the hiring of the permanent replacements commencing on October 15 prolonged the economic strike and converted it into an unfair labor practice strike. Additionally, the Union asserts that the Respondent hired the per-

¹⁶ Contrary to Respondent's argument in brief, I do not find that their October 4 letter addressed only to employees concerning the terms of a last-best contract offer and questions and answers regarding their status during an economic strike serves as notice to the Union when changing conditions of employment (GC Exh. 35).

manent replacements in such a way as to mislead it, and therefore contests the legitimacy of their hire. At trial, I rejected this argument but permitted the Union to make an offer of proof.

The only portion of the General Counsel's complaint that references permanent replacements is found in paragraph 12(d).¹⁷ It is, however, the allegations in paragraph 12(c) of the complaint that assert the strike was prolonged by the subcontracting of the pulp mill rather than the hiring of permanent replacements. Indeed, at no place in the complaint, does the General Counsel allege that the Respondent's hiring of permanent replacements violated either Section 8(a)(1), (3), or (5) of the Act. Thus, I find that the Union is foreclosed from attempting to expand the parameters of the General Counsel's complaint. Since the complaint does not allege that the hiring of permanent replacement violated the Act in any manner, no such finding will be made. *Kimtruss Corp.*, 305 NLRB 710, 711 (1991) (the charging party cannot enlarge upon or change the General Counsel's theory of the case). Lastly, I note that the Union withdrew the identical allegation in the May 6, 2002, amended charge that alleged since October 15, the Employer misrepresented the status of replacement employees and thereby terminated the employment of striking employees (CP Exh. 2(c)).

The Union further argues that the Respondent's replacement of a union-security provision in the proposed contract with the maintenance of membership clause at the November 13 collective-bargaining session prolonged the economic strike and converted it into an unfair labor practice strike (R. Exh. 42). As with the Union's argument regarding permanent replacements, I also rejected testimony on this subject but permitted the Union to argue their position in brief. Once again, I find that the Union is attempting to expand the parameters of the General Counsel's complaint that does not allege the economic strike was prolonged based on Respondent's maintenance of membership proposal made during collective bargaining. I also note that the Union was presented with a last best contract offer on November 13 that included the maintenance of membership proposal which it initially rejected on November 19, but after reconsideration it was accepted, and the strike ended on November 21. Thus, for this additional reason, I reject the Un-

ion's position that the strike was prolonged because of the maintenance of membership provision. Further, in the General Counsel's letters dated January 30 and May 28, 2002, that addressed the Union's appeal and reconsideration of allegations of bad faith bargaining both before and after June 15, no finding of bad-faith bargaining was made by the General Counsel (GC Exh. 1).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) and (5) of the Act by its refusal to bargain in good faith with the Union in an attempt to reach an accommodation of interests in response to the Union's request for relevant information that the Respondent considers confidential.
4. Respondent did not eliminate the pcc oiler classification and therefore, did not violate Section 8(a)(1) and (5) of the Act.
5. Respondent had no obligation to negotiate over the subcontracting of its pulp mill and therefore, did not violate Section 8(a)(1) and (5) of the Act.
6. The Union did not bargain jointly with Respondent for the purpose of negotiating the parties' collective-bargaining agreement.
7. The economic strike that commenced on June 16, 2001, was not prolonged by the Respondent's subcontracting of the pulp mill nor did it convert to an unfair labor practice strike.
8. Respondent did not engage in violations of Section 8(a)(1) and (3) of the Act by refusing or delaying the reinstatement of striking employees to their former positions.
9. Respondent did not engage in violations of Section 8(a)(1) and (3) of the Act by eliminating the pcc oiler classification or failing to recall striker Bernard Palmer to an available oiler position.

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.

[Recommended Order omitted from publication.]

¹⁷ Par. 12(d) alleges: At the time that the strike described above in par. 12(b) converted to an unfair labor practice strike, Respondent had not permanently replaced the striking employees.