United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: December 13, 1999

TO : Rochelle Kentov, Regional Director
Region 12

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: WPLG-TV (Post Newsweek Station Fl.)
Case 12-CA-20022

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This Section 8(a)(5) and (1) case was submitted for advice as to whether the Employer had a duty to bargain about its decision to subcontract the work of filming daily traffic reports.

FACTS

WPLG-TV Post Newsweek Station (the Employer) is a Delaware corporation engaged in the operation of a television station from its facilities in Miami and Ft. Lauderdale, Florida. The Employer broadcasts news, local programming, national programming supplied by ABC, and other nationally syndicated programs over the airwaves of southern Florida.

The most recent collective-bargaining agreement between the Employer and the International Cinematographers Guild Local 600, IATSE (the Union) expired on July 23, 1994. Nevertheless, the parties have continued to operate under the terms of that agreement.

Article III, Section 3 of the agreement identifies bargaining unit work as follows:

> It is understood that news film and news tape camera work will, except as set forth below, be

> performed only by employees in the bargaining unit. This work shall include the following duties: (a) Operate and maintain film cameras and associated sound record equipment outside the central control room. (b) Editing of film and operation and maintenance of film editing equipment. (c) Operation of electronic television cameras for news gathering and public affairs purposes, and editing of videotape produced by such cameras.
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> This provision, however, shall not apply in the event of: (a) An emergency, or (b) When bargaining unit employees are not "available." Employees shall be deemed "available" even though calling them in may result in overtime or premium payment. (c) With respect to public affairs, programming and promotion: (1) promos of news shows, promos of personalities, and promos of programming shows. (2) sales shows, commercials, and demo tapes.

Article XVIII of the agreement further describes bargaining unit work as follows:

> While the Company will continue its practice of using stringers, the Company will give its bargaining unit employees the first opportunity to perform work within Dade and Broward Counties when it is necessary to use a photographer to obtain news material. To expedite newsroom operations, the Assignment Desk will call-in up to but not less than three (3) camerapersons (the cameraperson closest to the proximity will be called first) to cover breaking news whenever the need arises. In the event the three (3) camera-persons called are unavailable, then, the Company reserves the right to assign a stringer to said breaking news. The Company will give due consideration to assigning a photographer to out-of-town trips to accompany producers and/or reporters outside of said counties.

Finally, Article V, Section 11 of the agreement states, with respect to "Aerial Flights," that:

> If an employee is required to photograph from any aircraft, he shall be paid an additional straight time pay in excess of the applicable rate as an additional premium (minimum of $30.00) for any flying hour or fraction thereof.

The Employer has traditionally leased a helicopter, referred to as "Sky-10," for the purpose of covering local breaking news stories that are not accessible from the ground. The Employer occasionally uses Sky-10 to cover newsworthy traffic stories, such as large accidents or holiday traffic. However, the Employer does not use Sky-10 for daily traffic reporting.

Until the events discussed below, the Employer did not provide live traffic coverage as part of its news program. Instead, the Employer provided coverage through a news reporter who was stationed at the Employer's facility and reported the daily traffic with the aid of maps, graphics, and scanners.[1] Around June 1998, the Employer hired William Pohovey as its News Director. Prior to Pohovey's arrival, there had been no full-time assignment for the operation of camera equipment on Sky-10. At that time, when the Employer's news desk dispatched Sky-10, a cameraperson would meet the helicopter at a designated area before it proceeded to the news scene. After Pohovey's arrival, the cameraperson assigned to operate the camera equipment on board Sky-10 became a permanent full-time position. Currently, the bargaining unit employee who operates the camera equipment on Sky-10 works from 9:30 a.m. to 6 p.m. In order to depart with Sky-10 immediately upon dispatch, this individual is stationed with the helicopter at Tamiami Airport, in southwest Dade County.

In the winter of 1998, Pohovey recommended to General Manager Garwood that the station provide live traffic coverage. On or about December 10, 1998, Garwood executed an agreement with Metro Networks Communications, Limited Partnership (Metro), in order to receive video traffic images intended for viewing during news programs that were broadcast from 5:30 a.m. to 7 a.m. and 5 p.m. to 6:30 p.m. These images were also to be used as cut-ins during the broadcast of "Good Morning America," which airs from 7 a.m. to 9 a.m. The Employer's agreement with Metro became effective on December 28, 1998.

Metro obtains daily traffic reports with stationary traffic cameras located throughout Dade and Broward Counties and a mobile camera on board a helicopter. Metro does not provide these services exclusively to the Employer. Rather, it makes the same video images available to other local news stations, which use them as part of

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[1] Under this previous arrangement, no camerapersons, and therefore no unit employees, were used in connection with the provision of daily traffic information.

their programming. The Employer does not employ the camerapersons who operate the Metro helicopter camera.

Under the agreement with the Employer, Metro retains control of the helicopter flight pattern at all times. The Employer cannot dispatch the Metro helicopter. However, if the Employer obtains information about a traffic related news story, it can communicate with the Metro dispatcher who may, in turn, dispatch the helicopter to the scene. The agreement allows the Employer to use video images of non-traffic news stories should the Metro helicopter cover such an event. Consequently, the Employer has used video images obtained by the Metro helicopter in connection with daily traffic and non-traffic related news stories. Specifically, the Employer used Metro for one news story about an emergency landing of an aircraft at Miami International Airport in early 1999, and for another feature on the Everglades brush fires in the spring of 1999.

In exchange for the daily traffic reporting services, the Metro agreement obligates the Employer to provide Metro with eleven commercial spots throughout the week. According to the Employer, the value of this advertising is $6,833 per month (or $82,000 per year). Based on the fact that it uses Metro 80 hours a month,[2] the Employer asserts that it costs $85 for each hour of Metro's flight time. The Employer asserts that its lease rate for Sky-10 is $516 per hour.

According to Pohovey, the addition of live traffic reports improves the news program as well as the Employer's ratings by capturing a larger viewing audience. This allows the Employer to become more competitive with other local news stations that already provide daily live traffic reports. The Employer admits that it did not negotiate with the Union over the decision to provide contracted daily traffic coverage.

On March 24, 1999, the Union filed the instant charge. The charge alleges, in relevant part, that the Employer violated Section 8(a)(5) and (1) by on or about January 7, 1999, unilaterally subcontracting unit work to an independent helicopter company to photograph traffic and other news items. It further alleges that bargaining unit employees previously performed such work.

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[2] The 80-hour per month figure appears to refer to the flight time of the Metro helicopter.

ACTION

We conclude that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) and (1) of the Act by failing to bargain over its decision to subcontract bargaining unit work.[3]

Sections 8(a)(5) and (d) of the Act obligate an employer to bargain collectively with the representative of its employees over "wages, hours, and other terms and conditions of employment." In creating this obligation, Congress limited the subjects of mandatory bargaining to those "issues that settle an aspect of the relationship between the employer and the employees."[4] Consequently, in First National Maintenance Corp. v. NLRB,[5] the Supreme Court found that employers have no obligation to bargain about management decisions that involve, for example, "choice of advertising and promotion, product type and design, and financing arrangements."

Initially, we note that the Employer did not have to bargain about its decision to provide live traffic coverage. In KIRO, Inc.,[6] the complaint alleged, in part, that the employer, a television station, violated Section 8(a)(5) by failing to bargain with the union about the decision to produce a regular news program for broadcast on the channel of an independent television station. In 1991, the employer had decided to add a half-hour news program at the 10 p.m. time slot. Because CBS required the station to run network programs at that time, the employer contracted with another station to broadcast the 10 p.m. news show even though the program was produced at the employer's

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[3] Because the contract has expired and the Employer is not willing to take grievances to arbitration, deferral under Collyer Insulated Wire, 192 NLRB 837 (1971), and United Technologies Corp., 268 NLRB 557 (1984), is inappropriate. Cf. Clarkson Industries, 312 NLRB 349, 353 (1993)(where union filed grievance and employer argued matter should be deferred to grievance-arbitration process, issue of subcontracting out unit work was to be deferred to the parties' contractual grievance-arbitration procedures).

[4] Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178 (1971).

[5] 452 U.S. 666, 676-677 (1981).

[6] 317 NLRB 1325 (1995).

facility and by its personnel. The Board concluded that the employer did not have an obligation to bargain over the decision to produce the show.[7] The Board characterized the decision to add the 10 p.m. news program as a choice of product type or method of product distribution that was outside the realm of mandatory bargaining because it had only a limited, indirect impact on employment.

Here, the Employer decided to add live traffic coverage to its news programs. This managerial decision is very similar to that made by the employer in KIRO. Thus, as a decision involving choice of product type, it is not a mandatory subject of collective bargaining, and the Union does not contend otherwise. The issue then becomes whether the Employer was obligated to bargain over the decision to use Metro, rather than unit employees, to provide the live traffic coverage. We conclude that the Employer had such an obligation under two theories.

I. Fibreboard

In Fibreboard Paper Products Corp. v. NLRB,[8] the Supreme Court held that an employer's subcontracting of its maintenance work in such a way that it merely replaced existing employees with those of an independent contractor who did the same work under similar conditions of employment, was a mandatory subject of bargaining. The Court reasoned that, since the decision to subcontract involved no capital investment, and had not altered the company's basic operation, requiring the company to bargain about the decision "would not significantly abridge the company's freedom to manage the business."[9] Moreover, since the decision turned on labor costs, it was "peculiarly suitable for resolution within the collective-bargaining framework."[10]

In Torrington Industries,[11] the employer used two drivers to haul sand and stone for one of its nine plants.

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[7] Id. at 1327.

[8] 379 U.S. 203 (1964).

[9] Id. at 213.

[10] Id. at 214.

[11] 307 NLRB 809 (1992).

The employer laid off one driver, transferred his truck to another facility, and required the second driver to work overtime. The employer later transferred that driver's truck to another facility, offered that employee a choice between layoff or reassignment, and subcontracted all the hauling work. The Board found the subcontracting decision was a mandatory subject of bargaining.[12] It held that, in order to determine whether subcontracting similar to that conducted in Fibreboard was a mandatory subject, it was not necessary to apply the tests set out in Dubuque Packing Co.,[13] which apply to "plant relocations which potentially involve complicated capital decisions regarding changes of plant facilities."[14] As to subcontracting decisions that involve only the substitution of one group of employees for another, the Board found that the "Supreme Court has already determined" that such decisions "do not involve 'a change in the scope and direction of the enterprise' and thus are not core entrepreneurial decisions which are beyond the scope of the bargaining obligation defined in the Act."[15] The Board said that it was not fashioning a per se rule that all subcontracting decisions are mandatory subjects of bargaining, but rather was dealing only with cases where virtually all that was changed through subcontracting was the identity of the employees doing the work.[16]

In Furniture Rentors of America,[17] the employer defended the subcontracting of its furniture delivery work

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[12] Id. at 811.

[13] 303 NLRB 386 (1991), enfd. in relevant part 1 F.3d 24 (D.C. Cir. 1993), cert. granted 511 U.S. 1016 (1994), writ dismissed 511 U.S. 1138 (1994).

[14] Torrington Industries, 307 NLRB at 810. Accord: Holmes & Narver, 309 NLRB 146 (1992)(employer's decision to lay off employees to achieve greater efficiency deemed a mandatory subject of bargaining).

[15] Torrington Industries, 307 NLRB at 810 (citations omitted).

[16] Id. at 811. See also Power, Inc., 311 NLRB 599 (1993), enfd. 40 F.3d 409 (D.C. Cir. 1994); Acme Die Casting, 315 NLRB 202 (1994).

[17] 311 NLRB 749 (1993), enf. denied in relevant part 36 F.3d 1240 (3d Cir. 1994).

on the ground that the deliveries were slow, the goods were damaged, customers complained, and there was theft. The Board rejected the defense and followed Torrington Industries. It found in substance that "labor costs," as the term is used in cases such as Fibreboard, is shorthand for matters that are amenable to resolution through the collective-bargaining process, and that the matters about which the employer was concerned were all appropriate subjects for collective bargaining.

In this case, the Employer's subcontracting of the traffic helicopter camera work was similar to the subcontracting in Fibreboard, i.e., the replacement of existing employees with those of an independent contractor to do bargaining unit work. This decision did not involve a change in the scope or direction of the enterprise since the Employer was still engaged in the business of broadcasting a news program.[18] It is irrelevant that the instant case does not present the exact Fibreboard fact pattern. Although the subcontractor's employees on board the Metro helicopter will not be using the Employer's leased facility, i.e., Sky-10, this difference is insufficient to preclude a Fibreboard/Torrington analysis where the decision otherwise meets the Fibreboard criteria.[19]

Moreover, unlike the employees in Torrington and Fibreboard, the subcontractor's employees here are not performing work that was previously performed by the unit employees, since the Employer had never performed this type of work. However, this does not alter the fact that the essential nature of the subcontracting here was a mere substitution of one group of employees for another to perform bargaining unit work. Had the Employer not contracted this work out to Metro, the work clearly would have been unit work under the terms of Article III, Section

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[18] See KIRO, Inc., 317 NLRB at 1327 fn. 7 (the television station-employer's decision to broadcast an additional news program did not involve a change in the scope or direction of the enterprise).

[19] See, e.g., Pertec Computer, 284 NLRB 810, 811 (1987), supp. decision in 298 NLRB 609 (1990), enfd. as modified sub nom. Olivetti Office USA, Inc. v. NLRB, 926 F.2d 181 (2d Cir. 1991), cert. denied 502 U.S. 856 (1991) (subcontracting off-site considered Fibreboard subcontracting where subcontractor's employees were doing essentially the same work).

3 of the collective-bargaining agreement. Therefore, this case is consistent with AMCAR Div., ACF Industries,[20] where the Board found that an employer had an obligation to bargain over its decision to subcontract the work of installing a guard tower even though the unit employees had not previously performed such work. In reaching its conclusion, the Board noted that the unit employees had performed similar work - construction of buildings smaller than the watchtower - in the past and that the new work "involved skills and experience which bargaining unit employees possessed."[21]

In the present matter, the unit employees, although they have not previously engaged in daily helicopter traffic reporting, have had, and continue to have, significant involvement with helicopter camera work. In addition to the stories that Sky-10 is normally dispatched to cover, Sky-10 has been dispatched to cover newsworthy traffic stories, such as holiday traffic. Therefore, this situation presents an even stronger case than that found in ACF Industries because the unit employees previously performed work identical in nature to that subcontracted out to Metro. Thus, the Employer engaged in Fibreboard subcontracting and was obligated to bargain over its decision to use Metro.

Our conclusion is not affected by the Employer's assertion that it would be unable to provide daily traffic reporting from a helicopter without the services provided by Metro because the contract rate for operating Sky-10 of $516 per hour far exceeds the cost for using Metro, which is approximately $85 per hour. In making this claim, the Employer has raised the possibility that the decision concerning the photography work was amenable to resolution through the bargaining process.[22] The Union may have been willing to offer labor cost concessions in order to eliminate the disparity in contract rates for the use of a

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[20] 234 NLRB 1063, 1064 (1978), enfd. as modified 596 F.2d 1344 (8th Cir. 1979).

[21] Id.

[22] See Rock-Tenn Co., 319 NLRB 1139 fn. 2 (1995), enfd. 101 F.3d 1441 (D.C. Cir. 1996)("the desire to reduce costs involves factors that are within the union's control and therefore are suitable for resolution within the collective bargaining framework," where a Board majority used a Fibreboard analysis).

traffic helicopter. Therefore, the decision to contract the work out to Metro was a mandatory subject of bargaining.[23] By failing to bargain with the Union over this decision, the Employer violated Section 8(a)(5) and (1) of the Act.[24]

II. Dubuque Packing

The Region should also argue in the alternative that even if a Fibreboard/Torrington analysis is inapplicable here, the Employer's decision to obtain live helicopter traffic coverage through Metro was subject to mandatory bargaining under Dubuque Packing.

In Dubuque Packing,[25] the Board set forth a test for determining whether a work relocation decision is a mandatory subject of bargaining. The General Counsel has the initial burden of showing that the decision was "unaccompanied by a basic change in the nature of the employer's operation." The employer then has the burden of rebutting the General Counsel's prima facie case or proving certain affirmative defenses.[26] Where the Board concludes that the employer's decision concerned the "scope and

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[23] Cf. Oklahoma Fixture Co., 314 NLRB 958, 960 (1994), enf. denied 79 F.3d 1030 (10th Cir. 1996), where the Board held that the employer's decision to use a subcontractor as a "buffer" to insulate it from legal liability did not involve labor costs and instead involved "considerations of corporate strategy fundamental to preservation of the enterprise." The Board found that the case presented the "unusual situation" referred to in Torrington Industries, i.e., where a non-labor cost reason provided a basis for concluding that the decision to subcontract was not a mandatory subject of bargaining.

[24] There is no evidence that the Employer gave the Union or the unit employees any advance notice that it was considering to use Metro for the purpose of daily traffic coverage. Because the decision to use Metro was presented to the Union as a fait accompli, it is irrelevant that the Union failed to request bargaining over this decision. See, e.g., Intersystems Design Corp., 278 NLRB 759 (1986).

[25] 303 NLRB at 391.

[26] Id.

direction of the enterprise," there will be no duty to bargain over the decision.[27] The employer may also avoid bargaining if it demonstrates that (1) labor costs were not a factor in the decision, or (2) even if labor costs were a factor, the union could not have offered labor cost concessions that could have changed the employer's decision.[28]

Applying the Dubuque test, we conclude that there has not been a significant change in the nature or direction of the business. The Employer continues to broadcast a news program, and the addition of live traffic images has not changed this. Having established a prima facie case, we must next determine whether there is probative evidence to establish either of the Dubuque affirmative defenses. The Employer asserts that traffic reporting from a helicopter improves the news programs and allows it to remain competitive with other local news stations that provide the same service. While this explains the Employer's programming decision to add the additional coverage, it does not explain the Employer's decision to use Metro to provide this coverage.

Moreover, the Employer claims that it would not be able to provide the helicopter coverage without the services provided by Metro because Metro costs far less than Sky-10. The Employer points to its claim that the advertisements the Employer carries for Metro have a value of $85 per hour while Sky-10 is reported to cost $516 per hour.[29] Such concerns associated with the provision of this service include the wages and benefits of some individual operating a camera from a helicopter, and therefore necessarily are concerns about labor costs. Accordingly, we reject the Employer's claim that its decision was not motivated at least in part by labor costs.

With regard to the second Dubuque defense, the large disparity between the costs of Sky-10 and the Metro helicopter does not automatically foreclose the possibility

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[27] See, e.g., Noblit Brothers, Inc., 305 NLRB 329, 330 (1992); Holly Farms Corp., 311 NLRB 273, 277-278 (1993), enfd. on other issues 48 F.3d 1360 (4th Cir. 1995), affd. 517 U.S. 392 (1996).

[28] See Dubuque Packing, 303 NLRB at 391.

[29] Metro also uses stationary cameras to provide video traffic images. However, the Employer did not raise any concerns with the cost associated with such cameras.

of potentially sufficient wage concessions. Assuming that there are 27 unit employees, that the Employer required Sky-10 for an additional three hours per day in order to provide live traffic coverage during the new time periods,[30] and that the cost for Sky-10 remained at $516 per hour, we conclude that each unit employee would have to take a pay cut of approximately $7 per hour in order to offset the hourly cost of Sky-10 and make its overall operating cost equal that of Metro.[31] Since the average unit employee earns approximately $20 per hour, such a pay cut is not infeasible.[32] "[A]lthough it is not possible to say whether a satisfactory solution could [have been] reached, 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 bargaining."[33] Therefore, the Employer cannot establish its affirmative defense that the Union could not have offered wage concessions sufficient to change the Employer's decision to use Metro. Since the decision was a mandatory subject of bargaining and the Employer did not bargain in good faith regarding the decision to use Metro, it violated Section 8(a)(5) and (1).

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[30] The three-hour per day figure was derived from the daily, non-overlapping flight schedules of Sky-10 and the Metro helicopter.

[31] Factoring in the hazard pay to which unit employees are entitled under Article V, Section 11 of the collective-bargaining agreement ($30.00 per hour of flight time) leads to the conclusion that each unit employee would have to make an additional concession of approximately $0.40 per hour.

[32] Cf. Dubuque Packing, 303 NLRB at 392 fn. 13; Nu-Skin International, 320 NLRB 385, 386 (1995)(union could not offer sufficient labor cost concessions where employer suffered from decreasing product demand and new state-of-the-art facility benefited from production efficiencies; moreover, the necessary labor cost concessions may have required the employees at the closed facility to accept wages below the minimum wage level).

[33] Fibreboard Paper Products, 379 U.S. at 214.

Finally, we concluded that dismissal of the charge was not warranted under Westinghouse Electric Corp.,[34] where the Board held that unilateral subcontracting may not be violative of the Act if there is no significant detriment to the unit employees. In dismissing the complaint, the Board noted that "the record fails to establish that if the subcontracts had not been awarded, Respondent would have either recalled employees in layoff status or assigned overtime work to employees in the unit."[35] The Board also noted that the employer and the union had bargained about subcontracting and agreed that the employer could subcontract work in certain circumstances.

Consistent with Westinghouse Electric, in Louisiana-Pacific Corp.,[36] the Board concluded that the employer did not violate Section 8(a)(5) by subcontracting certain work rather than reopening a lawfully closed plant and recalling laid-off employees to perform the work. A customer of the employer asked it to perform certain work and the employer determined that it would have cost $200,000 to reopen the plant. The employer refused to reopen the plant unless the customer bore the cost. The customer refused to do so. Therefore, instead of reopening the plant, the employer arranged to have a competitor perform the work and, in turn, agreed to perform similar work for the competitor in the future. In dismissing the allegation, the Board held that "the employees would have had no occasion to perform the work ... [and] the employees did not sustain a significant detriment as a result of the Respondent's arrangement with [its competitor]."[37]

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[34] 153 NLRB 443 (1965).

[35] Id. at 447.

[36] 312 NLRB 165 (1993), modified on other grounds 52 F.3d 255 (9th Cir. 1995).

[37] Cf. Acme Die Casting, 315 NLRB at 202 (the Board, in affirming the ALJ, stated that Torrington Industries is not limited to cases where employees are laid off or replaced; the ALJ found that even though no employees were laid off or suffered a reduction in their workweek, these employees lost additional overtime work that they might have enjoyed if the employer had left the work in plant); Dorsey Trailers, Inc., 321 NLRB 616, 617-618 (1996), enf. denied in relevant part 134 F.3d 125 (3d Cir. 1998)(same).

Here, the Employer contends that the decision to use Metro has had no effect on bargaining unit employees in the form of lost work or overtime. However, this case is distinguishable from Louisiana-Pacific since unit employees *have* been adversely affected by the Employer's decision. To begin with, unit employees are deprived of the opportunity to perform unit work. Under the terms of the 1994 collective-bargaining agreement, the definition of unit work would include daily traffic reporting from a helicopter, but unit employees are not performing this work.

In addition, while the Employer did not previously cover daily traffic, Sky-10 was used to cover significant news stories that involved traffic, such as holiday traffic or large accidents. However, during Memorial Day weekend in 1999, Sky-10 was not dispatched to cover the holiday traffic. The Employer also used Metro to cover non-traffic-related stories, such as an emergency landing of an aircraft and brush fires in the Everglades. Sky-10 would normally have been deployed to provide this coverage. Combining all of the preceding facts with the potential loss of overtime to the unit employees, the unilateral subcontracting clearly had a detrimental effect on the unit.

Accordingly, the Region should issue a Section 8(a)(5) and (1) complaint, absent settlement.

B.J.K.