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

Advice Memorandum

DATE: November 15, 2002

TO : Curtis A. Wells, Regional Director
Martha E. Kinard, Regional Attorney
Ralph D. Gomez, Assistant to the Regional Director
Region 16

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

SUBJECT: TYCO Electronics Power Systems
Case 16-CA-21854

530-6050-2575
530-6067-2070-6760
530-6067-4011-1100
530-6067-4022-1100
530-8054-1000
530-8090-6000

This Section 8(a)(5) case was submitted for advice as to whether TYCO Electronics Power Systems (the Employer) violated Section 8(a)(5) by failing to give CWA Local 6260 (the Union) notice of, and an opportunity to bargain over, its decision to subcontract plant maintenance and facility operations work remaining after the Employer had relocated production work and listed the plant for sale or lease.

We conclude that unit maintenance and facility operations work (maintenance work) still existed at the plant after implementation of the subcontracting decision, and thus the decision to subcontract that work constituted a mandatory subject of bargaining under Fibreboard.[1] Therefore, the Employer's failure to provide the Union with adequate notice and an opportunity to bargain over the subcontracting decision violated Section 8(a)(5). The Employer's action was not privileged by exceptions to the subcontracting limitations in the parties' collective-bargaining agreement.

FACTS

The Employer manufactures power supplies for the telecommunications and data networking industries. In December 2000, the Employer purchased the Mesquite, Texas facility at issue from Lucent Technologies. The Employer

[1] Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964).

adopted Lucent's collective-bargaining agreement with the Union, which is effective by its terms from May 31, 1998 through May 31, 2003, and commenced operations at Mesquite in January 2001.

The Union represents Mesquite's production and maintenance employees. Production employees perform manufacturing and associated warehousing and shipping tasks. Maintenance (or "trades") employees work in "Trades Occupation[s]," which Article 3.1(ff) of the collective-bargaining agreement defines as those jobs

> ...in a Trades Occupational Job Classification which [are] associated with the construction, repair and maintenance of tools, machines, equipment, buildings and service systems used in the manufacture of the [Employer's] products and which [are] assigned to an organizational unit functionally responsible for such services.

In addition to performing this contractually defined work of directly supporting production employees, maintenance employees regularly perform air conditioning and heating, lighting, plumbing, facility and machine repair and maintenance, communication line and equipment relocation, and associated tasks in Mesquite's non-manufacturing areas.[2]

On October 4, 2001,[3] the Employer notified the Union of its decision to close the Mesquite plant and relocate the production work to its Matamoros, Mexico plant, because both plants manufactured the same products and the Mesquite facility was too large for the Employer's employee complement and production needs. The Employer employed approximately 25 maintenance employees at the time it announced the decision to close, nine of whom immediately accepted an early release offer.

The Union did not request bargaining over the Employer's decision to relocate the production work to Matamoros and close the Mesquite plant, but did inquire about whether unit maintenance employees' services would be retained until Mesquite was leased or sold. The Employer

---

[2] The non-manufacturing areas house research and development, customer service, and administrative employees.

[3] All dates from October through December are in 2001, and the rest are in 2002.

stated that it was "still exploring its options" in this regard.[4]

On about November 29, Union Vice President Attaway learned that representatives of various maintenance contractors were touring the Mesquite plant. Attaway asked Employer Trades Supervisor Kotwitz, whose responsibilities include facility subcontracts, about these reports. Kotwitz told Attaway that no subcontracts had been awarded, but that the Employer was "exploring its options." Seven maintenance employees were laid off in November.

On December 3, Attaway asked Employer Facilities Maintenance and Services Manager Roelofs for notice prior to any maintenance work being subcontracted. Like Kotwitz, Roelofs replied that no subcontracts had been awarded.

In mid-January, the Employer announced that production and maintenance employees would be terminated in March. Despite Attaway's earlier request, the Employer did not give the Union notice and an opportunity to bargain over this decision. At some point, the Employer and the Union agreed that maintenance employee Sommers would continue to work at Mesquite until approximately mid-April.

On March 15, the Employer terminated its remaining production and maintenance employees. On March 16, Attaway observed numerous subcontractors' trucks in the plant parking lot, and administrative employees have testified that since March 15 subcontractors have performed work previously performed by unit maintenance employees. Attaway telephoned Kotwitz to complain that unit work remained that should not have been subcontracted. Kotwitz replied that the collective-bargaining agreement was a "manufacturing agreement," and that since manufacturing had ceased at Mesquite the collective-bargaining agreement was void. The Union later learned that the Employer used employee Sommers to train subcontractors' employees to perform maintenance work.

On April 5, the Union filed wrongful termination grievances on behalf of each maintenance employee, alleging that unit work still existed and had been subcontracted in

---

[4] According to the Region, the Union delegated effects bargaining to its national officials, and the parties reached an agreement. It is unclear what terms the parties' agreement embodied.

violation of the collective-bargaining agreement.[5] In this regard, Article 8(e) of the collective-bargaining agreement states, in relevant part, that:

> The [Employer] will not subcontract work traditionally performed by trades employees if...a layoff is pending in the affected occupation....
>
> The [Employer] will not subcontract work traditionally performed by bargaining unit trades employees unless one or more of the following conditions exist:
>
> The [Employer] has determined that it is unable to perform the work as economically in its plant. For machine and tool construction and maintenance work, this determination shall be based on a comparison of the Journeyman's wages and indirect labor costs...with the contractor's total costs. For plant construction work...this determination shall be based on a comparison of the Journeymen's wages and indirect labor costs with the contractor's direct and indirect labor costs.
>
> The [Employer] will review and evaluate with the Local Joint Trades Committee, in advance, the costs associated with any subcontracting of trades work.

Article 3.1(m) of the collective-bargaining agreement defines a layoff, in relevant part, as "[a] termination of employment arising out of a reduction in the force due to lack of work."

The Employer has listed the Mesquite plant with a commercial real estate agent for lease or sale. The Employer's research and development, customer service, and administrative employees continue to work at Mesquite pending its lease or sale, at which time the Employer intends to move them to a smaller facility.

---

[5] The grievances are pending at Step 3. However, we agree with the Region that this case is not appropriate for deferral under Collyer Insulated Wire, 192 NLRB 837 (1971), and/or Dubo Manufacturing, 142 NLRB 431 (1963), because the parties' collective-bargaining agreement excludes subcontracting decisions from arbitration, and the Employer has not indicated a willingness to waive that arbitral limitation.

ACTION

We conclude that the Employer's unilateral subcontracting of unit maintenance work after March 15 violated Section 8(a)(5) of the Act. Therefore, absent settlement, the Region should issue complaint.

A. Unit maintenance work existed after production ceased at Mesquite on March 15.

As an initial matter, we conclude that the maintenance work performed by subcontractors after March 15 was bargaining unit work. In doing so, we reject the Employer's argument that under the definition of unit work in Article 3.1(ff), once manufacturing ceased in the plant the bargaining unit of maintenance work ceased to exist. Rather, by virtue of a clearly established past practice, unit maintenance work encompasses more than support of production work.

The Board has not only relied on contractual provisions, but also on past practice to determine what constitutes unit work. For example, in Brotherhood of Locomotive Firemen & Enginemen,[6] the Board affirmed the trial examiner's finding that auditing work became bargaining unit work because the Employer had a longstanding practice of using bargaining unit employees to perform field audits. Therefore, the employer's unilateral assignment of the auditing work to non-unit employees violated Section 8(a)(5).[7]

Here, the maintenance work performed in non-manufacturing areas of the plant similarly had become unit work. In addition to performing maintenance work as defined in Article 3.1(ff), unit maintenance employees regularly performed air conditioning and heating, lighting, plumbing, facility and machine repair and maintenance, communication line and equipment relocation, and associated tasks in Mesquite's non-manufacturing areas.[8] Accordingly,

---

[6] 168 NLRB 677 (1968), enfd. 419 F.2d 314 (D.C. Cir. 1969).

[7] Id. at 677, 680.

[8] The fact that the Employer retained unit employee Sommers until mid-April to train subcontractors' employees supports our conclusion that unit work existed after March 15.

as long as there was maintenance work to be done in the plant after March 15, it was bargaining unit work.

B. The decision to subcontract the unit maintenance work was a mandatory subject of bargaining under *Fibreboard*.

It is well settled that subcontracting work regularly performed by unit employees is a mandatory subject of bargaining.[9] In Fibreboard, the Supreme Court held that the type of contracting out at issue -- the replacement of bargaining unit employees with those of an independent contractor to do the same work under similar conditions of employment -- is a statutory subject of bargaining.[10] The Court, explaining the propriety of its decision to require bargaining over the matter, stated that,

> [t]he Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment.

379 U.S. at 213.

Here, as in Fibreboard, the Employer did not contemplate any capital investment, and merely replaced its employees with those of subcontractors to perform the same work under similar conditions of employment. In addition, the subcontracting did not alter the Employer's basic operation with respect to maintenance work. Rather, maintenance work still needed to be performed at Mesquite, albeit on a reduced scale after March 15.

In Stevens International,[11] the employer had reduced its workforce over time from more than 100 employees to only 11 unit employees. When the employer laid off those remaining unit employees, it continued operating with non-unit employees and supervisors until it finally closed the

---

[9] See, e.g., Public Service Company of Colorado, 312 NLRB 459, 460 (1993), citing Fibreboard, above.

[10] 379 U.S. at 215.

[11] 337 NLRB No. 23 (2001).

plants.[12] The Board majority upheld the ALJ's finding that the employer violated Section 8(a)(5) by failing to give the union an opportunity to bargain over the decision to transfer unit work to non-unit employees before ceasing all operations at its plants.[13] The case did not involve the employer's right unilaterally to close its plants, but rather involved "the legal obligations [flowing] from that decision and the manner in which the decision was implemented."[14] Significantly, the ALJ found that, in spite of the employer's attempts to minimize the amount of unit work done after the unit employees were laid off, "it [was] clear that some such work was done" and that the employer unilaterally retained non-unit personnel to perform it.[15] The ALJ held that the performance of the minimal amount of unit work left after the plant closure was susceptible to negotiation, and that the assignment of this work was a component of the employer's bargaining obligation following its plant closure decision.[16] Accordingly, the ALJ found that the employer's substitution of non-unit personnel to perform the work of laid off unit employees was a mandatory subject of bargaining because it had a clear impact on unit employees.

Applying the principles of Stevens to the instant case, the Employer clearly was obligated to bargain with the Union prior to subcontracting the maintenance work that remained after manufacturing ceased on March 15. The cessation of manufacturing in the Mesquite plant did not alter the Employer's basic operations within the meaning of Fibreboard. As in Stevens, although manufacturing had ceased at Mesquite and far less maintenance work existed after March 15, the performance of that unit work was clearly a matter amenable to bargaining despite the legality of the Employer's unilateral plant closure decision. Therefore, we conclude that the Employer's decision to subcontract bargaining unit maintenance work

---

[12] Id., slip op. at 6.

[13] Id., slip op. at 1. The Board also found an independent violation concerning the failure to bargain over the effects of the decision to close even after operations had ceased. Id. at 2.

[14] Id., slip op. at 7.

[15] Ibid.

[16] Id., slip op. at 8.

was a mandatory subject of bargaining, and its unilateral decision to subcontract this work violated Section 8(a)(5).[17]

C. The Employer violated the terms of, and cannot defend its conduct by relying on, the parties' collective-bargaining agreement.

We conclude that contrary to the Employer's assertion of privilege, the subcontracting of maintenance work in these circumstances was in fact proscribed by the parties' collective-bargaining agreement.[18]

Initially, we note that Article 8(e) of the parties' collective-bargaining agreement prohibits the Employer from subcontracting "work traditionally performed" by unit maintenance employees "if a layoff is pending in the affected occupation." Article 3.1(m), in turn, defines a layoff as "[a] termination of employment arising out of a reduction in the force due to lack of work." As discussed above, the maintenance work at issue here had become unit work by virtue of past practice. Therefore, it was "work traditionally performed" by unit maintenance employees, and is governed by Article 8(e) of the parties' agreement. Since employees were laid off as a result of the

[17] In addition, we agree with the Region that the Employer deliberately concealed from the Union its intention to subcontract the bargaining unit work. Despite Union requests for advance notice of any such plans, the Employer repeatedly avoided its bargaining obligation by telling the Union it was "exploring its options." This conduct deprived the Union of an opportunity to bargain about the decision to subcontract the unit work, and evidences bad faith bargaining in violation of Section 8(a)(5). See Pennsylvania Energy Corp., 274 NLRB 1153, 1157 (1985) (employer's concealment from union of nature and extent of subcontracting arrangement deprived union of opportunity to bargain over subcontracting decision and its effects, and was indicative of a lack of good faith bargaining which was "clearly violative" of Section 8(a)(5)).

[18] See, e.g., E.R. Steubner, Inc., 313 NLRB 459, 459 (1993) (employer violated Section 8(a)(5) by subcontracting work to a nonunion company in violation of contractual prohibition of such subcontracting, where no evidence shown that union had consented to violation of the contract provision).

subcontracting of unit maintenance work, that subcontracting was plainly proscribed by the parties' collective-bargaining agreement.[19]

We reject the Employer's contention that Article 8(e) privileged its actions because it had "determined" that it could perform the work more economically by subcontracting. Thus, we note that this provision is qualified by the requirement that the Local Joint Trades Committee "review and evaluate...in advance...the costs associated with any subcontracting of trades work." (Emphasis added.) It is undisputed that the Committee was not convened prior to the Employer's subcontracting. Therefore, even if subcontracting the maintenance work was more economical, the Employer failed to review and evaluate its decision with the Committee in advance of doing so.

We also find inapposite the Employer's further contention that the provision concerning the Committee is of no effect, since the Committee had not been convened in more than three years, during which time the Employer had utilized subcontractors. First, it appears that the Employer had previously utilized subcontractors in circumstances different than those here. No prior subcontracting resulted in the layoff of unit employees; rather, any subcontractors' employees worked alongside and in addition to unit employees. Second, even assuming that the Union failed to invoke the provision concerning the Committee when the Employer previously subcontracted, the Board does not construe a party's past acquiescence to unilateral changes as a waiver with respect to present unilateral action.[20] Thus, the Employer's assertion that it

---

[19] Cf. Island Creek Coal, 289 NLRB 851, 851 (1988), enfd. 879 F.2d 939 (D.C. Cir. 1989), where the Board dismissed a Section 8(a)(5) allegation, holding that the employer had lawfully subcontracted work pursuant to a detailed subcontracting provision which "specifically [set forth the parties'] respective rights and duties concerning subcontracting." Unlike there, the Employer here acted contrary to the applicable subcontracting restrictions.

[20] See, e.g., Roll & Hold Warehouse Distribution Corp., 325 NLRB 41, 42 (1997), enfd. 162 F.3d 513 (7th Cir. 1998), citing NLRB v. Miller Brewing Co., 408 F.2d 12, 15 (9th Cir. 1969) (Board rejected employer's defense to Section 8(a)(5) allegation that union, by acceding to unilateral changes in various other working conditions over the years, had waived its bargaining rights; employer's contention was

was privileged by the contract to subcontract out of economic necessity is without merit.

Finally, we reject the Employer's contention that the collective-bargaining agreement did not limit subcontracting resulting from a plant closure decision. This argument speciously tries to distinguish a plant closure, which is not mentioned in the subcontracting limitations of Article 8(e), from a layoff, which specifically is. Regardless of whether the contract limited subcontracting for a plant closure, the wind-down of operations in anticipation of a plant closure here resulted in the layoff of unit employees when there was unit work remaining in the plant. As discussed above, subcontracting that results in the layoff of unit employees is specifically proscribed by the contract.

D. Conclusion

In sum, we conclude that unit maintenance work still existed after March 15, and accordingly the Employer's decision to subcontract that work constituted a mandatory subject of bargaining under Fibreboard. Thus, the Employer violated Section 8(a)(5) because it failed to provide the Union with adequate notice and an opportunity to bargain over its subcontracting decision and, in fact, concealed its plans from the Union, which itself evidences bad faith bargaining. We further conclude that the Employer's unilateral action was not privileged because it was in derogation of its contractual obligations concerning subcontracting. Therefore, absent settlement, the Region should issue complaint.

B.J.K.

"in conflict with long-established precedent that a mere failure to invoke bargaining rights over particular changes in the past does not represent a waiver of such rights over other changes in the future"). See also E.R. Steubner, 313 NLRB at 459, and Johnson-Bateman Co., 295 NLRB 180, 188 (1989).