

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

# Advice Memorandum

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TO : James J. McDermott, Regional Director  
Region 31

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice 530-6067-4001-7500  
530-6067-6001-5025

SUBJECT: Coastal Pacific Foods Distributors 530-6067-4001-9300  
Case 31-CA-22835 530-6067-4001-9800  
530-6067-4011-9500

This case was submitted for advice on whether the Employer violated Section 8(a)(5) since in or around March 1997, when it implemented substantial increases in its use of temporary employees to do bargaining unit work, while during the same period the bargaining unit workforce decreased substantially by attrition.

## FACTS

Coastal Pacific Foods Distributors, Inc. (the Employer), a delivery agent for manufacturers providing goods to domestic military commissaries, operates a warehouse facility in Ontario, California. The Employer began hiring employees at the facility around August 1996, and began operating around mid-September 1996. The Employer receives orders at, and warehouses and transports, packaged food products from the facility as well as two other locations.

The facility employs employees on two shifts, and their job classifications include the following: Receivers unload trucks and tag the products with their proper storage locations; Stockers/downstockers actually store the unloaded products; and Order-selectors remove and prepare stored products for shipment to the military bases. Temporary employees ("temps") perform the same functions, primarily order selecting and downstocking, receive the same supervision, and use the same equipment during the same shifts, as the Employer's employees. However, until around July 1997 the temps were not subject to the performance standards that the Employer had implemented for unit employees in March 1997.

In January 1997, the Employer froze hiring of both unit and non-unit employees at the facility due to a lagging cost-per-case performance compared with the Employer's other warehouses. In March, the Employer decided to use more temps to meet peak demand levels it was then experiencing and could not satisfy because of its hiring freeze.

Facility employees circulated authorization cards on behalf of Teamsters Local 848 (the Union) around the first two weeks of February 1997. On February 14, the Union filed an RC petition with Region 31.<sup>1</sup> After winning an April 4 election, 41 to 16, the Union was certified on April 17. While not specified in the unit description, neither party contends that temps are included.

Negotiations, which are still in progress, began on June 25. The Employer initially proposed unlimited use of temps as needed in its discretion, subject only to conferring with the Union should the number of temps employed exceed 50% of unit employees. The Union rejected this proposal, and did not make a counterproposal as to this. Further, the Union has repeatedly rejected the use of temps in any number, and urged the Employer to use part-time unit employees instead of temps.<sup>2</sup> On November 19, the Employer orally proposed that, should bargaining unit employees be on layoff, they would be offered temporary or part-time work, at a different wage to be determined by the Employer, before it hired temps. At every meeting, the Union has reiterated that it would not accept any use of temps at the facility. The parties are continuing to meet and there has been no declaration of impasse on any issue.

Warehouse employment at the facility had grown rapidly after the facility's August start-up, reaching about 60 by January 1997. The number of bargaining unit employees who work a regular 40-hour week declined after the February 14 petition filing. At the end of each respective month, the

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<sup>1</sup> There is no evidence that prior to February 14, the Employer was aware of organizing activity at the facility.

<sup>2</sup> The Employer subsequently modified this 50% figure to 35% as part of a proposal that was rejected, as recommended by the Union, by an employee vote on July 20.

number of regular employees was as follows: January, 63; February, 62; March, 56; April, 50; May, 48; June, 45; July, 43; and August, 39. Thus, the number of bargaining unit employees was reduced by about 38% between January 31 and August 31, 1997, and there is no evidence that the August number has changed significantly. At the same time, there is no pattern of diminishing "unit work" hours (i.e., hours worked by unit employees plus hours worked by temps) from January through August.<sup>3</sup> Finally, there have been no bargaining unit layoffs due to lack of work.

As noted above, the Employer's use of temps at the facility began in 1996, before the advent of the Union. Prior to July, the Employer's requests for temps typically involved commitments of a few hours to one week of work by approximately 10 to 15 persons. The Employer did not promise employment to any temp longer than one week at a time. However, around the July 20 contract vote, the Employer suddenly hired about 30 temps. The Employer describes its subsequent temp use as having decreased and then stabilized: it used 31 different individuals as temps in July 1997, but only 14 different individuals in the week ending October 12. However, of those 14, about nine worked at the facility "week in and week out" since June, primarily as order-selectors.

On July 21, the Union filed a charge alleging in relevant part<sup>4</sup> that the Employer violated Section 8(a)(1) and (5) of the Act by unilaterally changing the status quo during contract negotiations, i.e. an increased use of

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<sup>3</sup> The Employer admits that virtually all hours, including overtime, worked by temps involve bargaining unit work.

<sup>4</sup> The charge also included Section 8(a)(1), (3) and (5) allegations of discriminating against employees because of Union activity and membership; withholding scheduled raises; disciplining and harassing unit employees; unilaterally implementing a new on-call policy; and discharging an employee. On November 24, 1997, the Union appealed the Region's dismissal of these additional allegations, as well as those in a related case (31-CA-22930).

temps to perform the work of bargaining unit employees. In this regard, a day shift stocker at the facility states that:

starting shortly after the [April 4] election, the Employer started bringing in temps to do jobs formerly done by permanent employees on overtime, including order-selecting, freezer stocking, etc. Usually, there are about 15 temps at the facility on an average day, but at one time there were maybe 30 temps. That happened the day after employees at a Union meeting on July 20 turned down the Employer's contract proposal.

Moreover, a forklift operator at the facility asserts:

Monday, July 21, I observed and counted 30 temps at the facility. I and several other Union supporters spoke with a number of the temps individually; consistently, the temps said that their agency had told the temps that the facility employees were going on strike and that these temps would "permanently replace" us.

The Employer admits that:

in preparing for the "unknown" created by the [July 20] contract vote, which was reported to be accompanied by a strike vote, Coastal Pacific increased its use of temps the week prior to the vote, in order to properly train them in jobs to be done in the event of a strike. Therefore, the number of temps dramatically changed in the days preceding the contract vote, as well.

However, Employer has normally relied on temps because of monthly demand fluctuations of domestic military commissary orders (coinciding with military paydays) and longer-term, seasonal demand fluctuations:

the decision to use temps at Ontario was made in March or April, to meet peak demand levels.... [O]ur inability to meet fluctuating daily demand from customers with a workforce that was being pared down, led to the use of temps and that demand cannot be... accurately predicted until it

hits, even though we know there will be peaks around military paydays.

The Employer also emphasizes its need to fill all orders immediately. The facility receives directly from customers, within one hour prior to the start of each shift, 50% of the orders it must fill during that shift; the remaining orders are received during the first half of the shift. Thus, the Employer contends that its need for flexibility, rather than labor cost considerations, determined its use of temps.<sup>5</sup>

The Employer further assertedly relies on temps, in part, because it has been unable to determine what its stable complement of employees should be. The Employer finally states that a recent increasing trend in bargaining unit order-selectors' performance should lead to decreased use of temps in the future.

#### ACTION

We conclude that the Employer transferred bargaining unit work, and thereby violated Section 8(a)(5) and (1) of the Act, by substantially increasing its use of temporary employees without bargaining after the July 20 rejection of its contract proposal.

It is well established that even in the absence of an existing contractual waiver, it is not always a *per se* unfair labor practice for an employer to subcontract unit work without consulting the unit bargaining representative.<sup>6</sup> An employer's duty to give a union prior notice and an opportunity to bargain normally arises where the employer proposes to take action which will make some change in

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<sup>5</sup> The Employer's unit employee and temp labor costs are both about \$10 per hour.

The Employer further argues that employee absenteeism has increased to unprecedented levels since April, thus accounting for about 340 hours per month of the temps' employment. However, we note that this is only 17% of the 2,000 monthly temp employment hours from June through September.

<sup>6</sup> Westinghouse Electric Corp., 150 NLRB 1574, 1576 (1965).

existing employment terms or conditions within the range of mandatory bargaining.<sup>7</sup> Thus, when subcontracting involves a departure from previously established operating practices, and effects a change in conditions of employment, or results in a significant impairment of job tenure, employment security, or reasonably anticipated work opportunities for those in the bargaining unit, the unilateral elimination of unit work violates Section 8(a)(5).<sup>8</sup>

In Westinghouse, the employer had for many years contracted out unit work, including maintenance and fabrication of many items which could have been manufactured at the employer's plant. The union sought restrictions on this recurrent and frequent practice during three general contract negotiations. However, on each occasion its demands were dropped in the course of bargaining, and ensuing agreements were silent on these practices. Under all the circumstances, the Board held that the subcontracting in question was traditional and motivated solely by economic considerations, did not vary significantly in kind or degree from the established practice, and that the union had the opportunity to bargain about changes in existing subcontracting practices at contract negotiating meetings. Therefore, the employer was not obligated to bargain before subcontracting unit work.

In San Antonio Portland Cement,<sup>9</sup> the employer had an ongoing practice of hiring employees for a 90-day probationary period before they became permanent full-time employees. Without consulting with the union, the employer began to hire temps to perform bargaining unit work for only a few weeks or months. The Board affirmed the ALJ's finding that the hiring of temps without bargaining did not

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<sup>7</sup> Id.

<sup>8</sup> Brown-Graves Lumber Co., 300 NLRB 640, 640-41 (1990), enfd. 949 F.2d 194 (6th Cir. 1991). Cf. Shell Oil Company, 149 NLRB 283 (1964), and Shell Chemical Company, 149 NLRB 298 (1964) (where the 8(a)(5) complaints were dismissed).

<sup>9</sup> San Antonio Portland Cement Co., 277 NLRB 309, 313-14 (1985).

violate Section 8(a)(5) since there was no showing that the employer, by hiring temps, had abandoned its policy of affording new employees a 90-day probationary period before offering them full-time employment. In this regard, the ALJ concluded that temps were hired as a short-term expedient to maintain production until a contemplated layoff.

In contrast, the Board in Brown-Graves Lumber Co.<sup>10</sup> found that an employer's retention of casual labor as nonunit employees represented a material, substantial, and significant change from its prior practices. There, the parties' three year collective-bargaining agreement allowed the employer to use casual labor to do certain unit work during an eight month period of each contract year. When the cutoff date occurred in the first two years of the contract, the employer sought to retain the casual labor. The union rejected these requests, and the employer hired the casualls as regular unit employees. Thus, the unit work which had been temporarily removed from the unit during the agreed-upon period was returned to the unit on the expiration of each period. However, when the union rejected an employer proposal to retain the casual labor beyond the that period (at the expiration of the extended contract), the employer did so anyway. Thus, the casual laborers were retained as nonunit employees, and the unit work assigned to them effectively was permanently removed from the unit. The Board reversed the ALJ and found that this conduct had a substantial effect on the unit employees as a group, because post-contractual cutoff date work opportunities formerly enjoyed by fellow unit employees (i.e., casualls subsequently hired as regular unit employees) were no longer available and would no longer be performed under the unit's own terms and conditions of employment. Therefore, as a material, substantial, and significant change from the employer's prior practices, this conduct violated Section 8(a)(5).

In the instant case, we conclude that the Employer's conduct from March 1997 to mid-July 1997, when the employees rejected the Employer's contract proposal, was lawful. Thus, the Employer began using temps in September 1996 to meet peak and fluctuating daily demand levels.

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<sup>10</sup> 300 NLRB at 641.

Further, following a January 1997 decision to freeze hiring of both bargaining unit and non-bargaining unit employees at the facility for legitimate economic reasons, the Employer lawfully began hiring more temps in March to meet peak demand levels it was then experiencing. In this regard, the employees had not yet selected the Union as their bargaining representative. Moreover, the Employer used temps at this time for a period of a few hours to one week, and typically requested only 10 to 15 temps on each occasion. Under these circumstances, the Employer's conduct was motivated by economic considerations, did not until July vary significantly in kind or degree from its use of temps under past practice, and had no significant adverse impact on employees in the unit. Accordingly, the Employer did not violate the Act from March through mid-July 1997 by failing to bargain with Union when it hired temps.

However, we further conclude that since around July 21, 1997, the Employer unlawfully transferred bargaining unit work to the temps in an unprecedented way. Before that date, the Employer had at most 10 to 15 temps at its facility on an average day during the periods it used temps. Within a twenty-four hour period, the Employer admittedly doubled its temporary employee work force in response to the rejection of its contract proposal, and possible strike, by unit employees.<sup>11</sup> For these reasons, the instant case is more similar to the Board's decision in Brown-Graves Lumber than Westinghouse. Thus, the Employer's continuing assignment of unit work to an increased number of temps relative to its past practice while the number of unit employees declined was not motivated solely by economic considerations, and in fact *did* vary significantly in degree from what had been customary. The Employer had never hired more than 15 temps, and only for short time periods, while it now doubled that number for an indefinite period. Finally, this dramatic increase adversely affected unit employees, as their former work opportunities (i.e., regular bargaining unit work hours and overtime) were no longer

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<sup>11</sup> There is no evidence that temps were hired because the Union had threatened the Employer with an imminent strike, and in fact no strike ever occurred.

available to the same extent. Moreover, none of the Employer's asserted defenses, which serve only to explain why it used temps at all, justify its increased work transfer in July. Therefore, this unilateral conduct constituted a material, substantial, and significant change from the Employer's prior established practices, and the Employer violated Section 8(a)(5) when it unilaterally doubled its temporary employee work force.<sup>12</sup>

B.J.K.

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<sup>12</sup> [*FOIA Exemption 5*