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

# Advice Memorandum

DATE: May 26, 2006

TO : Stephen M. Glasser, Regional Director
Region 7

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

SUBJECT: Ford Motor Company
Case 7-CA-48263

530-4090-7500
530-6067-4011-1100
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The Region resubmitted this case for advice as to whether the Employer's decision to subcontract unit work was a mandatory subject of bargaining, and whether the Employer violated Section 8(a)(5) by refusing to bargain with the Union over that decision.

We conclude that the Employer's decision to subcontract unit work was a mandatory subject of bargaining under Fibreboard[1] and, therefore, the Employer violated Section 8(a)(5) by refusing to bargain over that decision. The Employer's subcontracting merely replaced one group of employees with another, had no effect on the scope or direction of the Employer's normal operations, and thus did not involve issues central to the Employer's entrepreneurial control. The Employer claims, however, that its decision was not merely to subcontract unit work at the Rouge facility, but rather to cease maintaining in-house fire protection units at all of its facilities in North America. To fully address this argument, the Region should argue, in the alternative, that the Employer's decision was a mandatory subject of bargaining under Dubuque Packing Co.[2] because the subcontracting had no effect on its basic operations, labor costs were at least one factor the Employer considered, and the Employer has not shown that the Union could not have offered anything in negotiations that could have changed the Employer's decision.

## FACTS

Ford Motor Co. designs, engineers, and manufactures automobiles at, among other locations, its Rouge Industrial

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

[2] 303 NLRB 386 (1991).

Complex in Dearborn, Michigan. From some time in 1979 to May 1, 2005, Ford employed at the Rouge Facility a bargaining unit of fire protection specialists.[3] The unit employees were responsible for fire suppression, emergency medical response, rescues, and hazardous materials containment at the facility (unit work).

Since 1979 unit employees have been represented by Local I-35 Dearborn Industrial Fire Fighters Association, International Association of Fire Fighters, AFL-CIO (Union). During the time that Ford employed the unit employees, it recognized and bargained with the Union; the parties' most recent collective-bargaining agreement was effective by its terms from May 12, 2003, through May 13, 2007.

At a January 14, 2005,[4] meeting between Ford and Union representatives, Ford advised the Union that it intended to subcontract all unit work at the Rouge facility. At that time, Ford told the Union that it was in the business of designing, engineering, and manufacturing cars, not fighting fires. Therefore, as of May 1, unit employees would no longer be Ford employees, but employees of the subcontractor, Guardsmark.[5] Ford handed the Union representatives copies of a letter confirming its decision to subcontract the unit work and offering to meet and bargain with the Union over the effects of its decision.

By letter dated January 18, the Union demanded that Ford meet and bargain with the Union regarding the decision to subcontract unit work. The Union also requested information relevant to the subcontracting issue. Ford responded by letter dated January 19, expressing its willingness to bargain over the effects of its decision, but refusing to bargain over the decision itself.

Representatives for the parties met on January 21 to discuss Ford's decision to subcontract unit work, the effects of that decision, and the Union's information request. Ford gave the Union a letter describing the transfer of unit work to Guardsmark, and assuring the Union that Guardsmark would recognize and bargain with the Union

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[3] As of May 1, 2005, there were approximately 16 unit employees.

[4] All dates are in 2005, unless noted otherwise.

[5] The Employer claims that it has now subcontracted all emergency service work at each of its facilities nationwide and in Canada to Guardsmark.

after Ford "resourced" the work to Guardsmark. The letter also reiterated Ford's position that unit work is not considered core to its primary functions of designing, engineering, and manufacturing automobiles.

On or about January 26, Ford provided the Union with a copy of its transfer agreement with Guardsmark covering all of Ford's facilities where security and fire-rescue specialists are employed. The agreement provides that Guardsmark shall offer employment to all security guards and fire protection specialists currently employed by Ford, provided that the employees meet Guardsmark's pre-employment screening requirements. The transfer agreement also provides that Guardsmark will recognize the unions representing those employees, and assume the terms and conditions of any collective-bargaining agreement between those unions and Ford.

Pursuant to the transfer agreement, on or about May 1 Guardsmark offered employment to, and ultimately hired, all of the unit employees, assumed the collective-bargaining agreement, and assumed control over fire protection services at Ford's facilities. At the Rouge facility, unit employees perform fire protection and emergency services as they did before the transfer: emergencies are reported to Ford's dispatch center; Ford dispatchers contact unit employees; and unit employees respond to emergency calls following the same policies and procedures as they did before the transfer, using the same codes and equipment. By all accounts, firefighters and emergency services employees are highly skilled and largely self-directed, performing their duties with little or no supervision.[6]

**ACTION**

The Region should issue a Section 8(a)(5) complaint, absent settlement, alleging that Ford's unilateral decision to subcontract the fire protection work was a mandatory subject of bargaining under Fibreboard. Ford's subcontracting merely replaced its in-house fire protection

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[6] There are always unit employees on duty at the Rouge facility, but Guardsmark has only one supervisor there, who works roughly 9 a.m. to 5 p.m., Monday through Friday. The Guardsmark supervisor schedules employees and handles administrative matters, but is largely not involved in unit employees' responses to emergencies unless contacted by a unit employee seeking guidance on a discrete issue.

In Cases 7-CA-48641 and 7-CA-48642 the Union alleged that Ford and Guardsmark were joint employers of the unit employees. The Region dismissed those allegations and the Division of Appeals upheld the dismissals.

employees with a subcontractor's, had no impact on the scope or direction of Ford's business, and occurred at least in part based on labor costs.

The Region should argue, in the alternative, that Ford had an obligation to bargain over its subcontracting decision under Dubuque Packing. In this regard, 1) Ford's subcontracting merely replaced one group of employees with another and had no effect Ford's basic operations, 2) labor costs were at least one factor in the decision, and 3) Ford has not presented any evidence to substantiate a defense that the Union could not have offered anything in negotiations that could have changed the decision to subcontract unit work.

Ford's Decision to Subcontract Unit Work at the Rouge Facility Was a Mandatory Subject of Bargaining Under *Fibreboard*

The Supreme Court in Fibreboard held that an employer must bargain over its decision to subcontract unit work where the proposed subcontracting would merely replace the unit employees with the independent contractor's and the replacement employees would perform the same work under similar conditions of employment. In such cases, the employer's decision to subcontract does not involve any capital investment, nor does it alter the employer's basic operation. Thus, it "would not significantly abridge [the company's] freedom to manage the business" to require the employer to bargain about the subcontracting decision.[7] Indeed, if the employer's decision turns on labor costs, it is "peculiarly suitable for resolution within the collective-bargaining framework...."[8]

Ford's decision to subcontract was amenable to collective bargaining under Fibreboard and Torrington. Although Ford is a car manufacturer, fire protection is an ancillary but necessary function at its various facilities. Ford's decision to subcontract unit work at the Rouge facility did not require Ford to make any capital investments or divestitures, and has had no effect on Ford's ability to design, engineer, or manufacture automobiles. Ford still requires on-site fire protection

[7] Fibreboard, above, 379 U.S. at 213. The Board has adopted the Supreme Court's approach in cases where all that changes through subcontracting was the identity of the employees doing the work. See Torrington Industries, 307 NLRB 809, 810-11 (1992).

[8] Fibreboard, 379 U.S. at 214.

services at its various facilities and, at the Rouge facility, the same unit employees perform the same work under virtually the same conditions as they had before. The only difference is that the employees are now paid by Guardsmark rather than Ford. Because Ford merely substituted one group of employees (its own) for another (those ultimately hired and employed by Guardsmark), its decision would have been suitable to collective bargaining.[9]

A Fibreboard analysis is particularly appropriate here because it is reasonable to infer that labor costs were at least one factor Ford considered when deciding whether to subcontract unit work.[10] Ford asserts that its decision "was based on a corporate decision to review and, if appropriate, get out of certain activities that are not core to designing, engineering and manufacturing automotive vehicles." (Emphasis added). Despite direct requests from the Region, Ford has not provided any information regarding the criteria it used to determine whether it would be appropriate to maintain or "get out of" a particular activity.[11] Ford instead merely asserted that "one may

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[9] See, e.g., Bob's Big Boy, 264 NLRB 1369, 1371 (1982) (decision to subcontract shrimp processing for the employer's restaurants was a mandatory subject because the employer had not changed the nature and direction of its business where it was still in the business of providing foods, including processed shrimp, to its restaurants). See also Vico Products Co., 336 NLRB 583, 595-596 (2001) (no change in the nature of the employer's relocated operations where employer continued to produce same product for same customers).

[10] See, e.g., Naperville Ready Mix, Inc., 329 NLRB 174, 181 (1999) enfd. 242 F.3d 744, 753-754 (7th Cir. 2001) (Fibreboard applied where labor costs were a factor in employer's decision to transfer its hauling work to subcontractors); Rock-Tenn Co. v. NLRB, 319 NLRB 1139, 1139 (1995), enfd. 101 F.3d 1441, 1445-1446 (D.C. Cir. 1996) (Fibreboard applied where employer's desire to reduce labor costs were a factor in decision to subcontract trucking work); Compu-Net Communications, 315 NLRB 216, 216 n.2, 225 (1994) (Fibreboard analysis appropriate where employer's decision to subcontract motivated by "significant savings" in labor costs).

[11] By letter dated May 18, the Region asked the Employer to explain "how and why the Employer deemed outsourcing of certain work [including fire protective services] 'appropriate.'" The Region also asked the Employer to specifically identify what factors the Employer took into consideration when making such determinations.

correctly conclude that" for each review, Ford "asked the question: Should Ford Motor Company continue to bear indirect or direct functional or financial responsibility [f]or this product or service?" At least some of the "financial responsibility" related to an in-house fire protective services unit would include unit employees' wages, benefits, and other labor costs. We therefore draw the reasonable inference that Ford considered labor costs when evaluating whether to subcontract the unit work.

Ford defends its refusal to bargain by arguing that it did not merely decide to subcontract unit work to Guardsmark at the Rouge facility, but rather decided to "get out of" the business of maintaining an in-house fire protection force across the continent. Ford argues that because its decision was directly related to the scope and direction of its business, under First National Maintenance[12] it had no obligation to bargain over it. We reject Ford's argument for the same reasons that we conclude Fibreboard and Torrington are controlling.

The subcontracting at issue here is not the kind of "partial closing" - or going out of part of a business - that was at issue in First National Maintenance. Under First National Maintenance, an employer's decision to close down part of its business is not a mandatory subject of bargaining, because it is a decision "akin to the decision whether to be in business at all" and, in such situations, the "harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision[.]"[13] Ford's subcontracting here is not governed by First National Maintenance. Because the subcontracting merely replaced Ford's fire protection employees with Guardsmark's, and had no effect on Ford's basic operations or the "scope and direction" of its business, First National Maintenance is inapposite.[14]

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[12] First National Maintenance v. NLRB, 452 U.S. 666 (1981).

[13] 452 U.S. at 677, 686.

[14] See Bob's Big Boy, above, 264 NLRB at 1370-71. See also, Garden State Newspapers, Inc. d/b/a Long Beach Press Telegram, Case 21-CA-32672, Advice Memorandum dated October 1, 1998, pp. 6 - 7.

The Region Should Argue, in the Alternative, that Ford Had an Obligation to Bargain Under *Dubuque*

Despite our conclusion that Ford has engaged in Fibreboard subcontracting, we recognize that its decision affecting fire protection units at the Rouge facility and nationwide could arguably be characterized as a "Category III" decision – one that has a direct impact on employment but has as its focus the employer's economic profitability.[15] Accordingly, the Region should argue in the alternative that Ford had a bargaining obligation pursuant to the analysis in Dubuque Packing.[16]

Under Dubuque, in order to make a prima facie showing that a relocation decision is a mandatory subject of bargaining, the General Counsel must show that the decision involved a relocation of unit work "unaccompanied by a basic change in the nature of the employer's operation."[17] The employer then has the burden of coming forward with evidence to rebut the prima facie case. If the Board concludes that the employer's decision concerned the "scope and direction of the enterprise," the employer has no duty to bargain over the decision.[18] Failing that, the employer can still raise two affirmative defenses demonstrating that it had no bargaining obligation regarding the relocation decision. First, it can show that labor costs, direct or indirect, were not a factor in its decision. Second, if such costs were a factor, the employer may prove that, at the time it made its decision, the union could not have offered sufficient "concessions that approximate, meet, or exceed the anticipated cost or benefits that prompted the relocation decision."[19] In other words, the employer may

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[15] See First National Maintenance, 452 U.S. at 677.

[16] Although Dubuque specifically concerned work relocation decisions, its principles are applicable to all "Category III" decisions that fall within the spectrum between Fibreboard and First National Maintenance. See Westinghouse, 313 NLRB 452 (1993), enfd. 46 F.3d 1126 (4th Cir. 1995) (Dubuque applicable to Category III decisions that are not Fibreboard subcontracting).

[17] Dubuque, above, 303 NLRB at 391.

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

[19] Dubuque, 303 NLRB at 391.

show that the union could not have offered labor cost concessions sufficient to change the employer's decision.[20]

The General Counsel can demonstrate a prima facie showing of a bargaining obligation under Dubuque because, as discussed above, Ford merely replaced of one group of employees with another. That decision that had no effect on Ford's basic operations, or Ford's need for or unit employees' performance of fire protection services. Thus, Ford's decision did not change the "scope and direction" of its business.

With regard to the first affirmative defense, it is reasonable to infer, for the reasons discussed above, that labor costs were a factor in the decision. Despite repeated requests from the Region, Ford had not presented any evidence rebutting this inference and establishing that labor costs were not a factor in its decision.

Ford has also not presented any evidence regarding the specific criteria it used to determine whether it would be "appropriate" to subcontract unit work, and thus has not met its burden with regard to the second affirmative defense. By failing to provide any information as to the relative total costs of maintaining fire protection services[21] versus the total costs to Ford of the new subcontracting arrangement,[22] Ford precludes any meaningful assessment of whether the Union could have offered direct or indirect labor cost concessions sufficient to offset the net savings to be derived from the subcontracting.[23]

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[20] See "Guideline Memo Concerning Dubuque Packing Co., Inc.," Memorandum GC 91-9, dated August 9, 1991 at pp. 4-6. See also, Professional Messenger, Case 20-CA-31707, Advice Memorandum dated February 17, 2005 and Menlo Worldwide Forwarding, Case 32-CA-20541, Advice Memorandum dated October 16, 2003.

[21] Such costs would include any capital Ford might recoup from the sale of Ford-owned equipment used by unit employees and/or any equipment leasing or maintenance expenses attributable to unit employees.

[22] These would include the cost of any vehicles or services that Ford is responsible for providing in connection with the subcontracting, as well as Ford's actual payments to Guardsmark pursuant to any formula set forth in the subcontract.

[23] Ford's unsupported assertion that the Union could not have offered sufficient concessions is insufficient in this regard. The Board has imposed a heavy burden on employers

In sum, the Region should issue complaint, absent settlement, alleging that Ford was obligated under Fibreboard and Torrington to bargain with the Union over its decision to subcontract unit work. In the alternative, the Region should allege that Ford was obligated under Dubuque Packing to bargain over the decision because the subcontracting had no impact on Ford's basic operations, and Ford has failed to show that it can avail itself of either affirmative defense.[24]

B.J.K.

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with regard to this defense (see, e.g., Owens-Brockway, 311 NLRB 519, 522-525 (1993)), and has been unwilling to hypothesize that a union "would not" agree to concessions it was capable of making. See Pertec Computer Corp., 284 NLRB 810, 810-811 n.3, (1987), affd. in rel. part sub nom. Olivetti Office, U.S.A. v. NLRB, 926 F.2d 181 (2d Cir. 1991).

[24] [*FOIA Exemptions* 2 and 5

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