

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

# Advice Memorandum

DATE: January 24, 2003

TO : Sandra L. Dunbar, Regional Director  
Rhonda Aliouat, Regional Attorney  
Charles Donner, Assistant to Regional Director  
Region 3

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

SUBJECT: Finch, Pruyn & Company, Inc.

Case 3-CA-23461-1

177-7067-3350

524-5079-4200

524-5079-4267

530-6050-0825-3300

530-6067-4001-3700

530-6067-4011-0183

530-6067-4011-1100

530-6067-4011-4400

530-8054-9000

This case was submitted for advice as to whether the Employer's unlawful unilateral change converted an economic strike into an unfair labor practice strike, so that the Employer violated Section 8(a)(3) by permanently replacing unfair labor practice strikers and failing to reinstate them upon their unconditional offer to return to work.<sup>1</sup>

The Region had determined that the Employer's decision to close its pulp mill, and use purchased pulp in its paper production operations for an indefinite future period, was a mandatory subject of bargaining which the Employer unlawfully unilaterally implemented. The Region did not seek advice on that issue. However, after the case was submitted for advice, the Employer's counsel requested that we reconsider the Region's decision to issue an 8(a)(5) complaint. We have reviewed the Region's determination and have concluded that it is sound. We further conclude that the Employer's unlawful unilateral change converted the economic strike to an unfair labor practice strike in July of 2001. Therefore, the Region should issue complaint alleging that the Employer violated Section 8(a)(3) by permanently replacing unfair labor practice strikers and

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<sup>1</sup> This case was also submitted as to the propriety of Section 10(j) relief. This memorandum does not address that issue.

failing to reinstate them upon their unconditional offer to return to work.

### **FACTS**

Finch, Pruyn & Company, Inc. (the "Employer" or "Finch") manufactures paper at its Glens Falls location. Historically, the Employer has utilized wood pulp from its pulp mill in the papermaking process.<sup>2</sup> Finch employees are represented by seven unions, including Paper, Allied-Industrial, Chemical & Energy Workers International Union (PACE) Locals 18 and 155. Local 18 represents about 300 employees, about 125 of whom worked in the pulp manufacturing department. Local 155 represents about 150 employees.

Local 18 and Local 155 (together, "the Union") have historically signed separate contracts with the Employer, each sharing a common master agreement covering their primary terms and conditions of employment. The remainder of their respective contracts consists of distinct local memoranda, which are included as appendices to the master agreement and cover lesser issues. The most recent contracts before the events at issue were in effect from June 16, 1996 through June 15, 2001.<sup>3</sup>

The parties began bargaining for successor agreements in the spring of 2001. Locals 18 and 155 were jointly represented in negotiations by Robert LaBrum, a PACE International representative who also jointly serviced both Locals. The Employer addressed its collective-bargaining correspondence to LaBrum. During bargaining, the Employer sought identical concessions from both Locals, but the parties were unable to reach a successor agreement before the contracts' expiration.<sup>4</sup> On June 15, the Employer shut down its pulp mill, with the assistance of Local 18 employees. On June 16, the Employer implemented its last,

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<sup>2</sup> The Employer's pulp mill produces a unique bi-sulfate pulp (pulp predominantly from hemlock and other softwood, as well as some hardwoods, cooked in an acid process). Many of its competitors use hardwood kraft pulp (pulp from hardwood, cooked in an alkaline process).

<sup>3</sup> All dates are in 2001 unless otherwise noted.

<sup>4</sup> Unresolved issues included wages, health insurance, holidays, vacation, pension, bereavement leave and life insurance.

best and final offer, and the Local 18 and 155 employees went on strike over the same bargaining issues.<sup>5</sup>

After the strike commenced, the Employer used its existing stocks of pulp to produce its paper.<sup>6</sup> By mid-July, the Employer had decided to keep the pulp mill closed for an indefinite future period, irrespective of the strike, and to instead utilize processed hardwood kraft pulp purchased from outside suppliers. The Employer's decision was admittedly based on substantial anticipated cost savings, as pulp prices were then at record lows.<sup>7</sup> For example, hardwood kraft pulp was available on the pulp exchange ("PULPEX") at about \$400 per metric ton in June.<sup>8</sup> In contrast, the Employer states that the cost of using its own pulp is between \$436.66 and \$446.90 per metric ton. In addition, after becoming familiar with the purchased pulp, the Employer concluded that the purchased pulp yielded paper equivalent to or better than the paper produced using its own pulp.<sup>9</sup>

The Employer has acknowledged that it implemented its decision to indefinitely outsource the pulp mill work without providing the Union with notice or an opportunity to bargain.<sup>10</sup> The Union was clearly aware that the pulp mill had been shut down and that the Employer had begun

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<sup>5</sup> Employees in the five other units also went on strike at this time.

<sup>6</sup> The Employer continued its other operations during the strike with salaried and temporary employees.

<sup>7</sup> The Employer admits in position statements and correspondence that its decision to use purchased pulp indefinitely was based on economic factors. Moreover, according to a July 10 newspaper article, an Employer spokesperson stated that pulp prices, which fluctuate based on demand, were so low that it was cheaper for the Employer to buy pulp than to make and process it on-site; in an August 13 article he is quoted as stating that the outsourcing decision was dictated by cost, not the strike.

<sup>8</sup> For comparison's sake, the PULPEX price for hardwood kraft pulp was \$703.51 per metric ton on December 27, 2000 and \$524.56 per metric ton on May 2.

<sup>9</sup> The Union disputes the Employer's quality assessment.

<sup>10</sup> The parties continued bargaining over other issues during the strike.

utilizing purchased pulp.<sup>11</sup> However, there is no evidence that the Union was told that the outsourcing was indefinite and based solely on economic factors irrespective of the strike.

On October 16, the Employer began hiring permanent replacements and converting temporary replacements to permanent status. By October 30, the Employer had converted over 300 replacement employees to permanent status. The pulp mill remained closed.

On November 12, the Employer circulated a memorandum to "All Employees" entitled "Operations Update." The memorandum stated, inter alia:

There has been a lot of speculation concerning the pulp mill. The facts are:

1. The pulp mill was shut down in June because our costs to make pulp was and continues to be much higher than the cost to buy pulp. In June, purchased pulp costs were 15% lower than our own pulp costs. Currently, purchased pulp costs are 20% lower than our own pulp costs.
2. As was the case on the paper machines, we have enough talent with supervisors and retirees to start up the pulp mill anytime we want to.
3. All of the key quality specifications are better with purchased hardwood pulp.... When we restart the pulp mill, we will...run only hardwood. That should produce quality levels equal to our current purchased hardwood pulp.
4. We continue to mothball and winterize the pulp mill believing a startup is likely months away.

During a negotiating session on November 13, LaBrum stated that the Union "expect[ed] that all strikers will return to work and none will be replaced by replacement workers" and also asked about the status of the pulp mill. The Employer's counsel responded that:

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<sup>11</sup> As discussed, Local 18 employees assisted in the shut-down of the pulp mill on June 15. Further, a July 10 newspaper article quotes Union representative LaBrum as stating that pulp prices can change abruptly and that the Employer "can't run the pulp mill without us."

With respect to permanent replacements, the Company intends to retain them. With respect to the Pulp Mill and Woodyard, we currently have not made a determination to reactivate these areas. That remains under review and we will revisit the matter from time to time. The factors include the price of purchased pulp, which makes it uneconomic to make our own compared to the situation we have in purchasing pulp. It is the company's intent to retain all employees hired as permanent replacements.

LaBrum then stated that "it is our understanding you have only offered probationary positions." The Employer's counsel then stated that "[w]e have hired permanent replacements...."<sup>12</sup>

On November 21, Locals 18 and 155 made unconditional offers to return to work simultaneously,<sup>13</sup> and executed and ratified their respective collective bargaining agreements simultaneously.<sup>14</sup> They signed identical striker recall agreements simultaneously on November 26. The pulp mill remained closed and, in a letter to the Union dated December 13, the Employer reiterated its business decision not to reopen the pulp mill for the foreseeable future.

On January 23, 2002, the Union sent the Employer a letter requesting copies of contracts relating to the Employer's purchase of pulp, claiming that the information was "relevant to helping us restore our members to their respective jobs." On January 29, 2002, the Employer denied the information request, claiming that such information was confidential; that the Union had not established that the requested information was relevant for collective bargaining purposes; that the Employer "maintain[ed] the entrepreneurial discretion to determine the nature and scope of its operations, including but not limited to the determination to utilize purchased pulp;" and that it did not anticipate starting the pulp mill in the near future

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<sup>12</sup> In letters to the Union dated November 14 and 15, the Employer reiterated its business decision not to reopen the pulp mill for the foreseeable future.

<sup>13</sup> Although about 450 strikers offered to return to work, the Employer only had 20 positions available, as the remainder had either been filled by permanent replacements or eliminated by the Employer's indefinite outsourcing of the pulp mill work.

<sup>14</sup> Ratification was ultimately decided by the combined vote of Locals 18 and 155 after separate balloting.

based on cost and quality considerations. On January 31, 2002, the Union again requested copies of the pulp contracts, explaining that "we 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," and agreeing to a redaction of the dollar amounts to assuage the Employer's confidentiality concerns. On February 7, 2002, the Employer again refused to provide the requested information, reiterating inter alia that "[t]he determination not to run the pulp mill is a management prerogative involving the scope of its operations."<sup>15</sup>

### **ACTION**

We agree with the Region that the Employer violated Section 8(a)(5) in July by unilaterally implementing its decision to outsource its pulp manufacturing operations, a mandatory subject of bargaining. The unilateral change was not in response to, and therefore was not privileged by, the strike, and the Union did not waive its right to bargain over the decision. We further conclude that the economic strike converted to an unfair labor practice strike in July. Accordingly, complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(3) by permanently replacing unfair labor practice strikers and failing to reinstate them upon their unconditional offer to return to work.

- I. The Employer violated Section 8(a)(5) by unilaterally outsourcing bargaining unit work.
  - A. The pulp mill shutdown and outsourcing of bargaining unit work was a mandatory subject of bargaining.

The Employer's decision to shut down the pulp mill indefinitely, and use purchased pulp rather than manufacturing its own, was not a "partial closing" under First National Maintenance.<sup>16</sup> The Employer has not terminated a portion of its business. While the Employer argues that its pulp manufacturing operation is a discrete business because it has the capability of selling processed pulp to other companies in the industry, in addition to using it internally, it acknowledges that it has never been

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<sup>15</sup> The Region has concluded that the refusal to provide the pulp contracts was unlawful.

<sup>16</sup> First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).

a pulp retailer.<sup>17</sup> Furthermore, the Employer has not permanently closed its pulp mill, but has retained its equipment, has acknowledged to the Union that it can reopen the pulp mill at will (although it takes 2-3 months to restart), and has informed the Division of Advice that it will reopen the pulp mill by the summer of 2003 at the latest in order to maintain its environmental permits.<sup>18</sup>

Therefore, it is appropriate to apply the test set out in Dubuque Packing Co.<sup>19</sup> Although Dubuque specifically concerned work relocation decisions, its principles are applicable to "Category III" decisions - decisions that have a direct impact on employment but have as their focus the economic profitability of the employing enterprise<sup>20</sup> - that fall within the spectrum between Fibreboard<sup>21</sup> and First National Maintenance.

Applying a Dubuque analysis, the Employer's decision was not a change in the scope or direction of the enterprise. Although the Employer has altered its production process and the ingredients used to produce its final product, it is still in the business of producing and selling fine paper.<sup>22</sup> The Employer has provided some

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<sup>17</sup> Compare Kingwood Mining Co., 210 NLRB 844 (1974), affd. mem. 515 F.2d 1018 (D.C. Cir. 1975) (employer closed coal mining operations and expanded independent coal processing operations).

<sup>18</sup> Cf. Eltec Corp., 286 NLRB 890, 892, 897-98 (1987), enfd. 870 F.2d 1112 (6<sup>th</sup> Cir. 1989), cert. denied 493 U.S. 891 (1989) (employer's decision to subcontract work and lease out the corresponding equipment was not a change in the nature or direction of its operations so as to exempt the decision from mandatory bargaining, where employer retained ownership in equipment and could reverse its decision).

<sup>19</sup> 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). See also "Guideline Memorandum Concerning Dubuque Packing Co., Inc., 303 NLRB No. 66," Memorandum GC 91-9, dated August 9, 1991 (hereinafter GC Guideline).

<sup>20</sup> See First National Maintenance Corp. v. NLRB, 452 U.S. at 677.

<sup>21</sup> Fibreboard Corp. v. NLRB, 379 U.S. 203 (1964).

<sup>22</sup> See Bob's Big Boy Family Restaurants, 264 NLRB 1369 (1982) (employer's decision to discontinue shrimp processing part of its food operation, sell equipment, and

evidence that the purchased hardwood kraft pulp enables it to produce higher quality paper than it can produce with its own pulp.<sup>23</sup> However, we would find, in agreement with the Region, that this was a relatively minor change in the Employer's business of producing and selling fine papers. Furthermore, the Employer's decision to outsource was not motivated by a desire to change the quality of its product. Accordingly, the Region has made a prima facie case under Dubuque, which the Employer has not rebutted.

We further conclude, in agreement with the Region, that the Employer has not established either of the Dubuque affirmative defenses. With regard to the first affirmative defense, the Employer's argument that labor costs were not a factor in its outsourcing decision does not withstand scrutiny. The Employer acknowledges that its decision was based on a purely economic comparison of the cost of manufacturing pulp versus the cost of purchasing it. Even assuming labor costs made up a relatively small portion of the Employer's overall cost in making and processing its own pulp, labor costs were necessarily "a" factor in its decision.<sup>24</sup>

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subcontract with other company to provide processed shrimp to its restaurants, involved a mandatory subject of bargaining, because the employer was still in the business of providing foods - including processed shrimp - to its restaurants; the employer had not closed a "separate and distinct" business, but rather had subcontracted an integral part of its business); The Topps Company, Inc., Case 4-CA-25444, Advice Memorandum dated April 28, 1997 (employer's decision to close facility and outsource its baseball card and bubblegum manufacturing operation not a "partial closing" under First National Maintenance, because it continued its business of designing and selling those products).

<sup>23</sup> On the other hand, the Union has presented evidence suggesting that the Employer has, in fact, produced inferior paper using the purchased pulp. This evidence includes, inter alia, a document produced by the Employer's consultant, dated May 2002, discussing problems with print quality; [FOIA Exemption 7(D) ] asserting that product quality has dropped and customer returns have increased since Finch began using purchased pulp; and internal company documentation of customer complaints and product returns.

<sup>24</sup> See Dubuque Packing Co., 303 NLRB at 393; GC Guideline at 6-7. We note that prior to the shutdown of the pulp mill the Employer had sought wage concessions from the Union at the bargaining table. See Owens-Brockway Plastic Products,

With regard to the second affirmative defense, we reject the Employer's assertion that the Union could not have met, approximated or exceeded the cost savings the Employer anticipated at the time it decided to indefinitely outsource its pulp operations. The Employer does not dispute that Locals 18 and 155, together, could have made sufficient wage concessions, but argues that the decision was not bargainable unless Local 18 alone could have offered sufficient concessions. Contrary to the Employer, however, we conclude that there is a basis for including the Local 155 employees in the wage concession calculation even though the outsourced work was exclusive to Local 18. Thus, the evidence indicates that Locals 18 and 155 engaged in joint bargaining and went on strike at the same time over the same issues. Moreover, the Union's actions were motivated by the economic strength of the Local 18 pulp mill workers, who possess specific skills and cannot readily be replaced.<sup>25</sup> Viewed objectively, the Local 155 employees arguably had an incentive to make wage concessions in order to preserve the pulp mill jobs and thus the Union's long-term economic leverage.

Alternatively, even if we were to include only the Local 18 unit in the wage concession calculation, the Employer has not established the second Dubuque affirmative defense. According to the Employer, the maximum potential wage concession from the Local 18 employees is \$11,557,884.<sup>26</sup> The Employer has provided the Division of

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311 NLRB 519, 522 (1993) (rejecting employer's defense that labor costs played no role in its relocation decision by noting that employer had persistently stressed the need for wage concessions during negotiations prior to plant closure).

<sup>25</sup> For example, LaBrum was quoted in a July 10 newspaper article, stating: "[The Employer] can't run the pulp mill without us." Furthermore, when the same unions struck the Employer for 18 days in 1996, the Employer could not effectively operate the pulp mill without the pulp mill workers. The Union's counsel believes the Employer's difficulties, which may have included a citation from the New York State Department of Environmental Conservation, forced the Employer to resolve the labor dispute.

<sup>26</sup> The maximum annual wage concession figure is calculated by subtracting the Employer's annual Local 18 labor costs while paying minimum wage (number of employees X annual paid hours per employee X New York minimum wage) from the Employer's annual Local 18 labor costs (number of employees X annual paid hours per employee X hourly wage rate).

Advice with two estimates of its annual cost savings: its "initial" estimate of \$11,711,517 and its "revised" estimate of \$14,761,768.<sup>27</sup> The Employer asserts that using either estimate, it has established the affirmative defense.<sup>28</sup>

In our view, the Employer clearly has not established the defense if the "initial" estimate is used, since Local 18 could offer almost the same amount in wage concessions and could offer cost-saving non-wage concessions as well.<sup>29</sup> Moreover, the Employer has not established that either its "initial" or "revised" estimates of annual cost savings represents the Employer's anticipated cost savings as of July, when it implemented its decision to indefinitely outsource the pulp mill work, rather than a post-decisional appraisal of its actual savings.<sup>30</sup> The Employer has not

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<sup>27</sup> The annual cost savings figure is calculated as follows: Employer's cost savings/ton X tons of pulp/day X 365 days/year. (The cost savings/ton figure is calculated by subtracting the Employer's cost of using purchased pulp [pulp purchase price + additional processing costs] from its own pulp manufacturing costs, and then adding additional efficiency savings per ton, such as "runnability.")

<sup>28</sup> The differences between the "initial estimate" and the "revised estimate" result from, inter alia, different figures for the Employer's internal pulp manufacturing cost, different figures for tons of pulp/day, and different figures for the additional costs of processing purchased pulp.

<sup>29</sup> See Holmes & Narver, 309 NLRB 146, 147 (1992) (even if the employer was already providing wages and benefits at the lowest possible level under the law, the parties could have bargained about many other alternatives to downsizing, including modified work rules, nonpaid vacations, restricted overtime, job sharing, shortened workweek, reassignment of work and job reclassifications).

<sup>30</sup> For example, the Employer's "Attachment A" to its August 28, 2002 position statement denotes the \$326 hardwood kraft pulp price figure as a "Nov[ember] Forecast." (Emphasis added.) Moreover, the Employer's "Schedule F: Comparison of Our Raw Material Costs for November 2001 With Those For the October 2001 Cost Period," attached to its September 9, 2002 position statement, which lists its pulp purchase price as \$326 per ton, does not reveal the Employer's projections as of July.

submitted copies of contracts, purchase orders, or other relevant internal documents as of July.<sup>31</sup>

The strongest evidence of the Employer's anticipated cost savings, as of July, suggests lower savings than it now contends. Thus, a July 27 newspaper article quoted Finch president Carota as stating that the company had contracted to buy enough pulp to operate three machines through the end of September at prices 15 percent below its internal pulp manufacturing cost, and that it was negotiating to buy additional pulp supplies sufficient to handle production through January 2002 at prices 20 percent below cost.<sup>32</sup> Accordingly, it appears that in July the Employer projected that its cost savings, through January 2002, would be between 15 and 20 percent. The Employer subsequently confirmed these figures in its November 12 "Operations Update" circulated to all employees. Based on this information, and applying the Employer's methodology, the Employer's projected annual cost savings would have been somewhere between \$8,294,576 and \$11,059,434 using the other variables from the Employer's "initial" estimate. Using the other variables from the Employer's "revised" estimate, its projected annual cost savings would have been somewhere between \$8,797,826 and \$11,730,434. Local 18's potential wage concession of \$11,557,884, in addition to other cost-saving non-wage concessions, could certainly "approximate, meet or exceed" the Employer's anticipated cost savings based on those figures.<sup>33</sup>

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<sup>31</sup> See Owens-Brockway Plastic Products, 311 NLRB at 524.

<sup>32</sup> An August 3 article quotes Carota as confirming that the Employer had contracted to purchase enough pulp from outside sources to operate four machines through February at prices 20 percent below its own manufacturing cost.

<sup>33</sup> We also note that even if the Employer's actual savings, rather than its anticipated savings, were relevant, the Employer has not demonstrated that it achieved the actual savings it claims. Thus, although the Employer asserts, without documentation, that it obtained pulp for \$326 per ton, the Region's investigation revealed that the PULPEX price for hardwood pulp did not drop below \$400 per ton and that pulp was never generally available at \$326 per ton, although this does not necessarily establish that the Employer was unable to get that price. To illustrate the significance of the pulp price variable, we note that for every \$5 per ton increase in the Employer's cost figure using purchased pulp, its annual cost savings figure using purchased pulp decreases by over \$600,000.

We also reject the Employer's argument that even assuming the Union could make concessions sufficient to alter the Employer's outsourcing decision, the Union's actions during bargaining and the strike indicate that it would not have made such concessions. The test is whether the Union could have offered sufficient concessions to prevent the Employer's outsourcing decision, not a speculative assessment as to whether the Union would have done so, for "to conclude in advance of bargaining that no agreement is possible is the antithesis of the Act's objective of channeling differences, however profound, into a process that promises at least the hope of mutual agreement."<sup>34</sup> Thus, we conclude that the Employer's outsourcing decision was a mandatory subject of bargaining.

B. The unilateral change in terms and conditions of employment was not privileged by the strike.

We further conclude that the Employer's unilateral outsourcing of the pulp manufacturing operation was not privileged by the strike. The Board has held that, during an economic strike, in addition to having the MacKay Radio<sup>35</sup> right to hire permanent replacement employees, an employer may also lawfully maintain its business operations by unilaterally effecting "nonpermanent, stopgap, or temporary measures," including subcontracting.<sup>36</sup> However, an employer's unilateral action affecting unit work is lawful only if it was undertaken for a "duration as is dictated by the exigencies of the strike."<sup>37</sup> Subcontracting that is not tied to the duration of the strike has been distinguished from permissible permanent replacement of employees, because

[T]he replacement of strikers by other employees who remain within the unit does not impair the authority or status of the bargaining representative to continue

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<sup>34</sup> Pertec Computer, 284 NLRB 810, 811 n. 3 (1987), aff'd in pertinent part 926 F.2d 181 (2d. Cir. 1991).

<sup>35</sup> NLRB v. MacKay Radio & Telegraph Co., 304 U.S. 333 (1938).

<sup>36</sup> Land Air Delivery, 286 NLRB 1131, 1132, n. 8 (1987) and cases cited therein, enfd. 862 F.2d 354 (D.C. Cir. 1988).

<sup>37</sup> Ibid. See also Empire Terminal Warehouse Co., 151 NLRB 1359, 1365 (1965), affd. 355 F.2d 842 (D.C. Cir. 1966) (employer's unilateral subcontract of delivery work during strike, lawful; decision prompted by customer requests and did not exceed what was necessary to protect customers).

bargaining for all the employees in the appropriate unit. In this case, individual strikers are not being replaced by other employees, but instead, the positions they held before the strike have been eliminated so that no replacement is being substituted for the striker.<sup>38</sup>

Here, the Employer's unilateral indefinite outsourcing of the pulp mill work was unlawful because it was done without regard to the strike. The Employer has admitted on several occasions that its decision was prompted, not by the strike, but rather by the relatively low market price of hardwood kraft pulp.<sup>39</sup> The mere fact that an employer's outsourcing of unit work coincides with a strike is insufficient to insulate the employer from its bargaining obligation, even if done solely for economic reasons.<sup>40</sup> Moreover, the Employer has provided no evidence to indicate that its decision was necessitated by the exigencies of the strike.<sup>41</sup>

The Employer attempts to analogize its "indefinite" subcontracting to lawful "temporary" subcontracting on the grounds that its subcontracting decision was not "permanent," i.e. it did not preclude the Employer from subsequently making a contrary decision.<sup>42</sup> Applying the Employer's logic, however, few decisions would ever truly be "permanent," other than to go out of business altogether

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<sup>38</sup> Hawaii Meat Co. Ltd., 139 NLRB 966, 969 (1962), enf. denied 321 F.2d 397 (9<sup>th</sup> Cir. 1963). See also American Cyanamid Co., 235 NLRB 1316, 1323 (1978), enf. 592 F.2d 356 (7<sup>th</sup> Cir. 1979).

<sup>39</sup> In fact, the Employer continues to outsource, based primarily on the market price of hardwood kraft pulp, even though the strike ended in November.

<sup>40</sup> See Alexander Linn Hospital Association, 244 NLRB 387, 390 (1979), enf. mem. 624 F.2d 1090 (3d. Cir. 1980).

<sup>41</sup> Cf. Elliott River Tours, Inc., 246 NLRB 935, 935 (1979) (unilateral two-year subcontract, executed while threat of strike was imminent, but which exceeded the strike's duration, lawful; subcontractor had demanded long term as condition for taking work).

<sup>42</sup> See American Cyanamid Co., 235 NLRB at 1322-23 (1978) (employer must bargain over decision to permanently contract out unit work and eliminate unit jobs); Alexander Linn Hospital Association, 244 NLRB at 390; Hawaii Meat Co. Ltd., 139 NLRB at 968-69.

and dissolve the company. In any event, the Employer's analysis is inconsistent with case precedent. For example, in Land Air Delivery, the D.C. Circuit affirmed the Board's finding that the employer violated 8(a)(5) by unilaterally subcontracting unit work during the course of a strike, stating: "[W]e take the term [permanent subcontracting] to mean subcontracting for an indefinite future period not to terminate at the expiration of the strike."<sup>43</sup> The court further stated that:

Petitioner claims that his decision to subcontract did not foreclose reemployment by strikers, because it planned to offer strikers the right to reinstatement if the subcontractors ceased operations.... We note, however, that...the argument misses the point, for whether or not petitioner was prepared to reemploy strikers if the subcontractors terminated their relationship, the bargaining unit was truncated in the meantime.<sup>44</sup>

The Employer's decision admittedly was not related to the exigencies of the strike, and therefore the strike did not insulate the Employer from its obligation to bargain over what, in the absence of a strike, would be a mandatory subject of bargaining. Since the Employer unilaterally implemented its decision to outsource the pulp manufacturing work in July, we conclude that the unfair labor practice occurred in July.

C. The Union did not waive its bargaining rights over the decision to outsource the pulp mill work.

An employer's duty to bargain over changes in terms and conditions of employment is generally not triggered until the union requests bargaining. Once a union is on notice regarding a proposed change, it is "incumbent upon the union to act with due diligence in requesting bargaining" or it will waive its bargaining rights by

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<sup>43</sup> 862 F.2d at 357, n. 2.

<sup>44</sup> Id. at 358, n. 4. (Emphasis added.) See also Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055, 1089 (1<sup>st</sup> Cir. 1981), enfg. in pertinent part 246 NLRB 792 (1979) (unilateral transfer of unit work during strike violated 8(a)(5); "apart from the metaphysical question of when a change becomes 'permanent,' there is no evidence that [the Employer] ever intended that his [removal of unit work] be instituted on a trial basis, or merely as a temporary response to the strike").

inaction.<sup>45</sup> However, a union is not obligated to request bargaining unless it has received timely notice of the proposed change sufficient to permit the union to make an informed decision as to the action it wishes to take on the matter.<sup>46</sup> Formal notice is not required if the union has actual knowledge of the proposed change and a formal announcement by the employer would therefore be meaningless.<sup>47</sup>

The Union was not obligated to request bargaining over the Employer's outsourcing decision, because it did not have sufficient notice of the change. Although the Union knew that the Employer had unilaterally closed its pulp manufacturing operation on June 15, and knew by July that the Employer was unilaterally outsourcing the pulp mill work, it reasonably believed that the Employer's decision was merely a defensive action to continue operations during the strike, and which would not continue beyond the end of the strike. Thus, the pulp mill was shut down the day before the strike began, when both sides knew a strike was imminent. This created the impression that the shutdown was tied to the strike, rather than to the price of pulp, which had been depressed for some time. Moreover, the Employer had just invested \$20 million in new silos in the woodyard for use in operating its pulp mill in 1998. The Union could reasonably expect that the Employer would reopen the pulp mill at the end of the strike in order to

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<sup>45</sup> Kansas Education Assn., 275 NLRB 638, 639 (1985), citing Meharry Medical College, 236 NLRB 1396 (1978); Haddon Craftsmen, 300 NLRB 789, 790-91 (1990), affd. mem. 937 F.2d 597 (3d. Cir. 1991).

<sup>46</sup> See Standard Motor Products, 331 NLRB 1466, 1490 (2000) ("notice of the proposed changes must adequately set forth what the changes entail, as well as grant sufficient time to bargain"); Melody Toyota, 325 NLRB 846, 848 (1998) (scant and indirect oral assertions of employer regarding possible sale of company was not actual or constructive notice to union for purposes of effects bargaining).

<sup>47</sup> See U.S. Lingerie Corp., 170 NLRB 750, 751-52 (1968) (union had actual notice of employer's decision to relocate, based on rumors of move, dismantling of machines, sign in shop stating "Jasper, Alabama," and evidence that union interpreted employer's evasive answer to question regarding potential move as admission that move was a near certainty). Mere conjecture or rumor, however, are not substitutes for actual knowledge. NLRB v. Rapid Bindery, Inc., 293 F.2d 170, 176 (2d Cir. 1961), enfg. in pertinent part 127 NLRB 212 (1960).

make the most of this investment. We further note that some Employer actions during the course of the strike may have further reinforced the Union's belief that the outsourcing was tied to the strike. For example, the Union asserts that, in November, the Employer made contract proposals suggesting that pulp mill employees would be on the active payroll when the strike ended.

We reject the Employer's contention that information in newspaper articles should be deemed constructive notice to the Union of changes in terms and conditions of employment.<sup>48</sup> In any event, the newspaper articles referenced by the Employer - most of which were published after the outsourcing decision had been unilaterally implemented - did not unambiguously reveal that the decision was unrelated to the strike. Although articles published as early as June 17 state that the pulp mill had been shut down "indefinitely," that could simply reflect the fact that, at the time, the length of the strike was uncertain. A July 27 article indicating that the Employer had contracted to buy enough pulp to last through the end of September did not reveal the true nature of the outsourcing, as the Union knew it would take 6-8 weeks to restart the pulp mill even if the Employer had that day decided to resume pulp production. An August 3 article indicating that the Employer had contracted to buy enough pulp, if necessary, to last through February, 2002, did not unambiguously reveal the Employer's intentions because the phrase "if necessary" implied that the decision was contingent upon the strike's continuation through February 2002.

An August 13 article came closest to revealing the true nature of the Employer's outsourcing: it quoted a company spokesman as stating that the pulp mill would remain shut down until at least January 2002; that the shutdown decision was "dictated by cost, not the strike;" and that the Employer had contracts to buy pulp from outside suppliers, if needed, in order to operate the mill through February 2002. We note that this information was buried in a single article regarding the impact of the strike on loggers, not on employees represented by the Union, and thus the Union likely did not see this

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<sup>48</sup> We are aware of no Board decisions creating a presumption that parties to a labor dispute have been adequately informed about proposed changes in employment conditions when they are referenced in a newspaper article. Cf. Gibson Greetings, 310 NLRB 1286, n.5 (1993) (confirming that newspaper articles may be considered evidence in some circumstances).

particular article. In any event, that Employer statement was not sufficient, in and of itself, to eliminate the earlier ambiguity regarding the nature of the outsourcing.<sup>49</sup> The Employer asserts that, even though it did not directly inform the Union of its outsourcing decision despite numerous opportunities to do so, it repeatedly referenced that decision in communications with the press. One relatively clear statement buried in a single news article is not the deluge of information the Employer represents occurred.

Finally, an October 9 article in which the Union conjectured that some employees might not be scheduled for work immediately after the strike ended if the company did not immediately reopen its pulp mill does not establish that the Union had actual knowledge that the outsourcing would continue indefinitely after the strike, as it may merely have reflected the Union's understanding that it would take 6-8 weeks to restart the pulp mill. Accordingly, the Employer has failed to demonstrate that the Union had actual knowledge of the outsourcing decision prior to mid-November.

We also reject the Employer's assertion that the Union waived its bargaining rights by failing to timely request bargaining over the outsourcing decision after being informed in November that the outsourcing decision was based on market conditions and that the pulp mill would not be reopened until the beginning of 2002 at the earliest.<sup>50</sup> The Employer had already implemented its decision for several months, which was therefore presented to the Union as a fait accompli.<sup>51</sup> Even in November, the Employer's

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<sup>49</sup> Also, the Union knew that the Employer had always purchased some pulp for use in its operations, so the fact that outsourcing on some scale might continue beyond the strike did not indicate that the pulp mill would remain closed indefinitely after the strike.

<sup>50</sup> The Union asserts, however, that it did not know the outsourcing would continue indefinitely beyond the strike until December 13.

<sup>51</sup> United Parcel Service, 323 NLRB 593, 595 (1997) ("[n]otice of a change months after it took effect is clearly insufficient"). Compare Bell Atlantic Corp., 336 NLRB No. 113, slip op. at 12-14 (2001) (no fait accompli where union was informed of the proposed change six months before its scheduled implementation, despite "positive tone" in which plans were announced; union waived bargaining rights by its failure to diligently pursue bargaining).

communications implied that any future decision to reopen the pulp mill was solely within management's discretion and thus not amenable to bargaining.<sup>52</sup> Nonetheless, in January 2002, around the time the Employer had indicated would be the earliest pulp mill start-up time, the Union requested information from the Employer regarding its contracts for purchased pulp. The information request was tantamount to a request for bargaining.<sup>53</sup> The Employer's subsequent refusal to provide the information, and statement that this decision was a management prerogative, made it futile for the Union to again request bargaining on the issue.<sup>54</sup> Thus, the Union did not waive its bargaining rights.<sup>55</sup>

Accordingly, we find no basis for countermanding the Region's determination that the unilateral outsourcing violated 8(a)(5).

II. The Employer's unlawful unilateral outsourcing of its pulp operations converted the economic strike into an unfair labor practice strike, and the Employer violated Section 8(a)(3) by refusing to reinstate unfair labor practice strikers.

A strike that is economic at its inception may be converted into an unfair labor practice strike if the employer commits unfair labor practices that have the effect of prolonging the strike. To demonstrate

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<sup>52</sup> See Westinghouse Electric Corp., 313 NLRB 452, 453 (1993), enfd. mem. 46 F.3d 1126 (4<sup>th</sup> Cir. 1995), cert. denied 514 U.S. 1037 (1995); Brannan Sand & Gravel Co., 314 NLRB 282, 282 (1994).

<sup>53</sup> A union's request to bargain need not be in any particular form so long as it clearly indicates a desire to bargain, Al Landers Dump Truck, Inc., 192 NLRB 207, 208 (1971), and the Board has found information requests to be requests for bargaining. See, e.g., Dubuque Packing Co., 303 NLRB at 398 & n.36.

<sup>54</sup> Westinghouse Electric Corp., 313 NLRB at 453.

<sup>55</sup> Similarly, we reject the Employer's Section 10(b) defense as the Union was unaware of the Employer's decision to engage in non-strike related outsourcing until November 13, less than six months before filing the charge. See, e.g., Land Air Delivery v. NLRB, 862 F.2d 354, 360 (D.C. Cir. 1988) (rejecting an employer's Section 10(b) argument where the employer withheld from the affected union its decision to permanently subcontract unit work during a strike).

conversion, the General Counsel must show that the unfair labor practice was a factor (but not necessarily the sole or predominant one) that caused a prolongation of the work stoppage.<sup>56</sup> Both subjective and objective factors may be probative of causation. In applying subjective criteria, substantial weight may be given to the strikers' own characterization of their motive for continuing to strike after the unfair labor practice.<sup>57</sup> In applying objective criteria, the Board has stated:

Certain types of unfair labor practices by their nature will have a reasonable tendency to prolong the strike and therefore afford a sufficient and independent basis for finding conversion.... The common thread running through these 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.<sup>58</sup>

Where an economic strike is converted to an unfair labor practice strike, the economic strikers become unfair labor practice strikers on the date of conversion, and, upon their unconditional offer to return to work, are entitled

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<sup>56</sup> See, e.g., Gaywood Mfg. Co., 299 NLRB 697, 700 (1990).

<sup>57</sup> C-Line Express, 292 NLRB 638, 638 (1989), enf. denied on other grounds 873 F.2d 1150 (8<sup>th</sup> Cir. 1989). See, e.g., Refuse Compactor Service, 311 NLRB 12, 20 (1993), enf. mem. 57 F.3d 1077 (9<sup>th</sup> Cir. 1995) (strikers' discussions among themselves, expressing support for continuing strike following on the heels of employer's unfair labor practices, established necessary causal connection for conversion).

<sup>58</sup> C-Line Express, 292 NLRB at 638. See, e.g., Sunol Valley Golf Club, 310 NLRB 357 (1993), enf. 48 F.3d 444 (9<sup>th</sup> Cir. 1995) (employer's unlawful withdrawal of recognition converted economic strike into unfair labor practice strike; such conduct objectively "prolongs the strike because it deprives the employees of their bargaining representative and thereby precludes the possibility of reaching agreement on a contract and impedes the settlement of the strike"); Vulcan-Hart Corp., 262 NLRB 167 (1982), enf. denied in part 718 F.2d 269 (8<sup>th</sup> Cir. 1983) (employer's unlawful discharge of 19 economic strikers, representing half of the unit, converted economic strike into unfair labor practice strike, because the unlawful discharge of strikers is "a blow to the very heart of the collective bargaining process" and "leads inexorably to the prolongation of a dispute").

to displace any replacement employees hired post-conversion.<sup>59</sup>

Based on objective factors, we conclude that the Employer's unfair labor practice converted the economic strike into an unfair labor practice strike. The indefinite elimination of a major portion of bargaining unit work is the kind of unfair labor practice that would have a "reasonable tendency to prolong [a] strike."<sup>60</sup> The Board has found that, where an unfair labor practice would objectively convert a strike, it is not necessary to show union or employee knowledge that the unfair labor practice was committed. Thus, in American Cyanamid Co., the Board affirmed an ALJ's finding that the employer's unlawful unilateral permanent subcontracting of unit work converted an ongoing economic strike into an unfair labor practice strike on the date the subcontract was executed, even though neither the union nor the employees were aware of the unlawful conduct at that time.<sup>61</sup> That conclusion in American Cyanamid could be termed dicta,<sup>62</sup> and the Board did not explain how its conclusion conformed with extant Board law requiring the demonstration of a causal link between an unfair labor practice and the continuation of the strike, which might necessarily require employee knowledge of the unfair labor practice.<sup>63</sup> Nevertheless, the Seventh Circuit

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<sup>59</sup> Sunol Valley Golf Club, 310 NLRB at 371.

<sup>60</sup> C-Line Express, 292 NLRB at 638. See also Hawaii Meat Co. Ltd., 139 NLRB at 969 (employer's failure to bargain over decision to subcontract unit work "was clearly a factor in prolonging the strike, since thereafter the very existence of the certified unit was at stake").

<sup>61</sup> American Cyanamid Co., 235 NLRB 1316, 1323 (1978), enfd. 592 F.2d 356 (7<sup>th</sup> Cir. 1979).

<sup>62</sup> The Employer argues that because the failure to reinstate unreplaced economic strikers would result in an 8(a)(3) violation under Laidlaw, the conversion finding in American Cyanamid was unnecessary.

<sup>63</sup> Knowledge of an unfair labor practice clearly is necessary in order to find a conversion based on subjective evidence. See Burlington Homes, 246 NLRB 1029, 1032 (1979) (economic strike not converted to ULP strike where strikers were unaware that employer had unlawfully offered higher wages to replacement workers); Robbins Co., 233 NLRB 549, 549 (1977) (employer's unlawful granting of a wage increase to a single crossover employee did not convert strike where there was no evidence union or striking employees knew of wage increase or that it had any impact upon the strike).

enforced the Board's order, including its conclusions regarding strike conversion, and the Board has never rejected that holding. Thus, American Cyanamid remains Board law and compels issuance of a complaint alleging conversion in the instant case.<sup>64</sup>

The Union asserts that the Employer's misconduct actually prolonged the strike, notwithstanding the lack of employee knowledge of the unfair labor practice, because, had the Employer acted lawfully and notified the Union of its plans, the strikers reasonably would have considered making concessions and ending the strike at that time.<sup>65</sup> However, the Union has provided no evidence that it would have ended the strike earlier if it had been made aware of the unlawful outsourcing.<sup>66</sup> Accordingly, the Region should

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Even where an employer commits the kind of unfair labor practice that would objectively have a tendency to prolong a strike, there arguably would be no conversion in the absence of any employee knowledge of the violation. See, e.g., F.L. Thorpe & Co., 315 NLRB 147, 149-50 (1994), *enfd.* in part 71 F.3d 282 (8<sup>th</sup> Cir. 1995) (the Board implied that some employee knowledge of an unfair labor practice may be required even to find an "objective" strike conversion).

<sup>64</sup> [FOIA Exemptions 2 and 5

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<sup>65</sup> See Gibson Greetings, 310 NLRB 1286, 1288-89 (1993), *enf. denied* in pertinent part 53 F.3d 385 (D.C. Cir. 1995) (the Board, noting that the employees may not have even been aware of the employer's unlawful conditioning of further bargaining upon acceptance of a permissive bargaining proposal, found that the actual result of the ULP was a two-week period in which no bargaining occurred, which impeded opportunities to settle the strike and necessarily prolonged the strike).

<sup>66</sup> Based on the Region's conclusion that the Union first learned the true nature of the outsourcing in mid-November, one could argue that the strike's end shortly thereafter indicated that the strike would have ended earlier had the Union received timely notification. But the Union contends that it did not learn the true nature of the outsourcing until December 13, well after the strike ended. Further, the Employer persuasively asserts that the Union ended the strike in November because that was when the Union first realized that most of the strikers had been permanently replaced; until then, the Union had mistakenly believed that the replacements were not "permanent" because they were subject to a probationary period.

base its strike conversion argument solely on American Cyanamid, and not on the Union's "actual causation" theory.

Finally, we agree with the Region that the Employer's unfair labor practice prolonged the strike as to all the Local 18 and Local 155 strikers, even though only a portion of the Local 18 work was unlawfully outsourced. There is no question that the strike was prolonged as to all employees in the same unit with the employees directly affected by the outsourcing.<sup>67</sup> With respect to the Local 155 strikers, we would reach the same conclusion because Locals 18 and 155 were unified throughout contract negotiations, the strike, the strike settlement, and the ultimate contractual agreements. This unity of action comported with the Union's historic bargaining practice, and notably, the 1996 strike. This was a strategic choice for the Union, not simply a matter of administrative convenience. Thus, because the overwhelming weight of the evidence indicates that the Local 155 and 18 strikers were united in common cause, we conclude that the actual effect of the unfair labor practice was to prolong the strike not only as to the striking pulp mill workers, but also as to the Local 155 strikers.<sup>68</sup>

B.J.K.

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<sup>67</sup> See, e.g., American Cyanamid Co., 235 NLRB at 1323 (unlawful unilateral subcontract of almost half of the jobs in the bargaining unit converted the strike as to the entire unit); Hawaii Meat Co., Ltd., 139 NLRB at 969 (unlawful unilateral subcontract of 15 of 73 unit positions converted strike as to entire unit).

<sup>68</sup> Compare Rose Printing Co., 289 NLRB 252, 253 (1988) (conversion as to unit where employer unlawfully withdrew recognition did not extend to other unit, where units bargained separately and began strikes on different days); Brown & Root, Inc., 99 NLRB 1031, 1036-38 (1952), enfd. in part 203 F.2d 139 (8<sup>th</sup> Cir. 1953), rehearing denied 206 F.2d 73 (8<sup>th</sup> Cir. 1953) (unfair labor practice strike based on employer's unlawful refusal to bargain did not extend to group of employees represented by other union, which was engaged in separate bargaining with employer, who joined strike without their union's sanction or authorization, because they did not have "sufficiently immediate relation" to the ULP).