UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

ROSE FENCE, INC.

Case Nos. 29-CA-30485
29-CA-30537

and

LOCAL 553, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND BRIEF IN SUPPORT

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The General Counsel excepts to portions of Administrative Law Judge Mindy E. Landow's decision in the above case. Although the ALJ correctly found that Respondent unlawfully disregarded its bargaining obligations when it laid off employees, the ALJ incorrectly failed to find Respondent similarly subcontracted work unlawfully. The ALJ concluded that the evidence was insufficient to show the work being subcontracted was work that could have been performed by bargaining unit employees. This conclusion, however, is contrary to the evidence presented at trial. Reversal of the ALJ on the issue of subcontracting is warranted.

EXCEPTIONS:

The General Counsel excepts to the following portions of the ALJ's decision:

Page	Lines	Decision
14	26-34	The ALJ incorrectly disregarded record evidence that subcontractors performed residential work.
14	42-43	The ALJ incorrectly disregarded affirmative evidence that Respondent subcontracted unit work following the Union's certification.
14-15	45-1	The ALJ incorrectly discounted the record evidence demonstrating that unit work was subcontracted after the Union's certification.
15	3-14	The ALJ incorrectly credited Respondent's argument of an established past practice with regard to subcontracting.
15	15-18	The ALJ incorrectly found Respondent lawfully subcontracted unit work.

FACTS:

Respondent manufactures, sells, and installs fences. (JD 2:24). On June 3, 2010, the Union was certified to represent Respondent's employees who work in fence installation. (JD 2:32-39, 2:46-3:1). Respondent's owner, Scott Roswesweig, estimated that about 95 to 98 percent of Respondent's fence work is residential, though it also does some select commercial projects as well. (23).[1] In addition to the 60 employees performing fence installations during peak season, Respondent also uses five or six subcontractors as well. (JD 2:46-47, 4:20-21). The subcontractors perform both commercial work which the Respondent's employees are not

qualified to do, as well as residential work. (JD 4:10-12). As Rosensweig explained, Respondent pays its subcontractors piece work, which makes it more cost effective to Respondent to have subcontractors do the work. (Tr. 41, 54). Respondent admits that, following the Union's certification, Respondent never contacted the Union prior to subcontracting out work. (JD 4:26-27).

DISCUSSION:

Contrary to the ALJ's analysis of the subcontracting issue, the Board should find the following: (1) as a factual matter, the record conclusively shows that unit work was given to subcontractors subsequent to the Union's certification; and (2) as a legal matter, Respondent's historical use of subcontractors to perform unit work does not relieve Respondent of its bargaining obligations. Consequently, Respondent's repeated action of subcontracting unit work after the Union's certification with first giving notice of and bargaining with the Union violated Section 8(a)(5) of the Act.

(1) The record conclusively shows that unit work was given to subcontractors subsequent to the Union's certification.

While the ALJ focused on the fact that some subcontractors have performed work that unit employees do not perform, she incorrectly refused to conclude that subcontractors performed unit work following the Union's certification. This is a clearly reversible error.

Respondent only used five or six subcontractors to perform work. (JD 4:20-21.) Many of these subcontractors were former employees who had installed residential fencing for Respondent. (Tr. 46). At hearing, Respondent's owner, Scott Rosensweig, testified with specificity about the subcontractors he had used. Rosensweig testified about Francisco Ramos, a subcontractor Respondent used for residential fence work. (Tr. 45). As the ALJ found, Ramos

[1] Specifically, Scott Rosenweig testified: "I do 98 percent, 95, 98 percent will be residential. I do some commercial

performed subcontracting work for Respondent from the time of Union's certification through December 2010. (JD 4:34-36). Rosensweig also testified about Fitz Roy, another subcontractor Respondent used only for residential work. (Tr. 46). Rosensweig testified about a subcontractor named Cabrera, a former employee performing residential fence work from May 2010 up to the day of the hearing. (Tr. 41-44). Each of these subcontractors was used by Respondent to do residential fence work subsequent to the Union's certification, and therefore, the clear record evidence is contrary to the Judge' findings.

In failing to recognize the residential fence work being given to subcontractors, the ALJ focused disproportionately on the commercial work a few subcontractors performed. This too is misguided. While there undoubtedly were some commercial projects that unit employees were not qualified to do, as described at hearing, many of the subcontractors were simply former employees who now worked for Respondent doing the same work on a piecework basis. (Tr. 46). Further, just as the subcontractors performed residential work, Respondent's owner Rosensweig testified that unit employees were also used to perform some commercial work: "A simple job, a six foot chain link fence is easy to handle... I could give my house crews small commercial jobs."[2] (Tr. 76).

While the ALJ is correct that some subcontracting work was not work unit employees could do, the record clearly demonstrates that much of the work performed by subcontractors was indeed unit work. In fact, many of the subcontractors were Respondent's former employees, and residential fence work was the only work those subcontractors performed. The fact that a portion of the subcontracted work was not unit work does not support a finding that subcontractors were not also performing unit work. Respondent's owner Rosensweig testified specifically that subcontractors did the same work that his employees performed. The ALJ committed reversible error by failing to find

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work for selected people where I know I'll get paid when I'm done." (Tr. 23).

that the Respondent violated Section 8(a)(5) by subcontracting unit work without bargaining with the Union.

(2) **Respondent's historical use of subcontractors to perform unit work does not relieve Respondent of its bargaining obligations.**

While Respondent had historically used subcontractors, with the Union's certification, Respondent incurred bargaining obligations under the Act. The subcontracting of unit work is a mandatory subject of bargaining, unless it involves the scope or nature of the enterprise. *Mission Food*, 350 NLRB 336, 344-345 (2007). Where subcontracting involves "the substitution of one group of workers for another to perform the same work," the union must be given notice and a meaningful opportunity to bargain. *Id.* at 344. As the ALJ found, Respondent did not give the Union notice in the current case. (JD 4:26-27). Further, once the parties began bargaining a contract, Respondent continued to unilaterally subcontract work in the absence of reaching any agreement on the issue or a valid impasse.

In the ALJ's decision, the dismissal of the subcontracting allegation relies heavily on the incorrect conclusion that unit work was not at issue. However, to the degree that the ALJ found that past practice justified Respondent's unilateral action, that legal conclusion is also incorrect. Respondent's past use of subcontractors did not allow it to unilaterally subcontract unit work subsequent to the Union's certification.

An employer's practices prior to the certification of a union do not relieve the employer of its obligation to bargain with the union when implementation of those practices entail changes to employees' wages, hours, and other terms and conditions of employment. *Porta-King Building Systems*, 310 NLRB 539, 543 (1993). More specifically, the Board has held that past practices that involve management discretion are precisely the type of actions which must be

[2] "House crews" were Respondent's employees. (Tr. 76).

bargained with a newly-certified Union. *Eugene Iovine, Inc.*, 328 NLRB 294 (1999). Absent a reasonable certainty as to the timing and criteria of an employer's action, the past practice is insufficient to allow an employer to act unilaterally. *Id.* On the subject of subcontracting, the Board has held that an employer's past use of subcontractors does not permit it to unilaterally subcontract unit work in disregard of the employees' bargaining representative. See e.g., *Citizens Publishing*, 331 NLRB 1622 (2000). As the Board has noted elsewhere, such subcontracting has a harmful effect on bargaining unit employees: "...the bargaining unit is adversely affected whenever bargaining unit work is given away to nonunit employees, regardless of whether the work would otherwise have been performed by employees already in the unit or by new employees who would have been hired into the unit." *Overnite Transportation Company*, 330 NLRB 1275, 1276 (2000). Therefore, Board precedent clearly shows that Respondent was not permitted to unilaterally subcontract unit work once its employees selected the Union.

CONCLUSION

The General Counsel respectfully submits that the evidence shows Respondent unilaterally subcontracted work in violation of the Act. The General Counsel requests that the ALJ's Decision and Order with respect to the subcontracting issue be reversed, and that the Board's order be amended to provide that the Employer violated Section 8(a)(5) by failing to bargain with the newly certified union about subcontracting and that the Board provide its usual remedy for such violations.

Respectfully submitted April 13, 2012.

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