

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

PATRISH, LLC, d/b/a NORTHWEST
AIRPORT INN (Respondent)

and

Case No. 14-CA-080874

UNITE HERE LOCAL 74

**RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION
AND MEMORANDUM OF LAW IN SUPPORT**

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Exception 1: The ALJ Erred in Disregarding the Hearing Testimony of Mr. Patel, the Managing Member of Respondent, and Mr. Moore, the Union Business Agent, about the Negotiations and Contracting Out of Bargaining Union Work, and in Concluding that Respondent presented the Union with a “*Fait Accompli*.”

A *fait accompli* occurs when the decision at issue has already been implemented. At the hearing, the evidence established that Respondent Employer had not yet hired out the bargaining unit work of the two workers in question as of the November 21, 2011 bargaining session of the Union. Notwithstanding the erroneous, conclusory statement in Mr. Patel’s affidavit, the testimony of Mr. Patel and Mr. Moore combined with the actual record of hiring of temporaries established that at the time of negotiations, Respondent had not yet laid off the two bargaining unit employees, nor contracted out their work to Southside Temporaries. In other words, the Union had an opportunity for good-faith bargaining before Respondent laid off the two bargaining unit employees and subcontracted their work.

1. Mr. Patel’s Testimony Does Not Support a *Fait Accompli*.

Q: (Ms. Ballentine of NLRB) And when you came into this meeting, you had no intention to discuss the new contract with the Union, correct?

A: (Mr. Patel) No, that is not true. We have discussed this contract for the last 10 years; why would I have not reason to do that? The only thing is right now I am starved for cash. I am completely at odds with my bank now. And here they are coming back as if nothing happened to this hotel. We are going to walk in, all things, you know, blaring high, and we are going to demand everything; they don't know what is going on with the property.

Q: So it's your testimony that is not true that you did not have any intention to discuss a new contract at the meeting?

A: If they had come back – if they had gone through some thought process – this guy is just coming through a disaster –

Q: So it was your intention to discuss the new contract at that meeting?

A: If they had come back with better numbers, yes.

Petitioner Ex. 5, Transcript at 43:17-44:11. Mr. Patel did not tell Mr. Moore about the possibility of contracting out the last two positions until Mr. Moore had made his offer with no

regard to the company's situation. As for the allegation that Mr. Patel had already contracted out the work before meeting with Mr. Moore, it simply did not happen that way. No Southside Temporary workers were hired for the bargaining unit work at issue until after the negotiation session had ended and the contract expired. In fact, no temporaries were hired until the first week of December, 2011.

2. Mr. Moore's Testimony Does Not Support a *Fait Accompli*.

Likewise, Mr. Moore was clear in his testimony that Respondent did not say subcontracting had already occurred. In fact, he was clear that the converse was true.

Q: (Mr. Housh for NW Airport Inn) What exactly is it that Bill [Thompson] said to you in the negotiation meeting in November or 2011?

A: (Mr. Moore of the Union) Bill state that they were going to contract the work out and lay the workers off.

Q: Okay. "Going to contract" – In other words, they didn't say we've already subcontracted?

A. No, they said they were going to.

Q: Okay. And what did you say besides you can't do that?

A: That's what I told them. I said you can't do that as far as laying the workers off because they were the only two individuals that were left in the bargaining unit. So if you are going to lay these two individuals off, then you are eliminating the whole bargaining unit.

Thus, Mr. Moore's objection to Respondent's explanation of what it *was going* to do (contract out the two positions) was not that Respondent owed the Union an opportunity for decision or effects bargaining, but rather that, in Mr. Moore's view, the elimination of all the remaining bargaining unit jobs was in and of itself an unfair labor practice. Having come to this conclusion, Mr. Moore abruptly ended the meeting, saying Mr. Patel would hear from his attorney and the NLRB. (Tr. at 42:17-22).

Not only did Mr. Moore acknowledge that his problem was not a lost bargaining opportunity, he admitted that the interpretation of Respondent's right in the Collective Bargaining Agreement ("CBA") to eliminate positions and contract out work was subject to the parties' agreed grievance and arbitration process:

Q: (Mr. Housh for NW Airport Inn) Well if you have the right to contract for outside work, what difference does it make if you're replacing the two union members or not?

A: (Mr. Moore for the Union) Because, first, had those workers called me within the right time frame, then I would have filed a grievance. And I did not realize that I could have come down and filed charges with the Labor Board against the Company for laying those other workers off and having them to perform union work.

Q: So had you known, what you would have done is filed a grievance?

A: Yes.

Q: And what would have happened next?

A: Then we would have set up a grievance meeting with the Company, and we would go over everything.

Q: Well, if you had a meeting on November 21st where Bill tells you we are going to contract out or subcontract out the work of these two people, you knew then, didn't you?

A: Someone saying what they are going to do and then actually do are two different things.

Q: So you didn't believe they were necessarily going to do it until you saw it happen?

A: That is correct.

Q: Neither of them said anything in that meeting, did they, to indicate they were withdrawing from the Union or anything like that? They didn't use words like that, did they?

A: No. There were very little words said.

Tr. at 93:22-95:11. Contrary to the ALJ's conclusion, the Union knew the subcontracting was a grievable issue under the CBA, and ignored the favored preference for arbitration. The subcontracting at issue was thus not a *fait accompli*.

Exception 2: The ALJ Erred in its Application of *Allison Corp.* and in Concluding that the Collective Bargaining Agreement Did Not Waive the Union’s Bargaining Rights over the Contracting Out of Unit Work.

The key holding in *Allison* is that the contract language *itself* is evidence the parties have already negotiated the issue on which the union seeks bargaining:

[T]he management-rights clause specifically, precisely, and plainly grants the Respondent the right “to subcontract” without restriction. We therefore find a “clear and unmistakable waiver” by the Union of its statutory right to bargain regarding the Respondent's decision to subcontract. We therefore conclude that the Respondent did not violate Section 8(a)(5) by unilaterally subcontracting unit work.

Allison Corp., 330 NLRB 1363, 1365 (2000).

The *Allison* Board found a waiver had occurred because the CBA gave Allison Corporation the right to subcontract. The ALJ found the instant CBA language “does not clearly vest in Respondent the right to replace all unit employees with contract employees without providing the Union notice and opportunity to bargain about such subcontracting.” [Decision page 5, 25]. The ALJ demanded too much from the Patrish/UNITE CBA. The Allison CBA contained no express language about the type of notice and opportunity to bargain. In fact, the Allison Board refused to imply the types of specificity urged by the Union to counter a finding of waiver.

Contrary to the ALJ’s conclusion, both Article 2, Section 4 of the CBA and the Management Rights Clause in Article 4 of CBA specifically, precisely, and plainly granted the Respondent the right to contract out work. The former establishes Respondent’s right to “from time to time...hire outside contractors.” The latter establishes Respondent’s rights to, among other things, “relieve employees from duty because of lack of work or for other legitimate reasons.” One cannot read these provisions in isolation with a mind toward reading them out of existence.

Consider an April 18, 2011 Advice Memorandum from the General Counsel's office on a Region 32 case, *Pacifica*, Case 32-CA-25450, in which dismissal or withdrawal of a charge based on a similar Allison argument was urged. Although layoffs rather than contracting out of work was at issue, the General Counsel's position still militates against unduly restricting an employer's right to manage its business protected in a CBA. Citing *Allison*, the General Counsel's Division of Advice adroitly observed:

With respect to the first allegation, the Employer was not obligated to meet and bargain with the Union over alternatives to layoffs because the Union waived its right to do so in the collective bargaining agreement. [citation to Allison omitted] Article 12 of the parties' collective bargaining agreement permits the Employer to "reduce the work force due to lack of work or other reasons including economic necessity," but requires that the Employer "actively explore alternatives to the layoffs(s) before the effective date of the layoff, if so requested by the Union." This language does not create a duty to bargain about alternatives to the layoffs. What it requires is that the Employer "explore alternatives," at the request of the Union. Here, the evidence establishes that the Employer met with the Union, at the Union's request, to discuss the Union's suggestions for alternatives to layoffs, considered and investigated those alternatives and ultimately rejected the Union's suggestions by vote of the Board of Director's finance committee. After that vote, the Employer's Executive Director met with the Union to explain why the proposals had been rejected. Based on these facts, the Employer met its only contractual obligation, which was to "actively explore alternatives to the layoffs."

See National Labor Relations Board, Office of the General Counsel, Advice Memorandum dated April 18, 2011 from Barry J. Kearney, Associate General Counsel Division of Advice to William A. Baudler, Regional Director, Region 32. The management power at issue in *Pacifica* was identical to that found in this case – to reduce the work force for legitimate reasons, including economics. Respondent acted in consort with its authority under the CBA. In limiting its analysis of the contracting language at issue to non-bargaining unit work, the ALJ improperly reduced it to mere surplusage. To read the language at issue to mean that Respondent need not bargain with the Union over work not covered by the CBA is to read the language to state a simple truism – i.e., "Respondent need not bargain with UNITE to have non-bargaining unit

work done.” The contract language at issue had meaning, and Respondent had followed that meaning before. Respondent had a recognized right to relieve bargaining unit workers as it saw fit. Combined with the express right to hire outside contractors “from time to time,” Respondent was entitled to replace the two individuals in question with workers from an outside contractor.

Exception 3: The ALJ Erred in Concluding that the Past Conduct of the Parties Did Not Constitute a Waiver of the Union’s Bargaining Rights over the Contracting Out of Unit Work.

The waiver language present in the CBA is buttressed by the conduct of the parties, including “past practices, bargaining history, and action or inaction.” *See American Diamond Tool, supra*. The ALJ found that the Respondent’s past conduct of laying off a laundry employee and replacement by a contract employee did not support a finding of waiver because “Respondent did not notify the Union that it was transferring the work of the unit employee to a subcontractor.” [Decision page 5, 40]. This finding is erroneous because the Union’s testimony established that it had knowledge of the transferred work. In addition, the ALJ failed to consider other past practices where Respondent eliminated four other positions.

The evidence at the Hearing established that months before the initial negotiation in November 21, 2011, Respondent had eliminated the position occupied by the Union’s shop steward and contracted out the work. Respondent had also eliminated four housekeeping positions and replaced them with a new position, inspectress. Against this historical backdrop, the Union knew it had a right to grieve and arbitrate its opposition to Respondent’s expressed intent to eliminate the two bargaining positions and contract for the work. Mr. Moore testified directly to this point. The Union chose not to arbitrate, and made no request for decision or effects bargaining. Instead, it chose to rely on a theory that Respondent had refused to bargain and constructively withdrawn recognition of the Union.

Respondent's evidence of waiver in the CBA language is buttressed by the prior subcontracting of work pursuant to the collective bargaining agreement. The Eighth Circuit recognizes that an established pattern exists when, as here, the past practices involved "an employer and a union located in the same bargaining unit at the same facility as the challenged practice." *Porta-King Building Systems, Division of Jay Henges Enterprises, Inc. v. NLRB*, 114 F.3d 1258, 1263 (8th Cir. 2005) (citing *Aquaslide 'N' Dive Corp.*, 281 N.L.R.B. 219, 223-24 (1986); *Montgomery Ward & Co.*, 217 N.L.R.B. 165, 167 (1975)). See also *Finch, Pruyn & Company, Inc. and Paper, Allied-Industrial, Chemical & Energy Workers International Union, AFL-CIO*, 349 NLRB 28, 349 NLRB 270 (2007) (employer did not violate the Act by continuing its unilateral subcontracting after a strike had ended because the Union never made a request to bargain about the post-strike subcontracting).

A unilateral change made pursuant to a longstanding practice is essentially a continuation of the *status quo* and not a violation of Section 8(a)(5) of the Act. *The Courier-Journal*, 342 NLRB 1093, 1095 (2004). In *WP Company, LLC d/b/a The Washington Post and Washington Mailers' Union No. 29 Printing, Publishing, and Media Workers Sector of the Communications Workers Of America, AFL-CIO*, 358 NLRB 140 (2012), the Board found that a long-established practice of having workers insert items into the paper by hand was not an unfair labor practice, particularly when the union had raised the issue before and filed a grievance.

The ALJ's finding ignores the elimination of bargaining unit work from eight to two positions from January, 2010, and the fact that the Company's management rights and contracting language had been in the contract as long as anyone could remember.

I also reject the General Counsel's argument that the Respondent's prior changes were too "variable and ad hoc." Unlike in the cases cited by the General Counsel (which involved newly certified or elected unions), here the parties have a 100-year collective-bargaining relationship. Further, not only the changes, but the benefits themselves, have historically

been grounded in past practice rather than contractual provisions during that time. In this context, I find that the Respondent's long history of making frequent, substantial, routine and nonroutine unilateral changes to the benefit plans for unit and nonunit employees alike--a history well documented in the record by both the evidence of the past changes and the language of section 13 --sufficiently establishes that the unit employees "could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." *Caterpillar, Inc.*, 355 NLRB No. 91, slip op. at 3 (2010), quoting *Sunoco, Inc.*, 349 NLRB 240, 244 (2007).

Pantagraph Publishing Co. and District Council Four, Graphic Communications Conference Of

The International Brotherhood Of Teamsters, 2010 WL 5137042 (N.L.R.B. Div. of Judges).

Likewise, the facts here support a reasonable expectation by the Union that elimination and contracting out of bargaining unit work was occurring.

From early 2010 forward, after a fire and the recession made the company starved for cash, Respondent found ways to make their hotel more self-service, having guests bring their own linens to the front desk for exchange, for example. When it eliminated four housekeeping positions, one of those employees who were supplanted contacted Mr. Moore, the Union Business Manager to let him know. He knew, or should have known, that the laundry service of his shop steward had been outsourced, but he made no mention of the issue to Respondent. Given that notice of all terminations are sent to the Union's office, Mr. Moore is imputed with the knowledge that bargaining unit was being replaced by restructuring and outside contracting. On November 21, 2011, after meeting with Mr. Patel, the Union had indisputable, actual knowledge of this fact.

Exception 4: The ALJ Erred in Ordering Reinstatement and Back Pay.

The financial condition of Respondent should be a factor in determining whether reinstatement and back pay are the right remedy. *See, e.g., Kobell v. J.D. Hinkle & Sons*, 131 L.R.R.M. (BNA) 2321 (N.D. W.Va. 1988):

More importantly, it is inconceivable, based upon the evidence of the financial condition of the respondent, that the respondent would be able to comply with any order of this Court requiring the respondent to re-employ the laid off workers. Such an order would create such a financial hardship on the respondent that it would jeopardize the existence of the business and the jobs of the 100 employees remaining on the payroll.

Respondent acted in good faith upon its express contract rights. Rather than submit this matter to the acknowledged grievance procedure or otherwise seek to bargain, it appears the Union chose to take the most delayed, litigious and expense route available, so as to extract the pain of a back pay award. Respondent has remained willing to bargain with the Union. If the Union is willing to consider the Company's financial and market circumstances, and attempt to provide union services at even roughly comparable terms, there is a chance the parties could work things out. Instead, Petitioner has chosen to bring to bear the full weight of the NLRB on a small hotelier over two restructured positions, in order to substantiate a legal theory (withdrawal of recognition and refusal to bargain) that is not borne out by the contract language or the parties' testimony. Under these circumstances, the Board should order the Union and the Company to bargain, but not order the Company to reinstate or pay back wages under these circumstances.

Dated November 21, 2012

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