

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

PATRISH, LLC d/b/a NORTHWEST
AIRPORT INN

and

Case 14-CA-080874

UNITE HERE LOCAL 74

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENT'S EXCEPTIONS**

Counsel for the General Counsel (General Counsel), pursuant to Section 102.46(d)(1) of the Board's Rules and Regulations, files the following answering brief opposing the exceptions filed by Patrish, LLC d/b/a Northwest Airport Inn (Respondent).

I. Statement of the Case

This case was heard before Administrative Law Judge Arthur T. Amchan on August 27, 2012. On October 24, 2012, the ALJ issued his Decision and Order in which he found that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by unilaterally subcontracting the work of all bargaining unit employees without giving UNITE HERE Local 74 (the Union) notice or an opportunity to bargain, terminating the two remaining unit members, refusing to bargain for a successor contract, and withdrawing recognition from the Union. On November 21, 2012, Respondent filed four exceptions to the ALJ's Decision and Order.

On October 12, 2012, a hearing was held in the United States District Court for the Eastern District of Missouri on a motion for a temporary injunction under § 10(j) of the National Labor Relations Act, 29 U.S.C. § 160(j). On October 15, 2012, the Court issued a Memorandum

and Order granting an injunction which provided for Respondent to take the following action: rescind the subcontracting, recognize and bargain with the Union, restore the terms of the expired contract, offer reinstatement to the two unit employees, post the order, and provide an affidavit. On about October 22, 2012, Respondent reinstated the two employees.

II. Facts and Analysis

A. Contrary to Respondent's first exception, the ALJ properly ruled that Respondent violated Section 8(a)(5) and (1) of the Act because when it notified the Union of the layoffs and subcontracting it presented the Union with a fait accompli.

Respondent and the Union have had a collective-bargaining relationship since at least 1991. (ALJD 2, LL. 17-18). The most recent collective-bargaining agreement was effective from November 30, 2010 to November 29, 2011 (the Agreement). (ALJD 2, LL. 19-20). During the term of the Agreement, the bargaining unit consisted of two employees, one inspectress and one houseman. (ALJD 2, LL. 42-44). On November 21 or 22, 2011, Union Vice President Moore met with Respondent's Managing Member Naresh Patel and General Manager William Thompson. (ALJD 2, LL. 7-9). Moore presented Respondent with its proposal for a successor agreement, and Respondent replied by stating that Respondent had contracted out the bargaining unit work and was going to lay off both remaining bargaining unit employees. (ALJD 3, LL. 9-10, 14-15).

The ALJ found that Respondent presented the Union with a fait accompli when it informed the Union that it was going to lay off the bargaining unit employees and subcontract their work. (ALJD 4, LL. 30-34). Respondent's replacement of two unit employees with a subcontractor's employees who performed the exact same work is the classic subcontracting addressed by the Supreme Court in *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), and is a mandatory subject of bargaining. It is undisputed that the work performed by the subcontractor's

employees was the exact same work as was performed by unit employees, and the subcontractor's employees did not perform any job duties that were not previously performed by unit employees. (ALJD 4, 1-2; Tr. 17, 26-27, 36, 73-74).

Normally, a union must promptly request bargaining after receiving timely notice that the employer intends to make such a change. *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001). The Union's obligation in this regard, however, is excused because rather than providing the Union with notice of its intent to subcontract, the ALJ properly ruled that Respondent presented the Union with a fait accompli. (ALJD 4, LL. 30-41). If the notice is given shortly before the implementation of a change because the employer has no intent of changing its position, then the notice is merely informing the union of a fait accompli and does not meet the requirements of the Act. *Pontiac Osteopathic Hospital*, supra at 1023. A finding of fait accompli will preclude a finding that a union waived its bargaining right by failing to request bargaining. *UAW-Daimler Chrysler National Training Center*, 341 NLRB 431, 433 (2004).

Respondent argues in its brief that a fait accompli occurs when a decision has already been implemented. (Resp. Br. 4). However, in determining whether a union has been presented with a fait accompli, the Board looks at objective evidence, i.e., whether there is evidence that the decision was predetermined. *Dorsey Trailers, Inc.*, 327 NLRB 835, 858-59 (1999) (holding that a union was presented with a fait accompli when it was informed that the employer was moving, it was "a done deal" and that the decision was on its way to being implemented).

The ALJ's ruling that Respondent presented the Union a fait accompli was based on his credibility resolutions which are clearly supported by the record. The Board has a long established policy not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that the resolutions were

incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). The ALJ credited Managing Member Patel’s affidavit testimony, that when he met with the Union in November 2011, and advised them of the subcontracting, the decision had already been made to subcontract all the unit work, and it would not have mattered whether the Union wanted an increase or a decrease in employees’ compensation. (ALJD 4, LL. 30-34). Further, the ALJ credited Patel’s testimony at hearing where he was asked, “When the contracts came up for renewal in November of 2011, you had already subcontracted out the remaining work to Southside; isn’t that correct? That’s correct.” (Tr. 26; ALJD 3, fn. 2) Thus, the ALJ’s credibility rulings regarding the *fait accompli* are clearly supported by the evidence, i.e. Patel’s own hearing and affidavit testimony. Finally, Respondent’s Answer to the Complaint admits that it “met with the Union regarding the Union’s request for new contract terms, *explained Respondent’s decision regarding subcontracting of work*, at which point the Union left the meeting.” (GC Exh. 1(f) ¶ 6(b)) (Emphasis added).

Based on Respondent’s own testimony and documents, along with the ALJ’s credibility determinations, the ALJ properly ruled that Respondent presented the Union with a *fait accompli* and the Union did not have a further obligation to request bargaining over the layoffs or subcontracting. See *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982) (holding that where notice of a change is too short or is *given under circumstances that make it clear that the employer had no intention of bargaining*, the employer has merely informed the union of a *fait accompli* and has not satisfied its obligation to bargain) (Emphasis added).

Respondent argues that the Union had an opportunity for good-faith bargaining before Respondent laid off the employees and subcontracted their work. However, the delay between Respondent’s November 21, 2011 announcement, and its November 29, 2011 implementation,

was best explained by Patel himself in response to a question from his counsel about the delay, “[M]y contract stated that I have to have a union contract until November 29th, so my obligation is with the contract.” (Tr. 62). “[M]y intention is not to do anything wrong by the contract with the Union. My obligation is with the contract, so I stayed with my contract obligation.” (Tr. 60). Respondent failed to produce any evidence that Patel would have changed his mind during this week or was providing the Union a meaningful opportunity for bargaining at the November 2011 meeting. Patel simply believed that he was obligated to the Union during the duration of the Agreement, but could terminate the relationship at its expiration.

B. Contrary to Respondent’s second exception, the ALJ properly applied *Allison Corp.*, in finding that the parties’ collective-bargaining agreement did not waive the Union’s right to bargain over subcontracting.

Respondent argues, that Article 2, Section 4 of the expired collective-bargaining agreement permits it to subcontract bargaining unit work. (Resp. Br. 7). Article 2 “Recognition” Section 4 states:

From time to time the Company shall hire outside contractors and employees of such contractors shall not be under the jurisdiction of the Union. (ALJD 5, LL. 7-8; GC Exh. 2, p. 4).

An employer may unilaterally make a change in a mandatory bargaining subject if the union clearly and unequivocally waives its right to bargain over a subject. *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB at 1017. The Board will not infer a waiver lightly. The Board has explained “[t]he clear and unmistakable waiver standard, then, requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply.” *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007).

The contract language here is not a clear and unmistakable waiver of the Union's right to bargain over the subcontracting of all bargaining unit work and the layoff of unit employees. First, it states the contracting will occur "from time to time". Second, there is nothing in the language to indicate that the contractor's employees may perform bargaining unit work or that Respondent may lay off or terminate unit employees. The language is a mere recognition that Respondent may have a need "from time to time" to employ outside contractors and if Respondent does so, the contractors' employees are not within the Union's jurisdiction. Therefore, the ALJ did not err when he concluded that Article 2, Section 4 permits Respondent to employ workers on a temporary basis, or for tasks unrelated to those performed by bargaining unit employees and it does not permit Respondent to permanently replace unit employees with contractor employees. (ALJD 5, LL. 10-14).

Respondent next argues the management rights clause in Article 4 allows the use of outside contractors. (Resp. Br. 7). However, the Board in *Centurylink*, 358 NLRB No. 134, slip op., at 1 (2012), made it clear that the elimination of a job classification and discharge of all employees in that classification are mandatory subjects of bargaining, notwithstanding a management rights clause which gave the employer the right to "classify, reassign, lay off and discharge employees." *Id.* at 1. As the administrative law judge noted in that case, the elimination of a job classification is not a "run-of-the-mill" layoff. *Id.* at 10. The agreement in that case did not contain any enumerated right to eliminate job classifications to reduce labor costs, and the Board further held that the agreement's layoff provision did not privilege the employer's actions. *Id.* at 1, 11.

Here, the ALJ properly ruled that the management rights clause does not clearly vest in Respondent the right to replace all unit employees with contractor employees, without giving the

Union notice or an opportunity to bargain. (ALJD 5, LL. 29-31). The management rights clause here states that Respondent has the right to “relieve employees from duty because of lack of work or for other legitimate reasons”. (ALJD 5, LL. 18-27; GC Exh. 2, p. 4). There is no language in the Agreement stating or indicating that the parties had a mutual intent to allow Respondent to unilaterally replace unit employees with outside contractors. As in *Centurylink*, this is not a “run-of-the-mill layoff”, and the management rights clause in this case is not sufficiently broad nor does it contain explicit language which would privilege Respondent to unilaterally lay off unit employees, subcontract unit work, and withdraw recognition from the Union. While Respondent argues that it was privileged to lay off for any legitimate reason, the desire to avoid a bargaining obligation cannot be held to be a legitimate reason to lay off employees. (Resp. Br. 8).

In its brief, Respondent alleges that the ALJ erred in applying the *Allison Corp.* decision to this case. 330 NLRB 1363 (2000). In his Decision and Order, the ALJ correctly distinguished the contractual language in *Allison Corp.*, which explicitly gave the employer the exclusive right to subcontract, from the language in the current case, which does not give Respondent that right. (ALJD 5, LL. 4-34) In *Allison Corp.*, the management rights clause stated without restriction, “the Company shall have... the exclusive right to subcontract.” In contrast, here the parties’ contract contains a restriction on the use of outside contractors in the words “from time to time”. Further, the language here stating that Respondent shall hire outside contractors is contained in the recognition clause, while the subcontracting language in *Allison Corp.* was contained in a management rights clause. The management rights clause here does not contain any language giving Respondent the right to subcontract unit work. In applying *Allison Corp.*, the ALJ properly concluded that the language found in Article 2, Section 4 “does not clearly suggest that

Respondent was entitled to permanently replace unit employees with contractor employees” and the management rights clause does not vest in Respondent the right to replace unit employees with subcontractors. (ALJD 5, LL. 13-14, 29-31).

In its brief, Respondent cites an Advice Memorandum in *Pacifica*, Case 32-CA-25450. The citation to that Memorandum is misplaced. First, the Memorandum has no binding precedence on the Board. Second, the Memorandum is factually distinguishable because in that case the union waived its right to negotiate over layoffs by agreeing that the employer only had to engage in the exploration of alternatives regarding layoffs. Finally, that case involved an economic layoff of some unit employees where this case involves the termination of the entire bargaining unit.

C. Contrary to Respondent’s third exception, the ALJ properly ruled that the Union did not waive its right to bargain through past practice.

Respondent argues that the Union waived its right to bargain because it did not object to prior subcontracting. (Resp. Br. 9). The ALJ found that in January 2010, Respondent ceased providing housekeeping services and as a result eliminated four unit housekeeping positions. (ALJD 2, 25-32) Further, the ALJ found that later in 2010, Respondent subcontracted unit laundry work and laid off the sole unit employee who had been performing that work. (ALJD 2, 32-34) Thus, the ALJ found only one prior incident of subcontracting. (ALJD 5-6, 37-40 and 1-6) Moreover, the ALJ found that there was no credible evidence that Respondent informed the Union about the single instance of subcontracting. (ALJD 6, 5-6) The ALJ found that the Union first learned of the layoff of the laundry employee months after it occurred. (ALJD 2, 33-34). The Union did not take any action regarding this layoff because the time provided for under the contract to file a grievance had expired. (Tr. 80). Thus, the parties’ history shows that on *one occasion*, and unbeknownst to the Union, Respondent replaced a unit employee with a

subcontractor. This single instance of subcontracting unit work does not constitute a waiver by past practice.

The Board has ruled a party does not waive its right to bargain "...unless it is clear that the parties were aware of their rights and made the conscious choice, for whatever reason, to waive them." *United Hosp. Medical Center*, 317 NLRB 1279, 1282 (1995), quoting *NLRB v. New York Telephone*, 930 F.2d 1009, 1011 (2d Cir. 1991). Waiver will not be thrust "upon an unwitting party." *Id.* Under the facts here, the ALJ properly found that a failure to request bargaining over a single lay off and instance of subcontracting does not establish a conscious yielding of the right to bargain. *Register-Guard*, 339 NLRB 353, 356 (2003) (holding that one instance does not establish a past practice). Further even if a union's past actions may be perceived as consent, "a union's acquiescence in previous unilateral conduct does not necessarily operate in futuro as a waiver of its statutory rights under Section 8(a)(5)." *United Hosp. Medical Center*, 317 NLRB at 1283, quoting *E.R. Steubner, Inc.*, 313 NLRB 459 (1993). Rather, each time a bargainable incident occurs, the union has the option of requesting negotiations. *Ciba-Geigy Pharmaceuticals*, 264 NLRB at 1017, citing *NLRB v. Miller Brewing Company*, 408 F.2d 12, 15 (9th Cir. 1969).

Respondent attempts to confuse the issue here by pointing to its January 2010 decision to scale back its services and operate the hotel in a more apartment-like fashion, and to reduce the number of housekeeping employees from seven or eight to two. (Resp. Br. 9-11). As developed at hearing, this decision did not include removal of the bargaining unit as a whole, nor did it include the subcontracting of unit work to outside contractors. (Tr. 35-36). Rather, Respondent continued to recognize the Union and employ unit employees, until November 29, 2011, when it terminated its inspectress and houseman and subcontracted out their work. (Tr. 15-18). In these

circumstances, Respondent has failed to meet its burden of establishing that the Union waived its right to bargain over its decision to lay off the entire unit, subcontract unit work, and withdraw recognition of the Union.

D. Contrary to Respondent's fourth exception, the ALJ properly ordered reinstatement and backpay.

Respondent argues, that the ALJ erred in ordering a reinstatement and backpay remedy for the two unit employees. It claims that its financial condition should be a factor in determining the remedies afforded to the affected employees. (Resp. Br. 11-12). In support of its argument, Respondent cites *Kobell v. J. D. Hinkle & Sons, Inc.*, 1988 WL 159195 (N.D.W.Va). In the *Kobell* case, a district court refused to grant a reinstatement remedy pursuant to Section 10(j) of the Act because the court found that the employer was not financially capable of restarting its long haul operations. *Id.* at 4. In contrast, in the related Section 10(j) proceeding in this case, the district court granted a reinstatement remedy pursuant to Section 10(j) of the Act. *Hubbel v. Patrish LLC*, 2012 WL 4893693 (E.D.Mo.). Respondent argued that reinstatement of the two employees was not appropriate due to its financial condition, the district court rejected Respondent's argument and found that the reinstatement of the two unit employees was appropriate because the unit employees:

...were replaced with subcontractors who are paid a higher hourly rate of pay than Poetting and Wholdmann. Patel's personal belief that he realizes unquantifiable, unspecified "efficiencies" by using subcontractors appears to be an *ad hoc* rationalization for respondent's apparent violations of the labor laws and is an insufficient basis upon which to deny interim relief. *Hubbel v. Patrish LLC*, 2012 WL 4893693, slip. op. at 3 (E.D.Mo.)

Further, reinstatement and backpay are appropriate as Section 10(c) of the Act empowers the Board to issue orders providing for such.

In further arguing against backpay and reinstatement, Respondent contends the Union might have submitted the case to the grievance procedure. However, the ALJ, citing *Avery Dennison*, 330 NLRB 389 (1999), correctly determined that deferral was not appropriate in this situation where Respondent terminated the bargaining relationship. (ALJD 4, fn. 4). Additionally, the Board will not defer cases where the collective-bargaining agreement has expired, as the arbitration provision is unenforceable. See *Hilton-Davis Chemical Co., Div. of Sterling Drug, Inc.*, 185 NLRB 241, 242 (1970), quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

III. Conclusion

With the exception of the issues raised in General Counsel's three cross-exceptions, Counsel for the General Counsel respectfully requests the Board to affirm the administrative law judge's findings, conclusions, and recommended Order.

December 5, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to the National Labor Relations Board's Rules and Regulations, Section 102.114, a true and correct copy of the foregoing COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS was e-filed with the National Labor Relations Board and served via electronic mail on this 5th day of December 2012, on the following parties:

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