

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

Advice Memorandum

DATE: September 5, 2012

TO: Rhonda P. Ley, Regional Director
Region 3

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

SUBJECT: Rainbow Transportation 530-6067-4011-1100
Case 3-CA-076229 530-6067-4011-2200
530-6067-4011-4600
530-8090-4100
530-8090-6000

The Region submitted this case for advice regarding whether the Employer violated Section 8(a)(5) of the Act by failing to bargain with the Union over its decision to subcontract work previously performed by a bargaining unit employee. We agree with the Region that the Employer had a duty to bargain over its decision to subcontract unit work and violated Section 8(a)(5) by failing to do so.

Employer Rainbow Transportation, Inc. transports public school students for the City of Tonawanda school district. During the fall of 2011, Teamsters Local 375 (“Union”) was certified as the collective-bargaining representative of the Employer’s bus drivers, bus monitors and aides, dispatchers, and sole mechanic. There are approximately 28 employees in the unit.

The Employer formerly leased a bay at a garage where its mechanic performed the maintenance work on its school buses. In mid-July 2011, the Employer began to look for an alternative place to perform maintenance work because, at least in part, its lease was too expensive. The Employer claims that the old space also was unsatisfactory because expensive tools were stored at the bay where non-employees could access them, additional bays were needed to perform the maintenance work, and the lessor was a manager of a competitor. Despite these other considerations, early in the process of looking for an alternative space the Employer asked the lessor for a reduction in rent, but the garage owner refused to lower the rent. In February 2012, the Employer approached Dr. Trailer Repair and asked about renting a bay at its garage. Dr. Trailer Repair refused to lease a bay, but offered to perform the Employer’s mechanical work and hire its mechanic. The Employer agreed to subcontract the work and permanently laid off its mechanic. The Employer did not

notify the Union of its decision to subcontract the mechanical work or offer the Union an opportunity to bargain over the decision or its effects.¹

Prior to entering into the subcontract, the Employer's monthly expenses for performing the bus maintenance work were approximately \$7,160, of which approximately \$4,300 were for labor costs and the remainder, approximately \$2,860, for rent. The Employer's monthly expense with the subcontractor is approximately \$5,200. The Employer pays the subcontractor for 75 hours of mechanical work per month, whereas its own mechanic was paid for 160 to 170 hours per month.

The Supreme Court held in *Fibreboard Paper Products* that an employer must bargain over its decision to subcontract unit work where the proposed subcontracting would merely replace the unit employees with the independent contractor's employees and the replacement employees would perform the same work under similar employment conditions.² In such cases, where the employer's decision to subcontract does not involve any capital investment or alter the employer's basic operation, it "would not significantly abridge [the company's] freedom to manage the business" to require the employer to bargain about the subcontracting decision.³ Indeed, if the employer's decision turns on labor costs, it is "peculiarly suitable for resolution within the collective-bargaining framework...."⁴

In *Torrington Industries*, the Board determined that it would apply *Fibreboard* to a subcontracting decision that involved the substitution of one group of employees for another regardless of whether or not that decision was motivated by labor costs in the "strictest sense of the term[.]"⁵ The Board expressly declined to apply the *Dubuque Packing*⁶ test to such "*Fibreboard* subcontracting," where the decision

¹ The Region has determined to issue complaint, absent settlement, based upon the Employer's refusal to bargain over the effects of its decision. The subcontractor did offer the Employer's mechanic a position, but he declined the offer because it would have required him to take a substantial pay cut.

² *Fibreboard Paper Products Corporation v. NLRB*, 379 U.S. 203, 213-14 (1964).

³ *Id.* at 213.

⁴ *Id.* at 214.

⁵ *Torrington Industries*, 307 NLRB 809, 811 (1992).

⁶ *Dubuque Packing Co.*, 303 NLRB 387 (1991), *enforced sub nom. Food & Commercial Workers Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993).

involved unit employees' terms of work and the decision did not lie "at the core of entrepreneurial control."⁷ We have concluded, however, that *Dubuque Packing* also provides an appropriate and alternative framework for determining when an employer has a duty to bargain over subcontracting decisions that have a direct impact on employment but focus on the employer's economic profitability.⁸

Under the *Dubuque* framework, in order to make a prima facie showing that a decision is a mandatory subject of bargaining, the General Counsel must show that the decision involved a change in unit work "unaccompanied by a basic change in the nature of the employer's operation."⁹ The employer then has the burden of rebutting the prima facie case by showing that the decision concerned "a change in the scope and direction of the enterprise," or alternatively may raise two affirmative defenses; first, it can show that labor costs, direct or indirect, were not a factor in its decision, or second, if such costs were a factor, that the union could not have offered sufficient concessions to offset the value of the employer's decision.¹⁰

We agree with the Region that here the Employer's failure to bargain with the Union regarding its decision to subcontract mechanical work is a violation of Section 8(a)(5). *Fibreboard* guides the analysis because the Employer's decision to subcontract merely replaced its mechanic with another set of employees who perform the same work. The decision to subcontract did not involve the Employer's capital investment, nor was there was a change in the Employer's basic operation, which is to transport public school children.¹¹ Moreover, since, as discussed below, labor costs

⁷ *Torrington Industries*, 307 NLRB at 810-811.

⁸ These are the so-called "Category III" cases described in *First National Maintenance Corporation v. NLRB*, 452 U.S. 666, 677 (1981) (holding there is no duty to bargain over an economically-motivated decision to shut down part of a business).

⁹ 303 NLRB at 391.

¹⁰ *Id.*

¹¹ See, e.g., *Bob's Big Boy Family Restaurants*, 264 NLRB 1369, 1371-72 (1982) (finding employer violated Section 8(a)(5) by failing to bargain over its decision to subcontract shrimp processing when before and after the subcontract, the employer's business included supplying processed shrimp to restaurants); *Ford Motor Company*, Case 7-CA-48263, Advice Memorandum dated May 26, 2006 at 4-6 (finding Ford Motor Company violated Section 8(a)(5) by failing to bargain over its decision to subcontract fire-fighting work at a factory when decision did not have any effect on Ford's manufacture of automobiles); *WPLG-TV*, Case 12-CA-20022, Advice Memorandum dated December 13, 1999 at 8-9 (finding television station's unilateral

were clearly a factor in the Employer's decision, this decision was particularly suitable for resolution through collective bargaining. For these reasons, *Fibreboard* requires the Employer to bargain with the Union regarding its decision to subcontract unit work.

Although we agree that the Employer had a duty to bargain under *Fibreboard*, the Region should also argue in the alternative that the Employer had a bargaining obligation under the *Dubuque* analysis. As noted above, the Employer's subcontracting decision did not result in a basic change in the nature of its operation. The Employer cannot demonstrate that the decision was not based on labor costs. The Employer's concern over operating costs initially led it to seek a reduction in its rent for the maintenance bay. Only after the subcontractor offered to do the work at a cheaper price did the Employer decide to subcontract the mechanical work. Previously, the Employer spent approximately \$7,160 per month for vehicle maintenance, including approximately \$4,300 per month to employ its mechanic. The Employer now pays a total of \$5,200 per month for vehicle maintenance. It is likely that virtually all of this savings is due to labor savings, given the significant reduction in the number of hours of mechanical work that it is now paying for. Based on these factors, it is clear that the Employer's decision to subcontract the mechanical work was based at least in part if not primarily on labor cost savings. We agree with the Region that the Union could have offered concessions to offset the Employer's \$2,000 monthly savings because the cost could have been spread out over the 28 members of the bargaining unit. Thus, the Employer cannot prove that the Union would have been unable to make an offer that would have changed the Employer's decision.

Accordingly, the Region should allege that the Employer's failure to provide notice and an opportunity to bargain over its decision to subcontract the mechanical work violated Sections 8(a)(1) and (5).

/s/
B.J.K.

subcontracting violated Section 8(a)(5) where the bargaining unit included an employee who operated a television camera on a helicopter that the employer leased and the employer entered into a contract with another company to provide helicopter images for WPLG's broadcasts).