UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ROCHESTER GAS & ELECTRIC CORPORATION

and **Cases 03-CA-075635**
03-CA-081230

LOCAL UNION 36, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

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

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February 19, 2014

CROSS EXCEPTIONS

On January 8, 2014, Administrative Law Judge (ALJ) Steven Davis issued his Decision and recommended Order in this matter. The General Counsel takes exception to the Judge's Decision and recommended Order as follows:

Exception 1

The ALJ appropriately found that Respondent failed to bargain over the effects of its decision to subcontract bargaining unit work but recommended a modified *Transmarine* limited backpay remedy[1] for the amount of overtime pay qualified bargaining unit employees would have earned but for the subcontracting of work they were qualified to perform, from 5 days after the date of his Decision until one of the four conditions set forth in *Transmarine* is met. The ALJ erroneously modified the standard *Transmarine* remedy to base the calculation of the backpay on qualified employees' loss of overtime pay, rather than the employees' normal wages. He further erroneously modified the standard *Transmarine* remedy to base the calculation of maximum backpay due each qualified bargaining unit employee, in part, on the value of wages paid to the subcontractors' employees. (ALJD at page 25, lines 32-44)

Dated February 19, 2014
Buffalo, New York

Respectfully submitted,

/s/ Aaron B. Sukert
Counsel for the General Counsel

[1] See Transmarine Navigation Corp., 170 NLRB 389 (1968), as clarified in Melody Toyota, 325 NLRB 846 (1998).

BRIEF IN SUPPORT OF CROSS EXCEPTIONS

I

PRELIMINARY STATEMENT

The essential facts of the case are set forth at pages 2 though 13 of the Decision. The General Counsel alleged and the ALJ found that Respondent Rochester Gas & Electric Corporation violated Section 8(a)(1) and (5) of the National Labor Relations Act by failing to timely furnish the Union with requested information and failing to afford the Union an opportunity to bargain with it over the effects of Respondent's decision to subcontract bargaining unit work. (ALJD at 24, lines 30 - 44). The ALJ concluded that Respondent failed to bargain with the Union over the effects of its decision to subcontract bargaining unit work on seven occasions. (ALJD at p. 20, lines 28 - 31).

In order to remedy Respondent's unlawful failure to bargain in good faith with the Union over the effects of Respondent's decision to subcontract bargaining unit work, the ALJ recommended that Respondent be ordered to engage in effects bargaining and pay limited backpay to qualified bargaining unit employees in a manner similar to that required in Transmarine Navigation Corp., 170 NLRB 389 (1968), as clarified in Melody Toyota, 325 NLRB 846 (1998). (ALJD at 25, lines 1-15). The ALJ inappropriately recommended, however, a modification to the standard *Transmarine* remedy for effects bargaining by limiting the backpay due to *the amount of overtime pay qualified bargaining unit employees would have earned* but for the subcontracting of work they could have performed from 5 days after the date of the Decision until the occurrence of the earliest of the following conditions: (1) the Respondent bargains to agreement with the Union on the effects of the subcontracting; (2) the parties reach a bona fide impasse in bargaining; (3) the Union fails to request bargaining within 5

business days after receipt of this Decision, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union subsequently fails to bargain in good faith. (ALJD at 25, lines 32-41). The ALJ further inappropriately recommended that: "The sum paid to each employee shall not exceed the value of his or her wages and the wages paid to the subcontractors' employees. However, in no event shall the sum paid to any employee be less than the unit employees' wages for a 2-week period." (ALJD at 25, lines 41-44).

The General Counsel excepts to the amount of backpay being calculated based on qualified bargaining unit employees' loss of overtime and wages paid to the subcontractors' employees, rather than the qualified bargaining unit employees' normal wages because it deviates from the standard *Transmarine* limited backpay remedy**.**

II

ARGUMENT

A *Transmarine* limited backpay remedy is the Board's standard remedy for an employer's failure to bargain over the effects of a nonbargainable decision. In *Transmarine*, *supra*, the employer unlawfully refused to bargain over the effects of its decision to shut down one of its terminals and terminate employees. The Board determined that a bargaining order alone would not effectuate the purposes of the Act because the union would not have the same bargaining power after the shutdown as it would have, had the employer engaged in effects bargaining prior to the shutdown. The Board ordered the employer to bargain with the union over the effects of its decision to shut down the terminal and to pay the affected employees their normal wages beginning five days after the date of issuance of the Board decision until one of four conditions occurred: (1) the parties reached agreement; (2) the parties reached a bona fide

impasse in bargaining; (3) the union failed to request bargaining; or (4) the union failed to bargain in good faith. The purpose for the remedy set forth in *Transmarine* was two-fold: first, to make employees whole for losses suffered as a result of the employer's refusal to bargain over the effects of its decision to shut down its terminal and, second, to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of all economic consequences for the employer.[2] In a subsequent case, the Board stated that restoring the union's bargaining strength is the more important objective.[3]

Although *Transmarine* involved loss of employment, the Board has applied the standard *Transmarine* remedy in cases where the employer's refusal to engage in effects bargaining did not result in lost jobs or reduced wages. In Live Oak Skilled Care & Manor, 300 NLRB 1040 (1990), the employer failed to bargain with the union over the effects of its decision to transfer the ownership of its hospital. There were no job losses or pay cuts. Nevertheless, the Board concluded that a *Transmarine* backpay remedy was appropriate because, armed with the bargaining strength available only in timely effects bargaining, the union might have negotiated additional benefits, such as accrued leave and severance pay. Id., at 1041-1042. See also Sea-Jet Trucking Corporation, 327 NLRB 540, 548-549 (1999), enfd. 221 F.3d 196 (D.C. Cir. 2000) (employer failed to bargain over effects of its decision to relocate its business and the Board concluded that a *Transmarine* remedy was necessary even though there was no loss of jobs or benefits because union might have negotiated commuting or relocation expenses for employees who remained, or accrued benefits for employees who resigned as a result of relocation); Richmond Convalescent Hospital, 313 NLRB 1247, 1249 (1994) (Board rejected ALJ's refusal to order a *Transmarine* remedy on the ground that there was no showing that any employees lost

[2] Id., citing Royal Plating and Polishing Co., Inc., 160 NLRB 990, 997-998 (1966).
[3] O.L. Willis, Inc., 278 NLRB 203, 205 (1986).

their jobs as a result of the employer's transfer of the facility to another employer); Walter Pape, Inc., 205 NLRB 719, 720 (1973) (Board issued *Transmarine* remedy for failure to bargain over effects of employer's transfer of its distribution operation even though all or most of the affected employees went to work for the new operator for higher wages).

The Board has even extended the standard *Transmarine* remedy to employees who were already entitled to a traditional make whole order. In Comar, Inc., 339 NLRB 903, 914 (2004), the ALJ concluded that "a blanket *Transmarine*" limited back pay order was not appropriate to remedy the employer's failure to bargain over the effects of its decision to relocate unit employees to a nonunit facility. The ALJ based his decision on the fact that a number of employees accepted the offer to transfer and did not lose any time off from work, and the remaining unit employees were to be reinstated and made whole for losses suffered. Despite the ALJ's conclusion that a *Transmarine* remedy would result in a "windfall" to those employees covered by the make-whole remedy, the Board extended the remedy to "all unit employees."

In the instant matter, the ALJ concluded that "material, substantial and significant" changes to unit working conditions took place because Respondent subcontracted unit work and that there were subjects over which effects bargaining could have taken place. (ALJD at p. 19, lines 36-38). The ALJ found there was evidence of the following: the size of the unit was reduced– employees had left their employment and were not replaced for about ten years (ALJD at p. 19, lines 21-22); unit employees were available for overtime work and would have worked overtime if requested (ALJD at p. 19, lines 47-49); and subcontractors' employees made errors in their work which were corrected by unit workers and could have caused danger and injury to unit employees (ALJD at p. 20, lines 15-18).

The ALJ further concluded that the Union could have engaged in meaningful effects bargaining regarding hiring additional bargaining unit employees (ALJD at p.19, lines 21-46), unit employees working overtime (ALJD at p. 19 lines 46-47), and training for subcontractors' employees (ALJD at p. 20, line 15) before Respondent agreed to the subcontracts. In support of these conclusions, the ALJ properly relied on the Board's decision in Hospital San Cristobal, 358 NLRB No. 89, slip op. at 11, fn. 26 (2012) (ALJD at p. 19, line 51).

Inasmuch as Respondent's decision to subcontract affected unit employees in ways other than loss of overtime and the standard *Transmarine* limited backpay remedy is based on the rate of affected employees' normal wages, even in circumstances where there has been no job loss,[4] it is inappropriate for the ALJ to limit the make whole remedy to loss of overtime.

Further, in cases which an employer failed to bargain about the effects of subcontracting, the Board orders a *Transmarine* limited backpay remedy based on the rate of the affected employees' normal wages. See Buffalo Weaving and Belting, 340 NLRB 684 (2003); Allison Corp., 330 NLRB 1363 (2000); Handy Spot, Inc., 279 NLRB 1320 (1986). Accordingly, it is inappropriate for the ALJ in the instant matter to order a *Transmarine* remedy based on the wages of the subcontractors' employees, rather than the normal wages of the qualified bargaining unit employees.

III

CONCLUSION

The General Counsel requests that the Board modify the remedy recommended by the ALJ to order Respondent to take the following action:

[4] Arguably, jobs are lost when Respondent reduces the size of the unit by failing to replace unit employees who left their employment at the same time it subcontracts bargaining unit work.

Pay unit employees qualified to perform work that has been subcontracted, at the rate of their normal wages, from 5 days after the date of this Decision until occurrence of the earliest of the following conditions: (1) Respondent bargains to an agreement with the Union on the effects of the subcontracting; (2) the parties reach a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union subsequently fails to bargain in good faith. The sum paid to each employee shall not exceed the value of his or her wages. However, in no event shall the sum paid to any employee be less than the unit employees' wages for a 2-week period.

DATED at Buffalo, New York this 19th day of February 2014.

Respectfully submitted,

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STATEMENT OF SERVICE

I hereby certify that on February 19, 2014, copies of Counsel for the General Counsel's Cross-Exceptions to the Decision of the Administrative Law Judge and Brief in Support of Cross-Exceptions in Cases 03-CA-075635 and 03-CA-081230 were served by electronic mail upon:

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