UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ROCHESTER GAS & ELECTRIC CORPORATION, Respondent, and LOCAL UNION 36, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, Charging Party.	Cases 03-CA-075635 03-CA-081230

CHARGING PARTY'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS

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STATEMENT OF THE CASE

On January 8, 2014, Administrative Law Judge Steven Davis issued a Decision in this matter ("ALJ Decision"). The Charging Party, Local Union 36, International Brotherhood of Electrical Workers, AFL-CIO, ("Charging Party" or "Union") has filed cross-exceptions to the ALJ Decision pursuant to Sections 101.11(2) and 102.46 of the National Labor Relations Board's Rules and Regulations. This brief is submitted in support of those cross-exceptions.

STATEMENT OF THE FACTS

A. Contractual Background: The 2003 Collective Bargaining Agreement.

On April 11, 2003, the Union was certified as the representative of employees of Respondent Rochester Gas & Electric Corporation ("Respondent" or "Company"). The unit includes gas and electric field workers, customer service workers, bill collectors and physical services workers. GC-2. Shortly thereafter, the parties began negotiating the terms of a collective bargaining agreement. The chief negotiator for the Union during the 2003 contract negotiations was Michael Flanagan, an International Union representative. Tr. at 240 (Flanagan). The chief negotiator for Respondent was Mark Corbett, its director of human resources. Tr. at 1141-42 (Benson). Mr. Flanagan and Mr. Corbett had negotiated other contracts on behalf of other utility companies and local unions in the past and had a very good working relationship. Tr. at 247-48 (Flanagan).

The parties reached a deal in late August or early September 2003, and the contract became effective September 1, 2003 through May 31, 2008. Tr. at 240; GC-3(a). The written agreement contained a very liberal management rights clause that provided that Respondent had the "sole and exclusive" right "to subcontract." GC-3(a) at 7. Despite that language, it was

agreed during the negotiations by Flanagan and Corbett that in *any* instance of subcontracting the Union would always be given an opportunity to do the work in the unit before Respondent would contract out. Tr. at 244-47 (Flanagan). Additionally, Mr. Corbett stated that Respondent would sit down and discuss the effects of subcontracting on unit employees. Tr. at 264 (Flanagan). And in fact, the Union did discuss such matters as safety, overtime, upgrades with backfilling with temporary employees, and job site reporting, in order to ameliorate the impact of subcontracting on unit employees. Tr. at 265-66. In other words, effects bargaining topics. Tr. at 272-73, 278. In addition to the management rights clause, the agreement contained a separate clause, Article 15, that required employees to be recalled from layoff if their work was subcontracted, and required subcontractors to be in good standing with the trades.

B. 2008 Collective Bargaining Agreement: Elimination of Subcontracting Waiver.

During the term of the 2003 contract, Respondent continued subcontracting bargaining unit work to supplement the work performed by unit employees. Tr. at 189 (Irish). However, in light of Respondent's failure to live up to its end of an agreement regarding wage parity (Tr. 240-41, 267-68 (Flanagan), 1188-91, 1201-04 (Irish); CP-6) and the Union's desire to keep more unit work in-house, a particular concern of the Union's going into negotiations for the next contract was the broad management rights clause and its exclusive grant of authority regarding subcontracting. Tr. at 194-95 (Irish), 249-50 (Flanagan).

With the 2003 contract set to expire on May 31, 2008, the parties began negotiations over a new contract in April 2008. Tr. at 193 (Irish), 253 (Flanagan). The Union submitted a comprehensive set of proposals, including one to replace the then-existing management rights clause with a much more limited clause that did not give Respondent the sole and exclusive

right to subcontract. Tr. at 197-98 (Irish), 261-62 (Flanagan); R-145 (Union's proposals of Dec. 17, 2008). The Union at the same time made a proposal regarding Article 15 aimed at addressing some of the impacts of subcontracting on unit employees in the event that it was unsuccessful in getting the management rights clause it sought; in other words, the Article 15 proposal was a hedge against not being able to get the Union's management rights proposal. Tr. at 223-24 (Irish), 250-51, 256-59, 1217-19 (Flanagan). There was never any consideration of the Union's proposals by Respondent. Tr. at 197-98 (Irish), 261-62, 1213-14 (Flanagan). Indeed, Respondent told the Union it "had no appetite" for the proposals and rejected them out of hand, without any substantive discussion. Tr. at 197-98 (Irish), 261-62, 1213-14 (Flanagan). In December 2008, the Union withdrew its set of proposals and the parties' negotiating committees ceased negotiations. Tr. at 198 (Irish), 254-55, 259 (Flanagan).

The last hope for negotiating a new contract fell to Mr. Flanagan and Richard Benson, Respondent's Chief Administrative Officer. Tr. at 198 (Irish), 254-55, 259 (Flanagan). In July 2009, Mr. Benson asked Mr. Flanagan for the six or seven most important items for the Union. Tr. at 256. Mr. Flanagan provided Mr. Benson with the Union's most important items, the first of which was the management rights clause proposal, which would replace the then-existing management rights clause with a much more limited clause that did not contain the language granting Respondent the sole and exclusive right to subcontract. Tr. at 256, 1220; GC-8(a)-8(f). Mr. Benson agreed to the Union's proposed management rights clause, and it became part of a Memorandum of Agreement between the parties in effect from 2008 to 2013. Tr. 258-59, 1220-21; GC-3(b). During their negotiations, Mr. Benson never communicated to Mr. Flanagan that Respondent intended to reserve its previous unilateral right to subcontract unit work, or

that it viewed the removal of the management rights clause as not impacting that previous right. Tr. at 1213-15, 1225. There was no discussion of Article 15 and it was not changed. Tr. at 261-62, 1213-14 (Flanagan).

C. Respondent Increases its Use of Subcontractors While Shrinking the Unit.

Despite the Union's success in getting the subcontracting language removed from the management rights clause in the new agreement, Respondent continued to subcontract bargaining unit work without providing the Union with notice and an opportunity to bargain. Around late 2009 and 2010 the nature and scope of Respondent's subcontracting substantially increased and Respondent began *supplanting* unit workers with subcontractors in numerous areas of work. Tr. at 189-91, 198-99 (Irish). This came on the heels of RG&E's shrinking the bargaining unit. In fact, from the time the Union was certified in 2003 until 2011, Respondent had not hired a single person into the gas or electric field operations areas (excluding intra-company transfers), and had promoted only one unit employee during that time. Tr. at 68-69, 71 (Irish), 922-23 (Pozzoulo), 593-94 (Frank). During this time, unit employee levels declined significantly due to attrition, including retirements and disabilities, dropping from 420 members in 2005 to about 340 in 2011. Tr. at 190-91 (Irish), 593-94 (Hagadorn), 543-44 (Rode), 923-24 (Pozzuolo). Respondent's Electrical Operations Manager, Richard Frank, admitted at the hearing that Respondent has restricted him from hiring additional employees to replace the 15 or so employees who had retired from his department in recent years. Tr. at 705-08 (Frank). The same policy was applicable to gas operations (Tr. at 945-47 (Pozzuolo).

As Mr. Irish testified, under the previous contract, Respondent used subcontractors to supplement the existing workforce, but in 2009-10 the nature and scope of Respondent's

subcontracting substantially increased and Respondent began *supplanting* unit workers with subcontractors in numerous areas of work. Tr. at 189-91, 198-99.

In early- to mid-2010, Respondent notified the Union of its intention to implement a new subcontracting project whereby Premier Utility Services would be performing unit work (stakeout work). Tr. at 198-99. The Union immediately objected and sent an information request to Respondent on June 2, 2010. Tr. at 201 (Irish); GC-131-132. Moreover, on July 27, 2010, the Union sent an information request to Respondent pertaining to all subcontracting of bargaining unit work. GC-38. After Respondent expressed to the Union its position that Article 15 granted it the unilateral right to subcontract (GC-133), the Union responded by letter dated August 2, 2010, making very clear that it strenuously disagreed and wanted the requested information and an opportunity to bargain over subcontracting decisions *and* their effects prior to implementation. GC-40; GC-134. When Respondent refused to provide the requested information, the Union filed unfair labor practice charges with the Board, including one on December 2, 2010 concerning the subcontracting of stakeout work (GC-31-32), and another on January 31, 2011 concerning the subcontracting of pole-setting work (GC-34; Tr. at 208-09 (Irish)). Those charges were ultimately unsuccessful, but they were not finally resolved until May 9, 2011, and August 2, 2011, respectively. GC-119; GC-125.

D. Union's August 29, 2011 Demand For Effects Bargaining and Information.

On Friday, August 26, 2011, Edward Pozzuolo, Respondent's Gas Operations Manager, contacted Richard Irish, the Union's then-Business Manager, by telephone and informed him of Respondent's intention to use a subcontractor to perform gas walking survey work after September 1, 2011. Tr. at 50 (Irish), 898 (Pozzuolo); GC-4. Mr. Pozzuolo did not identify the

subcontractor or otherwise provide Mr. Irish with any other details on the subject. Tr. at 50 (Irish). Mr. Irish objected to Respondent's proposed subcontracting and orally demanded effects bargaining. Tr. at 50 (Irish); GC-4. The Union then sent a letter to Respondent the following Monday, August 29, 2011, demanding "effects bargaining over each instance of subcontracting of unit work" and requesting information in connection therewith. Tr. at 55-56; GC-28 at 2. Respondent, namely its Labor Relations Director Jay Shapiro, received and reviewed the Union's letter of August 29, 2011, and disseminated it to Respondent's Vice President Sheri Lamoureux, other labor relations personnel, and Respondent's outside labor counsel. Tr. at 1060, 1110, GC-120, GC-141.

Instead of responding to the Union's August 29, 2011 demand for effects bargaining and information, Respondent went ahead and implemented its subcontracting of the gas walking survey work to Heath Consultants on September 6, 2011. Tr. at 13; GC-6. Respondent later informed the Union, by letter dated September 16, 2011, that it was willing to engage in effects bargaining regarding the gas walking survey subcontracting. GC-5. However, Respondent's September 16 letter still did not identify the subcontractor or specifically describe the work to be subcontracted, its location, or the time period of that subcontract, or otherwise respond to the Union's information request. GC-5. On September 23, 2011, Respondent provided information in the form of assertions about the identity of the subcontractor (Heath Consultants) and the nature of the subcontracting with respect to the gas walking survey, but none of the requested documentation. GC-6. Respondent provided additional information to the Union on October 11, 2011, consisting of a copy of the contract with Heath Consultants. GC-7.

After receiving the Union's bargaining demand and information request of August 29, 2011, Respondent engaged in various other subcontracting projects involving unit work without notifying the Union, including to the following contractors: Stanley M. Wright & Sons, Inc.; Northline Utilities; Premier Utility Services, LLC; O'Connell Electric Company, Inc.; Michels Power; Power & Construction Group; and D&D Power. GC-15 to GC-21; Tr. at 313-14 (Sondervan). Further, Respondent executed master subcontracting agreements with the seven subcontractors referenced above, including some *after* the Union's August 29 demand for bargaining and information, without discussing the same with the Union. See id. These subcontracts first came to the Union's attention in March 2012. Tr. at 313, 315, 316 (Sondervan). Respondent thereafter had bargaining unit work projects done by those subcontractors. GC-15-21; GC-48-51; Tr. at 613, 1102.

E. February 2012 Labor-Management Meetings.

Having not received any subcontracting information or notifications of subcontracting projects aside from the gas walking survey information described above and an electric substation project that never materialized (Tr. at 301-03; GC-11), the Union raised its August 29, 2011 letter with Respondent during labor-management meetings in February 2012. Tr. at 294-312 (Sondervan), 517-24 (Rode), 560-66 (Hagadorn). In a meeting held on February 1, 2012, Jeffrey Sondervan, the Union's Business Manager, asked Respondent why it had not timely provided all of the requested information regarding the gas walking survey subcontracting and also why it had not provided notice or information regarding all other subcontracting involving unit work. Tr. at 296 (Sondervan), 561 (Hagadorn). In response, Respondent raised various concerns as to the relevance of the requested information and what

it perceived to be the burdensomeness of the Union's request, and questioned whether the Union needed the information prior to effects bargaining. Tr. at 296-98, 561. Shortly after the meeting, the Union sent a letter to Respondent, reiterating the Union's position regarding Respondent's obligation to comply with the August 29, 2011 letter, and also to correct some statements made by an International Union representative, James Schlosser, at the February 1, 2012 meeting. Tr. at 299-310 (Sondervan); GC-10.

There was another labor-management meeting held on February 23, 2012. Tr. at 304-11 (Sondervan); GC-13 (meeting agenda). Just prior to that meeting, Ms. Lamoureux contacted Mr. Sondervan and asked him if the agenda item of effects bargaining over subcontracting could be tabled until the end of the meeting. Tr. at 305-06 (Sondervan), 519-20 (Rode), 562 (Hagadorn). Ms. Lamoureux gave as the reason for her request that Respondent's other representatives were irritated and angry about the subject. Tr. at 306 (Sondervan), 520 (Rode). However, at the meeting Respondent immediately raise the issue and contended it had satisfied the information request regarding the subcontracting to Heath Consultants. Tr. at 556-67 (Rode). Respondent then attempted to force the Union to engage in effects bargaining, despite its having failed to give notice and information to the Union regarding its subcontracting projects since August 29, 2011; the Union declined to do so. Tr. at 307-08 (Sondervan), 522-23 (Rode), 565 (Hagadorn).

F. Unfair Labor Practice Charges.

On March 1, 2012, the Union filed the charge in Case 03-CA-075635 concerning Respondent's failure to provide it with timely notice and an opportunity to effects bargain, as

well as requested information, in connection with the gas walking survey subcontracting. GC-1(a).

As indicated above, on March 21, 2012, Respondent produced information pertaining to unit work that it subcontracted to the subcontractors mentioned above, all of which had already been implemented, as well as the master subcontracting agreements it had entered into with such subcontractors. GC-16-21. The Union had not, until that time, received prior notice or information regarding such subcontracting and agreements. Tr. at 313, 315, 316 (Sondervan). Thus, on May 17, 2012, the Union filed the charge in Case 03-CA-081230 regarding Respondent's failure to provide it with timely notice and an opportunity to effects bargain, as well as requested information. GC-1(c).

DECISION OF THE ADMINISTRATIVE LAW JUDGE[1]

The ALJ issued a decision on January 8, 2014, finding (ALJ Decision at 24) that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) & (1), by: (1) failing or refusing to bargain with the Union by failing to timely furnish the Union with requested information which was relevant and necessary to the Union's performance of its duties as the exclusive bargaining representative of certain employees of Respondent; and (2) failing to give timely notice to the Union, and failing to afford the Union an opportunity to bargain with it over the effects of the Respondent's decision to subcontract bargaining unit work.

In so finding, the ALJ rejected Respondent's affirmative defense that the Union necessarily waived its right to bargain over the effects of subcontracting because it

[1] This section addresses only those portions of the ALJ's Decision that are pertinent to the Charging Party's exceptions.

contractually waived its right to bargain over subcontracting decisions. ALJ Decision at 20-21; see GC-1(s) ¶¶ 14-15, 36 (Respondent's defenses that "[e]ffects bargaining is not required because the effects are inherent in the decision to subcontract the work" and the CBA gives Respondent the unilateral right to subcontract bargaining unit work). Specifically, the ALJ found:

> The Respondent's argument that the Union implicitly waived its right to engage in effects bargaining because it waived its right to bargain about the decision to subcontract must fall. Its argument that effects bargaining is not required because the effects are inherent in the decision to subcontract work is contrary to the established principle that a union's waiver of its right to bargain about a decision to subcontract does not affect its right to bargain about the effects of that decision. In Allison Corp., above, at 1365, the Board stated that "while a cont[r]act clause may constitute a waiver of a bargaining right, it does not automatically follow that the same contract clause waives a party's right to bargain over the effects of the matter in issue." Indeed, here, the contract provides only that the Employer "may subcontract" work. It does not provide that it has the exclusive right to subcontract as the contract in Allison Corp. provided.

ALJ Decision at 21.

Despite the last two quoted sentences, however, the ALJ erred in concluding:

> I reject the Union's argument in its brief that the Union did not contractually waive its right to bargain about the decision to subcontract. That theory was not embraced by the General Counsel at hearing or in his brief. A charging party cannot enlarge upon or change the General Counsel's theory of the complaint. United Nurses and Allied Professionals (Kent Hospital, 359 NLRB No. 42, slip op. at 2, fn. 4 (2012) citing Penntech Papers, 263 NLRB 264, 265 (1982).

ALJ Decision at 17 n.4. The ALJ further erred in finding that "Respondent had the right to subcontract [bargaining unit work]" (ALJ Decision at 17), and that "the language of the parties' contract . . . gives the Respondent the right to unilaterally subcontract unit work" (ALJ Decision at 21).

As for the remedy, the ALJ erroneously recommended that Respondent be ordered to pay affected employees as a result of its failure to engage in effects bargaining "the amount of overtime pay the employees would have earned but for the subcontracting of work they were qualified to perform," limited in part by the amount of subcontractors wages paid, instead of the amount of their normal wages as required by Transmarine Navigation Corp., 170 NLRB 389 (1968), from 5 days after the date of the Decision until the occurrence of the earliest of four enumerated conditions. ALJ Decision at 25, 26.

While finding Respondent's information violations, the ALJ erroneously found that "[i]n a letter dated March 20, [2012] [Company representative Thomas] Cammuso sent detailed information to the Union which the Union agrees satisfied the request for information set forth in its August 29[, 2011] letter," (ALJ Decision at 11), and that "the Union agrees that it has received the information set forth in [its] August 29[, 2011] letter which is the basis for the alleged violation" (ALJ Decision at 24).

In discussing events prior those underlying the present charges, the ALJ erroneously found that "[i]n mid to late 2010, the Union requested information concerning subcontracting and the Employer sent responses which included the specific information requested." ALJ Decision at 12.

Finally, during the hearing the judge erroneously allowed into the record evidence of e-mails supposedly sent to the union showing subcontractors on the properties of RG&E's parent, Iberdrola. Although no witness could authenticate these documents, they were allowed into evidence under the business records exception to the hearsay rule, over the Union's objections. (Tr. 1056-58). (See Union's Cross-exception 6).

QUESTIONS INVOLVED

1. Did the ALJ err in rejecting the Union's argument, "that the Union did not contractually waive its right to bargain about the decision to subcontract" because that argument was an attempt to "enlarge upon or change the General Counsel's theory of the complaint"? ALJ Decision at 17 n.4; GC-1(s) ¶¶ 14-15, 36 (Respondent's affirmative defense that Union necessarily waived its right to bargain over the effects of subcontracting because it waived its right to bargain over subcontracting decisions).

(*This question corresponds to Charging Party's Cross-Exception No. 1.*)

2. Did the ALJ err in finding that "Respondent had the right to subcontract [bargaining unit work]" (ALJ Decision at 17), and that "the language of the parties' contract . . . gives the Respondent the right to unilaterally subcontract unit work" (ALJ Decision at 21)?

(*This question corresponds to Charging Party's Cross-Exception No. 2.*)

3. Did the ALJ err in recommending that Respondent be ordered to pay affected employees as a result of its failure to engage in effects bargaining "the amount of overtime pay the employees would have earned but for the subcontracting of work they were qualified to perform," limited in part to the amount of wages paid to the subcontractors' employees, instead of the amount of their normal wages as required by Transmarine Navigation Corp., 170 NLRB 389 (1968), from 5 days after the date of the Decision until the occurrence of the earliest of four enumerated conditions? ALJ Decision at 25, 26.

(*This question corresponds to Charging Party's Cross-Exception No. 3.*)

4. Did the ALJ err in finding that "[i]n a letter dated March 20, [2012] [Company representative Thomas] Cammuso sent detailed information to the Union which the Union

agrees satisfied the request for information set forth in its August 29[, 2011] letter," (ALJ Decision at 11), and that "the Union agrees that it has received the information set forth in [its] August 29[, 2011] letter which is the basis for the alleged violation" (ALJ Decision at 24).

(*This question corresponds to Charging Party's Cross-Exception No. 4.*)

5. Did the ALJ err in finding that "[i]n mid to late 2010, the Union requested information concerning subcontracting and the Employer sent responses which included the specific information requested. For example, on November 23, 2010, Cammuso responded to the Union's information request in July, 2010 which included spreadsheets summarizing the information requested, containing information concerning those jobs in which subcontractors presently were working." ALJ Decision at 12.

(*This question corresponds to Charging Party's Cross-Exception No. 5.*)

6. Did the ALJ err in allowing into evidence under the business record exception to the hearsay rule, RG&E's e-mails purportedly sent to the Union listing union subcontractors on Iberdrola USA properties? Tr. 1056-58.

(*This question corresponds to Charging party's Cross-Exception No. 6*)

ARGUMENT

POINT I

THE ALJ ERRONEOUSLY REJECTED, AS AN EFFORT TO ENLARGE UPON THE COMPLAINT, THE UNION'S ARGUMENT THAT IT DID NOT CONTRACTUALLY WAIVE ITS RIGHT TO DECISION BARGAINING OVER RG&E'S SUBCONTRACTING DECISIONS.

The ALJ rejected "the Union's argument in its brief that the Union did not contractually waive its right to bargain about the decision to subcontract" because, according to the ALJ, that

argument was an attempt to "enlarge upon or change the General Counsel's theory of the complaint." ALJ Decision at 17 n.4. However, the Union raised that argument (and put in evidence in support thereof) in response to affirmative defenses asserted by Respondent that the Union necessarily waived its right to bargain over the effects of subcontracting because it contractually waived its right to bargain over subcontracting decisions. Resp.'s Answer ¶¶ 14, 36. In other words, a necessary predicate of affirmative defenses raised by Respondent was that the Union contractually waived its right to bargain about the decision to subcontract. Indeed, the ALJ acknowledged (and ultimately rejected) "Respondent's argument that the Union implicitly waived its right to engage in effects bargaining because it waived its right to bargain about the decision to subcontract." ALJ Decision at 21.

Thus, even though the Acting General Counsel did not allege a decision-bargaining violation (thus preventing the ALJ from finding a decision-bargaining violation), the ALJ should not have rejected the Union's decision-bargaining waiver argument in light of the fact that Respondent raised affirmative defenses to the effects-bargaining allegations that necessitated findings on whether there had been a decision-bargaining waiver. See Vico Prods. Co., 336 NLRB 583, 589-90 (2001) (ALJ erroneously disallowed exploration of issue at hearing on grounds that the issue was not raised in complaint because the issue was raised by respondent as an affirmative defense); Dayton Newspapers, 339 NLRB 650, 656, 667 (2003) (Board considered and found lockout to be unlawful in response to respondent's business justification defense for failing to reinstate strikers, despite fact that Regional Director had dismissed charge alleging unlawful lockout). Further, it does not matter that the Regional Director and General Counsel had previously decided not to pursue charges filed by the Union alleging decision-bargaining

violations arising from Respondent's subcontracting practices: "Prosecutorial decisions by the Regional Director and General Counsel are not adjudications and have no preclusive effect on future actions of the Board." O'Dovero v. NLRB, 193 F.3d 532, 536 (D.C. Cir. 1999) (citing cases); see Int'l Union of Elec. Workers v. Gen. Elec. Co., 407 F.2d 253, 264 (2d Cir. 1968) ("[T]he proceeding before the Board was administrative only, neither formally adversarial nor like a trial. As such, it has no collateral estoppel effect."); Kelley's Private Car Service, 289 NLRB 30, 39 (1988), enforced 919 F.2d 839 (2d Cir. 1990).

Thus, the ALJ erred in rejecting the Union's argument that it did not contractually waive its right to bargain about Respondent's subcontracting decisions.

POINT II

THE ALJ ERRONEOUSLY FOUND THAT THE UNION WAIVED ITS RIGHT TO DECISION BARGAINING OVER RG&E'S SUBCONTRACTING DECISIONS.

As noted above, Respondent asserted an affirmative defense that the Union necessarily waived its right to bargain over the effects of subcontracting because it waived its right to bargain over subcontracting decisions, and the Union responded by arguing and presenting evidence that the CBA does not give Respondent the unilateral right to subcontract bargaining unit work and the Union did not otherwise clearly and unmistakably waive its right to bargain over subcontracting decisions. The ALJ rejected Respondent's waiver defense on the ground that there had been no clear and unmistakable waiver of the right to bargain over the effects of subcontracting. However, the ALJ also found that "Respondent had the right to subcontract [bargaining unit work]" (ALJ Decision at 17), and that "the language of the parties' contract . . . gives the Respondent the right to unilaterally subcontract unit work" (ALJ Decision at 21).

As discussed in more detail below, the ALJ erred in finding that the CBA gives Respondent the unilateral right to subcontract unit work. Alternatively, the ALJ should not have decided the issue given his rejection of the Union's arguments to the contrary as an effort to "enlarge upon or change the General Counsel's theory of the complaint" (ALJ Decision at 17 n.4), and his determination "that a union's waiver of its right to bargain about a decision to subcontract does not affect its right to bargain about the effects of that decision" (ALJ Decision at 21).

A. The ALJ Should Have Found That the Union Did Not Waive its Right to Bargain Over Subcontracting Decisions.

The evidence presented at the hearing established that the Union did not clearly and unmistakably waive its decision-bargaining rights with respect to subcontracting. While a union may contractually waive statutory bargaining rights, only "clear and unmistakable" waivers of such rights are recognized by the Board. See Provena Hospitals, 350 NLRB 808, 809-15 (2007). As the Board in Provena Hospitals recognized, the "clear and unmistakable" waiver standard has been approved by the Supreme Court. See Provena Hospitals, 350 NLRB at 812 (citing *NLRB v. C&C Plywood Corp.*, 385 U.S. 421 (1967) (upholding Board's application of the "clear and unmistakable waiver" standard in finding that a provision in a collective bargaining agreement did not constitute a waiver of the union's bargaining rights) and Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983) ("We will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable.")). To be sure, the employer raising a defense based on contract waiver bears the burden of proving the waiver. See Olivetti Office USA, Inc. v. NLRB, 926 F.2d 181, 187 (2d. Cir. 1991); NLRB v. N.Y. Tel. Co., 930

F.2d 1009, 1011 (2d Cir. 1991) ("The employer bears the weighty burden of establishing that a 'clear and unmistakable' waiver has occurred.").

In this case, there is no contract language that establishes a "clear and unmistakable" waiver of the Union's right to bargain over Respondent's decisions to subcontract bargaining unit work. That language was removed from the contract in 2008. Article 15, which references subcontracting, does not contain waiver language. It merely provides as follows:

> The employer may subcontract work performed by the classifications designated in NLRB Decision 3-RC-11307. An employee laid off during the term of this agreement from a classification within the bargaining unit shall be recalled if the Company contracts out work that is normally and customarily performed by the classification such employee was laid off from.
>
> In selecting contractors to perform work by the classifications designated in NLRB Decision 3-RC-11307, the Company will use reasonable efforts to secure contractors in good standing with the trades. Nothing herein shall require the Company to bear additional costs, to delay the work, or to violate Federal or State laws.

GC-3(a) at 11.

Contract waiver principles are set forth in the Board's oft-cited decision in Tocco Division of Park-Ohio Industries, Inc., 257 NLRB 413 (1981). The employer there claimed that the union had waived its right to bargain over the employer's transfer of work, by virtue of having agreed to a provision for severance pay "in the event 'the company determines' to . . . transfer a Tocco operation." Id. at 413 n.1. The Board refused to find that this clause constituted a waiver of the union's "statutory right to be consulted in advance about respondent's decision to transfer work." Id. at 414. The Board explained:

> The severance pay provision speaks only of the severance pay to be provided in the event of the closure of the Tocco plant or transfer of a Tocco operation. The provision is at best equivocal, however, as to the waiver issue before us, it contains no specific reference to a right by Respondent to transfer work to Boaz without prior notice or consultation with the Union.

Id. at 414. In reaching this conclusion, the Board in Tocco dealt with the employer's claim that a waiver finding was compelled by the Board's decision in another case where "the contract afforded employer 'the exclusive right' to 'change, modify or cease its operation, processes, or production in its discretion' as well as provisions that 'the employer shall be the sole judge of all factors involved including location of business and personnel." Id. at 414 n.7. The Board in Tocco rejected reliance on the other decision because the case before it "contain[ed] no such explicit language." Id. The same is true of Article 15 here.

In Consolidated Foods Corp., 183 NLRB 832, 833 (1970), the Board found a contract waiver was afforded by language granting the employer "the exclusive right" to "unilaterally" transfer certain work. Significantly, the Board distinguished its previous decision in Weltronic Company, 173 NLRB 235, enforced, 419 F.2d 1120 (6th Cir. 1989), cert. denied, 398 U.S. 938 (1970), stating that the contract there,

> included no language expressing union assent to management's right to unilaterally make business decisions having an adverse impact on unit employees. Thus, unlike the instant case, the clause in issue there was devoid of language investing management with "exclusive" or "sole" discretion as to changes in mandatory subjects of collective bargaining. Nor did the Weltronic contract provisions have the scope of the instant one, which gives Respondent exclusive right at all times to "change, modify or cease its operation, processes, or production." Additionally, that contract involved another clause protecting employees against the effects of job eliminations and transfers, and such a restriction, not present here, was viewed as significant to the finding that the union in Weltronic had not waived its right to be consulted about the transfer of work from one plant to another.

Id. at 833 n.5.

This analysis of Weltronic is easily applied to the baseline conditions Article 15 places on Respondent's subcontracting. Article 15 states that Respondent "may" subcontract (the Union reasonably interprets this to mean *might* subcontract), in which case there can be no employees in the affected classifications must be recalled from layoff. But Article 15 does not contain any *explicit* language of the type quoted above and emphasized by the Board as necessary to a waiver finding. In fact, language similar to the quoted explicit language—found in the management rights clause—was *removed* from the terms of the parties' collective bargaining agreement at the Union's insistence. GC-3(a) at 7; GC-3(b) at 4; Tr. at 221-24 (Irish), 250-51, 256-59, 1217-19 (Flanagan). The analogy is persuasive. Just as the Board cited the absence of any clear and explicit language before it in Park-Ohio and Weltronic, the parties here chose to eliminate such language from the current agreement. See id. The result is that Article 15 does not constitute a clear and unmistakable waiver by the Union of the right to be consulted in advance about subcontracting; Article 15 speaks only of baseline conditions that come into play *in the event there is subcontracting*. In the words of one court, Article 15 is but a "tidbit" [that] 'falls far short of the 'clear and unmistakable' evidence by which the company must demonstrate the Union's waiver of a statutory right." Sw. Steel & Supply v. NLRB, 806 F.2d 1111, 1115 (D.C. Cir. 1986).

A finding of waiver based on the language in Article 15 would be akin to the approach rejected by the Board in Reece Corp., 294 NLRB 448, 449 (1989), where the Board rejected the administrative law judge's finding of a contract waiver that was, in his view, "clear implication." Interpreting "may subcontract" as an authorization for unilateral action, instead of a mere possibility of action after lawful bargaining, which is the other available interpretation of the

words, is engaging in "normal contract interpretation"; this is inadequate to find clear and unmistakable waiver. Valley Programs, Inc., 300 NLRB 423, 424 (1990). The Union's reading of "may subcontract" is "at least arguable," precluding a finding of waiver as to decision bargaining. Ironton Publications, Inc., 313 NLRB 1208, 1208 n.3 (1994). The burden is on the employer to prove this defense, and the risk of any ambiguity in the language falls on the employer. St. Luke Lutheran Home for the Aging, 317 NLRB 575, 578 (1995). Thus, the language of Article 15 does not reflect a clear and unmistakable waiver by the Union of its decision-bargaining rights. (Notably, the ALJ found that "[i]ndeed, here, the contract provides only that the Employer 'may subcontract' work. It does not provide that it has the exclusive right to subcontract as the contract in Allison Corp., provided." ALJ Decision at 21.)

Moreover, there is nothing in the bargaining history of the parties that suggests a clear and unmistakable waiver as to subcontracting decisions by the Union under the current contract. See Pepsi-Cola Distrib. Co., 241 NLRB 869, 869 (1979) (considering "the facts and circumstances surrounding the making of the contract" in determining whether contract waiver has occurred). In Johnson-Bateman Co., 295 NLRB 180, 184 (1989), the Board explained: "[T]he issue . . . is not solely a matter of contract interpretation. . . . [T]he bargaining history of the instant contract documents do not establish that [the alleged waiver] was discussed in contract negotiations." Similarly, in KIRO, Inc., 317 NLRB 1325 (1995), the employer decided to produce a news program to air on another television station. The claim was made that the union waived the right to bargain over the effects of this in the contract, because the management rights clause reserved to the employer the right to "schedule," "assign work," and establish "production standards." The Board found, however, that the waiver was not clear and

unmistakable based on the contract language and that the evidence pertaining to bargaining history did not support the employer's defense:

> [T]he judge correctly emphasized the absence of evidence that the parties discussed the possibility of producing a 10 p.m. news program, to air on another station, during the negotiation of the current agreement. The Union thus could not have "consciously yielded or clearly and unmistakably waived its interest" in bargaining about the effects of a decision to produce such a program.

Id. at 1328.

In Park-Ohio, discussed above, the Board's conclusion that there was no contract waiver was also based on a finding that the bargaining history did not support such a waiver. 257 NLRB at 414. In that case, the Board noted that the employer never submitted a contract proposal which sought to limit or restrict the union's statutory right. Id. A similar lack of evidence was present in Flatbush Manner Care Center, 315 NLRB 15 (1994). The employer claimed that the union waived the right to bargain with respect to certain bonus payments. The Board approved the administrative law judge's rejection of this defense, where the ALJ stated: "Respondents who have the burden of proof of the waiver which it asserts as an affirmative defense have failed to adduce any evidence relating to the contemporary negotiations, bargaining history, or past practices, which support a clear and unmistakable waiver." Id. at 20; accord Allison Corp., 300 NLRB 1363, 1365 (2000).

In the instant case, the evidence from the bargaining history for the applicable current agreement is that the Union insisted on eliminating Respondent's exclusive right to act in subcontracting decisions, which it reasonably considered to derive from the broad management rights clause contained in the 2003 CBA. Tr. at 221-23 (Irish), 250-51, 256-59, 1217-19 (Flanagan). Indeed, the management rights clause in the previous version of the CBA

expressly provided that Respondent had the exclusive right "to subcontract, contract out, close down, or relocate the Company's operations or any part thereof." GC-3(a) at 7. The Union was successful in getting that language removed for the current contract. GC-3(b) at 4. As such, Respondent was at the very least "on notice that the [Union] contemplated a change in the bargaining relationship in that respect." Gannett Co., 305 NLRB 906, 906 n.1 (1991). Respondent did not put forth persuasive evidence to the contrary in terms of the parties' bargaining history. Thus, the 2008-09 negotiation history does not show that the Union clearly and unmistakably waived its right to bargain over subcontracting decisions.

Other provisions added to the CBA in 2009 show an intent by the parties that Respondent would *not* have the right to rely on a pre-existing practice, and they must be considered in assessing whether Article 15 is a waiver. See Ironton Publications, Inc., 313 NLRB 1208, 1208 n.3 (1994). Under the new Article 7(A) and Section (9) of the 2008 MOA, subcontracting was not agreed to as an "existing practice" and it therefore had to await further bargaining at the next negotiations. GC-3(b). As found by Arbitrator Maroney in a case involving an analogous issue, if no agreement was reached under the new procedure on an existing regulation, or here, a practice, then Respondent could not enforce it. CP-3 at 10-11. This arbitration award should be considered in determining whether on balance, Respondent retained any right to act without first bargaining. See Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 709 n.13 (1983).

Thus, the ALJ should have found that the Union did not contractually waive its right to bargain over Respondent's subcontracting decisions.

B. Alternatively, the ALJ Should Not Have Made Any Findings Regarding Whether the Union Waived its Right to Bargain Over Subcontracting Decisions.

As the Union argued in its post-hearing brief to the ALJ, the issue of whether the Union waived its decision-bargaining rights with regard to subcontracting was properly before the ALJ. However, in his decision the ALJ refused to consider the decision-bargaining issue (ALJ Decision at 17 n.4), and also determined "that a union's waiver of its right to bargain about a decision to subcontract does not affect its right to bargain about the effects of that decision" (ALJ Decision at 21). Given those determinations, it was improper for the ALJ to also find that "Respondent had the right to subcontract [bargaining unit work]" (ALJ Decision at 17), and that "the language of the parties' contract . . . gives the Respondent the right to unilaterally subcontract unit work" (ALJ Decision at 21). In other words, according to the ALJ's own findings the issue of whether the Union waived its right to bargain over subcontracting decisions was not before him, thus he should not have made any findings with respect thereto.

POINT III

THE ALJ ERRONEOUSLY RECOMMENDED THAT THE TRANSMARINE BACK PAY REMEDY BE BASED ON LOST OVERTIME OPPORTUNITY INSTEAD OF EMPLOYEES' NORMAL WAGES AND THAT BACK PAY BE LIMITED IN PART TO THE VALUE OF WAGES PAID TO THE SUBCONTRACTORS' EMPLOYEES.

The ALJ properly found that Respondent violated the Act by: (1) failing or refusing to bargain with the Union by failing to timely furnish the Union with requested information which was relevant and necessary to the Union's performance of its duties as the exclusive bargaining representative of certain employees of Respondent; and (2) failing to give timely notice to the Union, and failing to afford the Union an opportunity to bargain with it over the effects of the Respondent's decision to subcontract bargaining unit work. The ALJ also properly determined

that to remedy the violations Respondent should be ordered to pay backpay to the unit employees in a manner similar to that required in Transmarine Navigation Corp., 170 NLRB 389 (1968), a remedy that is not tied to actual loss but which is necessary to provide bargaining leverage for the Union to secure additional benefits for employees. ALJ Decision at 25 (citing Live Oak Skilled Care & Manor, 300 NLRB 1040 (1990)). However, the ALJ erred in recommending that Respondent be ordered to pay affected employees "the amount of overtime pay the employees would have earned but for the subcontracting of work they were qualified to perform," not to exceed their wages and the value of wages paid the subcontractors' employees, instead of the amount of unit employees' normal wages as required by Transmarine, from 5 days after the date of that Decision until the occurrence of the earliest of four enumerated conditions. ALJ Decision at 25, 26.

A. The ALJ Correctly Found that Transmarine is a Necessary Remedy to Effectuate the Purposes of the Act.

In Royal Plating and Polishing Co., Inc., 160 NLRB 990 (1966), the Board decided that effects bargaining could not take place without a Board order to "insure meaningful bargaining". In Royal Plating, the Board imposed a limited back pay order that in most respects was similar to the one soon to follow in Transmarine. In the Board's view the order "containe[d] the minimum requirement necessary to ensure the statutory bargaining which has been delayed until now by Respondent's earlier unlawful course of conduct." Id. at 998-99 (emphasis supplied). In Transmarine Navigation Corp., 170 NLRB 389, 390 (1968), the Board added the minimum two-weeks' back pay provision in an effort to "make whole the employees for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic

consequences for the Respondent." Id. at 390. Transmarine is the standard remedy in effects bargaining cases. AG Communication Systems Corp., 350 NLRB 168, 173 (2007).[2]

The Board has acknowledged that of the two goals stated in Transmarine, "restoring the union's bargaining strength is the more important objective." O.L. Willis, Inc., 278 NLRB 203, 205 (1986). Similarly, the courts have stated that the primary purpose of the Transmarine remedy is to "create an incentive for the company to bargain in good-faith." Nathan Yorke v. NLRB, 709 F.2d 1138, 1145 (7th Cir. 1983). In Yorke, the court upheld the Board's authority to grant such a remedy, stating: "ensuring meaningful bargaining comports with the primary objective of the Act." Id.; see also NLRB v. Emsing's Supermarket, 872 F.2d 1279 (7th Cir. 1989); First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 681-82 (1981) ("Under Section 8(a)(5), bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time, and the Board may impose sanctions to insure its adequacy.") As the Board stated in Town & Country Manufacturing Co., Inc., 136 NLRB 1022, 1029 (1962), "in passing the Act, Congress did not engage in the empty gesture of creating rights without parallel remedies."

B. Transmarine Back Pay Must Be Based on Employees' Normal Wages, Not On Actual Losses Suffered.

It is well established that Transmarine's reference to "losses suffered", quoted above, is not a reference to actual losses, but rather to "additional benefits" (i.e., gains) that the union might have been able to obtain if the employer had bargained prior to taking the action at issue as the Board requires. In Live Oak Skilled Care & Manor, 300 NLRB 1040 (1990) the

[2] In AG Communication Systems Corp., 350 NLRB 168 (2007), the Board found that no Transmarine order was necessary because the affected employees continued employment "with full pay and benefits" with continued union representation, and their new bargaining representative achieved "a positive outcome" in bargaining for them. Id. at 173. The Board's holding was expressly limited to "the unusual circumstances of [that] case." Id.

administrative law judge found that a Transmarine remedy was not required because the employees suffered no "palpable loss" by the employer's failure to engage in effects bargaining. The Board disagreed, holding that a Transmarine remedy was appropriate, irrespective of loss, because the union, with its bargaining power intact, may have secured additional benefits if the employer had engaged in timely effects bargaining. Thus, the Board emphasized that it is not employees' actual loss that is the focus, but rather the union's loss of leverage to negotiate additional benefits. "[T]he Union can hardly hope to obtain the same benefits from bargaining had effects bargaining taken place at the time required by law." Id. at 1040 (citations omitted).

This has been reiterated in numerous cases. In Walter Pape, Inc., 205 NLRB 719 (1973), "all or most of the employees" remained employed by a purchaser/subcontractor,[3] and there was evidence that their employment was at higher wages. Id. at 720. A Transmarine remedy based on employees' normal wages was imposed nevertheless. In Richmond Convalescent Hospital, Inc., 313 NLRB 1247 (1994), a case where new ownership took over the facility and the employer failed to engage in effects bargaining, the judge refused to provide the Transmarine remedy because "there was no showing that any employees lost their jobs as a result of the transfer or that employees suffered any out-of-pocket loss." The Board rejected that argument and reversed the judge, ordering that the employer pay a Transmarine remedy based on employees normal wage rate. Id. 1248-50. The Board stated that there is no requirement of a "palpable loss"; rather, the "loss" is the "additional benefits" the union "might have secured" had effects bargaining taken place in a timely manner. Id. at 1249.

[3] The Board indicated that under either scenario, the analysis would be the same. Id. at 720.

In TNT Logistics North America, 346 NLRB 1301 (2006), the employer argued that Transmarine was not appropriate because its employees would not experience any employment loss. Nevertheless, Transmarine based on employees' normal wages was part of the remedy, the Board adopting the judge's view that it was not necessary "to determine the extent of 'actual' loss to employees, since the failure to bargain 'resulted in the union's inability to bargain for additional benefits ;. . . and the employees' concomitant loss of these potential additional benefits." Id. at 1309. And in Bashas' Inc., 352 NLRB 391 (2008), the Transmarine remedy was imposed even though the employer argued that the remedy "is not appropriate . . . because all unit employees accepted transfers and therefore did not become unemployed or lose wages or other benefits as a result of the closing." The administrative law judge noted that it was not known whether the former unit employees worked reduced hours after the transfers. Nevertheless, the judge, affirmed by the Board, found that Transmarine based on employees' normal wages was necessary to provide the union bargaining leverage to support meaningful effects bargaining. Id. at 400.

Further support for a Transmarine remedy, including the minimum of two-weeks' backpay based on normal wages, is found where the remedy has been combined with other back pay relief for the same employees, arising out of the same set of circumstances. In National Car Rental System, Inc., 252 NLRB 159 (1980), enforced as modified, 672 F.2d 1182 (3d Cir. 1982), the employer moved work from a site in Newark, New Jersey to a location approximately twenty miles away in Edison, New Jersey, a situation involving transfer of unit work analogous to subcontracting. The Board found a Section 8(a)(3) violation for refusing to consider the unionized workforce for work at the new location, and ordered the employees

reinstated and made whole for that violation. Id. at 165. (The Board found that the union was entitled to continued recognition at the new location, so the make whole relief would have been at the terms of the extant collective bargaining agreement which was still in effect.) Additionally, the Board found an effects bargaining violation and ordered a remedy under Transmarine, which included the minimum two-weeks' back pay based on employees' normal wages. Id. at 164. On appeal, the court rejected the employer's contention that the effects bargaining remedy was punitive because the order already provided for the recovery of lost wages. The court enforced the back pay remedy under Section 8(a)(3), as well as the Transmarine to remedy the 8(a)(5) violation. 672 F.2d at 1191.

In Port Printing & Specialties, 351 NLRB 1269 (2007), the Board found an effects bargaining violation over the layoff of the employees due to a hurricane evacuation order. Id. at 1270. In the same case, the Board found an 8(a)(5) violation in the employer's use of non-bargaining unit employees to perform unit work after the layoff. The Board ordered a Transmarine remedy in addition to ordering employees made whole for work assigned to the non-unit employees. Id. at 1270-71; see also Bridon Cordage Inc., 329 NLRB 258 (1999) (same).

To the same effect is Sea-Jet Trucking Corp., 327 NLRB 540, 540, 552 (1999) (ordering Transmarine remedy based on normal wages despite retention of employment and limited actual losses after relocation), enforced, 2000 U.S. App. LEXIS 4083 (D.C. Cir. Feb. 18, 2000); Compact Video Servs., Inc., 319 NLRB 131, 145, n.87 (1995), enforced, 121 F.3d 478, 482-83 (9th Cir. 1997) (noting that Live Oak Board properly ordered Transmarine back pay based on normal wages "because the employees could have obtained additional benefits even though all of the employees were retained and received a raise"); Comar, Inc., 339 NLRB 903, 903, 914

(2004) (Transmarine based on normal wages award proper even though affected employees maintained employment and were otherwise made whole for loss of earnings), enforced, 2004 U.S. App. LEXIS 9937 (D.C. Cir. 2004).

In Comar, Inc., 339 NLRB 903 (2004), enforced, 2004 U.S. App. LEXIS 9937 (D.C. Cir. 2004), the Board found that a Transmarine remedy based on normal wages was proper even as to affected employees who maintained employment when the employer moved their work out of the unit to a location ten miles away. There, the ALJ had concluded that

> [A] blanket Transmarine is not appropriate in this case. As set forth above, a number of employees accepted the offer to transfer to the Buena facility; they did not lose any time off from work and therefore are not entitled to this remedy. As to the remaining unit employees, I have ordered Respondent to offer them reinstatement and make them whole for the losses they suffered. Those employees too will be fully made whole by those remedies and any Transmarine remedy would be a windfall.

Comar, 339 NLRB at 914. The Board disagreed with the ALJ, finding he improperly "fail[ed] to extend the Transmarine limited back pay remedy to all unit employees, including those who transferred to the Respondent's Buena facility." Id. at 903. Thus, the Board modified the ALJ's order such that all affected employees, in addition to their make-whole back pay, received the Transmarine remedy based on their normal wages. Id. at 903; see also Waymouth Farms, Inc., 324 NLRB 960, 963-64 (1997) (in a work relocation case, the Board ordered Transmarine back pay based on employees' normal wages, and make whole relief).

Thus, it is the Union's leverage to bargain additional benefits that Transmarine supports. Subjects such as payments to ameliorate the impact on employees financially of employer non-mandatory bargaining decisions, are legitimate objectives in effects bargaining. The Board only limits the subjects of effects bargaining to the parameters of Section 8(d), see Litton Business

Systems, 286 NLRB 817, 820 (1987), enforcement denied in part, 893 F.2d 1128 (9th Cir. 1990), reversed 501 U.S. 190 (1991), and the imagination of the bargainers, Good Samaritan Hosp., 335 NLRB 901, 903 (2001). Thus, in Good Samaritan, the Board stated that the effects bargaining obligation is "not conditioned on the view . . . of the Board as to what, if any, effects will be identified or how they will be resolved by the parties." Id. at 903.

In decisions issued by the Board in 2011 and 2012, it expressly refused to require an assessment of actual losses where a Transmarine remedy was ordered. Thus, the Board has refused to limit the Transmarine minimum two-weeks' pay to make it applicable "only to those employees who were adversely affected by respondent's unlawful action." Int'l Bridge & Iron Co., 357 NLRB No. 35 (2011), slip opinion page 1, n.3; Dodge of Naperville, Inc., 357 NLRB No. 183 (2012), slip opinion page 5 n. 2; Kadouri Int'l Foods, Inc., 356 NLRB No. 148 (2011), slip opinion page 1 n.1.

Finally, the present case is distinguishable from cases where the Board has ordered only a partial Transmarine remedy, i.e., one tied to actual loss instead of employees' normal wages. In Rochester Gas & Elec. Corp., 355 NLRB No. 86 (2010), the union challenged the reduction in eight employees' compensation caused by the employer's withdrawal of their take-home vehicles for commuting to and from work. The ALJ recommended a standard make-whole remedy but the Board declined to direct that remedy, creating instead a unique remedy for the effects-bargaining violation due to the fact that no work had been removed from the bargaining unit. The Transmarine back pay in that case was based on the value of the vehicle benefit computed on a daily basis. In Heartland Health Care Center-Plymouth Court, 359 NLRB No. 155 (2013), the Board similarly found that only partial Transmarine back pay was warranted where

the loss resulting from the effects-bargaining violation was a reduction in employees' pay. There was no removal of work from the bargaining unit. Notably, in both cases, the Board stated that the Transmarine remedy is the standard remedy in effects-bargaining cases where the employer fails to bargain over the effects of the removal of work from the bargaining unit. The only reason the Board in those cases did not award standard Transmarine back pay (i.e., back pay based on employees' normal wages) was because no work had been removed from the unit. The Board explained in Heartland that in Rochester Gas and Heartland, Respondent's decisions did not result in the loss of jobs. Heartland, slip opinion at 2. In this case, the ALJ made an express finding that the subcontracting was tied to a loss of unit jobs. 19 ALJ Decision lines 20-38.

Here, it is clear that the effect of Respondent's subcontracting was the transfer of unit work to non-unit subcontractors, which not only resulted in loss of overtime hours for employees, but also in a diminution of the bargaining unit. In Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964), the Supreme Court recognized that protection of the bargaining unit itself is an important goal of the union that is part of Section 8(d)'s mandatory bargaining. The Court quoted its previous decision in Teamsters v. Oliver, 358 U.S. 283, 294 (1959), where the Court stated that included in the subjects of mandatory bargaining are the union's interest in:

> Prevent[ing] possible curtailment of jobs and the undermining of conditions of employment for members of the bargaining unit.

Fibreboard, 379 U.S. at 212 quoting Teamsters v. Oliver, 358 U.S. at 294. This legitimate union goal of protecting the present and future bargaining unit through effects

bargaining is applicable to the subcontracting by Rochester Gas, and warrants the Transmarine remedy.

The Board has also recognized that subcontracting of bargaining unit work necessarily constrains work opportunities available to them. See Quickway Transport, 354 NLRB 1, 2 (2009), reaff'd 355 NLRB 140 (2010). For example, but for the subcontracting, "[u]nit employees might otherwise have been given overtime pay to perform the work that was subcontracted." Spurlino Materials, LLC, 353 NLRB 1198, 1198, 1219 (2009), reaff'd 355 NLRB 77 (2010); see Acme Die Casting, 315 NLRB 202 n.1, 207 (1994) ("The fact that no employees were laid off or suffered a reduction in their workweek—even if true—is irrelevant. The crux of their grievance is that they lost additional overtime work that they might have enjoyed if the Respondent had left the work in the plant."). Moreover, the Board has recognized that in the absence of subcontracting of bargaining unit work, an employer might have hired additional unit employees, resulting in jobs for them and benefits for the Union and existing unit employees in having an expanded unit. See Spurlino Materials, LLC, 353 NLRB 1198, 1198, 1219 (2009); Overnite Transportation Co., 330 NLRB 1275, 1276 (2000) ("We think it plain that 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.").

The ALJ in this case correctly found that unit employees were qualified and available to perform the subcontracted work and that Respondent's subcontracting constituted the removal of work from the bargaining unit:

> Here, there was evidence of a reduction in the size of the unit - employees had left their employment and had not been replaced for about ten years. At the same time, their work had been let to subcontractors. In this regard, electrical operations manager Frank testified that in the past five to seven years during which time 15 employees retired, he was not permitted to hire any new employees to replace them. At the same time, the workload increased. It was the Respondent's policy to employ only a "core" group of unit employees and supplement their work with an "increased use" of subcontractors. Frank noted that with fewer unit employees the only way the additional work was completed was by the use of subcontractors.
>
> Similarly, Pozzuolo was prohibited from hiring employees for the gas department for about the past ten years. The more than ten employees who retired from the gas department in the last five years had not been replaced. This policy changed at the time of the hearing when 16 workers were in the process of being hired.

ALJ Decision at 19.

Respondent's use of subcontractors to perform bargaining unit work has significantly diminished the size and strength of the unit.

Thus, the ALJ erred in basing the Transmarine back pay amount on employees' lost overtime instead of their normal wages because the Transmarine remedy is not dependent on or tied to actual losses suffered by affected employees, particularly in cases (such as this) involving the removal of work from the bargaining unit. Further, the limitation in back pay based on the subcontractors' wages is not authorized by any Board law, and indeed was unexplained by the judge.

POINT IV

THE ALJ ERRONEOUSLY FOUND THAT THE UNION CONCEDED THAT IT HAD RECEIVED ALL OF THE INFORMATION IT REQUESTED.

The ALJ found that "[i]n a letter dated March 20, [2012] [Company representative Thomas] Cammuso sent detailed information to the Union which the Union agrees satisfied the request for information set forth in its August 29[, 2011] letter," (ALJ Decision at 11), and that "the Union agrees that it has received the information set forth in [its] August 29[, 2011] letter which is the basis for the alleged violation" (ALJ Decision at 24). However, the Union does not agree that it received all of the information it requested. As Union Business Manager Jeffrey Sondervan testified, the Union received "some information" in March 2012, but at no point did the Union concede that it received all of the requested information from Respondent. Tr. at 366-71 (Sondervan).

POINT V

THE ALJ ERRONEOUSLY FOUND THAT THE UNION RECEIVED ALL OF THE INFORMATION IT REQUESTED CONCERNING AN EARLIER INCIDENCE OF SUBCONTRACTING.

The ALJ found that "[i]n mid to late 2010, the Union requested information concerning subcontracting and the Employer sent responses which included the specific information requested. For example, on November 23, 2010, Cammuso responded to the Union's information request in July, 2010 which included spreadsheets summarizing the information requested, containing information concerning those jobs in which subcontractors presently were working." ALJ Decision at 12. However, the evidence reflects that Respondent did not provide the Union with all that it requested in its letter of June and July 2010, and that the information Respondent did provide was 4-5 months after it was requested. R-19; Tr. at 124-30

(Irish). Further, much of the information Respondent provided in November 2010 pertained to ongoing subcontracting projects and thus did not constitute the required pre-implementation notice and opportunity to bargain.

POINT VI

THE ALJ ERRONEOUSLY ALLOWED INTO EVIDENCE UNDER THE BUSINESS RECORD EXCEPTION TO THE HEARSAY RULE, RG&E'S E-MAILS PURPORTEDLY SENT TO THE UNION LISTING UNION SUBCONTRACTORS ON IBERDROLA USA PROPERTIES.

Respondent offered into evidence Respondent's Exhibits 32 through 40, 44 through 47, 49, 50, 52, 54, 55, 57, 60 and 63, which are copies of "status of union contractors on Iberdrola USA property" documents that it asserts were sent to the Union. See Resp. Exh. 32 and Tr. 1056-1057. These were exhibits that Respondent had unsuccessfully tried to introduce through General Counsel's witness Richard Irish, who could not identify them. They were erroneously allowed into evidence under the business records exception to the hearsay rule. Tr. 1056-58.

At the hearing on April 19, 2013, Respondent's witness Jeffrey Shapiro did not testify as to his receipt of these specific documents [Tr. 1056 lines 9-13], transmission to the union, or union receipt of the documents (Tr. 1056). However, Respondent proceeded to offer them under the business records exception to the hearsay doctrine. They were accepted on that basis over Union objection.

In Palmer v. Hoffman, 318 U.S. 109 (1943), the Court explained that just because a company "makes a business out of recording" certain matters does not put the resulting documents "in the class of records made 'in the regular course' of the business'" that "experience has shown to be quite trustworthy. . . . The probability of trustworthiness of records because they were routine reflections of the day to day operations of a business would

be forgotten as the basis of the rule. [Citations omitted]. Regularity of preparation would become the test rather than the character of the records and their earmarks of reliability. " Id. at 113-114. The Court went on the reject the notion that the exception should also apply to "any 'regular course' of conduct which may have some relationship to business . . .." Id. at 114. The Court explained further that "'regular course' of the business must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business." Id. at 115. Here, it is not the regular course of Respondent's business of energy transmission to Rochester Gas and Electric customers to give a written notice to the union of "contractors on Iberdrola USA property" (which encompasses two companies, New York State Electric and Gas and RG&E). The documents appear to be focused on Respondent's dealings with the union, not with Respondent's business of providing energy services to RG&E customers.

The Board has noted that records are not business records just because one party or the other puts them in a file and labels them as such. Continental Can Co. Inc., 291 NLRB 290, 294 (1988). In United Parcel Service, 325 NLRB 1 (1997) an employer manager's memoranda that documented interviews with employees were not admissible under the exception. Moreover, the Board stated, the manager "was not a disinterested record keeper." Id. at 7 n.10. The same can be said for the issuer of the documents here, who the Respondent asserts sent the documents to Mr. Shapiro, director of labor relations for Iberdrola USA.

The above precedent shows that the documents in question are not within the business records exception to the hearsay rule. Since they do not qualify under the exception, they should have been rejected. See Gerrity Company Inc., 256 NLRB 350 n.3 (1981).

CONCLUSION

For the foregoing reasons, the Board should modify the ALJ's rulings, findings, and conclusions consistent with the Charging Party's Cross-exceptions.

Respectfully submitted,

Dated: February 19, 2014

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ROCHESTER GAS & ELECTRIC CORPORATION, Respondent, and LOCAL UNION 36, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, Charging Party.	Cases 03-CA-075635 03-CA-081230

CERTIFICATE OF SERVICE

James R. LaVaute, attorney for the charging party in the above captioned matter, certifies that on February 19, 2014 a copy of the within brief in support of cross-exceptions was served by electronic mail upon Respondent's attorneys and upon Region 3:

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