

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
THIRD REGION

ROCHESTER GAS & ELECTRIC
CORPORATION

and

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

**ANSWERING BRIEF
TO UNION'S
CROSS-EXCEPTIONS**

Case No.: 03-CA- 081230
03-CA-075635

PRELIMINARY STATEMENT

Local Union 36, International Brotherhood of Electrical Workers, AFL-CIO and the General Counsel submitted cross-exceptions to the Administrative Law Judge's Decision. In its exceptions, Respondent Rochester Gas and Electric Corporation addressed its position with regard to the issue raised in the General Counsel's objections, namely the appropriateness of the *Transmarine* remedy (or partial *Transmarine* remedy).

Rochester Gas submits this answering brief in opposition to the remaining cross-exceptions urged by the Union.

ARGUMENT

POINT I

**THE ALJ PROPERLY HELD THE UNION CLEARLY AND UNMISTAKABLY WAIVED
THE RIGHT TO BARGAIN ABOUT THE DECISION TO SUBCONTRACT.**

The Union does not want to effects bargain with Rochester Gas about the subcontracting decisions Rochester Gas makes. Consequently, the Union persists in

claiming that the collective bargaining agreement does not clearly and unmistakably waive the right to effects bargaining despite repeated findings by the Regional Director and the General Counsel that the only issue is whether Rochester Gas is required to bargain about the effects of its decision to subcontract work.

As an initial matter, as set forth in Point II, the issue of whether the Union waived the right to decisional bargaining has already been resolved. It is not properly before the Board. Decisional bargaining was not charged in the complaint and was not raised by the General Counsel at the hearing. Rochester Gas had no opportunity to present evidence on the issue.

Further, the collective bargaining agreement is clear—

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.

Collective Bargaining Agreement, paragraph 15 (GC-3a).

The Regional Director dismissed decisional bargaining charges by the Union in a prior case. GC- T. 233; R-71. The dismissal was upheld by the General Counsel on appeal. The ALJ properly referenced these past decisions in his decision limiting the issue to effects bargaining. The General Counsel declined to charge decisional

bargaining in the present complaint. ALJ-1. The Board should not entertain an expansion of the complaint on appeal, and should not entertain the Union's invitation to re-decide the issue without a complaint or hearing.

POINT II

THE ALJ PROPERLY LIMITED THE PROCEEDING TO THE ISSUE OF EFFECTS BARGAINING AS CHARGED BY THE GENERAL COUNSEL IN THE COMPLAINT.

As conceded by the Union, the General Counsel charged Respondent in the complaint with failing to effects bargain. The Union argues in its cross-exceptions, as it has unsuccessfully argued in previous cases, that the Union should be able to expand the charges alleged by the General Counsel in the complaint to include decisional bargaining. This argument has been rejected in a previous case by the Regional Director, the General Counsel, the Board, and the Second Circuit Court of Appeals. *See Rochester Gas & Electric Corp.*, 355 NLRB 507, 507 (2010), *enfd. sub nom. Electrical Workers Local 36 v. NLRB*, 706 F.3d 73 (2d Cir. 2013), *petition for cert. filed* 81 U.S.L.W. 3566 (U.S. Mar. 28, 2013) (No. 12-1178).

The General Counsel is master of the complaint and controls the scope of the charges against the Respondent. *See id.* at 88-89. The cases cited by the Union support this rule. In *Vico Prods. Co.*, 336 N.L.R.B. 583 (2001), the Board found the General Counsel and the Union should have been allowed to cross-examine the Respondent with regard to a material representation regarding the timing of Respondent's decision. In making this finding, the Board held "[t]he questioning was not intended to expand the parameters of the complaint, but rather to test the Respondent's defense to the 8(a)(3) allegation contained in paragraph 15 of the

complaint”. *Id.* at 590. By contrast, the Union’s position here is not supported by General Counsel and was not designed to test Respondent’s allegations dealing with effects bargaining. Rather, the Union sought to litigate the issue of decisional bargaining.

Dayton Newspapers, 339 N.L.R.B. 650 (2003), also cited by the Union, offers no support for the Union’s position. In *Dayton*, the issue was whether the Respondent ran afoul of the act by refusing an unconditional offer by economic strikers to return to work. In making that decision, the Board referenced the Regional Director’s finding that the lockout was lawful prior to the unconditional offer to return to work. The Board did not, as suggested by the Union in its brief, revisit the Regional Director’s decision. Instead, the ALJ and the Board focused on the violation charged in the complaint. *Id.* at 651 (“Therefore, we presume, as the judge did, that a lawful lockout was in place until that time.”)

Here, the complaint does not allege a failure to bargain about the decision to subcontract. Nothing Rochester Gas alleged in its affirmative defenses changed that result. The Union is fully aware that Rochester Gas’s affirmative defense that the effects bargaining is inherent in decisional bargaining is a legal defense relying on the holdings of the District of Columbia Court of Appeals. *See, e.g., N.L.R.B. v. United States Postal Service*, 8 F.3d 832 (D.C. Cir. 1993); *Enloe Med. Ctr. v. N.L.R.B.*, 433 F.3d 834, 837 (D.C. Cir. 2005).

The ALJ correctly recognized that decisional bargaining was not at issue in this hearing and properly refused to enlarge the complaint beyond the allegations by the General Counsel.

Finally, the Union cites to cases regarding collateral estoppel. Collateral estoppel is not at issue in this case as there is no prior case in which the Board held differently. The cases have no bearing on the issue here.

POINT III

THE UNION RECEIVED ALL OF THE INFORMATION IT REQUESTED THAT IT WAS ENTITLED TO RECEIVE.

In its brief, in conclusory fashion, the Union states the ALJ erred in holding that the Union agreed it eventually received all of the information it requested in 2012 and that the ALJ erred in finding the Union received all of the information it requested in 2010. The Union does not set forth what information it was entitled to receive that it did not receive—indeed, it cannot. As set forth in detail in Respondent’s objections, the evidence demonstrated that Respondent provided extensive information both in 2010 and again in 2012.

The 2010 Request

In 2010, Rochester Gas provided the name (if known) of the contractor, a description of the project, the approximate start date, and the cost of the project, among other information. R-19. Rochester Gas offered to meet to discuss any of the information provided. T. 129-130.

In addition to the information provided in the spreadsheet, Rochester Gas provided weekly updates to the Union on the movement and use of contractors. R-17, 18, 22, 24, 26, 30-40, 44-47, 49, 50, 52, 54, 55, 57, 60, 62, 63; T. 131, 134, 140; 153-54. The Union did not seek additional information about these, or any other contractors

contained in the e-mails, and did not request effects bargaining about any of the work listed in the e-mails. T. 1059.

The 2012 Request

In 2012, the Union requested, in relevant part, the following:

The identity of the subcontractor; a description of the work to be subcontracted; its location; the time period of the subcontract; the hours during the day or night when the work will be done; and the planned number of subcontractor employees who are to do the work.

If the subcontracted work involves tasks for which unit employees have received special training or are required to have specified skills, identify such training and skills and specify what training and skills the employees of the subcontractor have who will be doing the work.

[W]ho will be supervising the employees of the subcontractor and managing that work, so that the Union can ascertain who in fact is the employer of the subcontractor's workers.

Rochester Gas provided responses to each of these questions. T. 312; GC-15-22; R-108. T. 366. The responses included lengthy answers to each of the questions asked by the Union, copies of subcontracts, and extensive spreadsheets showing bargaining unit employees' overtime and qualifications. The responses contain thousands of pages covering gas and electric subcontracting. GC-15-21.

The Union did not respond to the March 20, 2012 e-mails. T. 370. The Union has never asked to effects bargain after receiving the information on March 20, 2012. T. 370. Instead, the Union filed a second charge on May 19, 2012. GC-1.

In its objections, the Union continues its pattern of insisting it needs more information, instead of considering the information provided and engaging in effects bargaining. The Board should not condone this approach.

POINT IV.

**THE ALJ PROPERLY ALLOWED INTO EVIDENCE RESPONDENT'S
EXHIBITS 32-40; 44-47; 49, 50, 52, 54, 55, 57, 60 AND 63.**

The Union also objects to various respondent exhibits (the Sardisco E-mails) received in evidence by the Administrative Law Judge on the basis that they are not admissible as business records. The e-mails in question were authenticated by both Jay Shapiro and Richard Irish. They were not offered for the truth of their content, but rather to show notice was provided to the Union. They are admissible either on that basis or as business records of the company.

A. THE E-MAILS ARE ADMISSIBLE AS BUSINESS RECORDS

The Union objects to the admission of the Sardisco e-mails not specifically identified by Mr. Irish on the basis that they are not business records. While courts do not automatically admit e-mails as business records, there is nothing that prevents a court from admitting e-mails as business records if they meet that criteria. Compare *SkyBluePink Concepts, LLC v. WowWee USA, Inc.*, 2013 U.S. Dist. LEXIS 34448 (N.D. Ill. Mar. 13, 2013) (e-mails attached to affidavit admissible as business records); *United States ex rel. Barcelona Equip. v. David Boland, Inc.*, 2012 U.S. Dist. LEXIS 121184 (E.D. La. Aug. 27, 2012) (admitting e-mails as business records).

The Sardisco e-mails and the information contained in them meet the business records exception. See Fed. R. Evid. 803(6). The e-mails were created at or near the time of the events by Mr. Sardisco who was the contract coordinator. The e-mails were kept in the ordinary course of business. The e-mails were maintained as records of the management of line contractors on the RGE property and as records of the business of

responding to the Union's information request. Making the e-mails was a regular practice of the business. Mr. Sardisco created and sent the e-mails weekly to comply with RGE's obligation. Finally, there are no circumstances to indicate the e-mails are untrustworthy.

Mr. Irish testified that he regularly received e-mails from Mr. Sardisco. He was able to identify some of the e-mails as ones he received. He testified the others were similar and could have been ones he received, but he wasn't certain. Mr. Shapiro testified the e-mails were the ones he received from Mr. Sardisco. Mr. Sardisco held the title of Contractor Coordinator at the time he sent the e-mails, and the information related to his position. The e-mails should be admitted.

B. THE E-MAILS WERE PROPERLY AUTHENTICATED AND PROPERLY RECEIVED TO SHOW NOTICE

Authentication of e-mails may be made based on the "distinctive characteristics and the like," of such e-mails. *United States v. Safavian*, 435 F. Supp. 2d 36, 40 (D.D.C. 2006), quoting Fed. R. Evid. 901. In *United States v. Safavian*, the Court found e-mails were authenticated based on their distinctive characteristics "including the actual e-mail addresses containing the "@" symbol, widely known to be part of an e-mail address, and certainly a distinctive mark that identifies the document in question as an e-mail." *Id.*, citing *United States v. Siddiqui*, 235 F.3d 1318, 1322 (11th Cir. 2000). The Court found the e-mails could additionally be authenticated because the e-mail addresses contained names or other identifying information in the e-mail addresses. *Id.* Finally, the Court considered the content of the e-mail as being information that was likely to be sent between the parties. *Id.*

Under this criteria, Respondent's exhibits were properly authenticated. The documents are clearly e-mails. Mr. Sardisco's name and his company's name are clearly contained in the e-mail from field. The recipients are identified as Jay Shapiro, IBEW Local 36 and IBEW Local 83 (the NYSEG Union). The e-mails themselves typically start with "Rick, Dan, Jay", referring to Rick Irish, Dan Addy and Jay Shapiro.

Mr. Irish testified that the IBEW e-mail address was the e-mail address he and others used for union business. He testified he received e-mails from Mr. Sardisco, and was able to identify some of them as e-mails he had received. Mr. Irish simply could not specifically identify the other e-mails as e-mails he received (though he acknowledged each had the correct e-mail address for Local 36). Because Mr. Irish could identify some of the e-mails and the others contain identical information, all of the e-mails were properly authenticated. "[E-]mails that are not clearly identifiable on their own can be authenticated under Rule 901(b)(3), which states that such evidence may be authenticated by comparison by the trier of fact with 'specimens which have been [otherwise] authenticated'". *Safavian*, supra. The ALJ compared the e-mails Mr. Irish identified with those he was unable to specifically identify and see that the identifying characteristics (headers, to and from fields, e-mail addresses) are identical.

Further, the e-mails do not need to comport with the business rule exception to the hearsay rule because they are not offered for the truth of their content, but rather to show they were sent to Local Union 36. E-mails may be admitted for a purpose other than their truth. *Compare Cantu v. Vitol, Inc.*, 2011 U.S. Dist. LEXIS 11512 (S.D. Tex. Feb. 7, 2011) (admitting e-mails for purpose of showing supervisor's state of mind). Documents that are otherwise hearsay are often admitted to show notice. Compare

United States ex rel. Woods v. Empire Blue Cross & Blue Shield, 2002 U.S. Dist. LEXIS 15251 (S.D.N.Y. 2002) (admitting videotape and newspaper articles to show party's awareness of charges). The purpose of the Sardisco e-mails was to show they were sent to the Union on a regular basis. They should be admitted for this purpose.

C. THE E-MAILS ARE ADMISSIBLE UNDER THE RESIDUAL EXCEPTION TO THE HEARSAY RULE.

Finally, the Administrative Law Judge could, in his discretion, have admitted the e-mails under the residual exception to the hearsay rule. Federal Rule of Evidence 807 permits a court to admit evidence if it has circumstances of trustworthiness, is probative of an issue, and admission will best serve the interest of justice.

In similar circumstances, the court in *Stamm v. New York City Transit Auth.*, 2013 U.S. Dist. LEXIS 8534, 28-29 (E.D.N.Y. Jan. 18, 2013) admitted e-mails of the New York State Transit Authority on the basis that such e-mails were likely trustworthy since they conveyed information that was being relied on by the receiving party, and the e-mails were probative of the issue of when the plaintiff was notified of the information. Here, Mr. Sardisco sent the e-mails knowing the Unions and Mr. Shapiro were relying on the e-mails to contain accurate information. Further, the e-mails are the best evidence of when the Unions were notified of particular contractor movements. They should be admitted under the residual exception.

CONCLUSION

The cross-exceptions urged by the Union should be rejected.

Dated: March 4, 2014
Binghamton, New York

/s/ James S. Gleason
James S. Gleason, Esq.
HINMAN, HOWARD & KATTELL, LLP
Attorneys for Respondent Rochester Gas &
Electric Corporation
Office and Post Office Address
Hinman, Howard & Kattell, LLP
P.O. Box 5250
Binghamton NY 13902-5250
[Telephone: (607) 723-5341]
jgleason@hkh.com